THE POLICIES OF THE EUROPEAN UNION FROM A CENTRAL EUROPEAN PERSPECTIVE

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Edited by
András OSZTOVITS and János BÓKA

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Edited by
András OSZTOVITS and János BÓKA

Technical editor:
Franciska JECS and Ibolya STEFÁN

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Contents

| Authors |

János BÓKA
Associate Professor, Department of EU Law and Private International Law, Faculty of Law Károli Gáspár University of the Reformed Church, Budapest, Hungary

Ştefan DEACONU
Professor, Department of Public Law, Faculty of Law, University of Bucharest, Romania

Balázs ELEK
Professor, Criminal Procedural law Department, Faculty of Law, University of Debrecen; Criminal judge and the Head of the Criminal Department of the Debrecen Regional Court of Appeal, Hungary

Zsolt HAJNAL
Associate Professor, Department of European and International Law, Faculty of Law, University Debrecen; Head of the Consumer Arbitration Board Hajdú-Bihar County, Debrecen, Head of the Association of Consumer Protectors, Budapest, Hungary

Matej KAČALJAK
Associate Professor, Department of Financial Law, Faculty of Law, Comenius University, Bratislava, Slovakia; Member of an expert advisory board to the Constitutional and Legal Affairs Committee of the National Council of the Slovak Republic

Andrei LUPU
Lecturer, Center for Constitutional Law and Political Institutions, University of Bucharest, Romania

Krzysztof MASŁO
Assistant Professor, Department of International and European Law, Institute of Legal Sciences, Cardinal Stefan Wyszyński University in Warsaw, Poland

Péter METZINGER
Associate Professor, Department of Business Law, Faculty of Law, Corvinus University, Budapest, Hungary

Reviewers

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Professor, Jagiellonian University, Krakow, Poland

Sándor LÉNÁRD
Head of Center for International Law, Mathias Corvinus Collegium
Research Associate, National University of Public Service, Hungary

Monika NIEDŹWIEDŹ
Assistant Professor, Jagiellonian Univesity, Krakow, Poland

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Associate Professor, Palacky University in Olomouc, Czech Republic

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Associate Professor, University of Miskolc, Hungary

Bence UDVARHELYI
Assistant Professor, University of Miskolc, Hungary

Emőd VERESS
Professor, University of Miskolc, Hungary, Sapientia Hungarian University of Transylvania, Romania;
Head of Private Law Department, Ferenc Mádl Institute of Comparative Law, Budapest, Hungary

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| Technical editors |

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Ibolya STEFÁN
PhD Student, Department of Civil Law, Faculty of Law, University of Miskolc, Hungary

Foreword

Trust is the foundation of all relationships (family, work, business). It often develops or breaks down in irrational ways, but without it no relationship can last. Trust is one of the fundamental pillars of European integration: whether countries with common roots but different cultural, linguistic and historical traditions believe that each other is as valuable and important for the peace and development of the European continent as they are themselves. The crises in the history of European integration are always crises of trust: the trust of one Member State in one of the EU institutions is shaken, or vice versa, or of one Member State in another. Loss of confidence can be caused by many things, but it is often caused by a lack of knowledge.

In the relevant legal literature, there is a clear dominance of analyses of the national legislation and practice of the EU's founding Member States. This is understandable given that this is where most experience of EU law is to be found. However, the focus can and should be extended to the other regions of the EU, including the new Member States that joined later. One of the aims of this book is precisely this: to provide an insight into the legal systems and jurisprudence of the Central European Member States and the challenges they face in implementing and applying EU law.

The legal and institutional systems of the EU and the Member States interact with each other: they mutually define and influence each other. This is true even if, given the direct effect and primacy of EU law, the EU may appear to be the more dominant actor in this relationship. However, the implementation of EU law depends on national institutions, their willingness, attitude and trust, given the gaps in the EU institutional system. The realisation of legal policy objectives can therefore vary from one Member State to another and thus be diverse. The collection of practical experience gained at national level and passed on to the EU institutions can increase the effectiveness of EU legislation and practice.

This is another aim of our study: in addition to presenting the implementation of EU law in Central Europe, it also examines how and in what ways individual Central European solutions have inspired EU legislation and practice. From this latter point of view, this volume is certainly a missing contribution.

Finally, it is hoped that this book will also strengthen trust between European regions and countries and between them and the EU. We believe that these relations are like a marriage: there are good days and bad days, but even on the bad days it remains a marriage.

Budapest, October 2022

The editors

| Chapter 1 |

In the Shadow of Legal Imperialism: The Supremacy of EU Law Over the Member States

Péter METZINGER

ABSTRACT

The primacy of EU law over the domestic law of the Member States is a matter of course. Nonetheless, the precise boundaries of EU law are often disputed between the Member States and the EU: while the Court of Justice of the EU draws those boundaries pursuant to the autonomy (sovereignty) of the EU legal order (i.e., from the inside), the national constitutional courts define the same boundaries pursuant to their own national constitutions (i.e., from the outside). The parallel jurisdiction of the Court of Justice and of the constitutional courts has exposed the tensions between the rule of law and democracy, and between the legal sovereignty of the European legal order and the popular sovereignty of European nations. Insofar as these tensions are resolved only according to the rule of law, without democratic processes, legal imperialism will impose itself.

KEYWORDS

conflict of jurisdictions, constitutional identity, democracy, European legal order, pluralism, primacy, rule of law, sovereignty, supremacy, *ultra vires*.

Introduction

Legal tensions between the institutions of the European Union (EU)[1] and the organs of the Member States exercising governmental powers have recently reached a level that has probably never been seen before.[2] One of the sources of those tensions is the question about the boundaries of the powers of the EU: to what extent can the

1 I will use the term "EU" regardless of the current terminology (European Communities, Community, Union).

2 By way of example, it is worth mentioning, on the one hand, from a legal perspective, the decision of the German Federal Constitutional Court given in the Public Sector Purchase Program (PSPP) case, according to which a concrete judgment of the European Court of Justice (CJEU) is *ultra vires*, and from a political perspective, Resolution no. 2021/2935 of the European Parliament on the rule of law crisis in Poland, which, according to which the Polish Constitutional Tribunal is illegitimate.

Metzinger, P. (2022) 'In the Shadow of Legal Imperialism: The Supremacy of EU Law over the Member States' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 13–54. https://doi.org/10.54171/2022.aojb.poeucep_1

Union influence the acts of the governments, of the legislators and of the courts of the Member States—and, vice versa, to what extent can the Member States restrict the functioning of the Union?

The EU is not a pure intellectual concept; there are wills behind that hold it. By rephrasing Schopenhauer (*Die Welt als Wille und Vorstellung*), I argue that the EU is, on the one hand, an idea represented by the Court of Justice of the EU (CJEU),[3] promoting the rule of law, and, on the other hand, it is a bundle of wills, represented by the national constitutional courts, promoting democracy. Alternatively, while the CJEU usually follows a pure, Kelsenian theory of law,[4] the national constitutional courts do not want to detach themselves so strictly from the social reality.[5] It seems that the CJEU, based on the rule of law, has transformed the autonomy of the European legal order into a real sovereignty (*infra*, Sections 2.2 and 3.4), and that legal sovereignty sometimes contradicts the popular sovereignty of the Member States, protected by the national constitutional courts (*infra*, 2.4 and 3). Although I am not arguing here for constitutional pluralism,[6] I am not convinced that the primacy of EU law over the national laws of the Member States would necessarily imply that the CJEU should have the last word in every single question which is intelligible to EU law. My hypothesis is that if we accept that the CJEU has been given absolute jurisdiction over the constitutional courts of the Member States as well, then democracy is necessarily subordinated to the rule of law, and society—at least potentially—surrenders to legal imperialism (*infra*, 1.9). I think conflicts between the CJEU and the constitutional courts should not be conceived as a purely legal dilemma to be resolved either by the CJEU or by "the great minds of EU law scholarship." Quite the contrary, those conflicts are the necessary accessories of a real (legal and political, European) pluralism.[7] It is not worth eliminating that pluralism for the serenity of some public lawyers and/or European bureaucrats. The result of pluralism (i.e., plurality) is sometimes a mess, but it is an absolute supposition by democracy, and cannot be set aside by the rule of law. The title of this paper is metaphorical: legal imperialism has not yet been imposed, but some aspects of the autonomy of EU law may cast a shadow over the European democracies (*infra*, 1.8, 3.4).

3 The expressions Court of Justice of the European Communities, European Court of Justice, Court of Justice of the EU, etc. are all used with the abbreviation CJEU.

4 The CJEU's understanding of EU law seems to be an illustration of Kelsenian theory in judicial practice (Eckes, 2020, p. 5). However, the Kelsenian Grundnorm implies a legal polytheism (Irti, 2011, pp. 10–11).

5 If the CJEU were a commercial and/or administrative court, then its Kelsenian method could not be called into question. But the CJEU has public international law and constitutional law competences as well, in which the law must be confronted with the other subsystems of society.

6 According to constitutional pluralism, the question of who is the ultimate judicial authority—which court has Kompetenz-kompetenz—need not be resolved if only we adopt a pluralist vision of the European constitutional order (Kelemen, 2016, p. 145). In my view, 'constitutional pluralism' is a simple matter of fact in the EU.

7 Although the unity of the legal system is an indispensable requirement to complete the identity of the system (Bifulco, 2018, p. 168), European law—even if conceived as an independent legal system—is made to be used by several legal systems, i.e., plurality is inherent in EU law.

Because of the complex nature of the issue, I apply several approaches: constitutional law, public international law, and European law viewpoints are all necessary, and—to avoid legal blindness—they need to be confronted with considerations of political philosophy,[8] since the questions at hand concern fundamental ruptures on the whole European policy, of strategic social importance.[9] The comparative method is also indispensable:[10] I will use the case law of the Italian Constitutional Court[11] (ICC) as a reference for the interpretation of the decisions of the Hungarian Constitutional Court (HCC); some landmark decisions of the Czech, Danish, German, and Polish Constitutional Courts will also be dealt with. However, since the legal literature[12] has already dealt with this topic in multiple ways, my goal is not to supply a further analysis of the well-known case law,[13] but rather to expose the intellectual tensions between the rule of law and democracy in the interaction of the EU and the Member States.[14] This paper is a piece of legal epistemology.[15]

8 In the same way, some academics note that the question of establishing the principles of EU public tort law is not merely a technical issue, but a political one, as it touches upon fundamental questions of distributive justice and the form of government in the Union, and therefore should be the subject of democratic debate (Letelier, 2009, pp. 291–292).

9 Political philosophy deals with the most fundamental questions of the social existence of human beings (Lánczi, 1997, p. 14). The case law of the CJEU regarding the legal order of the EU can be conceived as an unacknowledged political theology hiding behind the modern concepts of law (cf. Dubouchet, 2009, p. 39).

10 Pursuant to Art. 4(2) of TEU, the Union shall respect the constitutional structures of Member States, and the CJEU draws inspiration from the constitutional traditions common to the Member States: Opinion of the CJEU (Full Court) of 18 December 2014, Opinion pursuant to Art. 218(11) TFEU, Case Opinion 2/13, ECLI:EU:C:2014:2454, (hereinafter: Opinion, C-2/13, ECLI:EU:C:2014:2454.) para. 37.

11 We may draw a methodological parallel between the provisions of the Italian Constitution (Art. 10 of the Italian Constitution sets forth that the Italian legal order shall comply with the generally accepted rules of international law, and pursuant to Art. 11 Italy shall accept—under the same conditions as the other States—the restriction of its sovereignty insofar as it is necessary for a legal order guaranteeing the peace and justice among nations, and shall promote international organizations established for that purpose), and Arts. E) and Q) of the Hungarian Basic Norm.

12 It is obviously impossible to discuss the entire body of legal literature on the topic. As the basic Hungarian work of a systematic and theoretical approach, see Kecskés, 2020; for the application of EU law by Hungarian courts, see Osztovits, 2014; and for a critical analysis of the practice of the HCC, see Vincze and Chronowski, 2018. For an easily available and very sound summary, see Chronowski, 2019.

13 The law-developing, law-making case law of the CJEU shaped the legal nature of European integration. However, the Member States have a Union, the Union has a legal system and a Court—not vice versa.

14 In the EU, the importance of the rule of law is much higher than that of democracy, and it is not by accident that the democratic deficit of the EU is abundantly discussed by legal scholars (see e.g., Craig, 2011a), while the 'deficit of the rule of the law' has not even been mentioned. Democracy (and/or the democratic deficit) is usually not contrasted with the rule of law by academic writers.

15 See Atias, 2002, p. 23. Legal epistemology deals with the subject matter of the activity of (European) lawyers, especially of judges.

Chapter 1 will attempt to define the topic at the highest level of legal abstraction. Within that abstract framework, Chapter 2 will analyze the tensions between EU law and national laws from the perspective of international public law, EU law, and constitutional law. Chapter 3 will finally pose the question, "How does that relationship work in the practice?" and will reflect on the collision between the legal sovereignty of the Union (as an idea) and the popular sovereignty in the Member States (as a will). I will finally draw some temporary conclusions.

1. Democracy *versus* the Rule of Law

Both the Treaty on the European Union (TEU)[16] and the Hungarian Basic Norm[17] recognize democracy and the rule of law—both deriving from human dignity—as fundamental values (axioms for the organization of the society). While democracy, by its very nature, is based on pluralism (and the plurality of values can be extremely chaotic), the rule of law needs and promotes certainty, uniformity, order, and hierarchy. Hence, those two basic values of our European world are not always on the same page.

1.1. The equal dignity of the individuals forming an organized community (a system) implies certain principles for the organization of the community. Both democracy and the rule of law recognize the principle of popular sovereignty: only those rules may be binding on the individuals belonging to a given State community that have been set forth either directly by that community or by the representatives elected—in a democratic way, respecting the equal freedom of the individuals—by the community. The drafter of the community's general rules must have democratic legitimacy.[18]

1.2. The fundamental method for the operation of democracy and the rule of law is the separation of powers.[19] In the European integration, the separation of powers is not simply the horizontal separation of the State powers, it has a vertical aspect as well: the powers are divided among the institutions of the Union and of the Member

16 Art. 2 TEU.

17 Basic Norm, Art. B)(1) and Art. II.

18 In the case law of the HCC the exercise of the public power is democratic if it can be traced back to the sovereign people (Vincze and Chronowski, 2018, p. 44). Berke went further: popular sovereignty and democracy under the rule of law imply that the citizens of the State are the guardian of the existing social order (Kecskés, 2003, p. 21).

19 In a democracy, under the rule of law there is no unlimited or unrestrictable power, and therefore certain powers necessarily restrict other powers (Decision No. 28/1995 (I. 19.) of the HCC. Basic Norm, Art. C) para. (1). As the CJEU has pointed out: in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 124.)

States,[20] as well as among the institutions of the Union.[21] The separation of powers implies that the independence of the judge is detached from the State liability for the activity of the judge.[22]

1.3. The State is an organized community of the individuals forming it, having a legal personality separated from those individuals.[23] States may form further (inter-state or super-state) communities which may have their own legal personality.[24] The (external) sovereignty of each State represents its legal–ontological basis in public international law,[25] and human dignity defines the place of individuals in a democracy under the rule of law.[26] Self-determination is the cornerstone of human dignity and of State sovereignty as well. The necessarily equal sovereignty of the States[27] implies that their community—recognizing democracy and the rule of law—must consider its members, both theoretically and actually, as the single State considers the individuals that form it, with a fundamental difference: while the dignity of individuals is absolute,[28] the sovereignty of the State—with its consent—may be restricted.[29]

1.4. Regarding EU law, from the perspective of the Member States, we may conclude that: (i) one of the fundamental values of the Union is democracy, thus EU law may be binding on the Member States (and on their individuals and other entities) only insofar as that law has been accepted by the Member States either directly (i.e.,

20 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 224.

21 At the EU level, the separation of the powers is less clear-cut than within many of the Member States (Rosas, 2007, p. 1034).

22 As the CJEU has pointed out in Köbler, (Judgment of the Court of 30 September 2003, Gerhard Köbler v. Republik Österreich, Case C-224/01. ECLI:EU:C:2003:513.) (hereinafter: Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513) para. 42: As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

23 More precisely: the State is a legal entity constituted by the union of three elements (population, territory, and political power), which is a legal person recognized by public international law (Cornu, 2013, p. 362).

24 The legal personality is not necessarily a statehood, just as in the case of the EU, *infra*, 2.1.2.

25 Public international law qualifies the situation of the State in the international community by the notion of sovereignty, and builds the international legal order on it (Bruhács, 1999, p. 23).

26 To avoid any misunderstanding: I am not suggesting that human dignity would coincide with the sovereignty of the State; I am, however, suggesting that from a methodological perspective human dignity is an absolute point of reference for the legislation on individuals as well as sovereignty is an absolute point of reference for the legislation (both in international and in European law) about the State.

27 Charter of the UN, Art. 2 Pt. 1 (Combacau and Sur, 1999, p. 229).

28 Dignity is the immanent quality of human life, indivisible and unrestrictable, and thus equal for everyone (Decision No. 64/1991. (XII. 17.) of the HCC, D) 2) b).

29 However, scholars have pointed out that a classic notion like sovereignty might be misleading regarding EU law (Ost and Kerchove, 2002, p. 65); according to Kecskés, Hungarian public lawyers started dealing with the European integration with a certain delay because of a rigid concept of sovereignty (Kecskés, 2003, p. 21). Still, it is a legal and political fact that EU law has been built on the sovereignty of Member States, and that sovereignty was restricted by the Member States in the Founding Treaties.

the law has been created by them), or indirectly (i.e., the law has been created by the institutions, in the scope of their powers and according to the procedural rules of the legislation as determined by the Member States);[30] and (ii) another fundamental value of the European Union is the rule of law, and so each Member State is entitled to challenge any obligations put forward against it before a tribunal established by the law, and obligations against a Member State may be enforced only through a fair trial.[31] A dispute over an obligation is never a problem under the rule of law, while its settlement, the process for its resolution (independently from its length and result) is a proof and the catalyst of the rule of law.[32] According to the CJEU, the European integration is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter—the Treaty.[33]

1.5. As a logical consequence of the rule of law, each dispute must be formally closed, that is to say, a judge will make a decision, and regardless of the recognition of the right to appeal, it can no longer be challenged by the parties:[34] the final judgment must be executed. The rule of law can live together with legally wrong single decisions as well, and some ill-founded judgments do not undermine either the existence or the quality of the rule of law. Quite the contrary, the evolution of the rule of law is partially based on the diverging and developing case law, i.e., on the fact that the subsequent decisions of the courts mutually consider wrong. Legal persons (individuals and States) are not entitled to rely on *ius resistendi* when they must perform a final judgment that—according to them—violates their rights. A given legal system, sticking to the rule of law and to legal certainty, will not be able to recognize the situation as a problem when a final judgment infringes the fundamental values of the system. The legal system can correct itself only to a certain level, and beyond that level it may only recognize external correctives mechanisms. That immanent character of the legal system under the rule of law is positive, since it is the cornerstone of legal certainty, but it is worrisome from a democratic perspective. In fact, if we expect the parties to

30 Accordingly, Art. 5 TEU sets forth the fundamental principle of conferral, *infra*, 2.3.

31 Either through an infringement procedure pursuant to Arts. 258–260 TFEU, or by an action for damages according to the Francovich judgment.

32 Judicial disputes touching on the rule of law are a perfect laboratory for studying the constitutional nature of EU integration, and serve to shed light on some of the most debated legal challenges that it currently faces (Lenaerts, 2019, p. 17).

33 Judgment of the CJEU of 23 April 1986, *Parti écologiste* "Les Verts" v. European Parliament, Case 294/83, ECLI:EU:C:1986:166. By the term 'Treaty(s)' I refer to the current Founding Treaty(s).

34 Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513C-224/01, ECLI:EU:C:2003:513, para. 38: The importance of the principle of res judicata cannot be disputed. To ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question. Regarding the right to a fair trial the ECHR has decided: one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined that their ruling should not be called into question, ECHR, Case of 28342/95 Brumarescu v. Romania 61 (Application No. 28342/95).

accept final judgments as absolute authorities even if those judgments infringe upon fundamental democratic values, then we pose the rule of law over democracy. Such a hierarchy cannot be deducted from the democracy under the rule of law, because the relationship between the value of the rule of law and the value of democracy is a horizontal (not vertical) one.

1.6. It is thus no surprise that, at a certain level of the evolution of the rule of law, the claim for external control has arisen: the judgment being final in a given legal system may be challenged—to remedy a serious harm (injustice) that occurred in that legal system and not remedied by the final judgment, or was even caused by it—before a forum established out of that system.[35] An example for such external control is provided by the European Court of Human Rights (ECHR), which is authorized to examine final judgments in the legal system of a Member State, from the perspective of the potential breach of the parties' human rights.[36] The ECHR is not empowered to directly remedy (annul) the act of the State (judgment, law) breaching the human right of the party, but it may order pecuniary compensation. Legal certainty and justice are so reconciled in a way that the public act causing the harm remains valid and enforceable, while the individual harm gets material compensation. The same compensatory principle lays beyond the liability of Member States in EU law,[37] with the difference that under EU law the compensation is awarded by the judiciary of the same legal system that infringed the right of the individual, upon a special action brought pursuant to EU law.

1.7. The rule of law is not the only value in the EU.[38] The tension between democracy (the political power—legislator and government—having democratic legitimacy)

35 A remote, methodological precursor of this solution was the evolution of equity in England, besides common law.

36 The method of the system of the international investment protection established by the Washington Convention of 1965 (promulgated in Hungary by the Law Decree no. 27 of 1987) is based on the possibility to challenge an infringement committed in the legal system of a given State before a forum established out of that system, aiming at compensation. It is very instructive how the institutions of the Union treat the Washington system of the settlement of international investment disputes, as noted below 2.2.5.

37 Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513, para. 39. The recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

38 Art. 2 TEU mentions a series of values without establishing a hierarchy among them, and their order is the following: human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The regulation 2020/2092 of the Parliament and of the Council on a general regime of conditionality for the protection of the Union budget sets forth as well that there is no hierarchy among the values of the Union, and the rule of law and democracy are mutually presupposed.

and the rule of law (the professional judiciary power, independent from the political powers) is given by the fact that those two principles restrict each other in organizing the society; this is the dynamic of democracy under the rule of law. That tension—the corollary of the checks and balances among the branches of power—is one of the fundamental guaranties of the democracy under the rule of law. It is about the question of who should be given the last word in a social dispute: the democratically elected political power (that can be voted out of office), or the professional, independent, and irrevocable supreme judicial forum? Should the belief of the inaugurated politician in his/her own wisdom overrule the professional skills of the impartial judge, or, vice versa, the judge should control the politician.[39] The issue is more complex in the EU because of a further question: where is the supreme judicial forum to be found—at the level of the EU, or at the level of the Member States? Alternatively, has the classic hierarchic model of the law (regarding both the sources and the judicial system)[40] been replaced by a new model of the network,[41] in which there is a permanent dialogue among the centers of (political and judicial) power? Moreover, can courts enforce only the positive law, or should they consider political values as well? (i*nfra*, Chapter 3.)

1.8. EU law and politics identify the problems of the rule of law in its scarce, defective functioning.[42] Independently of the reality of those problems, the functioning of the rule of law might reach a level which is beyond what is necessary for the proper functioning of a democratic society, when the rule of law becomes counterproductive. By legal luxury, I mean an exaggerated use of the rule of law, when its costs greatly exceed its gains, and when the class of legal professionals (officials, attorneys, professors, judges, etc.)—necessary, of course, for the proper functioning of the rule of law—subordinates the interests of the society to its own class interests, consequently and without criticism (but usually not in bad faith). The situation is even worse when the perverse exaggeration of the rule of law hinders democracy and keeps the popular

39 While Montesquieu subordinated judges to the legislator ('judges are no more than the mouth that pronounces the words of the law'), according to Géza Marton, the text of the law is blind, and it is the judge that make it able to see.

40 According to some authors, in any constitutional order worthy of the name some judicial authority must have the final say (Kelemen, 2016, p. 139). We may note that the EU is certainly not a single constitutional order.

41 While classic legal systems have followed the values of coherence, security, stability and obedience, the network follows the values of creativity, subtlety, pluralism, and continuous learning; while the basis of the pyramid model is mechanic, the basis of the network model is relativistic, related to intersubjectivity and communication (Ost and Kerchove, 2002, p. 18). Instead of 'hierarchy' in the European legal space, it is sometimes said that the relationship between the EU and national legal orders remains a 'heterarchical' one (Kwiecień, 2019, p. 28).

42 See e.g., the procedure pursuant to Art. 7 TEU, the rule of law framework, and the regulation (EU, Euratom) 2020/2092 of the Parliament and of the Council on a general regime of conditionality for the protection of the Union budget. OJ L 433I, 22.12.2020, pp. 1–10. On that Regulation see Osztovits, 2021, pp. 68–70. The Regulation was challenged by Hungary and Poland at the CJEU, C-156, 157/21. Case C-157/21: Judgment of the CJEU (Full Court) of 16 February 2022. OJ C 148, 4.4. 2022, pp. 8–9.

sovereignty from prevailing: that is legal imperialism. Legal imperialism is a certain aggressive legal blindness that occurs when lawyers neglect the fact that the legal system is only one of the many subsystems in the society.[43] Legal imperialism goes on the offensive when legal professionals, especially judges (forming an independent branch of government) and bureaucrats who operate the rule of law, either refuse the social and political criticism regarding their activity, or (perhaps unconsciously) select among the critics according to their political orientation, and declare that the critics they do not like are waging an attack on the rule of law. It is another risk of legal imperialism when legal professionals—by jeopardizing the separation of powers—put forward an absolute claim to have the last word in each social issue, denying that certain social questions need political and democratic answers (sometimes over and over again).[44] A European legal imperialism will be imposed when the authority of EU law, as established by the CJEU, is enforced to the detriment of the basic democratic values of the Member States.

2. The Supremacy of EU Law

The primacy[45] of EU law over the national laws of the Member States is dogma, and it is a basic principle for the organization of the European society. Still, for a proper assessment of that dogma, it is necessary to overview first the international law and EU law process leading to its establishment, then its evolution in EU law and the counter reactions by national constitutional laws. I think the fundamental question is not posed by the technical hierarchy between EU law and national laws, but rather by the relation between the sovereignty of the Union's legal order and the popular sovereignty of the European nations.

2.1. The Ontology of the EU Legal Order

2.1.1. The Union, by its genesis, is a legal reality: contrary to States, the legal existence of the Union is not an acknowledged fact[46] but a matter of law, created by the Member States with international treaties. This legal reality, of course, has become a political

43 A judge should be aware of the political context in which he/she is operating and the foreseeable consequences of their decisions (Rosas, 2019, p. 8).

44 The International Court of Justice—by wisely recognizing its own professional limits—has held in its opinion of 8 July 1996 that in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake. There are therefore intelligible legal questions that cannot be answered by the applicable legal system (which is a necessary consequence of Gödel's incompleteness theorem).

45 The diversity in terminology (precedence, primacy, supremacy) is indifferent here.

46 The genesis of the State is a pure matter of fact, and its recognition is a purely declarative act, Nguyên et al., 2003, p. 270.

reality as well, and the EU has its own political interests (to enhance the integration),[47] which may not always coincide with the interests of the Member States.

2.1.2. The EU is not a State;[48] it is not even a federal State.[49] It is therefore not a sovereign under international public law. The legal existence of the EU, and thus the existence of its legal order, are derivative: they exist only insofar as the Member States mutually restrict their sovereignty.[50] Hence the legal order of the EU is not the legal order of a sovereign State but a special system of international treaties, on the one hand, and a set of rules deriving from that system, on the other hand.[51] One of the corollaries of the restricted but reserved sovereignty of the Member States is the principle of conferral set forth in Art. 5 TEU. No matter how large the powers conferred on the EU are, that fact does not affect the sovereign statehood of the Member States.[52] Member States are the lords of the founding Treaties, they possess their sovereignty, the Union is only the tool to achieve common objectives.[53] In that respect, the HCC has laid down the presumption of reserved sovereignty: by joining the EU, Hungary did not waive its sovereignty; it allowed only the common exercises of some powers through the EU, so the reservation of the sovereignty of Hungary must be presumed when judging the common exercise of further powers not defined in the founding Treaties.[54]

47 It is the process of creating an ever-closer union among the peoples of Europe, pursuant to Art. 1 TEU. Legal literature notes that from the standpoint of the Union, in principle, the Member States are considered as 'constituent units' whose main purpose is to converge toward the Union (Mangiameli, 2013 p. 153). According to the CJEU the implementation of the process of integration is the raison d'être of the EU itself, Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 172.

48 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 156: the EU is, under international law, precluded by its very nature from being considered a State.

49 Despite of the fact that according to some scholars there are signs in the case law of the CJEU that affirm its position as the supreme court of an increasingly federal judicial system (Turmo, 2019). It has been raised also in public international law that the EU may be a pre-federation (Nguyên et al., 2003, p. 212).

50 The EU can be terminated by the Member States at any time, e.g., by withdrawing from it one by one according to their constitutional requirements, pursuant to Art. 50 TEU.

51 Accordingly, the CJEU has decided that EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States, Judgment of the CJEU (Grand Chamber) of 6 March 2018, Slowakische Republik v. Achmea BV. Case C-284/16. ECLI:EU:C:2018:158 (hereinafter: Achmea, CJEU Judgment, C-284/16, ECLI:EU:C:2018:158), para. 41.

52 Nguyên et al., 2003, p. 212.

53 Várnay and Papp, 2010, p. 183. However, there are views that if the Member States act as the "Masters of the Treaties' then that would another crack in the EU's rule of law and would not only be counter-productive, but also potentially disruptive for the supranational legal order as a whole (Casolari, 2021).

54 Decision No.22/2016. (XII. 5.) of the HCC, [60].

This complies with the theory of reserved powers of public international law,[55] acknowledged by the CJEU as well.[56]

2.1.3. Because of the values of democracy and of the rule of law, EU law may be binding on a Member State (and in a Member State) only insofar as that Member State has previously approved that binding force. Such an approval—its legal basis and genesis—fully depends on the (constitutional) law of that Member State.[57] It is impossible to have a Member State joined the EU against its sovereign will, and that sovereign will must be expressed according to the national law of that Member State.[58] However, joining the EU will *ipso facto* amend the constitutional structure of the Member State, because the former unity of its sovereignty (according to which the sovereignty was exercised by the organs of that Member State exclusively) has been broken by the accession.

2.2. The Nature of the EU Legal Order

2.2.1. The first question is whether the legal norms of the EU form an independent set of rules which is separated from the legal systems of the Member States, being mutually separated one from the others?[59] If EU law as a system is separated from the legal systems of the Member States, a question of collision arises: in a given case, which legal system—the European one or the national one—applies? At the same time, if EU law makes part of the legal systems of the Member States, then the problem of the hierarchy of norms appears.

2.2.2. The founding Treaties are treaties of public international law. The relationship between public international law and the domestic laws of sovereign States is a classic problem of public international law. It is well known that according to the dualist theory, on the one hand, public international law and domestic systems form two distinct systems, being different in terms of their subjects, objects, sources, and sanctions.[60] On the other hand, under the monist model, the legal system is an integrated one, and there are no borders between public international law and domestic

55 Nguyên et al., 2003, pp. 218–223.

56 Provided that the exercise of reserved powers cannot permit the unilateral adoption of measures prohibited by the Treaty. Judgment of the CJEU of 10 December 1969, Commission of the European Communities v. French Republic, Joined cases 6 and 11–69, ECLI:EU:C:1969:68 (hereinafter: Commission v. French Republic, CJEU Judgment, Joined cases 11–69, ECLI:EU:C:1969:68), para. 17.

57 Accordingly, the HCC has found that the basis for the application of EU law in Hungary is Art. E) of the Basic Norm, Decision No. 2/2019 (III. 5) of the HCC, operative part, no. 1.

58 However, this did not necessarily imply that the Constitution must have been amended because of Hungary's accession to the EU (Kecskés, 2003, p. 29).

59 The domestic laws of the Member States form mutually separate legal systems, independently of the fact that they are converging because of the integration process, and they have actually been interacting with each other regardless of the integration process as well (for that interaction see, e.g., the decision BH1999.465. of the Hungarian Supreme Court adopting the *Durchgriffschaftung* from Germany into Hungarian company law, and the HCC applies comparative methods not only in cases regarding EU law).

60 Bruhács, 1998, p. 83.

law. The monist model necessarily implies the question about primacy, supremacy, or precedence—that is, the task to decide which is subordinated to the other in the same system.[61]

2.2.3. The Treaties have not dealt with the nature of the EU legal order (they have dealt only with the process to make secondary law and with its binding force). The CJEU has laid first down in *Van Gen den Loos*, in 1963, that the Community constitutes a new legal order of international law for the benefit of which the States limited their sovereign rights in limited fields.[62] Then in *Costa,* in 1964, it added that the Treaty—by contrast with ordinary international treaties—has created its own legal system which, on the entry into force of the Treaty, has become an integral part of the legal systems of the Member States, which their courts are bound to apply.[63] In that respect, French legal literature has pointed out the paradox that the founders of the Community wanted to establish a domestic legal system built on the method of international treaties.[64] According to the CJEU, the Union therefore has its own legal system which becomes part of the legal systems of all Member States. That approach has always been kept and refined by the CJEU, and it has been summarized as follows: the EU has a new kind of legal order, the nature of which is peculiar to the EU, with its own constitutional framework and founding principles—a particularly sophisticated institutional structure, and a full set of legal rules to ensure its operation.[65]

2.2.4. This view of the CJEU on the nature of EU law has not yet convinced everyone. Only one and a half years after the judgment of the CJEU in *Costa*, the ICC took the view[66] that the legal order of the Community was an external one, fully independent of the domestic legal order of Italy.[67] Since then the ICC has always considered that the norms of the EU are not sources of international law, nor they are foreign law, and are not the domestic law of a single State.[68]

2.2.5. In addition, the concept about the nature of EU law accepted by some international forums of investment protection is in sharp contrast with the concept of the CJEU. While according to the CJEU, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law,[69] an arbitral tribunal under the regime of ICSID

61 Ibid.

62 Judgment of the CJEU of 5 February 1963, NV. Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26-62, ECLI:EU:C:1963:1, II B.(hereinafter: Van Gend en Loos, CJEU Judgment, Case 26-62, ECLI:EU:C:1963:1, II B.

63 Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L, Case 6-64, ECLI:EU:C:1964:66. (hereinafter: Costa, CJEU Judgment, Case 6-64, ECLI:EU:C:1964:66.), para. 3.

64 Cartou et al., 2002, p. 175.

65 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 158. This seems to be a statement of an unacknowledged political theology.

66 In a case brought by an Italian private person against the High Authority of the ESCC before Italian civil courts, upon the constitutional referral of the civil judge.

67 Sentenza No. 98/1965, ECLI:IT:COST:1965:98, para 2. *in diritto*.

68 Sentenza No. 183/1973, ECLI:IT:COST:1973:183, para. 7 *in diritto*.

69 Achmea, CJEU Judgment, C-284/16, ECLI:EU:C:2018:158, para. 33.

simply labelled EU law as international law.[70] I will get back to the conflict of jurisdiction between the judiciary of the EU and international investment forums later (see Section 3.4.4.).

2.2.6. The HCC has distinguished EU law from international law;[71] it has never treated the Treaties as norms of international law from the perspective of its jurisdiction, and has always considered the primary and secondary sources of EU law as making part of domestic Hungarian law since the accession to the EU.[72] According to the Hungarian Supreme Court as well the norms of EU law make part of the Hungarian legal order.[73] Thus, pursuant to the case law of both the HCC and the Supreme Court, EU law is a special, privileged source of the domestic legal system of Hungary.

2.2.7. While the single States join the EU according to their constitutional rules, it is not the national constitutions that are the foundation of EU law but the common will of the Member States themselves to give life to a common legal order on a permanent basis. EU law is based on this fundamental decision that is better called: the legal sovereignty of the European order.[74] A new sovereign was born as a result of the supremacy and if the direct effect of EU law.[75]

2.2.8. It is a settled case law of the CJEU that EU law enjoys autonomy in relation to the laws of the Member States and to international law,[76] and one of the objects of the judicial system—the keystone of which is the preliminary ruling procedure, established by the Treaties—is to ensure the autonomy of the European legal order.[77] At a minimum, the autonomy of the EU legal order, as construed by the CJEU, requires that national and international law and the interpretations offered by national courts and international courts and tribunals not interfere with the power division or legal

70 An arbitral tribunal constituted under the ICSID regime, in case ARB/15/49 (Adamakopoulos and others v. Cyprus) has held that EU law, in particular the rules set out in the relevant EU Treaties as interpreted by the relevant EU organs, is international law binding on EU Member States. The Tribunal cannot accept that EU law must necessarily override other principles of international law applicable between the parties. That may be true within the regime of EU law, and the Tribunal does not question that the decision of the CJEU in Achmea is a valid interpretation of EU law. If this Tribunal were constituted under EU law, then presumably it would be obliged to apply the Achmea decision and decline jurisdiction. But, the CJEU in Achmea did not purport to apply principles of international law in deciding that Arts. 267 and 34 TFEU overrode the provisions of the BIT; it explicitly decided the matter based on EU law. Thus, this Tribunal has to decide whether as a matter of international law the rules emanating from the EU Treaties constitute the applicable law to resolve the question of jurisdiction or whether the law of the BITs as agreed by the parties to those BITs is the applicable law. Under any way of looking at the matter, the question is one of a conflict of treaties.

71 The sovereignty-transfer under Art. E) of the Basic Norm, explained by the sui generis nature of the law of the Union, is different from international law, Decision No. 9/2018 (VII. 9.) of the HCC, [31]. That approach is shared by legal literature too, Vincze and Chronoski, 2018, p. 314.

72 E.g., Decision No.72/2006. (XII. 15.) of the HCC, III. 11.

73 EH2010.2130.

74 Mangiameli, 2013, p. 161.

75 Jakab, 2006a, p. 7.

76 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 170.

77 Opinion, C-2/13, ECLI:EU:C:2014:2454, paras. 174–176.

principles set out in the Treaties. However, the CJEU goes further: it bases its reasoning on an understanding of the EU legal order as self-contained, self-referential, and self-sufficient.[78] The law of the Union has been derivative in its origin, but it has then been converted by the evolutive (legislative) case law of the CJEU into a genuine, independent, and autonomous legal order[79] that has become its own basis, and the very essence of EU law is to ensure its own autonomy, against both international law and the domestic laws of the Member States. This means that it is not the Union that has a legal order, but the sovereign, European legal order that has institutions, and the main task of those institutions is the protection of the sovereignty of the European legal order. The legal order of the EU has thus been converted by the CJEU from an object into a subject: in the case law of the CJEU, there is no distinction between the legal nature of the EU as given by the Treaties and the legal nature of the EU as constructed by the CJEU (for a criticism, *infra*, 3.4.).

2.3. The Borders of EU Law: Intra v. Ultra Vires

2.3.1. The membership of a State in the EU depends on the domestic, constitutional law of that State.[80] However, once the accession has been duly approved by the domestic law of the Member State, then EU law is going to be enforced and developed according to its own rules, within that Member State too. By joining the EU, the Member States have not written a blank cheque, still, they have not created an exhaustive list of rules the institutions of the Union might enact.[81]

2.3.2. It is axiomatic that the EU has *attributed* competence:[82] the institutions of the Union may act only within the powers conferred on them by the Member States,[83] and they must respect the principle of subsidiarity[84] as well. As a consequence of the principle of conferral, the secondary law is null and void in so far as it has been made by the institutions by exceeding their competence. The CJEU has laid down at an early stage that if a measure of an institution has been taken in a sphere that belongs exclusively to the jurisdiction of a Member State, the Court must investigate it, even if the measure has become definitive, because it is a fundamental requirement of the

78 Eckes, 2020, p. 3.

79 Community law perceives itself as an original (not delegated) authority (Jakab, 2006b, p. 386). Still, the autonomy of the EU legal system remains an inherently fragile construction because the CJEU cannot demonstrate the aprioristic character of EU law (Eckes, 2020, p. 2).

80 The Treaties and European law are binding only on the grounds of the Hungarian Constitution, because the possibility of the execution of the Treaty of Accession—being a convention of international law—has been given by the Constitution (Balogh et al., 2003, p. 130).

81 According to the ministerial reasoning of the Act no. LXI of 2002—enacting the Accession Clause of the Constitution—it is about the restriction of its sovereignty when Hungary concludes an international agreement from which concrete obligations—unforeseeable at the moment of the conclusion—may arise without its further specific consent.

82 Craig, 2011b, p. 395.

83 Art. 5 TEU.

84 Art. 5(3) TEU, Protocol 2.

Community legal system that a measure lacking all legal basis[85] cannot produce legal effects.

2.3.3. Art. 4(2) TEU sets forth that in its conferred powers, the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. Thus, the identity of the Member States is given an undisputed importance as delimiting not only the powers of the Union but also the integration process itself, which cannot go as far as touching, modifying, damaging, or cancelling the identity of its Member States,[86] and the identity of Member States is binding on the interpretation of European primary law and on the validity of its secondary law.[87]

2.3.4. In the Maastricht decision, the German Federal Constitutional Court (GFCC) explained that the legal acts of the Union that exceed the competences outlined in the Treaty, as interpreted by the GFCC, will not be legally binding in Germany,[88] and the German State institutions will be hindered by the German Constitution from enforcing them.[89] The most important question about *ultra vires* concerns the forum: which forum can control it (*infra*, Chapter 3).

2.3.5. Behind the *ultra vires* question, there is a problem of logic: (i) the EU is created by sovereign Member States; (ii) the EU exists in the boundaries set forth by the Member States in primary EU law sources; (iii) the final interpreter of EU law is the CJEU; and (iv) if Arts. 4 and 5 TEU mean that it is the CJEU to also define the boundaries that national constitutional identities lay down against EU law, then (v) those identities are not real identities anymore, because they are not self-determined, but ascertained (imposed) from above, and (vi) the EU would define its own boundaries. Assertion (v) contradicts assertion (i), while assertion (vi) contradicts assertion (ii). From the perspective of the sovereign Member States, it seems absurd that their constitutional identities should not be defined by themselves (i.e., by their own constitutional courts), but should instead be defined by the court of a community (the Union) without sovereignty.[90]

2.4. The Collision between EU Law and National Laws

2.4.1. Insofar as the number of the potentially applicable norms is rising (EU law is produced by the European institutions in large quantities, as well as domestic norms

85 Commission v. French Republic, CJEU Judgment, Joined cases C-6 and 11–69, ECLI:EU:C:1969:68, paras. 12–13.

86 Mangiameli, 2013, p. 154.

87 Mangiameli, 2013, p. 155.

88 Boom, 1995, p. 177.

89 Vincze and Chronowski, 2018, p. 200.

90 As it is pointed out by an author: The constitutions of the Member States did not and, as long as the Members States retain the status of States or sovereign subjects of international law, will not occupy a lower position in the hierarchy of sources of law than the Union provisions (Kwiecień, 2019, p. 37).

are produced by Member States),[91] the probability of contradiction between norms becomes higher and higher, and rights and obligations might not be clearly ascertainable. The number of conflicts between norms may be reduced using the method of conform interpretation, which basically consists of constructing a legal instrument belonging to a set of laws in compliance, if possible, with the norms belonging to another set of laws.[92] The HCC as well has pointed out that, insofar as it is possible, the domestic law and the Basic Norm have to be construed in accordance with EU law.[93] The CJEU has ruled that the principle of primacy must be applied only where it is impossible for the national judge to interpret national legislation in compliance with the requirements of EU law.[94]

2.4.2. Legal certainty requires, among other things, the resolution of conflicts between norms according to pre-established methods: which rule must be applied among the contradictory ones (as well as rules to fill gaps).[95] The legal culture has therefore established a hierarchy of norms and the principles of *lex posterior derogat priori* and *lex specialis derogat generali* to resolve conflicts in the same system, on the one hand, while the conflict-of-law rules appoint the applicable legal system and the competent jurisdiction in international (private or tax) law cases.

2.4.3. As of today, the relationship between EU law and national laws means twenty-seven relationships. The very reason of the integration would be questioned if those twenty-seven relationships could materially diverge.[96] Moreover, if the domestic law of each Member State must relate to EU law in the same way, meaning that the relationship between EU law and the law of each Member State must be the same (at least generally), then that relationship must be defined by the law of the Union.

2.4.4. The relationship between primary EU law made by the Member States and domestic law of the Member States seems simple: if a Member State has participated in making a norm of EU law according to the rules accepted by that Member State,

91 Legal norms—just like any other good—are produced, legal workshops are working 24 hours a day all over in Europe (Irti, 2005, p. 7).

92 In all the legal systems the core of the judicial activity is shifting from the decision to the interpretation, and judges are required to be well-equipped in *ars interpretandi* even more then in ars decidendi (Cartabia, 2007, p. 42). The CJEU has laid down a fundamental principle of interpretation in Marleasing (Judgment of the CJEU (Sixth Chamber) of 13 November 1990, Marleasing SA v. La Comercial Internacional de Alimentacion SA., Case C-106/89, ECLI:EU:C:1990:395.) regarding the relationship between European law and domestic laws, according to which a national court is required to interpret its national law in the light of the wording and the purpose of the directive. Also, Art. 28 of the Hungarian Basic Norm contains a conflict-prevention rule of interpretation, and the Constitution and domestic law must be construed in a way that the generally accepted rules of international law be able to prevail (Balogh et al., 2003, p. 168).

93 Decision No. 2/2019. (III. 5.) of the HCC, [37]. This EU-friendly interpretation is accepted by the Czech Constitutional Court as well (Kühn, 2016, p. 186).

94 Judgment of the CJEU (Grand Chamber) of 24 June 2019, Criminal proceedings against Daniel Adam Popławski, Case C-573/17, EU:C:2019: 530, paras. 58 and 61.

95 One of the first and best-known phrasing for that has been given by Art. 4 of the Code civil, by prohibiting déni de justice.

96 There may be specific differences among the receptions of EU law by the Member States on the grounds of specific derogations.

then it cannot subordinate the application of that EU norm to its own domestic laws, created by itself independently of the other Member States, either before or after the EU norm at hand.[97] Conversely, if the secondary law created by the institutions of the Union contradicts the domestic law of a given Member State, it is not excluded for that Member State to take objection to that secondary law, since the European lawmaker is able to enact valid norms only in the competences conferred on it by the Member States in primary law, and if the European lawmaker exceeds that competence, then its act—as *ultra vires*—is null and void. The Member States are therefore entitled to challenge the sources of the secondary law that infringes upon primary EU law.[98] On the contrary, insofar as the secondary law complies with the primary one, the Member States cannot challenge it on the grounds that it contradicts its own domestic law. Indeed, if Member States were entitled to challenge the secondary norms of EU law on the grounds of their domestic laws, even though those secondary norms comply with the primary ones, then the rule of law (and the legal nature of secondary law) would be questioned (denied).

2.4.5. The supremacy of EU law over the domestic laws of the Member State—i.e., the hierarchy of norms that determines the European legal order—has been laid down by the CJEU in *Costa*: the law stemming from the Treaty cannot, because of its special and original nature, be overridden by domestic legal provisions without being deprived of its character as community law and without the legal basis of the Community itself being called into question.[99] The principle of the direct effect of EU law has then been decided by the CJEU in *Van Gend en Loos*: Community law may produce a direct effect and create individual rights which national courts must protect.[100] Further, the CJEU has also determined that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of directly applicable EU law, and to refrain from applying provisions of national law which conflict with them.[101] Consequently, the relationship between the legal system of a Member State and EU law is understood by EU law according to the dichotomy of compliance and non-compliance.[102]

2.4.6. The case of *Costa* reached the ICC as well, and that Court, in its judgment of March 7, 1964, held that the Italian act (*legge*) promulgating the founding Treaty of the European Coal and Steel Community (ECSC) did not have any specific power that could hinder the principle of *lex posterior derogat priori* from applying, that is to say, a subsequent *legge* might contrast with it without infringing the Italian constitution.[103]

97 International treaty law—Art. 27 of the Vienna Convention on the Law of Treaties—has set forth the theorem that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

98 This has been dealt with by Art. 263 TFEU.

99 Costa v. E.N.E.L, CJEU Judgment, Case 6-64, ECLI:EU:C:1964:66, para. 3.

100 Van Gend en Loos, CJEU Judgment, Case 26-62, ECLI:EU:C:1963:1, II B.

101 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v. Comune di Milano, Case C-103/88, ECLI:EU:C:1989:256, para. 33.

102 Varju, 2016, p. 143.

103 Sentenza No. 14/1964, *considerato in diritto* 6, ECLI:IT:COST:1964:14.

Nonetheless, the CJEU in 1978 found that a national court that is called upon, in the exercise of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary rejecting its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting-aside of such a provision by legislative or other constitutional means.[104] The option of secession is there, but no other method of resistance is legitimate, and the supremacy of Union law should be accepted even over national constitutions.[105]

2.4.7. In 1984 the ICC—while keeping its starting point—functionally reached the same result in the *Granital* case[106] regarding the primacy of Community law, just as the CJEU: Community law and the domestic law are two autonomous and distinct systems that are necessarily coordinated according to the separation of powers laid down in the founding Treaties. Since the European legal system and the Italian one are separate systems, the question of the hierarchy of the norms is *ab ovo* excluded: the Italian judge must apply either the Italian norm or the European norm in a given case, provided that if the European norm is applied, then the application of the Italian norm is not an option.[107] A collision between European law and domestic law is therefore excluded in specific cases, insofar as the European norm is directly applicable. By contrast, if it is not about a concrete case, and an Italian norm does not comply with European law, then—upon a direct referral—the ICC will declare a breach of the Constitution and will annul the Italian norm, because the mere fact that that the domestic norm cannot apply in specific cases does not mean that the norms breaching EU law should not be removed from the domestic system.[108] Conversely, the HCC has held that it has no power to examine whether a Hungarian norm breaches EU law or not,[109] albeit a concurring opinion has already mentioned that the HCC is required to examine Hungarian norms that breaches EU law on the grounds of the principle of loyal cooperation laid down in Article 4(3) TEU.[110] Some scholars have urged the HCC to annul domestic norms that do not comply with EU law,[111] while others think that the constitutionality and the compliance with EU law are different categories.[112]

2.4.8. Before the accession to the EU the HCC took the view in the decision 4/1997. (I. 22.) that a Hungarian act promulgating an international agreement is an ordinary

104 Judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, Case C-106/77, ECLI:EU:C:1978:49, para. 24.
105 Jakab, 2006b, p. 395.
106 Sentenza No. 170/1984 del 5 giugno 1984. ECLI:IT:COST:1984:170.
107 It is worth noting that the rapporteur of the case was Antonio Mario La Pergola, advocate general and judge of the CJEU at a later date.
108 Sentenza No. 94/1995, *considerato in diritto* 2, ECLI:IT:COST:1995:94, Sentenza No. 389/1989, *considerato in diritto* 4, ECLI:IT:COST:1989:389.
109 Decision No.3090/2016. (V. 12.) of the HCC, [37], Decision No.34/2014. (XI. 14.) of the HCC, [54].
110 Concurring opinion of judge Czine to the Decision No.3090/2016. (V. 12.) of the HCC, [60].
111 Vincze and Chronowski, 2018, p. 320.
112 Szabó, 2020, p. 16.

domestic act from the perspective of the control of constitutionality, it is thus not safe from constitutional review. That decision has been criticized by the legal literature,[113] albeit the methodology applied by the HCC has been progressive insofar as it has tried to resolve a domestic constitutional problem without a breach of the international obligations of Hungary, and for that purpose the political power has been given a considerable degree of latitude to act, envisaging the cooperation of the branches of government.[114]

2.4.9. Regarding the relationship between EU law and domestic law, the HCC has explained that the dualist model has been increasingly replaced by the monist model in the European legal evolution. According to the monist model, an international agreement makes part of the domestic system without a specific promulgation, it is directly applicable, and prevails over domestic norms: all that is compulsorily required by the European integration, in the view of the HCC.[115] The Hungarian Supreme Court has taken the position that Art. E) of the Basic Norm has opened a window from the closed order of domestic legislation to the law of the Union, and pursuant to the Treaty of Accession promulgated by the Act XXX of 2004 and the founding Treaties incorporated by the same Act into the national legal order, the national judge has become the judge of EU law as well. Accordingly, it is the CJEU that is to be found at the top of the hierarchy of interpretation in the application of EU law in concrete cases in the domestic legal order built on Kelsen's normative pyramid, and the decisions of the CJEU are indispensable for the interpretation of EU law by the national judge.[116]

2.4.10. Eventually, the principle of primacy—and only that, without any reference to the autonomy of EU law—has been expressly acknowledged by the Member States: according to Declaration 17 of TEU, it results from the case law of the CJEU that primacy of EU law is a cornerstone principle of EU law. According to the CJEU, this principle is inherent to the specific nature of the EU. At the time of the first judgment of this established case law (*Costa/ENEL*) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty not in any way change the existence of the principle and the existing case law of the CJEU.

2.4.11. While the sovereignty of the legal order of the Union is artificial, and has been imposed by the CJEU from above, the sovereignty of the people of each Member State is organic, and it has come from the bottom-up, having found shape

113 Because, according to the authors, the HCC conflated international law with European law (Vincze and Chronoski, 2018, p. 258).

114 The constitutionality of a domestic norm promulgating an international agreement may be reviewed by the HCC. However, if the HCC finds that the international agreement breaches the constitution, that cannot affect the international obligations of Hungary, and the legislator must ensure that international obligations comply with domestic law: Hungary must terminate the international agreement, or it must have it amended, or it must amend the Constitution. The HCC may suspend the decision to annul the domestic norm at issue until the compliance will be ensured. Decision No.4/1997. (I.22.) of the HCC, II.8.

115 Decision No. /1997. (I. 22.) of the HCC.

116 EH 2014.08.K30: Curia Kfv. IV. 35.166/2013.

in the national constitution. Opposing narratives are on the table when European legal sovereignty and the reality of the national constitutions are considered incompatible.[117] Contrapunctual law[118] is one of the potential methods to bring those narratives into harmony with each other, by obeying some basic rules: (i) recognizing the existence of other legal orders and at least the possibility of different viewpoints on the same norms (pluralism); (ii) vertical and horizontal discourse among courts in order to achieve consistency in the system (i.e., at least considering the point of view of the respective court from the other legal order in the judgments); (iii) 'universalisablity' (i.e., using only arguments that can also be used by the 'other side'). Yet, this is a solution only for preventing conflicts, so there is no answer to the question of how to solve conflicts that have already arisen.[119] The next chapter will deal with that issue.

3. Enforcing and Controlling Primacy

On the practical side—from the perspective of the implementation of democracy and of the rule of law—the actual enforcement of the principle of primacy is even more important than its declaration. The legal tensions between the Union and the Member States show up between the bureaucracy of the Union (the Commission) and the governments of the Member States before the CJEU on the one hand, and in the parallel case law of the CJEU and of the national constitutional courts on the other hand. From a legal perspective, the very basic question is about the jurisdictions of the CJEU and of the national courts regarding the enforcement of EU law; such a question does not simply concern the primacy of EU law over national laws, but rather whether the sovereignty of the legal order of the Union is able to get the better of the (mutually equal) sovereignties of European nations.

3.1. Asymmetry of Jurisdictions

3.1.1. The acknowledgment of the primacy of EU law does not answer the question who—either the court of the Union or the courts of the Member States—is authorized to have the final word in disputes where EU law contradicts a national law. Even before the Hungarian accession, Kecskés noted that a division of jurisdiction between the CJEU and the HCC was (or would have been) necessary to think about.[120]

117 Still, even the Polish Constitutional Tribunal has pointed in its decision K 3/21 (*infra*, 3.3.4.): in the doctrine of law, with reference to the jurisprudence of the Constitutional Tribunal, at times it is asserted that in the case of recognizing an irremovable conflict between EU law and the Polish Constitution, the following consequences are possible: amending the Constitution; changing EU law; or leaving the EU. Such an assertion may only be deemed admissible in academic rhetoric. Above all, an irremovable conflict occurs very rarely, if it at all exists outside of the theory of law.

118 Maduro, 2003.

119 Jakab, 2006b, p. 396.

120 Kecskés, 2003, p. 30.

In Hungary—as well as in many other Member States—there are four supreme courts: the Kúria (the Hungarian supreme court), the HCC, the CJEU, and the ECHR. Among those supreme courts, the Kúria's position is special, since it has been tasked with interconnecting the other three courts.[121] Still, the principle of primacy implies that if EU law appoints the court to hear such disputes, then the jurisdiction of that court must be accepted by the Member States.[122]

3.1.2. EU law has appointed both the CJEU and the national courts to settle conflicts that arise between national laws and EU law, and the activity of national judges is absolutely necessary for the enforcement of EU law (and of the principle of primacy). In its operation, the national judge is exempted—to some extent, to enforce EU law—from the national judicial hierarchy[123] and from national procedural law[124] as well.

3.1.3. The cooperation between the CJEU and national judges on the implementation of EU law does not mean that the CJEU and national judges would be equal partners. The CJEU cannot be considered as a superior court over the national judges[125] since the judgments of national judges cannot be appealed before the CJEU, but in questions about EU law, the CJEU is obviously stronger than national judges, because: (i) the interpretation of EU law given by the CJEU is binding on national judges; (ii) the national judge against whose decisions there is no judicial remedy under national law must lodge a request for a preliminary ruling with the CJEU;[126] (iii) secondary EU law

121 Varga, 2021, p. 8.

122 In his concurring opinion attached to the Decision No.22/2016. (XII. 5.) of the HCC judge Dienes-Oehm has noted that any disputes concerning a legal norm of the Union, included that about lack of competence, falls under the jurisdiction of the CJEU.

123 In Cartesio (Judgment of the CJEU (Grand Chamber) of 16 December 2008, Cartesio Oktató és Szolgáltató bt. Case C-210/06, ECLI:EU:C:2008:723.) the CJEU has held that the jurisdiction conferred on any national court or tribunal by the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of national procedural rules. Also, in IS (Judgment of the CJEU (Grand Chamber) of 23 November 2021, Criminal proceedings against IS, Case C-564/19, ECLI:EU:C:2021:949, para. 82) the CJEU has held that Art. 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. The principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court.

124 In Factortame (Judgment of the Court of 19 June 1990, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others. Case C-213/89, ECLI:EU:C:1990:257.) the CJEU has held that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

125 However, the CJEU has been struggling to establish its position above the national supreme courts and to compensate for the lack of formal hierarchy in the Union's judicial system (Turmo, 2019).

126 With the exceptions defined in CILFIT (precedence, acte éclairé, acte clair).

can be annulled only by the CJEU;[127] and (iv) while the injured party is entitled to claim compensation if his/her human or European rights have been breached by the final judgment of the national court—not just in the legal system of that national court, and not only under the rules of that national system[128]— the CJEU (and the Union) cannot be sued except before the CJEU, and only under EU law, pursuant to Art. 340 TFEU.[129]

3.1.4. The cooperation between the CJEU and national courts is a matter of fact. The CJEU likes to call that cooperation a dialogue, and has emphasized in its declaration the importance of a constantly unfolding dialogue between itself and the national courts, a dialogue that pays due respect to their particular legal cultures and legal systems and the languages in which they operate.[130] Some scholars, however, question the method of dialogue between courts.[131] According to the division of tasks—division of jurisdiction—between the EU judicature and the national courts, the CJEU, when answering questions referred for a preliminary ruling, must take account of the factual and legislative context of the questions as described in the order for reference.[132]

3.1.5. The dialogue as a method is either dialectics aiming to find the truth (the art of questioning and answering), or it is eristic, purely aiming to convince the other party (or the forum) of a given position. The need for a dialogue is explained by the principle of sincere cooperation, according to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks that flow from

127 The CJEU has pinned down that national courts have no jurisdiction to declare that the acts of the EU Institutions are invalid, that falls under the exclusive competence of the CJEU as dictated by the requirement for EU law to be applied uniformly and for legal certainty, Foto-Frost (Judgment of the Court of 22 October 1987, Foto-Frost v. Hauptzollamt Lübeck-Ost. Case C-314/85, ECLI:EU:C:1987:452.) (hereinafter: Foto-Frost, CJEU Judgment, Case C-314/85, ECLI:EU:C:1987:452.). The Hungarian Supreme Court, by reference to Foto-Frost, has held that the quasi-constitutional court competence to declare a source of secondary law null and void belongs only to the CJEU, EH2014.K30: Kfv.IV.35.166/2013. [24]. Therefore, the invalidity of a secondary norm of EU law may take place only either as a result of a preliminary ruling under Art. 267 TFEU or of an action for annulment under Art. 263 TFEU.

