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LEGAL OPINION No. 1/11/2015

prepared on 23 December 2015 in Toruń, hereinafter referred to as "OPINION"

I The entity ordering the opinion

This legal opinion was prepared at the request of the Ad Arma Foundation, with its registered seat in Toruń, at Strumykowa 11/1, entered into the National Court Register the Association Register under the number: 0000534772, represented by the President of the Foundation Jacek Stefan Hoga, in relation to the statutory operation of the Foundation.

II The object of the opinion:

The object of this opinion is to analyse the directive project submitted by the European Commission, which aims at changing the Directive of 18 June 1991 concerning the control of purchasing and owning weapons (91/477/EWG), in terms of legal solutions, which the EU Member States will be obliged to implement into their national legislation procedures if the directive project is enacted in the submitted form and in order to assess the compliance of the directive project with the primary legislation of the EU.

The object of this opinion is also – as a consequence of the conducted analysis – to provide answers to the following questions asked by the assessed entity:

1. Is the scope of the changes planned for implementation wide and what is their character?
2. What is the actual objective of the directive project?
3. Does the scope of regulations contained in the directive project exceed the competence framework of the EU authorities?

III Main legislative acts used for the purpose of preparing this OPINION:

Legislative acts, relevant to the assessment of the issue presented by the assessed entity and to conducting appropriate analysis of the issue:

- 1/ Constitution of the Republic of Poland of 2 April 1997 (Dz. U. [Journal of Laws] 1997, No. 78, item 483, as amended) – hereinafter referred to as: the RP Constitution;
2. The Treaty on European Union – Consolidated version of the Treaty on European Union of 30 March 2010 (Dz. U. [Journal of Laws] EU 2010/C 83/01) – hereinafter referred to as: TEU
3. Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union of 30 March 2010 (Dz. U. [Journal of Laws] EU 2010/C 83/01) – hereinafter referred to as: TFEU
4. The Council Directive of 18 June 1991 on the control of purchasing and owning weapons (91/477/EEC) – hereinafter referred to as: directive or directive on weapons;
5. A directive project submitted by the European Commission on changing the Directive of 18 June 1991 on the control of purchasing and owning weapons (91/477/EEC) – hereinafter referred to as: directive project;

IV An analysis of particular changes planned in the directive project in relation to regulations functioning in legal transactions so far, based on the directive on weapons

The objective of this part of the opinion is to establish those normative elements contained in the directive project which are characterised by significant dissimilarities in relation to the previous directive on weapons and whose introduction to legal transactions is characterised by the differences not only of technical nature.

The basic criterion which was assumed for distinguishing those changes is the manner of regulation, i.e. the optional or obligatory nature, as well as absolute or relative nature of a given solution contained in the norm. Such distinguishing, taking into consideration those notion categories allows, on one hand, to present the proposed changes in accordance with their “normative gravity”, and on the other hand, it will constitute a useful reference point in the following part of the analysis.

However, it also needs to be reserved that a directive as a special legislative act, is not exclusively composed of the normative layer (traditionally for legislative acts expressed in editorial units, such as articles or paragraphs); a significant element of it, which must be taken into

consideration by Member States, both at the stage of the implementation process and later when the law is used (on the basis of the enacted directive), is the preamble to the directive. Although it does not contain any provisions which cannot be directly transposed to the national law, it is this part that contains formulations, which clearly present the intention of the European legislator concerning the fact how the directive is to be construed and implemented¹.

Independently of those two presented parts of the directive, because in this opinion the main gravity point must be within the scope of the directive project proposed by the European Commission, an element that will require a discussion will also be the justification attached to this project. However, due to the peculiar distinctiveness of the justification from the directive project itself, a detailed analysis of it will not be conducted as it would go beyond the scope of the order.

For conducting an appropriate analysis of the directive project in the requested scope (taking into consideration also detailed questions asked by the Contracting Entity) the following steps need to be taken:

- 1) Establish the legal character of the act, namely the directive, and point its fundamental features;
- 2) Considering the specifics of the instrument, namely the directive, distinguish the fundamental provisions of the directive project, which, if enacted, will significantly change or complement the previously prevailing directive on weapons;
- 3) Specify the character of the listed changes;
- 4) Examine the actual objective of the directive by confronting the resulting conclusions from the conducted analysis with objectives declared by the project initiator;
- 5) Refer the conclusions to the primary legislation of the EU and examine the admissibility, legitimacy and correctness of the intended changes;

1) The legal character and fundamental features of a legislative act, which the directive constitutes

In its nature the directive is an act of a platform character, which in this aspect is different from the second basic form of expressing will of a European legislator, i.e. from an order which states that it does not use norms that are directly applied, but it uses norms of a platform character, addressed to Member States². Therefore, the directive is to establish the direction for changes made

¹ See: J. Barcik, A. Wentkowska, European Union Law, Warsaw 2014, p. 275 i n.

² For following through the differences between individual types of act of secondary law see: The European Union in the time of political changes; systemic and institutional issues, ed. J. Galster, Toruń 2013, pp. 191-198.

by Member States in a given area, without imposing particular solutions. The objective of this mechanism is to make it possible to implement changes which will follow the direction outlined by the directive, at the same time providing Member States with the possibility to take into consideration the specifics of their entire legal system, as well as numerous differences that for particular Member States are so characteristic. The directive is a very flexible instrument which outlines main objectives and offers certain solutions, however it does not specify the rights and obligations in a definitive and unambiguous manner (which is characteristic for orders). Therefore, directives are different in a legal sense in a way that they are acts which originally are not to be directly applied but they are to specify the objective of enacted norm of direct application in certain Member States³.

Typical notions used by directives will be phrases indicating that a Member State “can”, “should” or even “has to” do something, however without specifying any specific measures. Therefore, in principle, directives will not specify notions or exhaustive lists for specifying criteria which must be met in order, for example, for a given activity to be allowed. Directives will rather present the desired scope of regulations (a Member State will “limit” / “introduce the obligation to obtain a concession” / “forbid” / etc.) and the direction which results from the objective of the regulation (by shaping the obligation, for example, to conduct “medical tests” / to obtain an appropriate “competence confirmation” / possessing “appropriate education” / collecting “appropriate financial security” / etc.).

