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Table of Contents

ARTICLES

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MIHAELA BRAUT FILIPOVIĆ[1]

Corporate Governance of Family Businesses in Croatia – Legal Framework and Open Challenges[2]

ABSTRACT: *The importance of family businesses in the Croatian economy is well known. In this respect, Croatia is part of the larger picture in which family businesses are considered of fundamental importance to the European Union's economy. The most specific feature that sets Croatian family businesses apart is that they are all relatively young, as they were mostly established in the 1990s. This is due to the socio-economic development of Croatia as a country that was part of the former Yugoslavia. In this regard, although the traditions of certain crafts and products are significantly older, the modern legal vehicles through which such business is conducted, that is, Croatian companies, are only around thirty years old. This fact contributes to the hypothesis that governance issues related to family businesses are an underdeveloped legal area. However, the need to address the specific needs of Croatian businesses is on the rise, as a significant number of the founders are now retiring, and the issue of successful transfer of these businesses has never been more important. The goal of this article is to question whether available legal instruments for enhancing the governance of family businesses from comparative law and practice such as family constitutions and family councils can be applied in Croatian practice as well. To this end, this study analyses the most significant legal forms in which a family business can be established in Croatia: crafts, family farms, and all types of commercial companies (with an emphasis on limited liability and joint-stock companies). Analysis of the Croatian legal framework from the perspective of family businesses will contribute to the comparative discussion regarding the specific legal needs and challenges of such businesses.*

KEYWORDS: Croatian family business, family governance, corporate governance, family constitution, family council.

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1. Introduction

There are no official statistics on the number of family businesses in Croatia.[3] However, it is undisputed in literature and practice that family businesses are among the most significant types of businesses in Croatia, with the prevailing opinion that they fall in the category of small-and medium-sized enterprises.[4] At the EU level, analyses have shown that at least 60% of all types of enterprises fall under the category of family businesses.[5] Thus, it is no surprise that family businesses have been the topic of EU documents, analyses, recommendations, etc.[6] However, all EU sources represent soft-law mechanisms for improving the framework for family businesses, while the extent to which these measures should be adopted is left entirely to the disposition of the member states. The corporate governance of family businesses is recognised as a specific type of corporate governance with specific challenges in both practice and literature.[7] However, the awareness of these issues as well as the development of practical solutions vary greatly throughout the member states. In this paper, the author elaborates on the soft law mechanisms that are most commonly applied in comparative practice to address the challenges of family businesses, such as family constitution and family council. The goal is to question the legal framework of available legal forms for conducting businesses in Croatia to determine whether these mechanisms can be applied to improve corporate governance. Analysis of the Croatian legal framework from the perspective of family businesses will contribute to the comparative discussion regarding the specific legal needs and challenges of family businesses.

2. Overview of the most commonly used corporate governance instruments for addressing the challenges of family businesses

Specific challenges for family businesses arise from the overlapping of ownership, family, and business.[8] Potential conflicts among family members threaten the existence of the entire business.[9] To address these new challenges, many authors have argued that corporate governance of family businesses should be divided into business governance and family governance,[10] where governing the family gains equal importance

3 The Croatian Bureau of Statistics does not recognize family business as a separate category of business in Croatia.
4 CEPOR, 2012, p. 5
5 See, for example, European Commission, 2009, p. 8.
6 For a detail overview, see Braut Filipović, 2020.
7 See, for example, Kormann, 2017; Eisenmann-Mittenzwei, 2006; Hougaz, 2015; Botero, I. C. et al., 2015.
8 See Lansberg, 1983, p. 40.
9 Kormann, 2017, p. 98.
10 See Koeberle-Schmid, Kenyon-Rouvinez, and Poza, 2014, p. 11.

as governing the business of the company. Within family governance, literature and practice most often call for the application of soft-law mechanisms, with the most popular are the creation of family constitutions, family councils, and family offices.[11] In this paper, the author provides only a brief overview of these instruments, as the primary goal is to examine their possible use in Croatian commercial companies and other available legal forms for conducting business.

Family constitutions are documents developed by family members, who are usually shareholders of the same family business. They are often described as the main strategy of the family for governing both the family and the business, with the goal of ensuring harmonious family relations and successful business across many generations of the family.[12] It should be emphasised that family constitutions are usually not legally binding but serve as a starting point from which agreements achieved in that document are transferred, for example, to the articles of associations of the company, which then become binding for the shareholders of the family business.[13] Some have even argued that a family constitution should be used to interpret the constitutive acts of commercial companies, as they incorporate shareholder tendency or intent on a certain issue.

Family councils are special bodies established within family businesses, usually in the case of commercial companies such as joint-stock and limited liability companies, which serve as the point of connection between the family members and the management of the company.[14] These bodies do not replace management or other formal company bodies. They are established voluntarily, and their scope of the duties, role, and composition is typically provided for in the constitutive act of the company, such as the articles of the association. However, it has been argued that these bodies can be established contractually, whether through family constitutions or shareholders' agreements.[15] Decisions made by family councils are generally not legally binding but can heavily influence the management and business strategy of a company, primarily through the family members who, as shareholders, transfer family council decisions by voting for them in the company's shareholders' meetings.[16] The influence of the family council is greater if they include managers of the company as their members, which *de facto* provides a way for the shareholders, that is, family members, to express their will through an informal body to the management of the company.

Finally, in comparative legal systems, especially in the USA, members of the family business have developed so-called family offices that can serve the different needs of the family members but the primary role of which is managing their private

11 See Koeberle-Schmid, Kenyon-Rouvinez, Poza, 2014, p. 11.
12 Baus, 2016, p. 107.
13 See Braut Filipović, 2018, p. 543. For such a conclusion regarding comparative German practice, see Schween et al., 2011, p. 13.
14 See Lächler, 2016, p. 814.
15 See Sanders, 2017, p. 963.
16 Haagen-Eck, 2016, p. 690.

assets, which they presumably gained from the successful family business.[17] The need for such services arises when the family business is successful for a longer period of time, allowing for family offices to be established as a separate asset management company that manages the portfolio of family members.[18] In other words, family offices become asset managers, and family members become investors.[19]

These soft-law mechanisms for improving the corporate governance of family businesses are known in various comparative legal systems, particularly Germany, the USA, and Spain.[20] There are additional initiatives to boost the development of these instruments in practice by raising awareness about them at the EU level through adoption of soft-law corporate codices and others.[21] As family businesses are of crucial importance for the economy of member states, the author considers that both political participants who draft the country's development strategy and private entrepreneurs who manage family businesses should continuously be reminded of the special challenges that family businesses face and possible instruments that could boost the success of family businesses for generations.

3. Possible application of corporate governance instruments on the various legal forms for conducting business in Croatia

To the best of my knowledge, there are no family constitutions, family councils, or family offices established in Croatian practice. the author considers the lack of introduction of these instruments detrimental to the development of Croatian family businesses who currently find themselves in a peculiar period – the transfer of the business.[22] The preferred solution for the founders of a Croatian family business is to transfer their business to their children.[23] To do this successfully, entrepreneurs should develop a long-term plan of how to connect the family and business before the business is transferred based on soft-law instruments such as family constitutions and family councils that have been proven to help in comparative jurisdictions. The author examines Croatian legal framework regarding various legal forms available for conducting business in Croatia, as family businesses exists in various legal forms and sizes,[24] to determine whether it is possible to introduce family constitutions and family councils in Croatian family businesses.

17 Wessel, 2013, p. 2.
18 Decker and Lange, 2013, p. 301.
19 Zetzsche, 2017, p. 156.
20 For an overview of existing studies, see Matherne et al., 2013. See also Fleischer, 2017, p. 104.
21 See, for example, the German Governance Kodex für Familienunternehmen from 2004 and the Slovenian Corporate Governance Code for Unlisted Companies from 2016.
22 See Alpeza, Grubišić, and Mikrut, 2015, p. 21; Senegović, 2015, p. 181.
23 Mezulić Jurić and Alpeza and Oberman Peterka, 2020, p. 19.
24 Smith, 2017, p. 14.

■ *3.1. Available legal forms for conducting business in Croatia – a brief overview of practice*

Commercial companies and crafts are the two main categories of legal vehicles for conducting business in Croatia. The types of commercial companies are strictly regulated and provided for in the Croatian Companies Act,[25] while crafts are regulated by the Croatian Crafts Act.[26] Crafts are traditionally very popular in business practice, and they represent more than 30% of all business subjects in Croatia.[27] Within the category of commercial companies, the most common form for conducting business is the limited liability company (društvo s ograničenom odgovornošću),[28] which represents more than 55% of all business subjects in Croatia.[29] As previously mentioned, there are no official statistics on the number of family businesses in Croatia, partially due to the fact that there is no definition of a family business.[30] However, as the limited liability company is considered the most popular legal form for conducting business in Croatia, most of the family businesses in Croatia can be presumed to be established as limited liability companies.[31]

From the agricultural sector, the most popular form for conducting business is family farms,[32] which is an additional legal form created solely for the agricultural sector and regulated by the Family Farms Act.[33]

The choice of legal form for family businesses depends on many factors, particularly taxes and legal framework. Within the legal framework, the most influential issues are the simplicity of the company's establishment and functioning, freedom to tailor the legal relations within the company, and the liability of the members towards third persons.[34] With the development of soft-law instruments for governing family businesses, the possible introduction of these instruments into the legal framework may also be taken into account in the process of establishing or restructuring a company. Considering the aforementioned data, the author analyses how family constitutions and family councils can be integrated into Croatian commercial companies, crafts, and family farms.

25 Official Gazette, No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19.
26 Official Gazette, No. 143/13, 127/19, 41/20.
27 See Croatian Bureau of Statistics, 2020.
28 Jurić and Braut Filipović, 2020, p. 70.
29 See Croatian Bureau of Statistics, 2020.
30 See the proposal for the definition of a family business in Croatia, which is in accordance with the proposal on the EU level by the Expert Group in the aforementioned *Overview of Family-Business-Relevant Issues: Research, Networks, Policy Measures and Existing Studies*, in CEPOR, 2012, p. 7.
31 See, for example, Orbico Group Ltd, https://www.orbico.hr/en/about (16.2.2021.); Gavrilović Ltd, https://www.gavrilovic.hr/en/ (16.2.2921.); AutoZubak, https://www.autozubak.hr/ (16.2.2021.). For related findings for Austria, see Kalls, 2017, p. 22.
32 Croatian Farmers register, 2020.
33 Official Gazette, No. 29/18, 32/19.
34 For similar considerations, see Lieder, 2017, p. 31.

■ *3.2. Croatian commercial companies – the possible introduction of family constitutions and family councils*

There are five types of commercial companies that can be established under the Croatian Companies Act: general partnerships (javno trgovačko društvo), limited partnerships (komanditno društvo), economic interest groupings (gospodarsko interesno udruženje), limited liability companies, and joint-stock companies (dioničko društvo).

The general and limited partnerships are among Croatian law types of commercial companies that have legal personality but have their origin in contractual partnerships,[35] which leads to their main feature – a high level of autonomy in determining relations among members.[36] Between these two companies, the limited partnership is characterised as a type of general partnership[37] with the main distinction that the liability of some members towards third persons can be limited.[38] Consequently, limited partnerships are minimally regulated, and provisions of general partnerships apply to limited partnerships as well unless otherwise provided by the Companies Acts or by the members in partnership agreements.[39] For this reason, the author analyses the possible combined use and implementation of the family constitution and family council to these companies. Notably, these legal forms are rare in Croatian practice, compared to other types of commercial companies. However, they can be used in the case of family businesses as they can be drafted according to the needs of their founders.

Both general and limited partnerships are established by registering a partnership agreement in the court registry.[40] As these partnerships enjoy high contractual autonomy, the prevailing number of provisions of the Companies Act regarding the legal relations among members are dispositive in nature,[41] meaning that members can arrange their relations rather freely, with the exception of a small number of mandatory provisions (for example, the members' right to information regarding the business of the company)[42] and the general limitation of the contractual freedom (all contracts must comply with the Constitution of the Republic of Croatia, mandatory laws, and the morals of society[43]).[44] On the contrary, the liability of the members towards third persons is a mandatory provision stating that all members of the general partnership[45] and general partners of the limited partnership[46] are liable for the obligations of the partnership unconditionally regarding all of their assets.

35 See Barbić, 2019, p. 399.
36 See Jurić, 2020, p. 7.
37 See Barbić, 2019, p. 565.
38 Article 131 of the Companies Act.
39 Article 132 of the Companies Act.
40 Articles 133-134 of the Companies Act.
41 Article 71 para. 2. of the Companies Act.
42 Article 84 para. 2 of the Companies Act.
43 Article 2 of the Croatian Obligations Act, Official Gazette, No. 35/05, 41/08, 125/11,78/15, 29/18.
44 See Barbić, 2012, p. 485.
45 Article 94 of the Companies Act.
46 Article 131 of the Companies Act.

The content of the partnership agreement is not expressly regulated, but it can be derived from some of the provisions of the Companies Act. However, the analysis shows that the mandatory content concerns only basic information regarding the company, such as the identification of the company's members, the company's name, and the place of business.[47] The lack of any other information in the partnership agreement can be substituted by the application of the default provisions of the Companies Act.

Such findings clearly lead to the conclusion that members of the general and limited partnerships can introduce nearly any mechanism of corporate governance to improve the relations among them. As there is no obstacle for members to conclude contracts among themselves outside of the partnership agreement, they are free to draft a family constitution as well.

It remains to be discussed whether a partnership agreement is the only legal act for arranging legal relations among members with an obligatory effect for the partnership. Although there are very few mandatory provisions that must be set by the partnership agreement, the Companies Act expressly states that the legal relations among members are to be arranged in the partnership agreement.[48] In particular, the management of the company can be freely determined by the members, but variation from the Companies Act is valid only if implemented via the partnership agreement.[49] Thus, the author concludes that any decision pertaining to legal relations among the members of a general or limited partnership reached outside of the partnership agreement, such as, for example, within the family constitution, should be implemented via the partnership agreement to ensure the obligatory effect for the members and for the partnership.

As for introducing a family council in the partnership, one must consider that general and limited partnerships do not have organs. All or some members manage the company.[50] However, they can establish a body that is not an organ but can be tasked with advisory, supervisory, or other functions in the company.[51] It cannot represent or manage the company (regardless of whether it consists only of members),[52] as only members are permitted, whether all or only some of them are provided for in the partnership agreement. Thus, it is possible to establish a family council in both general and limited partnerships but only as an advisory body.

Further, as there is no requirement that any additional body should be established in only the partnership agreement, there are no obstacles to establishing the family council via the partnership agreement or outside of the partnership agreement, for example, via the family constitution.[53] However, if members want to ensure that the

47 See Barbić, 2019, p. 405.
48 Article 71 para. 1 of the Companies Act.
49 See, for example, article 78 para. 2 of the Companies Act.
50 Articles 78 and 136 of the Companies Act.
51 See Barbić, 2019, p. 471.
52 For the same view in comparative German legislation for *Personengesellchaften,* see Sanders, 2017, p. 966.
53 It is a common practice to establish the family council first via the family constitution. See Smith, 2017, p. 636.

role of the family council is respected by all current and future members rather than only those who have signed the family constitution or some other contract outside the partnership agreement, they should provide the establishment, the role, the composition of the family council, and other elements via the partnership agreement.

To conclude, internal governance of both general and limited partnerships is mostly left to their members. Thus, members are free to arrange their relations and improve the functioning of the company by introducing additional instruments of corporate governance, which, for family businesses, could mean the introduction of the family constitution and family council.

An economic interest grouping is a legal vehicle introduced at the EU level,[54] which has the goal of facilitating and improving the economic activities of its members across different member states.[55] The Croatian legislature implemented Regulation No. 2137/85 in its Companies Act. This type of company is not relevant to the challenges of family businesses, as it represents a company of which the members are entrepreneurs who conduct their main business through other legal vehicles but use the economic interest grouping to promote their business. The members of these companies can only be those whose economic activities are connected with the activity of the economic interest grouping,[56] and the inheritance of membership is discouraged.[57] Thus, this will not be further analysed in this study.

The joint-stock company is the most heavily regulated type of company with the highest number of mandatory provisions under the Companies Act. The relationships among the members and the functioning of the company through division among ownership, management, and supervision are strictly regulated, with additional requirements if the company is listed on the stock exchange.[58] As family businesses are constituted and operate through the legal form of the joint-stock company,[59] it is important to determine the extent of shareholders' autonomy in the arrangement of their relations.

The joint stock company's constitutive act is the articles of association (referred to as a "statut" in Croatian), and the company is established after registration in the court registry.[60] The mandatory content of the articles of association is expressly determined by the Companies Act.[61] In the articles of association, shareholders can deviate from the provisions of the Companies Act only if such a possibility is expressly provided

54 Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1–9.

55 For the main features of this company, see Barbić, 2019, p. 683.

56 See Article 584 of the Companies Act.

57 See Article 598 para. 2 of the Companies Act.

58 For particularities when the family business is a joint-stock company listed on the stock exchange, see Oppitz, 2017. For a Croatian perspective, see Čulinović-Herc, 2003.

59 A Croatian example is the family business Vindija, established as a joint-stock company which is currently in the process of transition to the next generation. See http://www.vindija.hr/en-GB/About-us/Business-System-Vindija/Vision-and-mission.html?Y2lcNjI%3d (16.2.2021.).

60 See Barbić, 2013a, p. 153.

61 Article 173 para. 43 of the Companies Act.

for by the relevant provisions of the Companies Act.[62] Examples of what can be modified by the articles of association are restrictions regarding the transfer of shares, such as pre-emption rights[63] and changes in the management or representation of the company.[64] Thus, mandatory provisions are a general rule for joint-stock companies, while any modification by shareholders is an exception that must be expressly allowed.

On the other hand, shareholders are free to enter into agreements among themselves outside the articles of association. They can even make agreements with the goal of arranging their relations within the company, the most common example of which is shareholder voting agreements. However, these agreements are not legally binding for the company, that is, for the functioning of its organs and decision-making processes. In other words, the obligations enacted by such a contract cannot be enforced on the contractual party when it acts as a shareholder in the general meeting of the company or in another capacity within the company. They can, however, be binding on the basis of the obligations law, meaning that the party in breach may be liable for damages to other contractual parties.[65]

Thus, if shareholders draft a family constitution and arrange their relations as family members, these provisions are not legally binding for the joint-stock company or shareholders. However, family members as shareholders can transfer some of the rules of family constitution by implementing such provisions in the articles of association or through shareholders' agreements.[66] Even if it is not legally binding, the family constitution does not lose its primary role as a starting point for arranging the relations among the family members.

Regarding the introduction of the family council, a joint-stock company has organs, and its functions are strictly regulated to protect the balance between shareholders (owners) and management.[67] Consequently, any introduction of a new body cannot influence or replace the scope and duties of the existing organs, such as the general meeting, management, and supervisory board. However, in practice, joint-stock companies often establish additional bodies, usually with advisory or supervisory roles, to support the work of management or supervisory boards.[68] Thus, the introduction of an additional body such as a family council is possible. In fact, in the comparative practice of family businesses listed on stock exchanges, the introduction of an additional advisory body that would enhance the connection among shareholders, management, and supervisory boards is seen as desirable and necessary.[69] Family councils can be established in articles of association or contractually by shareholders.

62 Article 173 para. 4 of the Companies Act.
63 Article 227 para. 2 of the Companies Act,
64 See articles 240 and 241 of the Companies Act.
65 See Barbić, J., 2013a, p. 163.
66 Zellweger, 2017, p. 72.
67 For an overview of the one-tier and two-tier board systems available in Croatia, see Maurović, Gonan Božac, and Grgorinić, 2009.
68 See Barbić, J., 2013a, p. 164.
69 Kormann, 2017, p. 232.