128 In case of a breach of EU law the action—under Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513 —is to be brought before the courts of the breaching Member State, with the potential intervention of the CJEU, and in case of a breach of human rights the action is to be brought before the ECHR.

129 See e.g., Plásticos Españoles v. European Union, represented by the Court of Justice of the European Union, (Judgment of the General Court (Third Chamber, Extended Composition) of 17 February 2017, Plásticos Españoles, SA (ASPLA) and Armando Álvarez, SA v. European Union, represented by the Court of Justice of the T-40/15, ECLI:EU:T:2017:105) where the Tribunal awarded compensation for the material damage suffered by the applicants as a result of the breach of the obligation to adjudicate in a reasonable time in the cases giving rise to the original judgments.

130 Declaration by the Court of Justice of the European Union on the occasion of the Judges' Forum organised to celebrate the 60th anniversary of the signing of the Treaties of Rome. https://curia.europa.eu/jcms/jcms/p1_315711/en/.

131 Some scholars criticize the idea of a judicial dialogue, contending that dialogue is a common practice in the political institutions, but is almost impossible among courts and judges (Cartabia, 2007, p. 5).

132 Judgment of the CJEU (Fifth Chamber) of 26 October 2017, Argenta Spaarbank NV. v. Belgische Staat, Case C-39/16, EU:C:2017:813, para. 38.

the Treaties.[133] Still, that wording does not tell us the final objective of the dialogue: to know which are the real tasks, or to perform some tasks. Nonetheless, the dialogue between the CJEU and the national courts is simple: the national judge poses a question to be answered by the CJEU, and by that answer the dialogue is usually closed, because the national judge must accept that answer. The dialogue between the European courts thus seems a matter of power, aiming at the unconditional enforcement of EU law, rather than an intellectual method searching for truth. The CJEU has laid down with a certain sincerity, that the judicial system established by the Treaties has as its keystone the preliminary ruling procedure, which, by setting up a dialogue between the CJEU and the courts of the Member States, has the object of securing the consistency, full effect, autonomy, and particular nature of EU law.[134] Constitutional Courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the CJEU to let the composite European Constitution work properly, and to allow national constitutional identities to be duly taken into account by the CJEU.[135] By complying with the requirement of a constitutional dialogue, the HCC accepts the interpretation of EU law as falling under the jurisdiction of the CJEU (and not the Constitutional Court).[136] In accordance with that, the ICC has held that the concrete decisions of the CJEU—as well as the European norms dealt with by them—are directly applicable in the domestic systems of Member States.[137] The Polish Constitutional Tribunal, in its decision of October 7, 2021, which kicked up a great deal of dust (see *infra*, 3.3.4.), emphasized the necessity of a mutual, sincere dialogue in the event of a conflict of norms, as it is an obligation arising from the principle of loyalty, which is characteristic for European legal culture.[138]

3.1.6. The European judicial dialogue is thus between unequal partners. According to some scholars, that dialogue should not lead the national courts to overestimate their autonomy in interpreting EU law and deciding when to refer preliminary questions, and the very fact that national courts are essential components of the Union's judicial system and indispensable partners of the CJEU also means that there must be some degree of oversight by the CJEU responsible for the uniform application and interpretation of Union law.[139] However, the legal literature notes that the first reason the CJEU should abandon its Cartesian style of judgments and move to a more discursive and conversational style, is precisely to encourage the constitutional dialogue with the national supreme and constitutional courts.[140]

133 Art. 4(3) TEU.
134 Opinion, C-2/13, ECLI:EU:C:2014:2454, p. 176.
135 Lupo, 2018, p. 186.
136 Decision No. X/477/2021 of the HCC, [64]. Still, the HCC has never lodged a request for a preliminary ruling with the CJEU.
137 Sentenza No. 284/2007, *in diritto* 3, ECLI:IT:COST:2007:284. The ICC submitted a preliminary question to the CJEU the first time by the Ordinanza No. 103/2008.
138 Polish Constitutional Tribunal, decision of 7 October 2021 in the case No. K 3/21, see below, 3.3.4.
139 Turmo, 2019.
140 Cartabia, 2007, p. 42.

3.1.7. While the dialogue between the courts sometimes seems to be a mere (nonetheless, spectacular) courtesy on the part of the CJEU,[141] sometimes the CJEU takes notice of the response made by the national court to the preliminary ruling previously given by the CJEU. In this latter case, the dialogue is real. A good example is set by the cases *Taricco*[142] and *M.A.S.*[143] In the first case, on September 8, 2015, the CJEU—upon the request for a preliminary ruling from an Italian tribunal—has held that the Italian rule in relation to limitation periods for certain criminal offences (insofar as prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the EU) must be disapplied by the national courts to give full effect to the Treaty. Because of the *Taricco* judgment, the Italians courts should have disapplied the limitation period set forth by the Italian Criminal Code in specific cases. However, the ICC has expressed doubt as to whether that approach is compatible with the overriding principles of the Italian constitutional order and with the observance of the inalienable rights of the individual, because, according to the ICC, that approach is liable to interfere with the principle that offences and penalties must be defined by law, which requires that rules of criminal law be precisely determined and cannot be retroactive. The ICC therefore referred the case to the CJEU for another preliminary ruling, and, as a result, the CJEU—in the judgment delivered on December 5, 2017—has changed its standpoint as expressed in *Taricco*:[144] if the national court were to come to the view that the obligation to disapply the provisions at issue in the national Criminal Code conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation.[145]

141 One of the best examples for that spectacular courtesy is given in Omega Spielhallen, C-36/02, ECLI:EU:C:2004:614, where the CJEU has held that fundamental values prevailing in the public opinion of a given Member State and enshrined in its national constitution may justify a restriction of the obligations imposed by EU law, even under a fundamental freedom guaranteed by the Treaty. By that judgment the CJEU has formally acknowledged that national constitutions may over rule EU law.

142 Judgment of the CJEU (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and Others, Case C-105/14, ECLI:EU:C:2015:555. (hereinafter: Taricco).

143 Judgment of the CJEU (Grand Chamber) of 5 December 2017, Criminal proceedings against M.A.S. and M.B. Case C-42/17, ECLI:EU:C:2017:936. (hereinafter: M.A.S, C-42/17, ECLI:EU:C:2017:936.).

144 It is worth noting the reason the CJEU has changed (refined) its standpoint: according to the CJEU the constitutional principles raised by the ICC in the second case were not drawn to its attention in the first case in which the Taricco judgment was given, and so the CJEU needed to clarify the interpretation of Art. of the TFEU at issue.

145 M.A.S, C-42/17, ECLI:EU:C:2017:936, para. 61. It is worth mentioning that in the opinion of the advocate general fundamental rights do not allow the judicial authority of a Member State to refuse to fulfil the obligation identified by the CJEU in Taricco on the ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the national Constitution, as well as Art. 4(2) TEU does not allow the judicial authority of a Member State to refuse to fulfil the Taricco judgment on the ground that the immediate application to proceedings pending before it of a longer limitation period than that provided for by the law in force at the time when the offence was committed would be capable of affecting the national identity of that State.

3.2. Potential Conflict of Jurisdictions

3.2.1. What should be done when EU law materially contradicts the constitutional rule of a Member State, according to which that Member State has joined the EU? That question has never been tackled at the moment of accession of any of the Member States, either in domestic law or in EU law. While that question is considered by scholars as a constitutional paradox[146] or an unresolvable one,[147] it is answered by the CJEU. According to the CJEU, the claim of EU law to be enforced against the laws of the Member States is unconditional: the validity of a community law measure within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of national constitutional structure.[148] The CJEU has confirmed that the principle of the primacy of EU law cannot be subordinated to special domestic procedures, not even to constitutional ones.[149]

3.2.2. Against the position of the CJEU—considering itself omnipotent[150] in the EU—the national constitutional courts have identified the risk, at an early stage, that EU law might jeopardize, at least potentially, the sovereignty of Member States and the fundamental rights of individuals. The ICC has held, as early as 1973, that although the restriction of State sovereignty in the framework of the European integration is possible under the Italian Constitution for the benefit of the Community, having an autonomous and independent legal order,[151] and the legal order of the Community guarantees legal remedies for the infringements of the institutions of the Community, there is a possibility, even if very unlikely, that a regulation of the Community might breach the Italian Constitution in a civil, social-ethical or political domain, in which case the ICC shall be authorized to review the compliance of the founding Treaties with the fundamental principles of the Italian Constitution.[152] The GFCC has also emphasized in a series of decisions (*Solange I*, *Solange II*, *Maastricht*, *Bananenmarktordnung*) that (i) the Member States have remained the guardians of the Treaties; (ii) the GFCC shall be authorized to review the acts of the EU (especially their compliance

146 Blutman and Chronowski, 2007, p. 3.

147 Ost and Kerchove, 2002, pp. 67–68.

148 Judgment of the CJEU of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11/70, ECLI:EU:C:1970:114, para. 3, (hereinafter: Internationale Handelsgesellschaft, CJEU Judgment, Case 11/70, ECLI:EU:C:1970:114).

149 Judgment of the CJEU (Third Chamber) of 19 November 2009, Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu, Case C-314/08, ECLI:EU:C:2009:719, para. 85.: the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.

150 From the perspective of the CJEU—apart from the cases falling out the temporal, personal, territorial and objective scope of the legal act—the law of the Union is given an omnipotent claim to be enforced (Kovács and Völcsey, 2020, p. 1).

151 Sentenza No. 183/1973 del 27 dicembre 1973, para. 5 *in diritto*, ECLI:IT:COST:1973:183.

152 Sentenza No. 183/1973 del 27 dicembre 1973, para. 9 *in diritto*, ECLI:IT:COST:1973:183.

with the fundamental rights guaranteed by the *Grundgesetz*); however, (iii) the GFCC will not exercise that power, because the high-level protection of fundamental rights is guaranteed in the Union. These arguments are based on the sovereignty that is reserved by the Member States in the Union as well.[153] The GFCC, in its *Maastricht* decision, also explained that it will verify whether the institutions of the Union have acted *ultra vires* or not.[154] In a multilevel constitutional system, where the different levels complete and control each other, such an *ultra vires* review may make sense.[155] However, such un *ultra vires* review is the negation of the exclusive prerogative of the CJEU to rule as a sole arbiter on the invalidity of the acts of the EU institutions.[156] The temptation of being a final one, having the power to override any conflicting opinion, is too strong.[157]

3.2.3. The legal dilemma becomes actual when a final judgment of the CJEU is considered by a Member State as an *ultra vires* act (infringing the constitutional identity of that Member State), because, in the current legal order of the Union, there is no available remedy for such a situation. It is a fundamental principle of the EU legal order that the final judgment of the CJEU cannot breach EU law.[158] Accordingly, the mainstream of legal scholars affirms that the notion that a national court can simply override a CJEU judgment is inadmissible.[159] That view is not fully shared by the GFCC: as it explained in its *Lisbon* decision, insofar as European courts do not provide efficient remedy for *ultra vires* acts, the GFCC will review whether the institutions of the Union have respected their competence or not, and whether they have infringed the essence of the German constitutional identity or not.[160] The particularities of the *ultra vires* review have been further explicated by the GFCC in *Honeywell/Mangold*: such a review can apply only if a breach of competences on the part of the European bodies is sufficiently qualified (i.e., obvious), and the impugned act leads to a structurally significant shift to the detriment of the Member States in the structure

153 Jakab, 2006b, p. 389.
154 Vincze and Chronowski, 2018, p. 200.
155 Vincze and Chronowski, 2018, p. 252.
156 Anagnostaras, 2021, p. 804. This is true, but—as the GFCC has pinned down—if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences. Though cases where EU institutions exceed their competences are exceptionally possible, it is to be expected that these instances remain rare due to the institutional and procedural safeguards enshrined in EU law. Nevertheless, where they do occur, the constitutional perspective might not perfectly match the perspective of EU law given that, even under the Lisbon Treaty, the Member States remain the "Masters of the Treaties' and the EU has not evolved into a federal state (cf. BVerfGE 123, 267 <370 and 371>).
157 Kühn, 2016, pp. 193–194.
158 If the judgment of the CJEU breaches human rights, then the victim is entitled to bring a new, separate action for compensation before the CJEU under Art. 340 TFEU. But the breach of the principle of conferral by the CJEU does usually not involve the breach of the human rights of individuals, and so European citizens cannot challenge it with an action for compensation.
159 Kelemen et al., 2020.
160 Vincze and Chronowski, 2018, p. 201.

of competences to the detriment of the Member States; furthermore, the CJEU must first be given the opportunity to rule on the validity and interpretation of the acts in question in the context of preliminary ruling proceedings, insofar as it has not yet clarified the questions that have arisen.[161] Accordingly, the GFCC submitted a request for a preliminary ruling to the CJEU in the *OMT* case.[162]

3.2.4. The judicial activism of the CJEU in the field of fundamental rights brought about new dangers for the constitutional equilibrium between the EU and the Member States, and, more importantly, altered the relationship between the common core of values shared all over Europe and the diverse and plural historical traditions.[163] When the CJEU takes decisions on fundamental rights—which often involve the most important, delicate and controversial constitutional issues—it is critical that such decisions emanate from a tribunal which is capable, and seen to be capable of comprehending the constitutional sensibilities of the Member States at issue and communicating that comprehension to its national counterparts.[164] The activism of the CJEU to enforce fundamental rights may turn into judicial colonialism: the case law of the CJEU on fundamental rights is dotted with signs showing a centralizing effect, gradually drawing the protection of human rights to the European level, and at the same time emptying the protections guaranteed by national constitutions and breaking the limits of jurisdiction in which the action of the Community institutions should be carried out. In this centralizing evolution lies the risk of "judicial colonialism": the national constitutional traditions run the risk of being forgotten and lost forever.[165]

3.2.5. The interaction of constitutional identity and acts of the EU has been dealt with by the HCC as well. In the decision 22/2016 (XII. 5) the HCC has held—based on comparative researches—that it is authorized to review, in exceptional cases, upon a specific motion, and as *ultima ratio,* respecting the constitutional dialogue among Member States, whether the human dignity, or the essence of other fundamental rights, or whether the sovereignty or constitutional identity of Hungary have been breached by the EU institutions. The subject matter of such a review of sovereignty and of identity, however, is not directly the act of the Union or its interpretation, and so the HCC will not pronounce a decision on the validity or invalidity of those acts.[166] This decision of the HCC has been criticized by scholars for not having been fully elaborated, and having left several basic questions open.[167] In my view, however, the very essence of this decision is that the issue at hand could not have been resolved

161 Vincze and Chronowski, 2018, p. 202.
162 Judgment of the CJEU (Grand Chamber) of 16 June 2015, Peter Gauweiler and Others v. Deutscher Bundestag, Case C-62/14, ECLI:EU:C:2015:400. However, the tone of the reference bordered on the vitriolic, and laid down a clear threat to the CJEU: should the CJEU not adhere to the GFCC's restrictive interpretation of the OMT program, it would ignore the CJEU's ruling and declare the OMT program inapplicable in Germany (Kelemen, 2016, p. 137).
163 Cartabia, 2007, p. 16.
164 Weiler, cited in Cartabia, 2007, p. 41.
165 Cartabia, 2007, pp. 16–17, 20.
166 Decision No. 22/2016. (XII. 5.) of the HCC, [56].
167 Vincze and Chronowski, 2018, pp. 296–304.

in Hungarian constitutional law. Indeed, not only pure questions of Hungarian constitutional law are to be tackled by a review of sovereignty and identity, and other players (branches of government) need to contribute to the solution. This is not about clear-cut legal questions, but political ones—questions that are not resolvable under the rule of law, since the solution may require democratic actions as well.

3.3. Actual Conflicts of Jurisdiction

3.3.1. The Czech Constitutional Court (CCC) was the first constitutional tribunal to explicitly declare a judgment of the CJEU *ultra vires*, in the well-known *Landtova* case. The issue was a very special, indirect dialogue between the CJEU and the CCC.[168] First, in 2005, the CCC decided in its judgment on how the Czech Authority must apply the 1992 international agreement on Social Security that was concluded between the Czech Republic and the Slovak Republic. In reply to that judgment, in 2011, the CJEU—upon a reference for a preliminary ruling from the Czech Supreme Administrative Court—established that the judgment of the CCC is discriminatory, infringing the free movement of persons.[169] Finally, as a replication, seven months later, the CCC declared the judgment of the CJEU *ultra vires*. The CCC did not struggle to explain why the CJEU was in conflict with the basic core of the Czech constitution; rather, it simply remarked that the CJEU's judgment was in conflict with the established case law of the CCC, then denounced the CJEU for ignoring European history, namely the specifics of the dissolution of the Czechoslovak Federation and its lack of connection to the calculation of pensions in the EU.[170]

3.3.2. At the end of 2016, the Supreme Court of Denmark (SCDK) disregarded a judgment[171] of the CJEU. More notably still, the SCDK used the occasion to set new boundaries to the applicability of the CJEU's rulings in Denmark: the SCDK delimited the competences of the EU through the lens of its interpretation of the Danish Accession Act, and the SCDK delimited its own power within the Danish Constitution.[172] In regard to the first point, it concluded that the judge-made principles of EU law developed after the latest amendments of the Accession Act, such as the general principle

168 The request for a preliminary ruling was not lodged with the CJEU by the CCC, still, the CCC submitted its written observations to the CJEU, but the CJEU did not consider them (Vincze and Chronowski, 2018, p. 252).

169 Judgment of the Court (Fourth Chamber) of 22 June 2011, Marie Landtová v. Česká správa socialního zabezpečení, Case C-399/09, ECLI:EU:C:2011:415. (hereinafter: Landtova, CJEU Judgment, Case C-399/09, ECLI:EU:C:2011:415), para. 49. According to some scholars the interpretation given by the CJEU in this case was erroneous (Vincze and Chronowski, 2018, p. 252).

170 Kühn, 2016, p. 191. It is funny that after the Landtova (CJEU Judgment, Case C-399/09, ECLI:EU:C:2011:415) judgment of the CCC the Czech Supreme Administrative Court lodged a new request for a preliminary ruling, essentially asking what to do when a national constitutional court disregards a binding judgment of the CJEU; then the Czech Government settled the basic issue, and consequently the reference was withdrawn, and the CJEU did not have to review the review of the CCC (Kühn, 2016, pp. 192–193).

171 Judgment of the CJEU (Grand Chamber) of 19 April 2016, Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen, Case C-441/14, ECLI:EU:C:2016:278.

172 Madsen et al., 2017, p. 4.

of non-discrimination on grounds of age, were not binding; with regard to the second point, the SCDK argued that it would in fact exceed its own judicial mandate within the Danish constitutional framework if it interpreted a national law, which violated the principle in question, in conformity with EU-law in a dispute between private parties, or disapply it.[173]

3.3.3. The GFCC, in reviewing the exercise of the competences of the institutions of the Union in the well-known PSPP decision,[174] has also held that the judgment given by the CJEU in *Weiss*[175]—upon a request for a preliminary ruling from the GFCC—was rendered *ultra vires*. The GFCC is therefore not bound by the CJEU's decision, and it is inapplicable in Germany.[176] By contrast, the HCC—in its decision in December 2021 in the case X/477/2021—has upheld its position that it cannot review a concrete decision of the CJEU based on constitutional considerations (of fundamental rights, of *ultra vires,* or of sovereignty), even if the motion has aimed to such a review.[177] Nonetheless, insofar as the Union would incompletely exercise some of its exclusive competences, and if that incompleteness breached the constitutional identity of Hungary, then the Hungarian State—according to the presumption of reserved sovereignty—would have both the right and the obligation to exercise that competence until the institutions of the Union take the necessary measures.

3.3.4. The Polish Constitutional Tribunal has gone much further: by its decision of October 7, 2021,[178] it has held that the TEU was partially incompatible with the Polish constitution. The decision did not formally reject the Treaties, and did not formally challenge the principle of primacy of EU law. Nonetheless, it declared that the Union

173 Ibidem.

174 BVerfG, Judgment of the Second Senate of 5 May 2020—2 BvR 859/15, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, paras. 1–237.

175 Judgment of the CJEU (Grand Chamber) of 11 December 2018, Proceedings brought by Heinrich Weiss and Others, Case C-493/17, ECLI:EU:C:2018:1000.

176 According to the GFCC German constitutional organs, administrative authorities and courts may participate neither in the development nor in the implementation, execution or operationalization of *ultra vires* acts. See further Kovács and Völcsey, 2020; Wendel, 2020. The CJEU issued a press release concerning the decision of the GFCC: a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. To ensure that EU law is applied uniformly, the Court of Justice alone—which was created for that purpose by the Member States—has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created. Press release following the judgment of the German Constitutional Court of 5 May 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.

177 The motion leading to the decision of the HCC was submitted by the minister of justice, seeking an interpretation of Art. E) para. 2 of the Basic Norm because, according to the minister, the implementation of the judgment given by the CJEU in the case C-808/18 would lead to a de facto alteration of the population of the country and so to a breach of the Basic Norm.

178 In the case No. K 3/21, on the assessment of the conformity to the Polish Constitution of some provision of the TEU.

has been acting outside the scope of the competences conferred upon it by Poland, and because of that, Poland may not function as a sovereign and democratic state.[179] The Polish Constitutional Tribunal has also declared that EU law—including the case law of the CJEU—is subordinated to the Polish Constitution,[180] and so it is subject to the assessment of the Polish Constitutional Tribunal. Still, in the light of the principle of sincere cooperation, dialogue, mutual respect, and mutual support, the Tribunal refrains from executing that competence.[181] However, if the practice of the CJEU's progressive activism—which consists, in particular, in interfering with the exclusive competences of Polish state authorities, in undermining the position of the Constitution as the supreme law in the Polish legal system, in challenging the fact that the judgments of the Constitutional Tribunal are of universally binding application and are final, and ultimately in questioning the status of judges of the Tribunal—is not refrained from, the Tribunal does not rule out that it will resort to exercising the said competence and will subject the CJEU's rulings to direct assessment of their conformity to the Constitution, including their elimination from the Polish legal order.[182]

3.3.5. Thus, to date, two constitutional courts from the *old* Member States and two constitutional courts from the *new* Member States have taken the view that a given judgment of the CJEU was not applicable in that Member State, denying so the supremacy of the CJEU's jurisdiction over themselves.[183] According to the mainstream of legal scholars,[184] if a national constitutional court deems that an EU act or CJEU judgment clashes with its constitution, it cannot simply deem the act or ruling inapplicable in its jurisdiction. This is correct,[185] but the mainstream argues further that national constitutional courts might seek to remedy the situation only by compelling their government either to amend their constitution, to seek to change the EU legal norm involved by working through the EU political process, or, if necessary, to withdraw from the Union altogether.[186] I think this position is a bit rigid, voluntaristic, and one-sided (as it sometimes happens to the mainstream): (i) it is rigid in that it considers a given legal situation as a final and permanent one (which is usually not

179 Well, if the assertion of the Polish Tribunal according to which the EU has been acting ultra vires is well-founded, then its conclusion—according to which Poland cannot function as a sovereign and democratic State—must be correct.

180 That position is hard (impossible) to defend, especially because Poland joined the EU when the principle of primacy had already been established, and Poland too ratified the TEU together with Declaration 17.

181 This seems to be a simple rephrasing of the method of the Solange II decision of the GFCC.

182 For the moment I do not know whether this is to be understood as a threat, a bluff, or a harsh invitation to the CJEU to a real dialogue.

183 Noting that the Romanian Constitutional Court stated on 23 December 2021 that national judges will be able to set aside Romanian law in favour of EU law only after the Romanian Constitution will be amended accordingly.

184 National Courts Cannot Override CJEU Judgments, A Joint Statement in Defense of the EU Legal Order, 26 May 2020.

185 Art. 4(3) para. 2 TEU.

186 Kelemen, 2016, p. 140. The HCC has proposed the same solution in its Decision No.4/1997. (I.22.), II.8, with a fundamental difference in terms of timing, supra, 2.4.8. and footnote 120.

the case in our postmodern world), *ab ovo* excluding the possibility that the conflict will be resolved in an organic way, by changing the pertinent case law either of the CJEU or of the national constitutional court; (ii) it is voluntaristic, because it wants to resolve semi-legal issues only by legal means; and (iii) it is one-sided, because it does not even consider the possibility that the CJEU's final judgment seriously breaches one of the fundamental values of the Union—democracy.

3.3.6. The *Kompetenz-kompetenz* principle[187] implies that both the CJEU and the national constitutional courts are able to decide on the limits of their respective jurisdictions over the interpretation and enforcement of EU law, and on the interpretation and enforcement of the national constitutions.[188] The *Kompetenz-kompetenz* principle has never been denied by EU law.[189] A general rule on jurisdiction—which would split constitutional issues belonging to the competence of constitutional courts and EU law issues belonging to the jurisdiction of the CJEU—is simply missing in the Treaties.[190] As a consequence, the same questions may be dealt with by the CJEU and the national constitutional courts in parallel and from different perspectives. We should not be afraid of that, even if those parallel jurisdictions may lead to parallel narratives of public law: the CJEU—in default of a European government, perhaps—has been much more categorical in telling its own narrative, while the national constitutional courts have usually been more restrained (with some exceptions).[191] In the constitutional dialogue, the national courts have left room for their governments and legislators, and have been restricting themselves based on EU law to a much greater extent than the CJEU has restricted itself based on the common constitutional tradition of the Member States. However, if duly circumscribed, constitutional courts' power to declare an act of the EU inapplicable in the concerned Member State does not jeopardize the primacy and the uniform application of EU law; instead, it enhances the guarantees of fundamental rights and the rule of law in the EU, contributing to

187 By that principle I mean the ability of each judge to decide on its own jurisdiction to proceed with a case. Conversely, some authors use the term *Kompetenz-Kompetenz* as the question of which court has the authority to rule on the boundaries of the EU's competences (Kelemen, 2016, p. 138).

188 In the operative part (point 2) of the Decision No.2/2019. (III. 5.) the HCC has declared that the authentic interpretation of the Basic Norm is given by itself, and its interpretation cannot be overruled by other bodies.

189 The principle according to which secondary sources of EU law cannot be annulled by national (constitutional) courts does not challenge the Kompetenz-Kompetenz principle.

190 The Foto-Frost, CJEU Judgment, Case C-314/85, ECLI:EU:C:1987:452. has simply pinned down that the courts of the Member States cannot establish that an act of the EU is invalid. Still, this does not exclude that a national judgment—pursuant to the national constitution—may contradict a judgment of the CJEU. Art. 4(3) TEU sets forth that the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. But this obligation of the Member States is limited by Art. 4(2) and 5 TEU. And, a national constitutional court cannot be expected to breach the very essence of the constitution it must protect.

191 The HCC considers the obligations deriving from the membership in the Union as well for the interpretation of the Basic Norm, Decision No.2/2019. (III. 5.) of the HCC, operative part, 2.

the creation of a European legal space where common values are cherished while national peculiarities are respected.[192]

3.4. The Self-Isolation of European Law

3.4.1. In the era of globalization, a given legal order has two options: either the mutual interaction with other (pre-selected) legal orders, and the receipt of some of their values and solutions, or the isolation from the other legal orders. The self-established sovereignty of the European legal order is a logical consequence of the fact that the Union is not a State, has no government, has no people, so it can lay its own foundation only on itself. According to Lenaerts, the constitutional autonomy of the Union does not have any purpose of isolation.[193] Nonetheless, the autonomy of EU law has been converted by the CJEU into autarchy: EU law has become self-sufficient.[194]

3.4.2. The influence of the laws of the Member States on EU law have been expressly acknowledged by the Treaties concerning constitutional values[195] and tortious liability.[196] The CJEU has also laid down that the EU legal order must consider the legal orders of the Member States, their constitutional traditions, and human rights. Still, such an acknowledgement is usually made on a rhetorical level.[197] However, the autarchy of the legal order of the Union implies a strategy of the CJEU that precludes the EU legal order from being affected by legal impulses outside the control of the CJEU. Fundamental rights as well must be ensured within the framework of the structure and objectives of the EU,[198] and must be applied within the EU in accordance with its constitutional framework.[199] Although national authorities and courts remain free to apply national standards of protection of fundamental rights, the primacy, unity, and effectiveness of EU law must not thereby be compromised.[200]

192 Paris, 2018, p. 205.
193 Lenaerts, 2015, p. 369.
194 By doing so, many critics have argued, the CJEU establishes an unjustified and illegitimate legal autarky to protect its own institutional powers (Eckes, 2020, p. 3). On the contrary, advocate general Bot, in his opinion delivered in the case Opinion 1/17, took the view that the preservation of the autonomy of the EU legal order is not a synonym for autarchy. Opinion of Advocate General Bot delivered on 29 January 2019, Opinion 1/17 Request for an opinion by the Kingdom of Belgium, ECLI:EU:C:2019:72, para. 59.
195 Art. 4(2) TEU.
196 The jurisdiction of the CJEU in tort cases against the EU is exclusive under Art. 268 TFEU, but the Court gives judgment in accordance with the general principles common to the laws of the Member States under Art. 340 TFEU.
197 Fundamental rights form an integral part of the general principles of law, whose observance the CJEU ensures, and for that purpose, the CJEU draws inspiration from the constitutional traditions common to the Member States, see e.g., Internationale Handelsgesellschaft, CJEU Judgment, Case 11-70, ECLI:EU:C:1970:114, para. 4, Nold v. Commission, 4/73,ECLI:EU:1974:51, para. 13, and Opinion, C-2/13, para. 37.
198 Internationale Handelsgesellschaft, CJEU Judgment, Case 11-70, ECLI:EU:C:1970:114, para. 4, Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 170.
199 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 177.
200 Judgment of the CJEU (Grand Chamber), 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29.

3.4.3. It is a sign of methodological self-isolation if the CJEU does not apply the law to the Union as it applies it to the Member States. The CJEU has repeatedly been accused of double standards by legal scholars, e.g., the standards applied to Member State liability for normative acts are stricter than the ones applied to the EU,[201] and judicial decisions within particular areas treat EU action more leniently than Member State actions.[202]

3.4.4. As a step toward self-isolation, the Court has held that the requirements of efficient commercial arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the CJEU for a preliminary ruling.[203] By contrast, regarding international investment protection, the CJEU has held that Arts. 267 and 344 TFEU preclude a provision in an international agreement concluded between Member States, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[204] This is because—according to the CJEU—by concluding the BIT, the Member parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[205]

3.4.5. It is a matter of fact that individuals and Member States, for the time being, have no access to legal remedies by which they could bring an action before a forum established out of the EU for an infringement committed by the institutions of the Union (e.g., by the CJEU), even if that infringement breaches either the sovereignty of the Member State or the fundamental rights of European citizens. The reason for that, regarding individuals, is the opinion of the CJEU given in the 2/13 case:[206] because of that opinion, the EU could not join the European Convention of Human Rights (hereafter, Convention). Consequently, if the institutions of the Union breach the human rights of European citizens, they can bring an action for damages only before the CJEU, according to the exclusive jurisdiction set forth by Art. 268 TFEU. However, if the CJEU gives a final judgment that, in the opinion of a given Member State, violates the essence of its sovereignty, that violation—from the perspective of EU law—is irremediable, because a violation of the sovereignty cannot be remedied by

201 Antoniolli, 2008, p. 238.
202 Craig, 2011b, p. 397.
203 Judgment of the CJEU of 1 June 1999, Eco Swiss China Time Ltd v. Benetton International NV. Case C-126/97, EU:C:1999:269, paras. 35, 36 and 40.
204 Achmea, CJEU Judgment, C-286/16, ECLI:EU:C:2018:158.
205 Achmea, CJEU Judgment, C-286/16, ECLI:EU:C:2018:158, para. 56. In 2015 the Commission asked the Member States to terminate their intra-EU bilateral investment treaties on the grounds that they were outdated and incompatible with EU law. https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198.
206 Opinion of the Court, C-2/13, ECLI:EU:C:2014:2454.

an action for damages, and the supervision of the final judgments of the CJEU is not allowed. Thus, the CJEU enjoys full immunity[207] against the Member States.

3.4.6. The opinion of the CJEU given in the 2/13 case is emblematic of the procedural isolation of the EU legal order. The reasoning of the opinion has pushed the autonomy of the EU legal order to its outer limits, to save its own competence (power). Indeed, according to the CJEU, an external control over itself would be established by the accession of the EU to the Convention, but an international agreement may affect the powers of the CJEU only if the indispensable conditions for safeguarding the essential character of those powers are satisfied, and, consequently, there is no adverse effect on the autonomy of the EU legal order.[208] The procedural closure of the EU legal order is completed by the exclusive jurisdiction of the CJEU over itself.[209]

3.4.7. The fact that the CJEU vetoed the accession of the EU to the Convention—against almost all the Member States, the Commission, and the Parliament[210]—may be seen as an act of government of (constitutional) judges, taking over the legislators' and executives' responsibility. In addition, the following question may certainly be posed: if the Member States are required by the rule of law to accept an external control over themselves at least in the field of human rights, why is such a requirement missing against the EU?

3.4.8. The autarchy of the EU legal order as conceived and enforced by the CJEU seems to be an exaggeration of the rule of law. Indeed, in a democracy, under the rule of law, it is the exercise of (judicial) power that should be restricted by fundamental rights and popular sovereignty, not vice versa. Nonetheless, the CJEU recognizes fundamental rights only insofar as they are subordinated to the legal sovereignty of the EU, and the CJEU enjoys full immunity if it breaches Art. 4(2) TEU, i.e., the constitutional identity of Member States.

4. Temporary Conclusions

Currently, the basis of the legal order of the EU is given by the (mutually restricted) sovereignty of twenty-seven Member States. Thus, it is no surprise that the EU legal order is stronger than the distinct legal order of each single Member State. Certainly,

207 Immunity means a certain counterpoint of liability: irresponsibility (Kecskés, 2020, p. 707).
208 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 183.
209 In its Opinion given on CETA the CJEU has held that to determine the compatibility of the envisaged international mechanism with the autonomy of the EU legal order, it is necessary to be satisfied that the mechanism does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law, and the mechanism does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. Opinion 1/17 of the Court, ECLI:EU:C:2019:341, para. 119.
210 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 109.

the sovereignties of the Member States have been fading in the Union, but they do still exist, and the impairment of State sovereignty cannot depreciate the democratic principle of popular sovereignty a jot.[211]

The case law of the CJEU has established the thesis that EU law must be given an absolute supremacy over the laws of the Member States. By contrast, national constitutional courts have formulated the antithesis, according to which they are the final guardian to enforce national constitutions, against the institutions of the Union (CJEU included) as well. The tension between parallel legal orders may be conceived as a dialogue. Judicial dialogues are not always pleasant and constructive, but in any case, participation in the procedure allows constitutional courts to make their views known.[212]

The primacy of EU law over the laws of the Member States is a dogmatic necessity. The obligation of national judges (constitutional judges included) to apply EU law (and to set aside their own national laws) according to the instructions of the CJEU is a technical feature of the application of EU law, which, as a general rule, does not breach the constitutional identity of the Member States, because the primacy of the provisions of EU law in concrete court cases becomes a part of the constitutional structure of each Member State by the accession.

The authority of the CJEU must therefore be recognized in the enforcement of EU law—but only in the scope of EU law. The rule of law implies that the limits to the scope of EU law are to be defined by the CJEU. Still, pursuant to Art. 4(2) TEU, the rule of law implies as well that the CJEU has no authority to define the constitutional identity of the Member States: on the contrary, it is the constitutional identity of each Member State that restricts the powers of the EU. I do not see any reason the constitutional identity of a Member State should not be defined by the constitutional court of that Member State, provided that the *Acquis Communautaire* being in force at the accession of the Member State and primary law can never be disregarded by constitutional courts.

The conflict between the interpretation of EU law rendered by the CJEU, and the interpretation of the constitutional identity of a Member State given by its constitutional court, can be resolved in a number of ways: improving EU law, amending the constitution of the concerned Member State, developing the case law of the CJEU, changing the case law of the concerned constitutional court, or leaving the EU—each option compatible with Art. 4(3) TEU. It is a further option to face legal pluralism and acknowledge that the conflict—for the moment—is unresolvable for the law. Such a

211 The substantial depletion of the sovereignty of Member States calls for a different and substantial homogeneity, which can only be sought through a renewed development of the democratic principle. To this end, the most appropriate route is imagining increasingly intense forms of participation of the European Parliament and Member States in decision-making processes and differentiation paths, thus allowing Member States to safeguard and merge their own identity against union public policies (Bifulco, 2018, p. 185).
212 Claes, 2016, p. 170.

legal pluralism may well infringe the rule of law,[213] while the absolute negation of that pluralism may weaken democracy.

The CJEU has recently been called upon to settle a number of issues that have been both difficult legally and sensitive politically.[214] In a democracy, under the rule of law, the best tool for resolving individual disputes is the court case. However, the court case is not an efficient way to resolve public debates that arise in society; public debates are to be resolved through democratic elections. While court cases are—must be—decided by reason, social debates are to be decided by the will (of the people). The assertion that law and judges must also have authority to resolve the strategic issues of the society will lead to legal ideologies that want to legitimate the exercise of power according to their own narrative, instead of democratic legitimation.[215] Shaping the relationship between the EU legal order and the Member States is a political (democratic) task as well, not only a legal issue, to prevent legal imperialism.

213 Some authors argue that legal (constitutional) pluralism is incompatible with the rule of law (Kelemen, 2016; Kühn, 2016, pp. 193–194).
214 Rosas, 2019, p. 7.
215 Ideology, compared to democracy, is an alternative form to legitimate the power (Lánczi, 1997, p. 25).

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| Chapter 2 |

The Place and Role of Fundamental Rights in the EU Legal System

Krzysztof MASŁO

ABSTRACT

The protection of fundamental rights at European level has been one of the most important issues since the founding of the Communities. An important gap was filled by the Lisbon Treaty when it incorporated the Charter of Fundamental Rights into primary EU law. Its scope, interpretation, and relationship with national constitutions and legal systems has been the most controversial issue of the last decade. After a presentation of the historical development of the protection of fundamental rights in Europe, this chapter looks at the issues of application of the Charter of Fundamental Rights in the jurisprudence of the Eastern European countries.

KEYWORDS

Charter of Fundamental Rights, direct application of EU law, judicial cooperation in criminal matters, principle of mutual trust, protection of fundamental rights

1. Introduction

Fundamental rights are an extremely complicated issue in EU law. Under the Treaty on the functioning of the European Union, fundamental rights in the EU are based on three pillars: the Charter of Fundamental Rights (CFR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[1] and fundamental rights resulting from the constitutional traditions common to the Member States.[2] There is no doubt that at present the CFR constitutes the main pillar of the protection of the EU's fundamental rights.

The CFR was developed by states constituting the European communities and at the beginning Central European countries did not participate in the formation the Charter. However, the decision to make the Charter binding was taken with the

1 Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS No. 005.

2 Art. 6(3) Treaty on the European Union.

Masło, K. (2022) 'The Place and Role of Fundamental Rights in the EU Legal System' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 55–71. https://doi.org/10.54171/2022.aojb.poeucep_2

participation of these countries, and since 2009 the CFR has been applied in relation to all EU Member States.

2. Genesis and Legal Nature of the CFR

Initially, Central European countries did not participate in the formation of fundamental rights. The composition of the European Communities was limited only to Western European states, and Central European countries were not members of the Council of Europe, where the development of human rights began. It does not change the fact that in the 1970s, the process of shaping the fundalmental rights began, however initially limited to the protection of those rights of individuals that were necessary for the establishment and development of economic freedoms. In the absence of a community document protecting fundamental rights, the CJEU established their existence in community law in the form of general principles of community law.[3]

In the judgment in *Internationale Handelsgesellschaft* case, the CJEU explained that the protection of fundamental rights in the community legal order is 'inspired by the constitutional traditions common to the Member States' and that protection of these rights must be ensured in the EEC.[4] In the mid-1970s, the CJEU began to emphasize the importance of the European system of human rights protection in the Council of Europe for the understanding of fundamental rights in the EEC. One of the first CJEU rulings to refer to the ECHR and the case law of the European Court of Human Rights (ECHR) was the *Rutili* case.[5] In this case, the CJEU used the ECHR to define the scope of the public order clause enabling the restriction of the free movement of persons.

The emergence of fundamental rights in the jurisprudence of the ECJ was noticed by the European Parliament, which proposed in 1975 the adoption of the Charter of Citizens' Rights.[6] The result of this proposal was the adoption in 1977 of a joint declaration by the European Parliament (EP), the European Commission (EC) and the Council on the Protection of Fundamental Rights and the ECHR.[7] Although it was not a binding document, the three institutions undertook that they would abide by the ECHR in their activities. Together with the adoption of the declaration, the first ideas concerning the EEC accession to the ECHR and the cataloging of fundamental rights appeared.[8] While the implementation of the first postulate turned out to be extremely

3 . Judgment of the CJEU of 12 November 1969, Erich Stauder v. City of Ulm—Sozialamt, Case 29-69 ECLI:EU:C:1969:57.

4 Judgment of the Court of 17 December. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70,:ECLI:EU:C:1970:1141970.

5 Judgment of the Court of 28 October 1975. Roland Rutili v. Ministre de l'intérieur, Case 36-75. ECLI identifier: ECLI:EU:C:1975:137.

6 Wieruszewski, 2008, p. 42.

7 Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, April 27, 1977, O.J. 1977/C 103/01.

8 Rincón-Eizaga, 2018, p. 129.

difficult and was blocked by the CJEU in 1994,[9] the EU institutions were able to establish a set of fundamental rights fairly quickly. The first attempt to formulate a catalog of these rights was the EP resolution of 1989, called the Declaration of Fundamental Rights and Freedoms.[10] The structure of the Declaration was based on the catalog of rights and freedoms contained in the ECHR. Among the fundamental rights, the declaration mentioned dignity (Art. 1), the right to life (Art. 2), equality under the law (Art. 3), freedom of thought and opinion (Arts. 4 and 5), the right to privacy and the protection of the family (Arts. 6 and 7), and freedom of assembly and association (Arts. 10 and 11). Among the fundamental rights that the European Parliament intended to defend, there were also rights related to European integration (freedom of movement of community citizens—Art. 8) and the right to preserve the environment (Art. 24) and such social rights as the right to fair working conditions (Art. 13), the right to social protection (Art. 15) and the right to education (Art. 16).

Fundamental rights also penetrated the treaties establishing the European Communities. The preamble to the Single European Act (SEA, 1986) states that one of the objectives of the European Community is

> "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."[11]

As the reference to fundamental rights was only included in the SEA's preamble, it did not create any binding rights and obligations. However, the SEA indicated the direction of the interpretation of fundamental rights, pointing to two pillars of the protection of fundamental rights that had emerged in the jurisprudence of the CJEU: the constitutions and legal systems of the Member States and the ECHR. Only the Maastricht Treaty establishing the European Union included in Art. F the Union's obligation to respect fundamental rights as guaranteed by the ECHR and rights resulting from the constitutional traditions common to the Member States.[12] These fundamental rights acquired the status of general principles of community law.

The mandate for the development of the CPP was given by the European Council at the 1999 summit in Cologne.[13] The European Council stated that the European Union has reached a stage in its development which requires the rights of its citizens

9 Opinion 2/94 [1996] ECR I-1783.; Opinion of the Court of 28 March 1996 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECLI:EU:C:1996:140.

10 Resolution adopting the Declaration of Fundamental Rights and Freedoms, 12.04.1989, O.J.E.C. C 120/51.

11 Single European Act, O.J. L 169, 29 June 1987, pp. 1–28.

12 Treaty on European Union, O.J. C 191, 29 July 1992, (pp. 1–112).

13 Cologne European Council, 3–4 June.1999, Conclusions of the Presidency, Annex IV: European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union.

to be consolidated in the Charter (point 44). The conclusions did not prejudge the legal nature that the Charter should have. However, it was expressly stipulated that the Charter should contain those fundamental rights that are guaranteed by the ECHR and derived from the constitutional traditions of the Member States, and having the nature of general principles of Community law. In addition to these rights, the Charter should also contain fundamental rights that pertain only to EU citizens.

The Charter was elaborated by a special body composed of representatives of the heads of States and governments, a representative of the president of the Commission and representatives of the European Parliament and national parliaments. A representative of the CJEU could participate in the work of this body as an observer. Roman Herzog was elected chairman of the body. The first draft of the CFR was presented to the European Council in Santa Maria da Feira in June 2000.[14] The CFR was solemnly proclaimed on December 7, 2000, in Nice by the three institutions—the Council, the EC, and the EP.

From the very beginning, the legal nature of the CFR aroused a lot of controversy. At the Biarritz summit on October 11, 2000, Great Britain firmly vetoed the inclusion of the CFR in the treaties because the inflated standards of economic and social rights were unsatisfactory.[15] It is worth noting that the CFR was not a resolution of the European Council, nor it was attached to the Conclusions of the European Council. The Nice European Council only 'welcomed the joint proclamation' of the three institutions, stating that the question of the Charter's force will be considered later.[16]

From the beginning, the works of the European institutions showed efforts to make the Charter binding character. It was already visible during the works on the EU reform treaty, adopted on February 23, 2001, in Nice. In the declaration on the future of the Union, attached to the Treaty of Nice, the Member States announced the continuation of the reform of the EU, which was to focus, *inter alia*, on the strengthening the protection of fundamental rights in the Union by agreeing on the status of the Charter. In the draft treaty establishing a constitution for Europe—prepared by the EU Convent—the CFR was included into Part II.[17]

Thus, the draft treaty establishing a constitution for Europe gave the CFR the status of primary law. The process of ratifying the Constitutional Treaty, however, collapsed in 2005, which meant that the draft never came into force. Therefore, in 2007, works started on a new EU reform treaty. During them, the CFR was excluded from the content of the future treaty and was subject to correction. Finally, in 2007, the three institutions re-adopted the text of the CFR in Strasbourg. Subsequently, the Charter was announced in the EU's official journal.[18] It is worth noting that this procedure preceded the signing of the Treaty of Lisbon, which took place on December 13, 2007. However, the application of the CFR was closely related to the entry into force

14 Santa Maria da Feira European Council, 19–20. June 2000, Presidency Conclusions.
15 Muszyński, 2009, p. 56.
16 Nice European Council, 7-9. December 2000, Presidency Conclusions, Chapter I para. 2.
17 Treaty establishing a Constitution for Europe, O.J. C 310, 16 December 2004, p. 1.
18 Official Journal of the European Union, 14 December 2007, C 303/1, p. 1.

of this treaty, because—in accordance with the wording of the Charter—the revised Charter replaced the wording of the Charter proclaimed on December 7, 2000, from the date of its entry into force of the Treaty of Lisbon.

The adoption of the CFR as a joint declaration of three European institutions in 2000 initiated the application of this document by the CJEU. In the first place, only the advocates general applied the CPP. In the opinion on the TNT case of February 1, 2001, Advocate General Siegbert Albert referred to Art. 36 CFR, stressing that undertakings entrusted with the management of services of general economic interest are subject to the rules of the treaty only insofar as they legally or actually perform specific tasks.[19] In the BECTU case, Advocate General Antonio Tizzano addressed the issue of the binding force of the CFR.[20] He emphasized that the CFR had no strictly normative meaning, but contained wording that was recognized in other legally binding documents. This allowed him to make the evaluation that in the dispute over the nature and importance of the fundamental rights, the relevant norms of the CFR could not be ignored because they served as an essential framework for the activities of all entities in the Community (para. 27). Advocate General M. Dámaso Ruiz Jarobo Colomer went even further in his opinion in the *Kaba* case.[21] The advocate general noted that the CFR does not have autonomous binding force, but presents the main values of the Member States from which the general principles of Community law arise. Therefore, the CFR should be treated as a substance of the common European acquis in the area of fundamental rights.

The first case in which the CJEU referred to the CFR was the validity of Council Directive 2003/86 / EC on family reunification.[22] The CJEU noted in the judgment of 2006 the non-binding nature of the CFR, but stressed that the Community legislator also recognized the importance of this document—confirming, in the second recital of the directive, that the directive complies with the principles recognized not only by Art. 8 of the ECHR, but also by the CFR.

Long before making the CFR binding, the Charter turned out to be so important for the practice of the functioning of EU courts that they tried to include CFR into the catalog of documents relevant to the interpretation of Community law. The thesis that the CFR helps to discover the positive and legal nature of Community norms and collects in one document the fundamental rights resulting hitherto from the constitutional traditions of the Member States and international agreements (especially the

19 Opinion of Advocate General Alber delivered on 01 February 2001, C-340/99, ECLI:EU:C:2001:74, para 94.

20 Opinion of Advocate General Tizzano delivered on 08 February 2001, C-173/99, ECLI:EU:C:2001:81.

21 Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 July 2002, C-466/00, ECLI:EU:C:2002:447.

22 Judgment of the CJEU (Grand Chamber) of 27 June 2006, European Parliament v. Council of the European Union, Case C-540/03, ECLI:EU:C:2006:429.

ECHR, the European Social Charter and the international pact of civil and political rights) was emphasized in the early jurisprudence of EU courts.[23]

The CFR became part of the EU law together with the entry into force of the Treaty of Lisbon, on December 1, 2009. Pursuant to Art. 6 sec. 1 TEU, 'The Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of December 7, 2000, in the version adapted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties.' However, the Charter has not been incorporated (including as an annex or declaration) into any of the treaties on which the Union is based, and therefore does not constitute the basis of the Union. The Charter is therefore not a treaty,[24] but a treaty-related document, although it enjoys the status of primary law. This unusual solution results from the arrangements made by the EU Member States during the European Council in Brussels in 2007.[25] However, the formal and legal status of the CFR is of secondary importance from the perspective of the Charter's application by EU institutions and courts. Art. 6 sec. 1 shows that the CFR includes the effects assigned to primary law and, consequently, is subject to specific treaty procedures. First, it means that the CJEU has become the guardian of compliance with the Charter. Moreover, if a specific norm of the CFR meets the criteria of direct effectiveness, it will be possible to apply it directly, and in the event of a conflict between a national norm and a Charter norm, the principle of precedence of the Charter norms will apply.[26]

3. Scope of the Charter of Fundamental Rights of EU

The structure of the CPP differs from the dichotomous division into civil and political rights as well as economic, social, and cultural rights adopted in classic international agreements.[27] The division of fundamental rights adopted in the CFR follows 6 values, which are: dignity (Arts. 1–5), freedoms (Arts. 6–19), equality (Arts. 20–26), solidarity (Arts. 27–38), citizens' rights (Arts. 39–46) and justice (Arts. 47–50). The CFR has a preamble and is closed by the general provisions (Arts. 51–54). The above six values define the material scope of the CFR. It is worth emphasizing that the Charter contains a closed catalog of fundamental rights that may only be changed through the CFR amendment procedure. In the light of the preamble, the sources of fundamental rights formulated in the CFR are, first, the constitutional traditions of the Member States, but also the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case law of the CJEU and the ECHR (para. 5). The preamble also contains the important

23 Muszyński, 2009, p. 57.
24 Wróbel, 2020. See also: Szubska, 2018, p. 210.
25 Brussels European Council, 21–22. June 2007, Presidency Conclusions.
26 Wyrozumska, 2008, pp. 83–84.
27 Spaventa, 2017, p. 238.

principle of responsibility and obligations toward another person, the human community, and future generations (para. 6).

The CFR contains fundamental rights that have been granted the normative status of a right, freedoms, or principles. The Charter does not define the criteria for qualifying fundamental rights to one of these three categories.[28] According to the explanations to Art. 52 sec. 5 of the CFR, in some cases the provisions of the CFR may contain both elements of right and principle, e.g., Art. 23, Art. 33, and Art. 34 of the CFR. Therefore, in the opinion of the authors of the CFR, certain fundamental rights are hybrids—they are both a principle and right. Art. 51 sec. 1 of the CFR also suggests a different scope of obligations of the Member States and the Union—rights and freedoms are to be respected, and principles are to be observed. Second, not all fundamental rights are inherently and directly applicable. Some fundamental rights refer to other EU law or to national laws. For example, Art. 9 provides that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights, and Art. 37 states that a high level of environmental protection and an improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. These provisions are therefore general guidelines addressed to the EU and national law-making bodies.[29] These rights are also not suitable for direct investigation in court.

The fundamental rights contained in the CFR are addressed to the natural persons. The subjective scope of these rights, however, varies. Some of them are vested in every person (e.g., Art. 2—right to life, Art. 3—right to integrity, Art. 4—prohibition of torture, Art. 5—prohibition of slavery and forced labor). However, there is a group of rights whose addressees are limited. These include rights guaranteed to children (Arts. 24 and 32), the elderly (Art. 25), persons with disabilities (Art. 26), workers, employers, and their representatives (Arts. 27, 28, 30, 31) or citizens EU (Arts. 39–46). There is also a group of fundamental rights, the addressee of which has not been strictly determined by the provisions of the CFR; and to determine the group of addressees to whom the fundamental right is addressed, reference should be made to the normative systems (e.g., Art. 9, in which the right to marry and the right to found a family is conditioned on compliance with national laws). Some of the fundamental rights are conditioned on eligible EU citizenship, but the vast majority of the rights contained in the CFR are addressed to people regardless of their nationality, which means that the addressee of the right is not only a citizen of a Member State, but also every person residing in the territory of that country, including third-country nationals. There is also a group of fundamental rights in the CFR that is directed only to persons who belong to third-country or stateless persons, e.g., Art. 18 guarantees the right to asylum, and Art. 19 para. 2 prohibits collective expulsion.

28 Tridimas, 2000, pp. 2–3.
29 Gencaga, no date, p. 178.

Legal persons may also be an addressee of fundamental rights, if the nature of the right does not mean that it is granted only to a natural person.[30]

The issues of obliged entities are regulated by Art. 51 sec. 1 CFR. According to this provision, the Charter applies to 1) institutions, bodies, offices, and agencies of the Union, 2) Member States. This provision also shows that the obligation to apply the CFR by the Member States has been limited to situations in which they apply EU law. This provision aroused numerous controversies, and its literal wording could suggest that the Member States—unlike the EU bodies—will be bound by the CFR only exceptionally. These doubts were deepened by the wording of this provision in the English and French language versions, which suggested that the Member States referred to the CFR only when they are implementing Union law (French: *lorsqu'ils mettent en oeuvre le droit de l'Union*). Advocate General Eleanore Sharpston, in her 2010 opinion in the *Zambrano* case, noted that the fundamental rights of the European Union may only be invoked if the contested measure falls in the scope of European Union law (para. 156).[31] Therefore, while all measures adopted by institutions are subject to verification in terms of their compliance with EU fundamental rights, Member States are obliged to carry out such verification when taking actions related to the implementation of obligations provided for by European Union law or falling in the scope of European Union law (para. 156). According to the advocate general, the scope of application of EU law are situations in which the European Union has competence in a given area of law (exclusive or shared), even if that competence has not yet been exercised (para. 163). However, adopting the view of the advocate general would lead to the extension of the scope of application of the Charter to those areas to which EU law does not extend (or does not yet extend).

The most essential for the interpretation of Art. 51 sec. 1 of the CFR is the judgment of the CJEU in the *Åkerberg Fransson* case.[32] The case concerned the interpretation of the *ne bis in idem* principle regarding the possibility of imposing a criminal and administrative sanction for the same act of infringement of tax regulations. EU law harmonizes some taxes (including VAT) at the EU level, but does not require Member States to introduce specific criminal or administrative sanctions for violating the tax rules set out in EU law. In this judgment, the CJEU recalled its previous case law, according to which fundamental rights apply in all situations governed by EU law, but not outside such situations. For this reason, the Court does not have the power to assess the compliance with the Charter of domestic provisions that do not fall in the scope of application of EU law (paras. 19 and 21).

30 Spaventa, 2017, p. 244.

31 Opinion of Advocate General Sharpston delivered on 30 September 2010, C-34/09, ECLI:EU:C:2010:560.

32 Judgment of the CJEU (Grand Chamber) of 26 February 2013, Åklagaren v. Hans Åkerberg Fransson. Case C-617/10, ECLI:EU:C:2013:105; Judgment of the CJEU (Second Chamber) of 30 June 2016, Direcția Generală Regională a Finanțelor Publice Brașov. (DGRFP) v. Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, Case C-205/15, EU:C:2016:499, para. 23.

Thus, the Tribunal adopted an extremely broad understanding of Art. 51 sec. 1 of the CFR, according to which the CFR is applicable whenever there is a certain connection, even a very general one, between a national law and EU law.[33] In my opinion, however, a provision of EU law that obliges a Member State to act should be indicated in every situation.[34] In the *Åkerberg Fransson* case, the CJEU did not limit itself to a general reference to situations governed by EU law, but sought legal grounds for the obligation of Member States to sanction VAT depletions. For the tribunal, the lack of such specific obligations of states under EU law was not a problem, nor was the general obligation arising from Council Directive 2006/112 / EC on the common system of value added tax and Art. 325 TEU to combat illegal activities affecting the financial interests of the Union by means of dissuasive and effective measures.

The basic value of this judgment is related to the equal application of the CFR and fundamental rights as general principles of law, which means that the pre-Lisbon jurisprudence concerning the scope of fundamental rights resulting from general principles of law may also be applied to the CFR. However, the CJEU did not indicate detailed criteria for examining whether a national provision falls in the scope of application of EU law. Therefore, the CJEU did not say anything new in this case than it results from the principle of conferral (Art. 5 secs. 1 and 2 TEU). Since the scope of application of the CFR and fundamental rights as general principles of EU law is the same, it indicates a gradual increase in the significance of the CFR. European and national judges, instead of an arduous search for fundamental rights in the constitutional traditions of the Member States and the ECHR, will apply the ready catalog of rights contained in the CFR.

When talking about the scope of the Charter, it is worth paying attention to Protocol No. 30 on the application of the CFR in relation to Poland and the United Kingdom. The Protocol was attached to the TEU and TFEU and pursuant to Art. 51 TEU belongs to the EU's primary law. The Protocol affects the application of the CFR to Poland and does not constitute an opting-out, as it does not include the obligation to comply with it by Poland and does not limit the binding force of the Charter. The Protocol affects the application of the Charter on two levels: in proceedings before EU courts in cases concerning Poland related to the application of the Charter of Civil Procedure; and at the legal and national level.

First, the Protocol prohibits the enlargement of the CJEU's competences, but does not prevent the lodging of complaints against Poland with EU courts regarding the violation of the Charter, as long as they fall within the existing competences of the Tribunal. This view is confirmed by the position of the CJEU itself contained in the judgment in cases C-411 and C-493/10. As clarified by the court, Art. 1(1) is of no legal significance, since the Charter codifies existing rights, rather than creating new ones.

33 Berramdane, no date, p. 7.
34 See Półtorak, 2014, p. 22.

Second, at the national level, it makes it impossible for individuals to invoke the provisions of the Charter before Polish courts to adjudicate the incompatibility of national law with the Charter. Moreover, the provisions of the Charter relating to national legislation or practices will apply to the countries covered by the Protocol only to the extent that the provisions are recognized by national law and practice (Art. 2 of the Protocol). Thus, the rights contained in the Charter can be invoked if they have been specified in domestic law and to the extent that they exist in Polish law.