Apart from open notions, for directives it will remain characteristic to also outline what can be described as “the minimum of required regulation”. A good illustration of such a solution is, for example, the obligation to possess by a private institution, which operates a business in the scope of payment services, specific financial security by establishing the minimum amount of required registered capital⁴. Such a regulation allows a Member State to establish not only an appropriately higher level of financial security but also to create various categories (that is, differentiating the level of required security depending on, for example, the type of licence which a given entity was granted), or to specify the ways to cover such a security (e.g. in a form of a deposit in an account, appropriate tangible assets, guarantees of another entitled institution, etc.). As it is easily visible that such a solution allows a Member State to implement provisions of the directive in such a manner that ensures that when going in the same direction with other Member States (harmonising

³ This results from the nature of the directive itself. Concerning the specifics of this secondary law act and exceptional regulations in the scope of effects it has see: Institutional Law of the European Union, ed. M. M. Kenig-Witkowska, Warsaw 2015, pp. 314-326.

⁴ Art. 6 of the Directive 2007/64/EC of the European Parliament and Council of 13 November 2007 on payment services on the internal market (Dz. U. [Journal of Laws] UE. L.2007.319.1 as amended). For the scope of the obligation to possess by a given institution own funds also see art. 8 of the indicated act.

dimension) implement effective solutions, which will be legitimate to be applied because of their appropriate placement in a legal system of a given country and due to respecting traditions (cultural, religious, historical, etc.) or other forms of differences – which create an identity of a given Member State. The example provided above, by outlining the minimum amount of financial security, aims at guaranteeing that entities offering their services in a given scope will be appropriately credible and appropriately professional, as well as solvent towards their clients. However, specific measures for achieving such outlined objectives must be worked out by Member States by themselves – operating within the framework specified by the directive⁵.

In any case directives should not abuse instruments typical for orders, therefore, establishing specific rules of conduct which can only be implemented directly.

Of course the solution presented above has a character of an ideal theoretical model and is understood in a way that in practice it could be impossible to keep the entirety of the form; it is however very important for the general idea of a given act (a directive, an order) to be observed and not to make it possible to introduce another type of disposition (where it is really necessary), which will betray the identity of a given act which will introduce new regulations⁶.

2) Provisions of the directive project which significantly change the directive on weapons currently functioning in legal transactions

a) Definitions

- the following notions will be modified: “essential elements of weapons”, “agent” (an agent in sales – broker), “seller” (dealer);
- new notions appear: “alarm and signal weapons”, “salute and acoustic weapons”, “replicas of firearms”, “deactivated firearms”,
- changing the existing notions is connected with moving certain elements from current schedules to the prescriptive grounds of the directive (essential elements of weapons);
- new categories referring to types of weapons that have not been specified so far, are related to advanced restrictions which the directive project assumes (discussed further).

⁵ In Poland payment services were regulated by the Act of 19 August 2011 on payment services (Dz. U. [Journal of Laws] 2011, No. 199, item 1175, as amended). Registered capital mentioned above as an example was implemented by art. 64 of this act.

⁶ The basis of functioning of the European Union in the scope of legislature is the requirement of limited interference. European Union authorities should therefore aim at leaving Member States as much room for operation, as it is possible (in the context of the primary legislation). A requirement specified in this way determines the use of individual forms of secondary law in accordance with their intent (por.: J. Barcik, A. Wentkowska, European Union Law, pp. 270-271).

b) The scope of applying the provisions of the directive

- the directive project assumes significant modification in the scope of its application; the shape of current regulations excluded from applying the directive provisions not only Armed Forces, the Police and public authorities, but also collectors and units dealing with cultural and historic aspects of weapons, deemed as such by a Member State, in the territory of which they are located; the directive project separates this circle from the specified state authorities;
- the proposed regulation aims at placing under supervision and include in the scope of application anything that is a weapon or resembles a weapon;
- in the context discussed here it is important that the project initiator plans to keep out of the effects of the directive only those spheres which are related to public authorities, including first time legal private owners under full supervision (both concerning weapons as well as objects that are not weapons but resemble weapons – e.g. due to their external properties, such as for example theatre stage props).

c) Limitations for sellers and agents dealing in weapons

- increasing restrictions in trade for entrepreneurs, by the necessity to obtain appropriate consent from a Member State for operating a business related to that;
- the project assumes extending the obligation to obtain a consent to operate such a business onto all entities which deal in weapons and not only the ones who participate in trade in types of weapons specified in category A and B (of schedule I);
- the obligatory system of entrepreneur register (sellers and agents in selling) must be based on one or more specified methods, i.e. registration, licencing or authorisation;
- making the obligations related to registering weapons more detailed, controlling private persons who purchase weapons legally and transferring collected information to state authorities (centralisation of the registration process, computerised transfer of data obtained by sellers and agents in selling to central identification system of government authorities).

d) increasing the requirements concerning marking and registration of weapons

- introducing modifications of existing regulations to make it possible to fully identify and locate (position) a given weapon throughout the entire period of its existence (until it is destroyed, which is confirmed by appropriate authorities), including deactivated weapons;
- in the above context, introducing unique marking of weapons, characterised by permanence and in principle making it impossible to remove those markings;
- the above obligation is imposed on both the manufacturers and the importers of weapons;
- weapon marking should contain at least such information as: manufacturer's name, country

and location of production, serial number, year of production;

- the necessity to mark ammunition, where at least the following are specified: manufacturer's name, identification batch number, calibre and ammunition type;
- additional requirements concerning marking weapons coming to civil transactions from a government depot.

e) changes concerning the basis and the scope of granting weapon licences

- current regulation concerning the necessity of obtaining a licence for a weapon specified in category B (of schedule I of the directive) is replaced with the obligation to obtain a licence for a firearm;
- limitation of currently unrestricted (concerning sport and hunting firearms) rights of persons below the age of 18 by introducing additional requirements for obtaining a parents' consent, or requirements for being under a supervision of a parent or any grown-up while using a weapon, who has a valid weapon licence; possible allowing such persons to use weapons at appropriately licenced locations specially dedicated for this purpose or training centres approved otherwise;
- introducing obligatory medical examination in order to obtain a weapon licence; introducing an additional category, unknown so far in the prevailing directive on weapons, "licence extension", for which medical examination will be necessary;
- changing the flexible rule for Member States, which provides the possibility to cancel the licence if a given person does not meet necessary requirements, to absolute obligatory withdrawal of the licence in such a case.

f) change of the conditions for obtaining a weapon licence classified in category A (schedule I)

- eliminating the possibility for conditional issuing of a weapon licence specified in category A;
- introducing the obligation to take all the necessary steps by Member States in order to destroy any weapons and ammunition included in category A, but which is in possession of a private person;
- exceptional allowing the possibility to consent to continued possession of a weapon belonging to category A, which was obtained before these changes were implemented (for historical and cultural reasons), however, with implementation of an absolute obligation of full deactivation of such a weapon, in accordance with implemented regulations.