In comparative practice, they are often provided in family constitutions.[70] However, if they are established outside of the articles of association, it will affect only those shareholders who entered into that contract. Thus, in the author's opinion, such a body should be introduced in the articles of association, together with the regulation of its scope, composition, and role, to avoid any uncertainties regarding its possible effect on the work of the company's organs.

To conclude, family constitutions and family councils are viable mechanisms for improving the corporate governance of joint-stock companies, regardless of the fact that these companies are rigidly construed as having the possibility of only modest changes in the legal relations between the company and shareholders. They serve primarily as a starting point for arranging the legal relations among family members.

Finally, the author analyses the most popular company type in Croatia and in comparative practice – the limited liability company. As in partnerships, members of the company enjoy a high level of autonomy in arranging their legal relations within the company, which is one of the most important considerations for family businesses.[71] However, a limited liability company retains the main advantage of a joint-stock company – the members are not liable for the company's obligations towards third persons.[72]

The constitutive act of a limited liability company is termed *društveni ugovor*, which, literally translated, means a partnership agreement. However, it differs from the partnership agreements of general and limited partnerships. Specifically, it is not necessary that all members agree to the modification of the agreement,[73] and the mandatory content is expressly determined with a much higher number of mandatory provisions. Although it bears a different name, it has the same role as and is more similar to the articles of association (statut) of a joint-stock company. Several authors have proposed that the constitutive acts of both joint-stock and limited liability companies should be referred to as articles of association (statut), while partnership agreements (društveni ugovor) should be reserved for partnerships.[74] Thus, in this article, the author uses the translation of articles of association to mark the constitutive act of the limited liability company.

The mandatory content of the articles of association is set by the Companies Act,[75] although to a lesser extent than for joint-stock companies. Members enjoy more autonomy in arranging their legal relations in the articles of association,[76] although they do not often use it in practice. Instead, they use widespread models – forms of articles of association that usually consist of minimum provisions, while for all other

70 Baus, 2016, p. 50.
71 The high level of autonomy in limited liability companies is seen as the main advantage for family businesses in comparative laws as well. See Lieder, 2017, p. 57.
72 Jurić and Braut Filipović, 2020, p. 70.
73 Barbić, 2012, p. 500.
74 Jakšić and Petrović, 2016, p. 1142.
75 See Article 388 of the Companies Act.
76 Barbić, 2012, p. 501.

issues, including the relations among the company's members, the default provisions of the Companies Act apply. However, contrary to joint-stock companies, mandatory provisions for members' legal relations are exceptions.[77] Examples of mandatory rules regarding the relations among members include the requirement that each member must retain at least one voting right in the general meeting [78] and members' right to information regarding the business of the company.[79]

Modifications of legal relations among members should be done through the articles of association in order to be legally binding for all members and the company.[80] Examples of when the modifications must be done through the articles of association include the introduction of special benefits for a member,[81] management and representation of the company,[82] restriction of the transfer of a share,[83] and sharing of the profit[84]. It is clear that the members are free to conclude contracts outside of the articles of association, including the family constitution, but it appears that it is highly unlikely that any provision of the family constitution could be legally binding for the limited liability company. The only possible scenario in which a family constitution would be binding for all members of the company is if they would all be parties, that is, signatories of the family constitution, and if they would agree upon a member's right that can be modified outside the articles of association. However, in the author's opinion, this would only be the case for civil law obligations among the members or between the members and the company but not for members' rights.

The introduction of a family council would be possible because limited liability companies can introduce additional bodies within the company[85] under the condition that they do not alter the mandatory scope of obligations of mandatory organs of the company: general meetings and the management board. As previously stated, family councils could be established contractually outside of the constitutive acts of the companies, but it is preferable that their role and composition are determined by the articles of association to ensure their application to all members, current and future, and to determine their interaction with the organs of the company. Additionally, introducing a family council through the articles of association ensures that its existence is more permanent because it cannot be terminated with the sole revocation of the members but, rather, only through a change in the articles of association.[86]

77 Article 405 of the Companies Acts states which provisions cannot be modified by the members of a limited liability company. These are not the only cases, but it declares that mandatory provisions are treated as an exception.
78 Article 445 par 3 of the Companies Act. See Barbić, 2012, p. 502.
79 Article 447 of the Companies Act.
80 Barbić, 2012, p. 509.
81 Article 392 of the Companies Act.
82 Articles 422 and 426 of the Companies Act.
83 Article 412 para. 4 of the Companies Act.
84 Article 406 para. 2 of the Companies Act.
85 Barbić, 2013b, p. 326.
86 For the same view in comparative German legislation, see Sanders, 2017, p. 963.

To conclude, the family constitution and family councils could be introduced to help with the challenges of family businesses when they operate as limited liability companies. As this is the company that enjoys the benefits of both partnerships and joint-stock companies, it represents a vehicle that is most common in practice and thus likely the most relevant for family businesses as well. As the analysis shows, relations among members can be significantly modified, but in order for them to be legally binding for the company and for all members, these modifications must be implemented through the constitutive act of the company – that is, the articles of association. This once again leaves family constitutions and family councils as tools of primarily soft-law spheres, the introduction and enforcement of which are voluntary. It seems that the main task of scholars is to demonstrate the usefulness of these instruments to entrepreneurs and to entice them to use such instruments to improve the governance of their family business in the long term. It is yet to be seen whether these instruments will be recognised in Croatian practice as they have been recognised in comparative jurisdictions.

■ *3.3. Croatian crafts – the possible introduction of family constitutions and family councils*

Crafts are a very popular legal form for conducting business in Croatia and the only true rival to the popularity of limited liability companies. They have a long history and tradition in Croatia.[87] The Crafts Act states that craft refers to '*permitted economic activities performed independently and permanently [...] that are carried out by natural persons with the objective of generating profits by means of activities performed in the market in the field of production, traffic or services*.'[88] Craft does not have a constitutive act, as would be a partnership agreement of articles of association. It is established via registration in the Croatian Craft register.[89] It usually consists of only one person – the craftsman – but it is possible for two or more persons to establish the craft mutually. In that case, the relations between the craftsmen must be determined by a written contract, which is, in its legal nature, a civil law partnership agreement.[90]

Even in cases in which there is only one craftsman, crafts have the potential to become a family business when the founder transfers the business to his/her children or after the death of the craftsman. However, even before the transfer, crafts are traditionally considered family businesses.[91] Thus, the Croatian legislature expressly regulated that members of the family household can help the craftsman conduct the business without the need to conclude an employment agreement,[92] which significantly simplifies the possible introduction of family members into the business. Family members who help the craftsman do not have to register and do not become members of the craft.

87 See Alpeza, Oberman Peterka, and Has, 2018, p. 39.
88 Article 2 para. 1 of the Crafts Act. See Petrović, 2013.
89 Article 15 para. 1 of the Crafts Act.
90 Article 33 of the Crafts Act.
91 See Crnković Pozaić, 2008, p. 3.
92 Article 30 of the Crafts Act.

Can the relations among the members in a craft be analysed if crafts do not have such relations? Strictly speaking, we can speak of the legal relationship among the members only if there are at least two craftsmen who hold the craft mutually. However, family members are often employees of the craft, and the craftsmen face the issue of transfer of the craft, with which the drafting of the family constitution may help. In family constitutions, craftsmen and their families can state their values, conditions under which the children can be employed in the craft, succession plans, and so on. Thus, family constitutions can have the same role for crafts as they have for commercial companies, regardless of whether the craftsman manages the craft alone or mutually or whether the family members help with the business.

Regarding family councils, the author is of the opinion that, although crafts have no organs, they could be introduced on a contractual basis. However, crafts do not have members, even in cases in which family members help with the business and even if they are permanently employed in the craft. To establish a family council, one should start by determining who would be a party to a contract establishing it, as such a contract would be relevant solely for the contractual parties. As the craftsman is the only one who represents the craft,[93] it could not be altered by the introduction of the family council. However, the possibility of arranging the relations among family members or even introducing a voting mechanism to reach certain decisions regarding the craftsmen or others may make the family council a valuable tool for allowing family members to participate more actively in the management of the craft.

To conclude, crafts are traditionally considered to be family businesses in Croatian practice, despite the fact that they do not have members. However, there are no obstacles to family members and craftsmen concluding contracts or other acts when the possibility of introducing family constitutions and family offices, with the necessary adaptions to the specifics of the relevant craft, could offer valuable new options for craftsmen to include the family members more actively in the business and to reach a more successful transfer of the business to the next generation.

■ *3.4. Croatian family farms – possible introduction of family constitutions and family councils*

Croatian family farms are the most popular legal form for conducting business in the agricultural sector. In fact, 95% of farms in Croatia are registered as family farms, among which the average size of the farm holdings is rather small, that is, approximately 5.6 hectares.[94] Until 2018, the regulation of family farms was fragmented, being covered by various regulations, and they were not recognised as a separate entity with legal capacity for conducting business. However, the Family Farms Act of 2018 corrected this situation. Thus, family farms are now regulated as a separate legal form for conducting business, with more defined relations among members and the position of family farms towards third persons.

93 Article 28 of the Crafts Act.

94 See Lončarić, Lončarić, and Tolušić, 2016, p. 337.

The family farm is defined as the '*organizational form of a natural person (farmer) who, in order to generate income, independently and permanently performs agricultural activity and related ancillary activities, and is based on the use of own and / or leased production resources and on the work, knowledge and skills of family members.*'[95] Family farms can be established only through registration in the Register of Family Farms under the condition that the holder or one of the members has ownership over the production resources necessary for conducting agricultural activities.[96] The basic features of family farms are that they do not have legal personality[97] and that they can consist of one or more members (sole holders of family farms are dominant in Croatia).[98] The holder of the family farm is a person who is a manager of the business[99] and is solely liable for the obligations of the family farm to third persons with all of his/her personal assets, regardless of whether the family farm has one or more registered members.[100] Members can only be natural persons who are part of the holder's household or are the holder's family members,[101] which leads to the conclusion that family farms are construed as conducting family business in the field of agriculture. They face the challenge of transferring farms to the next generation. In a study conducted on Croatian family farms, it was found that around 50% have the chance of successful transfer of family farms to the next holder, and larger farms with only one designated successor (mostly a son) have higher chances.[102]

Compared to commercial companies, family farms remain rather rudimentary. Family farms do not have articles of association or any other legal act that would govern the legal relations among their members. Although the holder represents and manages the family farm, it remains unclear whether and how the other members can influence its management of the family farm. Relations among the members of a family farm are usually informal; thus, the legislature felt no need to introduce formal meetings of the members or the division of powers between the manager and the members as for commercial companies.

On the other hand, members of the family farm are not prohibited from introducing a more formal mechanism for decision-making processes. For example, it is expressly stated that if the family farm has two or more holders in cases of a jointly held family farm (holders are familially related but do not live in the same family household), the relation among holders shall be arranged via a written contract.[103] The contract is, in its legal nature, a partnership agreement.[104] There is no restriction on

95 See Article 5, para.1.a. of the Family Farms Act.
96 See Article 31 of the Family Farms Act.
97 See Article 15 of the Family Farms Act.
98 See Article 15 of the Family Farms Act.
99 See Article 5, para.1.i. of the Family Farms Act.
100 See Article 41 para. 1 of the Family Farms Act.
101 See Article 5, para.1.g. and para.1.h. of the Family Farms Act.
102 Žutinić and Bokan, 2011, p. 347.
103 See Article 22 para. 2. of the Family Farms Act.
104 See Article 22 para. 3. of the Family Farms Act. Partnership agreements are governed by the Obligations Act.

members entering into other contracts as well, which resembles the so-called shareholders' agreement, although such a development is unlikely in practice because of the nature of their relationship and the size of the business.

In this type of legal framework, members can introduce family constitutions by which they address business and family issues. As there is no constitutive act, there is no need to discuss the potential relationship between a family constitution and the constitutive act of the family farm. Members of the family farm enjoy greater contractual freedom in governing the relations among members as well as between the manager – the holder – and the members. The only restriction appears to be that the holder is the liable person for the obligations of the family farm towards third persons. In the authors' opinion, the use of family constitutions could be of paramount importance for enhancing the governance of family farms. Additionally, family constitutions could be used to set the criteria for choosing the holders of the family farm to determine issues that should be decided by the members in managing the family farm and other issues for governing the relations among members. If signed by all members, family constitutions have a higher potential to be obligatory for those members. The reason for this is the absence of articles of association or similar legal acts, which means that relations between the management and members can be set in any other act or contract produced by the members, which very well could be carried out through the family constitution if it is accepted by all members.

Further, there is no prohibition on introducing additional bodies, such as family councils. Family councils could enhance decision-making processes within the family and the relationship between the holder and members. As only family members or members of the same household can be members of the family farm,[105] the introduction of a formal body could be seen as redundant. Still, if seen as a tool for including family members more actively in the management of the farm, it could produce long-term positive effects, especially for the transfer of the family farm.

To conclude, family farms are of great importance to the agricultural sector. However, as a legal vehicle, it represents a very simple form of conducting business. The primary goal was to simplify business operation for farmers, allowing them to use household or family members to perform agricultural activities.[106] However, the author believes that introducing additional self-regulation of the relations among members through a family constitution could enhance such relations among the members, especially in cases of the transfer of management to another holder of the family farm.

105 See Article 28 para. 1. of the Family Farms Act.

106 Household or family members can help with agricultural activities without the need to conclude an employment contract. See Article 25 of the Family Farms Act.

4. Conclusion

The primary conclusion of this article is that there are no obstacles to introducing a soft-law instrument, such as a family constitution and family council, in all of the analysed legal forms for conducting business in Croatia. However, the fact that these instruments have not yet been used in Croatian practice testifies to the lack of awareness of these instruments and their potential use for Croatian family businesses. As many Croatian (family) businesses are currently facing the challenge of transferring the business from one generation to the next, successful planning must begin with establishing a more satisfying governance that connects and balances family and business in family businesses. The aim of this article is twofold: to raise awareness of these instruments among Croatian entrepreneurs and to demonstrate that the Croatian legal framework supports the introduction of instruments developed in comparative practice to enhance the governance of family businesses, namely family constitutions and family councils.

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Food Sovereignty: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons?

ABSTRACT: *This study aims to provide an overview of regulation with regard to the acquisition of ownership of agricultural lands by legal persons in four countries: Hungary, Slovakia, Poland, and the Czech Republic. Each state is analysed in separate chapters. The frame of reference for this research is food sovereignty; therefore, regulation in the respective countries is examined in light of this paradigm. Research has shown that even in a group of such closely related countries, there are significant differences in the scrutinised legal regulation. At the end of the study, a conclusion is drawn in light of food sovereignty.*

KEYWORDS: acquisition of ownership, agricultural land, legal persons, comparative analysis, Visegrád Group.

Introduction

This article aims to provide comprehensive and profound insight into the legal regulation of the Visegrád Group states relating to the issue of ownership acquisition by legal persons with regard to agricultural and forestry lands.

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The analysis covers the regulation of Hungary, Slovakia, the Czech Republic, and Poland. Each country is dealt with in separate chapters, followed by a summary chapter. First, the concept of food sovereignty is briefly introduced, which functions as a frame of reference in this study.

The acquisition of agricultural land ownership by legal persons is a highly topical issue. In recent years, not only the European Union (hereinafter referred to as the EU)[4] but also the Food and Agriculture Organization of the United Nations (hereinafter referred to as the FAO)[5] issued soft-law documents connected to the problem.[6]

Given that all of the examined countries are EU member states, their legal systems are also determined by EU law. As can be seen in the following chapters, there are several occasions when the free movement of capital is among the pillars of the EU's single market and the national land regulation conflict, at least from the European Commission's viewpoint. There are legal arguments and counterarguments as to whether the national land regulation in question is in conflict with EU law, although we do not aim to join these debates. After presenting the legal regulation of the issue in the four countries examined in this study, in the concluding chapter, we examine the respective regulations in regard to the compatibility of the paradigm of food sovereignty.

This article seeks to answer the question of whether the regulation of examined states can contribute to better realisation of food sovereignty, and if so, what the advantages and disadvantages are with regard to following this approach.

1. Food sovereignty as a frame of reference

This article considers the following definition of food sovereignty as a frame of reference:

"Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets; and to provide local fisheries-based communities the priority in managing the use of and the rights to aquatic resources. Food Sovereignty does not negate trade, but rather it promotes the formulation of trade policies and practices that serve the rights of peoples to food and to safe, healthy and ecologically sustainable production."[7]

4 (A) Opinion of the European Economic and Social Committee on *Land grabbing – a warning for Europe and a threat to family farming* (own-initiative opinion). Adopted on 21 January 2015 – NAT/632-EESC-2014–00926-00-00-ac-tra; (B) European Parliament resolution of 27 April 2017 on *the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers* (2016/2141(INI)); (C) Commission Interpretative Communication on *the Acquisition of Farmland and European Union Law* (2017/C 350/05).

5 Food and Agriculture Organization of the United Nations (2012) *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security,* Rome, FAO.

6 See the analysis of these documents in detail: Szilágyi, 2019.

7 People's Food Sovereignty Network (2002) is cited by Windfuhr and Jonsén, 2005, p. 1.

In this definition, certain elements are of paramount importance for this study. A key to understanding the intention behind this article is to emphasise that one of the constituting elements of the food sovereignty approach conceived as mentioned above is that it aims to protect and regulate domestic agricultural production to achieve sustainable development objectives.

Nonetheless, it is also advisable to conceive food sovereignty in relation to the paradigm of food security. Simply put, we can see the increasing confrontation of two paradigms in the 21st century: the approach of food security based on neoliberal political philosophy and neoclassical economics, which seeks to minimise state intervention[8,9] and the paradigm of food sovereignty, which seeks to question each inherent feature of the industrialised food system, including the dominance of agribusiness.[10] The neoliberal food system is the consequence of the ongoing structural transformation of agriculture in Europe and North America, which is dominated by large agri-food businesses.[11] Additionally, the rise of supermarkets and hypermarkets in the second half of the 20th century, which changed the market entirely following their entry, must be considered. Smaller producers suffer the greatest losses and, in general, may find themselves in a much more difficult commercial environment, given the demands of increased quantities and shorter deadlines.[12]

The question arises as to how legal regulation can reflect the approach of food sovereignty in connection with the ownership acquisition of agricultural and forestry lands by legal persons.

2. Hungary

In the final years before the regime change in 1989, Hungary's land act was Act I of 1987. Its material scope covered all agricultural lands, buildings on agricultural lands, and other installations situated within Hungary, with the exception of forests. These categories were labelled immovable properties. Based on § 6 (1) of the Act of 1987, legal persons could own immovable property, including agricultural land. Pursuant to § 38 (1) foreign legal persons (as well as natural persons) could acquire ownership of immovable property, including agricultural land, with the prior approval of the finance minister. However, the conditions were not coherent. The Decree of the Act of 1987 was the Decree of the Council of Ministers no. 26/1987 (VII. 30). This decree in its § 1 defines the notion of a 'foreign legal person': a legal person with a registered office abroad, as well as a legal person with a Hungarian registered office operating with foreign

8 Johnson, 2018, p. 30.
9 One of the three most important goals of economics (macroeconomics) based on neoliberal political philosophy is financial and trade liberalisation. See more: Martínez-Alier and Muradian, 2015, p. 154.
10 Mann, 2014, p. 3.
11 Andree, Ayres, Bosia, and Massicotte (eds.), 2014, pp. 3–4.
12 Maxwell and Slater, 2003, pp. 535–536.

interests. The Decree of the Finance Minister no. 37/1988. (IX. 5.) on the ownership acquisition of immovable property by foreigners determined the criteria which had to be considered when making the decision on granting permission for the ownership acquisition of the immovable property of foreigners. The next decree adopted on the same subject[13] maintained these provisions with minor modifications. The Constitutional Court of Hungary found that this latter decree as well as the second part of the definition of the notion of a 'foreign legal person', which referred to legal persons with a Hungarian registered office operating with foreign interests as foreign legal persons, were unconstitutional and annulled them.[14] In a later decision, the Constitutional Court found unconstitutionality in the form of an omission as 11 months had passed since the publication of its earlier judgement, and the government had not adopted new rules on the issue; thus, the acquisition of immovable property by foreigners was still based on the unconstitutional practice, and the legal vacuum resulted in uncertainty.[15] More than half a year after this latter judgement, a specific provision appeared in a new decree which declared that the ownership of arable land could not be acquired by foreigners.[16] Therefore, both foreign natural and foreign legal persons were excluded from the right to acquire ownership of arable land beginning 1 January 1992.[17]

We now consider Hungarian legal persons. According to a 2020 judgement of the Constitutional Court, Act I of 1987 followed the concept of distinguishing between general immovable property and agricultural land. Regarding the latter, Hungarian legal persons could acquire ownership. In contrast, the ownership acquisition of agricultural land was not possible for them, not because it was forbidden by law but because new commercial companies could have been established only beginning 1 January 1989; thus, there were and could have been no legal provisions to entitle legal persons to acquire ownership of agricultural land.[18] Evidently, similar to other countries belonging to the Soviet bloc, the ownership of agricultural lands was linked to the state and farmers' cooperatives.