Poland fortified the application of the provisions of the Charter in domestic law also by submitting two declarations (nos. 61 and 62) to the TEU and the TFEU. Declaration no. 61 has no formal impact on binding MPs by the Charter, and is an interpretative declaration. The second Polish declaration concerns the Protocol on the application of the Charter. The Polish government presented it as the exclusion of the operation of Art. 1 clause 2 of the Protocol in relation to Poland. It is also interpretative and cannot in any way change the primary law of the European Union.

The Czech Republic also tried to limit the scope of the CFR. In Declaration No. 53, the Czech Republic recalled that the provisions of the Charter are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States and that the provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law. The Czech Republic also emphasized that the CFR does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field. This declaration is only an interpretative statement, not a legally binding act, and has primarily a political, not a legal, value.

4. Impact of CFR on the Judicial System in the Member State

The CFR serves to fill the content of the values on which the EU is based, especially those indicated in Art. 2 TEU: democracy, the rule of law and human rights.[35] Recently, the CJEU has dealt with this issue several times, and one of the landmark decision of the Tribunal regarding the rule of law is the judgment in case C-64/16 on the reduction of the remuneration of judges in Portugal.[36] The judgment is a pattern for the other cases of this type, concerning Poland in particular.[37] In Polish cases, the Charter of Fundamental Rights has become a model for assessing the procedure for appointing

35 Lenaerts, 2012, p. 375.

36 Judgment of the CJEU (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117.

37 Judgment of the CJEU (Grand Chamber) of 24 June 2019. European Commission v. Republic of Poland, Case C-619/18, ECLI:EU:C:2019:531.

judges and members to the National Council of the Judiciary[38] and the Disciplinary Chamber of the Supreme Court, established in 2017.[39]

For the tribunal, the values on which the Union is founded, enshrined in Art. 2 TEU, are common to all Member States. An important element of the rule of law principle is the obligation to provide individuals with effective judicial protection of the rights derived from EU law.[40] It is a fundamental right, resulting from the constitutional traditions common to the Member States and the ECHR (Arts. 6 and 13). The CJEU does not question the appointment of judges by heads of state. The mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.[41] The case law of the CJEU has developed a uniform catalog of circumstances that should be considered when assessing whether a given body has the status of a 'court'. Importantly, these circumstances apply both at the EU level regarding judges and advocates general and at the level of the Member States with regard to national courts.[42] These circumstances include the statutory legal basis of the authority, its permanent nature, the obligatory nature of its jurisdiction, the adversarial nature of the proceedings, the application of the provisions of law by the authority and its independence.[43] The most important—from the Polish perspective—is the independence of the court.

The requirement of judicial independence was developed in another Polish case, in which the tribunal stated that the requirement that courts be independent has two aspects.[44] The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have

38 Judgment of the CJEU (Grand Chamber) of 6 October 2021, Proceedings brought by W.Ż, Case C-487/19, ECLI:EU:C:2021:798.

39 Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

40 Judgment of the CJEU of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117, para. 32.

41 Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 133.

42 Judgment of the CJEU (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117, para. 43.

43 Judgment of the CJEU of 16 February 2017, Ramón Margarit Panicello v. Pilar Hernández Martínez, Case C-503/15, EU:C:2017:126, para. 27.

44 Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, paras. 63–67.

the task of adjudicating a dispute, such as guarantees against removal from office or a level of remuneration commensurate with the importance of the functions that they carry out (para. 64). The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests regarding the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (para. 65).

Much space in the jurisprudence of the CJEU is occupied by the judicial appointment procedure and the participation of the judicial council in it. The participation of such a judicial body may, in principle, be such as to contribute to making that process more objective.[45] In particular, the possibility of requiring the president of the Republic to appoint a judge to the Supreme Court to the existence of a favorable opinion of the KRS is capable of objectively circumscribing the president of the Republic's discretion in exercising the powers of his office. That is only the case provided that the judicial body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal. The CJEU indicated to the domestic courts the criteria based on which such an assessment of the National Council of the Judiciary should be carried out.

In this context, however, it should be considered whether the jurisprudence of the CJEU has not gone too far and has not led to a situation where the areas previously included in the exclusive competence of the Member States have not been assessed from the perspective of EU law. The organization of the judiciary is an area that has remained with the Member States.[46]

5. Influence of the CFR on the Functioning of Cooperation between Member States in Criminal Matters

Using the CFR for the temporary postponement of the application of criminal cooperation mechanisms between the Member States, in particular instruments based on mutual recognition, is of great practical importance. It was the first time that the CJEU pointed out such a role to the CPP in the *Aranyosi and Căldăraru* case.[47] The CJEU answered a question for a preliminary ruling by a German court concerning the possibility of executing a European arrest warrant (EAW) in a situation where, in the issuing

45 Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 137.

46 Judgment of the CJEU (Grand Chamber) of 24 June 2019 European Commission v. Republic of Poland, Case C-619/18, ECLI:EU:C:2019:531, para. 52.

47 Judgment of the CJEU (Grand Chamber) of 05 April 2016, Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

state, the fundamental rights of the prosecuted person may be violated (in this case, it was about the conditions in a prison). The CJEU recalled that the execution of the EAW mechanism may be suspended only in the event of a serious and persistent breach of European values by a Member State and in accordance with the procedure provided for in Art. 7 TEU. Nevertheless, the Court inferred possibility 'in exceptional circumstances' of introducing restrictions on the principles of mutual recognition and mutual trust between Member States from the obligation to respect fundamental rights enshrined in the CFR (paras. 82–83). Therefore, if a judicial authority of the executing Member State has data that shows that there is a real danger of inhumane or degrading treatment of a person deprived of his/her liberty in the issuing member state, in light of the standard of protection of fundamental rights guaranteed by EU law, the execution of the order in question should be postponed, but the mechanism cannot be suspended *in abstracto*.

This line of CJEU case law has been confirmed by the Court in subsequent judgments, wherein the CJEU has clarified that a decision to temporarily postpone the surrender of a prosecuted person to a Member State should be taken only in exceptional circumstances, where the executing judicial authority determines, after a specific and thorough assessment of a given case, that there are serious and proven grounds for considering that the subject of a European arrest warrant will be exposed, after surrender to the issuing judicial authority, to a real risk of a breach of his fundamental right.[48]

The above case law of the CJEU should be considered correct and in line with the already functioning ECHR standard developed based on Art. 3 of the ECHR (prohibition of torture), although it is not known how far the jurisprudence of the CJEU will go in this respect. Until now, the CJEU has allowed the temporary postponement of the execution of the EAW only when there are concerns that the issuing member state would violate the prohibition of torture (Art. 4 of the CFR) and the right to a fair trial (Art. 47 of the CFR). It is not clear whether the justified fear of violating other fundamental rights recognized in the CFR (e.g., the right to environmental protection) can be treated as a justified ground for suspending the EAW mechanism. The CJEU inferred the possibility of temporary postponement of surrender due to violation of fundamental rights only in 'exceptional circumstances'. In my opinion, this means that only non-derogatory rights, the significance of which is comparable to the prohibition of torture and the right to a fair trial, could justify suspending the execution of EAW in an individual case.

6. Conclusions

During the last few decades, the protection of human rights has become the basic mechanism protecting an individual against the supremacy of the state. The development of European integration has indicated the need to create an internal document in the EU, which would become the main mechanism protecting an individual against

48 Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586.

the arbitrariness of EU institutions, the vast majority of which do not come from direct elections. The CFR is therefore an important argument for greater democratization of the EU. Unfortunately, until now it has not been possible to create a mechanism external to the EU for controlling the fundamental rights in the EU. The Charter is also an expression of the EU's aspirations to achieve independence in the field of protection of human rights and freedoms, particularly in relation to another European international organization, which is the Council of Europe.

The Charter is also an expression of efforts to constitutionalize the EU. The unclear scope of application of the CFR to the Member States may raise legitimate concerns that the CJEU will excessively interfere with national law, blurring the boundaries between the competences of the EU and the exclusive competences of the Member States even further.

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| Chapter 3 |

De-mystifying the European Union: Reflections on the margins of the conference on the future of the European Union

János BÓKA

ABSTRACT

The intellectual constructs of communities, especially myths of origin and other myths, play a role not only in interpreting the present but also in shaping plans and strategies for the future. Fortunately, political myths facilitate these processes: they strengthen community cohesion and motivate collective action. Myths are useful as long as they promote intellectual connection with reality rather than isolation from it. But the European Union is a special intellectual construct in the sense that it does not seek to represent or interpret reality, but to transform it. Hence the particular strength of the myths of the European Union, which claim exclusivity both in the face of reality and in the face of political will to the contrary. At present, these myths frame the debate on the future of the European Union – and, at the same time, strictly delimit the discourse that can emerge about its objectives and functioning. This academic work presents and analyses some of the myths of European integration.

KEYWORDS

European integration, future of the European Union, myths of the integration

1. The myths of the European Union

"The European Union has always been an idea in search of reality"[1] – writes Ivan Krastev, who can hardly be accused of being averse to the idea of European integration. The phenomenon is certainly not specific to the European Union: the existence of any political community cannot be confined within the framework of material reality. The intellectual constructs of communities, especially myths of origin and other myths, play a role not only in interpreting the present but also in shaping plans and strategies for the future. Fortunately, political myths facilitate these processes: they strengthen community cohesion and motivate collective action. Myths are useful

1 Krastev, 2017, p. 5.

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as long as they promote intellectual connection with reality rather than isolation from it.

But the European Union is a special intellectual construct in the sense that it does not seek to represent or interpret reality, but to transform it. Hence the particular strength of the myths of the European Union, which claim exclusivity both in the face of reality and in the face of political will to the contrary. At present, these myths frame the debate on the future of the European Union – and, at the same time, strictly delimit the discourse that can emerge about its objectives and functioning.

A substantive debate on the future of the European Union presupposes, on the one hand, an objective description of how integration actually works and an objective assessment of its achievements; and, on the other hand, an exploration of the political – i.e. not emotional or intellectual – demands of European citizens for integration and the most effective way to meet these demands. This cannot be done without demystifying the European Union, i.e. without a conscious and critical approach to its myths. To do this, we need to identify the myths of European integration and how they distort the self-image of the European Union. We need to analyse how myths determine the debate on the future of integration and how they disqualify certain ideas and proposals.

To this end, we look at some of the myths of European integration.

2. The European peace project: the myth of origin

The origin myth of the European Union is that integration is the continent's response to the horrors of the Second World War. It is thanks to the historic Franco-German reconciliation on which it is based that there has been no armed conflict between EU Member States since then.

The historical basis of the myth of origin needs to be nuanced: the mission of European integration from the 1950s onwards was not only to make war between the states of Western Europe impossible but also to prepare Western Europe politically and economically for the struggles of the Cold War. In this sense, European integration was a distinctly 'war' project, although the Europeans did not see the Cold War as necessary, and specifically wanted to avoid actual war. The added value of the European Union to peace in the western half of the European continent is difficult to quantify precisely, since an armed conflict involving western states outside the Union was no more likely than war between the Member States of the Union. Perhaps we are closer to the truth in stating that without the consent of the hegemonic power in the Western bloc, a conflict between the states of the bloc was as unthinkable as a similar conflict in the Eastern bloc without the consent of the Soviet Union. However, the European Union's peace project had no effect on European territories outside the sphere of influence of the United States: the Union had repeatedly failed to prevent armed conflicts from breaking out, and it was and is unable to manage on its own the conflicts that did break out.

Regardless of its historical foundation, the myth of origin contains two implicit claims. The first is that the project of peace in Europe is in fact a Franco-German reconciliation project,[2] or, more permissively, a project of the six founding member states of the Communities. The implication of this claim is that the European integration project is an 'alignment' process. Its proper functioning presupposes the acceptance that the strategic directions of integration are set by Franco-German cooperation. Alignment applies not only to the specific legal obligations of the EU but also to the European economic and social model in general. The contours of the European economic and social model are constantly changing, but two factors remain constant: the requirement of alignment means that only one model can be recognised as European, and its defining elements are the French and German economic and social development. This integration structure perpetuates the centre-periphery dichotomy, regardless of economic development, because it sees it as a distinction between the states that provide the model and those that receive it. This distinction inevitably leads to a cultural and moral hierarchy between the Member States: the model countries consider themselves to be ahead of the game in implementing the European economic and social model and reserve the right to evaluate the progress of catching-up countries and to encourage the catching-up process.[3]

The second claim is that the only alternative to the European peace project is a return to destructive wars. It follows that questioning the direction of Franco-German cooperation is an attack on European peace.

For Member States that joined from 2004 onwards, acceptance of this myth was a prerequisite for EU membership. However, the majority experienced it not as a constraint but as a decision taken in the possession of their regained freedom and sovereignty. The growing prevalence of this myth in the functioning of the Union and the resulting resentment have led to a certain, but not universal, need for a critical examination and revision of it. Alongside the 'alignment' narrative of integration, the 'unification' narrative gradually took shape. This can be traced back to the defining experience of the Central and Eastern European region, which sees the historical mission of European integration as the reunification of a continent artificially divided during the Cold War. For many decades, the Franco-German peace project was a structure that reflected and fitted into the specificities of a divided continent. The end of the Cold War therefore requires not simply an extension of this structure but a redefinition of it.

In the "unification" narrative, the source of Europeanism is not exogenous (the Franco-German point of alignment), but endogenous (Europeanism constituted by certain elements of one's own identity in common with other related identities), which does not require external legitimation. Different European identities can lead

2 The Schuman Declaration, which outlined the plan for a European Coal and Steel Community, says: "The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries."

3 For a similar description of the model, see Krastev and Holmes, 2019, pp. 54–76.

to different European socio-economic models. The objective of European integration in this context is to create an institutional framework for close cooperation between European models. The geometry of cooperation does not follow a centre-periphery but a network formula between European models. The alternative to European integration is not war but a divided continent.

The differences between the 'alignment' and 'unification' narratives of integration are also relevant to the debate on the future of the European Union because they lead to different approaches to its institutions and policies. For the 'unifying' narrative, it is important to develop mechanisms that would be able to genuinely assert national identities and constitutional traditions in the process of legal harmonisation. In this narrative, national identity and constitutional tradition are not aspects that EU institutions have discretion to 'factor' into their decisions when and to the extent they deem it appropriate, but are core values protected by national constitutional institutions and subject to institutionalised constitutional dialogue. The 'unification' narrative similarly attaches great importance to reinforcing a culture of consensus seeking. Its weakening has created divisions without contributing anything to a faster and more effective functioning.

For the "unification" narrative, it is also important to adapt the decision-making rules in such a way that the economic and social interests of entire regions or significant groups of Member States cannot be ignored. A return to unanimous decision-making is desirable in the Council of the EU on issues that fundamentally affect national identity and social organisation. In the post-Brexit situation, the voting rules for qualified majority voting in the Council should also be reconsidered.

The 'alignment' and 'unification' narratives also take a fundamentally different approach to the enlargement of the European Union. For the former, enlargement is an ancillary and contingent element of the integration project, which can take place when and in such a way that it serves the expansion of the Franco-German model of social development and does not threaten its dominance. For the latter, enlargement is an essential element of the integration project, which has its place irrespective of the fact that the new Member States will enrich the European Union with a different, but also European, economic and social model.

3. European democracy: the myth of legitimacy

From the very beginning, European integration has struggled with accusations of a democratic deficit that can be interpreted in many ways. Certainly, European integration has never been an organised grassroots movement. It crossed the dividing line between intellectual experiment and political project only after the Second World War, under considerable external pressure, but it remained an elite-driven process throughout. Of course, it cannot be said that the majority of European public opinion is hostile to European integration. However, even Ernst B. Haas, the father of the neo-functionalist model, which served as the official ideology of integration, was forced to

admit that public opinion 'favored "European unity" in general and unsophisticated terms in the earlier as well as in the most recent periods of history, but it still remains impressionistic, weakly structured, and lacking in patterns of demands and expectations except among young people. [4] In other words, it is incapable of doing precisely what a European political public opinion should do: formulating and enforcing expectations in relation to the European political agenda and decisions.

Regardless of this – or perhaps because of it – European public opinion can be very useful for the European integration process. A permissive consensus – that is, a general belief, based on little information and knowledge, that integration processes driven by the European institutions are fundamentally on the right track – can be a source of legitimacy in its own right, which can be used to counter national advocacy efforts. The Commission and the European Parliament also use thematic opinion polls for such purposes.

The legitimacy myth of European democracy can be summarised as the existence (or at least the advanced stage of formation) of a European demos capable of formulating political expectations of the integration project. The legitimacy of the European institutions is based on the fact that they put these expectations into practice. The integration project must support the formation of the European demos and the formation of its will, and break down political resistance to the will of the European demos. This will take the form, among other things, of strengthening the position and supranationality of the European Parliament and the European political parties, European interest groups and NGOs. The victims of this process are national governments, whose national democratic legitimacy is being eroded by European democracy, and national parliaments, which no longer have any meaningful control over the transfer of powers from national institutions to the EU level.

There are legal and political objections to the myth of European democracy. It is a legal fact that the European Union is an international organisation whose founders and members are states. Its functioning is based on the sovereign equality of the Member States. Accordingly, the legal legitimacy behind all decisions of the European Union can be traced back to the consent of the Member States, albeit often through multiple referrals. This situation is not altered by the fact that the European Union is unique in the world in that it is bound not only to its Member States but also to its citizens by a legal bond with its own content, namely citizenship of the Union. The European Union is therefore constituted not by its citizens but by its Member States. In legal terms, therefore, we cannot speak of European popular sovereignty – but this does not in itself preclude the existence of a European demos in political terms.

But the most important political objection to the myth of European democracy is precisely that this European demos does not exist in political terms. This claim should be examined from two angles: from the point of view of political identity and from the point of view of the formation of political will. A long-standing and consistent finding of Eurobarometer opinion polls is that the majority of EU citizens have both

4 Haas, 2004, p. xiii.

a non-exclusive European and a national identity, and that they usually identify primarily with their national identity.[5] The myth of European democracy foreshadows the consolidation of a European identity that is exclusively political, neutral in terms of all other community ties, but which claims political loyalty. Its archetype is the American identity in the United States, which is a loyalty based on political creed and constitutional foundations, and independent of origin, language, culture, religion and other community-building aspects.

The seeds of this process can also be seen in European development: modern French and German identities, which are decisive for integration, are also based on political creed and constitutional foundations, so that most of their constituent elements can be understood at the supranational level. At the same time, an intellectual trend has emerged in Europe which sees national identity as one of the elements of individual identity, but not as a priority, alongside religious, linguistic or gender identity, among others. This process can lead to the emergence of a hierarchical system of identities, with European political identity at the top and a range of other community identities, including national identities, in a subordinate role. The defining feature of American identity formation, however, is that there are no identities competing for political loyalties among the parallel identities: political loyalties are exclusively linked to American identity, and American identity claims this exclusivity. In contrast, European and national identities are competing political identities. The fact that the two loyalties are not necessarily mutually exclusive does not change the situation: such a clash is conceivable. In such cases, national identity has an exclusive claim to loyalty, and the vast majority of EU citizens now take this for granted. The identity to which political loyalty is attached will therefore be the decisive factor in drawing the boundaries of the demos, and from this point of view there is clearly no European demos today. The lack of political loyalty also affects the content of European identity: in its current form, it can be described as a derivative identity constructed from common elements of national identities and solidarity with other European nations, rather than as a separate phenomenon that is built on national identities.

From the point of view of political will-building, we could speak of a European demos if common political challenges were met by a common discourse seeking common answers. This model does not reflect political agenda setting in the European Union. Political challenges are identified within national political communities, and the demand for European-level responses is expressed in national political discourse. The demos of each Member State acts as an autonomous political community in this process, rather than as a geographically delimited part of a larger demos. The content of the European response is shaped at the level of the EU institutions, where actors act to assert national needs, particular lobbying interests or institutional self-interest, as

5 Eurobarometer has published data on the relationship between national and European identities between 1992 and 2019, which show a relative stability over the last decade. In spring 2019, about one third of respondents identified exclusively with their national identity, while 55% identified primarily with their national identity and secondarily with their European identity.

shaped in national discourse: neither strategy can be seen as an expression of European democracy.

The European Parliament deserves special attention in the myth of European democracy. As the only directly elected EU institution, the European Parliament sees itself as the depository of European democracy and representative of the European demos. From this role it naturally follows that it is constantly seeking to extend its powers and strengthen its supranational character. Within the myth of European democracy, there are no substantive objections to this ambition, and the European Parliament's advance is unstoppable: it can take the legislative initiative; it can extend its legislative powers to the few areas where they have not been exercised to date; and, through the system of top candidates (*Spitzenkandidaten*), it can exercise a decisive influence on the Commission's management.

However, the objections to the myth of European democracy also stand with regard to the European Parliament: the direct election of MEPs is not a manifestation of the European demos. European Parliament elections are second-order[6] national elections, where political discourse between political forces organised at national level takes place within a national framework. As a result, representatives who have national political legitimacy and are therefore politically accountable to the community that elected them are elected. When an MEP assumes this political responsibility, he or she becomes a national MP who happens to sit in the European Parliament. If, in accordance with the myth of European democracy, he/she does not assume this political responsibility, but wants to represent the European Union or the citizens of the European Union as a whole, he/she loses their democratic legitimacy. The European Parliament's response to this objection is to strengthen its supranational character: the full or partial introduction of transnational lists.[7] This solution, however, does not change the current European specificities of political identity and will formation. The likely result would be that, instead of a single national political mandate, the European Parliament would be occupied by a number of MEPs with inconsistent national mandates, who would have no political responsibility to any national community. This would lead to a weakening of democratic legitimacy.

The myth of European democracy can be contrasted with the concept of a Europe of nations or a democracy of democracies. The starting point that seeks to implement democracy at EU level as the rule of a non-existent European people is flawed, because it actually leads to the elimination of the democratic control of existing

6 The turnout rate in European Parliament elections showed a steadily decreasing trend between 1979 and 2014. In 2019, the turnout rate (50.66%) exceeded the 2014 rate (42.61%), but remained significantly below the activity rate in national parliamentary elections.

7 A further means of strengthening supranationality could be to make the European Parliament's current degressive system of allocating seats more proportional. The current system sets a minimum and a maximum number of MEPs for each Member State and applies a more favourable distribution of seats for smaller Member States. There are around 82 000 inhabitants per MEP in Malta and 865 000 per MEP in Germany. The rationale behind this system is that the European Parliament's role is not to represent European citizens, but to represent the European national communities properly – which is, of course, incompatible with the myth of European democracy.

European nations over EU institutions. Democracy in Europe can only be secured by strengthening the role of democratically organised national communities, and the way to achieve this is through the participation in EU decision-making of actors with real political responsibility for real political communities.

An obvious solution is to strengthen the role of national parliaments. The right to withdraw a proposal if a majority of national parliaments or chambers of national parliaments in a Member State consider that it is not acceptable should be guaranteed. This could be the red card procedure, replacing the current orange card procedure. A similar solution could be to bring the European Parliament closer to national parliaments. It could be a return to the solution that prevailed from the beginning of European integration until 1979, whereby national parliaments of the Member States delegate representatives to the European Parliament. This solution is the most effective way of ensuring that the European Parliament takes decisions based on a genuine political mandate, adapted to the realities of the Member States and taking due account of their economic and social specificities. Another option worth considering would be for EU citizens to elect their MEPs in individual constituencies in the Member States, which would create clearer political accountability than at present.

4. Ever closer union among the peoples of Europe: the myth of finality

European integration started with well-defined, interconnected functional cooperation in the form of the coal and steel community, the common market and the nuclear community. But the founding fathers never hid the fact that the objectives of the European project went far beyond this level. The basic thesis of the neo-functionalist model of integration mentioned above is that successful functional cooperation will generate pressure to broaden and deepen integration and shift political loyalties to supranational institutions. According to the myth of the finality of European integration, the spillover of the integration process is not only desirable but necessary and encoded in the functioning of the integration institutional system, to which member states have given their political approval at the time of accession. The myth interprets the objective of *ever closer union* between the peoples of Europe as a process of the stealthy transfer of powers and decisions to the supranational level, which is beyond the political control of the Member States and whose dynamics are determined by factors outside their control, or rather by unnamed factors. It is also part of the myth that Member States who complain about the lack of control over the integration dynamic are calling into question the very essence of integration, in violation of the principle of loyal cooperation.

In contrast, the sovereignist position is that the Member States are the masters of the future of European integration. Member States created and run the EU to exercise certain powers jointly or through EU institutions where national action is not effective enough. The Member States are the sole holders of sovereignty, so they alone can decide which powers they wish to exercise jointly. Member States can decide not only

to extend but also to narrow the scope of EU powers. All non-delegated powers remain with the Member States, and this principle cannot be overridden by the general objectives of the EU. Even in areas where the EU has powers, EU action is justified only if the objectives envisaged cannot be sufficiently achieved by the Member States.

The practical implementation of this stealthy division of powers would not be possible without the specific role of the Court of Justice of the European Union and the case law that derives from it. The jurisprudence of the Court of Justice of the European Union has often pushed the stalled machinery of European integration beyond a state of political indecision and assumed the responsibility of the political decision-maker. This activity, like judicial activism in general, has always been controversial, but it does not necessarily pose a sovereignty problem as long as it does not override but reinforces the need to achieve a politically accepted level of integration. In such cases, activism merely ensures that Member States can be compelled to comply with their integration commitments despite occasional disagreements or conflicts of interest. As long as EU law remains within the framework of the integration structure defined by the political consensus of the Member States, effective enforcement of EU law is a means of implementing the political will for integration. However, when the interpretation of EU law becomes a means to change the framework of the integration structure, it loses its EU legal nature and replaces the will-building of Member States to devolve powers. This is not a technical legal problem but a fundamental question of political legitimacy and sovereignty.

Member States are powerless in the current institutional structure and procedures of the European Union to challenge decisions of the Court of Justice of the European Union such as the above, even if they are unverifiable, irrational and inconsistent with previous decisions – i.e. arbitrary. Power can only be limited by power: instruments must be created that provide a real counterweight to the EU institutions in enforcing the principle of devolution. This could be achieved by a court of jurisdiction, to be set up on a basis of parity between the members of the Court of Justice of the European Union and the constitutional courts of the Member States or constitutional institutions with similar powers.

5. Equal and more equal Member States: the myth of fiscal and political gestures

Central and Eastern European Member States are all net beneficiaries of the EU budget balance. This measure ranges from around 4% of gross national income (GNI) per year in the region (Hungary) to around 2% (Czech Republic). The main sources of revenue for beneficiaries are cohesion and agricultural funds. By comparison, the largest net contributors in terms of GNI are Germany (0.41%), Sweden (0.36%), the Netherlands (0.35%) and Austria (0.31%). This indicator is mythical, confirming that the „West" is making gestures towards the „East" in all areas of integration: just as our admission to the European Union was a gesture, so too is the EU budget transfer

towards us. In return, the myth goes, net beneficiary member states can rightly be expected to accept the preferences of net contributor member states in the formulation of EU policies: to take the position of *policy taker* rather than *policy maker.* The radical but natural corollary of this line of thinking is that EU budgetary resources are only available to those Member States that adopt the *policy taker* position: this can be enforced by withholding resources where appropriate.

It is perhaps not superfluous to point out, first of all, that reducing the effects of European integration to the aspects of the budget balance gives a very distorted picture of the process. There are no net losers from EU membership, which is the general rationale of European integration. The combination of unquantifiable benefits, the opportunities offered by the internal market and the subsidies received means that everyone benefits more than they pay into the EU budget.[8] European integration is not a zero-sum game.

But it also follows that European integration is not a chain of budgetary and political gestures, but a rational pursuit of mutual benefits. The political position of the net beneficiary Member States in budgetary terms is no different from that of net contributors.

An integral part of the process of integration according to the „unification" narrative mentioned above is the assumption of this equal political position in European structures. If this happens, net contributors can only maintain their status by transforming the previous political asymmetry into a legal asymmetry. This could be done, for example, by introducing a sufficiently general fiscal conditionality, which could also be used to impose political demands. This solution upsets the balance of a system of integration based on complex linkages and transfers, highlighting an element of integration that only poses a real threat of sanctions for net beneficiaries.

6. The magic of Europe without magic

De-mystifying the European Union is unusual and, as we are often emotionally attached to myths, not always a pleasant undertaking. But the promise of success is that we can move from a European Union of myths to a more democratic and effective European Union. Clearly, this short essay could not complete the task. It may, however, have provided insights into its theoretical and methodological challenges, and may have contributed to transforming the debate on the future of the European Union from mythological rhetoric into a genuine political discourse.

8 For an overview of the balance beyond a budgetary approach, see for example the technical background paper prepared for the European Parliament's Committee on Budgets in February 2020: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/648145/IPOL_BRI(2020)648145_EN.pdf (Accessed: 12 October 2021).

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| Chapter 4 |

Common Commercial Policy and Member States' Playing Fields

Csongor NAGY

ABSTRACT

This chapter analyzes the playing field afforded by the EU exclusive competence over commercial policy to the Member States to develop an independent policy in relations to extra-EU trade. First, the chapter presents the primary elements of the EU's 'constitutional authorization.' particularly regarding investments, where the EU is less omnicompetent. Second, the nature of international economic relations is presented. This section shows that the focus of international commercial policy shifted from traditional restrictions of trade to regulatory trade barriers. Third, the elements of the EU's commercial policy and the Member States residual powers are presented to elucidate how the Member States may engage in commercial policy notwithstanding the exclusive EU competence. This section shows that, on the one hand, the margins of commercial policy are somewhat unclear, and, on the other hand, there are regulatory questions that are legally not part of the common commercial policy but do have an impact with trade with non-EU countries and, hence, giving a chance to Member States to develop an independent national policy toward extra-EU trade.

KEYWORDS

common commercial policy, extra-EU trade, internal market, international trade, intra-EU trade, investment protection, WTO

1. Introduction

The common commercial policy, including the customs union, is one of the few major fields where the EU has traditionally had exclusive competence. Given the Lisbon Treaty's extension of this competence to all four channels of international economic relations (goods, services, intellectual property, and investments), Member States' possibilities to influence their economic relations with countries outside the EU seem to be completely suppressed. Still, notwithstanding the exhaustive language of Art. 207 TFEU, Member States have important possibilities to carry out an independent commercial policy in relations to non-EU countries. This chapter takes stock of and

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evaluates these possibilities.[1] It must be noted that, when examining the remnants of independent national commercial policy, this chapter analyzes the possibilities of the regulatory state and not the state engaged in commercial transactions. Obviously, Art. 207 TFEU does not limit Member States in entering into commercial transactions with sovereign and non-sovereign actors.

Section 2 presents the primary elements of the EU's 'constitutional authorization.' Section 3 presents the nature of international economic relations and shows that the focus of international commercial policy shifted from traditional restrictions of trade to regulatory trade barriers. For instance, as to trade in goods, the major hurdles to trade are no longer tariffs and quantitative restrictions but technical barriers to trade, such as product standards, local regulation, licensing requirements, and taxation. Section 4 presents the elements of the EU's commercial policy and residual national powers to elucidate how Member States may engage in commercial policy notwithstanding the exclusive EU competence. This section shows that, on the one hand, the margins of commercial policy are somewhat unclear and, on the other hand, there are regulatory questions which are legally not part of the common commercial policy but do have an impact on extra-EU trade and, hence, give a chance to Member States to develop an independent national policy.

2. What is the EU's Actual, Exclusive Competence? The Common Commercial Policy

International economic relations are traditionally conceived as having four channels: goods, services, intellectual property, and investments. While the first three come under global regime (owing to World Trade Organization law), the substantive treatment of investments, apart from some exceptions, is subject to myriads of bilateral investment treaties (BITs).

Art. 207 TFEU contains a very wide, seemingly all-embracing authorization, which creates an exclusive EU competence over all the four channels of international trade:

> "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

1 For an overview on the role and appearance of Member States' interests in the common commercial policy, see Horváthy, 2019.

Initially, the scope of Art. 113 ECT, the predecessor of Art. 207 TFEU, was uncertain, as it referred only to goods and tariffs, and it was questionable whether the EU competence extended to other channels of international trade, such as services. Art. 113 ECT was renumbered to Art. 133 by the Treaty of Amsterdam and complemented with a new para. (5), which authorized the Council to extend, unanimously, the application of Art. 133 to services and intellectual property. Finally, the Treaty of Lisbon, via Art. 207 TFEU, extended the common commercial policy all four channels of international economic relations: goods, services, intellectual property, and investment.

Art. 207 TFEU raises two important questions of interpretation.

First, in global trade traditional tools of trade restriction (such as tariffs and quantitative restrictions) no longer have a predominant role. Quantitative restrictions have already been banned by the 1947 General Agreement on Tariffs and Trade (GATT'47), while tariffs have been gradually decreased. Hence, international economic relations are increasingly not about traditional trade restrictions, such as tariffs and quotas, and the focus of world trade shifted from traditional trade restraints to regulatory restraints (facially even-handed regulatory hindrances, such as standards). The primary goal of traditional free trade agreements was to abolish quantitative restrictions and customs duties (tariffs). In addition to this, new generation free trade agreements aim at securing the 'smooth course' of trade through ironing out different regulatory obstacles.

Second, while the reference to goods, services and intellectual property are clear and embracing, in respect to investments the exclusive competence extends merely to 'foreign direct investment.' In the field of investments, states usually not only regulate (and liberalize) the free movement of capital but also provides for important investment protection standards and set up an effective investor–state dispute settlement (ISDS). The question is if all and if not all then which parts of these activities come under Art. 207 TFEU.

In Opinion 2/15,[2] the CJEU held that the mere fact that an act 'is liable to have implications for trade…is not enough for it to be concluded that the act must be classified as falling in the common commercial policy.' Only that act falls in the common commercial policy that 'relates specifically to…trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.'[3] In the context of the EU–Singapore Free Trade Agreement, the CJEU found that the rules on non-direct investment and investor–state dispute settlement did not come under exclusive EU competence.[4]

2 Opinion 2/15, Opinion of the CJEU (Full Court) of 16 May 2017, Opinion pursuant to Art. 218(11) TFEU, ECLI:EU:C:2017:376. See Horváthy, 2018, pp. 117–132.

3 Opinion 2/15, para. 36.

4 See also Opinion 1/17, Opinion of the Court (Full Court) of 30 April 2019, Accord ECG UE-Canada. Case Avis 1/17, ECLI:EU:C:2019:341.

3. The Nature of International Economic Relations

The contemporary history of world trade was opened by the conclusion of GATT '47 and was consummated by the creation of the World Trade Organization (WTO) in 1994. The last seventy years have seen a revolutionary development in world trade governance and have featured the enormous success of WTO and its predecessor, GATT '47. While initially this platform of cooperation was, for the most part, used by market-based economies and rejected by socialist countries,[5] the collapse of communism extended the club's membership considerably. In the last two decades, the WTO's disciplines became ubiquitous. With the accession of China and Russia, the WTO became the sole global framework of trade and covered almost the entire globe. With the accession of China in 2001 and Russia in 2012, the WTO became a truly universal trade organization: its member countries account for 96.4% of world trade,[6] and thus, its rules and principles are vested with a nearly *erga omnes* authority.

WTO law limits the use of traditional trade restrictions considerably. It virtually prohibits all kinds of quantitative restrictions (quotas) and significantly restricts tariffs. GATT '47 prohibited quantitative restrictions and measures having equivalent effects at large[7] and obliged states to solely use tariffs (tariffication). In addition, it made tariff caps binding, and served as a platform for a long process to universally reduce duty rates.

The era opened by GATT '47 saw a remarkable tariff abatement. The 20-30% average tariff rate prevailing in 1947 (pre-GATT)[8] fell considerably. In developed countries the average duty rate of industrial products fell to less than 4%.[9] In 2012 the average applied tariff was 1% in developed countries and between 4–10% in developing countries;[10] the average tariff on world trade was about 2%.[11] Approximately 40% of international trade was fully duty-free under most-favored nation (MFN) terms, while about 10% faced tariff peaks of over 10%.[12] The diminution of applied tariffs was paralleled by a similar process concerning bound tariffs—legally binding duty rate

5 With the notable exception of Czechoslovakia and Cuba, which were founding members and remained a member after the communists seized power. China was also a founding member but subsequently withdrew from GATT after the communists took power. Interestingly, it was not the People's Republic of China but the Republic of China governed by the Kuomintang, having fled to Taiwan, which notified the withdrawal as the entity occupying China's seat at the relevant time. Hsiao, 1994, pp. 433–434; see also Hsieh, 2005, pp. 1195–1121.

6 Williams, 2008, p. 10.

7 General Agreement on Tariffs and Trade, Art. 11, October 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

8 World Trade Organization, 2007, p. 207; Brown and Irwin, 2016 (finding that the average tariff level in 1947 was about 22%).

9 World Trade Organization, 2007, p. XXXI. After the Uruguay Round, the weighted bound tariff average of the United States, Japan, and the EU (at that time having 12 Member States) was 3.1%, with the US having 3.5%, Japan 1.7% and the EU 3.6%. See id. at 209.

10 UN Conference on Trade and Development, 2013, p. 5.

11 Ibid, p. 3.

12 Ibid, p. 7.

caps established for specific product lines. These were agreed in a series of rounds that provided a platform for GATT members to negotiate tariff reductions with each other and to gradually reduce duty rates. While states may unilaterally change their applied tariffs, Art. II GATT makes tariff promises binding.

WTO members' tariff bindings were included into the Schedule of Concessions and Commitments annexed to GATT '94. The Uruguay Round, which took place in 1986–1994, was extremely successful in extending binding coverage: in developed countries, bound rates were virtually extended to all products (99% of product lines), same as in transition economies, which increased their binding coverage from 73% to 98%. This was paralleled by a similar process in developing countries, where binding coverage increased[13] (extended to most products: 73% of products lines that increased from 21% pre-Uruguay)[14] and bound tariffs also came down sharply (although remained high).[15]

The world's ten largest economies[16] by GDP (representing 80% of world GDP) are characterized by almost full-binding coverage (except for India) and relatively low bound tariffs. The first three economies—EU, Japan, and the United States (representing 52% of world GDP)—have less than a 5% simple average bound tariff.[17] It must be added that the actual tariff rates are usually considerably lower than the bound tariffs (the latter functioning only as a ceiling).

The above demonstrates that in global trade, the traditional and most robust tools of trade restriction are not determinant factors anymore. While specific products may be subject to above-average tariffs, for most products the major trade hurdles are technical barriers, such as local products standards, licensing requirements, and regulatory authorization.

A similar framework prevails as to trade and services, where the Schedule of Commitments annexed to the General Agreement on Trade and Services (GATS) fulfills a role like that of the Schedule of Concessions and Commitments annexed to GATT 1994. The GATS agreement was, for the most part, modelled after the GATT, but it contains two important limitations: as to services, market access and national treatment must be provided only if the member state concerned specifically promised them as to a given sector. This means that WTO members' enterprises are not guaranteed access to foreign markets and need not be afforded national treatment unless the country of destination promised one or both services in its Schedule of commitments. States may make commitments as to any of the four modes of supply specified by GATS (cross-border supply, consumption abroad, commercial presence, physical presence) and may make these commitments with restrictions. As with tariff bindings, GATS commitments cannot be revoked unilaterally unless the affected members are duly compensated.[18]

13 World Trade Organization, 2007, p. 45.
14 World Trade Organization, no date.
15 See World Trade Organization, 2015.
16 Based on the 2017 GDP, see Nagy, 2019.
17 World Trade Organization, 2017.
18 Art. XXI GATS (General Agreement on Trades and Services), January 1995.

4. The Absoluteness of the EU Common Commercial Policy

This section addresses Member States' playing field as to goods, services, and investments. The regulation of the commercial aspects of intellectual property has centered around the protection of intellectual property rights and not about the movement of technology. States naturally do not restrict the free movement of technology (though they may restrict investments, as well as the entry of enterprises that use a certain technology); hence, the international regulation in this field has focused on the minimum level of protection States must provide.

4.1. Trade in Goods

Trade in goods with non-EU countries has been largely 'Europeanized.' Customs policy is an exclusive EU competence (that is, Member States do not have the right to impose tariffs).[19] In the same vein, the representation of the EU on the international scene, including representation in the WTO and the conclusion of free trade agreements (provided their provisions have a 'specific link' to international trade in goods) are also an exclusive EU competence. The power to adopt measures against unfair trade were also shifted to the EU level: anti-dumping and countervailing duties are imposed by the European Commission.[20]

The only area in which Member States may manifest their preferences concerning (and adopt measures impacting on) extra-EU trade is technical barriers to trade, as long as the given question has not been preempted by EU legislation. Technical barriers to trade are state measures that establish, for instance, standards, testing and certification requirements, and rules of taxation. These may, at times, be even more burdensome than customs duties and quantitative restrictions. Member States have very broad regulatory power to establish such requirements, and their regulatory policy may consider commercial policy considerations. Perversely, if a Member States measure breaches WTO law (with a free trade agreement, or FTA), the Commission has the power to have it invalidated by the CJEU by means of an infringement procedure. Apart from that, however, Member States may make use of this regulatory power.

As noted above, due to the remarkable drop in tariffs in the last several decades, especially after the Marrakesh Agreement of 1994 establishing the WTO, technical barriers to trade (including sanitary and phytosanitary measures) came to the fore. Tariffs are no longer the major issue (though in certain industries they may still be high), and states strive to enhance the fruit-bearing capacity of trade through the

19 See *TARIC, the integrated tariff of the European Union*. https://web.archive.org/web/20220101133256/https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/customs-tariff/eu-customs-tariff-taric_en.

20 See e.g., Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, pp. 1–20; Council Regulation (EC) No. 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community, OJ L 288, 21.10.1997, pp. 1–33.

diminution of technical barriers. Nowadays, they are the most significant hurdles to trade, particularly in relation to commerce between developed countries, which have reduced their customs duties the most. For producers, beyond the costs of having double or multiple production lines, discrepant national standards necessitate extra administration, red tape, and paperwork in the form of conformity assessments (e.g., registration, testing, certification, licensing), which generates delays and unpredictability. Member States' regulatory powers concerning these questions gives them a wide playing field, and this has given them an opportunity to develop a policy toward extra-EU trade.

Central European countries have largely benefitted from the uniform EU commercial policy, which accumulates a stronger bargaining power than may have individually. The emerging waiver of FTAs concluded by the EU also creates new business opportunities in trade in goods. At the same time, it needs to be considered that Central European countries, which have a competitive advantage in the internal market due to lower labor costs, may be counter-interested in free trade agreements with low-cost developing countries.

4.2. Trade in Services

The exclusive competence over trade in services covers all the four modes of supply identified by the GATS: cross-border provision of services, consumption abroad, commercial presence, and physical presence.[21] Nonetheless, as long as the EU does not preempt Member State law by way of legislation, and Member State law does not go counter to the EU's international commitments, Member States have a wide playing field to develop an independent regulatory policy, which may extend to service standards, licensing requirements, recognition of certificates and diplomas, and government contracts. Contrary to goods, trade in services is not subject to a comprehensive EU program.

Member States' arena is expected to be further limited by the emerging EU regulation on service and take-over subsidies. On June 17, 2020, the European Commission adopted the White Paper on Levelling the Playing Field as Regards Foreign Subsidies. The white paper responds to the danger posed by 'state sponsored unfair trading practices.'[22] Non-EU subsidies may promote foreign undertakings' existing activities in the EU, enable them to underbid their non-subsidized competitors at public tenders, and help them acquire EU companies. The white paper identifies the major gaps in the international disciplines (and EU law mechanisms) on subsidies, and proposes a set of rules to neutralize unfair trade practices and ensure a level playing field in international trade and the EU internal market.

The proposed measures are made up of three layers. A set of measures of general application is proposed to cover all foreign service subsidies granted to economic

21 See Opinion 1/08, Opinion of the CJEU (Grand Chamber) of 30 November 2009, Opinion pursuant to Art. 300(6) EC ECLI:EU:C:2009:739, paras. 4, 118 and 119; Opinion 2/15, para. 54.
22 Ibid, p. 4.

operators established or active in the EU market (Module 1), which are meant to offset both product and service subsidies, and two special regimes governing foreign subsidies provided in the context of acquisitions of EU targets (Module 2) and bids in public procurement in the EU (Module 3). The term 'acquisition' covers not only take-overs (where decisive control is obtained), but also the acquisition of non-controlling minority rights or shareholdings, and other transactions that result in 'material influence' being acquired in an EU undertaking. As noted above, in the parlance of GATS, commercial presence is a mode of service supply; hence, subsidies granted in the context of acquisitions may qualify as service subsidies. The decisive trigger in all three modules is that the subsidy is foreign—that is, it is provided by a third country. The proposed measures are modelled after EU state aid rules, which apply solely to state aids granted by Member States[23] and hence do not cover subsidies provided by foreign governments. The term 'subsidy' must be conceived broadly; in the context of acquisitions, in addition to the benefits explicitly linked to the transaction, it also covers indirectly related aids (e.g., measures that enhance the acquirer's financial strength and, thus, facilitate the acquisition).

The operation of Module 1 is based on *ex post* investigations, while Modules 2 and 3 create an *ex ante* system and a duty of notification. Hence, the measures to be adopted because of the investigation slightly differ as to the three modules. Nonetheless, they are all 'redressive measures' aimed to obviate the repercussions of the foreign subsidy, and could range from structural remedies and behavioral measures to repayment.

The investigation extends to three core issues: existence of a subsidy, distortion in the internal market, and the subsidy's most redeeming virtue—'the positive impact that the supported economic activity or investment might have within the EU or on a public policy interest recognized by the EU.'[24] If a distortive subsidy has a redeeming virtue, the distortion and the positive effects must be balanced. The EU's public policy objectives include, for instance, the creation of jobs, climate neutrality goals, environmental protection, digital transformation, security, public order, public safety, and resilience.

The above principles have recently been converted into a proposal for regulation.[25]

Although the emerging regime on service and take-over subsidies is expected to introduce some limitations, Member States have a wide sphere in which to develop an independent regulatory policy.

23 According to Art. 107(1) TFEU: "1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market." (emphasis added).

24 Ibid, p. 14.

25 Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market COM (2021) 223 final.

4.3. Investments

The EU's exclusive competence as to foreign investments[26] is exclusive but not all-embracing. It does not extend to foreign indirect investments and investor–state dispute settlement.[27] Furthermore, the EU very quickly delegated its power acquired by the Treaty of Lisbon back to the Member States via Regulation 1219/2012.[28] The regulation accomplished this re-delegation by two principles. First, it kept in force Member States' existing BITs (that is, BITs signed before December 1, 2009) 'until a bilateral investment agreement between the Union and the same third country enters into force.'[29] Second, it authorized Member States to conclude new BITs (or amend an existing BIT) with third countries provided the general framework set out in the regulation is respected, and they obtain the authorization of the European Commission.

This means that Member States have significant competences in the field of investments: foreign indirect investments and investor–state dispute settlements do not come under exclusive EU competence, while the conclusion of BITs was delegated back to them, subject to vague substantive conditions and individual Commission authorization.

The above implies that notwithstanding the changes in the division of competences between the EU and Member States brought about by the Treaty of Lisbon, pre-existing extra-EU BITs (that is, treaties involving an EU Member State and a third country) remained, in essence, intact. This is reinforced by Art. 351 TFEU, which provides that rights and obligations arising from treaties with third countries that precede accession "shall not be affected by the provisions of the Treaties.' The CJEU established very early, in *Attorney General v. Juan C. Burgoa*,[30] that the purpose of Art. 351 TFEU is to ensure that EU law does not affect Member States' duties to respects the rights of non-member countries, emerging from an agreement concluded prior to accession.[31] In *Commission v. Slovak Republic*,[32] the CJEU held that benefits accruing from a private law contract and protected by Slovakia's extra-EU BITs and the ECT antedating accession persist under Art. 351 TFEU. In 1997, ATEL, a Swiss company was granted preferential access to the electricity grid in Slovakia. The Commission launched an infringement

26 See Víg, 2018.

27 For an EU perspective of international investment arbitration, see Hajdu, 2021; Hajdu, 2020.

28 Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. OJ L 351, 20.12.2012, pp. 40–46.

29 Ibid, Art. 3.

30 Judgment of the CJEU of 14 October 1980, Attorney General v. Juan C. Burgoa, Case 812/79, ECR 02787, ECLI:EU:C:1980:231.

31 This phrasing has been consistently followed in the judicial practice. See Judgment of the CJEU of 4 July 2000,
Commission of the European Communities v. Portuguese Republic, Case C-84/98, ECLI:EU:C:2000:359, para. 53; Judgment of the CJEU of 18 November 2003, Budéjovický Budvar, národní podnik v. Rudolf Ammersin GmbH, Case C-216/01, ECLI:EU:C:2003:618, paras. 144-145; Judgment of the Court (Grand Chamber) of 3 March 2009, Commission of the European Communities v. Kingdom of Sweden, Case C-249/06, ECLI:EU:C:2009:119, para 34.

32 Judgment of the Court (First Chamber) of 15 September 2011, European Commission v. Slovak Republic, Case C-264/09, ECLI:EU:C:2011:580.

procedure against Slovakia due to discriminatory treatment. However, the CJEU held that 'the preferential access granted to ATEL may be regarded as an investment protected by the [Swiss–Czechoslovakian BIT] and that, under the first para. of Art. 351 EC, it cannot be affected by the provisions of the EC Treaty';[33] 'even if it were to be assumed that the preferential access granted to ATEL were not compliant with Directive 2003/54, that preferential access is protected by the first para. of Art. 351 EC.'[34]

The parallelism of EU law and BIT commitments may subject Member States to situations where EU law mandates Member States to violate a BIT obligation. In such cases, the question is whether the 'defense of superior orders' may be valid in such situations. A few arbitral proceedings have dealt with the Member States' liability for implementing the commands of EU law, i.e., Member States' liability for violations mandated by EU law.[35] In these cases, the Member State promised benefits that were revoked later as illegal under EU law.

In *Electrabel S.A. v. Republic of Hungary,*[36] the Commission enjoined Hungary to put an end to the long-term power purchase agreements of the Hungarian national electricity company (MVM)[37] because they contained veiled state aid. Though Hungary terminated the agreements through a legislative act, the tribunal established that Hungary was not liable as its act was mandated by the Commission's formal decision[38] ('defense of superior orders'). This may imply that the EU should have been sued instead (in fact, the EU could have been sued as the claim was based on the ECT). At the same moment, the tribunal did investigate those elements of Hungary's conduct where Hungary had a certain leeway. These acts were regarded as Hungary's own acts despite being done to implement the Commission's decision. Contrary to the above, in *EDF International S.A. v. Republic of Hungary,*[39] which was launched by another investor but emerged from the same state aid matter as *Electrabel,* the tribunal decided for the claimant (in an *ad hoc* arbitral proceeding conducted under the UNCITRAL rules).[40]

33 Ibid, para. 51.
34 Ibid, para. 52.
35 Cf. Eilmansberger, 2009, p. 413.
36 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.
37 Mid-'90s Hungary privatized its power plants. The claimant purchased most of the shares in Dunamenti power plant and invested considerable funds for the purpose of retrofitting. Dunamenti had a long-term power purchase agreement with MVM, the Hungarian national electricity company. Such contracts were common at that time and were meant to back the privatization of the power stations: these facilities needed significant retrofitting and the long-term power purchase contracts were meant, in economic terms, to guarantee the investors that they would be able to sell the electricity they produced (note that at that time MVM was the only purchaser of electricity in Hungary and remained a super-dominant undertaking also after the electricity market was opened).
38 Commission Decision on the State Aid awarded by Hungary through Power Purchase Agreements, Brussels, 2008.VI.04, C (2008) 2223 final.
39 The award was rendered on December 4, 2014. The tribunal consisted of Karl-Heinz Böckstiegel (chair), Pierre-Marie Dupuy and Albert Jan van der Berg.
40 See Thomson, 2014, EDF wins claim against Hungary http://globalarbitrationreview.com/news/article/33251/edf-wins-claim-against-hungary.

Unfortunately, the award is not publicly available, so the tribunal's arguments cannot be reconstructed.

In *Micul Brothers v. Romania*,[41] the tribunal condemned Romania for withdrawing certain benefits due to EU state aid law. This case presents the clash between BITs and EU law, and powerfully demonstrates the vicious circle[42] encapsulated in this issue. After Romania provided compensation to the claimants (as ordered by the tribunal), the Commission ruled that the compensation replaced the illegal subsidy it was meant to make up for, and, hence, it qualified as state aid, and ordered Romania to resume the financial benefit provided. This was a controversial position, as the benefits were withdrawn before Romania's accession to the EU, so the withdrawal was motivated, but not compelled, by the EU state aid law.

Extra-EU BITs may gain enhanced significance due to the CJEU's suppression of intra-EU BITs in *Achmea*.[43] As European investors can no longer rely on a BIT if they invest in another Member State, they may seek alternative methods of protection, and one of the obvious options is treaty shopping—EU investors may make investments in other Member States via third countries (or transfer their interests to special purpose vehicles in third countries) and claim the benefits of extra-EU BITs in intra-EU matters.

While some have acknowledged these strategies with aversion, most arbitral awards—in fact, almost all of them—have been intensely dismissive of piercing the corporate veil in cases where the BIT contained no specific requirements of substantive link or denial of benefits clause. In reality, 'it has become so easy for foreign investors to relocate to different jurisdictions that the contents of nationality have largely lost their essence.'[44] Although piercing the corporate veil is a living doctrine, it is exceptional and applies only to abusive practices. According to the arbitral practice, the mere fact that the nationals of a country establish a company in another country is not, in itself, an abuse that justifies piercing the corporate veil (*ADC & ADMC v. Hungary*,[45] *Saluka Investments BV v. Czech Republic*,[46] *Yukos v. Russia*,[47] *Niko Resources v. Bangladesh and others*[48]). The very same line of interpretation has been

41 See SA.38517 Micula brothers v. Romania (ICSID arbitration award); IP/15/4725: European Commission—Press release, State aid: Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme. Brussels, 30 March 2015.

42 Kende, 2015, pp. 50–51.

43 Judgment of the Court (Grand Chamber) of March 6, 2018, Slowakische Republik v. Achmea BV, Case C-284/16, ECLI:EU:C:2018:158. Subsequently, Member States terminated intra-EU BITs by means of an international treaty. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. OJ L 169, 29.5.2020, pp. 1–41.

44 Charisse, 2015, p. 228.

45 ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungary, ICSID Case ARB/03/16, Award (2 October 2006).

46 Saluka Investments BV. v. Czech Republic, UNCITRAL, Partial Award (17 March 2006).

47 Ibid, paras. 415 and 417.

48 Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013).

taken as to 'round-tripping.' when domestic investors establish a shell company in a foreign country to be protected by the BIT between their home country and the shell company's country of incorporation. In *Tokios Tokelés v. Ukraine*,[49] the claimant was a Lithuanian company, 99% of its shares was owned by Ukrainian nationals who, allegedly, wanted to make use of the Ukraine–Lithuania BIT. Although with the dissenting opinion of one of the arbitrators, the tribunal found no reason not to apply the Ukraine–Lithuania BIT. A similar approach was taken by the arbitral tribunal in *Rompetrol v. Romania*,[50] *Alpha Projektholding v. Ukraine*,[51] and *KT Asia v. Kazakhstan*.[52] The very rare exception that goes against the above clear line of case law is *Venoklim v. Venezuela*,[53] where the tribunal declined jurisdiction over a Dutch company's claim because the company was in fact controlled by Venezuelan individuals.

Notwithstanding the growing role of denial of benefits clauses,[54] a good part of BITs consistently accord protection to companies incorporated in the other country, without containing any requirements of substantive links. Arbitral tribunals have been constantly disinclined to pierce the corporate veil of shell (or 'mailbox') companies in the context of BITs. It is settled practice that absent a specific provision to the contrary, the tribunal will, in principle, refrain from looking into whether there is a substantive relationship between the company and the country of incorporation.[55] This provides important opportunities for treaty shopping.

5. Conclusions

Notwithstanding the exclusivity of EU common commercial policy, Member States have a significant playing field and, hence, the chance to develop an independent national policy in respect to extra-EU trade. First, the exclusivity of EU power does not extend to indirect foreign investments and investor–state dispute settlement. Second, the EU delegated back the power to conclude investment treaties, thus giving Member States a wide playing field to develop their own policies and engage in international economic relations. Third, even regarding subjects that come under the exclusive EU competence, there is a grey zone of measures that have an impact but no specific link to trade. The EU common commercial policy's exclusivity extends to measures that have a specific link to trade, but does not extend to Member States' trade-related actions that have no such direct link. This may embrace, for instance, regulatory

49 Tokios Tokelés v. Ukraine, ICSID Case ARB/02/18, Decision on Jurisdiction (29 April 2004).
50 Rompetrol Group NV. v. Republic of Romania, ICSID Case ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008).
51 Alpha Projektholding GmbH v. Ukraine, ICSID Case ARB/07/16, Award (8 November 2010).
52 KT Asia Investment Group BV. v. Republic of Kazakhstan, ICSID Case ARB/09/8, Award (17 October 2013), paras. 111–139.
53 Venoklim Holding BV. v. Bolivarian Republic of Venezuela, ICSID Case ARB/12/22, Award (3 April 2015).
54 Charisse, 2015, pp. 289 and 302–303. See Alvarez, 2009, pp. 328–330 and 329.
55 Tokios Tokeles, para. 36.

policy, product and service standards, licensing and market authorization, and recognition of foreign certificates and diplomas. Finally, the exclusivity of EU commercial policy does not affect the Member States right to get involved in private transactions (directly, or through public enterprises) and invest or co-invest, buy, or sell, especially in network industries and sectors featuring public services.

The exclusivity of the EU commercial policy implies a complex set of advantages and drawback for the Central European region. The EU has an incomparably strong bargaining position in international economic relations and Member States have a much better opportunity to protect their interests in the framework of an EU policy than on an individual basis. The fact that the need for an exclusive EU competence has never been questioned since establishing the EU highlights the unquestionable preponderance of its merits over the potential drawbacks. Nonetheless, the various regions of the EU, including Central Europe, have their own traits and interests, and it is important that the EU policy be attentive to these. In the internal market, lower labor costs have been a competitive advantage for Central Europe, and the region has benefitted considerably from the relocation of work-intensive production operations in the automotive industry. FTAs with low-cost countries, which make the influx of goods, including interim goods, from these countries much easier, may interfere with this. Furthermore, when it comes to trade with non-EU countries, there is a tension between the uniformity required by the exclusive EU competence and the priorities of Central European countries, for instance, with respect to former Eastern Bloc countries. While the exclusive commercial policy requires uniformity, the economic interests and preferences of the Member States may be different. Nonetheless, Member States still enjoy a considerable playing field notwithstanding the exclusive EU competence. Moreover, the channeling-in of the interests of a region in EU commercial policy is expected to raise no difficulties if these do not conflict with the interests of another region.

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| Chapter 5 |

Central European Countries' Competition Law Practice Contribution to the Development of EU Competition Law

András TÓTH

ABSTRACT

The case law of the Central European EU Member States has made important contributions to the development of EU competition law through preliminary rulings. First, restriction of competition 'by object' is an open category since the European Court of Justice's judgment in the Hungarian insurance cartel: the competition authority or the court may also declare market conduct as anti-competitive by object if it is not yet characterized as having an anti-competitive object. Second, preliminary ruling questions referred from Central European countries have given the EU Court of Justice an opportunity to clarify the relationship between national and EU competition law.

KEYWORDS

EU competition law, restriction competition by object, *ne bis in idem*, parallel applicability of EU and national competition law.

1. Introduction

This chapter aims to demonstrate how the Central European countries (i.e., the Czech Republic, Hungary, Poland, Romania, and Slovakia) competition law practice contributed to development of the EU competition law. The methodology of the research is based on the preliminary ruling judgments of the European Court of Justice (EUCJ) referred from the above-mentioned countries in competition law cases since 2004.