g) limiting the possibility to sell weapons and ammunition at a distance

- forbidding the sale of weapons (also elements of weapons) specified in categories: A, B and C (schedule I) by entities other than authorised sellers and selling brokerage;

- imposition of the obligation to supervise all sales at a distance by a Member State.

h) change concerning the period for which a licence is issued

- introduction of temporary limitation by establishing a limit of 5 years for which a licence is issued;
- introduction of the possibility to renew a licence after the established period (provided that a citizen still meets the requirements which were specified for obtaining such a licence);

i) provisions concerning alarm and signal weapons, as well as acoustic weapons

- introduction of an obligation to ensure that a weapon from this category was not possible, in a technical sense, to be converted into a firearm;
- the European Commission will receive the right to establish technical specification in the scope provided above;

j) deactivation of weapons

- imposing an obligation on Member States to provide the functioning of a special unit which is competent to prepare an evaluation to check if a conducted deactivation guarantees that a modification made to a weapon makes it permanently and irreversibly useless;
- obligation to issue certificates of deactivation or to visibly mark weapons to indicate that it was made permanently and irreversibly useless;
- the European Commission is to receive the right to establish the standard for deactivation in a way presented above;

k) changes in the obligation to inform

- appropriate authorities of Member States will exchange information concerning granted rights to transfer firearms to other Member States;
- this obligation also concerns transferring information on refusals to issue a licence;
- the European Commission is to receive the right to issue delegated acts concerning the manner of exchanging information both about issued licences and issued refusals;
- every 5 years the European Commission will provide a report to the Council and the Parliament together with possible suggestions of changes, especially concerning weapon categories from schedule I and the question of new technologies, such as 3D printers (first report after 2 years after the act comes into effect);

l) changes in schedules

- adding schedule I to category A of automatic firearms which were converted into a semiautomatic weapon;
- moving semiautomatic firearms for private use, which are similar to weapons with automatic mechanisms, from category B to category A;

- adding schedule I to category C of alarm, signal and acoustic weapons, as well as replicas;
- adding to category C firearms (from category B and remaining from category C) after deactivation.

3) The character of proposed changes

a) Assessment of the character of proposed changes

The proposed changes focus on the relevant narrowing of accessibility to certain types of weapons and in general accessibility to weapons in legal trade on the private market. The basic consequence, in the case of implementing the legal solutions proposed in the project, will be limiting the market as such in terms of availability of goods. It is manifested most of all by transferring selected types of weapons specified in schedule I from category B to category A. This manoeuvre is essential from the perspective of the entire act because it eliminates the basic weapon units commonly functioning today among various shooters. Therefore, various rifles will be banned from private transactions, and because of ambiguous formulation, and probably also numerous types of handguns (e.g. many popular 9 mm calibre handguns)⁷. This will obviously be reflected in goods available on the market: many types of weapons which are popular today will simply not be available anymore because they will be made illegal.

The restrictive character of changes will also influence other entities which participate in weapon trade. The relevant limitation will obviously influence the number of entities conducting professional sale. It is to be accompanied by tightening the requirements for such entities and by introducing limitations concerning the possibility to start a business of such type, which will actually revolutionise the regulations for running such a business.

The character of the proposed regulation presented above results directly from provisions concerning the mentioned change in schedule I, but also from other provisions such as limiting trade at a distance, which is currently left without any additional restrictions, after possible implementation of proposed changes will completely eliminate private persons, providing a possibility to place offers in this scope exclusively to entities selling professionally, which will be appropriately licenced and supervised by appropriate authorities of Member States. Special

⁷ This results directly from provisions of art. 1 (6) of the directive project. The modification to art. 5 and art. 6 of the directive introduced by this provision will drastically influence – in connection with the change resulting from art. 1 (13) of the directive project – the distinction of which types of weapons will be illegal and which will be available with a licence.

regulations in trade will be applied to not only weapons (significant weapon parts or ammunition), but also accessories related to them, which is obviously the objective of the initiator of the project (such as for example, cartridge clips for handguns, which are currently an object of free trade). In this scope consequences will be especially severe for individual persons who do not run professional businesses (in this issue the emphasis was put on trade at a distance, especially through the Internet).

Further reading about the changes proposed in the directive project reveals that they also aim at influencing the sphere of personal liberties, i.e. imposing in this scope specific obligations on Member States so that using weapons, purchasing and owning them became more demanding and more inconvenient for citizens of Member States. This results most of all from modifications in categories A and B of schedule I already presented as significant. Besides that, the complete modification of the system of issuing weapon licences needs to be considered to be a significant limitation of liberties, which the EU citizens experience today – as the change in issuing licences without time limitations (current state) to issuing licences for the period of 5 years (a system proposed in the project) needs to be understood in such categories, subject to the possibility of allowing for further prolonging of the licence validity, which however is to be accompanied by specific obligations. Because of the degree of interference this change needs to be treated as generic rather than qualitative.

The entirely new approach to possessing weapons by the EU citizens is also expressed in the scope of supervision from Member States required by the initiator of the project. Current regulation assumes the existence of certain weapon categories (A, B, C and D), among others, in order to differentiate weapons considered to be especially dangerous (therefore available only with a licence, moreover, which is issued only in exceptional situations), commonly used weapons (requiring a licence under general regulations) and the other two: for weapons which require only a statement about the fact of purchasing them (that is registration) and free from any necessity to notify about anything (other firearms). The proposed changes result not only in significant movement and changes in these categories, but most of all for weapons in each of these categories it is required to meet specific requirements and to possess an appropriate licence⁸. Large emphasis was put in the project also on weapon units already possessed by citizens which belong to category

⁸ It is imposed by the construction of art. 1 (6) of the directive project, which changes art. 5 of the directive. Currently art. 5 of the directive states that: „(...) Member States allow for purchasing and possession of firearms classified in category B exclusively to persons who present a valid reason and who (...)”. Implementation of the proposed change will remove the provision of “classified in category B”, which will result in stretching the obligation, regulated by this provision, to possess a licence for firearms in general (which must be understood as any firearms in the understanding of the directive).

A (which will be much more capacious – as it was already presented – after the changes are implemented) as well as the obligation to necessary destruction of such a weapon (also those currently being in possession of private owners). Only the exceptional possibility to refrain from this rule was left, however because of special circumstances, and additionally only for deactivation of such a weapon (the deactivation itself also received a lot of attention in the project and it was decided that it must consist in making the weapon irreversibly and permanently completely useless – that is breaking it so that it will never be useful again). Therefore, the fundamental consequence of implementing this directive project in the proposed shape will be disarmament of the EU citizens on an unprecedented scale.