Therefore, the acquisition of agricultural land ownership by legal persons was complicated. In theory, Hungarian legal persons were able to acquire ownership of agricultural lands until the 1994 land act's entry into force, but the issue's regulation with regard to foreign legal persons was contradictory from 1 September 1987[19] to 31 December 1991, as shown above, with the help of Constitutional Court judgments. Beginning 1 January 1992 foreign legal persons were unequivocally deprived of the right to acquire ownership of agricultural land.

13 Decree of the Council of Ministers no. 145/1989 (XII. 27) on the ownership acquisition of immovable property by foreigners.
14 Constitutional Court Judgment no. 12/1990 (V. 23).
15 Constitutional Court Judgment no. 29/1991 (VI. 5).
16 Decree of the Government no. 171/1991 (XII. 27) on the ownership acquisition of immovable property by foreigners, § 1 (5).
17 Szinay, 2020, p. 40.
18 Constitutional Court Judgment no. 11/2020 (VI. 3), [30].
19 This was the day on which Act I of 1987 entered into force.

After the change of regime, Hungary's first and completely new land act was Act LV of 1994 on arable land, which entered into force on 27 July 1994. The rules were straightforward. It was the first legal source to introduce an almost complete ban on land acquisition by legal persons. Foreign legal persons could not acquire the right of ownership of agricultural land at all, while at the same time, several exceptions were determined for specific Hungarian legal persons: the Hungarian state, local governments, associations of forest holders, and public foundations could be owners of agricultural lands. Additionally, ecclesiastical legal persons could also acquire ownership of agricultural land on the basis of disposition of property upon death, donation contract, or personal care agreement.[20] The explanatory memorandum of Act LV of 1994 found that Hungary was in a transitional period from a planned to a market economy. The market of agricultural land and its real value had not yet been developed appropriately because of the artificially restrained real estate policy over a long period of time. The memorandum also declares that agricultural land, as a natural resource, is available to a limited extent; it cannot be propagated or replaced by anything else.[21] The Hungarian Constitutional Court[22] ruled that the regulation which excludes legal persons from the right of land acquisition is constitutional.[23]

Because of Hungary's accession to the European Union, national rules must be in accordance with EU requirements, although in connection with land regulation, Hungary was granted a transitional period (seven years from the accession), during which it could maintain its existing legislation. The European Commission later accepted Hungary's request to extend the seven-year transitional period by three more years;[24] thus, restrictions continued to remain in force until 30 April 2014.

Hungary's new legislation on agricultural and forestry land came into force on 1 May 2014. Despite EU requirements, Act CXXII of 2013 maintained the prohibition of the acquisition of land ownership by legal persons. Similar to the previous regulation, there are some exceptions to the general rule. Evidently, the Hungarian State is entitled to acquire land ownership for the enforcement of land policy objectives determined by law,[25] public employment, and other general interest objectives.[26] In addition to the state, some churches[27] and their internal legal persons can acquire land ownership based on specific titles,[28] as can mortgage credit institutions for a maximum period of

20 Act LV of 1994 on arable land, § 6(1)–(2) and § 7 (1).
21 Explanatory memorandum of Act LV of 1994 on arable land.
22 Constitutional Court Judgment no. 35/1994 (VI. 24).
23 Téglási, 2012.
24 Kozma, 2011.
25 More specifically, determined by Act LXXXVII of 2010 on the National Land Fund.
26 Act CXXII of 2013 on the acquisition of agricultural and forestry lands, § 11(1).
27 Currently, 27 churches determined by the Annex of Act CCVI of 2011 on the freedom of conscience and religion, as well as the status of churches, religious denominations, and religious communities, for example, the Hungarian Catholic Church, Hungarian Reformed Church, Hungarian Evangelical Church, etc.
28 On the basis of the disposition of property upon death, donation contract, or different types of personal care agreements.

one year through a winding-up or enforcement proceeding[29] and local governments in which the land concerned is situated for the aim of public employment, social land programme, and settlement development as well as in the case that the land in question is considered a protected site of local importance.[30]

Following an examination of Hungary's land regulation in its entirety, the European Commission launched infringement procedures, arguing that the total ban on legal persons' acquisition of land ownership was not in compliance with the law of the European Union.[31] Some authors consider the total ban to be one of the most important principles of Hungarian land regulation as it aims to prevent the complex chain of owners that is uncontrollable in practice, which is in sharp contrast to the objective of retaining the population of rural areas.[32]

As can be seen, there is significant disagreement between Hungary and the European Union concerning the regulation of land acquisition by legal persons. No other member states regulate this issue in a strict manner. According to the European Commission's position,[33] this categorical ban violates the principle of the free movement of capital.[34]

3. Slovakia

The accession of the Slovak Republic to the European Union has opened a new chapter in the country's history and has brought about dynamic changes in its land regulations. The member states such as Slovakia that joined the EU on 1 May 2004 were obliged to bring their national legislation in line with EU laws and abolish restrictions on land regulation that were applicable to nationals of the other Member States of the European Union. However, for a certain transitional period, the acceding states were permitted to maintain their national rules related to the restrictions on the acquisition of ownership of agricultural and forestry land in force during their accession period. This was the point at which the most dynamic period of the Slovak land regulation began. This is also emphasised by the fact that in October 2020, the Ministry of Agricultural and Rural Development of the Slovak Republic prepared a proposal to amend the law on the acquisition of ownership of agricultural land which is intended to be adopted in an abbreviated legislative procedure and which would be effective beginning 1 May 2021. In the present article, after defining the main sources of the Slovak land law, we present and analyse the most important

29 Act XXX of 1997 on mortgage credit institutions and mortgage bond, § 10(4).
30 Act CXXII of 2013 on the acquisition of agricultural and forestry lands, § 11(2).
31 Szilágyi, 2018.
32 Olajos and Andréka, 2017.
33 See https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1827: "Hungary has a very restrictive system which imposes a complete ban on the acquisition of land by legal entities and an obligation on the buyer to farm the land himself."
34 Treaty on the Functioning of the European Union, Article 26(2) and Article 63(1).

landmarks of the land regime, focusing particular attention on the reasons for which the European Commission initiated the infringement procedure against the Slovak Republic. The article also focuses on the acquisition of agricultural land by legal and natural persons as well as on the limits of acquisition of the ownership of agricultural land in Slovakia.[35]

■ *3.1. The main sources of land law in Slovakia*

Agricultural land as a natural resource is an integral part of every country's natural heritage, and every country is required to protect it. In the Slovak Republic, this legal obligation was declared in the Constitution of the Slovak Republic[36] (hereinafter referred to as the Slovak Constitution) on 1 June 2017.[37] As the Slovak Constitution is considered to be at the top of the Slovak hierarchy of sources of law, the duty to protect the country's agricultural land is assured at the highest level. Based on the text of the Slovak Constitution, the state focuses closely on the exploitation of natural resources and particularly on the protection of agricultural land and forest soils. These two natural resources were defined as non-renewable[38] natural resources, and because of this, the Slovak Constitution provides special protection for them to ensure food security in the country.[39]

At the constitutional level, the Slovak land regime is a system of complex legal norms. Regarding land law, the most important source of law is Act No. 140/2014 Coll. on the Acquisition of the Ownership of Agricultural Land (hereinafter referred to as the Land Act). This act regulates the process of the acquisition of the ownership of agricultural land by transfer of ownership as well as the powers of public administration bodies regarding this process.

■ *3.2. The acquisition of the ownership of agricultural land by legal persons*

The accession of Slovakia to the European Union on 1 May 2004 was an important landmark in the history of Slovak land management. In general, member states, including the Slovak Republic, which became a member of the European Union in 2004, were obliged to adapt their national rules in line with EU regulations upon accession. The seven-year transitional period expired in 2011, but the Slovak Republic submitted a request to the European Commission to extend the deadline by three years.[40] As a result, the European Commission issued Regulation No

35 For further information, see Lazíková–Bandlerová, 2011; Lazíková–Bandlerová, 2014; Ilavská, 2016. For English language literature, see Dufala–Dufalová–Šmelková, 2017; Lazíková–Bandlerová–Lazíková, 2020; Drábik–Rajčániová, 2014; Lazíková et al, 2015; Palšová–Bandlerová–Melišková–Schwarcz, 2017.

36 Act No 460/1992 Coll. The Constitution of the Slovak Republic, as amended. In Slovak: Ústavný zákon č. 460/1992 Zb., Ústava Slovenskej republiky.

37 The amendment to the Constitution was adopted on 16 May 2017.

38 For further see (in Hungarian language): Hornyák, 2017, pp. 188–204.

39 Article 44 (4) and (5) of the Constitution of the Slovak Republic.

40 Lazíková–Bandlerová, 2014.

2011/241/EU approving the application and extended the transitional period until 30 April 2014.[41]

Following the extended 10-year-long transitional period, the European Commission conducted a comprehensive review of the national regulations of the newly joined member states. As a result of this procedure, the European Commission found that national legislation in Slovakia was still restricting the fundamental economic freedoms of the European Union. More specifically, among the fundamental freedoms, the restrictions on the free movement of capital and the freedom of establishment were affected; as a result, these restrictions could lead to a significant reduction in cross-border agricultural investment.[42] Due to these facts, in 2015, the European Commission decided to initiate an infringement procedure against Hungary, Bulgaria, Latvia, Lithuania, and Slovakia.[43]

In the case of Slovakia, the main issue was the existence of 10 years of permanent residence or registered office in the Slovak Republic and the criterion of at least three years of commercial activity in agricultural production. The most problematic was the existence of a longer residence criterion, which resulted in the discrimination of EU citizens.[44] The Slovak legislature responded to this situation by amending certain paragraphs of the Foreign Exchange Act,[45] which resulted in the agricultural land market being opened not only for EU citizens but for third-country nationals as well. In addition, numerous rules concerning the purchase of agricultural land were adopted.[46] After these amendments were enacted, the Land Act regulated the transfer of agricultural land in detail, ensuring relatively wide contractual freedom. In the explanatory memorandum of the Land Act,[47] the main objective of the Act is to regulate the acquisition of agricultural land while preventing speculative purchases and thus to create an optimal legal environment that would allow agricultural production in the Slovak Republic as intended. It is clear that the most important objective of the aforementioned act is to utilise agricultural land for its intended agricultural purposes.[48] The Land Act also introduced a mandatory bidding procedure. On this basis, a seller was obliged

41 2011/241/EU: Commission Decision of 14 April 2011 extending the transitional period concerning the acquisition of agricultural land in Slovakia Text with EEA is available at the EUR-Lex portal: https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=CELEX%3A32011D0241 (Accessed: 14 January 2021)

42 Szilágyi, 2017, p. 176.

43 See the press release of the European Commission: '*Financial services: Commission requests Bulgaria, Hungary, Latvia, Lithuania and Slovakia to comply with EU rules on the acquisition of agricultural land'.* Available at the website of the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1827 (Accessed: 14 January 2021)

44 Szilágyi, 2017, p. 176.

45 The Foreign Exchange Act No. 202/1995. Coll., Section 19 (a): '*A foreigner may acquire the ownership of a domestic real estate property if its acquisition has not been restricted by separate laws'.*

46 Lazíková–Bandlerová–Lazíková, 2020, p. 100.

47 The Explanatory Memorandum to the Act. No. 140/2014 Coll. on the acquisition of agricultural land is available online (in Slovak): https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=399288 (Accessed: 1 February 2021).

48 Kollár, 2019.

to register the selling interest[49] in a database operated by the Ministry of Agriculture and Rural Development of the Slovak Republic at least 15 days before land transfer. In addition, the landowner had to publish his selling intention on the bulletin board of the territorially competent municipality. The publication on the official bulletin board of the municipality was free of charge; moreover, the municipality was required to cooperate in publishing such offers.[50] After these conditions were fulfilled, ownership of the agricultural land may have been acquired by a natural or legal person with 10 years of permanent residence or registered office in the Slovak Republic and who had been engaged in agricultural activities for at least three years prior to the conclusion of the contract.[51] If no one indicated their intention to purchase the land offered for sale in this way, the land could be claimed by a person with a permanent residence or domicile in the municipality in which the land was located. In the absence of interest, natural or legal persons residing or having their registered office in a neighbouring settlement had the opportunity to purchase the land.[52] If there was no interest in purchasing agricultural land from the neighbouring municipality, the offer could be extended to persons who had a permanent residence or seat outside the municipality or the territory of the neighbouring municipality. Furthermore, the law also stated that if no person, regardless of their domicile or registered office, had expressed an intention to purchase land in the bidding procedure, the seller could freely transfer ownership of the land to a third party at the same starting price. However, in this case, only a third party who had been a citizen or resident in the territory of the Slovak Republic for 10 years could acquire ownership of the land. Nevertheless, a transfer was possible no later than six months after the unsuccessful bid.[53] The district office was responsible for verifying the existence of legal requirements for the transfer of ownership of agricultural land.

Before the European Commission began the infringement procedure, a number of professional and political debates surrounded the Land Act because of several of its provisions. As a result, two groups of the National Council of the Slovak Republic (hereinafter referred to as the Parliament) submitted a petition[54] to the Constitutional Court of the Slovak Republic.[55] The Constitutional Court deemed the limitations excessive because they limited the right to ownership, both of the sellers and of the purchasers.[56] The decision of the Constitutional Court resulted in a fundamental change, especially with regard to the acquisition of agricultural land. *The decision of the Constitutional Court has resulted in the fact that currently, in Slovakia, both natural and legal persons can*

49 The procedure for the transfer of ownership of land has been outlined in Section 4 of the Land Act.
50 Lazíková–Bandlerová–Lazíková, 2020, p. 101.
51 Kollár, 2019.
52 Land Act, Section 4 (7).
53 Relevans advokátska kancelária: Pravidlá nadobúdania poľnohospodárskych pozemkov a ich pripravované zmeny. https://www.relevans.sk/pravidla-nadobudania-polnohospodarskych-pozemkov-pripravovane-zmeny/ (Accessed: 29 December 2020).
54 The petition was filed on 2 July 2014.
55 Drabik–Rajčániová, 2014, p. 84.
56 Decision no. PL. ÚS 20/2014 of the Constitutional Court of the Slovak Republic.

acquire ownership of agricultural land with almost no restrictions.[57] *The only restriction is that agricultural land cannot be owned by a citizen, a resident, or a legal person of a state whose legal system does not allow ownership of agricultural land by Slovak citizens, residents, or legal persons.* This rule does not apply to the inheritance of agricultural land or to member states of the European Union, the European Economic Area, Switzerland, and countries bound by an international treaty which is also binding for Slovakia.[58]

The year 2021 will undoubtedly be a year of change for Slovak land management regulations, and at the end of October 2020, the Ministry of Agriculture and Rural Development of the Slovak Republic submitted an amendment proposal for inter-ministerial conciliation and requested its negotiation in an abbreviated legislative procedure.[59]

The two main novelties of the new Land Act are the introduction of a system of pre-emption rights and maximisation of land acquisition limits.[60] Regarding these novelties, the introduction of land acquisition limits seems to be the most controversial. At the same time, it is almost certain that if the proposed amendment is approved in its original form, its constitutionality will presumably be re-examined by the Constitutional Court of the Slovak Republic.

The bill received 108 comments, of which 56 proposed significant changes. For example, a review was sent by the Slovak Chamber of Agriculture which complained that the proposal did not cover the fact that the majority of plots were, in many cases, owned by a large number of unknown owners. In this context, several questions arise: How can pre-emption rights be enforced in such a case? On what basis would the pre-emption order be determined? Furthermore, it is clear from the proposal that young farmers, who need an adequate amount of land to begin pursuing business activities, were not taken into account. "[Y]oung and small-scale farmers face very serious difficulties in acquiring land."[61]

Because of this, young people may find themselves in a difficult situation unless they inherit agricultural land. In addition, according to the opinion of the Chamber of Agriculture, a plethora of lawsuits will be triggered by placing pre-emption rights ahead of pre-emption contracts. The Chamber of Agriculture would also raise the land acquisition limit by 50 percent for those who are involved in registered animal husbandry, as this would be essential for fodder production. In addition, per the proposal of the Chamber of Agriculture, the Slovak Land Fund could lease the land of unknown

57 Ptačinová, 2019.

58 Land Act, Section 7.

59 The bill and its annexes were uploaded to the „*Slov-Lex*"- Legislative and Information Portal of the Ministry of Justice of the Slovak Republic. The whole package in the Slovak language is available at https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2020-504 (Accessed: 22 January 2021).

60 These limits would accordingly be introduced differently for natural persons as well as for legal persons: it would mean 300 hectares for natural persons and sole proprietors and 1200 hectares for legal persons. However, it is important to note that if the buyer is involved in animal husbandry, the above-mentioned ceilings will be 50 percent higher.

61 Dirgasová and Laziková, 2017, p. 372.

owners only to Slovak farmers and to legal entities in cases where the final beneficiary is a Slovak citizen.

The topic has not been reopened as of the completion of this manuscript.[62] Therefore, the most pressing question is what direction the forthcoming regulation will take.

4. The Czech Republic

After joining the European Union, a five-year transitional period was permitted for the Czech Republic to assure the conformity of laws related to residential properties and a seven-year transitional period was given to harmonise laws related to acquiring the ownership of agricultural and forestry land.[63] On 1 May 2011 the Parliament of the Czech Republic approved an amendment to the Foreign Exchange Act[64] which formally removed all of the restrictions for foreigners (both for natural persons and for legal persons based abroad) buying any type of real property in the Czech Republic. The bill entered into force on 19 July 2011. From this date forward, European rules regarding the free movement of capital have to apply to real estate acquisitions in the country. This means that *there is no legal obstacle for a foreign legal entity or investor to buy any type of real estate in the Czech Republic, including agricultural land, forestry land, or residential properties.*[65] This resulted in the Foreign Exchange Act being in line with the Accession Treaty, and no one was restricted in regard to buying real estate or agricultural land in the country.[66] This change in the law provided new opportunities for foreigners to acquire ownership of agricultural and forestry land, which is still considered a very good investment because such land is still significantly cheaper in the Czech Republic than in Western European countries. Moreover, investors were reluctant to buy real estate in the Czech Republic long before the Foreign Exchange Act was revised.[67]

According to the Land Fund, only 7% of the agricultural land in the Czech Republic was owned by the state, and more than 90% of agricultural land was already privately owned at that time.[68] The Foreign Exchange Act expired on 18 October 2016.[69]

Originally, before the problematic restrictions of the Foreign Exchange Act were removed in 2011, agricultural land could be acquired only by residents of the Czech Republic (both legal and natural persons). However, there were some exceptions.