Due to these methodological reasons, I do not describe in this study such competition law cases that can only be traced back to a single Member State's practice in the region. For example, the need for the regulation of cross-border enforcement of Member State competition law decisions imposing fines was highlighted by a Hungarian case.[1] Another example is the *Tibor–Trans* judgment of the EUCJ,[2] according to

1 Judgment of the CJEU (Second Chamber) of 28 July 2016, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Siemens Aktiengesellschaft Österreich, Case C-102/15, ECLI:EU:C:2016:607.
2 Judgment of the CJEU (Sixth Chamber) of 29 July 2019, Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF TRUCKS N.V., Case C-451/18, ECLI:EU:C:2019:635.

Tóth, A. (2022) 'Central European Countries' Competition Law Practice Contribution to the Development of EU Competition Law' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 103–118. https://doi.org/10.54171/2022.aojb.poeucep_5

which indirect buyers can bring damages action against any member of an EU-wide cartel in their own Member State.

Two major areas can be identified where the contribution of Central European countries' competition law practices have contributed to the development of European competition law. One is the restriction of competition 'by object' and the other is the relationship between national and European competition law.

2. Central European Competition Law Practices' Contribution to the Development of Art. 101 TFEU

2.1. Extension of the Category of Restriction 'By Object'

Over the last decade, as competition law compliance in the field of competition restrictions has strengthened, competition authorities have turned to competition law investigations of practices that are less clear-cut. However, they have focused their investigations on practices in markets with more complex and sophisticated operations, which are not characterized by *prima facie* practices. The competition authorities are interested in establishing restriction 'by object', but the Court of Justice has consistently held that this category must be interpreted restrictively: 'otherwise the commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.'[3] The Court of Justice has therefore not been reluctant about the possibility of extending the category of restrictions of competition by object and has sought to provide guidance on this, even if the interpretation of these restrictions has been the subject of much uncertainty over the last ten years.

2.1.1. Hungarian Allianz Case: Beginning of a New Age?

In its decision of December 21, 2006, in Case No. Vj-51/2005, the Hungarian Competition Authority (Gazdasági Versenyhivatal, or GVH) established that Allianz and Generali had infringed Hungarian competition law[4] by linking hourly repair fees to the performance achieved (undertaken) in the sale of their insurance policies. According to the decision, this behavior was considered a restriction of competition by object. Although the original case was conducted based on Hungarian competition law provisions only, the EU Court of Justice accepted the legal interpretation of the Supreme Court of Justice due to the similarity of the Hungarian and the EU

3 Judgment of the Court (First Chamber), 14 March 2013, Allianz Hungária Biztosító Zrt. and Others v. Hungarian Competition Authority (Gazdasági Versenyhivatal), Case C-32/11, ECLI:EU:C:2013:160 (hereinafter: CJEU Judgment No. C-32/11, Hungarian Competition Authority v. Allianz Hungária Biztosító and Others).

4 The GVH found that EU competition law was not applicable due to the limited cross-border trade in insurance products. Hungarian Competition Authority Decision No VJ/51-184/2005, para. 482.

provisions,[5] which concerned the assessment of vertical agreements as a restriction of competition by object. The conduct subject to the proceeding was in fact a vertical restraint of competition, which according to the case law was not considered a restriction by object even at the time of the GVH's decision.[6]

The judgment suggested that an extension of the categories of restriction by object could be possible by means of an effect-based analysis, which in turn has called into question the existence of separate restrictions of competition by effect.[7] As Advocate General Wahl stated in his opinion in CB v. Commission one year after the *Allianz* case, "It is clear that the case law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Art. 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anticompetitive object and the analysis of the effects on competition of agreements between undertakings."[8]

2.1.2. Consolidation after the Hungarian Allianz Case

More than a year after the judgment of the European Court of Justice in the *Allianz* case, the Court of Justice made its decision in the Cartes Bancaires (CB) case,[9] which appeared to have dispelled the above concerns raised by the Allianz decision, both on the question of extending the categories of restriction by object and on the question of effect-based analysis. Indeed, the European Court of Justice ruled that the restriction

5 In Case C-32/11 Allianz Hungária Biztosító Zrt. and Others v. Hungarian Competition Authority, the Curia ruled on the relationship between Art. 101 TFEU and Art. 11 of the Hungarian Competition Act as follows: "The Supreme Court notes, first of all, that the wording of Art. 11(1) of the Competition law is almost identical to that of Art. 101(1) TFEU and that the interpretation of Art. 11 of the Competition law, which will ultimately be adopted with respect to the agreements at issue, will in the future also have an impact on the interpretation of Art. 101 TFEU in this Member State. This Court points out that there is a clear interest in having a uniform interpretation of the provisions and concepts of European Union law." Or see also Judgment of the CJEU (Fourth Chamber) of 21 July 2016, SIA 'VM Remonts' (formerly SIA' DIV un KO') and Others v. Konkurences padome, Case C-542/14, ECLI:EU:C:2016:578. According to the settled case law of the Court, "it is clearly in the interest of the European Union that, to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply" (see in particular the judgment of 14 March 2013 in Allianz Hungária Biztosító and Others, C 32/11, EU:C:2013:160, 20, para. 18; Judgment of the CJEU (First Chamber), 4 December 2014, FNV. Kunsten Informatie en Media v. Staat der Nederlanden, Case C 413/13, EU:C:2014:2411, para. 18; Judgment of the CJEU (Fourth Chamber) of 26 November 2015, SIA "Maxima Latvija" v. Konkurences padome, Case C 345/14, EU:C:2015:784, p. 12).

6 For more details see Nagy, 2021, p. 157.

7 See Dömötörfy, Kiss and Firniksz, 2019, p. 32.

8 Opinion of Advocate General Bobek delivered on 5 September 2019, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Budapest Bank Nyrt., Case C-228/18, ECLI:EU:C:2019:678, para. 46 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CC0228&from=EN.

9 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204.

of competition by object must be interpreted restrictively.[10] Furthermore, it can be inferred from the judgment of the European Court of Justice that under the 'sufficient degree of harm' test set out in the Allianz case,[11] circumstances to be assessed[12] are not relevant to the effect-based analysis, but to the assessment of whether the agreement in question, inherently, pursues an objective by its very nature. (This conclusion was later also confirmed during the *Generics*[13] and *MIF* cases.[14]) Since the Court of Justice referred to the *Allianz* case in this context during the CB case, it is worth revisiting the Court's findings in the *Allianz* case in this respect. Accordingly, there must be a sufficient degree of harm *in terms of competition* (highlighted by me)[15] to establish a restriction of competition by object without an effect-based analysis. In other words, a restrictive interpretation of restrictions of competition by object means that it must be possible to show a *prima facie* adverse effect on competition.[16] Also in the Allianz case, the European Court of Justice emphasised that taking into account the economic and legal context in which the vertical agreements at issue in the main proceedings form a part—i.e., *the competition in the automobile insurance market* (emphasis mine)—are sufficiently harmful that they amount to a 'restriction of competition by object.'[17] This means that for qualifying a restriction of competition as 'by object' it presupposes that the conduct in question is placed in the appropriate market context and it is established that, in light of experience, competition interpreted in this way reveals a sufficient degree of harm.[18] In this context, the European Court of Justice emphasizes in the CB case that the question of defining the relevant market cannot be confused with the question of the market context to be considered when determining whether

10 Ibid. para. 58.
11 Ibid. para. 53. "According to the case law of the Court, to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' in the meaning of Art. 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question."
12 Regard must be had to the content of its provisions, its objectives, and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.
13 Judgment of the CJEU (Fourth Chamber) of 30 January 2020, Generics (UK) Ltd and Others v. Competition and Markets Authority, Case C-307/18, ECLI:EU:C:2020:52, para. 104.
14 Judgment of the CJEU (Fifth Chamber) of 2 April 2020, Hungarian Competition Authority (Gazdasági Versenyhivatal) v. Budapest Bank Nyrt. and Others,Case C-228/18, ECLI:EU:C:2020:265, para. 76.
15 CJEU Judgment No. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 34.
16 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204.
17 CJEU Judgment No. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 46.
18 Judgment of the CJEU (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v. European Commission, Case C-67/13 P, ECLI:EU:C:2014:2204, para. 51.

conduct constitutes a restriction by object, since it may also take place on a related market other than the relevant market.[19] In other words, it appears that the decision in the CB case corrects the decision in the *Allianz* case in that the categories of restriction by object cannot be extended, and the conducts under investigation must form part of a market context in which a substantive restriction of competition can be established under the classic categories (i.e., price-fixing, market-sharing, output restriction). In other words, circumstances that appeared to be an effects analysis in the *Allianz* case are in fact the appropriate market context for establishing restriction by object (and thus the applicable standard of proof). This was later explicitly stated by the European Court of Justice in the Generics case.[20]

Based on the CB case (one year later), the European Court of Justice also pointed out in the Romanian *ING Pensii* case the importance of placing the restriction of competition into appropriate market context to determine if the restriction is can be regarded as 'by object':

> "The purpose of the bilateral agreements to share duplications was to affiliate the persons concerned to a limited group of operators, contrary to the statutory rules applicable, and thus to the detriment of other companies operating in the economic sector concerned in the main proceedings."[21]

The Court concluded in this case that due to the fact that the agreement concerned constitute agreements with an anti-competitive object, the number of clients affected by such an agreement is irrelevant for the purpose of assessing the requirement regarding the restriction of competition in the internal market.[22]

2.1.3. Hungarian MIF *Case: The New Age Does Exist*

Following the decision on the CB case, which appeared to be a correction to the Allianz case, the possibility of expanding the categories of restriction by object seemed to be taken off the agenda.

After such antecedents, the other Hungarian case was ruled upon by the European Court of Justice on April 2, 2020, also in the context of a preliminary ruling and again in relation to a complex market. In its judgment in the Hungarian *MIF* case, the European Court of Justice maintained that the category of restriction by object must be interpreted restrictively[23] and that the conduct in question must be placed in

19 Ibid. paras. 77–78.

20 Judgment of the CJEU (Fourth Chamber) of 30 January 2020, Generics (UK) Ltd and Others v. Competition and Markets Authority, Case C-307/18 , ECLI:EU:C:2020:52, para. 104.

21 Judgment of the CJEU (Second Chamber) of 16 July 2015, ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v. Consiliul Concurenței, Case C-172/14, ECLI:EU:C:2015:484, para. 37.

22 Ibid. para. 56.

23 Judgment of the CJEU (Fifth Chamber) of 2 April 2020, Hungarian Competition Authority v. Budapest Bank Nyrt. and Others, Case C-228/18, ECLI:EU:C:2020:265, para. 54.

a market context in which it must be able to demonstrate that there was a restriction of competition with a sufficient degree of harm.[24] At the same time, contrary to what was suggested by previous judgments, the European Court of Justice has made clear what was already stated in the first Hungarian case:

> "It is likewise apparent from the wording of Art. 101(1)(a) TFEU and, more specifically, from the words 'in particular' that, as has been stated in para. 54 of the present judgment, the types of agreements mentioned in Art. 101(1) TFEU do not form an exhaustive list of prohibited collusion, since other types of agreements may also be classified as restrictions 'by object' where such a classification is made in accordance with the requirements stemming from the case law of the Court recalled in paras. 33 to 39, 47 and 51 to 55 of the present judgment. Accordingly, nor can it be ruled out from the outset that an agreement such as the MIF Agreement may be classified as a restriction 'by object' in that it neutralized one aspect of competition between two card payment systems."[25]

Thus, in the MIF case, the Court of Justice made it clear that a practice either succeeds in falling in the restriction by object category[26] or, in the absence of this, a category extension analysis must be carried out, i.e., it must be possible to show that the new type of behavior is restriction by object because it reaches the experiential degree of harm of the classical type.[27] It is therefore no coincidence that the extension of the restriction by object category and the assessment of behaviors that cannot be clearly identified as restriction by object are the same test. This was confirmed by the European Court of Justice in the MIF case.[28] In the MIF case, the Court also confirmed what it had previously ruled in the *Generics* case, that an effect-based analysis is not necessary to classify an agreement as a restriction of competition by object.[29] In any event, there must be sufficiently solid and reliable experience to conclude that the agreement is by its very nature harmful to the proper functioning

24 Ibid. paras. 35, 51, 52, 54 and 80.
25 Ibid. para. 63.
26 Ibid. para. 62: 'MIF Agreement may be regarded as falling in the scope of indirect price fixing in that it indirectly determined the service charges.'
27 Ibid. para. 63: 'In addition, it is likewise apparent from the wording of Art. 101(1)(a) TFEU and, more specifically, from the words 'in particular' that, as has been stated in para. 54 of the present judgment, the types of agreements mentioned in Art. 101(1) TFEU do not form an exhaustive list of prohibited collusion, since other types of agreements may also be classified as restrictions 'by object' where such a classification is made in accordance with the requirements stemming from the case law of the Court recalled in paras. 33 to 39, 47 and 51 to 55 of the present judgment. Accordingly, nor can it be ruled out from the outset that an agreement such as the MIF Agreement may be classified as a restriction 'by object' in that it neutralised one aspect of competition between two card payment systems.'
28 Ibid. paras. 51, 52 and 59.
29 Ibid. para. 76.

of competition.[30] Based on the above, there is therefore sufficient experience with the categories already known as restriction by object.[31] With non-existent types of market behavior, this experience must be gained from an examination of whether the conduct in question is, by its nature, sufficiently harmful to the proper functioning of competition.[32]

2.2. Clarification of Further Aspects of Cartel Infringements

In a Slovak case, the Court had the opportunity to clarify several aspects of cartel infringements.[33] The EUCJ confirmed that it is for public authorities and not private undertakings to ensure compliance with statutory requirements.[34] Therefore, there is no relevance to the question of whether the agreement constitutes an 'by object' infringement if it is apparent that the agreement entered into by the specific banks concerned had as its object the restriction of competition, and that none of the banks had challenged the legality of their competitor's business before they were investigated in the case.[35] The EUCJ clarified that the application of Art. 101 TFEU does not require to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking is sufficient.[36]

The EUCJ also confirmed that the application of Art. 101(3) TFEU requires that the four conditions decided in that provision must all be satisfied and proved.[37] In this regard, the EUCJ stated that the agreement at issue does not appear to meet the third condition (indispensability), since the proportional reaction would have been to lodge a complaint with the competent authorities and not to take it upon themselves to eliminate the competing undertaking from the market.[38]

3. Relationship between National and EU Competition Law

Since 2004, Romanian, Hungarian, Czech, Polish, and Slovak cases have given the EU Court of Justice the opportunity in several preliminary ruling procedures to clarify in detail the relationship between Member States and EU competition law.

30 Ibid.
31 Ibid. para. 36.
32 Ibid. para. 79.
33 Judgment of the CJEU (Tenth Chamber) 7 February 2013, Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s, Case C-68/12, ECLI:EU:C:2013:71.
34 Ibid. para. 20.
35 Ibid. paras. 19 and 21.
36 Ibid. para. 25.
37 Ibid. para. 31.
38 Ibid. para. 35.

3.1. Parallel Application of National and European Competition Law

The European Court of Justice in the Czech *Toshiba*[39] and Slovak *Telekom*[40] cases examined in detail the issue of the parallel application of European competition law by the European Commission and the Member States competition authorities. In this regard, Art. 11 of Regulation 1/2003 states, in the first sentence of para. 6, the following rule: 'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Arts. 81 [EC] and 82 [EC].'

3.1.1. Overlap Shall Relate to the Same Alleged Infringements

According to the EUCJ the national competition authorities are relieved of their competence to apply Arts. 101 and 102 TFEU when the Commission initiates proceedings for the purposes of adopting a decision finding an infringement of those provisions insofar as that formal act relates to the same alleged infringements of Arts. 101 and 102 TFEU, committed by the same undertaking on the same product market and the same geographical market or during the same period as those concerned by the proceeding previously brought by those authorities.[41]

3.1.2. Loss of Competence Does Not Extend to Reviewing the National Court

The EUCJ emphasized in its judgment in the Slovak *Telekom* case that

> "The 'loss of competence' provided for in Art. 11(6) of Regulation 1/2003 does not extend to courts of the Member States insofar as they act as review courts in respect of those decisions. By contrast, it applies in situations where, pursuant to the applicable national law, an authority brings an action before a judicial authority that is separate from the prosecuting authority. In such a situation and where the conditions of Art. 11(6) of Regulation 1/2003 are met, that authority must withdraw its claim before the judicial authority and bring the national proceedings to an end."[42]

3.1.3. National Competition Law No Longer Applies after the Commission Initiates Proceedings

The EUCJ added that the national competition authorities can no longer apply EU competition law alone, but must also apply part of their domestic competition law once the commission initiates proceedings for the adoption of a decision under Chapter

39 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72.
40 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139.
41 Ibid. para. 38.
42 Ibid. para. 24.

III of Regulation 1/2003.[43] The reason is that Art. 11(6) of Regulation 1/2003 is closely connected in terms of its content with Art. 3(1)[44] of the same regulation.[45] According to EUCJ the parts of national competition law which remain applicable are mentioned in Art. 3(2) of Regulation 1/2003 which states that the national competition authorities may implement stricter national laws which prohibit or sanction 'unilateral conduct engaged in by undertakings.'[46] However, the national competition authority is not authorized to apply Art. 101 TFEU or corresponding national law, where the commission has opened a proceeding for the adoption of a decision in application of Chapter III of that regulation.[47]

Although the Czech competition authority opened proceedings in the specific case after the commission had informed it about the initiation of its own proceedings, the commission did not investigate the cartel's activities in the Czech Republic because it had been operating mostly before May 1, 2004 (when the Czech Republic acceded to the EU). In this case, therefore, the prohibition of the parallel application of national law—in the absence of overlap over time—has not arisen. In addition, Regulation 1/2003 prohibiting parallel proceedings was not applicable for the period before its entry into force (the date of accession of the Czech Republic to the EU).[48]

3.1.4. Commission's Procedures Do Not Permanently Remove the National Competition Authorities' Power

The EUCJ stated that commission's procedures do not permanently and definitively remove the national competition authorities' power to apply national legislation on competition matters.[49] According to the EUCJ, the power of the national competition authorities is restored once the proceeding initiated by the commission is concluded.[50] Of course, by virtue of Art. 16(2) of Regulation 1/2003, where the competition authorities of the Member States' rule on agreements, decisions, or practices falling

43 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 74.
44 'Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices in the meaning of Art. 81(1) [EC] which may affect trade between Member States in the meaning of that provision, they shall also apply Art. 81 [EC] to such agreements, decisions or concerted practices.' See: Art. 3(1) of Regulation No. 1/2003.
45 Judgment of the CJEU (Grand Chamber) 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 74.
46 Ibid. para. 76.
47 Ibid. para. 78; see in this regard Art. 3(1) of Regulation 1/2003: 'The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition in the meaning of Art. 81(1) [EC], or which fulfil the conditions of Art. 81(3) [EC] which are covered by a Regulation for the application of Art. 81(3) [EC]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.'
48 Ibid. para. 67.
49 Ibid. para. 79.
50 Ibid. para. 80.

in Art. 101 TFEU or 102 TFEU, which already form the subject matter of a commission decision, they cannot take decisions which would contradict the decision adopted by the commission. The EUCJ emphasized that the same rules must apply *a fortiori* where the national competition authorities intend to apply national competition law.[51]

3.1.5. The Ne bis in idem Principle

It is apparent from the Court's settled case law that the principle *ne bis in idem* must be observed in proceedings that may lead to the imposition of fines under competition law.[52] The EUCJ held that the *ne bis in idem* principle precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalized or declared not liable by an earlier decision that can no longer be challenged.[53] It follows that the application of the principle *ne bis in idem* in proceedings under competition law is subject to a twofold condition: first, that there is a prior definitive decision (the *'bis'* condition) and, second, that the prior decision and the subsequent proceedings or decisions concern the same anticompetitive conduct (the *'idem'* condition).[54] According to EUCJ, the facts, the offender and the legal interest protected must be the same in the two cases.[55] In the Czech *Toshiba* case, one of the conditions thus decided—identity of the fact—was lacking because the anti-competitive effects of the cartel occurred in the Czech Republic prior to its accession to the European Union, which were not penalized by the Commission.[56] In the Slovak *Telekom* case, the principle *ne bis in idem* was not applicable since the sub-condition that the facts must be the same was not met and the '*idem*' condition was consequently not satisfied.[57]

In 2019, a Polish case raised the issue of whether the principle of *ne bis in idem* enshrined in Art. 50 of the Charter must be interpreted as precluding a national competition authority from finding an undertaking in a single decision for an infringement of national competition law and of Art. 102 TFEU. According to the EUCJ the rationale behind the principle of *ne bis in idem* that, as a corollary to the

51 Ibid. para. 86.

52 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 41.

53 Judgment of the CJEU (Fourth Chamber) of 3 April 2019, Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283, para. 28.

54 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 42.

55 Judgment of the CJEU (Fifth Chamber) of 7 January 2004, Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi—Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir—Cementerie del Tirreno SpA (C-219/00 P) v. Commission of the European Communities, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. ECLI:EU:C:2004:6, para. 338.

56 Judgment of the CJEU (Grand Chamber), 14 February 2012, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, Case C-17/10, ECLI:EU:C:2012:72, para. 103.

57 Judgment of the CJEU (Eighth Chamber) of 25 February 2021, Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky, Case C 857/19, ECLI:EU:C:2021:139, para. 45.

principle of *res judicata*, that principle aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he or she will not be tried again for the same offence.[58] The EUCJ stated that *ne bis in idem* aims to prevent the repetition of prosecution leading to a criminal sentence unrelated to a situation in which national and EU competition law are applied in parallel in a single decision (due to the lack of the '*bis*' condition).[59] However, where the national competition authority imposes two fines in a single decision, the national competition authority must ensure that, taken together, the fines are proportionate to the nature of the infringement.[60]

3.2. Commission's Primary Roles in the Consistent Application of EU Competition Law

Following a Polish preliminary ruling, the Court had the opportunity to clarify the importance of the Commission's primary role for the proper functioning of the EU competition law regime.

According to the Art. 5 of the 1/2003 Regulation, the power of the national competition authority is limited to the adoption of a decision stating that that are no grounds for action. According to Art. 10 of the 1/2003 Regulation, the Commission may decide that Arts. 101 TFEU and 102 TFEU are not applicable. Recital 14 in to the 1/2003 Regulation states that the Commission may adopt such a decision of a declaratory nature 'in exceptional cases.' The purpose of such action, according to that recital, is 'to [clarify] the law and ensur[e] its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case law and administrative practice.'[61] The EUCJ emphasized that "empowerment of national competition authorities to take decisions stating that there has been no breach of Art. 102 TFEU would call into question the system of cooperation established by the regulation and would undermine the power of the Commission."[62] According to EUCJ,

> "Such a 'negative' decision on the merits would risk undermining the uniform application of Arts. 101 TFEU and 102 TFEU, which is one of the objectives of the regulation, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law."[63]

58 Judgment of the CJEU (Fourth Chamber) of 3 April 2019, Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów, Case C-617/17, ECLI:EU:C:2019:283, para. 33.
59 Ibid. para. 34.
60 Ibid. paras. 38–39.
61 Recital 14. of Regulation No. 1/2003.
62 Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o, devenue Netia SA. ECLI:EU:C:2011:270, para. 27.
63 Ibid. para. 28.

Art. 12 para. (1) of Directive 1/2019/EU also confirmed that national competition authorities' decision to make commitments offered by undertakings or associations of undertakings binding, shall conclude that there are no longer grounds for action by the national competition authority concerned.

3.3. Application of European Competition Rules in National Competition Law Procedures

In the Hungarian *Allianz* case, the EU Court of Justice confirmed that it has jurisdiction to give preliminary rulings on questions concerning European Union law in situations where the facts of the cases being considered by the national courts were outside the direct scope of European Union law, but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law.[64] The reason behind that it is clearly in the interest of the European Union that, to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

The Court has already pointed out that a Commission notice, such as the *de minimis* notice, is not binding on the Member States.[65] The EUCJ in a Romanian case stated that determination of the limitation rules for the imposition of penalties by national competition authorities is a matter for Member States, subject to compliance with the principles of equivalence and effectiveness.[66]

3.4. Effective Application of EU Competition Law in the Member States

According to Art. 4(3) TEU, Member States are obliged not to detract, by means of national legislation, from the full and uniform application of EU law; nor may they introduce or maintain in force measures that may render ineffective the competition rules applicable to undertakings.[67] However, according to the EUCJ it is compatible with EU law to lay down reasonable time limits for the imposition of penalties by national competition authorities in the interests of legal certainty, which protects both the undertakings concerned and those authorities.[68] EUCJ stated in the Romanian *Whiteland* case that national rules laying down limitation periods must also ensure the effective and efficient application of Arts. 101 and 102 TFEU, to safeguard the public interest in preventing the operation of the internal

64 CJEU judgment no. C-32/11 Hungarian Competition Authority v. Allianz Hungária Biztosító and Others, para. 20.

65 Judgment of the CJEU (Second Chamber) 13 December 2012, Expedia Inc. v. Autorité de la concurrence and Others, Case C-226/11, ECLI:EU:C:2012:795, para. 29.

66 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 37.

67 Judgment of the CJEU (Second Chamber) of 19 March 1992, Criminal proceedings against José António Batista Morais, Case C-60/91, EU:C:1992:140, para. 11.

68 Judgment of the CJEU (First Chamber) of 17 November 2016, Stadt Wiener Neustadt v. Niederösterreichische Landesregierung, Case C-348/15, EU:C:2016:882, para. 41.

market being distorted by agreements or practices harmful to competition.[69] To determine whether national rules on limitation strike such a balance between legal certainty and effective and efficient application of Arts. 101 and 102 TFEU, all elements of those rules must be taken into consideration which may include, *inter alia*: the date from which the limitation period begins to run, the duration of that period, and the rules for suspending or interrupting it, or specific features of competition law cases and of the fact that those cases require, in principle, a complex factual and economic analysis.[70]

Therefore, according to EUCJ the national legislation, totally prohibiting the limitation period from being interrupted by action taken subsequently during the investigation, appears likely to compromise the effective application of the rules of EU competition law by national competition authorities, in that interpretation could present a systemic risk that acts constituting infringements of that law may go unpunished.[71] The EUCJ stated that EU competition law cases require, in principle, a complex factual and economic analysis. Thus, in a significant number of cases involving a high degree of complexity, such subsequent action, which necessarily extends the duration of the proceedings, might prove necessary.[72]

In this context, it should be noted that the Hungarian Supreme Court in 2018 in its judgment[73] in the concrete cartel case, took the view that the GVH could not involve a cartelist into ongoing proceedings if in the time of its involvement the five years passed since the end of the infringement, even if the proceedings discovered the cartel had already been initiated in the five years from the end of the infringement. In my view, this interpretation of limitation is also too strict and does not consider the complex factual and economic analysis of competition law cases, because, given the secret nature of cartels, it is highly likely that other members of the cartel discovered after the initiation of the preceding during the subsequent inquiry. This strict interpretation according to which, the initiation of proceedings would not interrupt the limitation period related to cartels who are not yet involved in the proceeding in the time of its initiation, could present a systemic risk that acts constituting infringements of that law may go unpunished.

69 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 49.
70 Judgment of the CJEU (Second Chamber) of 28 March 2019, Cogeco Communications Inc v. Sport TV. Portugal SA and Others, Case C-637/17, EU:C:2019:263, para. 46.
71 Judgment of the CJEU (Second Chamber) of 21 January 2021, Consiliul Concurenței and Whiteland Import Export SRL, Case C-308/19, ECLI:EU:C:2021:47, para. 56.
72 Ibid.
73 Decision of the Supreme Court of Hungary, No. Kfv.II.37.364/2017/26, 28 February 2018.

4. Summary

The case law of the Central European EU Member States has made important contributions to the development of EU competition law through preliminary rulings in two fields.

First, the most important development is the clarification of the category of 'by object' restriction of competition, which contributed to the EU competition law in one of the most important competition law issues at the EU level due to the Hungarian cases.

Second, preliminary ruling questions referred from Central European countries have provided an opportunity for the EU Court of Justice to clarify the relationship between national and EU competition law. In this context, it should be emphasized, inter alia, that according to EUCJ, the national competition authorities can no longer apply not only EU competition law but also their domestic competition law once the Commission initiates proceedings. The EUCJ also stated that Commissions' procedures do not permanently and definitively remove the national competition authorities' power to apply national legislation on competition matters. According to the EUCJ the power of the national competition authorities is restored once the proceeding initiated by the Commission is concluded. The EUCJ stated that *ne bis in idem* bears no relation to the situation in which national and EU competition law are applied in parallel in a single decision (due to the lack of the *'bis'* condition). EUCJ emphasized in the Romanian *Whiteland* case that national rules laying down limitation periods must also ensure the effective and efficient application of Arts. 101 and 102 TFEU, to safeguard the public interest in preventing the operation of the internal market being distorted by agreements or practices harmful to competition.

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Judgment of the CJEU (Second Chamber), 13 December 2012, Expedia Inc. v Autorité de la concurrence and Others, Case C-226/11, ECLI:EU:C:2012:795.

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| Chapter 6 |

EU Public Procurement Policy

Ştefan DEACONU and Andrei LUPU

ABSTRACT

A single European market cannot rule out the participation of the State, through public procurement, among other private actors on the market. However, specific rules have been imposed regarding the State's actions, aiming to secure a free market and to prevent protectionism. The 2014 new set of European directives have updated this approach, setting transparency, equal treatment, and open competition as the main objectives of the public procurement procedures. The CEECs, based on their common history regarding centralized economies, require a special approach when it comes to the state's intervention on the market. Therefore, the current study aims to analyze a series of particularities regarding the transposition of the 2004 and 2014 European directives on public procurement in the CEECs. Also, specific recent essential events with a direct impact regarding public procurement will be examined, such as the COVID-19 pandemic or the implementation of the Recovery and Resilience Facility (RRF).

KEYWORDS

public procurement policy, EU public procurement agreements, arbitrability, price adjustment, emergency public procurement

1. The Evolution of Harmonized Public Procurement Regulations in the EU

The economic crisis that erupted in 2008 gave birth to the awareness in the European Union of the need for common policies in the economic fields, beyond the specific notions of seeking a single market. From the need for common budgetary rules—such as those adopted by the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union, signed on March 2, 2012, by Member States' representatives—to the assumption by the European Central Bank of a key role in financial markets, there has been a tendency to centralize or harmonize measures that may have an impact on the market. The Europe 2020 strategy for smart, sustainable, and inclusive growth,[1] adopted by the European Commission in 2010, mentions public procurement among the areas that should have a central role in economic recovery.

1 Communication from the European Commission (EC), Europe 2020, A strategy for smart, sustainable and inclusive growth, COM (2010), 2020 final, Brussels, 3.3.2010.

Deaconu, Ş., Lupu, A. (2022) 'EU Public Procurement Policy' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 119–138. https://doi.org/10.54171/2022.aojb.poeucep_6

Subsequently, this area was detailed in a Commission Communication entitled 'Transforming public procurement so that it works in and for Europe'[2] which expressly established the 'strategic dimension of public procurement' in the European Union.

However, to reach this advanced stage, the construction of Europe has come a long way toward a greater 'centralization' of public procurement policies. A first step in this direction was taken from the first decade of existence of the European Economic Community, as the Commission adopted on November, 7, 1966, a directive[3] aimed at removing obstacles to the acquisition by public entities of products supplied by economic operators from other Member States—as was the case, for example, with the conditions relating to the national origin of goods acquired by a State. The second step in this direction followed shortly, but a generalization of the previous rules was achieved. Thus, on December 17, 1969, the Commission adopted a new directive[4] expressly prohibiting a wide range of forms of discrimination which a Member State might impose in a public procurement procedure regarding goods from other Member States. In a relatively short time, the prohibitions on discrimination on the grounds of origin in public procurement procedures are extended to the field of procurement of services. This time, however, we are no longer talking about a delegated regulatory act, but about a Council directive,[5] which requires the removal of restrictions at national level in the field of public works procurement.

The first European regulations in this field were aimed at removing the restrictions that Member States could have imposed to circumvent the principle of free movement of goods or services in the case of public procurement procedures. Basically, the way of regulating public procurement could be a non-tariff obstacle to the free movement of goods and services.[6] A new stage, however, opened in 1976, when a directive aimed at coordinating the procedures for assigning public procurement contracts[7] was adopted. This time it was no longer just a matter of ensuring that all economic actors in the Member States have access to public procurement procedures in other Member States, but the beginning of an effort to create a common market, an ideal example of which is the obligation to publish at the community level, notices on procedures

2 Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement work in and for Europe, COM (2017) 572 final. Brussels, 16 October 2017.

3 Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Arts. 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability, OJ 220, 30.11.1966.

4 Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, OJ L 13, 19.1.1970.

5 Council Directive 71/304/EEC concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ L 185, 16.8.1971.

6 Commission of the European Communities, 1988.

7 Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ L 13, 15.1.1977.

for the assignment of significant contracts. This led to what was considered the first *public common market* in Europe, in which demand always comes from the state and its representatives.[8] Since 1992, the regulation has been diversified with the adoption of three separate regulations, each for a particular type of public procurement: procurement of services[9] and procurement of works,[10] both complemented by a set of common rules on public procurement, applicable to procurement of goods.[11]

Subsequently, in 2004, a directive was adopted which could represent the framework legislation in the field, referring to the procurement of works, goods, and services,[12] as well as a first directive on special categories of procurement, such as those in the energy, transportation, or postal services,[13] These directives proved a special relevance rather from the contracting authority perspective, a classical contracting authority or public service provider. The subsequent adoption of the 2004 set of directives represents an important step for CEECs: the need for transposition at national level for the first time after they have become subject to the obligation to transpose unitary EU law regarding public procurement. The way in which this transposition was made will be analyzed in the following, together with a more extensive analysis of the current set of regulations in the field, adopted in 2014.

2. CEECs and the Application of the 2004 and 2014 Directives regarding Public Procurement

Most CEECs joined the European Union in three successive waves: 2004 (Poland, Czech Republic, Hungary, Slovakia, Slovenia, Estonia, Lithuania, and Latvia), 2007 (Bulgaria and Romania) and 2013 (Croatia). In all these states two factors can be identified which have a relevant impact on the transposition of European legislation

8 Bovis, 2016, p. X.
9 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992.
10 Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L. 199, 9.8.1993.
11 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9. 8.1993., Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30. 12. 1989, pp. 33–35 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L76, 23. 3. 1992, pp. 14–20.
12 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30. 4. 2004, pp. 114–240.
13 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30. 4. 2004.

in the field of public procurement: i) the origin from the former communist bloc, based on an economy in which the state is the main economic actor, which attracted a rapid, often only partially consumed, process of transition to a market economy; and ii) accession to the European Union after the establishment of a stable framework for European policies, which had to be transposed in a limited timeframe.

Regarding the first constant, it must be emphasised that for the states of the former communist bloc, the simultaneous period of transition to a liberal democracy also involved a process of transformation from a centralized economy to an economy based on free market principles. In this process, most states started from an economic premise that could be considered simplistic: state intervention to generate demand in certain markets will also generate the viability of economic actors in those markets and can equally attract foreign economic actors outside the concerned countries. However, this model quickly proved non-functional. The first five years of the transition to a market economy brought about essential changes, but not in the expected sense: if centralized economies had previously generated an endemic shortage of goods, the entry of domestic goods or services into foreign markets, often more competitive than those of national origin, led to a lack of activity for many former state-owned enterprises and, implicitly, a lack of demand in the labor market. Such a situation has led to the need for state intervention, either through specific means of social security policies, which has generated inflation, or by trying to create demand for national economic actors and, implicitly, demand on the labor market.[14] It quickly became necessary to adapt to rules specific to market economies regarding the intervention of states in the economy, starting from the protection of economic relations between the state and private actors to the establishment of authorities with regulatory or supervisory powers in this field.[15] An ideal example in this sense is represented by the case of Romania. In an initial phase of regulation of public procurement procedures, Government Ordinance no. 14 of 1993 was adopted, a succinct act, comprising only 31 Arts., one-third of which were transitional rules or sanctions, while the responsibility for implementation fell to existing authorities—the Ministry of Finance and the Ministry of Public Works. However, the experience of the economic and financial crises of the 1990s, as well as the process of economic liberalization that led to restructuring, privatization or, in some cases, the disappearance of former economic actors in key sectors, led to the adoption of a new legislative framework. Thus, according to Government Ordinance no. 118 of August 31, 1999, and, subsequently, Government Ordinance no. 60 of April 25, 2001, public procurement procedures were much more detailed, being customized according to their subject matter and adding additional rules on mechanisms for challenging the results of public procedures.

Beyond the transition to a market economy, perhaps an even stronger impact on public procurement regulations has been generated by the constant determination among CEECs to join various international structures and, most importantly, the

14 Podkaminer, 2013, p. 11.
15 Vintrová, 2004, p. 521.

European Union. Thus, in just two years, ten of the former Member States of the communist bloc applied to join the community bloc.[16] Equally, the European structures understood the need to establish much clearer conditions on the reforms in the acceding states, the debate on which was initiated at the European Council in Madrid on December 15–16, 1995. On this occasion, the model to be applied to all CEECs was established: the signing of a pre-accession agreement setting out the path of reforms needed to align with European conditions, under the supervision of the European institutions and with the help of a package of financial aid provided by the Union. Perhaps, the most consistent condition for accession was the transposition of the *acquis communautaire*, consisting of over 20,000 regulations. The fact that these had to be transposed in a short period of time had an interesting effect on how they were transposed, especially in the case of directives. If previously the transposition of European rules in the Member States involved a complex process, which in many cases led to exemptions granted to certain states, in case of CEECs there was a 'non-critical implementation of policies related to the European Union'.[17] Of course, this approach was also reflected in the transposition of public procurement legislation. Similarly, from the perspective of the transposition of the European *acquis*, a constant has been observed between Member States, especially in regulatory areas related to the economy or state intervention in markets; the coexistence of new rules adopted in the accession process to different organizations, such as the European Union or the Council of Europe, or even imposed by other organizations in financing procedures, such as the World Bank or the International Monetary Fund, with old rules, adopted during socialist regimes, now obsolete.[18]

The case of European public procurement law is symbolic from this perspective. Thus, a large part of the states that have long been members of the European Union have gone through a complex process of transposing Directive 2004/18/EC. For example, France, Austria, Italy, or Portugal have adopted Public Procurement Codes, including complementary rules, not included in European provisions. In particular, France opted to transpose the provisions relating to appeal proceedings to the Code of Civil Procedure or the Administrative Justice Code. Differently, Austria has chosen to divide the regulations between the Code adopted at the federal level and a series of regulations at the level of the federal states. Other states, such as Germany or Sweden, have preferred to update existing legislation, subsequently continuing to amend national acts with the adoption of new European public procurement rules. In opposition to these models, the approach used by all ten of the CEECs that joined the European Union in 2004 and 2007 was the same: Directive 2004/18/EC was simply transposed into a national legal system, and the previous

16 Hungary (31 March 1994), Poland (5 April 1994), Romania (22 June 1995), Slovakia (27 June 1995), Latvia (13 October 1995), Estonia (24 November 1995), Lithuania (8 December 1995), Bulgaria (14 December 1995), the Czech Republic (17 January 1996) and Slovenia (10 June 1996).
17 Podkaminer, 2013, p. 11.
18 Toschkov, 2008, p. 382.

regulations has been repealed.[19] Such an approach describes, as we have shown above, the tendency to fully transpose European legislation, without a particular analysis at national level.

However, a varied situation at the level of CEECs is generated by the institutional framework established by them for the purpose of implementing the provisions on public procurement. Thus, European regulations establish certain tasks incumbent on the state in the process of assigning public procurement contracts, controlling compliance with their execution, or resolving disputes arising from legal relationships specific to public procurement contracts. In most states that joined the European Union before 2004, these tasks fall to institutions with other responsibilities, such as the ministries of finance or administration. However, in some countries, such as Belgium or France, specialized bodies have been set up to approve acts in the field of public procurement (Commission for Public Procurement, in Belgium), advising and monitoring the execution of public procurement contracts (Advisory Commission on Public Procurement, in France) or even control (Control Procurement Body, in Belgium). This model of organizing specialized public procurement institutions has been followed by most CEECs, with only a few states (Czech Republic, Estonia) retaining authority over institutions with broader powers, such as ministries. One example is Lithuania, where both an institution responsible for the centralized organization of public procurement (Central Project Management Authority) and a control body (Public Procurement Office) were established. Similarly, in other states, there are institutions whose main responsibility is monitoring and control (Public Procurement Authority, in Hungary; Procurement Monitoring Bureau, in Latvia; Office for Public Procurement, in Slovakia). In the case of Poland, the Public Procurement Office has an extensive set of tasks, from secondary regulation to the organization of procurement procedures or control of contract execution. In Romania, however, a mixed system was preferred: the National Authority for Regulating and Monitoring Public Procurement, with a general role and autonomous functioning, and the Unit for Coordinating and Verifying Public Procurement, which operates in the Ministry of Finance. However, starting 2015, both authorities were merged into the National Public Procurement Agency, by means of Government Emergency Ordinance No. 13 of May 20, 2015.[20] Interestingly, all these examples demonstrate a tendency of CEECs to create an autonomous system in the field of public procurement, even if the practice so far has not been uniform.

19 An exception is the case of Poland, where the pre-existing regulation, adopted in early 2004, has been significantly revised to transpose the new European regulations. The case was similar in Hungary: Act CXXIX of 2003 was adopted by the Hungarian Parliament on 22 December 2003 and entered into force on 1 May 2004. The act was comprehensively amended in 2006 due to the obligation to transpose the new EU public procurement directives. After the accession of Croatia, the Croatian Government also started the revision of the existing public procurement system and a new Public Procurement Act was adopted by the Croatian Parliament in July 2011.

20 Government Emergency Ordinance No. 13 of 20 May 2015 regarding the establishment, organization and functioning of the National Public Procurement Agency, Official Gazette No. 362 of 26 May 2015.

Ten years after the 2004 directives, a package of public procurement directives have been adopted, with the aim of replacing previous regulations in the field, one on the general framework of public procurement,[21] and one on special procurement, as is the case for gas, energy, transport or postal services.[22] To these was added a directive which undertook the unification of national legislation in the field of concession contracts.[23] The objective assumed by these normative acts, as it is described even in the preparatory documentation drafted by the European Commission,[24] was the simplification and flexibility of the previous regulatory regime. The whole process started with a consultation launched with the publication in January 2011 of the 'Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market'. Also, starting from the 'Europe 2020' strategy, mentioned above, the substantive regulations have assumed as objective, according to the preamble of Directive 2014/24/EU, 'a smart, ecological and inclusive growth', being an example for the transition of the European Union from the neo-liberal paradigm of the free market to that of a state that assumes an extensive number of social responsibilities.

Pertaining to the proposed simplification as an objective, the analysis of the text of the directives in fact reveals the existence of more detailed regulations. New criteria are thus emerging to encourage small and medium-sized enterprises to participate in public procurement procedures or conditions that protect competition. However, such an approach can be considered a 'simplification' if detailed European regulations limit the room for maneuver of states when transposing directives. As the doctrine has shown, such a result 'cannot be considered a problem in itself as long as greater legal certainty is created'[25] throughout the Union, the alternative being the creation of a lax system that would have allowed significant variations in Member States' regulations. Regarding the second objective, flexibility, the new regulation seems much better adapted. Thus, the procurement purposes are increased for which procedures based on negotiation or competitive dialogue can be organized, and in addition the 'innovation partnership' procedure is added. The risk associated with such regulations is, of course, the potential for discrimination by participants in procurement procedures by the authorities, as well as limiting transparency. Another aspect directly related to the flexibility of regulations is the greater openness to the adaptation of contracts during their execution, an aspect that will be addressed in the third part of this paper.

21 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, pp. 65–242.
22 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, pp. 243–374.
23 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, pp. 1–64.
24 See Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, Brussels, 20. December 2011, Explanatory Memorandum, Section 1.
25 Treumer, 2014, p. 11.

The extensive analysis of the current European legal framework and its implementation at national level has been the subject of an extensive set of exhaustive works.[26] Distinctly, however, we intend to discuss in this art. only a limited number of issues, which have generated interest especially from the perspective of recent events.

3. Various Approaches to Recent Cross-border Challenges

Even before the adoption of the new European legislative framework on public procurement, several recurring dilemmas were noted, with practice in different Member States varying. We will analyze only two cases: the possibility of using arbitration in disputes arising from public procurement contracts, as well as the possibility of adjusting prices in public procurement contracts in case of significant market fluctuations. Finally, we will discuss two other topical issues that required the formulation of responses from European Union bodies: the adaptation of public procurement procedures to emergencies, as was the case of the COVID-19 pandemic, and the first major program of pan-European investments—the Recovery and Resilience Facility.

3.1 Arbitrability of Public Procurement Agreements

Between the legal relations arising from public procurement contracts, dominated by rules specific to public law, and the arbitral tribunals, which form a private justice system, parallel to the public one, there seems to be an almost 'oxymoronic relationship'.[27] However, more and more states are beginning to show openness to the use of arbitration to resolve disputes in the field of public procurement, through an attempt to limit the public (or administrative) nature of these procedures.[28] The main reasons are easy to understand. First, public procurement procedures concern the provision of goods or services that the state needs with relative urgency, in which case the resolution of any disputes cannot wait for the completion of lengthy proceedings before the ordinary courts. Similarly, resolving such disputes requires a relatively high degree of specialization, which may encourage the parties to turn to arbitrators who have experience in public procurement, instead of ordinary courts, which are obliged to adjudicate various disputes. Also, an often-raised issue is that of confidentiality in relationships arising from public procurement contracts, confidentiality that can be better ensured through arbitration proceedings which are, by their nature, non-public.[29] Another significant advantage of using the arbitration procedure in public procurement disputes is the award of contracts to foreign entities, which can be settled before international arbitral tribunals, the practice of which is more easily accessible than that of national courts. Finally, public procurement contracts often

26 See, e.g., Caranta and Sanchez-Graeells, 2021; Calleja, 2015; Lichere, Caranta and Treumer, 2014.
27 Sandulli, 2013, p. 205.
28 Ilinca, 2015, p. 20.
29 Kyriaki, 2010.

require an understanding of the market and economic conditions, beyond the legal regime that governs such relationships, so that arbitrators in the private sector can show more flexibility.[30]

In the absence of express provisions at European level on the acceptance of arbitration as a means of resolving public procurement disputes, the option remained at the discretion of the Member States. In CEECs, arbitration legislation has evolved in the context of the transition to a market economy, in parallel with that of public procurement. Thus, they have in most cases been open to the encouragement of arbitral tribunals, even if the work of such tribunals has not become, at least so far, comparable to that of other Western European countries. Regarding the acceptance of the settlement of public procurement disputes in arbitral tribunals, regulations in the acceding states after 2004 have varied.

A first category, the most extensive, includes states where no express provisions on the arbitrability of public procurement can be identified. In most such cases, we are dealing with a fair transposition of the European public procurement directives, which, in turn, do not refer to arbitration as a means of resolving disputes. This is the case, for example, in Slovenia, where national legislation transposing European public procurement directives does not explicitly refer to how the directives are resolved, while the Civil Procedure Act,[31] which regulates arbitration, does not explicitly exclude its use in the case of public procurement disputes. A similar situation can be found in other countries, such as Bulgaria, the Czech Republic, or Slovakia, and even the last state to join the European Union, Croatia. In such cases, the doctrine applied the principle of dividing the legal relations regarding public procurement into the part of public law, related to administrative procedures, and the part of private law, related to the execution of the contract. Consequently, disputes concerning the performance of the contract may become arbitrable.[32]

The second category includes European states in which arbitration has been expressly used as a means of resolving public procurement disputes. An example in this sense is Romania, in which Law no. 101 of 2016, intended for the organization of the National Council for the Settlement of Appeals in the field of public procurement, expressly provides in Art. 57 that 'the parties may agree that disputes related to the interpretation, conclusion, execution, amendment and termination of contracts to be resolved by arbitration'. A similar situation is in Turkey, a state that has transposed European directives in the field of public procurement, given the pre-accession phase it is in. Interestingly, however, in this case the possibility of using arbitration in relation to public procurement is provided by the arbitration legislation.[33]

In several European countries, the clear distinction between the two stages of public procurement procedures has even led to special regulations regarding the

30 Șandru, 2014, p. 114.
31 Civil Procedure Act, Law no 134/2010, Republished in the Official Gazette, Pt. I, No. 247 of 10 April 2015.
32 Subev, 2015, p. 216.
33 Art. 2 of the International Arbitration Act No. 4686/2001, as updated on 30 December 2017.

competence to resolve disputes. For example, in the case of Hungary, according to Art. 145 Act no. CXLIII of 2015, non-compliance with the rules on awarding public procurement contracts can be challenged before a special state body, called the Public Procurement Arbitration Board, while disputes over the execution of public procurement contracts fall in the exclusive jurisdiction of ordinary civil courts.

A particular case is one in which a procedure similar to arbitration is accepted, even if it is not carried out before traditional arbitral tribunals. Thus, a new law on public procurement, adopted in Poland in 2019, provides the parties to a public procurement contract with the possibility to opt contractually for the settlement of disputes before the Court of Arbitration at the General Counsel to the Republic of Poland. It should be emphasized that this court has the sole jurisdiction to resolve such disputes, apart from those in the judiciary.

Arbitration in public procurement disputes is certainly ongoing, and is closely linked to the openness of arbitral tribunals to accept their jurisdiction over such cases. The practice in the coming years will certainly lead to firmer legal solutions, as is the case of the Romanian regulation, regarding the acceptance of arbitration, or that of Hungary, which recognizes the exclusive competence of ordinary civil courts.

3.2 Price Adjustment in Case of Market Variations

One of the elements that illustrates the flexibility of procurement procedures through Directive 2014/24/EU, compared to previous regulations (e.g., Directive 2004/18/EC), concerns the express regulation of the possibility of modifying public procurement contracts after the start of their execution. From its preamble, Directive 2014/24/EU states in principle that '[m]odifications of the contract resulting in a minor change in the value of the contract should always be possible up to a certain value, without the need for new procurement procedures'. Art. 72 of the directive implements the principle and stipulates how public contracts may be amended either where this possibility was expressly provided for in the contract or when, even if the possibility of modification was not provided for in the contract, the intervention of certain exceptional situations makes the performance of the contract dependent on such changes. The second case, in which the amendment of the contract is accepted even if this possibility was not expressly provided for in the initial contract, is regulated in detail and additional conditions are imposed. Perhaps the most important provision in terms of price adjustment is to limit variations to 50% of the original price. However, it is necessary to draw attention to the fact that a distinction must be made between price change clauses (conditioned by uncertain factors, such as possible market variations) and price indexation (conditioned by objective indices, such as the inflation rate).

The way in which European provisions have been transposed has led to complex approaches at Member State level, and implementation through secondary rules has created additional difficulties.[34] A good example is that of Romania, where Art. 221 of Law no. 98/2016 on public procurement largely reformulates Art. 72 of Directive

34 Treumer, 2014, p. 281.

2004/18/EC, while maintaining the same substantive conditions. However, the methodological norms for implementation, as is the case of those adopted by Government Decision no. 395/2016 and subsequently amended by Government Decision no. 419/2018, provide for the limitation of situations in which the price may be changed. Thus, it will be possible to affect the price without organizing a new procedure only in the first case provided by the European directive and by Law no. 98/2016, the one in which the parties had previously agreed to this possibility. Moreover, the price change is limited to the measure 'strictly necessary to cover the costs on the basis of which the contract price was based.' Moreover, by subsequent norms adopted by the National Agency for Public Procurement (NAPP), respectively Instruction no. 2/2018, public authorities were obliged to introduce in the award documentation models a unique price revision formula, based on factors such as labor costs, average monthly gross earnings, growth rate of metal products, growth rate costs for electricity, gas, heat, rising raw material prices for construction, etc. Much more recently, the Romanian Government adopted the Emergency Ordinance no. 15/2021[35] simplifying the procedures for adjusting prices in case of market changes, especially regarding construction materials for *infra*structure projects. Also, NAPP Instruction no. 1/2021 on amending the public procurement contract/sectoral procurement contract/framework agreement[36] details how the clauses of public procurement contracts can be modified.

3.3 Emergency Public Procurement Procedures: The COVID-19 experience

The crisis triggered by the onset of the COVID-19 pandemic in February–March 2020 involved significant state intervention in the markets, mainly for the purchase of sanitary materials, from masks and ventilators to vaccines. Such an intervention also involved forcing the limits of public procurement regulations. Although Directive 2014/24/EU expressly stated in para. (46) of its preamble that

> 'Contracting authorities should be allowed to shorten certain deadlines applicable to open and restricted procedures and to competitive procedures with negotiation where the deadlines in question would be impracticable because of a state of urgency which should be duly substantiated by the contracting authorities. It should be clarified that this need not be an extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority. (...)'.

This was strictly an objective repeated to a greater or lesser extent in the rules of the directive or in national rules. We will analyze below the European legislative framework that can be used in general in such situations, but also the reactions

35 At the moment this article was drafted, Emergency Ordinance No. 15/2021 was still in the approval circuit at the level of the Parliament, as it happens according to the Romanian Constitution in the case of all Government Emergency Ordinances, arousing numerous disputes.
36 NAPP Instruction No. 1/2021 on amending the public procurement contract/sectoral procurement contract/framework agreement, Official Gazette, Pt. I, No. 56 of 19 January 2021.

regarding the COVID-19 pandemic, both at the European level and at the level of a part of the CEECs.

European legislators have chosen two main types of response to emergencies, such as the COVID-19 pandemic. The first of these is represented by the shortening of the terms for receiving the requests to participate, in receiving the offers. Depending on the type of procedure used for the award of procurement contracts, Arts. 27 to 29 of Directive 2014/24/EU provide for the limitation of these time limits to a minimum of 10 for an open procedure and 15 days for a restricted procedure.

The second way of responding is the intervention of the European Commission through delegated regulatory instruments or instructions on the implementation of existing rules. This is the case, for example, with the instructions set by the Commission on April 1, 2020.[37] In doing so, the European Commission urges as much flexibility as possible in the application of public procurement procedures, making it clear that European provisions are sufficiently open. Instruments such as a negotiated procedure without prior publication or a direct award procedure, where that provider is the only one that can provide the materials or services requested by the state, are fully encouraged. Similarly, the association of states is supported to carry out procurement procedures for products that are difficult to purchase, the European executive being willing to contribute to such procedures itself. However, the Commission urges compliance with the case law of the CJEU,[38] pointing out that these procedures, which significantly affect the principle of transparency, should be used only to the extent necessary for extreme emergencies, and other procedures cannot be applied.

In addition, the Commission has initiated a new regulation, and the Parliament and the Council are currently adopting a new regulation[39] on joint actions at EU level in the field of health, which expressly regulates the possibility of joint procurement, involving several Member States, or the possibility of the Commission to purchase for the benefit of the Member States products necessary to combat events such as pandemics.

At the level of some Member States, the call for flexibility made by the European Commission has led to radical solutions. For example, in Hungary, where a state of emergency was established on March 11, 2020, Government Decree No. 40/2020 gave public authorities the authority to purchase products intended for protection against COVID-19 directly, without complying with European legislation, or dealing with the the field of public procurement. These rules applied only to goods from sources

37 Communication from the Commission—Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01), OJ C 108I, 1.4.2020.

38 Judgment of the Court of 15 October 2009 Commission of the European Communities v. Federal Republic of Germany, Case C-275/08 ECLI:EU:C:2009:632; Order of the Court of 20 June 2013 Consiglio Nazionale degli Ingegneri v. Comune di Castelvecchio Subequo and Comune di Barisciano, Case C-352/12, ECLI:EU:C:2013:416.

39 Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021–2027, and repealing Regulation (EU) 282/2014, OJ L 107, 26.3.2021.

in Hungary. Poland adopted a similar measure, where on March 8, 2020, a set of amendments to the Law on Government Procurement entered into force, amending the exception from the application of the usual rules when procurement concerns essential goods or services for the fight against COVID-19. Moreover, the removal of the usual norms was applied to create strategic reserves by the Ministry of Health. Other states, such as Romania, have been more restrictive in enforcing the European Commission's instructions. Thus, by Emergency Ordinance no. 114/2020, Romania extended the possibility to apply the negotiation procedure without prior publication to a wider range of 'social services.'

Beyond these individual responses, the use of a regulation to unify procurement policies in medical emergencies clearly indicates the intention of European legislators to use a single practice at European level. It remains to be seen until the end of the COVID-19 pandemic and in the years to come to what extent such an objective can be achieved.

3.4 Public Procurement Regulatory Changes in the Context of the Recovery and Resilience Facility

In view of the effect of the COVID-19 pandemic on the economies of the EU Member States, on May 27, 2020, the European Commission proposed a plan on the formation of a European fund from which grants and loans could be granted to Member States.[40] Regarding the plan, the European Council accepted a set of conclusions on July 21, 2020. Although the initially proposed amount was €500 billion, the version subsequently approved in Parliament and the Council brought the total amount to slightly more than €700 billion in the form of the Recovery and Resilience Facility (hereinafter referred as to RRF). The aim of these grants and loans is to ensure reform in all Member States in all sectors of activity to prepare for the digital transition, the transition to a less polluting economy, and the transition to socially sustainable economies. Both public institutions and private actors can have access to the funds available under the National Recovery and Resilience Plans, as long as the proposed projects comply with the objectives set under the Facility. In the case of funds to be managed by public institutions, however, there is the problem of adapting public procurement procedures to such a funding inflow.

In this context, the Council adopted on November 25, 2020, a document entitled 'Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy',[41] seeking to indicate to the Commission, Parliament, and Member States the need to rethink public procurement policies and regulations in the context of the implementation of the Recovery and Resilience Mechanism. The main objectives that should be achieved, from the perspective of the Council,

40 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU budget powering the recovery plan for Europe, COM (2020) 442 final.

41 Council Conclusions Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy (2020/C 412 I/01), OJ C 412I, 30.11.2020.

through a unitary regulation in the field of public procurement would be: to ensure the efficiency of public procurement to encourage recovery from the crisis and prevent future crises; to establish through public procurement procedures means to encourage sustainable development and investment; and to contribute, through public procurement, to a more resilient European economy. To achieve these objectives, the Council also proposes concrete measures, some of which are particularly noteworthy.

A first direction envisaged for the future development of public procurement mechanisms, in particular in the context of the RRF, concerns cooperation between Member States. Thus, the collaboration of states through the Network of First Instance Review Bodies is proposed, encouraging development of strategies and mechanisms to achieve cross-border and joint procurements. Nonetheless, the Commission should support the Member States to create a European network of best practices advisory hubs for sustainable and innovative procurement, as well as cooperate with the Member States in developing guidelines and criteria through a common methodology to support the public sector in sourcing through transparent, reliable, flexible, and diversified supply chains with the aim to strengthen the European economy and reduce strategic dependence on third countries.

The second direction is closely related to the objectives of RRF in the digital, environmental, and social areas. Thus, the European Council proposes that the public procurement regulations in the future include, as strategic criteria job creation, support for small and medium enterprises, as well as green and digital development. From an institutional perspective, the Commission needs to develop a sustainable procurement screening mechanism that considers green public procurement principles. Public procurement should also be made considering Regulation 2020/852.[42] As a result, climate-friendly and resource-efficient products and services must be given priority, and the Commission must establish criteria to determine this.

4. Conclusions

CEECs' public procurement policies and regulations are changing. Although accession to the European Union has necessitated the transposition of a single body of legislation, solutions have sometimes varied. However, a much greater diversity has been caused by specific legal challenges, such as the institutions responsible for enforcing public procurement provisions, alternative ways of resolving public procurement disputes, or price adjustment in case of market variations. European public procurement policy is still changing, under the pressure of two major factors: state involvement

42 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, pp. 13–43.

in the markets in the context of the COVID-19 pandemic, and the implementation of large public procurement projects based on the RRF.