Everything that was presented above is accompanied by an increase in obligations to inform, both on the part of the sellers and the EU citizens in every part of the regulation. In the principles of the project, more requirements in relation to keeping records are to allow to control of who, where and what weapon one possesses. The initiator of the project wants to introduce detailed informing obligations at the level of the weapon itself (from the manufacturing of a given weapon unit, through placing it on the market, to destroying it), at the level of entities who participate in trade (e.g. an obligation to register transactions in a database centralised with a system of the Member State authority), and at the level of users (requiring a licence for all types of weapons, temporary character of a licence, obligatory medical examination etc.).

a) Summary of the character of proposed changes

The character of the project is typically restrictive. The main idea of the project is not the functioning of the civil weapon market but it is to restrict it, which needs to be clearly distinguished. Main provisions of the directive project focus on the possibility to own a weapon, the legality of particular types of weapons, the implementation of strict obligations concerning both keeping records of weapons and monitoring people who own weapons as well as strict legal restrictions to legally own a weapon. At the same time the project aims at eliminating many types of weapons currently functioning in common use, imposing the obligation to destroy them and not issuing licences for them in the future. Those basic changes in turn are accompanied by further changes, which directly concern weapon trade. The project makes weapon trade illegal in a very large scope for people who are not entrepreneurs, at the same time changing the definition of a weapon seller and of a sale agent, with simultaneous introduction of the requirement to obtain a

licence from appropriate authority to operate such a business.

Therefore, the project most of all very significantly narrows the rights of private users of weapons, with advanced restrictions along with it, also for entities who trade in weapons.

4) Assessment of the directive project through juxtaposing objectives which the initiator of the project declares he wants to achieve, with conclusions resulting from the conducted analysis

The construction of a European legal act, namely a directive, results in *ratio legis* of the proposed changes being contained in the part of the project which will also appear later in the enacted directive, and it does not have a normative character, i.e. in its preamble. Apart from that, the project is also accompanied by a justification, which elaborates on these questions, which is entirely natural for any legal act. A consequence of this fact is that motivations for introducing certain solutions should be perceived on two levels: in the non-normative content of the directive itself and in the justification prepared for it (which significantly extends the content of the preamble).

As it was noted at the beginning, the scope of this opinion – in accordance with what was indicated by the contracting entity for preparation of the opinion – will not include a detailed analysis of the justification itself, which we relate to only generally to grasp motivations declared by the initiator of the project. Therefore, the justification will not constitute the subject of our analysis in terms of its formal and substantial correctness (regardless of doubts that suggest themselves in this respect).

For conducting the analysis properly in the indicated scope it is necessary to discuss the objectives declared by the initiator of the project, which are to justify the change of the existing legal state and referring it to the most important changes indicated above, which as a result of introducing the directive project and later implementing it will appear in legislature of Member States. Such a comparison will allow to figure out if the declared objectives can be achieved with regulations proposed in the project, and if yes, in what scope. On this basis in turn it will be possible to assess whether the declared objectives correspond to the actual objectives of the directive project or not.

It is necessary to emphasise here that the assessment of concordance of these two spheres, i.e. the declared one and the one actually realised by the regulations of the project, is so significant that it influences the possibility to assess the proper or improper application of the basic European

laws, that is the rules of subsidiarity. Thanks to an analysis conducted in such a manner it will also be possible to verify if the applied measure is adequate to the needs diagnosed by the initiator of the project and – in consequence – if the directive project satisfies the requirements for this type of act, however imposed by primary legislation of the EU⁹.

a) Objectives declared by the initiator of the project

Issues related to the operation of illegal organisations are the fundamental elements emphasised to justify the need to introduce changes to the directive on weapons, i.e. organised cross-border crime and terrorist groups. Terrorist attacks conducted in Paris on 13 November 2015 were the direct reason for increasing the tempo of works, so already from the first paragraphs of the project it is visible that it is the security reasons of the citizens of Member States that define the main context for motivations of the project initiator.

Below, we selected the parts of the directive project in which the European Commission provides justification of the shape of the project and the scope of regulations:

- The basis and objectives of the project – emphasising the fact that using firearms by terrorists and criminals operating in organised groups can cause a lot of social damages, which brings the need to take coordinated actions within the European Union in order to prevent it;
- Compliance with the existing policy in this area – the objective of the current directive on weapons was to regulate weapon trade inside the EU, with consideration of safe guarantees; the directive project aims at solving potential problems that may arise in the period of the “lifespan” of a given weapon; for this purpose the directive establishes minimum requirements which Member States should impose concerning purchasing and owning firearms from various categories and regulates the conditions for transporting

⁹ This concerns art. 114 of TFEU in the context of art. 5 of TEU. Therefore, this influences the competences and the chosen legal base by the project initiator. We can quote here Ms Dąbrowska-Kłosińska: “In the ruling C-376/98 *Germany vs Council (tobacco advertisement I)* The Tribunal of Justice had an opportunity to expound art. 114 and indicate the framework for its application (...). It stated that art. 114 interpreted in the light of art. 3 item 1 letter c TFEU (without an equivalent in the current legal state) and art. 26 entitles the Union legislator to accept measures which are to really improve the conditions of creating and functioning of the internal market. Because article 114 does not create a general entitlement to establish regulations concerning the market (point 83, 84), but only to introduce measures facilitating its functioning (...). Interpretation of this article in a way that it would grant the Union general authorisation for legislative actions concerning the internal market, it would be in contradiction with the content of art. 114 and it would not be in compliance with the regulation specified in art. 5 of TEU, that the Union’s competence is restricted to those clearly granted to it”. (TFEU, Comment, vol. II (art. 90-222), ed. K. Kowalik-Bańczyk, M. Szwarc-Kruczek, A. Wróbel, Warsaw 2012); compare also with: D. Fiodorof, *Interpretation of the objectives of the provisions of the Union law in the judicature of the European Union courts*, p. 59 and in: *Interpretation of the European Union law*, ed. C. Mik, Toruń 2008.

weapons between Member States, at the same time ensuring more flexible regulations for hunters and shooters;

- Compliance of the policy in the remaining areas included in the scope of operation of the EU – reference to the Paris Declaration Respecting Maritime Law, in which appropriate ministers of Member States expressed their will to limit illegal weapon supply within the entire EU and to increase cooperation within the frame of EMPACT, for better cooperation of intelligence services, full utilisation of organisations such as Europol, Eurojust, or Interpol; pointing to situations in which representatives of Member States expressed their opinion on the necessity to fight illegal weapon trade at various international meetings; reference to the “European Program concerning Security” prepared by the European Commission, where differences between legislations of Member States were pointed out as an obstacle in effective control and cooperation of the police in the entire EU; there is also a call for urgent work on regulating the question of deactivation of weapons in order to prevent reactivating them and using them again by criminals; recalling the position of the EU Council to fight illegal weapon trade; recalling the resolution accepted by the European Parliament concerning anti-terrorist methods, in which the European Parliament calls for “the Commission to urgently conduct an assessment of the existing Union regulations in the issues concerning the movement of illegal: firearms, explosives and weapon trade, connected with organised crime”¹⁰.