62 The manuscript was finalised on 1 March 2021.
63 Jakub and Syrovátko, 2010, p. 12.
64 Amendment No. 206/2011 proposed to the Act No. 219/1995 Coll., Foreign Exchange Act.
65 Jakub and Syrovátko, 2010, p. 12.
66 Barešová, 2011, pp. I.-VII.
67 Humlová and Ueltzhöffer, 2001, p. 2.
68 For further information, see the article on ProfitLine's website: The road was opened before buying Czech agricultural land. [Online]. Available at: https://profitline.hu/Megnyilt-az-ut-a-cseh-termofoldek-vasarlasa-elott-252961 (Accessed: 4 March 2021).
69 The Foreign Exchange Act was terminated by the Act No. 323/2016 Coll.

Foreigners were able to buy agricultural land if they were married to a Czech citizen, and they could also acquire ownership through inheritance or exercising pre-emptive rights that emerged from co-ownership of the land. Foreigners were also able to exercise pre-emptive rights if the land could not be separated from another asset that was already owned by a foreigner. Farmers with EU citizenship were able to acquire the ownership of agricultural land if they were pursuing agricultural business activities as self-employed farmers and they had been permanently staying in the country for at least 36 months.[70] These farmers had to prove their professional knowledge of farming as well as their knowledge of the Czech language. This means that before the law was modified, natural persons who were permanently staying in the country and pursuing farming activities for at least 36 months, as well as Czech legal entities combining Czech and foreign capital, were permitted to buy private agricultural land.

In 2019, the Association of Czech Landowners[71] shared up-to-date information on agricultural land ownership. According to this report, there was a continuous decrease in the number of natural landowners. In January 2019, there were 3.19 million agricultural landowners in the Czech Republic who owned a total of 4.2 million hectares of agricultural land. The largest group of owners comprised natural persons. Natural persons, therefore, owned 75% of agricultural land in the Czech Republic (approximately 3.1 million hectares of agricultural land); meanwhile, the legal entities owned 21% (903 thousand hectares) of the agricultural land. The number of legal entities owning agricultural land is approximately 54,000. The average land area per legal entity was 17 hectares. Three% of all agricultural land (134,000 hectares) was owned by the state. Other organisations are of minor importance for agricultural land ownership. Compared to the previous year, the number of natural persons owning land decreased by almost 12,000 hectares, while the number of legal persons increased by approximately 700. The data were based on land registry statistics.[72]

In the Czech Republic, a number of domestic legal entities (also known as agricultural giants) control agricultural production. As a result, these large companies have a strong influence on real estate sales, thus affecting market prices. They often cultivate agricultural land without the knowledge or consent of landowners. These organisations not only benefit from the crop obtained on land but also receive subsidies for cultivation. According to their own declaration, this is considered to be remuneration received in return for their services because if the lands were not cultivated, they would have been destroyed as a result of inaction. According to statistics for 2019, in the Czech Republic, agricultural holdings farmed a total of 3,456,646 hectares of agricultural land in 2017, of which 2,507 enterprises used 1,720,555 hectares.[73]

70 Ciaian, Kancs, Swinnen, Van Herck and Vranken, 2012, pp. 9.

71 In Czech: Svaz vlastníků půdy České Republiky (SVP ČR).

72 Press release of the Association of Czech Landowners (available in Czech language). [Online]. Available at: http://www.svazvlastnikupudy.cz/cs/aktuality/v-ceske-republice-ubyva-drobnych-vlastniku-pudy.html (Accessed: 6 March 2021).

73 Damohorský and Chaloupková, 2019, pp. 8.

The largest group of agricultural holdings was made up of small farms, which account for less than two-thirds of all agricultural holdings in the Czech Republic. The smallest group of agricultural holdings (approximately 7%) is represented by large agricultural units. Although this is the least represented group, much of the Czech agricultural production is concentrated in large farms. These farms utilise 66% of the total agricultural land. The opposite situation occurs in the case of small farms managed by individuals, for which the largest group utilised only 5% of the agricultural land area in the Czech Republic.[74]

In the Czech Republic, both domestic and foreign legal entities can acquire land ownership. We believe that legal non-regulation in the land market causes significant problems, primarily due to the market situation created by large agricultural giants.

5. Poland

■ *5.1. Legal framework for the transfer of agricultural real property*

In its Article 23, adopted on 2 April 1997, the Constitution of Poland in force provides for a general principle, according to which the basis of the entire Polish agricultural system shall be the family farm.[75] According to Polish lawmakers, agricultural real properties are an indispensable means of agricultural production, the primary purpose and function of which is to ensure food security in the country.[76] Consequently, the transfer of land suitable for food production must be properly regulated, allowing for an even and just distribution of this 'public good'.[77]

The Polish framework governing the transfer of ownership of agricultural land concerns two main areas, distinguishing between the rules applicable to private property and those applicable to state-owned property. With the adoption of the Act of 14 April 2016 on suspension of the sale of real property from the Agricultural Property Stock of the State Treasury and amendment to certain acts,[78] the trade of state-owned

74 For more information, see the website of the Czech Statistical Office. Structural survey in agriculture – analytical evaluation 2016 – Structure of agricultural holdings expressed in classes according to economic size. (Strukturální šetření v zemědělství – analytické vyhodnocení 2016. Struktura zemědělských podniků vyjádřená ve třídách ekonomické velikosti) [Online]. Available at: https://www.czso.cz/documents/10180/79535242/27016818k02cz.pdf/eaf95599-31e7-4865-9dff-2f59fcd59f02?version=1.1 (Accessed: 6 March 2021).

75 The Constitution of the Republic of Poland adopted on 2 April 1997, Journal of Laws [Dz. U.] of 1997 No. 78, item 483 as amended.

76 Explanatory Memorandum of the draft bill on the suspension of the sale of real property from the Agricultural Property Stock of the State Treasury and amendment to certain acts, submitted by the government on 4 March 2016, item nr 293 (hereinafter: Explanatory Memorandum), pp. 1, 12. [Online] Available at: https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=293 (Accessed: 17 March 2021).

77 See Blajer and Gonet, 2020.

78 Act of 14 April 2016 on the suspension of the sale of real property from the Agricultural Property Stock of the State Treasury and amendment to certain acts, Journal of Laws [Dz. U.] of 2016, item 585 as amended.

farmland has been withheld for a period of five years beginning 30 April 2016 and is not covered in this paper.[79] The transfer of privately owned farmland, although not suspended, is subject to various far-reaching limitations outlined in the Act of 11 April 2003 on the Formation of the Agricultural System (hereinafter, the AAS).[80] It provides for the rules that are *lex specialis* to the Polish Civil Code,[81] with respect to legal transactions resulting in the transfer of ownership of agricultural real property. The AAS has been recurrently amended over the last several years. Substantial changes were introduced in April 2016 (referred to as the 2016 amendment) at the end of the 12-year transitional period provided for by the accession treaty to the EU, with the aim of preventing land speculation and uncontrolled land purchases by foreigners.[82] Additionally, in the case of the acquisition of farmland by foreign individuals or companies, the provisions of the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (hereinafter, the AREF)[83] shall also apply, providing for further trade-restrictive provisions.

■ *5.2. Acquisition of agricultural land under the AAS*

5.2.1. The scope of application of the AAS

For the purposes of the application of the AAS, agricultural real property shall be understood as an agricultural real property within the meaning of the Civil Code, excluding the properties located in areas designated in the local zoning plan for purposes other than agriculture.[84] The Civil Code, which the AAS refers to, defines agricultural real property as immovable property, which is or may be used for carrying out agricultural production activity within the scope of plant and animal production, not excluding gardening, horticulture, and fishery production.[85] Not covered by the scope of application of the AAS are *inter alia* state-owned properties, agricultural real properties with an area of less than 0.3 hectares, or, under certain circumstances, the agricultural land situated within the city limits.[86]

The term 'acquisition', as defined in Article 2 of the AAS, should be understood broadly to include not only acquisition by sale or donation but also acquisition by virtue of a court ruling or an administrative decision as well as acquisition as a result of other events of legal significance (e.g. by prescription). The AAS also imposes restrictions on

79 For more on the transfer of state-owned farmland, see Suchoń, 2017, pp. 43–47; Iwaszkiewicz, 2020, pp. 29–45.

80 Act of 11 April 2003 on the Formation of the Agricultural System, Journal of Laws [Dz. U.] of 2003 No. 64, item 592 as amended.

81 Act of 23 April 1964 Civil Code, Journal of Laws [Dz. U.] of 1964 No. 16, item 93 as amended.

82 See Explanatory Memorandum, pp. 1–2, 12, 30.

83 Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners, Journal of Laws [Dz. U.] of 1920 No. 31, item 178 as amended.

84 Article 2 point 1 of the AAS. As only 1/4 of the territory of Poland is regulated by local zoning plans, a question arises as to the application of the AAS with respect to agricultural real properties situated in areas with no local zoning plans; see Ilków, 2018, pp. 20–35.

85 Article 46^1 of the Civil Code.

86 See Articles 1a and 1b of the AAS.

the transfer of shares in commercial companies only indirectly, resulting in the transfer of ownership of agricultural land (via share-deal).[87] The rules for the acquisition of ownership of land provided by the AAS apply equally to the acquisition of ownership and the right of perpetual usufruct.[88]

5.2.2. The acquisition of farmland under the AAS

The AAS embodies the constitutional principle that family farming shall constitute the basis of the Polish agricultural system. The preamble sets out the principal objectives of the AAS, which include *inter alia* strengthening the protection and development of family farms, ensuring proper management of agricultural land, ensuring the food security of Polish citizens, and supporting sustainable agriculture.

By virtue of the 2016 amendment, a general principle was introduced into the AAS, according to which agricultural real property can be acquired only by individual farmers, that is, natural persons who meet the statutory requirements.[89] A 300-hectare threshold was put in place with respect to the maximum area of the arable land acquired by an individual farmer, which shall be calculated together with the arable land already owned by the acquirer.[90] Although the AAS formally declares in Article 2a that only an individual farmer can acquire agricultural real property, it also provides for several exemptions, which makes it possible for natural persons other than individual farmers as well as various categories of legal persons to acquire agricultural land. The exemptions include relatives, local government units, the State Treasury, churches and registered religious associations, national parks, and commercial companies that carry out specific public objectives or those owned by the State Treasury.[91] Furthermore, the general principle of acquisition by an individual farmer and the 300-hectare threshold do not apply to the acquisition of agricultural land as a result of a transformation, merger, or division of an existing company or that occurs in the course of restructuring or bankruptcy proceedings,[92] nor do they apply to agricultural real properties with an area of less than one hectare, which can be acquired by any legal person or a non-farmer individual.[93]

A legal person not covered by statutory exceptions may nevertheless acquire the ownership of agricultural real property upon permission issued by the National

87 Article 3a of the AAS.
88 Article 2c point 1 of the AAS.
89 Article 2a para. 1 of the AAS. According to Article 6 para. 1 of the AAS, an individual farmer is a natural person who is an owner, holder of perpetual usufruct, autonomous possessor, or lessee of agricultural real property whose combined area of arable land does not exceed 300 hectares, who holds agricultural qualifications and has been residing for a period of at least five years in the commune in whose territory at least one of the agricultural real properties forming part of the family farm is located, and who has been running this farm personally throughout that period. See Suchoń, 2017, p. 45; Kurowska, 2017.
90 Article 2a para. 2 of the AAS.
91 Article 2a para. 3 of the AAS.
92 Article 2a para. 3 points 4), 9) and 11) of the AAS.
93 Article 2a para. 3 point 1a) of the AAS.

Support Centre for Agriculture (hereinafter, the NSCA).[94] Such permission can be requested by the seller of the agricultural land which is to be transferred, provided that the conditions outlined by the AAS have been met. For permission to be granted, the seller is required to demonstrate that it was not possible to sell the land to an individual farmer, while the buyer must undertake agricultural activity on the acquired land.[95] Permission will not be issued if the acquisition leads to excessive land concentration; however, the AAS does not give any indication as to when land concentration is deemed excessive, leaving a margin of appreciation to the competent authorities.

The AAS provides several instruments allowing the state to exercise control over the agricultural real estate market, one of which is the right of pre-emption, regulated in Article 3 of the AAS. It endows the NSCA with the right of first refusal with respect to the agricultural land for sale, which can be exercised on behalf of the State Treasury on the condition that a tenant (lessee) has not exercised the right of pre-emption in first place.[96] The sale of farmland results in invalidity if performed unconditionally, without the party entitled to pre-emption being notified.[97] In the case of acquisition resulting from legal arrangements other than sale (e.g. from the transformation, merger, or division of a company, donation, acquisition by prescription, or court ruling), the NSCA has the right to acquire the land, which shall be exercised against the payment of the purchase price.[98]

As amended in 2016, the AAS has imposed a twofold obligation on the acquirer of agricultural property to ensure the active utilisation of agricultural land and to prevent capital investments in such agricultural land. These have the overall aim of ensuring food security in Poland.[99] Article 2b para. 1 of the AAS outlines an obligation to run the agricultural holding of which the agricultural real property became a part for a period of at least five years, starting from the day of acquisition.[100] During the same period, the acquirer is obliged to refrain from selling the agricultural real property or transferring its possession. However, neither of these restrictions are absolute in nature. The AAS provides several exemptions when the above-mentioned obligations are not applied. The exemptions refer to the acquirer himself (e.g. a relative), the type of acquisition (e.g. by inheritance), or the location of the agricultural real property (e.g. in the city, if the area of the real property is less than one hectare).[101] Even if not covered by statutory exemptions, the acquirer may still sell the farmland or transfer its possession within the prescribed five-year period if allowed by the general director of the NSCA.[102] Such

94 *Krajowy Ośrodek Wsparcia Rolnictwa* (KOWR) – a government agency responsible for the management and development of the Polish agricultural system. See Article 2a para. 4 of the AAS.
95 Article 2a para. 4 point 1) of the AAS. See Kubaj, 2020, pp. 128–129.
96 Article 3 paras. 1 and 4 of the AAS.
97 Article 9 para. 1 of the AAS.
98 Article 4 para. 1 of the AAS.
99 Czech, 2020.
100 Article 2b para. 1 of the AAS.
101 Article 2b para. 4 of the AAS.
102 Article 2b para. 3 of the AAS. The exemption from the prohibition of disposal of land is not accompanied by a similar procedure allowing for an exemption from the obligation to carry out agricultural activity.

exemptions need to be justified by the acquirer's important interests or the public interest. Otherwise, the implementation of the obligations set out under Article 2b paras. 1 and 2 are subject to state control and scrutiny. In the case of non-compliance with the obligation to farm the land or with the prohibition of disposal, the NSCA, on behalf of the State Treasury, may request from the court the buyout of the misused land.[103]

5.2.3. Acquisition of agricultural land via share-deal

The AAS restricts the transfer of shares in a commercial company which owns agricultural real property with an area of at least five hectares (or multiple agricultural real properties with a total area of at least five hectares). These apply equally to commercial companies which hold the right of perpetual usufruct. Pursuant to Article 3a para. 1 of the AAS, the NSCA, acting on behalf of the State Treasury, has a pre-emption right to purchase shares in case of a transfer of shares. This applies even if the agricultural land in question constitutes only a minor portion of the company's assets.[104] The share purchase agreement shall be subject to the condition that the NSCA does not exercise the right of pre-emption; otherwise, the entire acquisition of shares performed unconditionally is null and void.[105] The NSCA has the right of pre-emption only with respect to the shares in a company that owns agricultural real property (or holds the right of perpetual usufruct) directly, and the transfer of shares in a company which is an indirect owner of agricultural land – by holding shares in another company – remains beyond the scope of the NSCA's right of pre-emption.[106] In addition, the right of pre-emption does not apply with respect to the acquisition of farmland resulting from the transfer, merger, or division of a company; in that case, however, the NSCA is entitled to the right of acquisition of the land (see above).

Changes in ownership structure in business entities other than commercial companies are also subject to the restrictions specified in the AAS. According to Article 3b para. 1 of the AAS, in case of a change of partner in a partnership which owns agricultural real property with an area of at least five hectares (or several agricultural real properties with a total area of at least five hectares) or in the case of the admission of a new partner to such a partnership, the NSCA shall have the right to acquire the land against the payment of the purchase price equal to the property's market value. For this reason, a partnership is required to notify the NSCA regarding changes in partnership structure within one month.[107] Failure to comply with this obligation leads to the

103 Article 9 para. 3 point 1 of the AAS.

104 Hełka, 2019, p. 115.

105 Article 9 para. 1 of the AAS. To comply with the AAS, the company whose shares are to be transferred shall notify the NSCA about the share purchase agreement and submit all documents listed in Article 3a para. 4 of the AAS (certificate from the land registry, extract of land and building registration, balance sheet and profit and loss account, list of shareholders, and statement of the board of directors on the value of contingent liabilities).

106 Hełka, 2019, p. 116.

107 Article 3b para. 3 of the AAS.

invalidity of the legal transaction, resulting in changes to the partnership structure.[108] The provisions apply equally to partnerships which hold the right of perpetual usufruct to agricultural land with an area of at least five hectares.

■ *5.3. Acquisition of real estate by foreigners under the AREF*

In addition to the provisions of the AAS, the acquisition of agricultural land by foreigners is also governed by the provisions of the AREF. The definition of a foreigner given in Article 1 para. 2 of the AREF refers equally to foreign individuals and to legal persons, the latter including commercial companies as well as foundations, associations, and churches.[109] It is worth mentioning that a company or partnership with its registered seat in Poland and established under the laws of Poland may nevertheless be considered a foreign company if it is controlled, directly or indirectly, by foreign individuals or legal persons.

As a general rule given in Article 1, para 1. of the AREF, the acquisition of all types of real estate by foreigners requires permission from the Minister of Internal Affairs. Such permission is issued if the Minister of National Defence does not object to the acquisition and, in the case of agricultural land, if the minister in charge of rural development does not oppose the acquisition. Permission can be issued, providing that the acquisition of real estate by the foreigner does not pose a threat to the defence and security of Poland or to public order and if it is not contrary to the interests of social policy and social health as long as the foreigner can demonstrate circumstances that confirm his or her links to Poland.[110]

Similar to the AAS, the AREF provides for a broad definition of the acquisition of real property, encompassing the acquisition of ownership or perpetual usufruct of real estate following any legal event.[111] Not only is the direct acquisition of real estate controlled by the state, but permission is also required for the acquisition of shares in a Polish commercial company being the owner or perpetual user of real estate located in the territory of Poland if the company becomes a controlled company as a result of such transactions.[112] The AREF provides several exemptions to these permission

108 Article 9 para. 1 of the AAS. See Blajer and Gonet, 2020.

109 Article 1 para. 2 of the AREF defines a foreigner as (1) an individual person who does not have Polish citizenship, (2) a legal person whose registered office is located abroad, (3) an unincorporated partnership of the persons referred to in point 1 or 2 whose registered office is located abroad, established in accordance with the legislation of a foreign country, or (4) a legal person and an unincorporated commercial partnership whose registered office is located in the territory of the Republic of Poland, directly or indirectly controlled by the persons or partnerships referred to in points 1, 2 and 3. According to Article 1 para. 3 of the AREF, a controlled company or partnership is a company or partnership in which a foreigner or foreigners hold more than 50 percent of votes at the meeting of partners or the general meeting, as a pledgee or user, or pursuant to agreements with other persons, or are in a dominant position within the meaning of the provisions of the Code of Commercial Companies. For more on the personal scope of application of the AREF, see Wereśniak-Masri, 2019, pp. 63–64.

