Private Security Companies in the EU

The current legal frame of operation of Private Security Companies in the European market along an approach on the specific issue of liability for breaches of human rights.

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This article focuses on the absence of harmonisation in the field of Private Security Companies (PSC). PSCs are economic entities that provide security services in the open market. The services provided by such companies have been considered until recent years as part of the state nucleus of exercise of public power. Nowadays, a large part of the state nucleus in the field of security has been opened up to the private initiative and is regulated on a national level. However, the industry cannot fully rise without a harmonisation of the field which would facilitate the cross border operation in the European market. A possible intervention by the European legislator should also take into account the matter of liability of PSCs for breaches of human rights, a matter that has not been regulated so far on a national or supranational basis.

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I. INTRODUCTION

This article will examine the legal regime of PSCs in the European field of market operation. The European Union (EU) has not adopted any specific legal instrument on the operation of the PSCs. On the contrary, PSCs are seen by the CJEU and the Commission as no different than any other service provider in the internal market.¹

This prospective on PSCs appears problematic. The services PSCs provide resemble to a large extent the exercise of public power.² In addition, as Hakala and Button point out, Private Security Guards (PSGs) carry out operations with enhanced powers compared to other citizens.³ Hence, the nature of the services provided – being so closely linked to the state nucleus of coercion – has been addressed by many states through sector specific legislation. In that regard, Hakala – when referring to the results of a relevant research – submits that more than 90% of the existing legal systems have regulated specifically the matter of PSCs.⁴

In the EU, the regulation of PSCs is left to the initiative of the national legislator. Directive 2006/123/EC excluded PSCs from its scope and the Union has made clear its position on a free and open internal market for these services.⁵

The EU stance creates barriers to the cross border operation of PSCs. First, Member States appear suspicious to foreign PSCs established in their territory due to fears of espionage and terrorism.⁶ This is due to the very nature of services offered by PSCs. Moreover, Member States have regulated with

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¹ See for example Commission of the European Communities v Kingdom of Spain, Case C-114/97, ECLI:EU:C:1998:519; Commission of the European Communities v Kingdom of Belgium, Case C-355/98, ECLI:EU:C:2000:113; Commission of the European Communities v Italian Republic, Case C-283/99, ECLI:EU:C:2001:307; Commission of the European Communities v Portuguese Republic, Case C-171/02, ECLI:EU:C:2004:270; Commission of the European Communities v Kingdom of the Netherlands, Case C-189/03, ECLI:EU:C:2004:597; Commission of the European Communities v Kingdom of Spain, Case C-514/03, ECLI:EU:C:2006:63; Commission of the European Communities v Italian Republic, Case C-465/05 ECLI:EU:C:2007:781.


⁴ Hakala, p. 7.


⁶ Hakala, p. 14,16,26; Button, p. 110; See for example Case C-465/05 where according to the Italian legislation the PSCs personnel should swear an oath of allegiance to the Italian Republic.
differentiated stringency the PSC industry and thus they appear reluctant to the possibility of foreign PSCs establishing in their own territory without additional licensing and entrance requirements.\textsuperscript{7}

In our attempt to examine the problems that arise from the lack of harmonisation, we will examine the national regulations in different member States. This in order to support that in a field of operation with such disrupted regulation only the intervention of the European legislator would facilitate the cross border action of PSCs.

In our analysis we will not examine the elements of PSCs operation that need to form part of a possible harmonisation of the field. That is because the industry itself, through supranational organizations, has proceeded in adopting instruments of self-regulation that have paved the way for the fields that need to be covered by a possible harmonisation.\textsuperscript{8}

After examining the above we will proceed with a specific issue that we believe needs to be part of a future harmonisation and has not been part of the national regulations: The matter of liability of PSCs for human rights violations. We will argue that it is not legally correct for PSGs to bear personal liability for human rights violations. On the contrary, the liability needs to be regulated under a new model and in such a way that breaches will be attributed to the PSCs concurrently with the individual guard committing the offence, or even concurrently with the State while in any way, the individuals harmed should be remedied.