Apart from the above, it was clearly pointed to the need of increasing control, flow of information, cooperation and uniform marking of weapons in a way that is difficult to remove.

b) Assessment of regulations contained in the directive project in the context of objectives declared by the project initiator, which are to be achieved by those regulations.

The appropriate method for checking whether the introduced solutions are in compliance with the declared objectives is an assessment of effects that will be achieved as a result of executing those solutions. If it is stated that the achieved effect complies with the declared objectives we can state that actual objectives coincide with the declared objectives. If it is stated that the achieved effect does not correlate with, or correlates only to a small degree with the declared objectives, it

¹⁰ Compare: *Context of the proposal* in the directive project.

will be necessary to assume that actual objectives do not correspond to the declared objectives. It is a peculiar test of a tool that is planned to be used to perform a certain task.

The first general conclusion, which suggests itself, concerns the European Commission ignoring the differences existing between the legal civil market, and the illegal market of weapon trade. As a consequence, specific measures which were constructed to be applied for the legal civil market are substantiated by the fight against the illegal market, organised cross-border crimes and terrorist organisations. Such perception is unauthorised and shows that two independent items of regulation were considered jointly, as if the difference between them did not exist at all. It needs to be pointed out that no matter how the legal market can to some extent influence the illegal market, it is highly unjustified to consider them equivalent, which the European Commission seems to do (at least if you understand the directive project in the context of declared objectives). The mistake described above has a practical scope in implementing regulations which drastically strikes at the legal weapon owners and limits entities which trade weapons professionally, substantiating it by the necessity to fight broadly understood crime, which in its nature violates the law and will not obey such regulations – it is simply logically incorrect.

The core assessment must be based on the scope of regulations. In a large part the project contains provisions which introduce drastic changes for the citizens of Member States who possess a legal weapon, as well as for those who would like to legally purchase a weapon. To a much smaller extent, the project contains regulations which actually can potentially influence the illegal market of weapon trade (that is ones concerning the adjacent sphere between the legal and the illegal markets). Dangers that were specified for justifying introduction of the proposed changes are not in any way connected, neither do they result from availability of weapons for casual citizens of the EU Member States. The problem noted in the justification was the illegal weapon trade, cross-border crime and terrorism, and there are attempts to fight it by limiting access to legal weapons and legal trade. Such provisions dominate in the directive project and they are the main gravity point of the entire project. Other provisions, which could have meaning from the perspective of the declared objectives are of secondary character and not a lot of emphasis was put on them.

As the most important provisions of the directive project, according to the analysis conducted above, we must consider: the change of conditions for obtaining licences, licences granted for a limited period of time, additional requirements for issuing licences, including all weapons in national supervision, increase in obligations for people who apply for a licence, complete elimination – by modifying weapons in categories in schedule I – of many popular types of weapons, complete removal of weapons included in category A from hands of private persons,

obligation to destroy weapons from category A which currently are owned by private persons (which will include types of weapons that are very common today because of leaving them in category B under regulations of the current directive), introduction of strict age restrictions with very limited exceptions, limitation of goods available on the legal market, limitations in the possibility to operate a business in general, including weapon trade in absolute supervision by the government.

The indicated changes will be revolutionary for casual weapon owners, such as sport shooters, or hunters, as well as small and medium entrepreneurs who operate on the firearms market. Other provisions of the directive are much less categorical in comparison with the abovementioned and their influence on the legal weapon market will not be so large – therefore, they must be considered as having auxiliary character. Among them, we can find such regulations which seem to constitute an attempt to find a measure appropriate for achieving the objective declared by the project initiator. Here we need to point out imposing the obligation concerning marking of weapons, regulations connected with deactivation of weapons and monitoring individual weapon units by introducing coordinated information systems. The scope of regulations, which concerns the declared objectives, is incomparably narrower than the scope of these regulations, which at all do not concern illegal weapon trade, organised cross-border crime or terrorist organisations (however they affect only the sphere of fundamental civil liberties).

Finally, it also needs to be noticed that provisions of the current directive emphasise, most of all, the functioning of the market. The project in its declarative layer is to deal with security but its actual content constitutes a significant interference in civil rights and liberties – therefore, there is a discrepancy of a three-way character, which results, most of all, in obscuring the real picture of the discussed directive project, which must be considered unacceptable.

Applying the method of assessment of the directive project assumed at the beginning we must admit that the declared objectives do not correspond to its actual objectives.

5) The directive project in relation to the primary legislation

With regard to the character of the organisation such as the European Union is, it is necessary – in the process of creating regulations of international scope – to pay special attention to ensure that European Union authorities participating in this process do not go beyond their competence. Therefore, a fundamental issue will be the question of which sphere is regulated by

which body (objective aspect) and what instruments it is going to use to conduct this process (legal form). The scope of competences of the Union, as well as the allowed regulation area, are defined in a way that is appropriate in elementary legal acts, fundamental for the functioning of a creations such as the EU¹¹. Competence core understood in such a way must also be complemented with judicial decisions in appropriate scope, within the frame of which also the fundamental regulations of functioning of the EU would be shaped¹².

The integration processes within the EU can be perceived as progressing dynamically and this aspect must also be considered when conducting an analysis such as this. However, we cannot forget that development in this scope must always be shaped in relation to the primary legislation, which will keep it within an intransgressible frame. Therefore, the abovementioned dynamism must be understood as continuously present, however, not affecting the foundations of the European law directly. The needs perceived in the course of work by the European Union authorities, which would point to, for example, a change in understanding the role of particular EU institutions, the scope of competences, or the question of what should be the objectives of cooperation of Member States within the framework of the EU, cannot constitute a self-contained base for introducing such changes¹³. The European law is a specific kind of international law, and the EU authorities are supranational entities. The entire existence of the European Union still remains based on the treaty law and this is how the primary legislation of the EU is sometimes referred to¹⁴. The practice so far, also from the historical perspective, explicitly confirms the above: shaping of the foundation of today's cooperation within the framework of the EU has already been observed since post-war times, however, the European Union itself did not appear, not until 1993, that is when the Treaty of Maastricht came into force. During the functioning of the EU (earlier European Communities),

¹¹ Apart from the TEU regulations (especially art. 1, 4 and 5), also the TFEU regulations (especially: art. 2, 3, 4, or 6; also especially in the context of the object of this opinion, art. 114). Also compare with: *The European Union in the time of political changes. Systemic and institutional issues*, ed. J. Galster, p. 208 et al.