110 Article 1a para.1 of the AREF.

111 Article 4 of the AREF.

112 Article 3e para. 1 of the AREF.

requirements. Following the expiration of the transitional period provided for in the accession treaty to the EU, restrictions do not apply *inter alia* to the acquisition of real estate by individuals and legal persons from the European Economic Area (EEA) or Switzerland.[113] As a result, any legal person from outside the EEA wishing to acquire agricultural real property in Poland is required to obtain two separate permissions: one from the Ministry of the Interior (valid for two years) and the other from the NSCA (valid without time limit), the latter being required for all persons who do not qualify as individual farmers. If the agricultural land to be acquired by a non-EEA foreigner falls within the scope of exemptions listed by the AAE (e.g. the area of farmland is less than one hectare), only a permit from the Ministry of the Interior will be required.[114]

The Minister of Internal Affairs maintains a register of real estate and shares acquired by foreigners both based on the required permit and without it.[115] To ensure transparency and accountability, an annual report from the implementation of the AREF was developed by the minister and published on the official website. It comprises detailed statistics on the number of proceedings, granted permissions, and refusals, along with information on the nationality of foreigners (in case of legal persons, on the origin of their capital) and on the types of real estate acquired, along with their area and geographical location. In 2019, 108 permissions were granted to foreigners to acquire agricultural and forestry land, amounting to a total area of 35.32 hectares; however, no permission was issued to any legal persons.[116] One permission was issued to a foreigner to acquire shares in a Polish company owning agricultural and forestry land (total area of 2.91 hectares).[117] As for the agricultural and forestry land acquired without permission, a total of 703.26 hectares of such land was acquired by legal persons (365 transactions) and 633.25 hectares by individual persons (886 transactions).[118] A total of 3,016.62 hectares of agricultural and forestry land was involved in share transfers in companies owning real estate in Poland; the shares were purchased by foreigners (legal or individual persons) primarily from Germany, the Netherlands, Denmark, and Bulgaria.[119] These numbers are slightly higher than those reported in 2018 (41 permissions issued to foreign individuals to acquire agricultural and forestry land of the total area of 14.19 hectares, no permission issued to a legal person, one permission was issued to acquire shares in a company owning agricultural and forestry land, a total of 310.54 hectares of such land acquired by legal persons without permission in 198 transactions, 442.61 hectares acquired by individual persons without permission in

113 Article 8 para. 2 of the AREF.
114 For the double permit requirement, see Wereśniak-Masri, 2019, pp. 59–71.
115 Article 8 para. 4 of the AREF.
116 Report of the Minister of the Interior and Administration on the implementation in 2019 of the Act of 24 March 1920 on the acquisition of real estate by foreigners [*Sprawozdanie z realizacji w 2019 r. ustawy z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców*], March 2020, p. 27. [Online]. Available at: https://orka.sejm.gov.pl/Druki9ka.nsf/0/90FE391901192530C1258536003437B7/%24File/292.pdf (Accessed: 17 March 2021).
117 Ibid. p. 38.
118 Ibid. p. 53.
119 Ibid. p. 50.

742 transactions, and 3,132.02 hectares of agricultural and forestry land involved in share transfers).[120]

■ *5.4. Summarising remarks on Poland*

The Constitution of Poland puts forth a cornerstone principle, according to which the basis of the agricultural system in Poland shall be family farms. For this reason, several restrictions have been imposed on the trade of agricultural land, such as the general rule that only individual farmers may acquire farmland ownership. However, under certain conditions, legal persons and foreigners may also acquire agricultural land in Poland upon receiving permission from competent authorities.

The Polish legal framework applicable to agricultural land transactions is tantamount to introducing serious restrictions on ownership rights. Questions arise as to whether the adopted measures (e.g. the acquisition of farmland by individual farmers, the ban on alienating farmland, the obligation to carry out agricultural activity, pre-emption rights) are not overly restrictive.[121] However, it should be kept in mind that the overall aim of the Polish lawmakers was to ensure the citizens' food security, a principle the implementation of which requires proper regulation of the agricultural land market. The measures adopted by the Polish legislator are designed to prevent excessive concentrations of land and support family holdings and small-scale producers.

6. Conclusions

By analysing the regulation of the acquisition of ownership of agricultural lands by legal persons in the Visegrád Group countries, it has become clear that despite several common features among these countries, such as the Soviet influence on their agriculture in the post-World War II era, as well as despite their geographical proximity and the fact that all are EU member states, their approaches to the issue are in stark contrast to each other.

Considering an imaginary scale, Hungary would be at one end point, and Slovakia and the Czech Republic would be at another. Hungary, with its full prohibition, shows us an enormous difference in relation to the completely free land regimes of Slovakia and the Czech Republic. Poland falls midway to these two end points with its attempt to regulate in detail and handle the acquisition of ownership of agricultural lands by legal persons, going so far as to adopt provisions on share deals.

120 Report of the Minister of Interior and Administration on the implementation in 2018 of the Act of 24 March 1920 on the acquisition of real estate by foreigners [*Sprawozdanie z realizacji w 2018 r. ustawy z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców*], March 2019, pp. 27, 49, 52. [Online]. Available at: https://www.gov.pl/attachment/876e3da3-f8b5-4b32-9cd7-ecc54c53670a (Accessed: 17 March 2021).

121 See, for example, Maj, 2019, p. 90; Czech, 2020; Korzycka and Wojciechowski, 2019.

With the emerging paradigm of food sovereignty as our frame of reference, we can see the following: (a) the Hungarian regulation aims to protect domestic agricultural production at all costs, striving to keep foreign capital out of agriculture in the spirit of food sovereignty; (b) Poland has chosen a more moderate approach with its sophisticated and detailed regulation, but there are weaknesses in the system as a consequence of untraceable (indirect) ownership chains which are the immanent features of legal persons and which are beyond the scope of regulation; (c) Slovakia and the Czech Republic are currently offering themselves to the convenience and interests of foreign capital to the detriment of their own food sovereignty.

From the viewpoint of the EU, the current unregulated land regimes of Slovakia and the Czech Republic are prime examples of the "good cops" who follow the guidelines of the EU internal market, while Hungary can be considered a "bad cop" who acts against the principle of the free movement of capital. Poland is moderate in this respect.

Regulating the land market, including the acquisition of ownership of agricultural lands by legal persons, in the spirit of food sovereignty is an open-ended process the outcome of which cannot be guaranteed beforehand. If we accept Georg Jellinek's attributes of sovereign statehood, one of which is territory (*Staatsgebiet*),[122] it becomes crucial for each country to manage its land regime, thereby retaining one of the constituting elements of sovereignty. Territory includes agricultural and forestry lands which are essential and indispensable for providing food to another attribute of statehood, that is, to population (*Staatsvolk*).[123] If the control over land regulation and, thus, over agricultural production escapes from the control of the third attribute of statehood, that is, from the state power (*Staatsgwalt*),[124] and comes to be under the control of private entities, such as foreign legal persons with enormous amounts of capital, serious concerns may arise in connection with food sovereignty.

The future of agriculture of EU member states will be largely determined by the EU in regard to whether it adopts the paradigm of food sovereignty and, if so, to what extent. By prioritising positive integration[125] over negative integration[126], it may succeed in keeping national agriculture national and providing each member state with the possibility of protecting their own (food) sovereignty.

122 Jellinek, 1905, pp. 381–393.
123 Jellinek, 1905, pp. 393–413.
124 Jellinek, 1905, pp. 413–420.
125 Such as to the provision formulated in the Article 345 of the Treaty on the Functioning of the European Union, which declares that the Treaties shall in no way prejudice the rules in member states governing the system of property ownership.
126 Such as the free movement of capital.

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Changed Perspectives and Conflicting Treaty Obligations: What Is the Message of the CJEU *Achmea* Decision and the 2020 Plurilateral Termination Agreement for Candidate Countries such as Serbia?

ABSTRACT: *The authors analyse the changed landscape of the EU BIT policy following the Achmea decision and the 2020 Termination Agreement, in particular, their relevance for candidate countries such as Serbia. The perceived risks strongly suggest that some action must be taken before the accession to avoid becoming caught between conflicting obligations under EU law and the BITs, as happened to respondent countries in the cases of Micula and Magyar Farming Company. The potential for conflicts exists in the case of Serbia as well because it already has an obligation to comply with EU law in areas such as competition and state aid law, which may cause it to inadvertently breach investors' rights under the BITs. Various options that a candidate country can pursue to adjust its bilateral investment treaties to EU law standards are considered in search of the best approach. Difficulties that may be encountered due to the premature termination of sunset clauses and the retroactive termination of arbitration clauses in pending arbitrations lead the authors to conclude that certain adjustments to the course of action adopted within the EU are called for. The proposed action in the case of Serbia consists of consensually amending the 22 Serbia-EU member state BITs following a two-step procedure so that the sunset clauses are terminated at once, whereas the remaining provisions of the BITs are designated by the contracting parties to be terminated on the date of accession. To prevent treaty shopping, these amendments need to be accompanied by comprehensive reform of Serbia's other BITs that contain overly broad definitions of investors and investments. Some alternative approaches are also taken into consideration, such as the replacement of ISDS with other forms of dispute resolution and the replacement of the Serbia-EU member state BITs with other types of agreements. The candidate countries are advised to adjust their pre-accession commitments, both procedural and substantive, in a timely manner with the*

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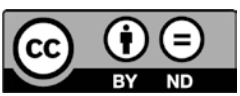

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incoming EU obligations. These inevitable adjustments should be pursued cautiously by candidate countries to minimise risks and maximise their bargaining power.

■ **KEYWORDS:** Plurilateral Termination Agreement, *Achmea*, bilateral investment treaties, conflict of international agreements, EU law standards, candidate countries.

1. Background – Changed landscape of the EU BIT policy: the CJEU decision in the *Achmea* case and the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union

Much has already been said about the Court of Justice of the European Union (CJEU) decision in the *Achmea* case,[3] and for good reason. In its landmark decision, the CJEU ruled, for the first time, that arbitration clauses in intra-European Union (EU) bilateral investment agreements (BITs) are incompatible with EU law. The CJEU assessed intra-EU BITs against standards of EU law and found that these instruments and, consequently, intra-EU BITs arbitral clauses, were not compatible with EU law. This decision laid bare the conflict between two sets of obligations for EU member states, the first arising under the BITs and the second arising under EU law. The question here is not only how the CJEU arrived at this conclusion but also how it was possible to have normative conflict of such magnitude broiling within the EU for so long. An additional question is when and why this conflict came into existence in the first place.

As is already well known, after Slovakia lost its investment case before the United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal, initiated by the Dutch company Achmea B.V. (originally Eureko B.V.), on the grounds that the reversal of liberalisation measures in the health insurance market contravened Slovakian obligations under the Netherlands-Slovakia BIT,[4] Slovakia moved to set aside the award before the High Regional Court in Frankfurt am Main in Germany. The action was dismissed, but Slovakia appealed on a point of law before the Federal Court, which decided to stay the proceedings and refer several questions to the CJEU for a preliminary ruling pursuant to Art. 267 Treaty on the Functioning of the EU (TFEU). The questions referred to the CJEU were whether an arbitration clause in an intra-EU BIT that provides for an investor-state arbitration between the national of one member state and the government of another for investment disputes arising under such intra-EU

3 Judgement of the Court of Justice of the European Union (Grand Chamber) of 6 March 2018. Slowakische Republic v. Achmea BV (Case C-284/16). Hereinafter: CJEU *Achmea* decision.

4 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, Permanent Court of Arbitration (PCA), PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Final Award, 7 December 2012.

BIT was precluded by Arts. 18(1), 267, and 344 TFEU. Given that the intra-EU BIT was a treaty between member states, the issue of conflict was to be resolved by reference to the precedence of EU law over the provision of the BIT. On 6 March 2018, the CJEU found that the arbitration clause in the Netherlands-Slovakia BIT was incompatible with EU law and had an adverse effect on its autonomy.[5] The consequence of this finding was that the operation of the BIT arbitration clause was precluded. Following the CJEU *Achmea* decision, the German Federal Court annulled the UNCITRAL arbitral award in the *Achmea* case.[6] The main rationale of the CJEU *Achmea* decision was that the autonomy of EU law would necessarily be compromised by the possibility of having a court outside the control of the CJEU vested with jurisdiction to interpret and apply EU law.[7]

The question that was referred to the CJEU had already been heard before in different international forums and contexts. It had been raised as part of Slovakia's argument against the jurisdiction of the UNCITRAL arbitral tribunal in the *Achmea* case. In its preliminary objections, Slovakia argued that the Treaty Establishing the European Community (the EC Treaty) governed the same subject matter as the BIT such that the latter was to be considered terminated or inapplicable pursuant to rules of treaty law (Arts. 59 and 30 of the Vienna Convention on the Law of Treaties, VCLT) but also that the arbitration clause could not be applied because of its incompatibility with the EC Treaty and the exclusive jurisdiction of the CJEU over the claims of the claimant.[8] In the course of the arbitral proceedings, the European Commission joined the arguments that intra-EU BITs were incompatible with EU law on the basis of the precedence of EU law, prohibition of discrimination (given that investors from certain EU countries are potentially in a better position than others), and the exclusive jurisdiction of the CJEU.[9]

An important factor that coincided with the jurisdictional arguments of both Slovakia and the European Commission in the *Achmea* arbitration was the adoption and entry into force of the TFEU and its Art. 307, which vested the EU with exclusive competence with respect to foreign direct investment (FDI) as part of the common commercial policy.[10] This was in addition to Slovakia's argument that by its accession to the EU in May 2004, the BIT and its arbitration clause were terminated and/or became inapplicable, as they were contrary to EU law.

5 The CJEU *Achmea* decision, para. 59.

6 BGH, 31.10.2018 – I ZB 2/15. Achmea has filed a constitutional complaint before the Federal Constitutional Court of Germany against the judgement of the German Supreme Court that annulled the award following the ruling of the CJEU. See Adams et al., 2020.

7 The CJEU *Achmea* decision, paras. 57-59.

8 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 19.

9 Ibid., paras. 176-186.

10 TFEU, Art. 207(1), Art. 3(1)(e)).

However, even before the *Achmea* case and the Lisbon Treaty, the same issue was raised in *Eastern Sugar v. The Czech Republic*,[11] the case that was initiated only one month after the Czech Republic had acceded to the EU.[12] Together with the Czech Republic, the European Commission argued in 2006 that intra-EU BITs were incompatible with EU law. The question that was pertinent in both the *Eastern Sugar* and *Achmea* cases was why there was no special termination of intra-EU BITs if they were perceived as incompatible with EU law. In the absence of a special termination agreement or clause, the respondent states and the European Commission were left to pursue arguments based on suspension or inapplicability due to incompatibility with EU law.

Therefore, problems with intra-EU BITs became visible soon after the new members had entered the EU. These problems piled up and controversies intensified in the years that followed, coupled with additional measures adopted at the EU level. Once the campaign against intra-EU BITs was launched by the European Commission (in 2005, just after ten new members had acceded to the EU), the EU stepped up to curtail intra-EU BITs. Since Art. 307 TFEU made clear that FDI became the exclusive competence of the EU but did not specifically address intra-EU BITs, the EU adopted several regulatory measures to foster its newly acquired competences but also to initiate the termination of the intra-EU BITs.

Shortly after the arbitral award in *Achmea*, the European Parliament and the Council of the EU adopted the *Regulation on establishing transitional arrangements for bilateral investment agreements between member states and third countries*.[13] This regulation was a game-changer for third countries, including candidate countries, because it could serve as a platform for renegotiating the existing BITs with EU member states. While the pre-Lisbon policy favoured the BITs of EU member states with candidate countries as a preparation for EU membership,[14] the Lisbon Treaty, the 2012 Regulation, and the CJEU *Achmea* radically changed this perspective. From the EU perspective,

11 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award of 27 March 2007.

12 Lavranos, 2020b, p. 446.

13 'Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union ('TFEU'), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.' – Regulation (EU) No 1219/2012 of 12 December 2012, Official Journal of the EU L 351/40, recital 1.

14 '40. For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. The Association Agreements between the Union and candidate countries also contained provisions for the conclusion of BITs between Member States and candidate countries.' – Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slowakische Republik v Achmea BV*, para. 40.

renegotiation is required due to the change in legislative competences and the need to preserve uniformity in the interpretation of EU law.

With respect to the termination of intra-EU BITS, it seems that not all EU member states were originally in favour of this option. For example, in both *the Eastern Sugar* and *Achmea* cases, the Netherlands argued in favour of the validity of BITs together with their arbitration clauses. More importantly, in the proceedings before the CJEU in the *Achmea* case, 15 member states submitted observations with opposing views on the issue of the compatibility of intra-EU BITs with EU law. The dividing line was the general position and experience of member states with investment arbitration – as many as 10 EU member states argued that intra-EU BITs were incompatible with EU law.[15] Advocate General Wathelet sided with a minority of EU member states supporting the intra-EU BITs. However, several member states began terminating their intra-EU BITs[16] even before the European Commission launched its campaign that culminated in infringement procedures against a number of member states.[17]

The 2018 CJEU decision in *Achmea* seemed to have consolidated both the EU and its member states in concerted efforts to terminate intra-EU BITs and all of their effects. EU member states first adopted a series of declarations on the legal consequences of the judgement of the CJEU in *Achmea* on investment protection in the EU, seeking, *inter alia*, to terminate all pending arbitral proceedings, prevent enforcement of intra-EU BITs arbitral awards, and terminate all sunset clauses[18] contained therein.[19] Further, EU member states, acting as respondents in pending arbitral proceedings, sought to

15 'The second group is made up of the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania and the Slovak Republic. Those States have all been respondents in a number of arbitral proceedings relating to intra-EU investments, the Czech Republic 26 times, the Republic of Estonia three times, the Hellenic Republic three times, the Kingdom of Spain 33 times, the Italian Republic nine times, the Republic of Cyprus three times, the Republic of Latvia twice, Hungary 11 times, the Republic of Poland 11 times, Romania four times and the Slovak Republic nine times.' – Ibid., para. 35.

16 Voon and Mitchell, 2016, pp. 428-430.

17 Titi, 2016, p. 435.

18 Pursuant to the Termination Agreement, Art. 1(7) '"Sunset Clause" means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time.'

19 There were three such declarations. The first was adopted on 15 January 2019 by 22 EU member states: *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court Of Justice in Achmea and on Investment Protection in the European Union (*https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf). The second was adopted on 16 January 2019 by five EU member states: *Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf.). The third is a unilateral declaration of Hungary. Despite certain differences all EU member states were unanimous in upholding the inapplicability of intra-EU BITs and confirming the precedence of EU law over intra-EU BITs. For the reasons why Hungary made a separate declaration, see Korom, 2020, p. 71.

employ the *Achmea* decision in order to dismiss investment cases based on intra-EU BITs. However, all of these attempts failed.[20]

Following the 2019 Declarations, exchange of notes,[21] and failed attempts to dismiss investment arbitrations, on 5 May 2020, 23 EU member states signed the *Agreement for the termination of bilateral investment treaties between the Member States of the European Union* (hereinafter referred to as the Termination Agreement).[22] Its purpose was to terminate all remaining intra-EU BITs together with the sunset clauses contained therein, to assert the inapplicability of intra-EU BIT arbitration clauses because

20 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April 2018, 30 April 2018*; Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018; *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Article 9 Objection to Jurisdiction, 12 October 2018 (not public); *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, UNCITRAL, Award, 15 May 2019; *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, UNCITRAL, Award, 15 May 2019; *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, UNCITRAL Award, 15 May 2019; *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, UNCITRAL, Award, 15 May 2019; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020; *Ioan Micula and others v. Romania II*, ICSID Case No. ARB/14/29, Award, 5 March 2020; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility, 24 March 2020 (not public); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020; R*aiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections, 30 September 2020.