II. PRIVATE SECURITY COMPANIES

A. Definition

The first step in our attempt to argue on the importance of a special regime for PSCs in the EU, is to proceed in defining these companies. Such an attempt immediately results in difficulties due to the absence of a harmonised field for PSC operation. Moreover, in national regulations, no Member State has so far been able to draw a clear definition for these companies which could result in a

\textsuperscript{7} Supra note 1, where the additional licensing and/or requirements were matter of the disputes adjudicated before the CJEU.

basis for common politics on the matter of PSCs.\textsuperscript{9} On the contrary, all the definitions used result in a non-exhaustive list of the services provided by PSCs.

For the scope of this paper, we consider as PSCs any private company providing armed or unarmed security services to individuals and the public on a contractual basis. The areas of operation of private security companies have been categorised in the American field as the following: physical security, personnel security, and information security.\textsuperscript{10} Further, ASIS International, an international organisation of security practitioners, has proceeded in a four limb categorisation adding to the above the area of Information Systems Security, which consists of services for safeguarding information transmitted online.\textsuperscript{11}

However in the European field, the area of physical security is most commonly encountered. PSCs who provide physical security engage in the protection of the public and property through guarding services. Such companies provide guarding of commercial or private spaces, guarding of events, guarding of transports of cash and other valuables, and guard of critical infrastructure. Of course, the list is non-exhaustive.

It is important to note that, depending on the national legislation, PSCs can proceed in the provision of both armed and unarmed services. The provision of armed security services poses \textit{ipso facto} a greater risk to individuals especially in the case where States pose no requirements for the use of weapons on behalf of PSGs.\textsuperscript{12}

\textbf{B. The economic rise of PSCs}

The economic activity of PSCs keeps enlarging. According to the Confederation of European Security Services (CoESS), which represents 19 Member States in the field of European Security Services, the sector comprises of 60.000 PSCs with 2.2 million PSGs. The same organisations consider the annual revenue of PSCs to amount to 34.2 billion euros.\textsuperscript{13}

The conclusions of relevant research conducted in 2004, show that in that year the employees of PSCs were larger in number that the members of national police forces in most European countries, whereas one out of five hundred

\footnotesize{\textsuperscript{9} Hakala, p. 7.}\n\footnotesize{\textsuperscript{10} Dempsey J., \textit{Introduction to private security}, Wadsworth, 2011 referring to Cunningham W., Taylor T., \textit{Private Security and Police in America - The Hallcrest Report}, Chancellor Press, 1985 and ASIS International.}\n\footnotesize{\textsuperscript{11} Ibid.}\n\footnotesize{\textsuperscript{12} See Cyprus and Czech Republic, in CoESS, Private Security Services in Europe: CoESS Facts and Figures, Belgium, 2013.}\n\footnotesize{\textsuperscript{13} CoESS, see \texttt{http://www.coess.org/} accessed 28 February 2016.}
European citizens was an employee of a PSC.\textsuperscript{14} It is our estimation that the number of PSCs keeps enlarging. However, due to the fractured national regulation in all EU Members States, we could not access more recent sources in order to determine the exact number of service providers presently active.

The enlargement of PSCs has not only been seen in numerical terms during the past twenty years, but also in the kind of services provided. The services differ from private investigations to the guarding of nuclear and military infrastructures. As the industry evolves, the services are provided in fields that were considered until recently to fall within the monopoly of state powers.\textsuperscript{15}

III. REGULATORY LEVELS

A. National Regulatory Level

In Member States, the PSCs are regulated solely on a national basis. The main goal of these regulations is to protect citizens from the misuse of power, to promote transparency and to deter the creation of paramilitary groups.\textsuperscript{16} On the same basis, the national regulation is used as the necessary tool to guarantee the quality of the services offered.\textsuperscript{17} In that matter each national regulatory system succeeds in the stabilisation of the market while improving the professionalism of the industry and strengthening the profession.\textsuperscript{18}

However, the national regulatory systems seem to differ importantly. In a research study published by CoESS in 2013, we observe rigid examples of the different levels of regulation of PSCs.\textsuperscript{19} In that research, we are able to identify primarily the national differentiation in the approach of PSCs as well as their effect on the level of quality of these services.