¹² Similar to the priority of law (here the ruling of ETS in the case 6/64 *Costa vs ENEL*; compare with the ruling of the Constitutional Tribunal of 11 May 2005, reference no. K18/04). In the context of the problems related to art. 114 of TFEU see footnote 9 (the quoted ruling) and other rulings related to this problem, such as: C-66/04 *United Kingdom vs the Parliament and Council*, or C-217/04 *United Kingdom vs the Parliament and Council*; for observing the role of regulations as such in the European Union law see: J. Galster, *Institutional balance as a doctrinal, judicial and prescriptive category. A study of the European Union principle*, Toruń 2008.

¹³ „(...) any competences not granted to the European Union in Treaties belong to Member States” (art. 4 item 1 of TEU); “The competence limitations of the Union are established by the rule of granting. Executing those competences is subject to the subsidiarity and proportionality principles” (art. 5 item 1 of TEU); “According to the granting rule the European Union operated exclusively within the limitations of competences granted to it by Member States in Treaties for achieving objectives specified in them. Any competences not granted to the European Union in Treaties belong to Member States” (art. 5 item 2 of TEU); “In accordance with the subsidiarity principle, in the areas which are not in its exclusive competence, the European Union takes actions only when and only in the scope that the objectives of the desired actions cannot be achieved in a way that is sufficient by Member States, both at the central level as well as the regional and local levels, and if because the range or the effects of proposed actions it is possible to better achieve them at the Union level” (art. 5 item 3 of TEU). Also compare with the Protocol to the TEU on applying the principles of subsidiarity and proportionality.

¹⁴ Regarding the legal existence of the European Union and the meaning of treaties see: W. Szyborski, *European Integration. Selected Problems*, Bydgoszcz 2012, p. 25-43.

whenever Member States discerned the need for further changes, it has always required the revision of treaties¹⁵. However, the treaty of Lisbon was the international treaty which gave the primary legislation of the European Union the shape that it has today¹⁶.

From the perspective of this analysis it will be necessary to consider most of all the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Their relevant provisions which shape the rules of the European law need to be understood with consideration of judicature oeuvre, which has already grown in the past specifying those regulations in the practical dimension.

Considering the above, the analysis in this scope needs to be conducted in terms of the compliance in the formal dimension (that is, the compliance of the secondary legislation acts and the primary legislation as well as in terms of competences – because of the object of regulation and its scope), as well as in terms of internal cohesion (that is, the relation of the directive project to the act itself in the currently prevailing form). When conducting such an analysis obviously one needs to take into consideration the findings made so far concerning the directive project itself.

Characterised also in that the project at this stage, when you cannot explicitly indicate the procedure according to which it is to be submitted to appropriate legislative authority of the EU, cannot be given an assessment concrete and categorical enough. The early stage of works requires that such assessment is conducted remembering about the fundamental reservations concerning it, that is, most of all when considering the fact that the project itself may be significantly modified in the course of legislative work and the fact that because of the difficulty of establishing, at this stage, the final procedure to enact it, it is possible to refer it exclusively to general regulations (therefore, without the possibility to formally verify it in detail)¹⁷.

a) Compliance analysis

The key issues in this area are: using a concrete legal form (in this case a directive), staying within the material scope established by the primary legislation for the EU authorities and staying within the frame established by the subsidiarity and proportionality principles.

The legal form chosen by the European Commission for introducing proposed changes is a

¹⁵ Roman Treaties (from 1957), i.e.: The Treaty of the functioning of the EU (the Treaty establishing European Economic Community) and the Treaty establishing the European Atomic Energy Community; Uniform European Act (from 1986); Treaty of Maastricht (from 1992); Treaty of Amsterdam (from 1997); Treaty of Nice (from 2001); and finally Treaty of Lisbon (from 2007).

¹⁶ For the meaning of the Treaty of Lisbon see: J. Barcz, A guide to the Treaty of Lisbon. Treaties establishing the European Union. Current state and consolidated texts in the content of the Treaty of Lisbon, Warsaw 2008.

¹⁷ Compare with: Decision procedures in the European Union, ed. j. Galster, A. Szczerba-Zawada, Warsaw 2015.

directive. Doubts in this respect result most of all from the specific effects, which will assuredly be created by implementing the directive project in the proposed form. The current form of the directive on weapons is an act which due to the scope of regulations and the form of specific provisions lies within the matter, which should be regulated by such an act at the European level. The prepared directive project is much more categorical in its provisions, it leaves Member States with less possibility to shape the legal space and imposes concrete solutions. Therefore, it is an act of unification rather than (due to the nature of provisions contained there) harmonisation. Most of all, in this scope it is doubtful whether an order would be a more appropriate form for implementing the changes which the project actually aspires.

On account of the fact that a directive on weapons already functions in legal transactions, which would be replaced by the directive project in the specified scope, in this context it is necessary to explain the abovementioned doubts. It is natural to question the argument raised earlier by stating that since once provided matter has been regulated by a directive, it still remains in effect. Such a statement would be true if the scope of proposed changes remained within what was the matter of regulation for the current directive and if the directive project strived at achieving objectives such as were to be achieved by enacting the current directive on weapons¹⁸. As it results from the analysis conducted above, the scope of regulations is much wider than when the current directive was introduced; it is similar in the case of the objective: when the currently prevailing directive on weapons was enacted the objective was coordination, the most distant was harmonisation of national regulations. The actual objective of the proposed project is to eliminate numerous types of weapons from private use and to limit general access to weapons for casual citizens.

It is also worth mentioning that an order, as a fundamental instrument of unification, should be utilised in areas which are reserved for exclusive legislative competence of the EU, which also would make it difficult to implement the proposed changes¹⁹. Therefore, we can clearly see that the chosen legal form remains bound to the allowed scope of regulation and it tries to stretch the “capacity” of the directive as much as possible by using the already existing directive on weapons for this purpose.

On account of the above, it remains highly arguable whether the solutions proposed in the discussed project are suitable for implementation at all – at least in the proposed form. It is also difficult to have a discussion of this nature mainly because the findings show that the actual objective is different from the one declared by the project initiator. The question of what form was

¹⁸ Compare with: Justification for the project of directive on weapons.