21 In *Micula v. Romania* (II) Sweden and Romania submitted the exchange of notes to the effect that the arbitration clause was contrary to EU law and thus inapplicable. The tribunal refused to treat this exchange of notes as a binding agreement. – *Ioan Micula and others v. Romania* II, ICSID Case No. ARB/14/29, Award, 5 March 2020, para. 287-288.

22 Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf (Accessed 15.01.2021.). States which did not sign the Termination Agreement are Austria, Finland, Ireland and Sweden (and the UK). In May 2020, shortly after the Termination Agreement was signed, the Commission sent the formal notice of infringement proceedings against Finland and the UK. Available at: https://ec.europa.eu/commission/presscorner/detail/en/INF_20_859 (Accessed 15.01.2021.).
Pursuant to Art. 16(1) of the Termination Agreement it entered into force 30 calendar days after the receipt of the second ratification instrument. Following the ratification by the Kingdom of Denmark on 6 May 2020 and the second ratification by Hungary on 30 July 2020, the Termination Agreement entered into force on 29 August 2020. On 11 January 2021, the Agreement was in force also in Bulgaria, Croatia, Cyprus, Malta and Slovakia and provisionally applicable in Spain. For the current status of the Agreement, see https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en (Accessed 15.01.2021.).

of their incompatibility with EU Treaties, and to exclude any new arbitral proceedings following the 2018 CJEU *Achmea* decision. With respect to proceedings initiated prior to the CJEU *Achmea* decision that are still pending, parties are expected to negotiate a settlement through 'a structured dialogue' before an independent facilitator within six months following the entry into force of the Termination Agreement or before national courts.[23] However, while EU member states consider that all listed intra-EU BITs that are still in force are terminated by virtue of the Termination Agreement, it seems that their position regarding the validity of arbitral clauses remains the same as before: that arbitration clauses became inapplicable much earlier, immediately following a state's full membership in the EU.[24]

The agreement prompted mixed reactions. There are voices of doubt ('Right or wrong, just or unjust, it remains to be seen, but the Agreement, in its current form, appears to be an affront to the rule of law, which may undermine its intended purpose.')[25] and voices of praise ('the Termination Treaty demonstrates a moderating of the European attitude toward intra-EU arbitration. Indeed, by adopting a graduated approach to dealing with concluded, pending, and new arbitrations, the Termination Treaty seeks to order the relationship between EU law and international law, without imposing absolute conclusions. Rather, it employs the language of moderate legal pluralism by providing for "transitional measures" and "structured dialogue".'),[26] but certainly, there is no lack of commentaries and academic literature on the Termination Agreement, the full effect of which is yet to be tested.

Undoubtedly, the perspective of BITs has changed in the eyes of the EU and its member states over about the last decade. This change was unequivocally demonstrated to the world by the ECJ *Achmea* judgement and the conclusion of the 2020 Termination Agreement.

Candidate countries have been somewhat slow to react to this change. The purpose of this article is to shed light on the messages that these two events carry for candidate countries such as Serbia. Is the era of Serbia-EU member state BITs soon to end? What actions should be taken even before accession? What are the consequences for existing investments and pending arbitrations? The search for answers is divided into several chapters. First, a brief reminder of *Micula v. Romania* and *Magyar Farming Company v. Hungary* is provided as these are telling examples of the experience of other

23 Arts. 9 and 10 of the Termination Agreement.

24 Pursuant to Art. 7 of the Termination Agreement '[w]here the Contracting Parties are parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated', they shall inform the arbitral tribunal of the consequences of the CJEU *Achmea* decision by submitting the statement envisaged in the Annex C: 'The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.'

25 Bray and Kapoor, 2020.

26 Restrepo Amariles, Farhadi, Van Waeyenberge, 2020, p. 941.

candidate countries confronted with conflicting BIT and EU obligations (2). This is followed by a chapter outlining the potential for conflicts in the future between the obligations arising simultaneously under the BITs with EU member states and under the *acquis communautaire* that Serbia must align its legal system with the Stabilisation and Association Agreement (3). The following chapter offers potential answers on mechanisms that may be used to ensure compatibility of the Serbian BITs with EU law, which are partly to be found in the Termination Agreement but possibly also in the broader EU investment treaty practice (4). The possibility of creating a new mechanism that will replace investment arbitration is also briefly considered in the final chapter (5) preceding the Conclusion chapter (6).

2. Learn fast – experiences of other candidate countries with respect to conflicting treaty obligations – the case of Romania (*Micula v. Romania*)

State aid is one of the areas of potential conflict between multiple layers of international obligations of the candidate country. There were at least seven intra-EU investment arbitrations centred around issues of state aid[27] before the sudden upsurge, starting in 2012, that concerned state aid in the field of renewable energy, when more than 40 new cases were brought, mostly against Spain, Italy, and the Czech Republic.[28]

The best paradigm of the troubles a candidate country may encounter trying to navigate between the requirements of investment protection and EU accession is provided by *Micula et al. v. Romania*,[29] an International Centre for Settlement of Investment Disputes (ICSID) case that was pursued by two former Romanian citizens who had acquired Swedish nationality but then returned to invest in Romania and their Romanian companies.[30] The case raised issues regarding the enforcement of EU state aid law and the enforcement of ICSID awards based on intra-EU BITs. The BIT in question was concluded between Sweden and Romania in 2002, five years before the Romanian accession to the EU. Ironically, its conclusion was part of Romania's obligations under the Europe Agreement, which entered into force on 1 February 1995, and provided legal framework for Romania's accession to the European Community, which was later transformed into the EU. Article 74 of the Europe Agreement provided

27 *Saluka (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *E.D.F. International v. Hungary*, UNCITRAL, Award, 4 December 2014; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (I), ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (Hereinafter: *Micula et al, v. Romania* (I) award.).

28 Baetens, 2019.

29 *Micula et al, v. Romania* (I) Award.

30 The ICSID arbitration against Romania was initiated in 2005 under the Sweden-Romania BIT. The claimants were the twin brothers, Ion and Viorel Micula and three food and soft drinks manufacturing companies owned and established by them in Romania: European Food, Starmill and Multipack.

for cooperation aimed at establishing a favourable climate for private investment in Romania. Among the aims of this cooperation, the same article listed 'the conclusion by the Member States and Romania of Agreements for the promotion and protection of investment'. Thus, the conclusion of BITs between member states and Romania was a direct consequence of the Europe Agreement.[31] The BITs had a European context and origin.[32] However, it was not envisaged in the Europe Agreement what would happen to those BITs once the candidate country became itself a member state. This prompted the Tribunal to note that it 'cannot therefore assume that by virtue of entering into the Accession Treaty or by virtue of Romania's accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT'.[33]

The Europe Agreement also required Romania to harmonise its existing and future legislation with that of the Community. The obligation of harmonisation extended to the area of competition law, which included the prohibition of illegal state aid. That portion of the *acquis* was applicable in Romania well before the date of accession.[34]

During the period preceding accession, Romania adopted measures designed to attract and promote investment. In the Emergency Government Ordinance number 24 adopted in 1998 ('EGO 24'), Romania introduced a plan for the development of its 'disfavoured' regions. The plan included exemptions from customs duties and corporate profit taxes for investors investing in those regions. Ştei-Nucet-Drăgăneşti was designated as a disfavoured region for a period of ten years, beginning on 1 April 1999. A government decision implementing EGO 24 declared that incentives offered under EGO 24 would be available to investors as long as that region was designated as disfavoured. Nevertheless, the incentives were prematurely revoked by Romania on 22 February 2005, in response to advice from the European Commission, which made this a condition for closing the competition chapter in the accession negotiations. According to the Commission, the incentives constituted state aid that was incompatible with EU law, which prohibited such anticompetitive schemes. The brothers Micula and their companies, being the investors and recipients of such incentives, initiated ICSID arbitration proceedings against Romania in August 2005. They claimed that they had made substantial investments in the Ştei-Nucet-Drăgăneşti region in reliance on the incentives and on the expectation that the incentives would remain in place during the entire ten-year period. They argued that the premature repeal of EGO 24 and the revocation of the incentives by Romania breached their legitimate expectations protected under the fair and equitable treatment standard of the BIT.[35] The respondent argued that the revocation was necessary to comply with EU state aid law, which, in turn,

31 *Micula et al, v. Romania* (I) Award, para. 304.
32 Ibid., para. 317.
33 Ibid., para. 321.
34 Ibid., para. 210.
35 Ibid., para. 131.

was necessary to complete accession to the EU in 2007.[36] In 2013, the arbitral tribunal found for the claimants and ordered Romania to pay cca EUR 82 million in damages and interest compounded on a quarterly basis. One of the decisive facts was that the three companies owned by the Micula brothers had been issued Permanent Investor Certificates (PICs), which were valid for ten years. According to the tribunal, the EGO 24 framework in conjunction with the PICs instilled in the Claimants a legitimate expectation that they would be entitled to receive the incentives until 1 April 2009.[37] Analysing the legitimacy of the investors' expectations in the context of Romania's impending accession to the EU, the tribunal concluded that between 1998 and late 2003, when the investments were made, it was reasonable for the Miculas to believe that the EGO 24 incentives were compliant with the Europe Agreement. According to the tribunal, it was decisive that the Romanian government had held a reasonable belief that EGO 24 was a valid regional operating aid under EU law. It follows that Miculas' beliefs were also reasonable.[38] On 18 April 2014, Romania filed an application for annulment of the award before an ICSID ad hoc committee, which was rejected in February 2016.

Meanwhile, on 1 January 2007, while the ICSID proceedings were still pending, Romania became a member state of the EU. The compensation granted in the 2013 award comprised an amount corresponding to the amount of incentives that the Micula companies would have received from the moment that EGO 24 was repealed until its scheduled expiry, on 1 April 2009, as well as lost profits resulting from the premature termination of the plan. By December 2013, the total sum owed by Romania to the claimants more than doubled due to compounded interest.[39] What ensued was a legal battle between the European Commission and the Micula brothers fought within the EU territory. Romania was caught in between the two fronts, torn between its international obligation and willingness to comply with the ICSID award and the prohibition to enforce the same award because it contravened the EU rules on state aid. In January 2014, the Commission advised Romania that any implementation or execution of the award would constitute impermissible new state aid and would have to be notified to the Commission. In February 2014, Romania informed the Commission that it had partly implemented the award by offsetting a portion of the compensation awarded to the claimants by the tribunal against taxes owed by one of the Claimants.[40] The European Commission then issued a suspension injunction in May 2014 to ensure that 'no further incompatible State aid would be paid'.[41] The Miculas sought annulment of this

36 Ibid., para. 132.
37 Ibid., para. 675.
38 Ibid., para. 706.
39 Commission Decision (EU) 2015/1470 of 30 March 2015 on state aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013, OJEU L 232/43, para. 1.
40 A Romanian court later declared the asserted tax set offs to be unlawful under Romanian law. See Micula v. Gov't of Rom., 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 284.
41 European Commission, Decision C(2014) 3192 of 26 May 2014 State aid SA.38517 (2014/NN) – Micula v Romania (ICSID arbitration award).

decision before the CJEU.[42] Slovakia and Spain intervened in support of the European Commission.[43] Because of the European Commission's investigation, Romania passed a law that suspended all of the enforcement actions initiated by the claimants.[44] Nevertheless, the claimants managed to obtain partial enforcement from the Romanian court and seized approximately EUR 10.17 million from Romania's Ministry of Finance. The Romanian authorities transferred the remaining amount of approximately EUR 106.5 million into a blocked account in the name of the five claimants.[45] On 30 March 2015, the European Commission issued a final decision declaring that the payment of the compensation awarded by the arbitral tribunal constituted state aid that was incompatible with the internal market within the meaning of the TFEU, Art. 107(1), because it sought to compensate the Miculas for advantages equivalent to those that were considered to be unlawful state aid. The Commission ordered Romania not to pay any further amounts and to recover the compensation it had already paid to the claimants or face infringement proceedings before the CJEU.[46] This decision was also challenged by the Micula brothers and their numerous companies in three separate proceedings that were joined before the General Court of the EU. Hungary and Spain intervened in support of the European Commission, but in an unexpected turn, the decision was annulled by the General Court.[47] The Commission lodged an appeal of the General Court's decision with the CJEU.

The Micula brothers also led an aggressive campaign for the enforcement of the 2013 award in various national jurisdictions in addition to Romania, including the US, the UK, France, Belgium, and Sweden.[48] Within the EU, the UK Supreme Court granted the Miculas' application despite the efforts of Romania and the EC Commission to prove that this would be contrary to the duty of sincere cooperation, as the EU Commission's investigation of the state aid in question was still ongoing.

42 Action brought on 2 September 2014 – Micula a.o. v Commission (Case T-646/14).

43 The case was discontinued by Order of the President of the Fourth Chamber of the General Court, 29 February 2016.

44 *Ioan Micula, Viorel Micula and Others v. Romania*, Decision on Annulment of 26 February 2016, ICSID Case no. ARB/05/2, para 73.

45 Subsequently, after the State Aid Decision of the Commission in 2015, Romania withdrew the funds from this account. See Micula v. Gov't of Rom., 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 285.

46 European Commission, Decision 2015/1470 of 30 March 2015 on state aid SA.38517(2014/C)(ex 2014/NN)(E) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013, OJEU L 232/43, Art. 2. On 7 December 2018 European Commission issued a Press release informing that it had decided to refer Romania to the CJEU for failing to fully recover illegal state aid worth up to €92 million from Viorel and Ioan Micula and their group of companies, as required by the Commission Decision 2015/1470 of 30 March 2015. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10147.pdf (Accessed 16.01.2021)

47 Judgement of the CJEU (General Court) of 18 June 2019. European Food and Others v Commission (Joined Cases T-624/15, T-694/15 and T-704/15).

48 Some decisions of national courts are accessible at https://www.italaw.com/cases/697.

In the US, litigation over enforcement lasted over six years. The District Court for the District of Columbia (the US court) rejected Romania's and the Commission's[49] jurisdictional argument that the CJEU's decision in *Achmea* rendered the arbitration agreement in the Sweden-Romania BIT invalid and unenforceable as of the date of Romania's accession to the EU.[50] The arbitration agreement was the sole basis for subject matter jurisdiction of the US court over Romania under the Foreign Sovereign Immunities Act (the arbitration exception from immunity, 28 U.S.C. § 1605(a)(6)). The US court distinguished *Micula* from *Achmea* for three reasons. The first was the difference in the factual matrix. In *Achmea*, the challenged government action occurred and the arbitration proceedings commenced after Slovakia entered the EU, whereas in *Micula*, all key events occurred before Romania acceded to the EU. The incentives were repealed in 2005, and the Micula brothers invoked the arbitration clause in the same year. At that time, Romania remained outside the EU and, according to the US court, thus remained subject, 'at least primarily, to its own domestic law'. The US court acknowledged in a footnote that at that time, Romania had been subject to the Europe Agreement, which formed part of the EU law, but in its view, the tribunal did not pass on questions of EU law. The treatment of EU law in the award was the second reason for distinguishing between the two cases. According to the US court, the *Micula* award was not related to the interpretation or application of EU law in the sense that the CJEU identified in the case of *Achmea*. Although EU law formed part of the factual matrix of the case, it was not the applicable law. The BITs' substantive rules solely supplied the applicable law. The tribunal did not decide a question of EU law in a way that would implicate the concerns expressed by the CJEU in *Achmea*. The third reason for distinguishing *Achmea* was the judgement of the General Court of the EU that intervened in 2019. This was, in fact, just a confirmation of the first two reasons, as the General Court itself distinguished *Micula* from *Achmea* on the basis of two facts: that the events giving rise to the *Micula* award occurred before the accession and that the *Micula* tribunal was not bound to apply EU law to events occurring prior to the accession.[51] Therefore, the US court concluded that Romania's position that the *Achmea* decision nullified the arbitration agreement in the Sweden-Romania BIT was untenable. Consequently, FSIA's arbitration exception applied. The judgement was affirmed on appeal.[52]

In November 2020, the same US court issued a civil contempt order against Romania. The Miculas moved to compel Romania to answer post-judgement

49 The European Commission entered the proceedings before the district court of the District of Columbia as *amicus curiae* in December 2018.

50 *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 276-283.

51 The General Court's suggestion that some portion of the award might be subject to EU state aid rules because it constituted compensation for the period after Romania's accession to the EU, which was subject to EU law, was considered by the US court to be an argument that goes to the merits of the ICSID award and was not a valid ground on which to reject the enforcement of the award. *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 286.

52 See, Judgement of the US Court of Appeals for the District of Columbia, 10 May 2020. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11504.pdf (Accessed 16.01.2021).

interrogatories, seeking additional information about its assets. Romania refused to answer those interrogatories because one of its main arguments against enforcement was that it had fully satisfied the award. The court granted the Miculas' request for a starting sanction of US$ 25,000 per week, progressing up to an amount of US$ 100,000 per week, 'to coerce Romania's adherence to the Discovery Order and to compensate Petitioners for the 'losses sustained' from Romania's noncompliance thus far'.[53] Romania finally paid this compensation to avoid enforcement measures on American soil against its state-owned enterprises.[54]

In 2014, the Micula brothers and their companies initiated another ICSID arbitration against Romania, claiming damages of over EUR 1.8 billion. This time, their claims were denied,[55] but the legal battle continues, as they currently seek annulment of this award before an ICSID *ad hoc* committee.[56]

The drama with Miculas begins in a candidate country aspiring to become a member of the EU and, at the same time, striving to attract foreign investment by granting various types of state aid. These two goals ultimately conflict and place the main protagonist in a hopeless situation. When finding Romania liable to pay damages, the tribunal did not point to any alternative means that would have allowed Romania to act fairly toward the claimants and avoid liability without sacrificing its policy goal of joining the EU in 2007. The tribunal recognised that 'Romania was in a quandary whilst trying to balance two conflicting policies, i.e. first, the continuation of the facilities regime and the protection of the interests of PIC holders in the disfavoured regions, and second, EU accession'.[57]

When one looks back at 15 years of litigation and the costs and humiliation that Romania had to endure, it becomes clear that the current legal framework exposes the candidate countries to grave risk of being caught between the Scylla and Charybdis of investment treaties and EU law. Certain EU requirements might oblige candidate countries to renege on their previous commitments to investors when they join the EU.[58] The *Achmea* judgement of the CJEU apparently offers no solution for candidate countries as 'the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgement of 6 March 2018, Achmea'.[59] The candidate countries will have to learn fast from the experience of Romania in *Micula* if they wish to avoid or attenuate that risk.

53 US District Court for the District of Columbia, Memorandum, Opinion and Order, 20 November 2020.

54 Szilágyi and Andréka, 2020, p. 104.

55 *Micula et al. v. Romania II*, ICSID Case No. ARB/14/29, Award of 5 March 2020.

56 The Annulment proceedings were registered on 13 July 2020. https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/29.

57 *Micula et al, v. Romania* I, Award, para. 864.

58 Ibid., para. 595.

59 Judgement of the CJEU (General Court) of 18 June 2019. European Food and Others v Commission (Joined Cases T-624/15, T-694/15 and T-704/15), para. 87.

3. Potential or prospective conflict of Serbia's treaty obligations arising simultaneously under BITs with EU countries and those arising under *acquis communautaire* (Agreement on Stabilisation and Association)

Serbia was granted the status of a candidate country by the European Council in 2012, and accession negotiations began in January 2014. Preceding its status as a candidate country, Serbia signed the Stabilisation and Association Agreement with the European Communities and their Member States (SAA) in April 2008, which entered into force in September 2013.[60] This agreement remains the main legal framework for the accession of Serbia to the EU. The comprehensive regime of the SAA, which is concomitant with the pre-accession Europe Agreements of new EU member states, requires direct application of EU rules on competition and state aid. Apart from being directly applicable, these rules became effective even before the SAA's entry into force, based on the Interim Agreement on Trade and Trade-related Matters signed simultaneously with the SAA in April 2008, which entered into force in February 2010. In other words, pursuant to Art. 139 of the SAA, EU rules on state aid were among the first rules that were binding to Serbia in its process of accession, which is one of the common features in the accession process of any candidate country.[61]

The principal provision on state aid in the SAA prohibits 'any state aid which distorts or threatens to distort competition by favouring certain undertakings or certain products', provided that it may affect trade between the EU and Serbia.[62] The benchmark for assessing legality is set forth in Art. 73(2) of the SAA: 'Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions.' As several commentators noted, this is an all-encompassing provision that implies the direct applicability of the EU's state aid law, even the soft law, and all EU law that is yet to be adopted without the possibility of participating in rule making.[63] It follows that, with respect to EU state aid law, an association country becomes a rule taker without being a rule maker.