The differences in regulation of such services make it almost impossible to proceed with a clear cut categorization of the regulatory systems of EU

\textsuperscript{15} Button, p. 110; See however Rhead Enion M, Constitutional Limits on Private Policing and the State's Allocation of Force, 2009 Duke LJ 59, pp. 523-526 who supports that the monopoly of the state is not only seen as the basis of the provision of public force but also as a monopoly on the choice of allocation of force.
\textsuperscript{16} Button, p. 39.
\textsuperscript{18} Ibid.
\textsuperscript{19} CoESS, Private Security Services in Europe: CoESS Facts and Figures, Belgium, 2013.
countries. In our attempt to outline the main systems that exist in the EU we could proceed in the following three part division.

First, there are Member States with no sector specific regulation on PSCs.20 In such states PSCs are seen as merely economic operators and that is reflected in the companies’ regulation under general commercial laws. In addition even PSCs’ extra powers – such as the use of weapons – are regulated by general gun laws that apply to every citizen in the jurisdiction. In such countries the only requirements that could be seen as sectorally applying to PSCs are related to PSG uniforms, with the aim of avoiding confusion with police wear.

Second, we observe systems of mixed regulation.21 In such Member States, PSCs are seen as economic operators who in some cases, provide services that resemble the exercise of public power and as such they are mildly regulated. Hence, even though PSCs fall under general commercial law provisions, some specific areas of the PSC activities most commonly operated in these countries (such as airport security) are regulated specifically. More over their extra powers are regulated sectorally and in some cases, entrance restrictions also apply.

Third, there exist strict systems.22 In such countries, the police-like functions of PSCs are addressed and are as such regulated in order to protect citizens and enhance the operation of the industry. Hence, the countries have provided sector specific legislation for the private security industry. Their powers are specifically regulated and there are specific entrance requirements as well as mandatory training to be followed by anyone employed in the industry.

Of course, the three systems that we just described cannot be seen as rigid examples in which every country fits. In general, it seems that most countries fall under the third category. However, even with this division, there are still countries which appear to differentiate themselves, and therefore do not fit in a model. Such would be the example of Cyprus where there is, for example, sector specific legislation, however entrance restrictions, mandatory training or even a clear cut regulation on use of guns seem to be absent.23

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20 Ibid, see Czech Republic.
21 Ibid, see Austria.
22 Ibid, see Belgium.
23 Ibid, see Cyprus.
B. European Regulatory Level

In the EU, PSCs operate as service providers in the internal market. The lack of European regulation results in problems in their transnational operation and the quality of the services offered.

In order to overcome some of those difficulties, the organisations UNI-Europa and CoESS have managed to promote a minimum level of standards and succeeded in 2003 to establish a Code of conduct and ethics.\(^24\) Their main goal was to raise the standard of operation in the industry and to guarantee a higher professional ethics level.

Regardless of said code, which could be considered a soft-law instrument, the national regulatory systems differ significantly as they mirror different national environments of operation. In that matter, Hakala refers to the effects of the local history, the political system, the abidance by the law and finally the maturity of administrative and economic systems as factors that affect the regulation in different countries.\(^25\)

Further, certain services PSCs offer have been partially regulated on EU level. For example in Regulation (EC) 300/2008, which sets common rules in the field of aviation security, provisions concerning background checks and training affect PSGs employed by companies which offer security in the aviation field.\(^26\) However, the regulation as such does not directly regulate the conduct of PSCs in general, but rather the conduct of PSGs operating in the aviation sector.

In any case, the fact that there is no harmonisation in this sector could be interpreted as meaning that the EU has not taken a stance on the matter. On the contrary, in the case law of the CJEU we can find many examples where the Court and the Commission appear critical of national regulations of Member States as contrary to the fundamental freedom of establishment, free movement of services and free movement of persons.\(^27\)

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\(^25\) Hakala, p. 44.


\(^27\) Supra note 1. It is important to note that in the said case law all the Members States argued that their regulation was to be seen as an exemption to the freedom of establishment under article 51 TFEU.
1. Directive 2006/123/EC

In 2004 the procedure for adoption of the General Directive 2006/123/EC was enacted with the goal of creating a truly open market for services in the EU. The proposed directive would cover all the services of the internal market apart from those offered directly from public operators without payment. The draft Directive included a range of services with significantly different characteristics, among which were services provided by PSCs.

The Directive was accepted as a legal text which would allow the amelioration of the internal market. It was expected to lead in surpass of administrative difficulties, achieve the necessary transparency in operators and protect both the workers and the receivers of the services.