CEECs have been tempted to take individual approaches to the COVID-19 pandemic, responding autonomously to the various challenges from adapting national rules to the need for emergency procurement. Although this flexibility has been tacitly accepted by the European Commission, the European Council has suggested that the implementation of the RRF seems to require a centralized approach at European level from a public procurement perspective. Such centralization could even prove to be an opportunity to update the regulatory framework in the coming years, perhaps even by choosing a normative instrument with direct applicability, such as regulations. Furthermore, CEE countries have proposed some of the most ambitious plans in relation to the RRF, a fact that would generate large public procurement procedures that will have to observe EU law provisions. Simplifying the existing procedures or even establishing exceptional provisions applicable in the context of the RRF would prove beneficial from this perspective.

Today we are witnessing a constant pressure on public sector budgets—especially on local government budgets for the procurement of goods and services. This trend is characteristic to all EU Member States. The continuing need for rational spending of public money and raising service standards for citizens is a necessity, due to a rapidly changing political and economic environment. Public procurement of goods and services must also generate positive social outcomes, especially in key areas such as health, education, environment, or the relationship with public authorities. Therefore, we consider that several changes are needed, such as:

1. Encouraging innovative procurement by leveraging creative solutions. Procurement professionals need to become smart and knowledgeable customers, open to new ideas, so they do not risk missing out opportunities that could lead to efficiency and improved outcomes for the communities of citizens they lead.

2. Establishing robust procurement monitoring systems to continuously assess whether suppliers and contracts are being managed efficiently, and whether collaboration with them is constantly being improved. Procurement recipients need to ensure that their procurement partners have the right skills and experience to deliver efficiently. For example, understanding the sector in which the services are procured can have a significant impact on the ability to procure the best offer.

3. An increasing use of digital technologies that will allow procurement beneficiaries to have a better ability to manage contracts and suppliers. Computers have a much greater ability to store and compare data so that the risk factors with suppliers of goods and services can be better assessed (for example, the performance of suppliers in their contractual relationships with other organizations), and this will not only provide historical data on supplier performance, but will also allow organizations to accurately establish supplier risk profiles and predict risk events.

The goal of any public policy is to provide a set of rules and procedures at the executive level of public administration, which ensures the achievement of goals and priorities agreed at the political level, and which allow the development of all

essential sectors of society. In the field of public procurement, the goal is to achieve efficient procurement, which means more than rational spending of public money. Efficient procurement means offering to the citizen a service or product of a superior quality, aiming to positively impact one's quality of life.

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| Chapter 7 |

EU Employment Law and Social Policy and the Need to Develop Unitary Electronic Technology of Work by Central and Eastern Member States

Andrzej Marian ŚWIĄTKOWSKI

ABSTRACT

This chapter presents the current situation on the common market caused by the use of electronic employment technologies by entrepreneurs on digital platforms. Its aim is to inspire the Member States of Central and Eastern Europe to take steps to standardize the status of self-employed people on digital platforms. Occasional attempts by the EU institutions to develop a definition of the status of people employed on digital platforms may be treated as a continuation of the practice of multiplying precedents in the jurisprudence of the CJEU. They do not guarantee stable working standards for self-employed people on digital platforms.

KEYWORDS

algorithm, algorithmic management, atypical employments, digital platforms, electronic technologies, employee, self-employed, work, working conditions.

1. Digital Employment Model

The fourth industrial revolution brings about significant changes in the traditional model of labor relations shaped by the International Labor Organization for over one hundred years. The current, relatively stable model of employment based on predictable growth, guaranteeing people who EW even only moderately interested in a career in the labor market, has begun to crumble. Protection guaranteed by the provisions of labor and social security law is starting to be replaced by strictly defined tasks and activities consisting of the provision of organized work—from case to case—by legal entities.[1] Signals in the legal literature warning against a change in the employment model were presented at the beginning of this century. However, they were not taken seriously by specialists in the field of labor law. At that time it was not feared that soon

1 Schoukens and Bario, 2017, pp. 306 et seq.

Świątkowski, A. M. (2022) 'EU Employment Law and Social Policy and the Need to Develop Unitary Electronic Technology of Work by Central and Eastern Member States' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 139–153. https://doi.org/10.54171/2022.aojb.poeucep_7

they could constitute a strong competition for employment relationships, which were considered standard models of employee employment.

In this art., I will attempt to present the views of the EU on the adjustment of employment conditions in the common market. The legal basis for the operation of EU institutions in this matter is the provisions of Art. 154 TFEU. Dialogue with social partners active at the EU level started on February 24, 2021.[2] In the second phase, it was found to be justified, and therefore desirable in the meaning of Art. 154(3) TFEU, taking measures to improve the conditions of people working through electronic employment platforms. This means a chance to adapt electronic employment to EU standards regulated by the provisions of Directive 2019/1152, adopted by the European Parliament and the Council on June 20, 2019.[3] The self-employed are exposed to the risk resulting from employment conditions in most Central–Eastern EU Member States. Their situation is precarious and does not guarantee protection against dismissal, with marginal fixed-term employment and unclear working hours. Their remuneration for the work they perform is insufficient for a decent living. They also do not benefit from protection against discrimination, mobbing, or other activities prohibited by law. They have very limited opportunities for promotion and professional development.[4] Their work environment usually does not meet the common, mandatory standards of occupational health and safety. In fact, most economically active people under the electronic model of employment implemented through employment platforms are precarious from the first to the last day of work. It does not matter to which category of the common EU labor market they will be classified: work on-demand via apps, remote work (crowdwork), or work in the digital platform (capital platform work).[5] Electronic employment models enable entrepreneurs to coordinate the processes of performing work, bypassing the traditional methods used so far. The latest practices enable global companies using market mechanisms to coordinate peripheral activities. It seemed that such seemingly marginal business behavior and behavior of entrepreneurs had little effect on the replacement with digital technologies of traditional, stabilized, and protection-oriented employees commonly regarded as the 'weaker side of employment relations' methods. However, outsourcing, franchises, and temporary employment agencies result in 'fissured employment relationships.' They also lead to changes in the distribution of risk and obligations toward both employed persons and other entities on the labor market.[6]

2 European Commission, Consultation Document, First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, Brussels, 24 February 2021, COM(2021) 1127 final.

3 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019. (pt. 1), European Judicial Review, 2020, No. 4, pp. 15–21; (pt. 2), European Judicial Review, 2020, No. 7, pp. 22–28.
See Resolution of the European Parliament of 4 July 2017 on working conditions and precarious employment, 2016/2221(INI), OJ C 334, 19 September 2018.

4 See Florczak and Otto, 2019, p. 10; Godlewska and Patulski, 2019, Ibid. pp. 22 et seq.

5 Sanz de Miguel, Bazani and Arasanz, 2021, p. 17.

6 Ibidem, p. 19; Wood, Martindale and Lehdonvirta, 2021.

Digital platforms accelerate the processes of changing the current standard employment relationship model (SERM).[7] Due to the protection of the interests of 63% of men and 24% of women on a global scale (and 47% in developing countries) at the age of full economic activity, it is justified to undertake actions aimed at the unification of atypical employment models.[8] These may be standardized by adapting them to EU standards and by defining the legal term 'employee' in the EU labor law system.

2. Work Management Through an Algorithm

Algorithmic management of work and the people who perform it seems to be the most difficult element in a unified sample of non-typical—electronic—forms of employment. The hypothesis about the autonomy of employment in these platforms is a legal fiction, promoted as a protection of a vision of human work that is impossible to concise legally. The 'autonomy and discretion' of digital platforms is severely limited 'by the principles and design features of the platforms.'[9] Data collection and algorithms appear to be the central elements in shaping the functioning of the platform and in controlling the workforce.[10] They are also key factors that determine the negative working and living conditions of platform workers, as they are associated with greater intensity and longer work hours.[11] Algorithmic human work management can accelerate and extend precarious employment relationships[12] even further during the COVID-19 pandemic through remote control, outsourcing, franchising, temporary work agencies, job brokers and digital work platforms. Algorithmic management contributes to increasing the effort put into work, creates new sources of algorithmic uncertainty, and fuels resistance in the workplace. Algorithms, defined as work processes to be followed in calculating or solving other problems arising from work, have been used since at least the 19th century. Their modern application focuses exclusively on algorithmic technologies. They are defined as 'computer programmed procedures that transform an input into the desired output in a way that makes it more versatile, instantly interactive and opaque.'[13] The traditional typology of managerial management, still used in computer science, distinguishes three dimensions of algorithmic control: direction, evaluation, and discipline.[14] None of the concepts mentioned is related to the freedom and independence in the performance of work by a person providing services consisting of performing various activities ordered, assessed, and enforced by the digital

7 Wood and Lehdonvirta, 2021.
8 International Labor Organization, Report, World Employment and Social Outlook 2021: The role of digital labour platform in transforming the world of work. https://www.ilo.org/wcmsp5/groups/public---dgreports/---dcomm---publ/documents/publication/wcms_771749.pdf.
9 Świątkowski, 2018, p. 106.
10 Wood and Lehdonvirta, 2021; Sanz de Miguel, Bazani and Arasanz, 2021, p. 25.
11 Wood and Lehdonvirta, 2021; Sanz de Miguel, Bazani and Arasanz, 2021, p. 25.
12 Wood, 2021.
13 Joys and Stuart, 2021, p. 158.
14 Edwards, 1979.

platform. Professionally active people in the platforms are subject to the platform to a much greater extent than employees. Digital work platforms use algorithmic control to guide employees and determine what should be done, in what order and time, and with what degree of accuracy.[15] The study reveals the characteristic features used by entrepreneurs managing employment platforms: discipline and subordination. Based on the experiences of employees with the Deliveroo and UberEATS platforms, the authors of this study show how the control of the work process is multifaceted and goes beyond algorithmic management. They point to three distinguishing features of the latest electronic employment technology: panoptical placement of technological infrastructure, the use of information asymmetry to limit the selection of employees, and the unclear nature of performance management systems. Algorithmic assessment is used to control how the platforms record and monitor working time—in particular, the hours spent on the platform. Particular attention was paid to the hours in which professionally active people logged on to the platform to perform work. The algorithms also test the speed of work and the level of task activity in processes consisting of the performance of partial activities and tasks ordered by the organizer of the work. They show that some micro-tasking platforms control employees using computer monitoring programs, and record the progress of employees' work. For example, they use progress tracking instruments that can record screenshots every ten minutes. The programs used by the employee monitoring platforms have access to the employee's webcam.[16] Keystrokes on the computer or keyboard buttons are counted and recorded. The possibilities of controlling the progress indicate that the platforms are not neutral intermediaries between the persons commissioning and performing professional activities. They are business institutions that play an active role in structuring the digital work process and shaping working conditions. Their governance structures are coded, objectified, and stored in seemingly neutral technology infrastructures. Such camouflage maintains the hidden relationship between capital and labor.[17] The use of disciplinary measures against less productive employees is possible thanks to algorithmic work discipline, especially 'disciplining' replacements of less efficient ones with more efficient recipients (algorithmic replacement). Managers of the digital platform warn employees about this possibility. However, they do not inform them of the criteria that determine the making of 'disciplinary decisions' by an electronic device. It is generally known that withdrawal from work takes place when employees do not meet the requirements of people managing digital platforms.[18] The problem is that the requirements of the entities, platform management, and the electronic device that make the decision are neither specified nor communicated to employees. The legal basis for the 'substitution' in the performance of professional duties by people employed on digital platforms is an undocumented ('dry') message about non-compliance with

15 Kellog, Vallentine and Christin, 2020, p. 366.
16 Veen, Barrat and Goods, 2020, p. 384.
17 Gerber and Krzywdziński, 2019, p. 121.
18 Sanz de Miguel, Bazani and Arasanz, 2021, p. 28.

the applicable requirements relating to the performance of tasks. It is formulated and communicated through an electronic device (algorithm).[19] For this reason, the above assessment of compliance with the obligations regarding the maintenance of the work efficiency determined by the digital platform was considered by specialists to be a 'black box.' Many employees are therefore under the impression that they can be automatically deactivated at any time when their performance drops below certain thresholds unknown to them, set by the algorithm. People employed on digital platforms do not have physical contact with any board member or other person holding a managerial position and authority there. Thus, those who accurately investigate the role and significance of algorithms used by digital platforms recognize the applied disciplinary systems as 'a serious enhancement of the algorithm's competences.'[20] According to J. Woodcock, 'the emergence of a ubiquitous and automatic method of supervising and disciplining employees is an illusion of freedom, created by an algorithmic panopticon, along with the possibility of working outside a permanent, formal workplace, be it on a bicycle or moped/motorcycle.'[21] The disciplinary effect related to the perception of the algorithm, known as the 'fear the wizard,'[22] is speculation in the circles of people working on digital platforms about the impact of the 'shadow manager' on their behavior in the workplace. The presented circumstances strengthen the significance of the algorithm, because 'employees absorb the algorithm's performance evaluators and take responsibility for controlling the discipline of their own actions…and [that of] customers.'[23] Algorithms are a management tool that shapes power relations between employees, clients, and platforms.[24] Therefore, it is necessary for the authorities of Central–Eastern EU Member States to develop uniform practices in labor relations and social policy aimed at eliminating the automatic level of mechanical competences and the importance of algorithms. Today, digital and traditional institutions and organizations increasingly use the algorithmic management model. Algorithms can therefore find application in unified digital employment models.

3. Working Conditions—The Illusion of Freedom?

'Working conditions' represent the working hours (time) of persons who have legal or factual relations with the digital platforms, protective standards guaranteeing safe and hygienic working conditions. The relationship with digital platforms has been and continues to be advertised as the main advantage of flexible, independent decision-making by the person associated with the platform at the most convenient time for the employee, allegedly entitled to exercise full freedom to decide when

19 Ibid.
20 Woodcock, 2020, pp. 67 et seq.
21 Ibid.
22 Ibid.
23 Bucher, Schou and Waldkirch, 2021, pp. 44 et seq.
24 Sanz de Miguel, Bazani and Arasanz, 2021, p. 28.

and how long to perform selected tasks, and to complete the portions allocated by the platform. The ethos and freedom of work occupy the main place in the hierarchy of free and voluntary performance of assigned tasks and simple activities that digital platforms are obliged to accomplish when performing obligations consisting of providing employment. Natural persons working on digital platforms exceed the legally permitted and generally applicable working time standards in days, weeks, and months.[25] According to the calculations made by the team of Urzi Brancanti et al., 60-hour standard weekly working hours occur on platform employees twice as often as employees working in the normal, standard, generally applicable working time system. Significantly, 68% of platform employees work at night and 72% work on non-working days. Health and safety at work is no better.[26] The vast majority of employees are not covered by insurance against risks related to the performance of tasks and activities commissioned by the digital platform.[27] Regarding health and safety, most of the platform's digital workforce does not have set rules of health and life standards. Even where certain disease-related financial support programs had been adopted, their applicability proved questionable. Documents required to access treatment programs were impossible to obtain by employees.[28] The controller of employment conditions on digital platforms, according to P. Bérastegui, draws attention to the problem of social isolation resulting from individual work in a competitive atmosphere. These circumstances make it difficult to establish a coherent professional identity between employees. In addition, in the case of working on the platform, the problems are compounded, as I have already written, by the feeling of insecurity of people employed there in matters related to job retention. All the above-mentioned factors have a negative impact—1.6 to 3.6 times the overall average—on the physical and mental health of people employed on platforms.[29] The vast majority of the self-employed are therefore fully responsible for their own insurance. Paradoxically, the health and safety at work of people employed on platforms during the COVID-19 pandemic is slightly better. In the initial period of the pandemic, most platforms refrained from providing any form of protection for their workers. They did not want to undermine the applied classification of people employed on platforms as independent contractors, obliged by law to self-insure themselves. Only—due to the need to protect customers using services provided by platforms—public authorities have obliged entrepreneurs to comply with strict procedures necessary to maintain a license to continue operating.[30] Prevention policies are therefore only focused on customers, not on people employed by platforms. Only after some time, half of the surveyed food delivery platforms—Deliveroo and Amazon in the UK and the US—did the state authorities provide a partial form of

25 Urzi Brancati, Pesole and Fernandez, 2019.
26 Ibid.
27 Bérastegui, 2021.
28 Ibid.
29 Ophir et al., 2020, pp. 65 et seq.
30 Sanz de Miguel, Bazani and Arasanz, 2021, pp. 32–33.

financial support to the employees. The above derogation from the rule applies only to cases of illness due to COVID-19.[31]

4. Status of People Employed on Digital Platforms

The provisions of European Union law do not regulate the status of persons employed on electronic platforms. The restraint of the EU institutions cannot be tantamount to the freedom of the authorities of Central–Eastern European Member States in matters concerning the choice of employment models for professionally active people. Currently, the legal position of these people is primarily shaped by the organizers of electronic forms of employment.[32] Professionally active people connected with employment platforms can act as service recipients whose status is regulated by civil law, who are self-employed and working based on and in the legal framework regulated by the provisions of labor law. The basis of this structure is the freedom of choice of legal forms of employment by the parties to the legal relations under which the work is performed. The disproportions between the rights of persons employed by virtue of performing work under any of the above-mentioned bases and legal frameworks for employment are too large. Therefore, they could not be approved in the past—and cannot be approved now—due to the differences in the legal status of the categories of persons who perform work-related tasks and activities on the platforms. The most favorable, in terms of legal protection, employment stabilization and entitlement to employee and social benefits, was—and still is—the status of an employee. However, in only one EU Member State, Spain, the self-employed workers were economically guaranteed in 2021 on the ride-hailing platforms (*trabajador autónomo dependiente*).[33] Platform employees are allowed to understand the content and principles of the

31 Ibid. Howson et al., 2021.

32 Waas, 2017, pp. 97 et seq. Box 1. National Courts interpretation: the Spanish Case, Sanz de Miguel, Bazani and Arasanz, 2021, p. 40. In the judgment of the labour court in Madrid, No. 53 of February 11, 2019, it was ruled that the subordination of an employee should be understood in a flexible, not formal way. The most common symptoms of the employee's subordination are: the presence of the employee at the workplace of the employer or at the workplace designated by the employer, personal performance of work, cooperation with other employees, except for the possibility of replacing each other without the prior consent of the employer or the person planning and managing the employee's activity and not having a company (enterprises) by an employee. See Todoli-Signes, 2021, pp. 28 et seq. See also Judgment of the Polish Supreme Court of July 20, 2010, appeal No. 3344/2009).

33 *Rider's law*. https://www.eurofound.europa.eu/nl/data/platform-economy/initiatives/riders-law. The new obligation entered into force on 12 August 2021. https://hsfnotes1.com/employment. Przepisy the Riders for Rights movement (Riders por Derechos, RxR) were important in the sector responsible for providing food to customers. The strike organized against the delivery platform Deliveroo in 2017 resulted in the disconnection of the couriers participating in it from the application. The ruling of the Supreme Court, ordering the platform to return to work and pay them compensation, illustrates the state of changes in the Spanish electronic labor law system. See Sanz de Miguel, Bazani and Arasanz, 2021, p. 57. See also Olias, 2021.

algorithms governing their specific employment relationships on digital platforms. An obligation to inform employees about the parameters and rules on which it is based has been introduced. This is because it influences decision-making about access to work and employment conditions. The case of Spain may motivate the authorities of the EU Member States of Central–Eastern Europe to take uniform decisions in matters relating to labor law and social policy, and not yet regulated by the provisions of EU treaties.

5. An Attempt to Work out a Uniform EU Definition of an Employee and an Employer

The concept of an employee, established by the CJEU, is based on the freedom of movement of persons in the common market to seek and perform work. The right to work is treated by EU law as a fundamental human right. In the EU Charter of Fundamental Rights, the term 'employee' appears in Art. 27. This legal rule applies only to persons who work under an employment relationship. It deals with the employees' right to information and consultation in the enterprise. In the TFEU containing separate titles: IX 'Employment' (Arts. 145–150) and X 'Social Policy,' the term 'employee' appears in Art. 157(1), a standard that obliges Member States to respect the principle of equal pay for employees irrespective of their sex. In the general provisions of the EU treaties, references are made to the concepts of 'employment.' its level and the related term 'social protection' (Art. 9 TFEU). However, it cannot be concluded from the above statements that when defining and implementing measures taken and implemented by the EU, 'the requirements related to promoting employment levels, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and health protection should be automatically taken into account.'[34] However, I share the views of the authors of the report on the definition of an employee about the need to establish healthy competition rules necessary to ensure the functioning of the common, internal EU market (Art. 3(1)(b) TFEU).[35] It is an undeniable fact, as indicated by the European Trade Union Confederation, that digital platforms use unfair competition for entrepreneurs operating on the market according to traditional rules.[36] A uniform definition of an employee working under an employment relationship, common to all employees, can now be achieved not in a long way, consisting of supplementing EU labor law, but as a result of systematic application to the CJEU with claims for granting the status of employees to persons employed under civil law contracts, be self-employed. For a long time, the CJEU, referring to the obligation of uniform application of labor law and equal treatment of parties to legal relationships under which work is performed, established

34 Sanz de Miguel, Bazani and Arasanz, 2021, p. 62.
35 Ibid.
36 Brockmann et al., 2021, p. 3.

in the EU judiciary, decided that in the EU it is necessary to use autonomous and uniform definitions of legal terms: 'employee'[37] and 'employer.'[38] The creation of such definitions by the CJEU consists of including in the sphere of influence of the European labor law all active professionals: workers, employees, and self-employed individuals, as well employers related by legal employment relationships, based on mutual obligations: provision of work by the employing entity and the obligation to perform it under the employer's management at the time and place indicated by him or her. It is easier and more feasible than the intention to implement the provision of Art. 153(1)(a-k) TFEU on the support of the EU to implement the legal objectives regulated by the provisions of the labor law. The wording of the EU definition of an employee was not included among those listed in this provision. Moreover, the said provision does not authorize the EU to develop an EU definition of a worker. The EU institutions can only support and complement the actions of the Member States. Therefore, it is more justified to apply to the CJEU to issue judgments stating the need for issuing judgments containing autonomous definitions of employees and employers. Thus, precedents may be created in the judicature of the CJEU, guaranteeing the minimum standards of employment for employees who have not worked so far and are self-employed, working on digital platforms. Thus, the conditions for fair and competitive work in the internal EU market, listed in Art. 3(1)(b) TFEU will apply. By following the above guidelines, it will be necessary to comply with the granting principle set out in Art. 5(1) TEU. There will therefore be no legal basis for a possible allegation of infringement of the competences of individual Member States when classifying certain types of persons employed as self-employed, employees or atypically employed by employers or only entrepreneurs. The CJEU can also make a non-conflict setting of a minimum legal basis for the transformation of employed and self-employed workers into employees. The same highest European judicial authority has the power to issue rulings defining employers, employing employed and self-employed people, converted into workers.

37 See Judgments of the CJEU of 14 July 1976, Gaetano Donà v. Mario Mantero, Case 13-76, ECLI:EU:C:1976:115; Judgment of the CJEU (Sixth Chamber) of 5 October 1988, Udo Steymann v. Staatssecretaris van Justitie, Case 196/87, ECLI:EU:C:1988:475; Judgment of the CJEU Court of 15 December 1995, Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman, Case 415/93, ECLI:EU:C:1995:463; Judgment of the CJEU of 20 November 2001, Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, Case 268/99, ECLI:EU:C:2001:616; Judgment of the CJEU (Second Chamber) of 14 October 2010, Union syndicale Solidaires Isère v. Premier ministre and Others, Case 428/09, ECLI:EU:C:2010:612; Judgment of the CJEU of 13 January 2004, Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, Case C-256/01, ECLI:EU:C:2004:18; Judgment of the CJEU (Second Chamber) of 11 November 2010, Dita Danosa v. LKB Līzings SIA, Case C-232/09, ECLI:EU:C:2010:674.

38 Judgment of the Court (CJEU Grand Chamber) of 16 July 2020, AFMB e.a. Ltd v. Raad van bestuur van de Sociale verzekeringsbank, Case C-610/18, ECLI:EU:C:2020:565.

6. Conclusion—"Polish Self-employed Work Pattern"

From the Polish perspective, there is no urgent need to construct complex, separate legal concepts in which self-employed, professionally active people, single persons performing tasks and activities consisting of the provision of work or services for their own account, could act as 'pseudo-workers.' In the provisions of Art. 22 para. 1-1[1] and 1[2] of the Polish Labor Code[39] the legislator formulated 'fuses' limiting or even excluding the possibility of replacing work performed under the employment relationship with non-employee type of work, mainly performed under civil law. The rich jurisprudence of the Supreme Court of the Republic of Poland that has accumulated over the last twenty years plays a role similar to that currently used in Spain. A necessary condition of the lawful work model of self-employment is the care of public institutions, especially the National Labor Inspectorate, for strict compliance with the prohibition of replacing an employment contract with a civil law contract under the conditions specified in Art. 22 para. 1 of the Labor Code. In Polish law, there is no prohibition of employment based on civil law contracts. Therefore, people who do not meet the requirements of performing work under an employment contract may also negotiate with entrepreneurs the rules of using certain rights, called 'employee privileges' guaranteed by the provisions of the Labor Code. However, the problem that needs to be solved is the scope of the benefits which, in the framework of the employee model of self-employment, can already be used by sole proprietorships. This is the main problem that should be discussed and resolved. Self-employed entrepreneurs cannot be considered as 'full-fledged workers' who are currently employed based on employment contracts for an indefinite period, exercising their associated employment and social rights, as they have had a sufficiently long service record. The current Labor Code provides sufficiently clear patterns from the past, enabling the formulation an objective legal structure applicable to self-employed workers. The essence of the intended distinction must therefore apply, on the one hand, to self-employed workers, whose degree of dependency is essentially the same as employees. On the other hand, to real self-employed people who have a sufficiently long and independent status to be treated as able to take care of himself in the right respects.

The current system, however, is used.[40] Therefore, it cannot be ruled out that Polish public authorities are interested in participating in a possible joint venture—undertaken by the EU Central and Eastern countries—to legally protect the self-employed. Other Central and Eastern EU Member States consider whether it is justified to introduce into the national labor system the automatic transformation of self-employed

39 The Act of June 26, 1974, Uniform text, Journal of Laws of 1998, No. 21, item 94 with changes. The amendment to the above-mentioned provisions was announced in the Journal of Laws No. of 2002, No. 135, item 466. See Świątkowski, 2018, pp. 131–147.

40 Consider the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, COM/2021/762 final. See https://eur-lex.europa.eu>TXT>ur.

workers into the category of employees. However, one should consider the risk of a change by the CJEU in the status of persons employed beyond that classification. They perform of tasks involving self-employed work in the category of 'employment relationships regulated by labor law.' In fact, one can be sure that only the self-employed who do not employ other people, and thus personally perform all work for their own use and at their own risk, may be classified as self-employed by the national or EU justice system (CJEU).

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| Chapter 8 |

The Policies of the European Union from an East-Central European Perspective Tax Policy

Matej KAČALJAK

ABSTRACT

This chapter concerns the reflections of selected Central European Member States on the Tax Policy of the European Union. The legislation and case law of courts in these states constantly reflect upon the CJEU case law and initiatives of other European Union institutions on one side, but also upon the legislative and juridical movements in each other. Three particular areas are discussed where this recurrent process is illustrated, namely the concept of General Anti-Abuse Rules (GAARs), the issue of VAT fraud and particularly of third-party liability and, finally, the area of special (sectoral) levies. The GAARs eventually became harmonized through the ATAD directive, but up to that moment, very different approaches could be observed between the Central European Member States, with some being early adopters even before accession to the European Union either through legislative enactment (Hungary) or through development of judicial doctrines (Czech Republic) but also with others that have enacted their GAARs only relatively recently (Slovak Republic, Poland). The issue of VAT fraud and third-party liability shows that referrals from Central European Member States (especially Hungary) have been a strong driver of the CJEU case law in this area. Finally, the special levies enacted by Central European Member States and CJEU proceedings they have triggered have provided very useful insight to testing the compatibility of sectoral levies with European Union law but also to the recent discussions on the digital services taxes.

KEYWORDS

corporate income tax, general anti-abuse rule (GAAR), VAT fraud, third-party liability, equalization levy, special review

1. Introduction

As to the distribution of competences between the Union and the Member States the field of taxation falls under the Art. 4 of TFEU being the shared competence with pre-emption, i.e., 'whenever the Union exercises its competence, the Member States lose their competence in the field on which the Union has exercised its competence.'[1]

1 Wattel, Szudoczsky and Weber, 2019, p. 11.

Kačaljak, M. (2022) 'The Policies of the European Union from an East-Central European Perspective Tax Policy' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 155–172. https://doi.org/10.54171/2022.aojb.poeucep_8

In particular, it falls under the internal market principal area under Art. 4(2)(a) of TFEU, since 'taxation affects intra-Union cross-border trade, investment, service provision, and employment.'[2] From s broader perspective, the only exemption is the field of customs duties falling under the exclusive competences of the Union under Art. 3(1)(a) of TFEU.

> 'Nevertheless, it is apparent from TFEU that different emphasis is placed on the indirect taxes on one hand and on direct taxes on the other. Art. 113 of TFEU directly incites the Union to 'adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition'[3] and, indeed, the Union 'has done so extensively in respect of customs duties, excise duties and turnover tax.'[4]

However, such a clear mandate is absent in the TFEU with respect to direct taxation and therefore any positive harmonization could be based on the '*general harmonization provision aimed at establishing and ensuring the functioning of the internal market,*'[5] i.e., Arts. 114 and 115 of the TFEU. Nevertheless, Art. 114(2) of TFEU expressly states that harmonization under Art. 114(1) of TFEU through a qualified majority voting by the Council shall not apply to 'fiscal provisions' and, further, the CJEU has already ruled that

> 'the words 'fiscal provisions' contained in Art. 95(2), EC must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes.'[6]

Thus, the only available route for positive harmonization is through directives passed by a unanimous voting under the Art. 115 of TFEU, which explains 'why by far the most integration of direct taxes is negative integration, notably on the basis of the free movement rights prohibiting hindrances to the functioning of the internal market and of the State aid prohibition.'[7]

The state then opens a door for a constant dialogue between the Union and Member States in which individual concepts formulated by Member States

2 Ibid, p. 12.
3 Art. 113 of TFEU.
4 Wattel, Szudoczsky and Weber, 2019, p. 12.
5 Ibid, p. 34.
6 Judgment of the CJEU (Sixth Chamber) of 29 April 2004, Commission of the European Communities v. Council of the European Union, Case C-338/01, ECLI:EU:C:2004:253, para. 67.
7 Wattel, Szudoczsky and Weber, 2019, p. 34.

legislatures and courts are being tested against the EU law either through infringement procedures and preliminary ruling proceedings, thereby developing new principles:

> 'Like a sound wave, the reverberation of principle development progressively spreads outward throughout the EU and the national legal orders. And like the motion of a wave, there is not only radiating movement, but multi-directional movement back and forth, which for our purposes, means movement both between the EU judicial arm and the courts and legislatures of the Member States (vertically), and movement between courts and legislatures of different Member States amongst themselves (horizontally)'.[8]

Further, this opens the opportunity to coordinate national laws through soft law measures such as recommendations, opinions, communications, and codes of conduct.[9] The aim of this chapter is to describe how the Central European Member States have contributed to the process of development of EU tax law principles and EU tax law in general and, at the same time, how they have been affected by the process.

There are three particular areas where the contribution of the Central European Member States or effect on them seems to be particularly profound. In the field of direct taxes one notable example concerns the formulation of the general anti-abuse principle in judicial doctrines and/or its incorporation into national laws through a General Anti-Abuse Rule (GAAR). Further, in the field of indirect taxes, the Central European Member States have been drivers of a significant number of CJEU case laws concerning VAT fraud, particularly regarding third-party liability. Finally, again in the field of direct taxes, CJEU case law concerning special sectoral levies in the Central European Member States (particularly in Hungary) have provided useful hints to the design of EU digital equalization levy (though not all issues were already resolved, particularly its relationship with double tax treaties).

All three topics introduced above will be discussed in detail in the following sections of this chapter.

2. General Anti-Abuse Rules

In the period pre-accession to the Union, the position of Central European Member States with respect to GAARs or similar judicial doctrines was rather heterogeneous, which makes their individual paths up to the harmonization of GAARs through the

8 de La Feria and Foy, 2016.
9 Ibid, pp. 27 et seq.

ATAD directive[10] even more interesting. In the Slovak and Czech Republics, such rules and doctrines were practically nonexistent. In Hungary, the first GAAR was already legislatively enacted in 1990, though it seems that it is not being relied upon very often by the tax authorities.[11] In Poland a GAAR was enacted in 2002 with effect from 2003, only to be struck down as unconstitutional in 2004 and re-enacted again in 2016.[12]

The Slovak and Czech approaches seem particularly noteworthy, as the countries have shared a common legal system in the Czechoslovak Republic for several decades prior to 1992. Despite this, their methods of harmonizing GAARs in line with the ATAD directive were significantly different.

From an EU law perspective, the anti-abuse principle is not a legislative rule, but a general principle of EU law formulated by CJEU in its case law.[13] First time the relatively rigorous test for identification of abuse of law was in the CJEU decision *Emsland-Stärke*,[14] where it stated that

> '[a] finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions decided by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting of the intention to obtain an advantage from the Community rules by creating artificially the conditions decided for obtaining it'.[15]

The penalty in the above decision was in the rejection of right arising out of the EU law (in the particular case essentially through its *contra legem* interpretation).

Afterward, in respect to tax matters, the anti-abuse principle was invoked in the *Halifax*[16] decision regarding VAT. Though a similar conclusion was formulated by CJEU in the *Fini*[17] case, it was the *Halifax* decision where a two-prong test for identification of abusive practice was formulated by CJEU as follows:

> 'First, the transactions concerned, notwithstanding formal application of the conditions decided by the relevant provisions of the Sixth Directive

10 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, pp. 1–14.
11 Kolozs and Krever, 2016.
12 Olesinska, 2017.
13 de la Feria, 2020.
14 Judgment of the CJEU of 14 December 2000, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, Case C-110/99, ECLI:EU:C:2000:695.
15 Ibid, paras. 52 and 53.
16 Judgment of the CJEU (Grand Chamber) of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, Case C-255/02, ECLI:EU:C:2006:121.
17 Judgment of the CJEU (Third Chamber) of 3 March 2005, I/S Fini H v. Skatteministeriet, Case C-32/03, ECLI:EU:C:2005:128.

> and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
> Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage [where] it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden'.[18]

With the Halifax decision, the principle of the prohibition of abuse of law in tax matters was settled in the CJEU case law, and subsequent decisions were only fine-tuning minor issues.[19] Nevertheless, this applies particularly for VAT due to it being thoroughly harmonized and CJEU has in this respect stated that the anti-abuse principle should apply 'regardless of a national measure giving effect to it in the domestic legal order…and the principles of legal certainty and of the protection of legitimate expectations do not preclude this.'[20] It is also of particular relevance that the CJEU (in line with the proposals of Advocate General Bobek) ruled that the anti-abuse principle also applies to transactions that were effected long before the Halifax decision.

The situation was different with respect to direct taxes in the pre-ATAD period, where the CJEU case law dealt with assessment of measures aiming at protection of domestic tax base (*Cadburry-Schweppes;*[21] *X GmbH*[22]); and interpretation of rights conferred upon by secondary EU law in the partially harmonized fields (*Argenta Spaarbank*,[23] *N Luxembourg 1*,[24] *T Danmark*[25]).

18 Judgment of the Court (Grand Chamber) of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, Case C-255/02, ECLI:EU:C:2006:121, paras. 74, 75 and 81.
19 de la Feria, 2020.
20 Judgment of the CJEU (Fourth Chamber) of 22 November 2017, Edward Cussens and Others v. T. G. Brosman, Case C-251/16, ECLI:EU:C:2017:881, para. 1 of the operative part.
21 Judgment of the CJEU (Grand Chamber) of 12 September 2006, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, Case C-196/04, ECLI:EU:C:2006:544.
22 Judgment of the CJEU (Grand Chamber) of 26 February 2019, X-GmbH v. Finanzamt Stuttgart–Körperschaften, Case C-135/17, ECLI:EU:C:2019:136.
23 Judgment of the CJEU (Fifth Chamber) of 26 October 2017, Argenta Spaarbank NV. v. Belgische Staat, Case C-39/16, ECLI:EU:C:2017:813.
24 Judgment of the CJEU (Grand Chamber) of 26 February 2019, N Luxembourg 1 and Others v. Skatteministeriet, Case C-115/16, ECLI:EU:C:2019:134, discussed in Slovak literature by Bonk, 2019a.
25 Judgment of the CJEU (Grand Chamber) of 26 February 2019, Skatteministeriet v. T Danmark and Y Denmark Aps, Joined Cases C-116/16 and C-116/17, ECLI:EU:C:2019:135, discussed in Slovak literature by Bonk, 2019b.

In the above situations, CJEU did not formulate any specific test for identification of abusive practice, and thus the *Halifax* test should remain valid. Nevertheless, in the pre-ATAD period, CJEU concluded with respect to direct tax matters that 'no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation.'[26]

Despite the above, the EU law did influence the anti-abuse laws and doctrines in the Central European Member States, which may be illustrated using examples from the Czech Republic and the Slovak Republic.

In the Czech Republic, the anti-abuse doctrine was first formulated by the Supreme Administrative Court on November 10, 2005,[27] even before the *Halifax* decision was issued by CJEU. Nevertheless, the decision was challenged with the Czech Constitutional Court, which upheld the decision of the Supreme Administrative Court and in its reasoning expressly referred to the *Halifax* decision issued in the meantime.[28]

In the decisions that followed, the Czech Supreme Administrative Court was refining its reasoning in matters concerning abuse of tax law, and eventually referred to the *Halifax* test, however with a remark that this may be merely an inspiration due to direct taxes not being harmonized.[29]

Thereafter, in the public discussions as to the means of transposition of the ATAD GAAR, the Czech legislature expressly stated in the explanatory report to transposing legislation that the legislative GAAR does not represent any new rules on top of existing judicial doctrines.[30]

In contrast with the above is the Slovak experience,[31] where, save for one exception concerning VAT, the law and the courts were silent with respect to an abuse of law until a legislative GAAR was introduced with effect from January 1, 2014.[32] In this respect, the explanatory report to the draft law expressly states that the GAAR was introduced in response to the Commission recommendation on December 6, 2012.[33]

This then resulted in discussions whether the GAAR is a continuation of existing case law,[34] of whether it is new institution, which would essentially mean that it may not have retroactive effect. The Slovak Supreme Court essentially resolved this issue,[35] which suggested that retroactive application would be in breach of Slovak

26 Judgment of the CJEU (Fourth Chamber), 29 March 2012, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. 3M Italia SpA, Case C-417/10, ECLI:EU:C:2012:184, para. 32.
27 See further Morávek, 2016; Kamínková, 2018.
28 Kamínková, 2018, p. 35.
29 Ibid, p. 66.
30 Explanatory report to the GAAR proposal in Tax package presented by the Czech Ministry of Finance, p. 132. https://www.mfcr.cz/assets/cs/media/Dane_2019_Danovy-balicek-2019-zakon-c-80-2019-Sb.pdf.
31 See further Kačaljak, 2021.
32 Discussed in Slovak literature by Prievozníková, 2015; Sábo, 2015; Bonk, 2018a; Bonk, 2018b.
33 I.e. it was a soft law instrument that triggered the harmonisation effort in Slovakia. According to Filipczyk and Olesinska, 2016, p. 487. this was also the trigger for re-enactment of GAAR in Poland in 2016.
34 Prievozníková, 2015.
35 Decision No. 3Sžfk/8/2019 from 25 February 2020.

constitutional principles. Nevertheless, the facts of the case implied that the neither application of (then nonexistent) GAAR or of a judicial anti-abuse principle was necessary, as the matter could have been decided through application of already existing substance over form rule.

Nevertheless, there is still one case pending that might result in a different decision. However, the case concerns also the application of a double tax treaty, which adds to the complexity of the matter.[36] In this case, the Slovak Supreme Court even tried to consult CJEU, but as the facts of the case occurred before the accession of Slovakia to EU, CJEU ruled[37] that the matter does not concern the application of EU law.[38]

The enactment of ATAD GAAR by the Member States should now result in a harmonized approach to testing and tackling abusive arrangements, though it is still too early to draw any conclusions.

3. Third-Party Liability in VAT Fraud

The CJEU case law phenomenon of third-party liability in VAT fraud dates back to the CJEU *Optigen*[39] judgment on January 12, 2006. In this judgment, CJEU seemingly rejected the notion of third-party liability in VAT matters but in the following *Kittel and Recolta Recycling*[40] decision this has been severely qualified and the so called 'Axel Kittel test' was introduced according to which 'third-party liability for VAT fraud is possible where 'the recipient tax payer knew, or should have known, that the goods were connected with the fraudulent evasion of VAT.'[41] The above cases concerned 'new domestic legislation and administrative practices [that] were purportedly aimed at strengthening anti-fraud policy in the context of organized fraud, yet [by their design they could not] tackle fraud per se but merely minimize its revenue costs.'[42] This gave rise to a significant number of cases being referred to CJEU, with several Member States being the sources of referrals repeatedly.[43] Out of the Central European Member States, Hungary seems to be the most prominent one with cases such as *Mahagében*

36 See further Kačaljak and Koroncziová, 2017.
37 Order of the Court (Sixth Chamber) of 1 October 2020, Slovenský plynárenský priemysel, a.s. v. Finančné riaditeľstvo Slovenskej republiky, Case C-113/20, ECLI:EU:C:2020:772.
38 Kačaljak, 2021.
39 Judgment of the CJEU (Third Chamber) of 12 January 2006, Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03) v. Commissioners of Customs & Excise, Joined cases C-354/03, C-355/03 and C-484/03, ECLI:EU:C:2006:16.
40 Judgment of the CJEU (Third Chamber) of 6 July 2006, Axel Kittel v. Belgian State (C-439/04) and Belgian State v. Recolta Recycling SPRL (C-440/04), Joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446.
41 de la Feria and Foy, 2016, p. 264.
42 de la Feria, 2020, p. 19.
43 Ibid.

and David,[44] *Mecsek-Gabona,*[45] *Tóth,*[46] *Signum Alpha Sped,*[47] *Glencore,*[48] and most recently *Vikingó*.[49]

All these essentially concern either '(1) cases concerning the burden of proof for establishing liability, [or] (2) cases concerning the scope of that liability.'[50] As to the latter group of cases, *Mecsek-Gabona* stands out as the case marking a significant step in expanding the scope of third-party liability also to cases of fraud that are only about to occur in the future (and yet it is possible to establish that the seller of the concerned goods known or should have known that he is involved in a chain of fraudulent transactions).[51] The reasoning indicated in *Mecsek-Gabona* was later confirmed in the landmark *Italmoda*[52] decision 'in which [CJEU] established that the liability for VAT fraud can arise in the absence of national legislation providing for it, which in essence transformed third-party liability for VAT fraud from a rule into a principle.'[53]

Nevertheless, almost equally interesting is the former group of cases concerning the burden of proof for establishing third-party liability. CJEU remains consistent in these cases in referring to the knowledge test, i.e., a third-party could be established only if the business has known or should have known of its involvement in a fraudulent transaction. This, however, seemingly clashed with judicial doctrines and practices in several Member States,[54] including the Central European Member States.

44 Judgment of the CJEU (Third Chamber), 21 June 2012, Mahagében Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága, (C-142/11), Joined Cases C-80/11 and C-142/11, ECLI:EU:C:2012:373.

45 Judgment of the CJEU (Second Chamber), 6 September 2012, Mecsek-Gabona Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága, Reference for a preliminary ruling from the Baranya Megyei Bíróság, Case C-273/11, ECLI:EU:C:2012:547.

46 Judgment of the CJEU (Third Chamber), 6 September 2012, Gábor Tóth v. Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága, Reference for a preliminary ruling from the Legfelsőbb Bíróság, Case C-324/11, ECLI:EU:C:2012:549.

47 Order of the CJEU (Ninth Chamber) of 10 November 2016, Signum Alfa Sped Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, Case C-446/15, ECLI:EU:C:2016:869.

48 Judgment of the CJEU (Fifth Chamber) of 16 October 2019, Glencore Agriculture Hungary Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-189/18, ECLI:EU:C:2019:861.

49 Order of the CJEU (Tenth Chamber) of 3 September 2020, Vikingo Fővállalkozó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-610/19, ECLI:EU:C:2020:673.

50 de la Feria, 2020, p. 21.

51 Ibid.

52 Judgment of the CJEU (First Chamber), 18 December 2014, Staatssecretaris van Financiën v. Schoenimport "Italmoda" Mariano Previti vof and Turbu.com BV. and Turbu.com Mobile Phone's BV. v. Staatssecretaris van Financiën, Joined Cases C-131/13, C-163/13 and C-164/13, ECLI:EU:C:2014:2455.

53 de la Feria, 2020, p. 22.

54 de la Feria, 2020, p. 19 indicates that even the current amount of litigation with CJEU concerning third-party liability represents only 'a small fraction of total litigation in the EU' as there are indications that many of the cases do not even reach the CJEU.

This might be illustrated by the preliminary questions posed by the Czech Supreme Administrative Court in the case *Kemwater ProChemie*:[55]

> 'Is it compatible with Directive 2006/112/EC for exercise of the right to deduct input value added tax to be conditional on the taxable person fulfilling the obligation to prove that the taxable supply received was made by another specific taxable person?
> If the first question is answered in the affirmative and the taxable person fails to fulfil that evidentiary obligation, can the right to deduct input tax be refused without it being established that that taxable person knew or could have known that by acquiring the goods or services in question he was participating in tax fraud?'

The above questions correspond to the doctrine of 'declared supplier', applied quite extensively in Slovakia and Czech Republic (and most likely also in other Central European Member States) under which the Tax Authorities avoided the application of the knowledge test and rather refused the right to deduction of input tax if the business failed to prove that the supply was actually made by the supplier who issued the invoice. The usual process for this was based on the Tax Authority pointing out that the supplier did not have own capacities for the performance of the supply and, subsequently, on the conclusion that the business was not able to produce sufficient evidence of the supply.[56]

Quite remarkably, even recent research[57] shows that the declared supplier doctrine still represents major line of reasoning in the decisions of Slovak Supreme Court despite growing number of CJEU cases in which CJEU keeps repeating that the knowledge test is the key component for invoking third-party liability in VAT fraud cases.

This indicates that there exists quite a strong pushback in the Central European Member States against the knowledge test doctrine applied by CJEU. Nevertheless, it seems clear that irrespective of the formulation of the preliminary question by the national court, CJEU seems to stand firmly on the requirement to perform the knowledge test by the Tax Authorities to invoke the third-party liability in VAT fraud cases. Simply said, the national courts keep asking CJEU whether there could be any simpler way to invoke third-party liability in VAT fraud than application of the knowledge test and CJEU keeps responding in the same (negative) manner, each time tailoring

55 Judgment of the CJEU (Tenth Chamber) of 9 December 2021, Kemwater ProChemie s. r. o. v. Odvolací finanční ředitelství, Case C-154/20, ECLI:EU:C:2021:989.
56 This particular issue was subject of another CJEU decision with question originating from Romania (See Judgment of the Court (Sixth Chamber) of 4 June 2020, SC C.F. SRL v. A.J.F.P.M. and D.G.R.F.P.C, Case C-430/19, ECLI:EU:C:2020:429). Unsurprisingly, CJEU ruled that such practice is not in line with the principles governing the common system of VAT, as such practice would essentially render the knowledge test virtually obsolete.
57 Kačaljak, 2020, p. 34.

the response to the question of the national court and, thus, expanding the catalogue of reasons that are not sufficient for rejection of right to deduction/exemption on a standalone basis.

It is difficult to assess which of the CJEU cases could be considered final, though at this time, the *Vikingó*[58] decision seems a rather promising candidate, as it is issued in the form of an order of the court[59] and rather extensively summarizes the conclusions in the CJEU decisions to date.

Nevertheless, a response by CJEU to the questions posed in *Kemwater ProChemie*[60] added further complexity to the matter, and it seems that further decisions might eventually be needed to steer the national courts (at least in Czech Republic and Slovakia) away from the "declared supplier" doctrine.

4. Special Levies

With the advent of proposals for digital services taxes worldwide[61] and in the Union,[62] it is interesting to compare the alternative routes the Central European Member States have taken. First, to date no true digital services tax was imposed by the Czech Republic, Poland, or the Slovak Republic. Both the Czech Republic[63] and Poland have introduced legislative proposals to introduce such taxes, but the legislative process in Poland has not yet concluded,[64] and in Czech Republic the proposal was unsuccessful in the parliament and its future is uncertain.[65]

The Slovak Republic never introduced any proposal for a digital services tax, and it has been assumed that it is waiting for coordinated solution at the OECD or Union level. Nevertheless, with effect from 2018, a digital permanent establishment concept was introduced into Slovak law. This, however, proved to be ineffective vis-à-vis businesses established in jurisdictions with which there exists a double tax treaty.[66]

Hungary, by contrast, introduced an advertisement tax in 2014,[67] which resulted in European Commission initiating formal investigation procedure provided for in Art.

58 Order of the Court (Tenth Chamber) of 3 September 2020, Vikingo Fővállalkozó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-610/19, ECLI:EU:C:2020:673.
59 Which indicates the posed question does not cover any new issues on top of those already decided by the CJEU.
60 Judgment of the Court (Tenth Chamber) of 9 December 2021, Kemwater ProChemie s. r. o. v. Odvolací finanční ředitelství, Case C-154/20, ECLI:EU:C:2021:989.
61 KPMG, 2021a.
62 Geringer, 2021.
63 KPMG, 2021b.
64 Orbitax, 2021.
65 KPMG, 2021b.
66 Cibuľa and Kačaljak, 2018.
67 As a temporary measure its rate has been reduced to zero for period from 1 July 2019 to 31 December 2022; KPMG, 2021a, p. 30.

108(2) of TFEU, and eventually adopting a decision that the design of the tax constituted state aid.[68]

Hungary has challenged the decision with the CJEU, which eventually ruled that the tax does not constitute state aid.[69]

Nevertheless, the above decision is only the latest one in a chain of CJEU cases dealing with the nature of special levies imposed by Hungary, namely *Hervis Sport- és Divatkereskedelmi,*[70] *Vodafone Magyarország,*[71] and *Tesco-Global Áruházak*.[72] The principal issue dealt with by CJEU in the latter two was whether these special levies are to be regarded as direct taxes or indirect taxes, particularly in the light of the fact that they use turnover as the basis for assessment of the levy.

Similar discussions were ongoing also in Slovakia with respect to the (now abolished) special levy of financial institutions.[73]

CJEU has ruled that 'turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay,'[74] essentially stating that just because the assessment base of a tax or levy refers to turnover, this does not by itself make it an indirect tax and other elements must be considered. In particular, as the advocate general has pointed out, for a tax to be regarded an indirect tax, it must be designed to be passed on.[75]

> '[The tax in question] it is not designed to be passed on to the consumer.... This cannot be taken to be the case simply because a tax has been reflected arithmetically in the price of the goods or services. That is more or less the case with any tax charge on an undertaking. Rather, if the consumer...is not the person liable for payment, the tax must be designed to be passed on to the consumer specifically.

68 Judgment of the CJEU (Grand Chamber) of 16 March 2021, European Commission v. Hungary, Case C-596/19 P, ECLI:EU:C:2021:202, paras. 7–11.

69 Ibid.

70 Judgment of the CJEU (Grand Chamber), 5 February 2014, Hervis Sport- és Divatkereskedelmi Kft. v. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága, Case C-385/12, ECLI:EU:C:2014:47.

71 Judgment of the CJEU (Grand Chamber) of 3 March 2020, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2020:139.

72 Judgment of the CJEU (Grand Chamber) of 3 March 2020, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-323/18, ECLI:EU:C:2020:140.

73 Kubina and Kurillová, 2019a; Kubina and Kurillová, 2019b; Kačaljak, 2020.

74 Judgment of the CJEU (Grand Chamber) of 16 March 2021, European Commission v. Hungary, Case C-596/19 P, ECLI:EU:C:2021:202, para. 47.

75 Opinion of Advocate General Kokott delivered on 13 June 2019, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2019:492, paras. 33–37 and Opinion of Advocate General Kokott delivered on 4 July 2019, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-323/18, ECLI:EU:C:2019:567, paras. 31–34.

> This would require the amount of tax to be established at the time when the transaction is carried out (at the time of the supply to the consumer), as is the case with VAT. However, as that amount cannot be calculated until the end of the year and depends on the volume of annual turnover, the supplying... undertaking does not yet know any tax charge which may have to be passed on at the time when the supply is made or at least its precise amount. For example, if the lower threshold is not reached at the year end, there is no tax at all to be passed on to the consumer. It is not therefore a tax designed to be passed on....
> The intention is therefore to tax the particular financial capacity of those undertakings and not the financial capacity of recipients of [their] services. The Hungarian special tax is similar in this regard to a special (direct) corporate tax for certain undertakings....
> In this way too, the special corporate tax is similar in character to a special direct income tax. Unlike 'normal' direct income taxes, however, the taxable amount is not the profit generated—as the difference between two operating assets in a certain period—but the turnover generated in a certain period. Nevertheless...this does not affect its character as a direct tax.'[76]

These conclusions are especially relevant with respect to the discussion on compatibility of digital services taxes with double tax treaties.[77] This discussion might come alive again should the OECD two-pillar solution fail.[78]

Second, the *Hervis Sport- és Divatkereskedelmi* decision was relevant also with respect to discussions in Slovakia regarding the Retail Tax Act which was introduced with effect from January 1, 2019, and abolished very shortly afterwards in response to the initiation of an investigation by the European Commission.[79] The issue at hand concerned discriminatory treatment of food vendors where there were several indications in the act that the tax was specifically targeted at foreign retail chains.

The *Hervis Sport- és Divatkereskedelmi* decision was referred to in public discussions from the moment when the draft of the Retail Tax Act was disclosed to the public[80] and was also expressly referred to in the communication to Slovakia from the European Commission.[81]

76 Ibid.
77 See Kofler, 2021, p. 51 and Hohenwarter et al., 2019, pp. 143 et seq.
78 OECD, 2021.
79 European Commission State aid — Slovak Republic — State aid SA.52194 (2018/FC) — Slovak Retail Turnover Tax — Invitation to submit comments pursuant to Art. 108(2) of the Treaty on the Functioning of the European Union, OJ C 194, 7.6.2019, p. 15.; Commission Decision (EU) 2019/2140 of 21 October 2019 on State aid SA.52194 – 2019/C (ex 2018/FC) – Slovak Republic – Slovak Retail Turnover Tax (notified under document C(2019) 7474), C/2019/7474, OJ L 324, 13.12.2019.
80 Kačaljak, 2018.
81 European Commission State aid — Slovak Republic — State aid SA.52194 (2018/FC) — Slovak Retail Turnover Tax — Invitation to submit comments pursuant to Art. 108(2) of the Treaty on the Functioning of the European Union, OJ C 194, 7.6.2019, p. 15.

Thus, it might be concluded that particularly the steps of Hungary in respect to special sectoral levies were relevant not only to further development of CJEU case law, but also in respect to development of law in Slovakia as another Central European Member State.

5. Conclusions

The legislation and case law of courts in Central European States constantly reflect upon CJEU case law and initiatives of other European Union institutions, but also upon the legislative and juridical movements in each other's countries. It may be also concluded that the movement is not simply one-sided, but the dynamics of the Member States also affect development in the entire European Union.

First, the GAAR concept shows that the approach of individual Central European Member States varied greatly, and only through EU harmonization initiatives through the ATAD directive do they seem to eventually converge. It might be expected that the interpretation of national GAARs would converge even further through CJEU case law.

Further, the issue of VAT fraud and third-party liability shows that referrals from Central European Member States (especially Hungary) have been a strong driver of CJEU case law in this area. This recurrent topic seems to constantly raise new issues, and at the same time indicates that there remains a significant friction between the domestic judicial doctrines concerning the burden of proof in tax matters and the CJEU conclusion with respect to VAT matters in general.

Finally, the special levies enacted by Central European Member States, and the CJEU proceedings they have triggered, have provided very useful insights into testing the compatibility of sectoral levies with European Union law, but also to the recent discussions on digital services taxes (equalization levies). As a general observation, the special levies tend to have a character of direct tax, which brings about the issues of double taxation and their compatibility with double taxation treaties. This *inter alia* strengthens the arguments advocating a global, coordinated approach to taxation of digital economy (such as the currently discussed OECD Two-Pillar Solution) before a unilateral approach by the EU, or individual Member States.

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Judgment of the CJEU (Grand Chamber) of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise, Case C-255/02, ECLI:EU:C:2006:121.

Judgment of the CJEU (Third Chamber) of 6 July 2006, Axel Kittel v. Belgian State (C-439/04) and Belgian State v. Recolta Recycling SPRL (C-440/04), Joined cases C-439/04 and C-440/04, ECLI:EU:C:2006:446.

Judgment of the CJEU (Grand Chamber) of 12 September 2006, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, Case C-196/04, ECLI:EU:C:2006:544.

Judgment of the CJEU (Third Chamber), 21 June 2012, Mahagében Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (C-80/11) and Péter Dávid v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága (C-142/11), Joined Cases C 80/11 and C 142/11, ECLI:EU:C:2012:373.

Judgment of the CJEU (Second Chamber) of 6 September 2012, Mecsek-Gabona Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága, Case C 273/11, ECLI:EU:C:2012:547.

Judgment of the CJEU (Third Chamber), 6 September 2012, Gábor Tóth v. Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága, Case C 324/11, ECLI:EU:C:2012:549.

Judgment of the CJEU (Grand Chamber) of 5 February 2014, Hervis Sport- és Divatkereskedelmi Kft. v. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága, Case C-385/12, ECLI:EU:C:2014:47.

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Judgment of the CJEU (Grand Chamber) of 3 March 2020, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C-323/18, ECLI:EU:C:2020:140.

Judgment of the CJEU (Grand Chamber) of 3 March 2020, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2020:139.

Judgment of the CJEU (Sixth Chamber) of 4 June 2020, SC C.F. SRL v. A.J.F.P.M. and D.G.R.F.P.C., Case C-430/19, ECLI:EU:C:2020:429.

Judgment of the CJEU (Grand Chamber) of 16 March 2021, European Commission v. Hungary, Case C-596/19 P, ECLI:EU:C:2021:202.

Judgment of the CJEU (Tenth Chamber) of 9 December 2021, Kemwater ProChemie s. r. o. v. Odvolací finanční ředitelství, Case C-154/20, ECLI:EU:C:2021:989.

Opinion of Advocate General Kokott delivered on 13 June 2019, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-75/18, ECLI:EU:C:2019:492.

Opinion of Advocate General Kokott delivered on 4 July 2019, Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-323/18, ECLI:EU:C:2019:567.

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Order of the CJEU (Tenth Chamber) of 3 September 2020, Vikingo Fővállalkozó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case C 610/19, ECLI:EU:C:2020:673.

Order of the CJEU (Sixth Chamber) of 1 October 2020, Slovenský plynárenský priemysel, a.s. v Finančné riaditeľstvo Slovenskej republiky, Case C-113/20, ECLI:EU:C:2020:772.

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| Chapter 9 |

The Emergence of Member States' Characteristics in European and National Consumer Law

Zsolt HAJNAL

ABSTRACT

European legislation often has a significant impact on private laws in the Member States, especially consumer legislation. In the absence of national, strong consumer protection traditions, consumer protection legislation in Central and Eastern European countries has been largely defined by European consumer law. In the chapter, I am looking for answers as to the specificities of these countries, their ability to enforce these in the EU's main legislative trends, and how these countries have contributed to European Union consumer law.