Other obligations related to state aid include, *inter alia*, the obligation to set up a special institutional mechanism entrusted with authorising state aid schemes and individual aid grants, ordering the recovery of unlawfully granted state aid, providing regular information to the European Commission on individual decisions on state aid, and drawing up a regional aid map on the basis of the relevant Community guidelines.[64]

60 Stabilisation and association agreement between the European Communities and their member states and the Republic of Serbia, 30 April 2008, Official Journal of the European Union, L 278/16, 18.10.2013.

61 Papadopoulos, 2010, p. 120.

62 Art. 73(1) of the SAA.

63 See Milenkovic, 2018, p. 70, also citing Cremona, 2003, p. 265.

64 Arts. 73(4)(7)b of the SAA.

Transition and implementation periods vary but do not exceed five years from entry into force of the SAA. This can explain the relatively slow harmonisation of national legislation on state aid in Serbia with EU law. For example, the 2009 Law on State Aid Control was amended, in line with the European Commission recommendations, only in October 2019 and entered into force on 1 January 2020. In the opinion of the European Commission, this law is generally aligned with EU legislation on state aid, but several additional requirements are still missing: implementation of secondary legislation, strengthening a still-novel Commission on State Aid Control, transparency, and non-discriminatory allocation of subsidies and other forms of state aid.[65] Therefore, the EU rules on state aid are slowly but steadily becoming incorporated into Serbian law.

On the other hand, Serbia, like many former and current pre-accession countries, relies heavily on state aid as part of its foreign investment policy. The total amount of state aid awarded by different governmental authorities to all beneficiaries, both domestic and foreign, fluctuated between EUR 319.82 million in 2005 and EUR 939.6 million in 2019. Official data on the allocation and distribution of state aid demonstrate that it is awarded through different instruments such as subsidies, tax incentives (tax credits, cancellation of tax debts, tax write-offs), loans, and guarantees. Subsidies are by far the most frequently used instrument of state aid, comprising 50-70% of total state aid.[66] However, official figures do not disclose the amount of subsidies granted as incentives to foreign investors, so these amounts remain within the sphere of speculation, and the government is often criticised by the media and civil society for the lack of transparency in this domain.

The 'invisibility' of subsidies to foreign investors, subsidies which may be in contravention of Art. 73(1) SAA, can also explain the comments made by the European Commission in its 2020 Progress Report regarding the inventory of schemes and certain aid schemes, which still need to be finalised or, in certain areas, harmonised with the *acquis*.[67] One of the obligations under the SAA is to establish a comprehensive inventory of aid schemes in line with the *acquis* no more than four years from the entry into force of the SAA.[68]

65 European Commission, Serbia 2020 Report – Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2020 Communication on EU Enlargement Policy, SWD(2020) 352 final, 6 October 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0352. (Hereinafter: 2020 Progress Report), 58, 78.

66 E.g. 60.7% in 2016, 69.6% in 2018, and 55.4% in 2019. – Official data of the Commission on State Aid Control of Republic of Serbia, Report on State Aid Granted in the Republic of Serbia in 2016, p. 27; Report on State Aid Granted in the Republic of Serbia in 2018, p. 27; Report on State Aid Granted in the Republic of Serbia in 2019, p. 27. Available at: http://www.kkdp.gov.rs/izvestaji.php (Accessed 16.01.2021).

67 'The existing aid schemes, namely the fiscal state aid schemes part of the laws on corporate income tax, on personal income tax and on free zones, are not yet harmonised with the EU *acquis.* Some progress has been noted on creation of a new inventory of schemes.' – 2020 Progress Report, 78. It is to be noted that tax legislation allows for tax exemptions for large investments (Art. 50a of the Law on Corporate Income Tax).

68 Art. 73(6) of the SAA.

The general justification for state aid is to protect the market's competitiveness and provide an impetus for economic development. However, the figures illustrate that Serbia has 'a higher share of state aid in GDP compared to the European Union member states, on the one hand, and an unfavourable position from the standpoint of competitiveness, on the other hand, which is reflected in weaker scores in the Global Competitiveness Index and, consequently, ranks in the Global Competitiveness Report by the World Economic Forum'.[69]

Trends in regulating and distributing state aid in Serbia have been closely monitored by the European Commission. The monitoring power of the European Commission was laid down in the legal framework established by the SAA. The clout of the European Commission also transpires from official reports of Serbian governmental agencies entrusted with the control of state aid. For example, the Commission on State Aid Control regularly reflects on comments made by the European Commission and marks areas in which changes were made in line with its recommendations. Additionally, the general reports on the progress made by Serbia in the process of accession include the EU analysis and recommendations in the area of state aid. In its 2020 Progress Report, the European Commission is moderately critical of the Serbian state aid framework, pointing primarily to institutional and structural deficiencies as well as to a lack of transparency. The European Commission remarks are made in general terms with respect to all types of state aid. However, with respect to subsidies for foreign investors specifically, the 2020 Progress Report merely notes that 'Serbia continues to use budgetary subsidies for newly created jobs as an incentive for foreign direct investments'.[70]

It seems that despite the large amounts of distributed state aid and lack of transparency in the process of allocation, the European Commission still hesitates to demand the full compliance of Serbia with EU state aid requirements. There are possibly several reasons for this: the national institutional framework is yet to be redesigned to gain full structural independence so that it can, by itself, provide adequate monitoring of state aid in close cooperation with the European Commission; for the first five years of the SAA, Serbia as a whole, similar to Romania in the period from 1995 to 2000, was categorised as an underdeveloped region in terms of Art. 87(3) (a) of the EC Treaty, pursuant to Art. 73(7) of the SAA, which provided it with a wider margin of discretion in allocating state aid. Furthermore, there are likely other priorities on the European Commission's list. Finally, given the 'conditionality' approach of the EU in the accession process[71] and a larger set of requirements for Western Balkan countries to join the EU,[72] there seems to be plenty of manoeuvring space and extra time for further adjustments and harmonisation. However, despite the changed accession criteria and procedures,

69 Radukić and Vučetić, 2019, p. 34.

70 2020 Progress Report, 98.

71 'The transposition of key legislation under other chapters (e.g. *acquis* on environmental impact assessment, anti-discrimination legislation, public procurement, and state aid control) is a prerequisite for using European structural and investment funds.' – 2020 Progress Report, 100.

72 Milenkovic, 2018, p. 68.

compared to the last three rounds of EU accession,[73] one should still cautiously read the European Commission's hesitant approach. Given the current state of implementation of the EU rules on state aid,[74] together with the possibility of the change of pace in implementing those rules as illustrated in the case of Romania, it is not unlikely that Serbia will find itself between conflicting obligations arising under EU law, on the one hand, and international commitments to foreign investors, on the other.

4. Mechanisms for ensuring compatibility of the dispute settlement clauses in Serbia-EU country BITs with EU law

The structural changes of the Serbian exchange with the EU defined in the SAA have had an impact on the trade regime between the two economies but also on the FDI policies of Serbia and the inflow of FDI from the EU member states. EU countries have been not only Serbia's most important trade partners but also its dominant investment partners. From 2010 to 2016, EU countries were among the top five major investor partners by FDI inflow into Serbia. Their share was rarely below 50%, and in some years, it reached nearly 90%.[75]

Since 2005, when it encountered its first investment claim, Serbia has had to defend 12 arbitration cases, all of which involved investors from at least one EU member state.[76] Given that Serbia has 22 BITs with EU member states,[77] and in light of the *Achmea* decision and the Termination Agreement, on this front as well, the risks are imminent, and actions are required.

73 The Europe Agreements generally required, within the pre-accession arrangements, the conclusion of BITs between EU member states and candidate countries. ('Indeed, in the context of the Europe Agreements, which the EU signed with the accession countries in order to prepare them for the EU, the EU was encouraging the Eastern and Central European countries to conclude BITs.' – Lavranos, 2020b, p. 445). There is no such provision in the SAA with Serbia. Nevertheless, Art. 93 of the SAA requires Serbia to 'improve the legal frameworks which favours and protects investment.' On the other hand, Art. 15 of the SAA requires Serbia to 'start negotiations with the countries which have already signed a Stabilisation and Association Agreement with a view to concluding bilateral conventions on regional cooperation, the aim of which shall be to enhance the scope of cooperation between the countries concerned.' This is the condition for 'the further development of the relations between Serbia and the European Union.'

74 'SAA state aid rules effectiveness stands at the level where it was in 2009 when the Agreement was signed. No added value to the minimum liberalisation can be identified.' – Sretić, 2018, p. 162.

75 Bjelić and Milovanović, 2018, pp. 137–138.

76 Four of those cases are still pending. For chronology and the parties, see: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/187/serbia (Accessed 16.01.2021).

77 Serbia has BITs with Malta, Portugal, Denmark, Cyprus, Finland, Lithuania, Belgium/Luxembourg, Spain, Slovenia, Netherlands, Austria, Hungary, Croatia, Czech Republic, Greece, Poland, Bulgaria, Slovakia, Romania, Germany, Sweden, and France. The BIT signed with Italy has not entered into force.

Serbia should be prepared to take certain steps to align its treaties with EU law requirements even before it reaches the stage of accession. This is clear from the latest progress report for Serbia, which states the following:

> 'For all investment and trade agreements, it is important that Serbia ensures compatibility with the EU acquis and includes a sunset clause allowing it to denounce the agreement upon accession to the EU. Serbia should also develop a strategy for amending or terminating existing bilateral investment agreements that fail short of EU standards and expose the country to risks due to the broad and open language used.'[78]

Serbia should thus, according to the recommendation of the European Commission, follow the beaten path set forth by the Termination Agreement. This path entails the amendment of the existing BITs to ensure their compatibility with the EU *acquis* by including a termination clause that would enable the contracting parties to terminate those agreements once Serbia accedes to the EU. Within the scope of the termination, two additional situations need to be addressed and agreed upon with the EU partners: the treatment of any newly initiated arbitrations and the destiny of pending arbitrations. Finally, Serbia should proceed to a systematic and comprehensive examination of the language of its existing treaties (with both EU and non-EU countries) to determine whether they fall short of EU standards, are incompatible with the EU *acquis*, or contain overly broad or open language that exposes Serbia to unnecessary risks.

■ *4.1. Amendments to Ensure Termination of Serbia-EU member state BITs Upon Accession*

Ensuring the timely phase-out of Serbia-EU member state BITs would entail inserting amendments into the existing 22 BITs that would provide for the automatic termination of those treaties on the date of Serbia's accession to the EU. As for the sunset clauses contained in those BITs, they should be terminated by these amendments.[79] Their termination before the accession would, to a certain extent, resolve the problem of retroactivity, which will be further discussed in connection with the new arbitration proceedings. The investors who made their investments before the termination could still rely on sunset clauses provided that the sunset clause expired before the accession.[80] However, investors who made investments after the termination could no longer rely on them as the sunset clauses would no longer be part of the BIT. In this manner,

78 2020 Progress Report, 114.

79 'The Czech Republic adopted a two-step approach to the termination of its BITs with, at least, Denmark, Italy, Malta and Slovenia. The parties first agreed to amend the treaty by terminating the survival clause and then, secondly, to terminate the treaty itself.' – Titi, 2016, p. 436. '[T]his has been the preferred solution, which the European Commission has been pushing all member states to adopt.' – Lavranos, 2016.

80 Sunset clauses commonly provide extended validity for the period of 10 to 20 years.

at least some of the sunset clauses with EU member states would be allowed to expire before the accession.

The proposed amendments should be acceptable to EU countries and the European Commission because they are aware of the problems caused by pre-accession intra-EU BITs. Pursuant to Regulation 1219/2012,[81] the European Commission is entitled to supervise any new BITs as well as amendments to existing BITs and must ultimately authorise them.

There is one important problem to be noted in connection with the prospective termination of intra-EU BITs pursuant to the 2020 Termination Agreement. There are predictions that the termination of intra-EU BITs may lead to the restructuring of intra-EU investments such that they would be covered by extra-EU BITs.[82] EU investors may migrate to more favourable destinations from which they would place their FDI inflows to EU countries. Some British[83] and Swiss[84] law firms have already sensed the potential for hosting such affluent migrants, distrustful toward the host EU member state courts as the exclusive forums for investment protection. If such restructuring is undertaken before any dispute is in existence or reasonably anticipated, most investment tribunals would likely hold that the restructured investment qualifies for the extra-EU treaty protection.

Therefore, the extinction of Serbia-EU member state BITs cannot work in isolation from other BITs. Investors from EU member states could restructure their investments to meet the requirements of another non-EU member state BIT, such as Serbia's BITs with the UK and Switzerland,[85] countries that aspire to welcome the restructured investors fleeing from their former EU nests. To effectively avoid risks, any move to terminate Serbia-EU Member State BITs should be accompanied with provisions in the BITs addressing the issue of the restructuring of investments, shareholder claims, and reflective loss.[86] The definitions of investors and investments should also be adjusted. Only investors with substantial business activities in their home state should be protected.[87] Other provisions to be considered for inclusion are denial of benefits and good

81 Regulation (EU) No 1219/2012 of 12 December 2012, Official Journal of the EU L 351/40, Arts. 9 and 11.

82 Lavranos, 2020b, p. 457; Bray and Kapoor, 2020; Triantafilou and Manoli, 2020, p. 24.

83 Storrs and Witzorek, 2020.

84 Terrapon and Feit, 2020, pp. 2–3.

85 https://investmentpolicy.unctad.org/international-investment-agreements/countries/187/serbia (Accessed 16.01.2021).

86 See, UNCITRAL, Working Group III, Possible reform of investor-State dispute settlement (ISDS), Shareholder claims and reflective loss, Note by the Secretariat, A/CN.9/WG.III/WP.170, available at https://undocs.org/en/A/CN.9/WG.III/WP.170 (Accessed 16.01.2021). For example, CETA (2016) provides in Art. 8.23 that a claim may be submitted to an investment arbitral tribunal by (a) an investor of a Party on its own behalf; or (b) on behalf of a locally established enterprise which it owns or controls directly or indirectly. In the latter case, Art. 8.39(2) provides that (a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the locally established enterprise; and (b) an award of restitution of property shall provide that restitution be made to the locally established enterprise.

87 See, for example, the explicative part of the definition of investor from the CETA (2016).

faith clauses.[88] In other words, the incompatibility of ISDS clauses with EU law should be addressed from a wider perspective of the reform of investment treaty law, which currently, with its broad definitions of investors and investments and protection of indirect shareholders, allows large-scale potential for treaty shopping.[89] These definitions should be in line with EU standards. Therefore, once the process of amendment is initiated, it should not stop at providing for the termination of the future intra-EU BITs or the termination of sunset clauses but should proceed to a comprehensive reform of BITs in line with the new generation of EU investment agreements.

■ *4.2. New arbitrations*

If the amended Serbia-EU member state BITs provide that they are terminated upon the date of accession, that termination will affect the new proceedings initiated after the accession date, such as *Achmea*. Those proceedings will not be based on the consent of Serbia as the potential respondent, and, presumably, the tribunals will have to decline jurisdiction. However, some uncertainties remain regarding the legal possibility of terminating the sunset clauses in this manner.

The EU likely anticipates that sunset clauses apply only in cases of unilateral terminations, whereas they do not apply in cases of consensual terminations.[90] Nevertheless, EU member state investors could claim before the arbitral tribunals that once they have made the investment in Serbia (prior to the accession), they have obtained a vested or acquired right to rely on the BIT protections that can expire only upon expiry of the promised term of the sunset clause. Alternatively, they could put forward an argument based on making the investment in reliance on the specified term of the sunset clause, just as the Miculas made their investments in reliance on the ten-year term of the incentives.[91] In *Magyar Farming Company,*[92] the tribunal addressed the issue of the purported termination of the sunset clause by the 2019 Declarations of the Member States:

> '222. The Tribunal's finding that the 2019 Declarations were not the proper procedure to terminate or amend the BIT is not based on mere formalism.

88 CETA contains a denial of benefits clause in Art. 8.16 and a good faith clause in Art. 8.18(3).

89 Notably, the widespread use of the Dutch BITs by non-Dutch investors in the past years has led the Netherlands to order an investigation by UNCTAD which found that '[i]n around three quarters of Dutch cases, the ultimate owners of the claimants are not Dutch. In two-thirds of those cases, the relevant foreign-owned group of companies does not appear to engage in substantial business activities in the Netherlands.' – Treaty-based ISDS cases brought under Dutch IIAs: An Overview, available: https://investmentpolicy.unctad.org/uploaded-files/document/treaty-based-isds-cases-brought-under-dutch-iias-an-overview.pdf. Accessed on 16 January 2021.

90 This argument, attributed to Anthea Roberts, is cited in Titi (2016), p. 438.

91 Bray and Kapoor, 2020.

92 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary,* ICSID Case No. ARB/17/27 Award of 13 November 2019. For the review of this case, see, Szilágyi and Andréka, 2020, pp. 92–105.

> The BIT is an international treaty that confers rights on private parties. While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*. This is evident for instance from Article 13(3) of the BIT, which grants a guarantee of stability to investors who have made investments in reliance on the BIT:
>
> > In respect of investment made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.
>
> 223. This provision shows that, even where the Contracting Parties terminate the treaty on mutual consent, they acknowledge that long-term interests of investors who have invested in the host State in reliance on the treaty guarantees must be respected. This is the purpose served by the 20-year sunset provision. If the protection of existing investments outlives an unambiguous termination of the Treaty, then the protection must continue a fortiori in respect of a decision of an adjudicatory body constituted under a different treaty or of declarations that purport to clarify the legal consequences of that decision.' (references omitted)

Many authors have already expressed their reservations regarding the retroactive effect of Arts. 2(2) and 3 of the Termination Agreement, which terminate the sunset clauses. Some of them question whether the tribunals in the 'New Arbitration Proceedings'[93] will accept that the sunset clauses contained in the terminated intra-EU BITs are moot and inapplicable for investments already made.[94] Others qualify these clauses as 'a further troubling blow to basic principles of international public law, among them *pacta sunt servanda* and legal certainty'[95] and wonder 'whether the intended effects of the Termination Agreement actually are compatible with the VCLT'.[96] Further criticism comes from those authors who consider that the Termination Agreement 'also raises some questions concerning its conformity with fundamental principles recognised by the CJEU, such as legal certainty, non-retroactivity and the protection of legitimate expectations'.[97]

Considering these views, it is not unlikely that future investment tribunals would be inclined to interpret the termination of sunset clauses prospectively, such that the termination would not apply to investments that were already made before the termination in reliance on the sunset clause. Indeed, the costly testing of this controversial

93 Pursuant to the Termination Agreement, Art. 1(6) "New Arbitration Proceedings" means any Arbitration Proceedings initiated on or after 6 March 2018.

94 Lavranos, 2020a.

95 Adams et al., 2020.

96 Triantafilou and Manoli, 2020, p. 24; Bray and Kapoor, 2020.

97 Guarín Duque, 2020, p. 817.

question only requires an investor who is willing to risk initiating new arbitration proceedings.[98] For this reason, the candidate countries would be well advised to terminate the sunset clauses from their BITs well before their accession.