¹⁹ “Most frequently, ordinances are used as an instruments of unifications, most of all in the areas where the EU has exclusive legislative competence” (TFEU, Comment, vol. II (art. 90-222), ed. K. Kowalik-Bańczyk, M. Szwarc-Kruczek, A. Wróbel, Warsaw 2012).

chosen is explicitly connected with the subject and the scope of regulation. Without concentrating here on discussing the question whether the European legislator is entitled to interfere in availability of weapons for civil use (which seems to be a sphere strictly national, based on the sovereignty of a Member State²⁰), it needs to be emphasised that the proposed regulation introduces far-reaching restrictions, which push the boundary of what could be justified by the will to achieve the objectives declared by the project initiator. We also need to consider that when the European Commission decided to introduce certain provisions in the form of changing the directive on weapons it should not go beyond the framework in which the directive on weapons was originally grounded.

A negative assessment in the scope of fulfilling the requirements of the subsidiarity principle by the directive project also results from the discrepancy of the declared and the actual objectives.

In the directive project the European Commission justifies that on account of the nature of threats (international crime, terrorism), it is impossible to eliminate them at the national level²¹. This argument is not satisfactory, because we can apply it to any sphere of the EU citizens' activity. Since the omnipotent power of the European Union is not in effect, such vague justification coming down to stating that the diagnosed problem is present in more than one Member State and to the fact that it will be possible to deal with this problem more efficiently as the EU, is highly insufficient. Such an approach requires providing objective reasons, and this requirement is already grounded in judicature, which the European Commission does not fulfil. It is also worth emphasising that such a justification concerns only the diagnosed problem (it does not refer to measures imposed by concrete regulations contained in the directive project).

In their justification concerning the issue of how the European Commission fulfilled the subsidiarity principle they do not refer to what was diagnosed as the main gravity point of the proposed regulation – at least on the grounds of this analysis. Thus, only issues such as information flow between Member States or ways of marking weapons are considered, and pass over the essential changes introduced by the directive project²². The justification also does not present any correlations between the legal and illegal weapon trade. After reading the justification one can be under the impression that introducing concrete changes on the legal market will directly influence the illegal market, which seems to be too much of a simplification. It is highly arguable how the

²⁰ On the subject of modern problems related to the concept of sovereignty, especially in the context of international relations and European integration see: *Sovereignty concepts*. Collection of studies, ed. I. Gawłowicz, I. Wierchowicka, Warsaw 2005.

²¹ „(...) the threats of serious and organised crime and terrorism and the potential huge social and economic costs of violent actions, are inherently characterised through their transnational nature, affecting more than one Member State at the same time. In this sense, they cannot be dealt with in a fully satisfactory manner by the individual Member States”.

²² Compare: point 2 of the analysis conducted in the title IV of this opinion.

introduction of new procedures for transporting legal weapons would influence transporting illegal weapons, which is done by the criminals by definition in a way that violates regulations enacted in this scope.

The project initiator, to justify staying within the framework determined by the proportionality principle indicated that it results from “limiting the content of the proposed changes to those with the most important impact on security”²³. The project initiator also claims that he does not go beyond what is essential for achieving the set objectives. On account of the results of the analysis conducted in this opinion and determining that the declared objectives do not correspond to the actual objectives, a justification formulated in such a way cannot be recognised. The statement that the introduced changes will not excessively limit the internal market is also incomprehensible. As it was presented above, typically restrictive character of fundamental changes and their wide scope will necessarily cause noticeable changes on the weapon trade market. They will also seriously influence private weapon owners by completely changing the regulations concerning access to firearms (what is important, not only from the perspective of civil rights, but also of the market as it will significantly influence demand).

The project initiator does not present any concrete arguments to show that the proposed solutions are appropriate, indispensable and proportional in a strict sense²⁴. The proposed scope of regulations significantly interferes in the sphere of civil liberties and significantly influences the shape of weapon trade market, which is left without a comment by the project initiator.

Finally, we need to point that the provided legal basis for introduced changes, i.e. art. 114 of TFEU, raises serious reservations. The objective of the mechanism provided for in this article is to influence the functioning of the internal market. In the context of the justification itself (disregarding the fact that that the actual objectives need to be considered as not in compliance with the declared objectives) we need to point out that the matter concerning security is rather in the sphere which is described as European Security and Defence Policy²⁵.

b) Summary (compliance assessment)

²³ „Proportionality is ensured by limiting the content of the proposed changes to those with the most important impact on security (...)”.

²⁴ Therefore, it was limited to stating, in a declarative manner, the compliance with the proportionality principle, without presenting a factual justification for it (see: point 2 of the justification of the directive project: *Legal basis, subsidiarity and proportionality*); compare: J. Maliszewska-Nienartowicz, *Proportionality principle in the law of European Communities*, Toruń 2007, pp. 78-121

²⁵ *The European Union in the time of political changes. Systemic and institutional issues*, ed. J. Galster, Toruń 2013, pp. 296-298; in this context also compare: T. Safjański, *European Police office Europol. Genesis. Main aspects of actions. Development perspectives*, Warsaw 2009.

We can therefore recapitulate that the directive project leaves a lot of doubts concerning the question whether it violates the primary legislation of the EU. The scope and character of proposed changes result in the possibility to question the regulation of this matter in a certain way in general by implementing the directive. In this respect, also the introduction of changes to the existing directive on weapons becomes arguable, which aiming at harmonising regulations prevailing in Member States in its scope touched upon the questions of functioning the internal market (therefore, it is within the limits of the framework of these tasks which according to fundamental acts of primary legislation remain in the sphere of European Union competence in the applied procedure). The directive project – even from the perspective of the declared objectives – does not aim at facilitating the internal market but it aims at fighting illegal weapon trade. Bearing in mind that the analysis of particular provisions of the project leads to the conclusion that the actual objectives are different from the declared objectives, the doubt concerning the object and the scope of regulation only becomes larger. It clearly emphasises the conflict of the directive project both with the primary legislation and with the directive on weapons itself (that is in the dimension both external – in the context of the requirement for the secondary legislation to be compliant with the primary legislation, as well as in the internal dimension – in the context of consonance introducing certain changes within the limits of a given existing act). The question of following the principles of subsidiarity and proportionality needs to be recapitulated in a similar way. The project initiator also did not fulfil the obligation to properly justify the introduced changes. The project initiator basically limited himself to general statements, and where he tried to quote concrete arguments, he perfunctorily referred exclusively to auxiliary regulations, which do not constitute the main object of the regulation. Therefore, the project initiator does not refer to those provisions which need to be considered to be the most important changes introduced by the directive project.