However, such a general directive could not have the said outcome for PSCs. For that reason, CoESS campaigned strongly against the inclusion of PSCs. According to the organisation, before the adoption of the directive, there should be a minimum standard of qualifications for PSCs in all Member States, so that there would be no danger for the standards of operation to fall in order to meet the lowest common denominator. As a result, CoESS along with other organisations achieved an amendment to the directive, excluding PSCs from its scope. To this day the PSCs have not been part of any other directive and issues by the lack of harmonisation continue to arise.

However, the differences that appear at the national regulatory level in connection with the rigid opinion of the CJEU that PSCs constitute just another service in the open market without a special nature gives continues to give rise to problems. The PSCs will never be fully able to function in transnational level without disastrous consequences for the standards of the industry as long as there is not a homogenous field in European level which would set minimum standards for their action.

Already since 2002 the European Council adopted a recommendation for the enhancement of cooperation between Member States in the field of PSCs. In

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addition, the standards set by CoESS and UNI-Europa with the Code of conduct in 2003 is yet another step to that direction. However, after the exclusion of PSCs from the General Services Directive the procedure for a well needed harmonisation has been stopped.

2. The question of sovereignty

Two World Wars in the first half of the 20th century ripped apart the geographical area of Europe. After World War II, the idea of a united continent in which citizens could live in security and national economies could prosper became the motive for the venture that keeps evolving and has today taken the form of the European Union.

The road followed to this evolution was not paved with roses. Supporters of national sovereignty have been emerging throughout the history of the union with the more recent examples of Brexit and Grexit. These tendencies towards escaping European integration are seen as a real threat to all the standards the European Union has achieved for its Member States and their citizens.

In that matter, the harmonisation of PSCs raises the question of interference with Member States’ sovereignty. For us, an attempt to harmonize this field should be welcomed as means to raise the standards of the PSCs industry. Such an approach would balance the arguments about interference in the Member State’s public order. However, we understand that this interference can be experienced as aggravated for Member States who do not even regulate PSCs in a sector specific way.

This issue would appear due to the nature of PSCs. Since in most cases PSCs offer services in the field of public order and security, Member States can have many reservations on foreign operators establishing in their territory as has been shown by the case law of the CJEU on the matter. However we trust that any decision for a possible harmonisation based on the Treaties can never be done in a forceful manner and should respect each Member State’s reservations.

A harmonisation of a sector in the internal market as such cannot be a coercive procedure. Of course a procedure in which all stakeholders will be heard and everyone can express their fears and reservations is needed. But what we need to remember is that following a transparent and democratic path of decision making in Europe can never bring about cracking in the foundations of the Union.

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33 CoESS, UNI-Europa, Code of conduct and ethics for the private security sector.
34 Supra note 36.
IV. PSCS’ ENHANCED POWERS

A. Misuse of power by Private Security Guards

In other jurisdictions, the enhanced powers of PSGs have in many cases been misused and have resulted in violations of human rights with lethal results. Examples of such violations can be found in the study by Hakkala:35

In the state of Michigan, 3 people died while in custody by Private Security Guards. In Australia the violent behaviour of security guards, more specifically of guards who exercised crowd-control, was the reason for a discussion around the need for regulation. In another context Button indicates that both the US and Australian legislation is exhausted at state level while, generally, industry regulation requires minimal training and there are no specific requirements as to this, a fact which we consider as another cause of such incidents36

In the European field, complaints of abusive behaviour by security guards are reported on cases of more vulnerable groups, such as asylum seekers. In Germany, Human Rights Watch’s World Report 2015: European Union mentions allegations that PSGs have been abusing asylum seekers in seven out of the twenty reception centres of the state during 2014 when the research for the report was carried out.37

Further, as the Integrated Regional Information Network(IRIN) reports:

“In the UK, which carried out over 40,000 forced removals and voluntary returns in 2012, civil society and the media have been reporting for years on the excessive use of force by private security guards contracted by the UK Border Agency.”38

In most cases, redress is hard to achieve due to an ineffective system of complaints in the UK. IRIN further reports that this is aggravated by the fact that those subject to torture – as returnees – are not able to officially monitor their injuries, an action which is possible only after their return. In addition any complaint made after their return to the countries of origin could also raise issues of jurisdiction.