KEYWORDS

EU consumer law, consumer contracts, ADR, warranty, guaranty, dual quality

1. Introduction

Evaluating the European Union's consumer legislation from a Central European perspective seems to be a rather difficult challenge, since there was no consumer protection law in the modern sense before our accession to the EU, and the nearly 30 years since the signing of our Association Treaty[1] make it impossible to discover the original characteristics of the Hungarian consumer protection legislation. In addition, if we want to go back to the roots of legislation, which predates our association, it is difficult to find any surviving characteristics that we could monitor.

In the early days of consumer legislation, the minimum harmonization directive was a means of approximation favored by the Member States, as it gave Member States, which traditionally had a higher level of consumer protection, the possibility to deviate from the minimum objective of the directive to protect consumers. However, the application of the maximum harmonization directives, which have become commonplace since the mid-2000s and still prevail, no longer allow for stricter national

1 Act I of 1994 on the Proclamation of a European Agreement on establishing an association between the Republic of Hungary and the European Communities and their Member States.

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regulations. Behind the change of concept, a strong competitive approach can be detected, which is considered the strongest engine of integration and the functioning of the internal market. This change of approach, the need to remove Member States' regulatory differences as barriers to trade and the repeated revisions of legislation, have completely changed the map of consumer law since we joined.

Consumer policy is one of the European Union's shared legislative powers, so that Member States can only legislate in the framework of empowerments provided for by the EU legislation enacted or in fields of competences left untouched. The Central European legislature's own consumer protection initiatives were also characterized by a detailed, situational, and problem-oriented approach. This approach is exemplified by the yellow checker fee rules in the Act on Consumer Protection, Art. 8, the provisions banning the formation of new consumer groups,[2] the detailed rules on mandatory guarantees for durable goods,[3] or even the provisions on out-of-business premises trading.[4] The Hungarian legislature could declare unlawful forms of business activity and types of contracts that could not be remedied through the public administrative procedure, and which caused massive consumer harm, as it did with consumer groups. Due to the relevant and existing legislative act (the consumer rights directive) of the European Union[5] and thus its lack of competence, the Hungarian legislature could not do the same in relation to the regulation of contracts concluded out of business premises. Finally, the legislator made amendments to the law to make (fraudulent) operations impossible, requiring businesses that offer product demonstrations to operate a customer service,[6] to register the events, to restrict the conclusion of loan agreements at the same place where products are demonstrated [7]and to prohibit the promise of prizes or free benefits.[8]

It is not excessive to say that our current domestic consumer protection law and institutional system is largely due to European Union legislation. We owe the general and specific rules of product safety, the establishment of a market surveillance system, the private law rules of contracts between consumers and businesses, the individual and collectivities law enforcement framework, the framework for public cooperation, passenger rights, and representation of the consumers' interest at both the EU and domestic political level all to the consumer protection objectives of the European Union.

During the research, I tried to identify the special characteristics that were typical of the Hungarian and the Visegrad Four (Hungary, Poland, Slovakia, and the Czech

2 Act CLV of 1997 on consumer protection, Art. 16/B.
3 Government Decree No.151/2003 (IX.22.) on mandatory guarantee of durable consumer items.
4 Act CLXIV of 2005 on commercial activity, Arts. 5/C-D.
5 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011.
6 Act CLXIV of 2005 on commercial activity, Arts. 5/C-D.
7 Act CCXXXVII of 2013 on credit institutions and financial undertakings, Art. 265.
8 Act XLVIII of 2008 on commercial advertising activity, Art. 12.

Republic) consumer protection law, jurisdiction, and the institutional system. In the absence of specific Hungarian traditions, the research focused on the areas where European Union law radically changed the previous prevailing Hungarian concept, where European Union law has given Member States the opportunity to deviate and thus to develop national specificities. The study also covers Central Europe initiated legislative proposals and Hungarian-initiated preliminary rulings that have had an impact on the interpretation of European consumer protection law.

2. The Subjective to be Protected: The Notion of the Consumer

Apart from the Package-Travel Directive[9] and the previous Timeshare Directive,[10] European directives limit the concept of consumer to a specific range of *natural persons*. In addition to this concept, the European Court of Justice consistently insists on excluding non-natural persons from the concept of consumer in its case law.[11]

Following the minimum harmonization principles of the first generation of consumer directives, Member States were allowed to regulate the concept of consumer differently or to maintain their previous rules, extending the personal scope of consumer protection legislation to other categories of persons. At the same time, with the emergence of directives with maximum harmonization clause, and with the acceleration of legal approximation, Member States were under pressure to unify their regulatory frameworks, which forced them to abandon their previous national concepts. For this reason, the definition of the consumer in the Member States and its change illustrates the impact of European Union law on national law, retaining the national character in line with minimal harmonization, and the intervention of uniform rules enforced by maximum harmonization into the private laws of the Member States.

Prior to the revision of consumer law in the 2000s, Member States ensured the protection of consumers in various ways in national law, either on a comprehensive basis or in specific rules transposing certain directives, in compliance with the minimum harmonization obligation. There were many versions of the personal scope of the legislation to be protected, with some Member States specifically identifying final addressees as the subject of consumer protection, while others have extended the concept of consumer to businesspeople or legal entities entering into atypical contracts, and still others have given consumers' protection to employees.[12]

9 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, Art. 3. para 6.

10 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, Art. 2.

11 On the definition of consumer: Hámori, 2009, p.89; Vékás, 2002, pp. 3–13.

12 Schulte-Nölke, Twigg-Flesner and Ebers, 2007, pp. 671–685.

The *final addressee* of the contract was protected in Spain, Greece, Luxembourg and, in a sense, Hungary, by defining the consumer in Act CLV of 1997 on consumer protection and based on related jurisdiction. In Greece, the definition of the final addressee was not included for personal purposes either, and in Spanish and Greek terms, the definition of the final addressee should designate a much broader scope of subjects than the definition of the consumer contained in the directives. We have seen an extension of protection in relation to certain member state regulations where the businesspeople conclude an atypical contract that does not fall within the scope of its normal professional activities. We have found solutions in the case law of France, Latvia, Poland, and Luxembourg. As with to the European Court of Justice's decision in *Cape Snc v. Idealservice Srl és Idealservice MN RE Sas v. OMAI Srl* joint cases[13] (the Court has interpreted the definition of consumers of the directive 93/13/EEC), a number of countries have followed the concept of limiting the notion of the concept of consumer to natural persons, including Cyprus, Germany, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovenia, and Sweden. The concept of recognizing workers as consumers was applied in Germany.[14]

By restricting them to natural persons, small and medium enterprises and charities such as sports clubs or ecclesiastical parishes are unprotected. Thus, in Austria, Belgium, the Czech Republic, Denmark, France, Greece, Hungary, Slovakia (with a few exceptions), and Spain, there were norms that treated legal persons as consumers, provided that the conclusion of the contract was for private purposes and use.[15]

In view of European trends, domestic consumer protection legislation has also been adapted to the narrowing of consumer protection to natural persons. Although the Hungarian jurisprudence had a well-established and consistent case law for assessing the consumer quality of legal entities, when adopting the Act XLVII of 2008 on unfair commercial practices, the legislation defining the framework of the Hungarian public and private consumer law narrowed the personal scope to natural persons by reference to the maximum harmonization clause of the directive. Thus, the Hungarian legislator has not extended the scope of consumer protection beyond the scope of the persons envisaged by European legislation, either out of necessity or out of a concern for consistency in the legal system. The Act V of 2013 on Civil Code (hereinafter Hungarian Code Civil) also broke with its previous conceptual definition by narrowing the concept of consumer to natural persons. At the same time, Hungarian consumer law is trying to use the consumer protection toolkit system for other, mainly economical purposes, because according to Act CLV of 1997 on consumer protection Para. 2(a), the consumer is also considered to be a nongovernmental organization, church, condominium, or housing association, or a micro-, small-, and

13 Judgment of the CJEU (Third Chamber) of 22 November 2001, Cape Snc v. Idealservice Srl (C-541/99) and Idealservice MN RE Sas v. OMAI Srl (C-542/99), Joined cases C-541/99 and C-542/99, ECLI:EU:C:2001:625.

14 Schulte-Nölke, Twigg-Flesner and Ebers, 2007, pp. 671–685.

15 Ibid. 683.

medium-sized enterprise, which buys, orders, receives, uses goods, or is the recipient of commercial communications or offers relating to the goods.

3. National Models of Consumer ADR

The regulation of alternative dispute resolution (ADR) mechanisms of consumers can be considered an area of consumer protection law in the European Union where national traditions and specificities can be freely enforced, so it is particularly interesting from the perspective of the study to examine how national specificities could be applied under a flexible regulatory framework.

The established ADR systems are easily comparable through their institutional forms, rules on the obligation to cooperate, sectoral systems, the binding force of decisions, and solutions for enforcing compliance. From this we can draw conclusions on the national traditions of out-of-court dispute resolution methods, the awareness of the consumer society and the willingness of the entrepreneurial sector to cooperate voluntarily or to be forced to. National ADR models and regulation are perfect examples of a system that reflects the needs of national consumer societies and meets local specificities or traditions along a sufficiently flexible and broad framework of EU legislation.

However, the right to consumer enforcement was named among consumers' fundamental rights, but in this context, the European Union's binding acts[16] were born relatively late following early recommendations.[17]

Against this backdrop, the European Union passed two innovative legislative initiatives on consumer dispute resolution.[18] Directive 2013/11/EU on alternative dispute

16 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008; Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union (European Commission, January 2011); Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, pp. 63–79.; Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), OJ L 165, 18.6.2013.

17 Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, O.J. C (2000/C 155/01); Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, OJ L 115, 17.4.1998.; Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, OJ L 109, 19.4.2001.

18 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, (Directive on consumer ADR), OJ L 165, 18.6.2013. and Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, (Regulation on consumer ODR), OJ L 165, 18.6.2013.

resolution for consumer disputes (the ADR directive) aims to tackle three main deficiencies in the provision of extra-judicial redress:[19]

- the absence of quality standards;
- the low levels of consumer awareness regarding ADR programs; ADR national program are more widely established to resolve disputes in the fields of financial services, package travel, and telecommunications. Where ADR is particularly inaccessible, identified gaps include games of chance, food products, nonfood consumer goods, construction, and transport;[20] and
- the availability of ADR entities for the resolution of consumer complaints.

The second legislative text is Regulation 524/2013 on online dispute resolution for consumer disputes (ODR regulation), which sets an online platform (ODR platform) that will operate as a single-entry point for resolving consumer complaints arising out of e-commerce. The ODR platform will link disputing parties with ADR registered entities and is expected to be fully operational by the January 8, 2016.

This ADR directive requires the principles be implemented, like access to ADR entities and procedures, expertise, impartiality, transparency, effectiveness, fairness, liberty, legality, and protection against the expiry of prescription and limitation periods.

These principles follow from the principles set out in the previous recommendations,[21] yet the ADR directive defines them in more detail. The ADR directive requires that the Member States provide the option for the consumer to submit a dispute to ADR. Thus, the ADR directive seems to adopt the point that this could be the better method to settle consumer disputes.

The ODR Regulation can also be considered as a framework regulation in its current form, as it generally lays down the guarantee rules under which national consumer ADR procedures and bodies can be authorized as a mechanism under the ADR directive and does not wish to establish a single and unified European consumer ADR system.

3.1. Consumer Arbitration Boards in Hungary

Following the obligations to harmonize the law resulting from the accessing process to the European Union, on December 15, 1997, the Hungarian Parliament adopted Act CLV of 1997 on consumer protection, which entered into force on January 1, 1998,

19 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee on Alternative Dispute Resolution for Consumer Disputes in the Single Market, COM/2011/0791 final; Alleweldt et al., 2009, pp. 9, 31 and 49; European Consumer Centre Denmark, 2009, p. 57.

20 Alleweldt et al., 2009, p. 59.

21 Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, OJ L 115, 17.4.1998;Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, OJ L 109, 19.4.2001.

and established the organizational and procedural rules of the consumer ADR, the arbitration boards.[22] The entire procedural statute, selection and formation requirements of the consumer arbitration boards are decided in the Consumer Protection Act. These ADR entities started operating alongside the regional chambers of commerce on January 1, 1999.

In Hungary, consumers can use the traditional consumer arbitration boards to settle their general consumer disputes, while in the case of financial consumer disputes they can turn to the Financial Arbitration Board, which operates under the auspices of the Hungarian National Bank.[23]

Arbitration boards operated by the county chambers of commerce and industry have jurisdiction over all consumer disputes except financial services. The proceedings of the arbitration body shall be free of charge, which may be initiated only at the consumer's request against the business. The consumer must attempt to resolve the dispute on his own before submitting the application and, if this fails, the ADR route will be permitted by law. During the arbitration procedure, the undertaking is obliged to cooperate with the body, which in some cases includes a written reply and the obligation to offer a settlement equal to the consumer's request, or in other cases an obligation to appear in addition to replying. For breaches of the obligation to cooperate, the consumer protection authority initiates proceedings and imposes fines. The arbitration board may impose an obligation on the parties to submit a commitment, which is binding on the parties and enforceable. The agreement is equally binding. The recommendation of the arbitration board is not binding on the parties, but in the event of non-performance of the undertaking, the decision shall be published by the board.

The Hungarian Financial Arbitration Board is an independent body operating alongside the National Bank of Hungary and has jurisdiction over financial consumers disputes. The financial service provider is obliged to cooperate in the proceedings of the Financial Arbitration Board, which can make commitments, agreements, recommendations, and rejections. The commitments and the agreements are binding on the parties, and in absence of agreement and acceptance of the parties the Financial Arbitration Board can also take commitments in cases with a value of less than HUF 1 million. The undertaking is under a duty to cooperate in the procedure.

3.2. Consumer ADR in Poland

In Poland, ADR schemes are existing at national and regional level. The Permanent Consumer Arbitration Courts are linked to the regional Trade Inspectorates.[24] Specific ADR bodies exist in several sectors, like online commerce, air transport, rail, postal and communications services markets, as well as in the financial services for the settlement of food disputes.

22 Fazekas, 2004, p. 61.
23 Act CXXXIX of 2013 on Hungarian Central Bank.
24 Alleweldt et al., 2009, p. 86. European Consumer Centre Germany, ADR bodies in the EU. https://www.evz.de/en/shopping-internet/alternative-dispute-resolution/adr-bodies-in-the-eu.html.

If the dispute does not fall under the jurisdiction of a special ADR body, consumers may contact the Trade Inspection Authority of the trader's provincial seat. The Ultima Ratio: First Electronic Arbitration Court at the Association of Notaries has competence in the fields of energy and water, financial services, and postal and electronic communications.

In general, ADR procedures are free of charge for consumers, while special ADR procedures have variable but small fees for consumers. Traders are not obliged to participate in ADR procedures, only a few ADR bodies can require traders to participate: the Polish Banking Association, the financial ombudsman, and the ombudsman for passenger rights.[25] ADR entities propose solutions that are binding on the parties if they are accepted. The proposals of the Polish Banking Association are binding on the company, while in the case of Ultima Ratio, the proposal is binding on the consumer and the trader.

3.3. Consumer ADR Mechanisms in the Czech Republic

In the Czech Republic, there are specific ADR entities in the communications (Czech Telecommunication Office—CTO), financial services (Financial Arbiter—FA), energy (Energy Regulatory Office—ERO) and insurance sectors (Office of the Ombudsman of the Czech Insurance Association—KO ČAP), most of them are operated by public authorities.[26] If a specific ADR entity is not available in relation to a consumer dispute, the general ADR body, the Czech Trade Inspection Authority or Czech Consumer Association, will be competent. In most cases, dispute resolution procedures are free of charge for consumers and businesses, and the fee should be paid by the consumer alone before the telecommunications ADR body. Businesses are obliged to participate and cooperate in the procedure. Decisions of the telecommunications and financial services ADR bodies are binding on consumers and businesses; in all other cases, the determining entity shall make recommendations to the parties at most, which shall bind them only if they both accept.[27]

3.4. Consumer ADR in Slovakia

In Slovakia, there is a special ADR body in the electronic communications and postal services, financial services, insurance, and energy sectors. In addition, three general ADR bodies deal with disputes between consumers and traders: the Slovak Trade Inspection (public authority), Consumer Protection Society (SOS), Poprad, and OMBUDSPOT, the Association for Protection of Consumers' Rights.[28] Where several ADR bodies are competent, the consumer is free to choose one. Consumers

25 Polish Civil Aviation Authority, About the Passengers' Rights Ombudsman. https://pasazerlotniczy.ulc.gov.pl/en/the-passengers-rights-ombudsman.

26 Ministry of Industry and Trade of the Czech Republic, Alternative Dispute Resolution in the Czech Republic: https://www.mpo.cz/en/consumer-protection/alternative-dispute-resolution-adr/alternative-dispute-resolution-in-the-czech-republic---basic-information--253288/.

27 European Consumer Centre Germany, ADR bodies in the EU.

28 Vačoková, 2020, pp. 266–267.

do not have to pay for ADR procedures, except for Ombudspot's procedure. Traders are obliged to participate in ADR procedures. Agreements of the ADR are binding on the parties if they are accepted, otherwise the ADR body can adopt a reasoned opinion.[29]

3.5. Evaluation of the ADR Regulatory Patchwork in Europe

European Union legislation did not wish to standardize more than 700 forms of ADR, but at the same time set common standards that could create a network of notified and registered consumer ADR mechanisms. The flexible regulatory framework could maintain and developing ADR systems that meet Member States' traditions and specificities. It is also interesting to observe the regulatory methods and detailed procedural rules used by each Member State to increase the effectiveness of the procedure. The effectiveness and success of out-of-court dispute resolution methods depends not only on legislative ingenuity, but also on social and cultural characteristics of the Member States. In view of this, the legislative of the Member States intends to ensure the effectiveness of the procedure through regulatory instruments such as the obligation to cooperate, compulsory participation in the procedure, the possibility of binding decisions and non-binding recommendations, forms of enforcement of decisions, participation by public authorities, economics, and private entities.

4. Member States' Impact on European Consumer Law

Within the scope of the European Union's competence, the European consumer legislation and the case law of the European Court of Justice fundamentally define the conceptual issues of national consumer laws, in particular regarding the Member States that subsequently acceded. In the absence of deep and strong consumer law traditions, the Central and Eastern European Member States have been most adrift of the European regulatory trend, with only a few cases having a demonstrable impact on regulation or interpretation of the law at the European level.

4.1. Prohibition of Discrimination between Member States in the Light of the Dual Quality Issue

In 2021, the Ministry of Innovation and Technology of Hungary compared 120 product pairs (typically household chemical and toilet cosmetics, nonfood products) and found differences in about a third compared to their product pairs from Austria, Germany, and Italy. According to the ministry's communication, in 29 cases the active substance content of the foreign product was higher compared to the product available in Hungarian stores under the same name. In 24 cases, the fact that more information was on the packaging of the foreign product caused the

29 Vačoková, 2020, p. 268.

discrimination of domestic consumers. A total of 41 cases of dual quality have been established.[30]

In recent years, there have been several cases of suspected discrimination against Central and Eastern European Member States based on the nationality of the Member States or their consumers. The problem is best illustrated by whether Hungarian consumers enjoy the benefits of the internal market in the same way as consumers in other countries, whether they benefit from services of the same quality as nationals of other Member States.

To answer this question, we must start from fundamental rules of the European Union. The requirement of equal treatment and the prohibition of any discrimination in European Union law is at the heart of the rule of law of citizens and of the functioning of the internal market. Equal treatment is mentioned countless times in the primary law of the European Union among the union's core values, and as a common value of the Member States, and in all its activities, the Union must respect equality between its citizens and the union's external activities.

During the functioning of the internal market, the Treaty on the Functioning of the European Union (hereinafter TFEU) excludes all discrimination between producers and consumers in respect of agricultural policy in the European Union, and the prohibition of discrimination between citizens in the functioning of the internal market has repeatedly appeared in relation to workers, in the freedom of establishment, in the freedom of services and in relation to the free movement of goods.

The prohibition on the distinction of consumers on a geographical basis is decided by Directive 2006/123/EC on services in the internal market,[31] which prohibits discrimination of the recipient by nationality or national or local residence. The directive, supplemented by the Geo-Blocking Regulation,[32] prohibits discrimination against consumers on a territorial basis. For the purposes of the regulation, it is forbidden to apply different contractual terms to consumers in different Member States and to restrict access to online interfaces. However, on this basis it will still be possible to apply different tariffs, and to exclude certain countries from the orientation of their business activities, due to their different legal requirements. However, these rules did not contain any direct provision for dual-quality goods.

In 2017, following the announcement of the Minister of Agriculture of Hungary, an initiative on the dual quality of goods was launched from Hungary with the support of the Visegrad Four countries. The product comparison test carried out by

30 Communication of the Ministry of Innovation and Technology of Hungary, 2021. https://kormany.hu/hirek/egy-ev-mulva-birsagolhato-lesz-a-magyar-vasarlok-hatranyos-megkulonboztetese; TFEU, Art. 40 (2).

31 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, pp. 36–68.

32 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment in the internal market and amending Regulations (EC) 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, pp. 1–15.

the Hungarian Food Chain Authority formed the basis for the ministry's finding.[33] Thanks to the effective contribution of the Visegrad Four, the regulatory proposal on dual-quality food and goods has remained on the agenda of the Romanian Presidency. As a result, Directive 2019/2161 on the better enforcement and modernization of Union consumer protection rules[34] specifically provided for the issue of dual quality in the context of the amendment of Directive 2005/29 on unfair commercial practices. Preamble 51 to the Directive 2019/2161 EU considers such commercial practices to be misleading practices, like marketing across Member States of goods as being identical when they have a significantly different composition or characteristics, which may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise. Art. 6(2) of Directive 2005/29/EC is replaced by the abovementioned point because of the amendment. To assess and examine all these practices, the Commission has issued guidelines on how EU rules should be applied, setting out evaluation and consideration criteria. The amendment to the Act enters into force on May 28, 2022, the Hungarian Parliament transposed the rule with Act CXXXVI of 2020 before the implementation deadline of November 28, 2021.

4.2. Case Law on the Unfairness of the General Contract Terms in Consumer Contracts

Reviewing the judgments of the European Court of Justice, preliminary ruling proceedings have been initiated in 61 of the 260 cases completed to interpret a provision of Directive 93/13 on unfair terms in consumer contracts[35] by a court of one of the four Visegrad Member States.

However, while the interpretation of the law of the European Court of Justice has greatly shaped domestic jurisprudence and had a significant social and economic impact, domestically initiated cases have added new elements to the case law of the directive in all Member States. The Kásler judgment[36] contained several such findings. On the one hand, in addition to the legal consequences of the invalidity which had been applied consistently until then, in para. 3 of the judgment, the European Court of Justice ruled as such:

> 'In a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision

33 National Food Chain Safety Office, 2017.

34 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, pp. 7–28.

35 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, pp. 29–34.

36 Judgment of the CJEU (Fourth Chamber) of 30 April 2014 in Case C-26/13, (request for a preliminary ruling from the Kúria — Hungary) Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Mortgage Bank Zrt., Case C-26/13, OJ C 194, 24.6.2014, pp. 5–6.

> does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.'

In addition, by interpreting the contested provision of Art. 5 of the Directive 93/13, the European Court of Justice has filled a previously inactive rule with content, thus creating the possibility of differentiating the consumer model, especially in contractual relationships. Let us not forget that the provision of the Directive 93/13 imposing a requirement of plain and intelligible language, has not been implemented by several Member States (including Hungary).[37] Point 2 of the Kásler judgment interpreted the requirement of transparency based on the capabilities of a consumer protected by private consumer protection law. On this basis,

> 'The requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.'

The impact of the judgment was significant at the Member State and European level. The interpretation of the European Court of Justice paved the way for resolving the foreign currency credit crisis and, unlike prevailing jurisprudence, added another option to the legal consequences of unfairness. The judgment was also a precursor to the differentiation of our vision of the average European consumer model, allowing us to create a consumer policy that better fits the individual needs of the consumer in the future.

5. National Characteristics of Consumer Sales

The rules of Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees with a minimum harmonization clause are the basis for the non-conforming performance of contracts and the rules of the Member States relating to warranties and guarantees.[38] This detailed and fragmented consumer protection legislation and harmonization based on minimum harmonization clause can be seen

37 Joó and Osztovits, 2012, p. 59.

38 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, pp. 12–16.

as the cause of the fragmentation that underpins today's current legislative trend, just as it has been explained in the past.[39]

Since the 2000s, the European Union has made efforts to remove barriers to trade resulting from the diversity of Member States' legal systems, while ensuring uniformly high level of protections for consumers throughout the Union. Legislative efforts have yielded results in a number of areas, with commercial practices, out-of-business premises and distance selling contracts, consumer credit law, travel package and out-of-court redress rules offering uniform provisions to consumers and traders in all Member States for their cross-border transactions, with maximum harmonization. At the same time, warranty and guarantee rights governed by Directive 99/44 EC, based on minimum harmonization, are subject to different rules from one Member State to another, with Member States having managed to withstand several very significant attempts at reform over the past 10 years. The rules on consumer sales, warranty and guarantees have therefore proved to be a very good place to display national characteristics. When comparing the law of the Visegrad Four countries, I considered the different specificities of the Member States regarding to the implementation of the Directive 99/44 EC and carried out it based on important issues.

5.1. The Personal and Material Scope of the Regulation

In relation to the definition of the consumer, we are encountering a narrowing down to natural persons in the law of Hungary, the Czech Republic and Slovakia. Polish law defines the concept of consumer more broadly than EU consumer protection directives. As the Act of April 23, 1964 of the Civil Code (hereafter, the Polish Civil Code) Art. 22 states that a natural person who enters into a transaction with an undertaking which is not directly related to his or her economic or professional activity shall be considered a consumer.[40]

The concept of "thing" in the meaning of Art. 2158 of the Act No. 89/2012 Coll. on the Civil Code (hereinafter, the Czech Civil Code) also applies to the subject in the legal sense. Since the Czech Code Civil does not define the nature of the product sold under consumer contracts and does not narrow its functional concept, the goods can be both commuters and real estate.[41]

The text of the Hungarian Civil Code differs from Art. 2(2) of Directive 99/44/EC, since the Hungarian Civil Code applies not only to consumer goods but also to the overall range of services. In the case of Slovak implementation, the term "transposed consumer goods" is understood to mean movable things. which comply with the definition of the consumer goods in Art. 1(2) of Directive 99/44/EC.

39 Twigg-Flesner, 2010, pp. 7–8.
40 Jagielska, 2020, pp. 72–73.
41 Hradek, 2020, p. 7.

5.2. Warranty Claims

There are also differences in the number of claims that can be enforced by the consumer in the Member States. A different level of consumer protection can be achieved through case law and consumer enforcement rules. Generally, by the Czech Civil Code, one may require a replacement and a repair may take place if a replacement of part of the item is necessary in accordance with Art. 2169 Czech Civil Code (this art. contains the rights from defective performance of the contract). For replacement, the consumer may request the same or better quality of the product. If it is not possible to replace it, the consumer may require repair. However, if the seller has tried to repair the defect twice, but it nevertheless occurs again, the buyer may request a replacement. The right of withdrawal may be exercised only if the goods or parts thereof cannot be repaired or replaced, or if the defects reappear or if the product has more than three defects.[42] The right to a price reduction does not constitute a secondary or tertiary claim, but acts as a separate primary right of the buyer within the rules of liability for defective performance.[43]

The regulation of warranty rights pursuant to Art. 6:159 of the Hungarian Civil Code is based on the rules set out in Art. 3 of Directive 1999/44/EC, but the Civil Code also adopts the rule of Art. 306(3) of the old Hungarian Civil Code,[44] according to which the defect could be repaired or repaired by the consumer himself at the expense of the obliged, and the directive regulation is extended by the provisions on the violation of interests in respect of claims that can be enforced in the second row.[45] Against this background, Hungarian law still envisages the enforcement of warranty rights in a so-called two-step system. In this first step, it names the repair or replacement in Art. 6:159(2)(a) of the Hungarian Civil Code, while in point (b) in the second stage, it names the proportional reduction of the consideration, the repair or repair at the expense of the obligor, and the right of withdrawal.[46]

The Polish warranty law has a number of characteristics, grant the buyer the right to withdraw from the contract in the event that the defect appears a second time, unless it is insignificant.

5.3. Time Limits and Guarantees

The Czech legislature does not set an explicit time limit in which the defect must be reported and sets a three-year limitation period for the limitation of rights. Act No. 634/1992 on consumer protection (hereinafter Czech Consumer Protection Act) requires that complaints, including the restoration of conformity, be settled without undue delay, However, the consumer's claim be fulfilled no later than 30 days after

42 Czech Supreme Court Decision No. 33 Cdo 1323/2013.
43 Hradek, 2020, pp. 12–15.
44 Act IV of 1959 on Hungarian Civil Code.
45 In the norm text of the old Civil Code, Art. 306 regulates the warranty rights.
46 Fézer and Hajnal, 2020, pp. 27–29.

the complaint has been lodged, unless the seller and the consumer agree on a longer period.[47]

In the case of a contract between a consumer and a business in paras. 6:163 (1)–(2) of the Hungarian Civil Code, the consumer's warranty claim expires two years from the date of performance (in case of second-hand items, the limitation period cannot be shorter than one year). If the subject of the contract is an immovable property, the warranty claim shall expire within five years from the date of performance. The consumer is obliged to report the defect without delay, no later than two months after its discovery, and the Hungarian legislature has also applied the presumption of six months of defective performance.[48]

According to Art. 556 of the Polish Civil Code, in the case of contracts between undertakings and consumers, it extends the presumption of non-conform performance to one year, unlike in other countries examined. Contrary to Hungarian law, under Polish law, the consumer can enforce his or her claim at any time during the warranty period, regardless of when it was discovered. Polish law also requires the seller to respond to a consumer's complaint for 14 days, which, if it fails, must be deemed to have accepted the consumer's claim. Under Polish law, the guarantee is for two years unless otherwise agreed by the parties in the guaranty statement.[49]

Act No. 141/1950 Coll. Civil Code (hereinafter: Slovak Code Civil) regulates the enforcement of warranty claims in the system decided in the Directive. The company is obliged to examine the complaint within three days, and it must be carried out within a maximum of 30 days after receipt of the claim, in the event of failure to do so, the consumer is entitled to withdraw from the contract or demand the exchange of the item.[50]

Hungarian law operates with commercial and obligatory guaranties, which is not known in any other examined country's law. Art. 6:171(1) of the Hungarian Code Civil mentions the obligation to provide for a performance guarantee may be required by the law. Examples of this requirement can be found in Governmental Decree No. 151/2003 (IX. 22.) on the mandatory guarantee associated to consumer products, in Governmental Decree No. 181/2003 (XI. 5.) on mandatory guarantee in relation to constructions, and in Governmental Decree No. 249/2004 (VIII. 27.) on mandatory guarantee in relation to repair and maintenance services.[51]

5.4. Summarizing Thoughts and the New European Regulatory Framework for Consumer Sales

European consumer sales legislation has given Member States many opportunities to maintain their national characteristics, which was also the primary cause of legal fragmentation. The national legislature could also provide stricter protection

47 Hradek, 2020, pp. 15–18.
48 Fézer and Hajnal, 2020, p. 30.
49 Jagielska, 2020, pp. 74–77.
50 Mészáros, 2020, pp. 136–142.
51 Fézer and Hajnal, 2020, pp. 32–35.

for consumers by means of a main regulation differing from the directive (e.g., by increasing the presumption of defective performance to one year in Polish law, or by the institution of mandatory guarantees in Hungarian law), through deadlines or a system of warranty claims. The most sophisticated differences can be found in the detailed rules for enforcing warranty claims. On this basis, we can conclude that Polish law has protected its consumers with stricter rules in several respects, while Hungarian law has at most only oriented the parties in the field of claims enforcement, and provides a higher level of protection for products and types of contracts provided by the institution of mandatory guarantees.

The spread of e-commerce offers tangible benefits to consumers, such as rapidly evolving new products, lower prices, and greater choice and quality improvements in goods and services, through easier comparability of cross-border trade and supply. Even after changes in our shopping habits, the supply chains, and the digital revolution, the most important interest of consumers remained the conform performance of their contracts. The global economic pressure on the European Union legislature and the Member States has made it inevitable that warranty and guarantee rights, which are a traditional part of Member States' private laws, are also regulated uniformly to maintain the continent's global competitive position and make more effective use of the reserves of the internal market.

On May 6, 2015, the Commission adopted the Digital Single Market Strategy, which consists of three pillars: 1) easier access for consumers and companies to digital products and services across Europe; 2) creating an appropriate and level playing field for the recovery of digital networks and innovative services; and 3) maximizing the growth potential of the digital economy.[52] As part of this legislative plan, Directive 2019/771 of the European Parliament and of the Council of May 20, 2019, on certain aspects concerning contracts for the sale of goods was adopted, which, by repealing previous Directive 99/44 EC, will usher in a significant period in the development of European consumer law.[53]

5.5 Current Changes in the Legal Framework of Consumer Sales

As part of the legislative package adopted, Directive 2019/770 lays down rules applicable to certain requirements concerning contracts for the supply of digital content or the provision of digital services,[54] while Directive 2019/771 establishes rules applicable to certain requirements concerning contracts for the sale of goods. Both

52 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM (2015) 192 final.

53 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC OJ L 136, 22.5.2019, pp. 28–50.

54 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services OJ L 136, 22.5.2019, pp. 1–27.

directives—which shall be applied in the Members States beginning January 1, 2022—have a maximum harmonization clause, which unifies Member States' law on a very high level, through derogating many of the above-mentioned national characteristics. Before the deadline, only Hungary[55] and Czech Republic had transposed the directives. Without giving a detailed list of the different national implementations, the main characteristics of the legislative actions are as follows.

Unlike previous regulatory ideas, Directive 2019/771 provides for general and comprehensive rules on sales contracts between consumers and sellers. As an exception, it names the digital content service as defined in the complementary directive, the contracts for the provision of digital services. As regards the degree of harmonization, it has a mixed solution: it provides, in principle, for full harmonization, but in several areas, it gives Member States the ability to deviate or maintain stricter provisions to protect consumers. These areas include, for example, the general contract law rules, the conclusion, validity, nullity, or legal effect of the contract, and the possibility of maintaining special remedies for defects that have become recognizable within a short time of performance.

It provides separately for the subjective requirements of contracting, in which the functionality, compatibility, interoperability, and other requirements prescribed in the contract appear as new elements. Among the objective requirements of contraction, we can also find, in addition to those terms, the concept of durability, which denotes the ability of the product to maintain its required functions and performance under normal use. Among the objective requirements of conformity, we find the requirements that have become necessary because of digitalization and the emergence of new products.

Perhaps one of the most important innovations of the 2019/771 directive is the burden of proof regulation, which raises the presumption of defective performance from the previous six months to one year, which will clearly have an impact on the internal market to increase the durability of goods.

The 2019/771 directive will bring about a significant change in the system of remedies available in the event of non-conforming performance. As a remedy, it refers to the making of the goods in accordance with the contract (repair and replacement), the proportional reduction of the price and the termination of the contract. The system continues to be a two-step model, but the principle of proportionality is not only based on the choice of needs that can be enforced in the first stage, but can also provide a reference for the transition to second-stage needs. The seller may refuse to make the goods conform if the repair or replacement imposes an impossible or disproportionate cost on the seller, considering all the circumstances of the directive. The directive also extended the reasons for the consumer's transition from first-stage claims, for example, by saying that if the performance error arises again, despite the

55 Government Decree No. 373/2021 (VI. 30.) on detailed rules on detailed rules for contracts between consumers and businesses for the sale of goods, the supply of digital content and the provision of digital services.

seller's attempts to make it conform to the contract. Detailed rules for implementing the repair and exchange of goods are also clarified in the directive.

6. Future Challenges of European Consumer Policy

Due to the changed way of life and technological pressure, our changed shopping habits have created several business models, contracting mechanisms and commercial communication channels that are challenging from the perspective of market surveillance, to which our existing consumer protection law can only be applied in part.

The European Digital Agenda, the New Deal for consumers, clearly aims to make the European Union a global competitive factor, to ensure a high level of protection for the European consumer in changed market conditions and to make European consumer law suitable for this. Slowly changing consumer regulatory frameworks have necessitated the introduction of new regulatory models, the abandonment or reform of older regulatory concepts in almost all areas of private consumer law and public law.

Consumer policy and legislation must clearly face the emergence and challenges of new types of products (Internet of Things, AI), new types of information flow and advertising structures, the failure of the prevailing consumer information regulatory model and the inescapable results of behavioral economics.

7. Conclusion

European Union law has a very strong impact on national law, especially the right to protection. To make the internal market without borders work more efficiently and to increase consumer confidentiality, legislation under the banner of digitalization has been focused on maximum harmonization in regulatory areas, where national resistance has previously stopped all previous unification efforts. All these new legislations, aiming for maximum harmonization, give Member States even less leeway to display their national characteristics and establish or maintain different levels of protection. However, through the examples presented in the study, we can see that, despite maximum harmonization, Member States have many opportunities to adapt the protection mechanisms of European consumer law to the needs of national consumers and to Member States' regulatory traditions through different legislative methods. The European Union's policy and method of regulation are largely defined by one-two dogma items, such as the average consumer's model or regulatory technical solutions, like withdrawing the rights and information model. There is also suspicion that impulses from Eastern and Central European countries can have an impact on European legislation and jurisprudence, as well as changes in the economy and consumer habits.

Through the transposition of European legislation on alternative dispute resolution and warranty and guarantee rights, I have sought to demonstrate the extent to which the Visegrad Four countries have presented national specificities in relation to legislation with different harmonization depths. It was interesting to show how the Hungarian legislature controls certain economic sectors like doorstep selling activities in a maximum harmonized legal framework for the benefit of Hungarian consumers. I have also examined cases where preliminary ruling procedures from this area have radically changed the practice of the Unfair Contract Terms Directive, while also having an impact on the fundamental elements of European legislation on the protection of consumers.

Member States' specificities can be embedded in Member States' consumer law through legislative creativity, and Member States' initiatives can also have an impact on EU consumer legislation. The question is simply whether the European legislature is satisfied with the current state of harmonization or whether it will be forced to take further steps over the next decade to completely reduce the differences in the Member States that cause fragmentation.

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Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015.

Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019.

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019.

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019.

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Judgment of the CJEU (Third Chamber) of 22 November 2001, Cape Snc v. Idealservice Srl (C-541/99) and Idealservice MN RE Sas v. OMAI Srl (C-542/99), Joined cases C-541/99 and C-542/99, ECLI:EU:C:2001:625.

Judgment of the CJEU (Fourth Chamber) of 30 April 2014, (request for a preliminary ruling from the Kúria — Hungary) Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Mortgage Bank Zrt., Case C-26/13, OJ C 194, 24.6.2014.

Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013.

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| Chapter 10 |

Common Foreign, Security, and Defense Policies

Agnieszka MIKOS-SITEK

ABSTRACT

This chapter examines the issue of the common foreign and security policy, as well as its integral part of the common security and defense policy, discussed from the perspective of the EU Member States, including, in particular, the countries of Central and Eastern Europe. To create a substantive basis for the assessment of the position of EU Member States in the CSFP implementation process, the basic issues related to the provisions of the treaties in this area are discussed at the beginning. An important element of the chapter is also the characterization and identification of the separateness of the regulations in force in the field of CFSP. Attention is also paid to institutional solutions, which are important in this case, as well as legal instruments for the implementation of CFSP. In addition to general guidelines, decisions, and the issues of strengthening systematic cooperation, attention is also drawn to the importance of international agreements concluded by the EU in the area of CFSP. An important element of the analysis of the rights and obligations of EU Member States is also the decision-making procedure considering the unanimity principle, as well as the so-called solidarity clauses. The discussion of the role and position of the EU Member State in the CFSP area is summarized with a reference to issues that specifically concern the countries of Central and Eastern Europe. Attention is drawn to the spectrum of problems that arise in the practice of CFSP implementation, related primarily to significant differences in defining state security guarantees and the underlying factors.

KEYWORDS

Common foreign and security policy, common security and defense policy, EU external action, EU Member State, Central and Eastern Europe, unanimity mechanism, general guidelines, action decisions, position decisions

1. Introduction

Common Foreign and Security Policy (CFSP)—and in its framework, the Common Security and Defense Policy (CSDP)—is one of the levels of cooperation in the European Union, the goals, principles, and scope of implementation of which have undergone significant modifications over the years. The provisions of the Treaty of Lisbon of December 13, 2007[1] became the basis for a structural reform eliminating

1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1–271.

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the structure of the three pillars of the EU, as a result of which CFSP ceased to be the second pillar of the EU, and became one of its policies, which are the most important areas of cooperation between EU Member States.

At the same time, it should be noted that CFSP is the only EU policy regulated by the provisions of the Treaty on European Union,[2] and not—like the other categories—by the provisions of the Treaty on the Functioning of the European Union.[3] Therefore, in the normative sense, it has been clearly separated from the catalogue of EU policies, but also from the whole of the so-called EU external action. The provisions of the Treaty on European Union, defining the scope of the EU's competences in the field of CFSP, indicate all areas of foreign policy and all issues related to EU security, and the gradual definition of a common defense policy. At the same time, the interpretation of these provisions allows for the definition of—important from the perspective of this study—rules of cooperation between EU Member States, as well as the possibility of protecting the national interests of individual countries, considering CFSP subjecting to specific rules and procedures.[4]

Specifying the EU's competences in the field of CFSP, the TEU provisions stipulate that, in the framework of the principles and objectives of the EU's external action, it also conducts, defines, and implements a common foreign and security policy, based on the development of mutual political solidarity between the Member States, identifying issues of general interest and achieving an ever-greater degree of convergence in the actions taken by these countries.[5] Moreover, Member States are to support the EU's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, and to respect the EU's actions in this area. Unanimity in actions should characterize the activity of EU Member States aimed at strengthening and developing mutual political solidarity. At the same time, they should refrain from any action that would run contrary to the interests of the EU or could jeopardize its effectiveness as a coherent force in international relations. The Council and the EU high representative for Foreign Affairs and Security Policy ensure the observance of the above-mentioned principles.[6]

In the process of the changes taking place, the CFSP has retained the nature of actions implemented at the level of intergovernmental integration, and the division of competences between the EU and individual Member States should be specifically qualified in this case.[7] Decisions under the CFSP are to be (with certain exceptions) based on the unanimity mechanism. Legislative acts are also excluded in this case. [8]

In the context of the analyzed issue, the provisions of Declaration No. 13 on the common foreign and security policy are of particular importance, according to which

2 Treaty on European Union, OJ C 326, 26. 10. 2012, pp. 13–390 (further referred to as: TEU).
3 Treaty on the Functioning of the European Union, OJ C 326, 26 10. 2012, pp. 47–390 (further referred to as: TFEU).
4 Art. 24(1) TEU.
5 Art. 24(2) TEU.
6 Art. 24(3) TEU.
7 Arts. 2–6 in conjunction with Art. 24 TEU.
8 Art. 24(1), Art. 31(1) TEU.

the provisions of the TEU on the indicated issues, including the creation of the office of the EU high representative for Foreign Affairs and Security Policy and the European External Action Service, do not violate the current responsibility of Member States to shape and conduct their own foreign policy, and the way they are represented in relation to third countries and international organizations. The provisions of the declaration also indicate that the provisions governing the common security and defense policy do not violate the specific nature of the security and defense policy of the Member States. The provisions of Declaration No. 13 also referred to the issue of membership in the United Nations, because of which the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations,[9] and in particular the primary responsibility of the Security Council and its members for the maintenance of international peace and security.

Reference should also be made to Declaration No. 14 on the common foreign and security policy, the provisions of which refer primarily to the provisions of Art. 24(1) TEU, from which it follows that CFSP is subject to specific rules and procedures. In accordance with the content of Declaration No. 14, in addition to the specific rules and procedures referred to in Art. 24(1) TEU, the provisions on the common foreign and security policy, including the EU high representative for Foreign Affairs and Security Policy and the European External Action Service, will not affect the applicable legal basis, responsibility and powers of each Member State to shape and conduct its own foreign policy, national diplomatic service, relations with the third countries and participation in international organizations, including membership of the UN Security Council. The provisions of Declaration No. 14 indicate at the same time that the provisions governing the Common European Security and Defense Policy do not infringe the specific nature of the security and defense policy of the Member States.[10]

Currently, 11 countries belong to the group of Central and Eastern European countries that are part of the EU structures. Their accession took place in several stages and took place in 2004 (Czech Republic, Estonia, Lithuania, Latvia, Poland, Slovakia, Slovenia, and Hungary), 2007 (Bulgaria, Romania), and 2013 (Croatia).[11] The representation of 11 states should therefore result in a significant participation and influence on decisions and directions of EU actions in the field of common foreign, security and defense policy. However, the specific nature of the analyzed area of cooperation between EU Member States is also related to the fact that in this case identifying the priorities that constitute the basis for the decisions and actions taken is conditioned by many factors, including, in particular, different economic and geopolitical interests. It should not be forgotten that the shape of the security and defense policy is also significantly influenced by historical and cultural conditions. All these factors make it difficult to develop, and quite often even prevent the development of, common solutions fully supported by the conviction that the same security

9 Charter of the United Nations, signed in San Francisco, 26 June 1945.
10 Gadkowski and Gadkowski, 2019, pp. 91–93.
11 Łazowski, 2008, pp. 426–432.

guarantees are maintained for individual EU Member States. Achieving the aforementioned security guarantees by joining the forces of all states remaining in the EU structures remains an important argument, but it does not seem to be sufficient in a situation where the geopolitical point of gravity—having a decisive impact on the shape of foreign, security and defense policy—is, however, located differently in the presented beliefs and direct actions of various EU Member States.

When attempting to take a historical look at the process of integration and cooperation of EU Member States in the field of common foreign, security and defense policy, it should be noted that activities aimed at establishing broadly understood cooperation between European countries were undertaken throughout the postwar period, and their significance for inclusion in this the process of Central and Eastern European countries increased especially in connection with the events of the 'Autumn of Nations' in the 1980s and 1990s. The significantly changing balance of power in Europe, resulting from the collapse of the communist system in the eastern part of the continent, was the basis for the EU to build new rules of cooperation with the countries of Central and Eastern Europe and became one of the priorities of the EU's foreign policy. From the perspective of the countries of Central and Eastern Europe, establishing such cooperation was associated with building and strengthening their position in Europe and resulted in many cooperation initiatives and, consequently, the initiation of the process of concluding association agreements,[12] and finally membership in the EU of the eleven countries mentioned above.

At the same time, it should be noted that the efforts to integrate the countries of Central and Eastern Europe with the EU were accompanied by activities aimed at the inclusion of individual countries in the region into the North Atlantic Treaty Organization (NATO), which in relation to the analyzed group of countries took place for the first time in 1999 and concerned the Czech Republic, Poland, and Hungary. This process was extended in 2004 (including Romania, Slovakia, and Slovenia) and then in 2009 (including Croatia). In the case of the countries of Central and Eastern Europe, NATO's defense forces have been an important pillar of security from the very beginning, and their positions in the field of CFSP implemented in the EU structures were shaped considering the perspective of this broader cooperation of states. An example of, among others, Poland shows that for a relatively long time, also in the period after joining the EU, the dominant position was that NATO remained the pillar of Poland's security.[13] Currently, the cooperation of EU Member States in the field of CFSP is considered particularly important, and the definitely growing role of the EU in the field of common security is indicated, but it is difficult to talk about replacing allied obligations in NATO structures with it, which is related to, inter alia, with a lack of sufficient defense infrastructure.[14]

12 First with Czechoslovakia, Poland, and Hungary (1991), followed by Bulgaria and Romania, among others (1993); see Papadimitriou, 2003.
13 Miszczak, 2020, p. 181.
14 Ibid. pp. 189 and 213.

2. Institutional Solutions in the Field of CFSP

The rules in force in the implementation of CFSP have a direct impact on the shape of institutional solutions adopted in this area. As mentioned above, CFSP has retained the nature of activities carried out at the level of intergovernmental integration of EU Member States, which determines the manner of its implementation by the EU institutions of an intergovernmental nature. In this case, it is primarily about the European Council and the Council of the European Union. In the complex structure of institutions assigned competences in the field of CFSP, there are also those established solely for the purpose of implementing the assumptions and goals of the analyzed sphere of EU functioning. The main competences in this respect lie with the high representative for Foreign Affairs and Security Policy, assisted in his activities by the European External Action Service and the EU Member States.[15]

The competences of the European Council in the field of CFSP are related to defining the strategic interests of the EU, including setting goals and defining the general guidelines of the common foreign and security policy.[16] They also include adopting the necessary binding decisions. The strategic interests and objectives of the EU are determined based on the principles and objectives set out in Art. 21 TEU, and decisions taken by the European Council on these matters may concern the Common Foreign and Security Policy and other areas involving EU external action. [17]An additional competence of the president of the European Council is the possibility of convening an extraordinary meeting to define the strategic directions of the EU's policy in a situation when the international situation so requires.

The competence of the Council of the European Union covers the development of the common foreign and security policy and making the decisions necessary to define and implement this policy based on general guidelines and strategic directions defined by the European Council. The Council of the European Union is to ensure the uniformity, coherence, and effectiveness of EU actions, which is also the responsibility of the EU high representative for Foreign Affairs and Security[18] policy.[19]

In the context of the functioning of the Council of the European Union, it is also worth paying attention to the issue of the presidency of individual Member States, because the programs implemented in this area often referred to issues related to CFSP. In case of Poland, the six-month presidency program implemented in 2011 covered three priority areas: 'European integration as a source of growth.' 'Safe Europe—food, energy, defense,' and 'Europe benefiting from openness.' Two of the indicated areas of planned activity related to EU external actions. Activities related to shaping a safe Europe were related to many areas, including the economy,

15 Aleksandrowicz, 2011, p. 92; Barcz, 2020, p. 118.
16 Art. 26 TEU.
17 See Art. 21(2) and Art. 22(1) TEU.
18 Art. 26(2) TEU.
19 Aleksandrowicz, 2011, pp. 92–93; McCormick, 2010, pp. 127–141.

common agricultural policy, finance, and energy security. In the latter case, it was proposed to create the assumptions of the external energy policy of the European Union. The activities of the Polish presidency were also focused on solutions related to the external security of the EU, including the security of its borders. The need for changes in the functioning of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), ensuring effective support of EU Member States in crisis situations, was mentioned. An important element of the Polish presidency of the Council of the European Union were also activities aimed at strengthening the military and civilian capabilities of the EU, as well as strengthening the direct dialogue between the European Union and NATO. As part of the 'Europe benefiting from openness' priority, *inter alia*, support for the EU's foreign and security policy was mentioned, which was considered an important element in strengthening the EU's position on the international stage. Attention was also paid to the further expansion of the European Union and the development of cooperation with neighboring countries. An important goal of the Polish presidency of the Council of the European Union was also the finalization of accession negotiations with Croatia and the signing of the Accession Treaty with Croatia.[20] The continuation of accession negotiations with Turkey, progress in Iceland's accession negotiations, and support for the European aspirations of the Western Balkan countries were also considered an important element of the presidency's objectives. The issues of cooperation between the EU and Russia were also highlighted.[21] The implementation of the objectives of the Polish Presidency of the Council of the European Union in the field of CFSP turned out to be partial, but it allowed for the finalization or intensification of many activities—covered by the presidency's priorities.[22] It should be emphasized, however, that the presidency mechanism can be considered an important tool that highlights—important from the perspective of individual EU Member States—the principles and directions of cooperation, also in the field of CFSP.

In practical terms, the CFSP is carried out by the EU high representative for Foreign Affairs and Security Policy (acting in this case under the authority of the Council of the European Union) and by the Member States. The EU high representative for Foreign Affairs and Security Policy participates in the preparation of the CFSP and represents the EU in matters falling in its scope. They also ensure the implementation of decisions adopted in this area by the European Council and the Council of the European Union. They are appointed by the European Council, acting in this case by a qualified majority, which takes place with the consent of the president of

20 The accession treaty with Croatia was signed on 9 December 2011.

21 See Program of the Polish Presidency of the Council of the European Union 1 July 2011—31 December 2011, Warsaw, 2011, pp. 8 et seq.

22 See Polish Presidency of the Council of the European Union. Final report on the preparation and exercise of the presidency, Warsaw, 2012.

the European Commission. Under the same procedure, the European Council may terminate the term of office[23] of the high representative.[24]

In the context of the discussed issues and the assessment of the implementation of the CFSP assumptions from the perspective of EU Member States, including Central and Eastern European countries, attention should be paid to the special positioning of the EU high representative for Foreign Affairs and Security Policy in the structure of EU institutions. They ensure the implementation of decisions made by intergovernmental institutions, and are vice presidents of the European Commission, which certainly has a significant impact on maintaining coherence in the field of EU foreign policy. The assessment of the institutional affiliation of the high representative and its character goes beyond the scope of this study, but there is no doubt that the common denominator of the aforementioned affiliation is the scope of tasks performed by them. It should be emphasized, however, that the function of the EU high representative for Foreign Affairs and Security Policy is performed at the intergovernmental and supranational level of cooperation between EU Member States.[25] While there are justified doubts as to the degree of independence of the high representative in the process of carrying out his or her tasks, the proper weighting of intergovernmental and supranational factors having a fundamental impact on the broadly understood EU foreign policy, or the effectiveness in achieving assumptions and goals with such a wide range of tasks performed, the possibility of accentuating in the field of CFSP the diversity of interests of individual EU Member States, which cannot always be closed into a uniform framework of common solutions.

In carrying out his or her tasks, the high representative is assisted by the European External Action Service, which consists of officials from the relevant services of the General Secretariat of the Council of the European Union and the European Commission, as well as staff seconded from the national diplomatic services. The organization and functioning of the European External Action Service are determined by a decision of the Council of the European Union. It cooperates with the diplomatic services of the individual EU Member States.[26]

Its substantive basis is, of course, the limited competences in the field of CFSP of the European Parliament, the European Commission, and the CEJU. However, it should be remembered that there are many institutions in the organizational structure of the EU which—apart from the key competences discussed above—carry out specific tasks falling in the scope of CFSP. Examples include: the Political and Security Committee,[27] the so-called special representatives,[28] and the Agency for the Development of Defense Capabilities, Research, Purchasing and Armaments (whose

23 Arts. 18(1) and (2) TEU.
24 See Barcz, 2020, pp. 118–121; Grzeszczak, 2013, pp. 28–33.
25 Dubowski, 2019, pp. 107–128.
26 See Art. 27(3) TEU.
27 Art. 38 TEU.
28 Art. 33 TEU.

activities relate to the CSDP, which is an integral part of the Common Foreign and Security Policy, Art. 42(3), Art. 45 TEU).[29]

As the issue of institutional solutions is complementary to the basic assumptions of this study, reference was made to the key issues of importance in the CFSP implementation process from the perspective of EU Member States, their participation in making these decisions and the assessment of the degree of representation of their national interests.[30]

3. Instruments for the Implementation of the EU's Common Foreign and Security Policy

3.1. General Guidelines and Decisions

Pursuant to Art. 24(1) TEU, in the field of Common Foreign and Security Policy, the adoption of legislative acts is excluded, which is additionally confirmed by the provisions of Declaration No. 41 relating to Art. 352 TFEU. However, in accordance with the wording of Art. 25 TEU the European Union conducts a common foreign and security policy through:

1. defining general guidelines;
2. adopting decisions specifying:
   a. activities to be carried out by the Union;
   b. positions to be taken by the Union; and
   c. the rules for implementing the decisions referred to above; and
3. strengthening systematic cooperation between Member States in the conduct of their policies.

The competences listed above are shared between the European Council and the Council of the European Union. As already indicated—in accordance with Art. 26(1) TEU—the European Council defines the general guidelines of the CFSP and takes the necessary decisions. It also sets goals and outlines the general guidelines of the CFSP, including matters with political-defense implications. In the process of implementing the general CFSP guidelines, decisions are issued by the Council of the European Union. According to Art. 26(2) TEU, the Council of the European Union develops the CFSP and takes decisions necessary to define and implement this policy based on general guidelines and strategic directions defined by the European Council.[31]

Considering the above, it should be emphasized, however, that the decisions issued by the Council of the European Union are of fundamental importance from the perspective of CFSP implementation. TEU regulations qualify them in the group of the so-called decisions about actions and decisions about positions. In the former

29 Aleksandrowicz, 2011, pp. 93–96.
30 See Missiroli, 2008.
31 Ibid. pp. 96–97.

case, these decisions impose certain obligations on states. The Council of the European Union undertakes them if the international situation requires operational actions by the EU, and the provisions of the treaty do not specify what in practice these operational actions should mean. Decisions on actions define their range, objectives, scope and means to be placed at the disposal of the EU, the conditions for their implementation and, if necessary, their duration. In this case, there is also a situation where a change of circumstances takes place which has a clear impact on the issue being the subject of such a decision—the Council of the European Union then reviews the principles and objectives of such a decision and takes further necessary decisions (see Art. 28(1) TEU). The decision to act then remains in force until the Council adopts a revised decision.[32]

Referring the discussed issues to the position of individual EU Member States participating in the process of making and approving such decisions, it should also be noted that:

a) They bind Member States regarding their positions and activities;
b) Member States are required to inform the Council of the European Union of any national position or action taken pursuant to the decision; the Member State is obliged to inform the Council of the European Union in time which, if necessary, allows prior arrangements to be made in its forum, and the obligation to inform in advance does not apply to measures that merely simply implement the Council's decision at national level;
c) The information obligation of the EU Member States also applies to situations where, in the event of absolute necessity resulting from developments in the situation and in the absence of a review of the decision of the Council of the European Union, they will urgently apply the necessary measures (as allowed under the TEU provisions, see Art. 28(4)) , having regard to the overall objectives of such a decision; apart from the existence of the information obligation itself, it should also be noted that the Member States are obliged to respect several rules in this case (case of absolute necessity, no review of the Council of the European Union decisions, the need to take into account the general objectives of the decision taken by the Council);
d) In the event of serious difficulties in implementing a decision, a Member State is required to notify them to the Council of the European Union, which considers them and seeks appropriate solutions, provided that they may not run counter to the objectives of the decision or prejudice its effectiveness.[33]

Therefore, making decisions specifying actions under CFSP and CSDP is related to the existence of specific obligations on the part of EU Member States (e.g., information) and compliance with certain rules related to their implementation, including in the event of a need to take a national position or difficulties in implementing a specific

32 Starzyk-Sulejewska, 2013, p. 461.
33 Arts. 28(2)–(5) TEU.

decision. At the same time, it should be emphasized that these decisions do not significantly restrict the ability of the Member States to implement an independent security and defense policy, but require, in some cases, close cooperation of EU Member States (if it concerns, for example, specific missions carried out under the CSDP).[34]

Decisions of the Council of the European Union setting out positions define the EU approach to a given problem of a geographic or subject nature. The rule in this case is that the Member States must ensure that their national policies are in line with EU positions, which means they should not adopt decisions contrary to the common position. Similarly, the TEU provisions impose certain obligations on the EU Member States:

a) Member States coordinate their actions in international organizations and at international conferences, upholding the EU positions in this forum; the EU high representative for Foreign Affairs and Security Policy is responsible for organizing coordination in this regard;
b) If all EU Member States are not represented in international organizations or at international conferences, it is for the participating Member States to uphold the EU positions.[35]
c) Member States represented in international organizations or at international conferences in which not all Member States participate are required to inform the latter, as well as the EU high representative for Foreign Affairs and Security Policy, of any matter of mutual interest;
d) Member States that are also members of the United Nations Security Council are required to act compliantly, and fully inform the other Member States as well as the EU high representative for Foreign Affairs and Security Policy about decisions on common positions; Member States that are members of the Security Council are bound, in the performance of their functions, to defend the positions and interests of the EU, without prejudice to their obligations under the provisions of the Charter of the United Nations;
e) Where the Union has defined a position on a matter which is on the United Nations Security Council agenda, the participating Member States request that the high representative be invited to present the Union's position;[36]
f) Member States' diplomatic and consular missions and EU delegations in third countries and at international conferences, as well as their representations in international organizations, are also required to ensure that decisions defining EU positions and actions are respected and implemented; they strengthen cooperation in this area by exchanging information and making joint[37] assessments.[38]

34 See Art. 42(1) and Art. 43 TEU; see also Starzyk, 2003, pp. 127–136.
35 See Art. 34(1) TEU.
36 See Art. 34(2) TEU.
37 Art. 35 TEU.
38 See Starzyk-Sulejewska, 2013, pp. 463–464; see also Gadkowski and Gadkowski, 2019, pp. 96–97.