The number of doubts that appear in relation to the compliance with the primary legislation, far-reaching interference and lack of correspondence between the declared objectives and those recognised as actual require the project to be assessed (as a whole) negatively. Proposed regulations most of all will change the nature of the legal weapon trade market and will drastically limit the rights of the Member State citizens; to a much lesser degree they will influence the problem of illegal weapon trade, organised cross-border crime and terrorist threats. Therefore, it seems that the issues which, at least in the declarative sphere, were to be the core of the project are the least important elements of it. Actual changes provided for in the project significantly interfere in the sphere based directly on the sovereignty of Member States, which seems to overstep the allowed scope of the EU interference in general, which was established in founding treaties.

V. Providing synthetic answers to questions asked by the entity ordering the opinion

1. Is the scope of the changes planned for implementation wide and what is their character?

Yes. The project provides for a number of changes which drastically change the current regulations. According to the current directive owning a weapon is allowed (it only introduces certain restrictions and regulations concerning it), whereas the directive project orders this perception to be completely inverted: weapons are regarded illegal and only certain licences are granted which make it possible to own it in exceptional situations. However, we can argue whether the scope of those licences is narrow or wide, but still for each licence it should remain without doubt that both owning a weapon as well as access to the market of weapon trade become highly limited privileges, which are completely restricted by the government.

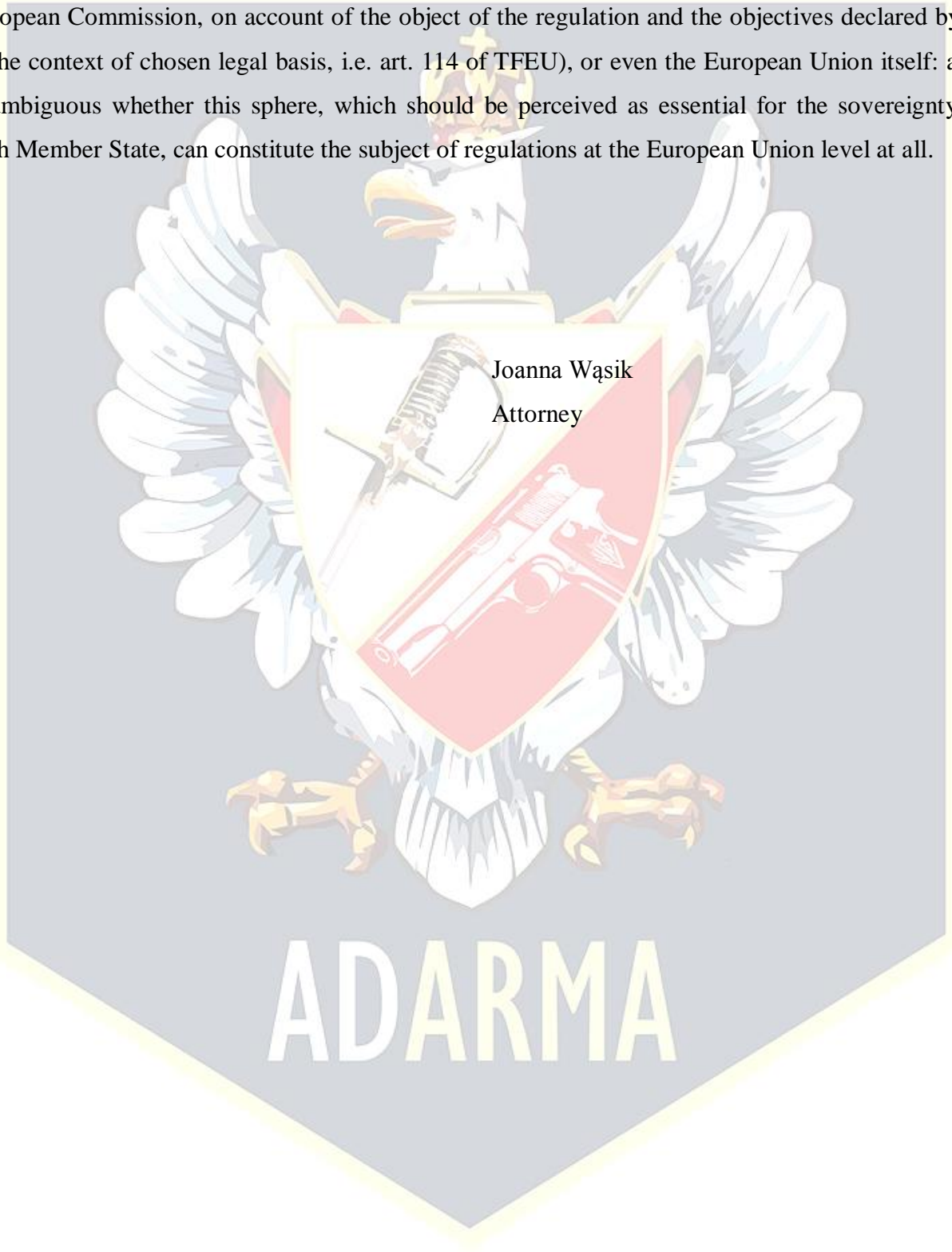
2. What is the actual objective of the directive project?

The object of the directive, contrary to what appears from the project initiator's declaration, is not fighting with threats caused by organised cross-border crimes and terrorist organisations. Changes which the project initiator plans to implement concern mainly the legal weapon market and the regulations for access to weapons by the citizens of the EU Member States. Introduced limitations can only result in depriving the citizens of European countries of access to numerous types of weapons (and limiting access to other types of weapons, which will be legally based on a licence) and significant reduction of the legal weapon and ammunition market. Therefore, if we – answering such a formulated question – rigorously stick to the rule that the achieved effect indicates the actual objective, then we would have to say that the objective motivating the European Commission is a disarmament of the European communities.

3. Does the scope of regulations contained in the directive project exceed the competence framework of EU authorities?

The directive project in the scope of compliance with the primary legislation of the EU raises numerous reservations. It certainly uses many categorical restrictions and in significant aspects provides for numerous entitlements of the European Commission to issue acts of direct enforcement. The character of the act is typically restrictive. The objective of this project – contrary to the existing directive on weapons – is not to harmonise the internal market, but simply to practically limit access to weapons. The declared objectives are fundamentally different from the

actual objectives. Additionally, we can find a violation of the subsidiarity and proportionality principles. It can also be argued, looking from the perspective of the European law, whether the scope of regulations does not go beyond the competence framework (when it comes to the European Commission, on account of the object of the regulation and the objectives declared by it, in the context of chosen legal basis, i.e. art. 114 of TFEU), or even the European Union itself: as it is ambiguous whether this sphere, which should be perceived as essential for the sovereignty of each Member State, can constitute the subject of regulations at the European Union level at all.



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