35 Hakkala, pp. 27-28.
36 Button, p. 118.
B. Private Military Companies

At this point we would like to address the matter of Private Military Companies (PMCs). With regard to PMCs there have been many attempts for definition. However, many Member States, among which Spain and Portugal, refuse to acknowledge the very existence of such a category of companies. And that is because they consider impossible the concession of such part of the state nucleus to the private initiative.\(^39\) Further, they believe that the very term “military” concentrates the nature of the state monopoly of violence.\(^40\) Hence, the very use of the word military results in confusion when used in private companies.

Such a lack of a uniform definition can lead to political distraction. Specifically, the absence of definition has allowed Member States to conceal the use of private contractors in international military operations. When PMCs proceed in violation of humanitarian law, the issue of international liability of the state arises.\(^41\)

At this point we would like to draw attention to a recent finding of the United Nations (UN) regarding the liability of PMCs.\(^42\) And that is because we consider that the points made could find an analogic application for the liability of PSCs.

The press release of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination resulted from the conviction of an ex PSG and three other individuals for the murder of 14 unarmed Iraqis in Baghdad in 2007. Seventeen more Iraqis were wounded when the PSGs opened fire. In the relevant press release the following was emphasised:

“The outsourcing of security to these firms by States creates the risk for human rights, hence the need to regulate their activities. [...] Private military and security companies must always be held accountable for violations committed under international human rights and

\(^39\) An analysis of the argumentation of these countries is found in Finabel Coordinating Committee, Possibilities and Limitations of the Operational Co-operation with Private ‘Military’ Companies (PMC), FIN/SEC/27.239-A, 2008, p. 6, footnote 2.


\(^41\) Ibid.

humanitarian law. [...] However such examples of accountability are the exception rather than the rule."^43

Further, the Working Group pointed out the need for a new international instrument within the UN. Moreover, it proceeded in drafting a Treaty for PSCs and PMCs which could be used as a binding international law instrument in order to effectively monitor human rights violations by PSCs and PMCs and to remedy the victims.^

During the same military operations — in the issue of the UK liability — that the matter of PMCs was examined in the cases of *Al Skeini* and *Al Jedda*.^45* The two cases were also examined by the European Court of Human Rights (ECTHR) for breaches of the right to life and the right to freedom and security under art. 2 and 5 of the European Convention on Human Rights respectively.^46

In the national legal order of the United Kingdom, the question of jurisdiction of the British courts for acts that occurred outside its territory by companies based in Britain and contracted with the British state was examined. Finally, it was accepted that the activity of PMCs based in Britain fell within the jurisdiction of the British courts. But even with this decision, a British citizen cannot turn directly against private companies for actions performed by them while in contract with the British state.^

V. A NEW APPROACH ON LIABILITY

Because of the action of PSCs and the power of PSC personnel compared to other citizens, it is important to examine the approach on liability of PSCs for crimes perpetrated against individuals. The liability concerns cases in which the exercise — possibly misuse — of power by the security personnel results in human rights violations.


^45 Al-Skeini a.o. v. the United Kingdom, Application no. 55721/07, ECHR, 7 July 2011; Al-Jedda v. the United Kingdom, Application no. 27021/08, ECHR, 7 July 2011; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), ETS no. 5.

The basic question that arises in the regulation of the liability of PSCs is whether it can be considered legally correct for Private Guards to bear criminal responsibility as any other citizen for acts performed in the exercise of tasks governed by contractual relations.

A response consistent with the economic activity of PSCs would be in the affirmative. However, the coercive power that is in some cases exercised by PSGs cannot be relegated behind the reality of economic operation of the companies. It has been shown that PSCs in their interaction with citizens are exercising police-like powers which could not be exercised by any other citizen. Specifically, during the performance of the services assigned they have access to sensitive personal data, they are able to use violence and they engage in activities similar to those of the police.\textsuperscript{48}

A. Corporate Responsibility

In that matter, we propose the examination of their responsibility in a different manner. Specifically we suggest the proposal of Cottier on the provision of specific penalties for PSCs when their personnel proceeds in violations while in a contractual relation.\textsuperscript{49} An example of such penalties could be found in the form of penalties for contract violations on the basis of inappropriate conduct of the personnel. In violations of the private agreements under which PSCs operate, a possible solution could be the provision of penalties for unconventional behaviour ranging from fines to suspension of contract and exclusion from future procurements.\textsuperscript{50}

Further, we would like to point to the fact that in 1988 the Committee of Ministers of the Council of Europe had issued a recommendation to the member-states regarding corporate responsibility of enterprises for offenses committed in the exercise of their operations.\textsuperscript{51} In this Recommendation the responsibility needed to be bore by companies and the appropriate sanctions that have to be applied are analysed.