For the sake of order, we should also mention the decisions taken by the Council of the European Union pursuant to Art. 215 TFEU related to the application of restrictive measures against third countries, as well as natural or legal persons and groups or entities other than states.[39]

3.2. Strengthening Systematic Cooperation, Common Approach

Pursuant to Art. 25 TEU, the European Union conducts a common foreign and security policy by strengthening systematic cooperation between its Member States. EU Member States—under the TEU provisions—are obliged to agree in the European Council and the Council of the European Union on all foreign and security policy issues of general interest to define a common approach. As a consequence of the above-mentioned TEU provisions, each EU Member State consults the others in the European Council or the Council of the European Union before taking any action in the international arena or entering into obligations that could affect the interests of the Union. In addition, Member States ensure, through concerted action, that the EU is able to pursue its interests and values in the international arena and remain in solidarity with each other. Where the European Council or the CEU has defined a common EU approach on a specific matter, the high representative of the EU for Foreign Affairs and Security Policy and the foreign ministers of the Member States coordinate their activities in the Council. Similar guidelines apply to Member States' diplomatic missions and EU delegations in third countries and to international organizations.[40]

3.3. Sanctions for Non-compliance with Decisions Made in the Field of CFSP

The TEU provisions do not provide for specific sanctions applicable to an EU Member State in breach of its obligations under the Title V TEU. Under the current legal status, the jurisdiction of the Court of Justice of the EU in this area of cooperation between EU Member States—with few exceptions—is almost completely excluded. This means that the legal instruments for implementing the CFSP are practically outside judicial control.[41]

Referring to these exceptions, it should be noted that the Court of Justice of the EU is competent to control compliance with Art. 40 TEU, which defines the issue of compliance with procedures and the appropriate scope of powers of institutions exercising their competences in the field of CFSP. The Court of Justice of the EU also reviews the legality of certain decisions provided for in Art. 275 para. 2 TFEU.

39 E.g. Council Decision 2014/145/CFSP of 17 March 2014 on restrictive measures in relation to actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine, OJ L 78, 17.3.2014, pp. 16–21.

40 Art. 32 TEU.

41 See Art. 24(1) para. 2 TEU.

3.4. International Agreements

An important element of the discussion of issues related to the instruments of implementation of the EU's common foreign and security policy in practice are also international agreements. The catalog specified in Art. 25 TEU does not include international agreements, but from the beginning of the cooperation of EU Member States in the field of CFSP, they were an important instrument for achieving goals in this area of EU functioning. It should also be emphasized that the regulations in force in this area have undergone significant changes over the years, they were also introduced by the provisions of the Treaty of Lisbon, according to which the EU was granted legal personality[42] and the procedure for concluding international agreements by the Union was given a uniform nature.

Referring to the key issues important from the perspective of this study, attention should be paid to Art. 216(1) TFEU, which defines the general principles shaping the EU's competence to conclude international agreements. Pursuant to its provisions, the EU may conclude international agreements with one or more third countries or international organizations. The EU may conclude international agreements if it is provided for in the Treaties or if the conclusion of an agreement is necessary to achieve, in the framework of the EU's policies, one of the objectives set out in the Treaties, if the conclusion of the agreement is provided for in a legally binding Union act, or if the conclusion of an agreement is may affect common rules or may change their scope. It should be emphasized in this case that international agreements concluded by the EU with third countries or with international organizations bind both EU institutions and individual Member States.

The principles and stages of a uniformly regulated procedure for concluding international agreements are regulated by Art. 218 TFEU, while the competence to conclude them in the field of CFSP is specified in Art. 37 TEU.[43] At the same time, it should be noted that the regulations on concluding international agreements, also after the changes introduced in this respect by the provisions of the Treaty of Lisbon, did not restrict the ability of Member States to make decisions in the field of CFSP.[44]

3.5. The Principle of Loyalty

The cooperation of EU Member States—also in the field of CFSP—is also influenced by the principle of loyalty, currently regulated by the TEU regulations. Pursuant to the principle of sincere cooperation, the EU and the Member States respect each other and assist each other in carrying out tasks under the Treaties. The provisions of the TEU also oblige the Member States to take any appropriate measures, general or specific, to ensure the fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Member States are also to facilitate the

42 Art. 47 TEU.

43 On CFSP, see, e.g., the Framework Agreement of 31 March 2011 between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, OJ L 143, 31.05.2011, p. 1.

44 Starzyk-Sulejewska, 2013, p. 471.

fulfillment by the Union of its tasks and refrain from taking any measures that could jeopardize the achievement of the Union's objectives.[45] This rule for CFSP is specified in detail in Art. 24(3) TEU.[46]

In addition to the principle of loyalty, both the TEU and TFEU[47] provisions define the content of solidarity clauses that are binding on the Member States on various levels of cooperation. Art. 42(7) TEU, according to which, in the event that any EU Member State becomes a victim of an armed attack on its territory, other Member States are obliged to provide assistance and support to it using all available means—in accordance with Art. 51 of the United Nations Charter. At the same time, the mentioned provision contains a reservation that the clause contained therein does not affect the specific nature of the security and defense policy of some Member States.

4. Decision-making Mechanism under CFSP

The decision-making procedures based on the principle of unanimity in this area are also an important safeguard for the interests of the Member States in the field of CFSP. They provide for some exceptions related to, for example, establishing a few decisions by the Council of the European Union applying the rules of qualified majority, e.g., when it adopts a decision defining the action or position of the EU, based on a decision of the European Council regarding the strategic interests and objectives of the Union or under the procedure appointment of a special representative (in accordance with Art. 33 TEU). The qualified majority voting mechanism, however, provides for the possibility of opposing the adoption of a decision under this procedure if it is based on significant national policy considerations, which the Council member must define in this case.[48]

The TEU regulations also provide for a solution in the form of the so-called constructive abstention, which does not, however, prevent making decisions by the required unanimity procedure. According to the formal declaration made by the Member State (abstaining), it is not obliged to implement the decision in this case, but accepts that the decision is binding on the European Union. Such state—in a spirit of mutual solidarity—refrains from any action that could contradict or impede the action of the EU taken based on this decision, while the other Member States respect its position. However, the TEU provisions contain an important proviso that a decision cannot be adopted if the members of the Council of the European Union who have made a declaration of abstention represent at least one-third of the Member States whose total population is at least one-third of the population of the Union.

45 Art. 4(3) TEU.
46 See point 1 of this Chapter.
47 See Art. 222 TFEU.
48 Art. 31(2) TEU.

From the perspective of the interests of EU Member States, the reservation is also important, according to which the rules of qualified majority voting do not apply to decisions having military or defense implications. This sphere of cooperation between the Member States requires unanimity in each case.[49]

It should also be noted that the TEU provisions grant the Member States the right of initiative in decisions taken in the field of CFSP. They also have the right to submit to the Council of the European Union any questions and motions relating to matters falling in the scope of the[50] CFSP.[51]

5. The Perspective of the Countries of Central and Eastern Europe—Final Remarks

The analysis of the binding treaty provisions and the procedures for cooperation between the EU Member States in the area of CFSP envisaged therein allows for the identification of significant differences in the normative and practical solutions that characterize it. The discussed area of cooperation in the European Union has kept separate solutions over the years, and subsequent changes introduced in this respect in the treaty regulations concerned both its institutional structure and legal instruments at the disposal of EU Member States. The current shape of the TEU provisions given by the provisions of the Treaty of Lisbon is confirmed by the fact that CFSP has been separated from the catalog of EU policies, as well as from the entirety of the EU's external actions, while maintaining its intergovernmental character. From the perspective of this study, it is important to clarify some of the obligations of the Member States in the field of CFSP—with the reservation, however, that the provisions of the TEU in force refer to the originally adopted solutions. It should also be emphasized that while the TEU provisions impose certain obligations on the Member States—also in the context of the solidarity clauses—they do not significantly restrict their freedom in making decisions in the field of foreign policy.[52] Decisions taken by the Council of the European Union in a given matter do not result in the inability to make a decision in this respect at the national level.[53] Therefore, notwithstanding the fact that the CFSP area currently covers all areas of foreign policy and all matters relating to the security of the EU, including the gradual definition of a common defense policy,[54] and efforts to achieve an ever greater degree of convergence of actions by Member States,[55] the provisions of the TEU in many places emphasize the autonomy of the Member States in shaping and implementing foreign policy at the national level. At the time time, a kind of boundaries of the aforementioned

49 See Art. 31(5) TEU.
50 Art. 30(1) TEU.
51 Aleksandrowicz, 2011, pp. 97–98.
52 Hillion and Wessell, 2008, p. 86.
53 Starzyk-Sulejewska, 2013, p. 466.
54 Art. 24(1) TEU.
55 Art. 24(2) TEU.

autonomy are determined by the rules of loyalty applied in CFSP and the requirements of coherence of the entire external relations of the EU.

In conclusion, it should also be noted that CFSP—as an intergovernmental area of cooperation between EU Member States—is shaped by the EU institutions of an intergovernmental nature, i.e., the European Council and the Council of the European Union, and performed by the EU high representative for Foreign Affairs and Security Policy, who is assisted by the European External Action Service in performing its tasks. Of course, the EU Member States themselves participate in the CFSP implementation process, applying in this case national and EU measures.[56] The TEU provisions exclude the adoption of legislative acts in the field of the CFSP, establishing as the basis for the CFSP implementation process tools in the form of, above all, general guidelines, decisions defining actions or positions, and strengthening systematic cooperation between the Member States in the conduct of their policies. An important supplement to the aforementioned solutions is the possibility for the EU to conclude international agreements in its external relations, which are binding both for the EU institutions and for individual Member States.

Important from the perspective of the CFSP objectives is also the fact that its integral element is the Common Security and Defense Policy (CSDP), which has been separately regulated by the TEU regulations. Pursuant to Art. 42(1) TEU, the CSDP provides the Union with an operational capacity based on both civilian and military means. The European Union can use them in peacekeeping, conflict prevention and strengthening international security missions outside the EU, in line with the principles of the United Nations Charter. These tasks are performed using the potential and capabilities provided by EU Member States. The TEU regulations also specify that the missions for which the EU may use civil and military means include: joint disarmament operations, humanitarian and rescue missions, military advisory and support missions, conflict prevention and peacekeeping missions, and military crisis management missions, including post-conflict stabilization operations. All these missions can contribute to the fight against terrorism, including supporting third countries in combating terrorism in their territories.[57] At the same time, it should be noted that the CSDP assumes the gradual definition of a common defense policy.[58]

It should be noted that the institution of permanent structured cooperation was introduced in this respect,[59] in which the countries of Central and Eastern Europe also participate.[60] The adoption of the above solutions resulted in a return to the concept of creating a common European army.[61]

56 Art. 26(3) TEU.
57 Art. 43(1) TEU.
58 Gadkowski and Gadkowski, 2019, p. 103.
59 Art. 42(6) in conjunction with Art. 46 TEU.
60 See Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331, 14.12.2017, pp. 57–77; Miszczak, 2020, pp. 229–235.
61 Miszczak, 2020, p. 229.

The issue of external security is an important element of foreign policy for each country, and it is obvious that we strive to ensure it at the highest possible level. As already indicated above, the problem in creating fully consistent rules for the implementation of CFSP is sometimes a significant difference in the assessment of threats from the perspective of individual countries, which is influenced by a number of factors related mainly economic and political, but also related to geographic conditions. The coherence of solutions in the CFSP area was adopted to the extent that allows all Member States to make decisions at the national level. Therefore, such solutions increase the effectiveness of states providing security guarantees both within the EU structures and outside of them.

From the perspective of Central and Eastern European countries, the discussed issue has recently gained particular importance in connection with events related to, for example, the ongoing war in Ukraine, the concentration of Russian troops in Belarus, or the migration crisis that now affects the countries of Central and Eastern Europe.

Due to the different perceptions of the realization of one's own interests for the reasons mentioned above—the current situation shows a certain weakness of the solidarity clauses embedded in the treaty provisions—in terms of both cooperation in the field of foreign policy and, consequently, also security. This study does not deal with the issue of economic cooperation between EU Member States, however, the activities of states on various levels of their operation intertwine with each other, causing certain repercussions in areas (seemingly) unrelated.

Strategic assumptions of Central and Eastern European countries related to foreign and security policy share many common points. When discussing them, using Poland as an example, attention should be paid first of all to the expectations in terms of building the stability of the immediate geographical environment, maintaining measures to strengthen the voice of Central European countries in the European Union and the implementation of an active regional policy. The important issue remains, of course, taking actions aimed at expanding own defense capabilities, as well as strengthening the potential of allied relations in the EU and NATO.[62]

Recent events, particularly affecting many Central and Eastern European countries, show that the further development of cooperation between EU Member States in the field of CFSP depends to a large extent on their political will. It is also important to define European cooperation in such a way that it will be deprived of the context of the special importance of the interests of the stronger states. For the above reasons, for activities focused on ensuring security guarantees—assuming a broad spectrum of understanding of this term—apart from cooperation implemented in the structures of the EU, cooperation implemented in the region is also important for Central and Eastern European countries (e.g., as part of the Visegrad Group or

62 See Strategy of Polish Foreign Policy 2017–2021; see also National Security Strategy of the Republic of Poland (2020), Hungary's National Security Strategy (2020), Security Strategy of the Czech Republic (2015).

the Three Seas Initiative). Forms of cooperation on a level going beyond the borders of the EU and Europe, the importance of which should at least be indicated here, are beyond the scope of this study. It is also worth paying attention to the fact that the issues of foreign, security and defense policy today are associated with many issues which, to some extent, require re-analysis and formulation of effective solutions, and concern a very wide spectrum of problems, such as the protection of the EU's external borders,[63] military security,[64] the growing migration crisis, or the protection of EU cyberspace.[65]

63 Moraczewska, 2021, pp. 115–200.
64 See Miszczak, 2020, pp. 151–168.
65 Oleksiewicz, 2021, pp. 181–224.

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| Chapter 11 |

European Asylum Policy and its Reforms from a Central and Eastern European Perspective

Ágnes TÖTTŐS

ABSTRACT

This chapter explores the recent developments of the EU's asylum policy and focuses in details on three specific issues, namely the short-term actions at EU level given to the 2015 migration crisis, the direction of the long-term reform of the Common European Asylum System, and the most recent developments at the Eastern borders, including the instrumentalization of migration by Belarus and the fleeing of millions from Ukraine. Given the geographical position of Central European countries in the EU, they have been exposed to migratory challenges earlier and to a greater extent than many other parts of the Union. Because of their unique historical and societal context, their reaction is focused on the provision of security instead of allowing for the misuse of the asylum system. Therefore, the three specific issues are introduced with special attention to the effect on and the position of Central Europe and especially the Visegrad countries.

KEYWORDS

Common European Asylum System, relocation, asylum reforms, instrumentalization of migration, Ukrainian refugees.

1. The Common European Asylum System and its Inoperability

Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU) sets out that

> 'the Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

Töttős, Á. (2022) 'European Asylum Policy and its Reforms from a Central and Eastern European Perspective' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 217–237. https://doi.org/10.54171/2022.aojb.poeucep_11

Since 1999 the EU, based on its shared competence in the field of asylum, has established a Common European Asylum System governed by several legislative instruments that already underwent a reform phase before the 2015 migration crisis.

In 2015, a record 1,392,155 applications for international protection were lodged in EU+ countries,[1] with most asylum seekers being nationals of Syria, the Western Balkans, and Afghanistan. The main EU+ countries that received the most applications for international protection were Germany (34% of all applicants), Hungary, Sweden, Austria, and Italy. Although Germany had the highest number of asylum applications in 2015 (476,510), Hungary had the highest number of applicants (177, 135) in the population, four times more than in 2014.[2]

> 'The European Union failed to coordinate a rapid and effective response, and many asylum and social-support systems reached a breaking point. Yet the number of arrivals alone, while historic, was not solely to blame. Structural deficiencies—both legal and operational—are baked into the very DNA of the Common European Asylum System (CEAS) and have long undermined Europe's ability to manage asylum flows.'[3]

This study explores the recent developments of the EU's policy on refuges and focuses on details on three specific issues, namely the short-term actions at EU level in response to the 2015 migration crisis, the direction of the long-term reform of the CEAS, and the most recent developments at the Eastern borders, including the instrumentalization of migration by Belarus and the fleeing of millions from Ukraine. Given the geographical position of Central European countries in the EU, they have been earlier and more exposed to migratory challenges than many other parts of the Union. Given their unique historical and societal context, their response focuses on providing security rather than allowing the asylum system to be abused.

Therefore, the three specific issues will be introduced with special attention to the effect on and the position of Central Europe and especially the Visegrad countries. There is a wide selection of academic work formulating critical examination of the actions of these states from a human rights perspective, this study instead intends to highlight the policy challenges that the European asylum reform ideas pose for these countries. It also argues that these challenges are no longer vocalized solely by the Central European countries; furthermore, it concludes that the most recent influx of those fleeing from the war in Ukraine proved that these countries are ready to provide effective protection when people in need are seeking refuge from an imminent danger.

1 EU Member States plus Switzerland and Norway.
2 European Asylum Support Office, 2016, p. 11.
3 Beirens, 2018, p. 1.

2. Immediate Actions: The Relocation Decisions as the Root of Mistrust

On 27 May 2015, the Commission, to assist Italy and Greece, proposed to use the emergency response mechanism under Art. 78(3) TFEU. This provision, which was activated for the first time, envisioned the relocation of 40,000 asylum seekers[4] in the clear need of international protection from Italy and Greece toward other EU Member States over a two-year period. Although the Commission had suggested the share of relocation among Member States to be calculated based on a distribution key, the adopted Council Decision (EU) 2015/1523[5] of September 14, 2015, in line with the April 2015 European Council conclusions, set out that relocation should be carried out by Member States based on their voluntary pledges.

The first relocation decision was soon followed by the proposal of another relocation decision after the sharp increase in illegal border crossings in the Central and Eastern Mediterranean, but also on the Western Balkans route. On 9 September 2015, the Commission proposed the setting up of another emergency relocation for 120,000 asylum seekers in clear need of international protection from Italy (15,600), Greece (50,400), and Hungary (54,000). Hungary, however, expressed its wish not to become a beneficial state in the framework of relocation, especially that the possible necessity of such measure had not been previously consulted with Hungary. After rejecting becoming a beneficiary of relocation, and contrary to its explicit objection,[6] Hungary became obligated according to the adopted Council Decision 2015/1601 of 22 September 2015[7] to relocate a certain number of persons (quotas) calculated according to a distribution key based on GDP and population, without considering the constant migratory pressure Hungary still faced.

The annulment of the second relocation decision was sought by Hungary and Slovakia,[8] yet its validity was confirmed by the Court of Justice of the EU (CJEU) in its 6 September 2017 ruling.[9] In support of their actions for annulment they put forward pleas seeking to show that, on the one hand, the adoption of the decision was vitiated

4 According to Recital (21) of Council Decision 2015/1523 this number corresponds to ca. 40% of the total number of third-country nationals in clear need of international protection who have entered irregularly in Italy or Greece in 2014.

5 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156.

6 The decision was adopted by the Council by a qualified majority, with the Czech Republic, Hungary, Romania and the Slovak Republic voting against and Finland abstaining.

7 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94.

8 Judgment of the CJEU (Grand Chamber) of 6 September 2017, Slovak Republic and Hungary v. Council of the European Union, Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union, ECLI:EU:C:2017:631 (hereinafter: Judgment of the Court in Joined Cases C-643/15 and C-647/15).

9 Judgment of the Court in Joined Cases C-643/15 and C-647/15.

by errors of a procedural nature or arising from the choice of an inappropriate legal basis and that, on the other hand, the decision was neither a suitable response to the migrant crisis nor necessary for that purpose. Vikarska[10] and Nagy[11] argue that although some of the arguments may be well founded in law, the overall impact of the case goes beyond the question of validity of the Council decision. Groenendijk and Nagy conclude that 'what appears to be a legalistic challenge to a Council Decision may be part of a larger strategy representing a genuine threat to the functioning of the CEAS. Alternatively, it may turn out to be a rear guard battle.'[12]

By the end of the two-year implementation period most of the Member States did not or not completely implement the obligations arising from the two Council Decisions on relocation. The European Commission started infringement procedures against Poland, the Czech Republic and Hungary[13] as these Member States were the ones that did not offer any relocations to take place in the last 12 months of the implementation period of the decisions. The three Member States at issue put forward a series of arguments which they claimed vindicated them for having disapplied Decisions 2015/1523 and 2015/1601. The arguments concerned, first, relate to the responsibilities of Member States with regard to the maintenance of law and order and the safeguarding of internal security, arguments derived by the Republic of Poland and Hungary from Art. 72 TFEU read in conjunction with Art. 4(2) TEU and, secondly, are derived by the Czech Republic from the malfunctioning and alleged ineffectiveness of the relocation mechanism as provided for under these decisions. Poland and Hungary also referred to the drawbacks of the practical implementation of relocations by other Member States that were later also highlighted by the European Court of Auditors in its special report.[14]

Art. 72 TFEU sets out the important and indisputable rule in the Area of Freedom, Security and Justice (AFSJ) that harmonization in this area shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. According to Craig and de Búrca, the proposition in Art. 72 TFEU

> 'has political resonance and is not without substance but does not reflect reality. The AFSJ title is an area of shared competence. This necessarily means that Member State responsibilities for law and order will be circumscribed by EU measures. The nature and degree of this circumscription will perforce depend on the particular measure adopted by the EU.'[15]

10 Vikarska, 2015.
11 Nagy, 2017.
12 Groenendijk and Nagy, 2017.
13 Judgment of the CJEU (Third Chamber) of 2 April 2020, European Commission v. Republic of Poland and Others, Joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257 (hereinafter: Judgment of the Court in Joined Cases C-715/17, C-718/17 and C-719/17).
14 European Court of Auditors, 2019.
15 Craig and de Búrca, 2015, p. 976.

These infringement cases therefore raise important questions of Union law, including whether and, if so, under what conditions a Member State may rely on Art. 72 TFEU to disapply decisions adopted based on Art. 78(3) TFEU, the binding nature of which is not disputed.

In its evaluation[16] the CJEU highlighted that the derogation provided for in Art. 72 TFEU must be interpreted strictly, and it is for the Member State which seeks to take advantage of Art. 72 TFEU to prove that it is necessary to have recourse to that derogation to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security.[17] In its conclusions the Court found that the Member States in question could not prove the justified use of this derogation and that by not implementing the relocation decisions they had infringed EU law. Bornemann finds it emblematic of a judicial strategy 'that casts questions of high politics, *in casu* the fundamental opposition of the defendant Member States' governments against mandatory refugee relocation, in the guise of administrative deliberation.'[18]

It is interesting to see that most of the Member States were far from completely fulfilling their obligations deriving from the relocation decision, and even the implemented procedures showed deficiencies exactly because of the security concerns raised by Poland and Hungary.

> 'The majority of rejections [of the relocations of particular asylum-seekers] were justified on public order or national security grounds, in accordance with the Relocation Decisions. However, the explanations given [by the contacted Member State] were often generic, without detailed justification of individual cases. The number of rejections was higher for Greece than for Italy owing to the different security profiles of eligible migrants.'[19]

The number of relocations effectively carried out by November 14, 2017, so in the two-year implementation period of the two relocation decisions there were 31,503 relocations,[20] which is even fewer than the original aim of the first relocation decision adopted based on voluntary pledges of Member States. Given this figure, it is even more painful to conclude that all the loss of trust, the division of east and west, and increasing political differences could have been avoided by taking a step back and not rushing ahead with further relocation, which was expected to be a magic solution but instead forced even more migrants to undertake a dangerous journey. As a long-lasting effect, the relocation decisions and the migration crisis 'became a Rubicon

16 Töttős, 2021.
17 Judgment of the Court in Joined Cases C-715/17, C-718/17 and C-719/17, points 143–144 and 147.
18 Bornemann, 2020.
19 European Court of Auditors, 2019, p. 25.
20 Report from the Commission (EU) to the European Parliament, the European Council and the Council Progress report on the European Agenda on Migration, Brussels, 15.11.2017, COM/2017/0669 final, Annex 6.

because it exposed the deep philosophical, political, and emotional differences' [21] that have only intensified in recent years.

3. Long-term Reforms: Missing the Target of Crisis Resilience

3.1. The First Set of CEAS Reform Proposals and Ideas

> 'The overall objective is to move from a system which by design or poor implementation places a disproportionate responsibility on certain Member States and encourages uncontrolled and irregular migratory flows to a fairer system which provides orderly and safe pathways to the EU for third country nationals in need of protection or who can contribute to the EU's economic development....For it to work, this system must be comprehensive, and grounded on the principles of responsibility and solidarity.'[22]

To make the CEAS more crisis proof in the future, the Commission presented two packages of altogether seven reform legislative proposals in 2016.[23] The first asylum package launched on May 4, 2016, includes the reform of the Dublin system aiming to make it more transparent and enhance its effectiveness, while providing a relocation mechanism to deal with situations of disproportionate pressure on Member States' asylum systems;[24] transforming the existing European Asylum Support Office (EASO) into a fully-fledged EU Agency for Asylum to reflect its enhanced role in the new system;[25] reinforcing of the EU's fingerprinting database, Eurodac, to better manage the asylum system and to help tackle irregular migration.[26]

On July 13, 2016, the European Commission presented further proposals to complete the reform of the CEAS to move toward a fully efficient, fair, and humane asylum policy—one which can function effectively both in times of normal circumstances and in times of high migratory pressure. To this end, to achieve a common and harmonized set of rules at EU level, the Commission proposed the creation of

21 Orbán, 2021b.

22 Communication from the Commission (EC) to the European Parliament and the Council, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels, 6.4.2016, COM/2016/0197 final.

23 See also Töttős, 2019.

24 European Commission, COM(2016) 270 final, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final–2016/0133 (COD).

25 European Commission, COM(2016) 271 final, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) 439/2010, COM/2016/0271 final–2016/0131 (COD).

26 European Commission, COM(2016) 272 final, Proposal for a Regulation on the establishment of EURODAC (recast), COM/2016/0272 final–2016/0132 (COD).

a common procedure for international protection by turning the existing Asylum Procedure Directive into a regulation,[27] uniform standards for qualification as beneficiaries of international protection and rights granted to them by turning the existing qualifications Directive into a regulation[28] and the further harmonization of reception conditions in the EU.[29] Overall, these proposals aim at simplifying and shortening the asylum procedure and the decision-making, discouraging secondary movements of asylum seekers and increasing integration prospects of those that are entitled to international protection. On the same day and as a fourth element of the second asylum reform package the European Commission proposed an EU Resettlement Framework[30] to establish a common European policy on resettlement ensuring orderly and safe pathways to Europe for persons in need of international protection.

Given the different nature and sensitivity of the seven legislative proposals, the negotiations of the files in and between the co-legislators, namely the Council of Ministers and the European Parliament, were taking different paces and showing various degrees of progress. While the Commission likes to promote the result by stating that in 2017, the European Parliament and the Council reached a broad political agreement on five out of the seven proposals,[31] the Council actually did not confirm these provisional agreements. On the one hand, the different groups of Member States, such as the Mediterranean, the Visegrad Four and the western Member States, had greatly diverging ideas on what direction the reform of the CEAS should go. On the other hand, the European Council reconfirmed in its June 2018 conclusions that 'a precondition for a functioning EU policy relies on a comprehensive approach to migration which combines more effective control of the EU's external borders, increased external action and the internal aspects'.[32] Therefore it was not enough to proceed further on internal asylum reforms, if amidst the constant inflow

27 European Commission, COM(2016) 467 final, Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final–2016/0224 (COD).

28 European Commission, COM(2016) 466 final, Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final– 2016/0223 (COD).

29 European Commission, COM(2016) 465 final, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 final–2016/0222 (COD).

30 European Commission, COM(2016) 468 final, Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final–2016/0225 (COD).

31 As regards the setting-up of a fully-fledged European Union Asylum Agency, the reform of Eurodac, the review of the Reception Conditions Directive, the Qualification Regulation, and the EU Resettlement framework.

32 European Council, 28 June 2018, para. 1.

of migrants the external borders were not protected or the third-country nationals found to be illegally staying could not be effectively returned to their countries of origin.

In this context, the European Council remained 'determined to continue and reinforce this policy to prevent a return to the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes'.[33] It also raised further ideas to be explored, such as the concept of regional disembarkation platforms in a non-EU country that could host those disembarked after search and rescue (SAR) operations at sea borders instead of automatically taking them to EU territory.[34] Yet, only initial elements of the concepts were drafted[35] and no serious thought was given at EU level to this direction of the reforms. Maiani in his crude summary states that 'the idea is that if Europe can lift the drawbridge and confine migrants in its Southern neighborhood, it need not face a divisive debate on internal solidarity'[36] and concludes that these initiatives raise so many legal and political questions that they might never see actual implementation. The Commission nevertheless rolled out a series of new legislative proposals in 2018 as well,[37] yet they merely added to the complexity of ideas instead of solving the legislative deadlock evolved by the end of the Juncker era of the Commission.

While the negotiations of legislative reforms missing the target of creating a resilient system had only increased divisions between Member States and allowed the uncontrolled inflow of migrants, a meaningful solution to manage these challenges was reached in the external dimension of migration that is the cooperation with third countries, particularly with Turkey. Turkey currently hosts about four million refugees, and the EU is committed to assist Turkey in dealing with this challenge to provide Syrian refugees protection as close to their home as possible and also not to encourage anyone to embark on a dangerous journey toward the EU. According to the EU–Turkey statement[38] of March 2016, Turkey would take any measures necessary to stop people travelling irregularly from Turkey to the Greek islands, and for every Syrian returned from the Greek islands, EU Member States would resettle one Syrian refugee from Turkey. Refugees and host communities in Turkey also received 6 billion EUR to improve their situation.

33 Ibid. para. 2.
34 Ibid. para. 5.
35 European Commission, 2018. https://home-affairs.ec.europa.eu/system/files/2018-07/20180724_non-paper-regional-disembarkation-arrangements_en.pdf.
36 Maiani, 2018.
37 European Commission, COM(2018) 633, Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/633 final.
38 European Council, 2016. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

3.2. The Second Set of CEAS Reform Proposals and Ideas

> 'Asylum and migration are amongst the most significant challenges the EU has faced in recent years. Along with security, they rank high among the priorities and concerns of many Europeans. They will inevitably remain at the center of our politics during the next mandate.'[39]

The new commissioner for Home Affairs, Ylva Johansson, was entrusted by Commission President von der Leyen with the task of finding the common ground and the fresh start on migration and asylum by developing the New Pact on Migration and Asylum. This should involve a comprehensive approach looking at external borders, systems for asylum and return, the Schengen area and working with partner countries outside the EU.

The New Pact was initiated in a Commission Communication[40] on September 23, 2020 with another set of ideas and legislative proposals.[41] Although the newest reform proposals were prepared by rounds of consultation with the capitals, and they aim at balancing the various interests of the different groups of like-minded countries, what has been proposed is a strange mixture of already existing elements of migration and asylum policy that have a questionable effect on their own, and when seemingly arranged into one set of rules, they do not necessarily create a fully operable system that is able to resist crises.

According to the new proposals, once migrants reach the borders of the EU, only a five-day screening procedure is envisioned, and only a small group of migrants would be kept at the border for further procedures. Most asylum seekers would need to be provided access to the territory of the EU even if the present figures show that most asylum claims are not well-founded and only a small percentage of those with an expulsion order actually leave the territory of the EU. Furthermore, those avoiding such screening at the border and only being caught in the territory of a Member State would not be sent back to the border, which only encourages illegal border crossings and human smuggling activities. Even if certain groups of migrants would be kept at the external borders for specific asylum and/or return procedures, the time of applying such procedures with the legal fiction of non-entry would be very limited (12 weeks for each procedure to be concluded completely). Consequently, even those most likely to be expelled from the EU would need to be provided entry to the territory of the EU after a certain period, yet the ratio of effective return of these migrants is still very low.

39 Von der Leyen, 2019, p. 4.

40 Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.

41 European Commission, 2020, Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

The main and almost exclusive form of reaction the Pact proposes to situations of disproportionate pressure is relocation or return sponsorship, the latter being practically a delayed relocation after unsuccessful implementation of return decisions from the Member State of entry. Relocation has already proven to be an ineffective solution as it is neither able to alleviate the burden effectively in case of constant inflows, nor able to stem further inflows of migrants. Those rescued and disembarked after a search and rescue operation are handled as a separate category by the reform proposals, and the Pact envisions the automatic relocation of most of the rescued after a SAR operation, thus it can generate further embarkations and increase the loss of lives, having the opposite effect of what is intended.

While in 2020, the Commission has been supporting a quick adoption of the proposals, or at least those that have advanced well during the negotiations, the only reform element in which the co-legislators could reach an agreement was to turn EASO into a fully fledged EU Asylum Agency.[42]

3.3. The Position of Central Europe

On July 9, 2021 the prime ministers of the Visegrad Group countries discussed, among others, the situation along the main migratory routes into the EU and declared that 'uncontrolled illegal migration represents one of the most serious threats to the security and cohesion of the European Union and that citizens expect credible actions in tackling this phenomenon.'[43] Therefore the Visegrad Group prime ministers restated their conviction in a Joint Statement that 'the main goal of the reform of the Common European Asylum System is to set up the framework in a comprehensive, sustainable, efficient, safe, and crisis-resilient form to stem illegal migration on all existing and emerging routes.'[44]

As regards the formulation and negotiation of the new reforms, the voice of Central Europe many times remains unheard contrary to the extensive experience these countries have in coping with the challenges of migration. This only resulted in controversial actions that rather brought division of Member States instead of real solutions. Consequently, even if Art. 78 TFEU sets out qualified majority voting rules in the Council, the V4 leaders advocate for the reform of the EU asylum policy to be based on a consensus among all Member States and that the different reform elements have to be adopted as a package, ensuring proper balance between responsibility and solidarity.[45] As regards the content of the reforms, with a view to avoiding further pull factors, they remain convinced that 'mandatory relocation is not a viable solution to stem illegal migration flows.'[46]

42 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, OJ L 468, 30.12.2021.
43 Visegrad Group, 2021a, p. 2.
44 Ibid.
45 Ibid. p. 3.
46 Ibid.

The Visegrad Group is far from being isolated in representing this position. Not only V4 ministers, but also the ministers of interior of Estonia, Latvia, and Slovenia, signed a letter on June 4, 2020, expressing their shared position. Furthermore, Denmark and Austria in their letter also highlighted the need for a consensus on the key issues and similarly rejected mandatory relocation that can only 'reawaken old disagreements.'[47] While the list of countries realizing the toxic nature of any form of automatic and compulsory relocation is growing, there are still a number countries, especially the five Mediterranean countries (Cyprus, Greece, Italy, Malta, and Spain) as well as Germany, who call for a mandatory relocation mechanism entailing the distribution among all Member States of all or most of those who enter the territory of a European nation, including as a result of SAR operations at sea.

Central Europe's position does not end with simply rejecting the proposals coming from Brussels, as this region also points to solutions that provide meaningful impact:

> 'It is important for a well-functioning EU asylum and migration policy to anticipate migration developments and focus all the efforts on truly strengthening the external dimension, improving border management, and providing international protection to those in need while ensuring rapid return of others.'[48]

The Visegrad countries therefore support the increased EU attention on the external dimension to better handle the migration-related challenges and in this context, they emphasize that

> 'the EU should continue working on tailored migration partnerships based on conditionality in various areas and responding to EU priorities and the needs of third countries as well. Concrete actions for priority countries indicating clear objectives are needed to prevent illegal migration and address its root causes, encourage better border protection, efficient fight against smugglers and human traffickers as well as effective implementation of returns and readmission. These activities should aim at strengthening their capacity to combat external threats and to prevent future migration crises.'[49]

As regards cooperation with third countries, the continuation of financing for Syrian refugees and host communities in Turkey as well as maintaining and developing cooperation with the neighboring regions, such as the Western Balkans and North Africa, remain essential.

47 Barigazzi, 2020. https://www.politico.eu/article/eu-countries-still-fighting-over-mandatory-relocation-of-migrants/.
48 Visegrad Group, 2021a, p. 2.
49 Ibid.

4. The Most Recent Events at the Eastern Borders of the EU

4.1. The Instrumentalization of Migration

In the meantime, another migratory route has been activated through the Eastern borders of the EU because of Belarus facilitating migration of Iraqi and other nationals via Minks to the EU as a response to EU sanctions. By late November 2021, 7, 831 migrants had entered Latvia, Lithuania, and Poland from Belarus illegally, compared to 257 in the entire 2020; in addition, 42741 attempts to cross illegally had been prevented by the three Member States.[50] While the figures were still lower than those of 2015, the brutally visible manifestation of institutionalization of migrants is what raises serious concerns. The phenomenon is not new either in an EU or in a global context. As regards EU borders, in the early months of 2020, the situation at the EU's external borders with Turkey raised similar concerns. [51]

In her book *Weapons of Mass Migration*,[52] Greenhill offers the first systematic examination of this widely deployed but largely unrecognized instrument of state influence. She shows both how often this unorthodox brand of coercion has been attempted and how successful it has been. She claims that

> 'since the 1951 Refugee Convention came into force, there have been at least 75 attempts globally by state and non-state actors to use displaced people as political weapons. Their objectives have been political, military, and economic, ranging from the provision of financial aid to full-scale invasion and assistance in effecting regime change. In nearly three-quarters of these historical cases, the coercers achieved at least some of their articulated objectives. In well over half of the documented cases, they obtained all or nearly all of what they sought, making this rather unconventional instrument of state-level influence more effective than either economic sanctions or traditional, military-backed coercive diplomacy.'[53]

Braw also highlights that

> 'the standoff at Belarus' borders with its EU and NATO neighbors is not a migration crisis but a border-violation crisis. The migrants at the border are being used by a hostile government that is trying to harm NATO and the EU.'[54]

50 European Commission, COM(2021)752 final, Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, Recital (4).
51 Council of the EU, 2020. https://www.consilium.europa.eu/en/press/press-releases/2020/03/04/statement-on-the-situation-at-the-eus-external-borders/.
52 Greenhill, 2016b.
53 Greenhill, 2016a, p. 77.
54 Braw, 2021. https://www.politico.eu/article/belarus-border-migration-geopolitical-crisis-nato-eu/.

Nevertheless, even in such cases of force majeure, neither the present asylum and migration acquis, nor the reforms proposed by the Commission in 2016 and 2020 allow any immediate actions by Member States at the external borders to effectively combat a serious threat to public policy and internal security. That is why Ministers of Interior of 12 Member States[55] argued in their letter on October 7, 2021 that

> 'recent developments at the external borders of the European Union indicate that the EU needs to adapt the existing legal framework to the new realities, enabling us to adequately address attempts of instrumentalization of illegal migration for political purposes and other hybrid threats.'[56]

The letter also emphasized that physical border barriers appear to be effective border protection measures that serve the interest of the whole EU, and therefore this legitimate measure should be additionally and adequately funded from the EU budget as a matter of priority that has so far been systematically rejected by the European Commission.[57]On December 13, 2021 the V4 leaders, on their meeting with the President of the French Republic, also discussed the recent developments at the external borders of the European Union with Belarus and condemned the instrumentalization of migration and all other forms of hybrid attacks affecting the EU's external borders. While the Prime Ministers expressed their solidarity and further support to Member States on the Eastern borders as they protect the EU as a whole, they also acknowledged the efforts of these Member States standing at the forefront of the fight against illegal migration that poses a serious threat to the security and integrity of the European Union. In this context, the V4 leaders agreed that

> 'the current EU legal framework is not sufficient to address challenges of mass migration, including the instrumentalization of migration for political purposes, as it does not provide adequate means that Member States under pressure can apply in a crisis situation. The practical experience of directly affected Member States needs to be considered while adapting the legal framework to the new realities based on consensus: our focus should be on stemming primary migratory movements to the EU, avoiding pull factors, and guaranteeing the security of our citizens. Given the volatile migration situation, the Visegrad group Prime Ministers restated their conviction that all effective external border control measures, including physical border

55 Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Slovak Republic.

56 Ministers of Interior, 2021. https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190591327.

57 Orbán, 2021a.

barriers, should be at the forefront of our actions and therefore must be underpinned by adequate EU financial support.'[58]

4.2. Providing Protection for Those Fleeing from Ukraine

As a result of the Russian invasion of Ukraine started on February 24, 2022, more than three and a half million people, mainly women and children, have arrived in the European Union in the first month, showing an unprecedented scale and the speed of arrivals. The focus of the four Member States bordering Ukraine (Poland, Slovakia, Hungary, and Romania) together with Moldova was rightly on meeting the immediate reception and protection needs of those fleeing the war and therefore they opened their Eastern borders and ensured an unconditional but at the same time-controlled inflow to their territory. The Commission also acknowledged their efforts after seeing first-hand the very substantial support programs these countries provided.[59]

Responding to the enormous numbers fleeing Russian military aggression, the EU made an unprecedented move in activating the Temporary Protection Directive[60] on March 4, 2022, thus offering a unified protection status for Ukrainian nationals and their family members.[61] Nevertheless, it should be highlighted that many of the Member States close to Ukraine already made a step toward providing national protection from the outset of the war. For instance, the Hungarian Government activated the national scheme of temporary protection already on the eve of February 24, 2022.[62]

The role of protection provided by Central and Eastern European countries finding themselves in the frontline may raise two particular aspects. First, the volatile situation of Ukraine has been in the spotlight of these countries for some time. As regards the migration crisis in 2015 Kowalski[63] pointed out that Polish authorities should have put their perception of the crisis in a broader context by highlighting the potential outflow of internally displaced persons in Ukraine after the annexation of the Crimean Peninsula by Russia in 2014 together with the tens of thousands Ukrainian workers in Poland who could easily turn into refugees should the situation escalate further.

58 Visegrad Group, 2021b, p. 4.

59 European Commission, COM(2022) 107 final, Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on European solidarity with refugees and those fleeing war in Ukraine, COM/2022/107 final, p. 4.

60 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, HL L 212., 7.8.2001.

61 Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022.

62 Government Decree No. 56/2022 (II. 24.) on the different application of the transitional rules of the asylum procedure of Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of an emergency.

63 Kowalski, 2016, p. 968.

Secondly, many could regard the current action of solidarity toward Ukrainian refugees as a shift in asylum policy of Central European states. The basis for this is the misperception that anti-migration narrative means a complete lack of international human rights of people in need of protection. This interpretation simply ignores the position also highlighted by Visegrad countries that refugees should be helped in the region closest to their country of origin, and those who arrived during or after the 2015 migration crisis have either crossed several safe third countries or they are not in genuine need of international protection. Therefore, being ready form the start to fulfil the protection needs of those fleeing now from a war in our neighborhood is not only not contradictory to previous positions, quite the opposite as the newly occurring situation just provided an opportunity to confirm their position in practice by offering their help when it is primarily this region's duty to welcome these refugees.

5. Conclusions on the Role of Central Europe in the Midst of Various Migration Crises

In his memoirs, Jean Monnet famously stated that 'Europe will be forged in crises and will be the sum of the solutions adopted for those crises.'[64] Migration and asylum issues provide more than enough crises for the EU that could push it into a new development phase. The main challenge is whether the reforms should remain at the level of fine tuning or be based on a complete change in concept. As the situations along the external borders of the EU no longer show any version of 'normal situation' of arrivals of asylum seekers as atypical situations of mass arrivals and asylum applications by non-eligible persons have become the new normal. The present unfitness of the current asylum acquis makes the whole EU vulnerable to, among others, situations of instrumentalization of migration.

In this context, Central Europe raises the 'heretic idea' of diverging from the main conception of the present CEAS and not to allow asylum applications on the territory of the EU as a main rule, and as a result eliminate the elements that give rise to abuse.

> 'Although the legal standards currently in force in the EU have their roots in the Geneva Convention, European asylum law has evolved into its current form through the layering of a legal superstructure onto the Convention. As a result, there are considerable differences between what is laid out in the Convention and the implementation carried out by the Common European Asylum System. (....)The Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's

64 Monnet, 1978, p. 417.

> asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions.'[65]

Šimonák and Scheu attribute this outcome to the jurisprudence of the European Court of Human Rights as well as the EU's legislative ambition, which is broader than that of the Geneva Convention.

Central European countries many times functioned as an early warning region shouting out their concerns regarding the inoperability of the present acquis, based on this overly generous interpretation. Nevertheless, their position has constantly been overwritten. Forming regional alliances to balance powerful states instead of going with the flow and accepting their dominant role in European policymaking and legislation regarding migration and asylum policy has therefore become a new area for cooperation for the Visegrad countries (V4). Since the negotiations on the long-term reforms of the CEAS are still ongoing, the V4 should aim at maintaining its cooperation in this field to provide a greater influence even if the V4 alone cannot establish a blocking minority and should make the voice of this part of Europe also heard.

The most recent tragic events in Ukraine and the millions of people fleeing showed that even situations in the direct neighborhood of the EU may require Member States to be prepared to provide help and protection. Central and Eastern European states were ready from the outset to mobilize their reception and protection system. The large scale of the influx of Ukrainians in clear need of protection nevertheless raises the question for the rest of the EU as well, whether it can continue spending a huge part of its administrative and reception capacities on asylum-seekers not in genuine need of protection.

65 Šimonák and Scheu, 2021, p. 11.

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Chapter 12

The Present and Possible Future of Judicial Cooperation in Civil Matters

András OSZTOVITS

ABSTRACT

Judicial cooperation in civil matters is based on the principle of mutual recognition, which in turn is based on the principle of mutual trust. The study shows how the EU has been given the power to regulate this policy through the amendments to the founding treaties, what the current results of this policy are, and how the principle of mutual trust is reflected in the various EU legal sources and the relevant case law of the CJEU. It gives an overview of the most recent relevant legislation on digitization and finally suggests how to make the practical implementation of this policy in the relationship between national courts and the CJEU more effective.

KEYWORDS

principle of mutual trust, rule of law, recognition and enforcement of foreign judgments, jurisdiction, foreign service of documents, digitization, court of competent jurisdiction

1. Introduction

'Mutual trust is a prerequisite for cooperation and the struggle for a common goal, and working together strengthens it even more....The starting point is, above all, mutual trust. This develops naturally when people approach the problem to be solved in a similar way. If they look at a task in the same way, and if everyone has the same interest in solving it, then conflicts and suspicions disappear, and friendship often replaces previous bad feelings. But how can people be made to approach a problem in the same way, and how can they be made to see that they have the same interests, when people and nations are very much divided?'[1]

1 Monnet, 1976, p. 145.

Osztovits, A. (2022) 'The Present and Possible Future of Judicial Cooperation in Civil Matters' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 239–258. https://doi.org/10.54171/2022.aojb.poeucep_12

Jean Monnet, one of the founding fathers of the European Union, formulated one of the most important questions of European integration in his *Memoirs*: how to make Member States trust each other and the new European institutions. It is precisely because of this mutual trust that judicial cooperation in civil matters, as one of the EU's policies, has developed. It is safe to say that this area of law can only develop as long as the Member States do not begin to doubt the independence and professionalism of each other's judicial systems. In this chapter, we will show where this policy started, what the relevant primary EU legal framework is, and what secondary EU legal norms currently give it substance. We will also look at the impact of digitization, the key challenge of the ever-closer future, on this policy. We will then examine how the principle of mutual trust is reflected in the various EU legal sources and how they have been interpreted by the CJEU. We also look at the organizational weaknesses that hamper the effectiveness of judicial cooperation in civil matters. Finally, proposals are made to ensure that mutual trust between Member States is maintained in the future.

2. The Development of Judicial Cooperation in Civil Matters

It reflects the caution and political reality of the countries that founded the European Economic Community that, to create an internal market based on the four basic economic freedoms (free movement of capital, labor, services and goods in the Community), Member States did not give up their full sovereignty in favor of an integration organization with an uncertain future. Thus, for example, a single judicial organization has not been created in the EC, which would adjudicate civil disputes involving cross-border elements in the same way in each Member State. There was not even legislation to unify the problems arising from these situations.

But the need was there when the EEC was founded. Art. 220 of the ECSC Treaty stated that the Member States undertook to ensure the simplification of formalities for the mutual recognition and enforcement of judgments and arbitral awards. As a result of the amendment of the Maastricht Treaty, judicial cooperation in civil matters was added to the intergovernmental third pillar. One of the most important achievements of the Amsterdam Treaty was the transfer of this area to the first pillar, also known as the Community pillar, which gave the EC institutions legislative powers in this area under Arts. 61(c) and 65 TEC.

The Lisbon Treaty also brought substantial changes: the relevant Arts. 65 to 69 of the EC Treaty, in the area of judicial cooperation in civil matters, were consolidated into a single Art. 81, thus removing the restriction in Art. 68 of the EC Treaty on the jurisdiction of the CJEU to refer questions for a preliminary ruling on the interpretation of Community law in this policy area to national courts against whose decisions there is no judicial remedy under national law.

Art. 65 TEC set two important limits on the measures to be adopted in the field of judicial cooperation in civil matters: on the one hand, the scope of such Community

legislation should only cover civil matters with cross-border implications and, on the other hand, it should serve the proper functioning of the internal market. Art. 81 TFEU contains only the first restriction and, in para. 2, merely refers to the need to adopt Union rules to achieve the objectives set out therein, in particular where this is necessary for the proper functioning of the internal market. This is a clear extension of the EU's pre-existing powers, but it will only become clear in the coming years how the EU institutions can make use of them.

Art. 81(1) still does not give the Union the power to regulate civil procedural law as a whole and to establish a uniform code of civil procedure for all Member States. Nor was it given the power to unify the organization of the courts in the Member States, which remained the exclusive competence of the Member States.

The United Kingdom, Ireland and Denmark have annexed an additional protocol to the Treaty of Amsterdam, excluding themselves from the measures to be taken under Arts. 61(c) and 65 TEC. The United Kingdom and Ireland have refined this negative position insofar as they wish to participate in judicial cooperation between Member States, which means that the rules of civil procedure issued by Community bodies are also applicable there. Denmark has concluded an international treaty with the EU, as a result of which Regulation (EC) 44/2001 and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which repealed it on 21 January 2015, are also in force on its territory.

Notwithstanding the positive case law experience of the secondary Community legislation adopted, these three Member States have also added a protocol to the TFEU: in No. 21, the United Kingdom and Ireland reserve the right to participate in the adoption by the Council of proposed measures under Title V TFEU only if they consider it appropriate to do so. If they do not take part, the rule so adopted shall not have effect in their territories.[2] Denmark has declared in Art. 2 of Protocol (No. 22) that it will not apply Title V of Pt. 3 of the TFEU.[3]

3. Legislation in the Field of Judicial Cooperation in Civil Matters

Art. 81(2) TFEU broke with the system of legislative rules governing judicial cooperation in civil matters previously established in Art. 67 TEC. The current rules are simpler and thus allow for more effective legislation. The ordinary legislative procedure is the general rule for all measures. The exception to this is measures on family law matters with cross-border implications under Art. 81(3) TFEU, which can only be adopted under the special legislative procedure. Although this para. does not define precisely what is meant by such family law matters, it does, for the sake of clarity,

2 In Declaration 56 to the TFEU, Ireland stated that it wished to participate to the fullest extent possible in the adoption of measures under Title V. of Pt. 3 of the TFEU.

3 Brexit has created new challenges for judicial cooperation in civil matters between EU Member States and the UK. For more details, see Molnár, 2022, pp.80–107; Ungerer, 2019, pp.397–405.

empower the Council, acting unanimously on a proposal from the Commission, to list the areas of family law matters with cross-border implications which are exempted from the special legislative procedure and may be adopted by ordinary legislative procedure.

Even today, there are still significant differences in national family law rules between Member States, due to different cultural and legal traditions. Even when the Lisbon Treaty was adopted, the Member States did not want to leave this entirely to the EU, which is why the third subpara. of Art. 81(3) TFEU gives the national parliaments of the Member States a 'right of veto' over the Council's decision. If the latter institution adopts a 'list' of family law issues to be subject to the ordinary legislative procedure, it must notify the national parliaments, which may object to the proposal within six months. It only takes one objection for the Council not to adopt the decision.

4. Secondary EU Legislation Adopted to Date

4.1. Background

At the Commission's initiative, a committee of experts composed of representatives of the Member States and experts in observer status began work in 1960, with the task of drafting the text of an international legal convention.[4] As a result of the careful work of the commissioned body, a convention was signed by the Member States in Brussels on September 27, 1968, entitled the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as the Brussels Convention), which entered into force on February 1, 1973, following ratification.

The practical effectiveness of the rules of the Brussels Convention was ensured by the fact that it directly regulates the question of jurisdiction in civil and commercial matters. Where the defendant in a civil dispute is domiciled in one of the contracting states, the rules of the Convention apply. Last but not least, it has simplified and sped up the recognition and enforcement of judgments of the contracting states.

The amendments to the Brussels Convention were made at the time of the enlargement of the EEC, given that this legislation is not formally part of Community law, but is an international legal norm, with the specificity that only the Member States of the EEC—later the EU—can accede to it.[5] The Convention has faced its greatest challenges in the context of the accession of the new Member States, namely the United Kingdom and Ireland. It was questionable to what extent the Convention's provisions, based on

4 The committee was chaired by the German Arthur Bülow, while the rapporteur for the proposal was the Belgian P. Jenard, whose report is still one of the most important starting points for the interpretation of the Brussels Convention. Kengyel, 2012, p. 450.

5 Thus, Accession Convention I—for Denmark, Ireland, and the United Kingdom—was signed on 9 October 1978, Accession Convention II—for Greece—on 25 October 1982, Accession Convention III—for Spain and Portugal—on 25 and 26 May 1989, and finally Accession Convention IV. —for Austria, Finland and Sweden—on 29 November 1996.

continental concepts, were compatible with common law concepts. Although this led to a thorough reworking, the basic principles that governed the Convention stood the test and did not need to be changed.

The beneficial effect of the provisions of the Convention on the case law of the courts of the Member States has also been noticed outside the EEC. In 1982, on the initiative first of Sweden and then of Switzerland, a committee of experts was set up among the Member States of the European Free Trade Association (EFTA) to draw up an international legal convention, modelled on the Brussels Convention, to which both the EEC and EFTA Member States could accede. The document prepared by the panel was signed by the Member States in Lugano on September 16, 1988, and was also entitled the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter, the Lugano Convention), and entered into force, after ratifications, at different times in the various Member States, between 1 January 1992 and 1 September 1996.

The importance of the Lugano Convention is that, when it entered into force, it created uniform rules of jurisdiction and mutual recognition of judgments of the courts of the contracting States for the whole Western European economic area. Although it lost some of its practical usefulness with the accession of Austria, Sweden, and Finland to the EU, it is still in force between the EU Member States and Norway, Switzerland, and Iceland.[6]

The drafters of the Lugano Convention, however, looked beyond the Western European economic area, and made it possible for other countries to accede to it if a Contracting State so requested on its behalf (Art. 62 I(b)) from the depositary country, Switzerland. After the required notifications and declarations have been made, a unanimous decision of the member countries is required to invite a new member state.

In the first half of the 1990s, the countries of Eastern Europe also began to take the diplomatic and legal steps necessary for accession. Thanks to the acceleration of our accession to the EU and the results of the changes in Community legislation following the entry into force of the Amsterdam Treaty, Poland was the only Eastern European country to accede to the Lugano Convention, with effect from February 1, 2000.[7]

Nevertheless, the Lugano Convention has left a lasting mark on the legal systems of many countries, including Hungary. The Hungarian legislator has comprehensively amended the Nmjt.[8]—and partly also the Pp.[9]—to comply with the text of the Convention.[10]

6 Coester-Waltjen, 2003, p. 321.
7 Wagner, 2000, p. 699.
8 Act XXVIII of 2017 on Private International Law.
9 Act III of 1952 on the Code of Civil Procedure.
10 It is important to note that accession to the Lugano Convention does not necessarily entail an obligation to amend domestic legislation, since the provisions of the Convention replace and supplement the relevant domestic legislation and apply to matters covered by the Convention.

4.2. European Union Sources of Civil Procedural Law[11]

With the legislative powers conferred by the amendment to the Treaty of Amsterdam, the Council immediately set to work and adopted Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility on May 29, 2000.[12] The Council's task was made easier by the fact that it could work from 'ready-made material.' On May 28, 1998, the Member States of the European Union concluded a new international convention, modelled on the Brussels 'Convention, called the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters.' However, this Convention did not enter into force because the regulation entered into force before it.

Although the high priority of the subject of the regulation certainly justified the swift adoption of the regulation, there was not enough time to think through certain issues. Thus, on July 3, 2000, France presented a proposal to amend the regulation to extend the rules on parental supervision. This proposal was almost entirely taken up by the Council, which repealed Regulation (EC) 1347/2000 by Regulation (EC) 2201/2003, adopted on November 27, 2003. In the meantime, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, recognition and enforcement of judgments, and decisions in matters of matrimony, parental responsibility, and the wrongful removal of children has been drafted and will apply to legal proceedings brought on or after August 1, 2022.

On December 22, 2000, the Council adopted Regulation (EC) 44/2001 'on the jurisdiction, recognition, and enforcement of judgments in civil and commercial matters.' This legislation owes its rapid adoption mainly to the fact that the fifth amendment to the Brussels Convention was essentially ready by that time, and the regulation took over the text of the Brussels Convention.[13] In view of all these antecedents and similarities, it is referred to in legal literature as the Brussels I Regulation. The latter regulation has been further developed, in particular by the abolition of exequatur in the context of the declaration of enforceability of judgments given in the Member States, by the Brussels I Regulation.

On May 29, 2000, the Council adopted, in addition to Regulation (EC) 1347/2000, two other regulations: Regulation (EC) 1346/2000 on insolvency proceedings[14] and Regulation (EC) 1348/2000 on the service in the Member States of judicial and

11 In the legal literature, there is no consensus on the exact classification of EU rules based on Art. 81 TFEU. There are several terminologies in use, of which the terminus technicus of European Union civil procedural law is used in this study, following the example of international civil procedural law. Kecskés, 2006, pp. 8–10.

12 Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, pp. 19–36.

13 Junker, 2003, p. 366.

14 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, pp. 1–18.

extrajudicial documents in civil or commercial matters.[15] This latter legislation was again not without precedent, as the Council had already drawn up a convention on the same subject in 1997, which had not entered into force by the time the regulation was adopted. As regards service, on November 13, 2007, the European Parliament and the Council adopted Regulation (EC) 1393/2007[16] on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, repealing Regulation (EC) 1348/2000. This legislation entered into force on November 13, 2008, pursuant to Art. 26 thereof.

On May 28, 2001 the Council adopted Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[17]

Gradually, the Council has regulated more new issues relating to cooperation in civil matters. Having decided the main rules on jurisdiction, mutual recognition, and enforcement of judgments in civil, commercial, and matrimonial matters, the rules on service of documents and the requests for evidence, it was able to start working on the detailed rules. As a first step, on January 27, 2003, it adopted Directive 2003/8/EC establishing minimum common rules relating to legal aid for cross-border disputes to facilitate access to justice in cross-border cases.[18] With this legislation, the Council aims to establish common minimum rules relating to legal aid for cross-border disputes throughout the European Union. It does this in the form of a directive, requiring Member States to bring their national legislation into line with these standards.

The specific substantive source of EU civil procedural law is Regulation (EC) 805/2004 of the European Parliament and of the Council of April 21, 2004, creating a European Enforcement Order for uncontested claims.[19] This legislation only entered into force on January 21, 2005, a date which even the most ardent supporters of the Single European Area of Justice could only hope for.[20] This regulation makes it unnecessary to obtain the approval of a court in a second Member State for uncontested claims, compared with the exequatur procedure provided for in Council Regulation (EC) 44/2001, with the delays and costs this entails.

15 Council regulation (EC) 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, pp. 37–52.
16 Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000, OJ L 324, 10.12.2007, pp. 79–120.
17 Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, pp. 1–24.
18 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, pp. 41–47.
19 Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, pp.15–39.
20 Pfeiffer, 2004, p. 3.

New, hitherto nonexistent and separate procedures have been created by the European Parliament and the Council with Regulation (EC) 1896/2006, creating a European order for payment procedure, and Regulation (EC) 861/2007, establishing a European Small Claims Procedure. What both procedures have in common is that they are available to litigants as an alternative to the procedures under national law and can only and exclusively be used in cross-border cases. Such a case is one in which at least one of the parties is domiciled or habitually resident in the Member State of the court being petitioned. The objectives of the two regulations are largely identical, the Community legislator identifying it as facilitating access to justice. Para. 7 of the preamble to Regulation (EC) 861/2007 adds that the distortion of competition in the internal market caused by the uneven operation of procedural means available to creditors in the various Member States requires Community legislation to ensure uniform conditions for creditors and debtors throughout the European Union. In determining the costs of adjudicating a claim subject to the European Small Claims Procedure, it is necessary to uphold the principles of simplicity, speed, and proportionality. The Union legislature considers it appropriate that information on the costs to be charged should be publicly available, and that the way in which such costs are determined should be transparent. The European Small Claims Procedure should, while reducing costs, simplify and speed up the handling of small claims in cross-border cases by offering an additional optional instrument in addition to the unchanged options under the domestic law of the Member States. To this end, the regulation also simplifies the recognition and enforcement of judgments given in another Member State in the context of the European Small Claims Procedure.[21]

Mention should be made here of Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. This legislation, which will only be fully applicable in the territory of the Member States from 18 June 2011, contains a number of innovations and facilitates the transparency of the rules of jurisdiction in maintenance actions and the enforcement of such decisions in another Member State.

For the sake of completeness, we should mention two more sources: Regulation (EU) 650/2012 of the European Parliament and of the Council of July 4, 2012, on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession and Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015, on insolvency proceedings. There has been only one directive in this field, Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, which had to be transposed by the Member States by May 21, 2011.

21 For a critical view of the regulation, see Varga, 2008, p. 9.

4.3. International Conflict of Laws

For a long time, EU legislation in the field of conflict of laws did not seem to develop as dynamically. Even before the entry into force of the Amsterdam Treaty, the Convention on the law applicable to contractual obligations, which was an international legal norm, was signed in Rome on June 19, 1980, by the then EEC Member States.[22]

EU legislation in the area of conflict of laws has also started, with a time lag compared to the adoption of the jurisdictional regulations, with the adoption of two sources of legislation: Regulation (EC) 864/2007 of the European Parliament and of the Council of July 11, 2007, on the law applicable to non-contractual obligations (Rome II Regulation) and Regulation (EC) 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations (Rome I Regulation). The former will apply from January 11, 2009, and the latter from December 17, 2009. The Regulations provide for a uniform set of conflict-of-law rules governing the law applicable to contractual obligations in all EU Member States except Denmark.[23] The Council Regulation (EU) 1259/2010 of December 20 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation) allows international couples to agree in advance on the law applicable to their divorce or legal separation, provided that the law chosen is the law of the Member State with which they have a closer connection. If the couple cannot agree on this, the courts can decide based on common rules which country's law applies. The regulation does not affect the application of regulation 2201/2003.

4.4. Cooperation with National Authorities and Courts

The practical implementation of judicial cooperation in civil matters depends to a large extent on cooperation between the administrative authorities and courts of the Member States and with the Commission. The continuous exchange of information and experience and the implementation of permanent training are essential.

By Decision 2001/470/EC, adopted on May 28, 2001, the Council set up the European Judicial Network in civil and commercial matters, which is both an information database and a contact point of experts from all the Member States. The network shall pursue the following objectives in particular, in accordance with Art. 3 of Regulation (EC) 1049/2001 Art. 3(2): to ensure the smooth conduct of proceedings with cross-border implications, and to deal with requests for judicial cooperation between Member States, in particular where there is no relevant Community or international

22 This legislation has since become part of the legal systems of several Eastern European countries. In Hungary, it is based on the Convention on the law applicable to contractual obligations and its Protocols, opened for signature in Rome on 19 June 1980, and the Conventions amending it, as well as on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the said Convention and its Protocols, signed in Brussels on 19 June 2005, signed in Brussels on 14 April 2006.

23 Vékás, 2009, pp. 321–326.

legal provision; to ensure the effective and practical application of Community instruments and agreements in force between two or more Member States; and to establish and maintain an information system accessible to the public on judicial cooperation in civil and commercial matters in the EU, on relevant Community instruments and international agreements, and on the internal law of the Member States, in particular as regards access to justice.

5. The First Steps toward Digitalization

On November 25, 2020, the European Parliament and the Council adopted new Regulations on the taking of evidence[24] and on the service of documents.[25] The aim of the recast was to adapt the two previous Regulations to technical progress, to take advantage of digitalization, thereby increasing legal certainty and simplifying and streamlining cooperation mechanisms in cross-border cases.[26]

In 2018, around 3.4 million civil and commercial court proceedings in the European Union had a cross-border element, and the European Commission estimates that this number will reach 4.16 million by 2030.[27] In most of these cases, notably those where at least one of the parties resides in a Member State other than the Member State of the proceedings, courts often apply the regulation on the service of documents more than once, or the regulation on the taking of evidence if evidence from another Member State must be obtained. In 55% of cases, documents were still transmitted by post between Member States, and one in four of these notifications had to be repeated because of a postal deficiency.

Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters was an important instrument of European judicial cooperation: it allowed for the taking of evidence in another Member State, both directly and indirectly. In cross-border litigation, the way in which the court can obtain evidence, which is often decisive in a case, is of great importance, for example where the witness is resident abroad, the place to be inspected is in another State or the document may be kept outside the territory of the State of the court seized. However, almost 20 years have passed since the old regulation entered into force, and it was time for a more thorough 'facelift' to make

24 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, pp. 1–39.

25 Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L 405, 2.12.2020, pp. 40–78.

26 Muzsalyi, 2021, p. 14.

27 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), COM/2018/379.

cross-border taking of evidence faster and more efficient with the technological tools of the present day. It should be recalled that several points of the old Regulation aimed at a simple, quick, and efficient taking of evidence.[28] The CJEU has also ruled that the obtaining of evidence by a court of a Member State in another Member State should not have the effect of prolonging national proceedings. The Regulation therefore introduced a system obliging the Member States parties to overcome any obstacles that might arise in this respect.[29]

The main features of the EU-wide system established by the old regulation remain unchanged, but the use of electronic data transmission as the default channel for electronic communication and document exchange between Member States has become the primary means of communication. Other key innovations include the promotion of the use of modern means of taking evidence, such as videoconferencing, the removal of legal barriers to the admissibility of electronic digital evidence and the elimination of different interpretations of the concept of 'court.'

One of the common elements of the amendments is digitization, which is a priority in all areas of the European Union, as set out in the European e-Justice Strategy and Action Plan 2019–2023.[30] E-Justice aims to improve and simplify access to information in the field of justice and to support the digitization of cross-border judicial and extrajudicial proceedings. This action plan has three main objectives: to ensure and improve access to information, e-communication in the field of justice, and interoperability. The rules of the new regulation are aligned with all three objectives and are closely linked to several elements of the development of judicial cooperation, in particular the regulation on the service of documents and the proposal for the creation of a computerized system for cross-border communication—the e-CODEX system.[31]

6. The Emergence and Development of the Principle of Mutual Trust

As a precursor to the principle of mutual trust, the principle of mutual recognition emerged in the case law of the Internal Market in the interpretation of the free movement of goods in the case law of the CJEU.[32] The same concept has appeared in EU law in the area of mutual recognition of judgments in the field of judicial cooperation. The

28 Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, Recitals 2, 7, 8, 10 and 11.

29 Judgment of the CJEU (First Chamber) of 17 February 2011, Artur Weryński v. Mediatel 4B spółka z o.o., Case C-283/09, ECLI:EU:C:2011:85, para. 62.; Judgment of the CJEU (First Chamber), 21 February 2013, ProRail BV. v. Xpedys NV and Others, Case C-332/11, ECLI:EU:C:2013:87, para. 43.

30 2019–2023 Action Plan European e-Justice (2019/C 96/05), OJ C 96, 13.3.2019, pp. 9–32.

31 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for cross-border civil and criminal communications (e-CODEX) and amending Regulation (EU) 2018/1726, COM/2020/712.

32 Weller, 2015, p. 76.

principle of mutual trust has already been invoked by the EU legislator as one of the reasons for this.

It is interesting to note that among the secondary sources of EU law, only the preamble of Brussels I and IA, Brussels IIA, the Insolvency Regulation and Regulation (EC) 805/2004 contain a reference to the principle of mutual trust. Recital 26 of the Brussels I Regulation and recital 21 of the Brussels IIA Regulation justify the need for the automatic recognition of judgments given in the Member States on the grounds of mutual trust in the judicial systems of the Member States. Recital 18 of Regulation (EC) 805/2004 justifies the mutual trust in the administration of justice in the Member States which justifies the possibility for a court in a single Member State to decide on the certification of a judgment as a European Enforcement Order under the regulation, thus allowing enforcement of the judgment in all other Member States without the need for an additional court in the Member State of enforcement to examine the correct application of the minimum procedural standards. Recital 65 of the Insolvency Regulation also states that the recognition of judgments given by the courts of the Member States should be based on the principle of mutual trust and that the grounds for non-recognition should be reduced to the minimum necessary to this end. On this basis, it is possible to achieve the main objective of the regulation, which is that the decision of the court of first instance should be recognized by the other Member States and not be subject to review by those Member States. Recitals 16 to 17 of the Brussels I Regulation refer to the principle of mutual trust as a justification for the automatic recognition of judgments given in the Member States without any special procedure. It is also the basis for an efficient and rapid procedure for the enforcement of a decision given in one Member State in another Member State.

In Case C-433/18, the Court of Justice of the European Union confirmed that the rules on recognition and enforcement provided for in the Brussels I Regulation are based on mutual trust in the administration of justice in the European Union. According to the CJEU, this trust requires not only that judgments given in one Member State are automatically recognized in another Member State, but also that the procedure for establishing the enforceability of judgments given in one Member State in another Member State is efficient and expeditious. Such a procedure can consist only of a purely formal verification of the documents necessary for the declaration of enforceability in the Member State addressed, the declaration of enforceability being almost automatic.[33] The CJEU added in the case at hand that this objective cannot be achieved by weakening the rights of the defense in any way, and that, in the context of the objectives of the regulation, the procedures leading to the adoption of judicial decisions must be conducted in a manner which respects the rights of the defense.[34]

33 Judgment of the CJEU (First Chamber) of 12 December 2019, ML v. Aktiva Finants OÜ, Case C433/18, ECLI:EU:C:2019:1074, para. 23.

34 Judgment of the CJEU (First Chamber) of 12 December 2019, ML v. Aktiva Finants OÜ, Case C433/18, ECLI:EU:C:2019:1074, para. 26.

In case C-514/10, the issue was the temporal scope of the Brussels I Regulation. Here, the CJEU stressed that the simplified recognition and enforcement rules of the regulation are justified by mutual trust between Member States, in particular the trust of the court of the requested state in the court of the state of origin.[35]

In C-70/15, the CJEU confirmed that it follows from recitals 16 to 18 of the Brussels I Regulation that the system of judicial remedies for the recognition and enforcement of judgments is intended to strike the right balance between, on the one hand, the principle of mutual trust in the Union in the field of judicial cooperation (which justifies, principle of mutual trust in the Union (which requires that, as a general rule, judgments given in one Member State should be fully recognized and enforced in the other Member States) and the principle of the rights of the defense (which requires that the defendant, where appropriate, bring an action for a declaration of enforceability against the declaration of enforceability, examined in the context of an adversarial procedure, if he or she considers that one of the conditions for enforceability is lacking).[36] In this case, the CJEU placed the rights of the defense in the right to a fair trial, pointing out that they are not an unlimited right, that national legislation may contain restrictions, but that the latter must be proportionate to the public interest objectives pursued by the measure in question and must not constitute a disproportionate infringement of those rights in the light of the aim pursued.[37]

The Brussels IA Regulation was interpreted by the CJEU in case C-551/15, where it appeared to separate the principle of mutual trust between Member States from the principle of mutual recognition. According to the CJEU, both principles are fundamental to EU law, as they allow the creation and maintenance of an area without internal borders. The effect of these principles is that judgments given by the courts of a Member State must be treated and enforced as if they had been given in the Member State in which enforcement is sought.[38] The CJEU concluded by stating that one of the objectives of judicial cooperation in civil matters is to make freedom an area of freedom, security and justice based on the high level of trust that must exist between Member States.[39]

In recent years, the CJEU has increasingly interpreted the principle of the rule of law under Art. 2 TEU as a value common to all Member States.[40] In Case C-896/19, it has already linked the principle of mutual trust to the rule of law, stating that it follows specifically from Art. 2 TEU that the Union is based on values such as the rule

35 Judgment of the CJEU (Third Chamber), 21 June 2012, Wolf Naturprodukte GmbH v. SEWAR spol. s r.o., Case C-514/10, ECLI:EU:C:2012:367, para. 25.
36 Judgment of the CJEU (Second Chamber) of 7 July 2016, Emmanuel Lebek v. Janusz Domino, Case C70/15, ECLI:EU:C:2016:524, para. 36.
37 Judgment of the CJEU (Second Chamber) of 7 July 2016, Emmanuel Lebek v. Janusz Domino, Case C70/15, ECLI:EU:C:2016:524, para. 37.
38 Judgment of the CJEU (Second Chamber) of 9 March 2017, Pula Parking d.o.o. v. Sven Klaus Tederahn, Case C551/15, ECLI:EU:C:2017:193, paras. 51–52.
39 Judgment of the CJEU (Second Chamber) of 9 March 2017, Pula Parking d.o.o. v. Sven Klaus Tederahn, Case C551/15, ECLI:EU:C:2017:193, para. 53.
40 Lenaerts, 2019, pp. 6–8.

of law which are common to the Member States in a society of justice.[41] In this respect, the CJEU underlined that mutual trust between Member States, and in particular between their courts, is based on the fundamental premise that each Member State shares with all the others a number of common values on which the Union is founded, as stated in Art. 2 TEU.[42]

The principle of mutual trust is therefore one of the pillars of judicial cooperation in civil matters, and the sovereignty of the Member States is the limit. As the previous chapters of this study have shown, there have been changes in a number of areas which would have been unthinkable a few decades ago precisely because of the idea of national sovereignty: automatic recognition and enforcement of judgments of courts in other Member States, direct service of judicial documents in the territory of another Member State, direct taking of evidence, all of these can be seen as limitations on state sovereignty. In the area of judicial cooperation in civil matters, the conflict-of-law rules on personal status and matrimonial matters are the most controversial, as to how far the Union's jurisdiction can extend and what are the issues that each Member State can regulate differently. The issue of same-sex marriage and its recognition in another Member State stands out among these.

This was indirectly at issue in case C-490/20, which involved a Bulgarian woman married in Spain to a woman from the United Kingdom and had a child. The birth certificate issued by the Spanish authorities listed both parents as mothers. Subsequently, the Bulgarian mother asked the Sofia municipality to issue the Bulgarian birth certificate for the child, which was necessary, among other things, for the issue of the Bulgarian identity card. The Bulgarian municipality refused the request on the grounds that the model birth certificate in the national model birth certificates in force only provides one box for the mother and another for the father, and that only one name can appear in these boxes. The negative decision was challenged before an administrative court, which initiated a preliminary ruling procedure before the CJEU, asking, *inter alia*, whether respect for the national and constitutional identities of the Member States under Art. 4(2) TEU means that Member States have a wide margin of discretion as to the rules for establishing origin. In its judgment, the CJEU recalled Art. 4(2) TEU, according to which the Union shall respect the national identities of the Member States, which are an integral part of their fundamental political and constitutional organization.[43] According to the CJEU, the obligation for a Member State to issue an identity card or passport to a child who is a national of that Member State but was born in another Member State, and whose birth certificate issued by the authorities of that other Member State shows two persons of the same sex as the parents of the child, does not infringe the national identity of the Member State nor does it threaten public

41 Judgment of the CJEU (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, Case C896/19, ECLI:EU:C:2021:311, para. 62.

42 Judgment of the CJEU (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, Case C896/19, ECLI:EU:C:2021:311, para. 62.

43 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 54.

policy in that Member State.[44] Similarly, it does not infringe the national identity of a Member State to recognize a relationship of descent between that child and each of those two persons in the exercise by that child of his or her rights under Art. 21 TFEU and related secondary legislation. The CJEU has concluded that this obligation does not mean that the Member State of nationality of the child concerned must provide in its national law for the parental status of persons of the same sex or that it must recognize a relationship of descent between that child and the persons listed as the child's parents on the birth certificate issued by the authorities of the host Member State. [45]

The CJEU has therefore taken an explicitly moderate decision, skillfully balancing different values and interests: while it has required Member States to ensure that the rights of EU citizenship are granted equally to all persons, i.e., that there is no obstacle to the issuance of a passport or identity card if a child's parents are of the same sex, it has not imposed a legislative obligation on Member States regarding the parental status of same-sex couples. This compromise also seems to be well-suited to national legal systems with different rules, public authorities, and courts.

The case law of the CJEU clearly shows that it also treats national court judgments as a kind of commodity: what is accepted in one Member State under its organizational and procedural framework must be accepted in the other Member States. As a model, this is easy to understand and apply in practice. It should be pointed out, however, that after the Cassis de Dijon judgment, a community legislative dumping campaign was launched (and is still ongoing) to ensure that there are common minimum standards for all goods and thus reduce national differences. Such legislative process has been launched for 'judicial products' (procedural law, organizational standards). Although there is a growing body of legal literature calling for such a process,[46] it is easy to see that the EU is encountering a number of difficulties in this area, particularly jurisdictional obstacles.[47] The CJEU also has difficulties in overcoming this problem by means of a law-enforcement approach: paradoxically, the more and more specific the criteria it lays down for the fulfilment and verifiability of the condition of mutual trust, the more the practical applicability of mutual recognition is jeopardized. We therefore disagree with those authors who argue that trust should be optional (as opposed to mistrust), and that greater leeway should be given to national authorities and courts in a specific case. Whereas, for example, when the Brussels I Regulation was reformed, it was argued that the exequatur procedure should be abolished (because it goes against the principle of mutual recognition); a few years later, it is argued that guarantees should be included to protect fundamental rights and ensure a fair trial.

With regard to the latter, there are significant differences between judicial cooperation in civil and criminal matters, which is understandable, since in criminal cases the

44 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 56.
45 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 57.
46 Hamenstädt, 2021, pp. 13–16; Wischmeyer, 2016, pp. 360–363.
47 Cortés-Martín, 2018, pp. 34–36.

personal freedom of the accused and its restriction are at stake, and thus the effective enforcement of the rules of guarantee is even more important. In the preliminary ruling procedures initiated at the CJEU, the only cases in which a lack of mutual trust has arisen in the Eastern European region so far have been in criminal matters. In these cases, the CJEU has warned skeptical judges to be cautious: although it has opened up the possibility of this being examined by the national judge in the specific case—which, if it occurs frequently, could easily lead to a break in the momentum of judicial cooperation in criminal matters—it has limited it to the emergence of specific facts and evidence, rather than general ones. such spectacular doubt about the administration of justice in the Eastern European region has so far arisen in the area of judicial cooperation in civil matters, which perhaps also confirms that this is a less sensitive area compared to criminal matters.

7. Organizational Weaknesses in the Area of Judicial Cooperation in Civil Matters

The EU-wide rule on *lis pendens* is a necessary consequence of the shortcomings of the EU's system of legal protection: since all national courts in each Member State have the power and the obligation to apply national law, claims based on it can be brought anywhere, in accordance with the rules of jurisdiction. However, this risks creating a situation where two different national courts in the same dispute will hear and rule on the same case. The *lis pendens* rules in the Brussels Regulations allow national judges to avoid this undesirable situation quickly and efficiently in simple cases. However, in the case of more complex and complicated applications, it is not entirely clear, even in the light of the relevant case law of the CJEU, how the national courts concerned should act correctly. One of the main reasons for this is the differences in national rules of civil procedure, terminology, and thinking in the Member States, and the autonomous interpretation of these rules of the regulation. The national court concerned may then have recourse to the CJEU for a preliminary ruling, which takes time.[48] Moreover, the correct interpretation and application of the *lis pendens* rules is only an important preliminary question and does not affect the substance of the dispute. However, it can have very important practical consequences for litigants: it is not at all indifferent for them to choose between pursuing their case before a court in a country with which they are familiar, possibly based on domestic rules of civil procedure, where they have no language difficulties, or in a completely unfamiliar legal environment.

Perhaps the biggest practical shortcoming of the Brussels Regulations' *lis pendens* rules is that the national courts concerned are powerless to resolve the situation quickly and effectively. This is particularly true when both conclude that they must proceed or when neither wants to proceed. Such conflicts of jurisdiction and competence are not unknown among the national courts of a Member State, where most national procedural

48 Moreover, until the entry into force of the Lisbon Treaty, even this could not be done by the courts of first instance because of the limitation of Art. 68 TEC.

laws provide for a solution whereby the court higher up in the hierarchy of the court organization designates the court that is to act, whose jurisdiction and competence can then no longer be challenged. Such a model would also be extremely useful at EU level: in disputes, the CJEU, as a 'court of jurisdiction,' could not only give its interpretation of the *lis pendens* rules in the context of a preliminary ruling procedure, but could also designate by order the national court which has jurisdiction and is bound to hear the specific case. This might not even require a further amendment of the TFEU, since Art. 257 TFEU allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to create specialized tribunals with jurisdiction ancillary to the General Court.[49] Such a new specialized tribunal would be able to resolve conflicts of jurisdiction between national courts much more quickly and efficiently than at present, which would be in the interests of the litigants in particular.

8. Summary

Judicial cooperation in civil matters is based on mutual recognition, which is based on the principle of mutual trust. The heart of cooperation is therefore trust in each other's legal and judicial systems, acceptance of the hypothesis that a judgment handed down in another Member State has been delivered by an independent and impartial court of the same professional standard as would have been the case by the national court.

This principle is most clearly reflected in the recognition and enforcement of judgments given in another Member State, but it is also the rationale behind the universal scope of the EU's jurisdiction regulations: as a general rule, it does not matter in which court in a civil or commercial dispute is raised—the more important aspect is that the forum is predictable for the parties involved.

Perhaps less is said about the other three legal instruments where mutual trust is of paramount importance: cross-border service of judicial documents, taking of evidence in another Member State and cross-border provisional measures. There are real breakthroughs here. A couple of decades ago, these solutions were still based on the classic legal aid system, where it seemed unthinkable that a state court could directly take procedural steps in the territory of another state.

It seems clear that any legal development in this area is only possible if mutual trust between Member States remains unchanged. Paradoxically, in the world of digitalization, it is often more difficult to navigate through the wealth of information and form an objective view of the challenges facing the institutions and legal systems of a Member State. This should also make national courts and authorities cautious and, as long as the EU's detailed legal provisions allow, they should trust each other. Let us trust that the words of Jean Monnet, quoted in the Introduction, will also prove true in this case: 'If a task is seen in the same way, and if everyone has the same interest in its solution, then differences and suspicions will disappear, and friendship will often replace the bad feelings of the past.'

49 Osztovits, 2017, p. 170.

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Chapter 13

Criminal Judicial Cooperation from a Central and Eastern European Perspective

Balázs ELEK

ABSTRACT

Today, the European Union and EU law influence essentially all areas of the law in Member States. Criminal and criminal procedural law are no exception. The European Union can require Member States to criminalize certain defined behaviors, determine the opinion on criminal sanctions that will punish perpetrators, and oblige the states to apply measures in certain areas of criminal law and laws on criminal procedure. As such, the harmonization of substantive and procedural norms in the Member States' criminal law falls in the EU's scope of authority.

After the accession of the countries of Central and Eastern Europe to the European Union, the harmonization of criminal and criminal procedural law throughout the European Union has been taken to a new level. There were also previously trust-based agreements on criminal co-operation between East and Central European countries, so mutual trust in EU cooperation was not entirely new in these countries. The harmonization has also been facilitated by the fact that there have historically been many similarities between Member States' legal systems. One of the best examples of this is the habeas corpus principle.

The harmonization of criminal procedure rules has already been developed with the countries of East and Central Europe. However, the case law of the European Court of Justice regularly shows that in former Western European countries there is a greater distrust of the legislation of the East-Central European countries and that the new East–Central Member States often approach a legal issue quite differently.

KEYWORDS

criminal law, criminal procedural law, principle of mutual recognition, procedural rights.

1. Legal Harmonization of Criminal Law in the European Union

Today, the European Union and EU law influence essentially all areas of the law in Member States. Criminal law is no exception. The European Union can require Member States to criminalize certain defined behaviors, can determine the opinion on criminal sanctions that will punish perpetrators and can oblige the states to apply measures in certain areas of criminal law and laws on criminal procedure. As such,

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the harmonization of substantive and procedural norms in the Member States' criminal law falls in the EU's scope of authority.[1]

Likewise, Krisztina Karsai notes that the term 'integration of European criminal law' did not refer to a well-defined area of law until the Lisbon Treaty took effect. Legal scholars used it as a blanket term to cover the extraordinarily heterogeneous results of the developmental processes that were occurring in the subsystems of Member States' criminal statutes.[2]

Ius puniendi is traditionally considered an immanent power of the states. Notwithstanding, with the Treaty of Lisbon and the creation of the EU's Area of Freedom Security and Justice (AFSJ) it appeared that the EU Member States have individually reduced this original right which was until then jealously guarded and considered as un-transferable and un-detachable part of state sovereignty.[3]

Cooperation in matters of criminal law between Member States of the European Communities entered a new phase when the Lisbon Treaty entered into force on December 1, 2009. A massive new area of law, generated by a supranational organization, took shape in the form of 'European criminal law.' Today, this expression is generally accepted and is understood to mean the (existing and evolving) regulatory and institutional systems in the European Union's substantive and procedural criminal law.[4]

Karsai currently defines 'European criminal law' simply as an independent area of law that derives from the body of EU criminal legislation, which came to life through the Treaty on the Functioning of the European Union (TFEU).[5] This body of law is now a genuine area of EU law.[6]

By extension, legal harmonization can become a tool for eliminating 'forum shopping'—the practice by which perpetrators exploit the differences between Member States' criminal laws by choosing to have their case heard in the country where the regulations are most favorable to their particular circumstances.[7]

The Lisbon Treaty authorizes the harmonization of definitions of criminal offences and sanctions only when they fall in the 'extraordinary' category. Art. 79 of the TFEU gives authority to the EU in the field of trafficking in human beings, while Arts. 82–83 grant powers concerning shared competencies and Art. 325 for financial crime and fraud.[8]

TFEU Art. 83(1) states that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

1 Udvarhelyi, 2013, pp. 295–315.
2 Karsai, 2015, pp. 15–16.
3 Misoski and Rumenov, 2017, pp. 364–390.
4 Farkas, 2012, pp. 139–158.
5 Karsai, 2015, pp. 15–16.
6 Wade, 2013, pp. 165–183.
7 Ligeti, 2008, p. 24.
8 Karsai, 2015, p. 26.

These crimes include terrorism; trafficking in human beings and the sexual exploitation of women and children; trafficking of illegal weapons; money-laundering; corruption; trafficking of illegal narcotics; counterfeiting of money and other financial instruments; computer-related crime; and organized crime.

As criminal activity develops, the Council may pass resolutions establishing that other kinds of criminal acts fulfill the criteria defined in this Article.

This sphere includes acts related to racism and xenophobia since they constitute violations of the central principles of freedom, security, and justice; they also represent components of the prohibition of discrimination, a fundamental right.[9]

The adoption of the minimum rules, as laid out in the Lisbon Treaty, may relate to criminal offences and punitive sanctions. However, since the Treaty can only prescribe minimum harmonization, Member States can apply stricter rules than those outlined in the directive.

The EU legislator can prescribe the nature and scope of the punishment as well. EU norms prescribe efficient, proportional, and dissuasive sanctions—in most cases, imprisonment lasting for a determinate period. They often stipulate other kinds of sanctions, such as monetary fines, confiscation of property, expulsion orders, or disqualifying perpetrators from practicing their professions. A monetary fine is the most common sanction applied against legal entities. It is also possible to bar perpetrators from receiving state benefits and subsidies, forbid them to conduct certain business activities on a temporary or permanent basis, place them under court supervision, apply a court-ordered liquidation, or order the temporary or permanent closure of facilities used in the commission of a crime.[10]

2. The Process of Harmonizing Criminal Procedure Rules

2.1. The Principle of Loyalty and the Principle of Mutual Recognition

The cooperation among the EU Member States initially was based on traditional treaty law (e.g., extradition treaties).

The initial cooperation was defined by the *principle of loyalty*:

> 'The loyalty principle, or the principle of sincere cooperation, is a fundamental principle of EU law and has been central in shaping the EU's legal order.

9 Osztovits, 2008, pp. 1957–1958.

10 This also explains that the principle of mutual recognition extends to various sanctions, financial penalties, confiscation of property or even imprisonment, and conditional measures: Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, pp. 102–122; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, pp. 32–34; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, pp. 59–78.

> Particularly relevant in the early stages, when obligations were not as inclusive as they are nowadays, but the principle has never left the institutional stage. Member States show a high degree of loyalty to EU law, despite the lack of a general enforcement mechanism. This can partly be ascribed to "a degree of trust and the expectation that the other Member States will act similarly. As such loyalty is an outcome of trust and reciprocity.'[11]

The European Council decided in Tampere, Finland (1999), to set up an organization at the European level (EU) dealing with judicial cooperation in criminal matters.[12] This agency became the Eurojust (2002), which had the task to improve the coordination of investigations and prosecutions between the competent authorities in the Member States.[13]

The Tampere European Council in 1999 also adopted that the principle of mutual recognition would be the cornerstone in the establishment of the Area of Freedom, Security and Justice. So, the traditional cooperation of states would be replaced by transboundary cooperation between local judicial authorities of the EU Member States based on trust and mutual recognition.

Mutual recognition assumes that a judicial order issued by one Member State is to be recognized and executed by another Member State, except when there are grounds for refusal apply. The *principle of mutual recognition* in EU criminal (and criminal procedural law) assumed that the basic procedural rights were similar in the Member States. However, this assumption proved to be only partially true.

When courts of one Member State are ordered to trust and accept the judgments of another Member State, that involves a presumption of trust at the system level. Mutual recognition means that inside the EU Member States acknowledges and implement each other judicial decisions (and each other's defined legal actions) with no further examination or evaluation. This results in the removal of procedural barriers in the European Union. The principle of mutual recognition has brought about a remarkable change in legal thinking in EU Member States' cooperation by making criminal cooperation technically and legally simpler.

Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules but also trust that those rules are correctly applied.[14] However, the spirit

11 Willems, 2016, pp. 211–244.

12 Wade, 2013, pp. 165–183.

13 In 1999 the European Commission also established an agency, the European Anti-Fraud Office (OLAF) in the framework of criminal cooperation to carry out independent investigations into fraud and corruption involving EU funds. Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC [1999] 802) (1999/352/EC, ECSC, Euratom).

14 Judgment of the Court (Second Chamber) of 12 March 2020, Criminal proceedings against VW, Case C-659/18, ECLI:EU:C:2020:201 CJEU (hereinafter: CJEU Case C-659/18).

of trust can be built on a very long and bumpy road between countries that have previously participated in opposing alliances.

2.2. The Enlargement of the European Union to Central and Eastern Europe

The largest enlargement of the European Union took place on May 1, 2004, when the Czech Republic, Estonia, Poland, Latvia, Lithuania, Hungary, Slovakia, and Slovenia joined the Union. These countries were followed by Romania and Bulgaria in 2007 and Croatia in 2013.

It can be seen from this that when the Central European countries acceded the European Union, they were already joining an area where one of the main principles was the mutual recognition of decisions and mutual trust.

EU harmonization of criminal law and criminal procedure in the CEE region has not been as challenging as for former EU members in terms of mutual recognition and mutual trust in the judicial authorities of the Member States. However, the principle of mutual recognition existed between the Member States of Central and Eastern Europe even before their accession to the European Union, even if not explicitly in this form. The former socialist countries also sought a kind of 'integration'. So, with Slovakia and the Czech Republic, Hungary carried out direct legal aid even before the accession to the EU and even requests did not need to be translated.[15] Thus, the direct and smooth flow of legal aid introduced in the 2000 Convention was not a 'novelty' in the Hungarian–Slovak–Czech relations.[16]

2.3. The Common Roots of Judicial Certainty in European Countries

Mutual trust in court decisions may have developed at the European level because the level of judicial certainty has similar roots in European countries. Delmas-Marty and Spencer pointed out that judicial convictions have a similar origin in Anglo-Saxon and Continental countries. In the common law, the guilt of the accused must be established beyond a reasonable doubt. The level of certainty in French law is the '*intime* conviction'. In French law, the court must not convict except where it has '*une intime* conviction' that the accused is guilty. The expression of this phrase is found in the instruction to French Juries contained in Art. 353 of the Code of Criminal Procedure: 'The law puts to them just this single question, in which the whole of their duty is contained: 'Are you personally convinced?' The concept of intime conviction is equally found in German and in Hungarian law—as it is indeed in most of the systems which were influenced by French law in the 19th century. The expressions

15 See the Treaty between the Czechoslovak Socialist Republic and the Hungarian People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family and Criminal Matters, signed at Bratislava on March 28, 1989. Published in Hungary by the Act LXI of 1991.

16 There are similar bilateral conventions still in force with the surrounding countries. Some of them allow direct mutual assistance, like the Agreement between the People's Republic of Hungary and the People's Republic of Bulgaria on Legal Assistance in Civil, Family and Criminal Matters, signed at Sofia on 16 May 1966. Published in Hungary by the Legislative Decree 6 of 1966.

'*intime* conviction' and 'beyond reasonable doubt' have different origins. But if asked to explain what *intime* conviction means, a judge from France, Romania, Hungary, or any other country in continental Europe would reply, 'It means you must feel certain'. And that is the same how English judges actually direct juries as to the meaning of the standard of proof. How does the prosecution succeed in proving the defendant's guilt? The answer to that is even simple—by making you certain of it.[17]

The principle of mutual recognition of decisions raises this certainty to a fundamental level in relation to each other's decisions. This was the reason that a lengthy process has begun to harmonize procedural rights for cooperation between the Member States. This process has also been extended to allow the execution of sentences and transfer of sentenced persons from the other EU Member States. As a consequence of the mutual recognition of final decisions, the principle of ne bis in idem has become a key principle of EU cooperation.

2.4. The Ne Bis in Idem Principle

If we accept that, based on its structure, the procedure has a defined end-point, then the procedure ends permanently with the arrival of a procedural event, as the ideal goal could not be reached otherwise. The criminal procedure, as a dynamically moving process that evolves toward a goal, can be hardly imagined without an end-point, provided that it is not a Perpetuum mobile. The principle of ne bis in idem expresses that final decisions close the proceedings definitively and the defendant cannot be subjected to another procedure and another penalty.

The *ne bis in idem* principle means the prohibition of double jeopardy for the same act.

The *ne bis in idem* principle now also has an exclusionary effect because it also prohibits a new proceeding based on the same facts and evidence. The principle of ne bis in idem therefore constitutes a limitation of the criminal power of the State. In other words, this prohibition applies in the strict sense to criminal proceedings and criminal penalties. It does not preclude the possibility of a retrial in an extraordinary appeal procedure if new evidence becomes known.

The prohibition on double jeopardy is elaborated in Art. 4(1) of Protocol 7 of the European Convention on Human Rights, signed in Rome on November 4, 1950. It states,

> 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.'

Art. 54 of the Convention implementing the Schengen Agreement (CISA) also regulates the ne bis in idem principle for relations between EU Member States: 'A person whose

17 Delmas-Marty and Spencer, 2002, pp. 7–9.

trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts.'

The EU Charter of Fundamental Rights has elevated the *ne bis in idem* principle to the level of a basic right.[18]Art. 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence,' states,

> 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted in the Union in accordance with the law.'

The European Court of Justice and the ECHR has interpreted the ne bis in idem principle in many of its decisions.[19] The significance of these decisions is that they seek to reconcile the differing criminal traditions of the Member States. Such decisions are, in particular, those that analyze the possibility of parallel criminal and administrative proceedings for the same acts, which is a particular feature of the legal systems of the countries of Central and Eastern Europe. The *ne bis in idem* principle is a good illustration of how much criminal cooperation changes after two Central European country joins the European Union.

Croatia's Office for Suppression of Corruption and Organized Crime issued an indictment against the director of a Hungarian company for a corruption offense. According to the indictment, he handed over a large amount of bribe money to a senior Croatian politician. In 2011, criminal proceedings were initiated against the director of the Hungarian company in Croatia. Croatian authorities applied to Hungary for international legal assistance to interrogate the director as a suspect. Hungary did not do all this, citing its national interests, but the prosecutor's office also initiated criminal proceedings against an unknown perpetrator in Hungary, where he was questioned as a witness and the criminal proceedings were terminated on the grounds that no crime had taken place. So, the criminal proceedings in Hungary were not pending against the director, he was only questioned as a witness.[20]

On October 1, 2013, after the Republic of Croatia's accession to the European Union and before criminal proceedings were initiated in Croatia, the Office for Suppression of Corruption and Organized Crime issued an European Arrest Warrant (EAW) against AY. The execution of that EAW was refused by decision of the Fővárosi Törvényszék (Budapest Regional Court, Hungary) of October 7, 2013, on the grounds

18 Karsai, 2015, p. 113.

19 See European Court of Human Rights (ECHR) Cases: Sergey Zolotukhin v. Russia, (Appl. No. 14939/03), Case of Mihalache v. Romania (Appl. No. 54012/10); A and B v. Norway (Applications nos. 24130/11 and 29758/11), Judgment of the CJEU (Grand Chamber) 26 February 2013 Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, ECLI:EU:C:2013:105.; Judgment of the CJEU (Grand Chamber) of 20 March 2018 Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca.; Joined Cases C-596/16 and C-597/16, ECLI:EU:C:2018:192.

20 Judgment of the CJEU (Fifth Chamber) of 25 July 2018 AY, Case C-268/17, ECLI:EU:C:2018:602. (hereinafter: CJEU Case C-268/17).

that the available information showed that criminal proceedings had already been brought in Hungary in respect of the same acts as those on which the EAW was based and those proceedings had been halted.

In this case, the CJEU ruled that the prohibition of double jeopardy is not based on the fact that the requested person (who is the subject of the EAW) was heard only as a witness during the investigation. Extradition of the requested person may not be refused on this basis. [21]

2.5. The EAW

The first legal instrument was adopted in 2002 on the EAW and the Surrender Procedures between the EU Member States.[22] The EAW is the first concrete measure in the field of criminal law implementing the principle of mutual recognition. The EAW was introduced after the 9/11 terrorist attacks to create a fast-track extradition system in the EU. A new system was needed to ensure efficient cooperation in transnational cases. However, a legal institution had to be established without prejudice to fundamental rights to liberty and the right to judicial hearings.

The *right to liberty* is one of the most important principles in judicial cooperation between Member States. The right to liberty requires that rules allowing for deprivation of liberty be enacted and enforced in an accessible and foreseeable way.[23] This means legal certainty. In law enforcement activities, the most common restriction on fundamental rights is the limitation on personal freedom—that is, the apprehension and preliminary detention of suspects. Habeas corpus proceedings are generally understood to be cases in which an individual in custody files an urgent petition to a court with the aim of obtaining his release. The principle is closely related to the accused party's right to a hearing before the bench and right to judicial review.

In these procedures, a basic rule is the principle of specialty. The specialty rule means that according to which person who has been surrendered may not be prosecuted, sentenced, or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

2.5.1. The Common European Origins of the Habeas Corpus principle

Habeas corpus is the greatest safeguard of personal freedom, guaranteeing that an individual can only be deprived of liberty for a short period of time unless he is formally charged or arraigned before a judge. The principle first appeared in the 13th century as a means of preventing the arbitrary restriction of personal freedom during the war between England's barons and the king. An individual detained at the king's behest could receive a writ of *habeas corpus* from a judge, which would then be handed

21 CJEU Case C-268/17.

22 Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA).

23 Mancano, 2019, pp. 1–15.

to the arresting authorities. In this manner, the detainee could demand that the authorities disclose the reasons for his arrest, grant him a court hearing, and allow a judge to review the legality of the arrest. By sending back the writ, the authorities would confirm that they had fulfilled these conditions. The development of the *habeas corpus* principle covers several important milestones, including the prohibition on arbitrary detention enshrined in the Magna Carta.[24]

The very first written source of law in Hungary, the Golden Bull, shows that the Hungarian legal system was developing in parallel to that of England. Proclaimed in 1222 by King András II, this document qualifies the detention of suspects as the most basic restriction on the individual right to liberty. According to Ferdinandy, the Golden Bull represents 'the basic code of personal freedom in Hungarian public law' since it mandates the state to respect the individual and, by extension, personal freedom.[25] The Bull deals with arrest and detention in Art. II: 'We also desire that neither [the current monarchy] nor any king that succeeds us shall arbitrarily arrest or oppress any nobleman unless he is previously convicted in a court of law and through proper procedure.'

It is worth mentioning that the 1789 Declaration of the Rights of Man and of the Citizen also codified *habeas corpus*. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations, makes the principle mandatory. *Habeas corpus* also constitutes a significant part of the European Convention on Human Rights, signed on November 4, 1950, in Rome intending to defend human rights and fundamental freedoms.

Art. 5 of the Convention lists the circumstances under which it is possible to deprive an individual of liberty. The Convention not only details the scope of circumstances but also discusses the most important procedural necessities, such as the requirement that court proceedings be overseen by a judge. An arrested or detained individual must, with all deliberate speed, appear before a judge or other public official who is legally vested with commensurate powers. Throughout the period of arrest or detention, every individual who is deprived of liberty has the right to a hearing, during which the court will decide on the legality of the detention; in case of unlawful detention, the court will order the petitioner released.[26]

The Convention's clause on arrests is supplemented by other recommendations. These include Resolution 11 (1965) of the Council of Europe's Committee of Ministers, which suggests that detention of suspects should not be an automatic requirement, but rather a decision made by a court of law following an examination of the facts and circumstances of the particular case. Arrest should be regarded as an exceptional measure that can be ordered and sustained only when absolutely necessary.

24 Mezey, 2015, pp. 2–6.
25 Ferdinandy, 1899, p. 169.
26 Act XXXI of 1993 on the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome; Art. 5, Right to Liberty and Security.

The European Court of Human Rights has, in numerous judgments, addressed the legality of detention considering the guarantee of due process enshrined in Art. 5 of the European Convention on Human Rights.

In harmony with the provisions Art. 5(1c), every person who is arrested or detained must be brought promptly before a judge (or other public officer authorized by law to exercise judicial power); the arrested or detained individual has a right to a hearing on his or her case in a reasonable amount of time, or must be released until the hearing takes place. His or her release must take place under conditions that will guarantee their appearance at the hearing.

In EU law, it is also required by the directive on the right to information in criminal proceedings[27] that the Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which contains information about the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

The rules relating to the legality of detention also stem from the principles that ultimately led to the common rules of the European Arrest Warrant. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[28] The mechanism of the European arrest warrant is based on a high level of confidence between the Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6(1) of the Treaty on European Union.

The execution of the European arrest warrant may be refused if there are reasonable grounds for believing that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions, or sexual orientation.

The requested person may not be transferred even if there is a risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The case law of the European Court of Justice has also raised the question of whether the execution of a European Arrest Warrant can be refused if there is a danger of judicial independence.

2.5.2. The Independence of the Courts of an Eastern Central European Member State and the Enforceability of the European Arrest Warrant

A Dutch court asked the European Court of Justice whether the execution of an EAW issued by Polish courts could be refused on the grounds that the independence of

27 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

28 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

Polish national courts was reported. The CJEU ruled that if the Member State executing the EAW has information that the independence of judges in the Member State issuing the arrest warrant is at stake, this should not be an obstacle to judicial cooperation without carrying out specific and precise verification. It also means that the executing court cannot refuse to execute the EAW for such a reason.[29]

2.5.3. The Right to a Judicial Hearing in the Practice of the CJEU

A preliminary referral question was formulated in the context of the execution in Romania of four EAWs issued by the German authorities against a Romanian national who had not been heard before issuing the EAW. The CJEU decided that the Framework Decision (FD) EAW cannot be interpreted as meaning that the requested authority may refuse to execute an EAW because the person had not been heard before issuing the EAW. The FD EAW grants the right to be heard in the state of execution which complies with the rights recognized under Arts. 47 and 48 of the EU Charter.[30]

2.5.4. The Principle of Proportionality

Respecting the principles of the European Union, a European Arrest Warrant may be issued only if it is strictly necessary and proportionate. A list of criteria must be considered when assessing proportionality. The principle of proportionality means that for example, the minor nature of the offence or the suspect's circumstances (for example, poor health or the time elapsed since the alleged offence) may make extradition disproportionate. The principle of proportionality includes the seriousness of the crime, the health conditions of the requested person, and his or her family circumstances. The Member States consider the seriousness of the offence, the length of sentence, the existence of a less severe measure, as well as an analysis of its cost and benefits before issuing an EAW.[31]

In many cases, it is seen that through the execution of an EAW a disproportionate restriction of freedom occurs because those same cases would never allow detaining a person at the national level.

Limitations to the exercise of the rights and freedoms recognized by the Charter of Fundamental Rights are subject to the principle of proportionality. It requires that the restriction be suitable and necessary to achieve a legitimate aim.[32] The propor-

29 Joined Cases C 354/20 PPU and C 412/20 PPU: Judgment of the Court (Grand Chamber) of 17 December 2020, OJ C 62, 22.2.2021, pp. 1–10.

30 Judgment of the CJEU (Grand Chamber) 29 January 2013 Ciprian Vasile Radu, Case C-396/11, ECLI:EU:C:2013:39.

31 However, in many cases it is seen that through the execution of a EAW a disproportionate restriction of freedom occurs, because those same cases would never allow to detain a person at the national level. Bachmaier, 2015, pp. 505–526.

32 Art. 52 CFREU: 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

tionality also means that the severity of penalties must not be disproportionate to the criminal offence (Art. 49 CFREU). The proportionality involves both the legislative and the sentencing levels, i.e., the penalties as provided by the law and applied to the concrete cases by the judges.[33]

The principle of proportionality in the practice of the CJEU may be well illustrated with a case which was initiated by a judge from Poland. The CJEU ruled that it is not contrary to EU law and thus does not infringe the principle of proportionality if a Member States classify as a criminal offence the possession of a significant quantity of narcotic drugs or psychotropic substances both for personal consumption and for the purposes of illicit drug trafficking while leaving the interpretation of the concept of 'significant quantity of narcotic drugs or psychotropic substances to the discretion of the national courts on a case-by-case basis. However, this is subject to the condition that interpretation is reasonably foreseeable.'[34]

2.6. European Supervision Order

The European supervision order (ESO) establishes a system in which judicial authorities of Member States are required to recognize and enforce decisions on supervision measures issued by another MS.[35] Council Framework Decision 2009/829/JHA aimed to reduce pre-trial detention in a cross-border context.[36] The ESO strengthens the right to liberty and the presumption of innocence in the European Union by ensuring cooperation between judicial authorities when a person is subject to obligations or supervision pending a court decision. One of the main reasons for the creation of the ESO was that suspects or accused persons who are not nationals of the country where the criminal proceedings are taking place have a higher risk of arrest. This is the case even if the other circumstances are the same as for a person residing in the Member State of criminal proceedings. Discriminatory treatment against non-resident EU citizens in criminal proceedings is incompatible with the objective of the EU to facilitate a common European area of justice. The ESO was adopted as a legal instrument intended for solving the issue of keeping foreigners under detention and creating unequal conditions for foreigners if compared with residents of that state.[37]

The Framework Decision lays down the rules, according to which one Member State recognizes a decision on supervision measures issued in another Member State as an alternative to provisional detention.

33 Mancano, 2019, pp. 1–15.

34 Judgment of the CJEU (First Chamber) of 11 June 2020 Criminal proceedings against JI, Case C 634/18, ECLI:EU:C:2020:455.

35 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

36 Klimek, 2017, p. 76.

37 Jurka and Zentelyte, 2017, pp. 31–45.

2.7. The Treaty of Lisbon and Procedural Rights

The Treaty of Lisbon provided a constitutional framework for the principle of mutual recognition and significantly broadened legislative powers in the field of criminal procedure law. Under the Lisbon Treaty, the principle of mutual recognition must be followed by a degree of harmonization of criminal procedural law.

The Treaty on the Functioning of the European Union (TFEU) confers upon the European Union competence to adopt minimum rules on the rights of individuals in criminal procedure.[38] Based on the TFEU, several measures on the rights of individuals in criminal proceedings have been adopted.

In 2009 the Council proposed a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The roadmap proclaimed that there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, so it provides for a harmonization obligation on the field of translation and interpretation, information on rights and information about the charges, legal advice and legal aid, communication with relatives, employers and consular authorities, special safeguards for suspected or accused persons who are vulnerable, and last but not least a Green Paper on pre-trial detention.[39]

The roadmap aimed to ensure that the rights enshrined in the ECHR are respected in practice and consistent manner across all Member States.

Following the roadmap, new directives have been adopted on the right to interpretation and translation in criminal proceedings and on the right to information in criminal proceedings.[40]

A Hungarian preliminary ruling procedure in connection with the directive on the right to interpretation and translation is a good example of how often the nature of legal thinking is different in the Member States. The question referred for a preliminary ruling was whether the convicted person could be required to pay a translation fee in a special procedure in which a court is examining the compatibility of a criminal conviction handed down in another Member State with Hungarian law. However, the EUCJ ruled that not only could the defendant not be required to pay a translation fee in such proceedings, but that the introduction of such a special procedure was also contrary to EU law.[41]

38 Art. 82(2)(b) TFEU.

39 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01 (The Council of the European Union), OJ C 295, 4.12.2009.

40 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.
Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

41 Judgment of the CJEU (Fifth Chamber) of 9 June 2016 Proceedings brought by István Balogh, Case C-25/15, ECLI:EU:C:2016:423.

A framework decision was already adopted by the Council in 2009 on the recognition of decisions rendered in the absence of the accused or suspect.[42] This framework decision intended to establish clear and common rules for non-recognition where the final decision was taken in the absence of the accused.

Following the enlargement of the European Union to Central and Eastern Europe, the number of official languages in the Union has risen to 23. There are currently 506 (23x22) possible language combinations in the EU. The borders have become more open, which has increased the problem of the right to interpretation and translation in criminal cooperation.

So, the first legal instrument after the roadmap was Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. It requires translation before police and judicial authorities, including communication between a suspected or accused person and his/her legal counsel in direct connection with any questioning or hearing during proceedings, or with the lodging of an appeal or other procedural application.

The directive establishing minimum standards on the rights, support, and protection of victims of crime was adopted in 2012.[43] The purpose of this directive is to ensure that victims of crime receive the appropriate information, support and protection and are able to participate in criminal proceedings.

This was followed by Directive 2012/13/EU of the European Parliament and the Council on the right to information in criminal proceedings. This introduced an obligation for the competent authorities to warn the suspected or accused of his or her most fundamental rights; like the right to remain silent, the right of access to a lawyer, and the right to be informed of the accusation.[44] The reason for adopting the directive was that the extent of mutual recognition is very much dependent on many parameters, which include mechanisms for safeguarding the rights of suspects or accused persons. The directive sets common minimum standards that strengthen confidence in the criminal justice of another Member State. This directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a EAW relating to their rights.

Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

42 Council Framework Decision 2009/299/JHA on enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009.

43 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

44 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012.

Suspects or accused persons should have the right to communicate with the lawyer representing them. Suspects or accused persons should, while deprived of liberty, have the right to communicate without undue delay with at least one other person, such as a relative, nominated by them.

This directive was interpreted in the light of questions referred by a Bulgarian court in a reference for a preliminary ruling. The court has ruled that the national legislation, which requires a national court to dismiss the defense lawyer against the will of the defendants, is not contrary to the directive if the interests of those defendants are contrary to each other and both have given the same defense power of attorney.[45]

2.8. European Investigation Order

The Stockholm Program adopted by the European Council (2009) considered the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension. The aim was to create a new flexible system for judicial cooperation. It was also intended that the grounds for refusal could be invoked as narrowly as possible.

This new approach is based on a single instrument called the European Investigation Order (EIO). The purpose of the EIO is to gather evidence in the executing State. This includes the obtaining of evidence that is already in the possession of the executing authority.

The EIO establishes a single regime for obtaining evidence. Additional rules are however necessary for certain types of investigative measures which should be indicated in the EIO, such as the temporary transfer of persons held in custody, hearing by video or telephone conference, obtaining of information related to bank accounts or banking transactions, controlled deliveries, or covert investigations

The EIO is a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing state') to have one or several specific investigative measure(s) carried out in another Member State ('the executing state') to obtain evidence. The 'issuing authority' may be a judge, a court, an investigating judge, or even a public prosecutor. 'Executing authority' means an authority having the competence to recognize an EIO and ensure its execution.[46]

The EIO is issued on a standard form. The EIO should be executed automatically, without further formalities, unless the executing Member State detects a reason for refusal on the grounds for non-recognition. Such a ground for refusal may, for example, be in breach of the ne bis in idem principle or relate to an act which is not a criminal offence in the executing Member State.

If the executing Member State does not want to implement the EIO, it must first conduct a consultation with the issuing Member State. The EIO provides for judicial

45 Judgment of the CJEU (Grand Chamber) of 5 June 2018, Criminal proceedings against Nikolay Kolev and Others, Case C-612/15, ECLI:EU:C:2018:392.

46 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.

cooperation in procedural institutions such as transfer of evidence, temporary transfer to the executing State of persons held in custody to carry out an investigative measure, hear by videoconference or other audiovisual transmissions, hearing by telephone conference, information on bank and other financial accounts, covert investigations, interception of telecommunications with the technical assistance of another Member State. For the purposes of the EIO, the prosecution should also be considered a judicial authority, regardless of whether it is subordinate to the executive of a Member State.[47]

The principle of proportionality in the case of a EIO means that it can only be issued if it is absolutely necessary and its acquisition would have been ordered in a domestic case. The EIO is already a legal institution that is often used by the Central and Eastern European Member States in their relations with each other.

In a criminal case, the subject matter of the proceedings was that the suspect had imported sugar into Bulgaria from the Czech Republic but had not paid value-added tax because he had proved by false documents that he had forwarded the sugar to Romania. The Bulgarian Criminal Court has issued a EIO to conduct a house search and seizure in the Czech Republic. The EIO was also intended to examine witnesses by videoconference. However, the issuing court had a problem filling in the form because it could not indicate the remedies available under domestic law. In that regard, that court points out that Bulgarian law does not provide for any legal remedy against decisions ordering a search, a seizure, or the hearing of witnesses, but the directive requires remedies to be completed. The Bulgarian court, therefore, referred for a preliminary ruling on how to complete the form in such a case. The CJEU's decision was, in essence, that in such a case the remedies need not be indicated when issuing an EIO.[48] The execution of the EIO is a matter of simplicity and should be pursued by the requesting Member State.

2.9. The Right to a Fair Trial and the Lack of Trust

The right to a fair trial is one of the basic principles of a democratic society. The right of suspects and accused persons to be present at the trial is based on that right and should be ensured throughout the Union.[49]

The right to a fair trial is one of the basic principles in a democratic society. The right of suspects and accused persons to be present at the trial is based on that right and should be ensured throughout the Union. The right of suspects and accused persons to be present at the trial is not absolute. Under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right.[50]

47 Judgment of the CJEU (Grand Chamber) of 8 December 2020, Criminal proceedings against A and Other Case C 584/19, ECLI:EU:C:2020:1002.

48 Judgment of the CJEU (First Chamber) of 24 October 2019 Criminal proceedings against Ivan Gavanozov, Case C-324/17, ECLI:EU:C:2019:892.

49 Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

50 Ibid.

In one case, Romanian courts sentenced two Romanian citizens to imprisonment *in absentia* and then asked for their extradition from Germany. The German judicial authorities have requested assurances from Romania that the case of the requested persons will be retried.

Finally, the CJEU ruled, that the executing judicial authority may not refuse to execute a EAW, where the person concerned has prevented the service of a summons on him in person and did not appear in person at the trial because he had absconded to the executing Member State, on the sole ground that that authority has not been given the assurance to a new trial.[51]

2.10. Presumption of Innocence and the Facts of the Judgment

The directive on the presumption of innocence also seeks to establish common minimum rules.[52] The purpose of this directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

This directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States.[53]

A Bulgarian court has initiated a preliminary ruling procedure to determine whether the presumption of innocence is infringed if the facts of the judgment also include persons whose criminal liability has not yet been decided by the court.

The CJEU ruled that it is not contrary to the presumption of innocence that the judgment of the court includes the acts of the accused who made the indictment, as well as the acts of the persons whose criminal liability has not yet been decided by the court.[54]

3. Closing Remarks

By the accession of the Central and Eastern European states to the European Union, integration has begun not only in the economic field but also in the long process including the harmonization of criminal law and criminal procedural law based on mutual trust.

51 Case C 416/20 PPU: Judgment of the CJEU (Fourth Chamber) of 17 December 2020, OJ C 62, 22.2.2021, pp. 11–11.

52 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016.

53 Ibid.

54 Judgment of the Court (Second Chamber) of 5 September 2019 Criminal proceedings against AH and Others, Case C 377/18, ECLI:EU:C:2019:670, pp. 27–28.

We have seen that in the earlier international treaties of the Central and Eastern European Member States, mutual recognition and respect for each other's judicial decisions was not at all unknown. Moreover, it had previously been based entirely on the principle of equality and mutual respect. The accession of the countries of Central and Eastern Europe resulted in a change in many areas of the legislation governing criminal convictions. Undoubtedly, the attitude of law enforcers, the legal systems and cultures have changed a great deal in the newly acceded countries.

However, it should also be mentioned that there is a regular suspicion on the part of the law enforcement authorities of the former EU Member States toward the judicial authorities of the new Member States. It is similar to the idea that the previously joined Member States fear their prosperity from the newly joined Member States, forgetting how huge the market is that has opened up to them, not to mention the skilled and hardworking people who have contributed to the economic development of the states already members of the Union.

It does not usually happen that the judicial authorities in Central and Eastern Europe question the fairness of a criminal procedure, nor the rule of law in the legal and political systems of the former Member States. However, despite the fundamental provision of mutual trust, additional guarantees are often required executing a procedural act, which is unduly degrading for the Central and Eastern European states. However, in some cases, prison conditions are not worse, nor there are fewer procedural guarantees, in these countries.

Judicial cooperation, like economic integration, will only have a future if the Member States respect each other and each other's legal systems not only at the level of expression of principles but also in the everyday law enforcement practice. In my opinion, cooperation in the field of criminal law and criminal procedural law has developed in the right direction at the level of legislation since the Treaty of Lisbon. Guarantee principles and legal standards have been established that can essentially ensure effective cooperation.

The obstacle to truly effective cooperation remains the approach that does not consider decisions by other Member States to be taken seriously and seeks various loopholes from its implementation at the enforcement level. I also consider it an excuse to label the judicial system of another Member State with different pseudo-democratic adjectives without that state having a thorough knowledge of it.

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