B. Concurrent liability of the Manager of the PSC and the PSG

\textsuperscript{48} Button, p. 112; Rhead Enion, pp.527-528 who argues in the U.S. legal order that constitutional demands should apply to PSCs whenever the act in fulfilment of public demand of force.

\textsuperscript{49} Cottier M., Elements for contracting and regulating private security and military companies, 2006 IRRC 88/863, p. 645.

\textsuperscript{50} Ibid.

\textsuperscript{51} Council of Europe, Committee of Ministers, Recommendation, No. R (88) 18 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, 20 October 1988, Strasbourg.
Another way to protect individuals could be found in establishing the concurrent liability –disciplinary and/or criminal – of PSGs and managers of the PSCs for crimes of domestic law. Each Member State should regulate the most appropriate punishment for committed offences. However, states must make sure that there is a sufficient and effective mechanism for reporting, investigation and prosecution of any illegal behaviour.  

The establishment of criminal responsibility in the face of the company's manager for offenses committed by employees could be seen as a relative way to restore law and order from the criminal behaviour. The contracting parties should implement a regulatory framework that allows the establishment of concurrent liability in the face of managers of PSCs.

C. Concurrent liability of the PSC and the State

Another type of liability should be established in case of crimes committed by PSGs during the contractual operation of the PSCs when their contractor is a Member State. In such cases there should exist the possibility of concurrent civil liability of the Member State and the PSCs. Hence, an individual affected could be remedied by damages which should not only be awarded by the company but also by the state.

The reason why the civil liability should also be bore by the state is based on its protective function towards its citizens. When a state contracts a company which undertakes security services, regards should be paid to the conduct that may affect citizens which the company is hired to protect in the first place.

All the above may not seem directly related to a harmonisation at the EU level. For us, however, a possible harmonisation needs to recognise the specific nature of PSCs and not only proceed in arrangements in order to facilitate the economic activities of these companies in the free market. Instead, especially after the EU shift from 2011 towards the protection of fundamental rights, harmonisation in this field should take into account the potential human rights violations that may take place from European PSCs and be able to verify the existence of a mechanism for rehabilitation of affected citizens.

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53 Council of Europe, Committee of Ministers, Recommendation, No. R (88) 18.
54 Due to the binding legal force of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.
VI. CONCLUSION

The disrupted national legislation in the sector of PSCs combined with the persisting view of the CJEU that PSCs are like any other sector of services on the free market without special function raises problems. A harmonisation cannot be conducted without special arrangements arising from the very nature of services provided by PSCs.

This will only happen if the European Commission and the CJEU understand that PSCs operate significantly similar to the exercise of public authority. Hence, a regulation cannot be merely technical, but must take into account all the different interests that need to be respected. Unfortunately, during the past years neither seem to depart even slightly from their rigid positions that PSCs constitute merely another market service provider and thus should operate without any restrictions in the internal market.\textsuperscript{55}

Moreover, a regulation should primarily respect human rights. After the Treaty of Lisbon, the Charter of Fundamental Rights received binding force analogous to the Treaties.\textsuperscript{56} For this reason and because PSCs can interfere significantly with the rights and conduct of citizens, a possible harmonisation should take into account the respect for individual rights and particularly the rights to life, property and security. This will only be possible if the question of liability of PSCs is adjusted uniformly. And that is due to the fact that their action involves the element of authoritarianism despite the fact that, before the state, PSGs do not differ from other citizens.

Therefore the European Union must proceed in a harmonisation of this economic sector. In this way not only the cross-border operation of PSCs will be facilitated but most importantly all issues arising from their action with respect to human rights will effectively be resolved.

\textsuperscript{55} Supra note 1.

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