■ *4.3. Pending arbitrations*

It is probable that there would be certain pending arbitrations with investors from EU member states at the time that Serbia accedes to the EU, such as the arbitration that was occurring between the Micula brothers and Romania.[99] The Termination Agreement defines 'Pending Arbitration Proceedings' as those that were initiated prior to 6 March 2018 and do not qualify as concluded arbitration proceedings. The solution envisaged for those arbitrations in the Termination Agreement is for the two state parties of the terminated BIT to inform the arbitral tribunal about the consequences of the *Achmea* judgement, that is, that the arbitration clause is contrary to the EU Treaties and thus inapplicable.[100] This provision cannot be transposed into a candidate country's BITs with member states of the EU as the date of the *Achmea* judgement is not the date of termination for that country. The provision that could be agreed upon would require the acceding state and the other member state to inform the tribunal in such pending arbitration that the BIT has been terminated pursuant to its own terms on the date of accession based on the BIT provision mentioned above that would envisage termination upon accession. The desired outcome would be that the arbitral tribunal, upon receiving such a notification, dismisses the claims due to lack of jurisdiction.

However, such an outcome is not certain. As the tribunal in *Magyar Farming Company* held, even if the BIT has been terminated, as argued by Hungary (in that case, by virtue of the 2019 Declarations), the relevant time for determining jurisdiction in an investment arbitration case is the date of initiation of the arbitration.[101] The tribunal found that 'the Claimants accepted the BIT's offer to arbitrate prior to its purported termination'.[102] The tribunal then quoted the ICSID Convention, Art. 25, which provides that 'when the parties have given their consent, no party may withdraw its consent unilaterally'.[103] Following this rationale, other arbitral tribunals in the pending cases

98 Tropper, 2020. The author mentions a case where a tribunal implied that the member states parties to a treaty may denounce a sunset clause: 'As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant 'survival' period. Accordingly, [...] the Tribunal would still have jurisdiction to hear this case'. – *UP & CD Holding Internationale v. Hungary*, ICSID Case ARB/13/35, Award, 9 October 2018, para. 265.

99 According to one source, there were at least 55 pending intra-EU arbitrations only before ICSID at the end of 2020. See Yanos and Ramos-Mrosovsky, 2020, p. 2. Other sources refer to approximately 15 pending intra-EU arbitrations based on BITs that would be terminated once the Termination Agreement enters into force and around 45 pending intra-EU arbitrations based on the ECT. See Prantl and Pettazzi, 2020.

100 *See*, the Termination Agreement, Art. 7(a).

101 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, para. 213.

102 Ibid.

103 Ibid. See, also, *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, para. 593 and *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, para 226.

might decide to retain and confirm jurisdiction, as the 'consent to arbitrate, in the sense of a meeting of the minds, which is perfected by the investor's acceptance of the State's offer to arbitrate expressed in the BIT would not be retroactively invalidated by a subsequent termination of the BIT'.[104] According to the holding in *Magyar Farming Company*, therefore, the Parties' agreement to terminate the BIT upon accession could not invalidate the consent to arbitrate, which was given and accepted prior to the termination.

Some authors have noted that the outcomes of the tribunals' examination of this issue may differ depending on the dispute resolution mechanism chosen by the claimant as the ICSID Convention expressly prevents unilateral withdrawal of consent to arbitration.[105] Other authors highlight the public international law implications of the Parties' attempt to extend the effects of termination to already pending arbitrators. Bray and Kapoor refer to VCLT, Art. 70(1)(b), which states that the termination of a treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination' and to Art. 26 *pacta sunt servanda* obligations, particularly in cases in which the promises given have been relied on by individuals.[106]

It should be noted that, pursuant to Art. 1(5) of the Termination Agreement, the term 'Pending Arbitration Proceedings' also encompasses final arbitral awards that were rendered before the termination of the relevant BITs (and before the *Achmea* judgement of the CJEU) but were not yet executed at the time of termination, such as the *Micula* award. In such cases, pursuant to Art. 7(b), the EU member states are obliged to resist enforcement, that is, 'to ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it'. Again, the retroactive reneging of investors' rights under a final award is dubious and may be viewed as expropriatory, especially by the courts of non-EU countries. Nardell and Rees-Evans argue that the attempt to undercut arbitrations commenced well before the agreement came into force, including those resulting in awards rendered before the *Achmea* judgement, is incompatible with investors' rights under the European Convention on Human Rights and the EU's Charter of Fundamental Rights. They argue that 'by purporting to deprive investors of the fruits of valid claims in this way, the Agreement infringes on Article 1 of the First Protocol to the ECHR […] and may also breach the rights of access to justice and a fair hearing under Article 6(1) (and their equivalents in the Charter)'.[107]

The ICSID award in *Magyar Farming Company* would also fall under the definition of 'Pending Arbitration Proceedings' in terms of the Termination Agreement but for the fact that the UK is not a party to the Termination Agreement. Therefore, it appears

104 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, para. 214.
105 Guarín Duque, 2020, p. 822; Triantafilou and Manoli, 2020, p. 24.
106 Bray and Kapoor, 2020.
107 Nardell and Rees-Evans, 2020, p. 1.

that the UK-Hungary BIT remains in force.[108] However, now that the new EU-UK Trade and Cooperation Agreement was signed on 24 December 2020[109] it remains to be seen whether the UK-Hungary BIT will be deemed in force or repealed. This case also ended up in the US courts, in the same district court for the District of Columbia in which enforcement was sought by the UK claimants in March 2020.[110]

Both *Micula* and the *Magyar Farming Company* case flag the risk of respondent countries being dragged to third-country courts[111] by investors from members states in 'Pending Arbitration Proceedings' pursuant to intra-EU BITs even after the accession. For these reasons, it seems that candidate countries should strive to settle all their pending arbitrations with investors from EU countries before the date of accession[112] to avoid protracted legal battles over the enforceability of the awards and the effects of the retroactive termination of the arbitration clauses.

■ *4.4. Other possible amendments to the existing Serbia-EU member state BITs*

There are other possible avenues for tackling issues raised by the *Achmea* decision and the Termination Agreement with respect to Serbia-EU member state BITs. One possible option would be to renegotiate these BITs to exclude existing ISDS clauses and sunset clauses entirely and to replace them with different dispute settlement mechanisms, such as inter-state arbitration. Given that some authors caution that these amendments could be easily circumvented via the MFN clause,[113] it follows that renegotiation should also include an MFN clause to exclude ISDS clauses from its scope of application. A more radical alternative would be to replace them all with one EU-Serbia BIT, which would have different ISDS provisions as agreed upon by all parties. Recent EU treaty-making practice provides support for both propositions. For example, the EU-UK Trade and Cooperation Agreement, adopted on 24 December 2020 contains provisions on substantive protection for the Contracting Parties' investors but no ISDS

108 Guarín Duque, 2020, p. 821.

109 This is a free trade agreement which also contains provisions on investment protection excluding investor-state dispute settlement clauses. It is not yet in force but has been provisionally applied since 1 January 2021. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6039/download (Accessed 16.01.2021).

110 Information available at https://www.italaw.com/sites/default/files/case-documents/italaw11363.pdf (Accessed 16.01.2021). Hungary filed an annulment application against the ICSID award, and the annulment proceedings are currently pending. – https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/839/magyar-farming-and-others-v-hungary (Accessed: 16.01.2021).

111 There are currently enforcement actions concerning intra-EU investor-state awards of approximately US$600 million in value that are pending before United States federal district courts. Yanos and Ramos-Mrosovsky, 2020, p. 2.

112 Such settlement is also envisaged in the Termination Agreement, Art. 6(2): '[...] this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018.'

113 Titi, 2016, p. 440.

mechanism, which is replaced by interstate arbitration.[114] Further, certain EU member states have substantially changed their investment-treaty policies not only regarding other EU member states but also regarding non-EU states. The Netherlands terminated several of its non-EU BITs[115] and, in 2018 (revised in March 2019), substantially revised its Model Investment Agreement.[116] These two trends combined provide a platform for renegotiating the Serbia-EU member state BITs.

Another option for amending the existing Serbia-EU member state BITs is to insert a clause that would provide for the supremacy of obligations stemming from EU membership. Similar provisions have already been in place for former pre-accession countries, such as Croatia. The 1991 BIT between Austria and Croatia, for example, provides the following in Art. 11(2): 'The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time.' Although Croatia's challenges to the jurisdiction of investment tribunals based on this provision were unsuccessful,[117] the *obiter dictum* of the *Addiko* tribunal provides support for inserting such provisions in BITs with pre-accession countries because they may prospectively invalidate the consent to arbitration, following the *Achmea* decision:

> 'The Tribunal thus finds that as a matter of international law, any invalidation of Article 9(2)'s stated "irrevocabl[e] consent[] in advance" to arbitration, by virtue of an incompatibility with the EU *acquis* pursuant to Article 11(2) of the BIT, could not be applied to invalidate a consent to arbitration that was given before the *Achmea* Judgement, but only prospectively for investors who had not yet initiated a BIT arbitration. In the Tribunal's view, this conclusion holds whether the *Achmea* Judgement *itself* is considered under EU law to be applied *ex nunc* or alternatively ex *tunc*.'[118]

114 Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Official Journal of the European Union, L 444/14, 30 December 2020.

115 With South Africa (as of 1 May 2014), Indonesia (as of 1 July 2015), India (as of 1 December 2016), and Tanzania (as of 1 April 2019). – Lavranos, 2020b, p. 444.

116 Available at: https://www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden (Accessed: 16.01.2021).

117 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April 2018, 30 April 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Article 9 Objection to Jurisdiction, 12 October 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility, 24 March 2020 (UniCredit decisions are not public – information gathered from the awards that are publicly available); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections, 30 September 2020.

118 *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, para. 280.

There are EU member states that have recently concluded BITs with third countries, including clauses that provide for priority of obligations arising under EU membership while at the same time excluding EU law as applicable under the BIT. For example, Hungary signed a BIT with Kyrgyzstan in 2020 that contains the following provision:

> 'This Agreement shall apply without prejudice to the obligations deriving from Hungary's membership in the European Union, and subject to those obligations. Consequently, the provisions of this Agreement may not be invoked or interpreted neither in whole nor in part in such a way as to invalidate, amend or otherwise affect the obligations of Hungary arising from the Treaties on which the European Union is founded.'[119]

The same BIT excludes the applicability of EU law by a prospective arbitral tribunal in the following manner:

> 'When rendering its decision, the tribunal shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. For greater certainty the national law of the Parties shall not constitute part of the applicable law. In case of Hungary the term "national law" comprises the law of the European Union.'[120]

Similar provisions are to be found in the Hungary-Belarus BIT[121] and the Lithuania-Turkey BIT[122] as well as in the Dutch Model Investment Agreement.[123] The recent EU-Singapore BIT, which replaces all existing Singapore-EU member state BITs, sets forth a specific dispute settlement mechanism and excludes the applicability of the parties' domestic law.[124]

119 Art. 16(1) of the Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, signed on 29 September 2020. Not in force.

120 Art. 9(7) of the Hungary-Kyrgyzstan BIT.

121 Arts. 9(8), 16(4) and 17(1) of the Agreement Between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments, signed on 14 January 2019, entered into force on 28 September 2019.

122 Art. 2(3) of the Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments signed on 28 August 2018. Not in force.

123 Art. 2(5) of the Dutch Model Investment Agreement.

124 Art. 3.31(2) of the Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part, signed on 19 October 2018, not yet in force. OJ L 279 (09/11/2018).
Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download (Accessed: 16.01.2021).

5. Creating a new mechanism for efficient dispute settlement

The candidate countries should also bear in mind that the European Union has firmly stood by the position that the best protection against all concerns raised by investment arbitration would be its replacement with a multilateral investment court (MIC).[125] Since November 2015, when it publicly announced the establishment of an international investment court as its policy goal,[126] the EU has actively worked on the realisation of the MIC project, including in the UNCITRAL Working Group III.[127]

For seamless implementation of this idea, states are advised to introduce buckle clauses into current BITs that would enable transition from the current ISDS mechanisms to MIC once it comes into place. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains the following provisions:

> 'The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.'

Some EU model BITs already include provisions by which the state parties automatically accept the jurisdiction of the MIC once it becomes operational.[128] These provisions could serve as a model for the amendment of the Serbia-EU member state BITs.

6. Conclusion

There are several messages for candidate countries such as Serbia regarding their investment treaty making and policy to be taken from the recent conflicts between the EU and international investment arbitrations. Recent events have exposed the potential for conflicts between existing BITs and EU law on both procedural and substantive levels. The landscape of the intra-EU BIT policy has drastically changed following the CJEU *Achmea* decision and the 2020 Plurilateral Termination Agreement. The EU set

125 Possible reform of investor-State dispute settlement (ISDS) – Submission from the European Union, 12 December 2017, A/CN.9/WG.III/WP.145. For a comprehensive analysis of this idea, see Bungenberg and Reinisch, 2018.

126 Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396 (Accessed: 16.01.2021).

127 See, submissions of the European Union in documents A/CN.9/WG.III/WP.145 and A/CN.9/WG.III/WP.159/Add.1.

128 For example, the 2019 Dutch Model Investment Agreement, Art. 15 – Multilateral investment court. See also Lavranos, 2020b, p. 453.

new red lines that are on the opposite side from the EU accession procedure, compared to the last wave of accessions – while, originally, BITs with EU member states were trendy and desirable, they are now a no-fly zone. However, this is not the only problem with BITs signed between candidate countries and EU member states. As illustrated by the experiences of Romania and Hungary, newly-EU-weds can run into conflicting obligations and find themselves torn between BITs and EU law to such an extent that no reconciliation seems possible. Therefore, candidate countries such as Serbia should be advised to adjust their pre-accession commitments, both procedural and substantive, with incoming EU obligations within their new setting in a timely manner. These inevitable adjustments should be conducted cautiously to minimise the countries' potential conflicting treaty obligations and maximise their bargaining power.

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The Current State of Recodification Works of Slovak Private Law and Its Perspectives (A New Civil Code *per partes or en block*?)

ABSTRACT: *The article discusses the current state of the ongoing process of private law recodification in the Slovak Republic. Despite the efforts promised by every new government, to this day, none of them have achieved a recodification of civil law that would ultimately result in unambiguous treatment of, in particular, the so-called questions of values, nor have any of them seen through the creation of a codex, which has long been required. The need for recodification first became apparent even before the November 1989 Revolution. The focus of the expert public post-revolution was on filling the legal vacuum that came about through the abolition of the Economic Code and the Code of International Trade and on substituting them with a new and equivalent legal regulation. Due to time constraints and the urgent need for a solution to the given situation, the country failed to adopt a single universal regulation for private law; instead, the so-called major amendment of the previous Civil Code was adopted. This state has since prevailed; thus, Slovakia's legal system is still subject to a Civil Code from 1964, amended on several occasions, as well as the Commercial Code from 1991. This is despite the numerous attempts to recodify private law, the last attempt having been introduced to the public at the end of 2018. The form of this reform was, however, surprising. Slovakia saw a change in governments in 2020, and the new government has, to date, declared other priorities in the domain of justice. It is, therefore, difficult to say whether the new government will adopt the ambition to recodify private law and, if so, to what extent it will succeed in completing this goal.*

KEYWORDS: recodification of private law, Civil Code, Commercial Code, the Legislative Intent of Codification of Private Law.

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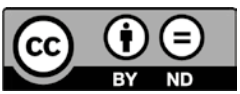

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1. Introduction

Since March 2020, Slovakia has had a new government, which, like all previous governments, in its declared program for 2020–2024, cites the need to recodify Slovak private law and simultaneously recommends that the authors of the new Slovak Civil Code should be inspired by the experiences of their foreign colleagues, namely those from the Czech Republic[2] ('why create something that has already been created'). The current declared program explicitly states, '*The Government of the Slovak Republic is committing to creating a new Civil Code and law on commercial entities, following a rigorous participative discussion about its basic legal institutions, on the basis of a common agreement; while taking into consideration the practical experience related to introducing the new Czech Civil Code into practice.*'[3]

The need to recodify private law, however, extends, in terms of timeframe, beyond the existence of the Slovak Republic, since the first efforts to create a new modern civil code date back to the common Czechoslovak state and even to the pre-November 1989 era when Czechoslovakia witnessed a momentous change in societal and political affairs.[4]

Despite many attempts and specific activities within the Slovak Republic, and in contrast with the Czech Republic as well as with Hungary, Romania, Estonia, and Russia, this recodification process has not yet been completed. The Slovak Republic thus remains one of the last countries to adopt recodification of private law out of all the previously socialist states of Eastern Europe.[5]

2. The current state of the Civil Code

Since 1964, private law in the Slovak Republic has been governed by the basic and general regulation of the Civil Code of 1964, that is, Art. No. 40/1964 Cc and its later regulations (henceforth referred to as the 'Civil Code').

Throughout its existence, it has been amended more than 60 times, while it is worth noting that out of the total amount, only four amendments were adopted prior to 1989 (before the so-called Velvet Revolution). The Amendment of the Civil Code, Art. No 509/1991 Cc, is considered to be of specific importance, as it essentially changed, or

2 The Czech Republic shared the contents of its Civil Code from 1964 with the Slovak Republic up until 2012, while after the separation of Czechoslovakia (i.e. since 1.1.1993), each country made its own edits of their respective Civil Codes. Unlike Slovakia, though, the Czech Republic managed to add a new private legal codex in 2012 (art. No. 89/2012 Cc), which came into force in 2014.

3 Declared program of the Slovak Republic's government for the period 2020–2024, available at: http://www.culture.gov.sk/programove-vyhlasenie-vlady-180.html.

4 Eliáš, 2008, pp. 1–7.

5 Another of these countries that have yet to recodify their civil law is Poland.

amended, approximately 80% of the original text of the Civil Code.[6] Despite its essential nature, the amendment did not manage to effectively address the ambiguity caused by the previous forty years of development of the so-called socialist private law.[7] Latter amendments may have, in part, resolved these shortcomings; however, the amended changes lacked a set of unifying concept criteria. This was reflected in the applications of novelties and modern elements, which were introduced due to a current need to react to the external conditions rather than a need to make the law an organic unit (this was especially apparent at the time of transposition of directives dedicated to customer protection.)[8]

3. The progression of previous recodification work

Discussions about the conceptual questions, functionality, and effectiveness of the Civil Code and its relation to separate legal regulations began prior to the socio-political changes brought about by 1989, that is, when the Civil Code was restricted to a very narrow material scope, defined by the conditions and requirements of the current material and cultural needs of the citizens. Further aspects of material and personal relations were regulated by individual regulations, in particular the Economic Code (Art. No 109/1964 Cc), International Trade Code (Art. No 65/1965 Cc), Labour Code (Art. No 65/1965 Cc) and Family Code (Art. No 94/1963 Cc). The aforementioned laws, with the exception of the Family Code,[9] were not explicitly linked to the Civil Code, and as a result, a significant separation between the individual material and personal relationships as well as an atomisation of the whole private law system ensued.

It was, therefore, logical that among the primary considerations of the recodification of private law, which were inevitable after 1989, the main aim of all involved experts was filling the legal void created by the abolition of the Economic Code and the Labour Code, rather than on removing the conceptual shortcomings of private law as a whole, or on the adoption of a brand new Civil Code (this particular solution was not popular because of the time strain the experts experienced in their work). As a result, the aforementioned major amendment of the Civil Code (Art. No 509/1991 Cc) and a new Commercial Code (Art. No 513/1991 Cc) were adopted, which, on one hand, signified a positive and necessary step in transforming private law based on the needs

6 Lazar et al., 2010, p. 96, as well as the approved Legislative Intent of the Civil Code; see at: https://www.justice.gov.sk/Stranky/Nase-sluzby/Nase-projekty/Obciansky-zakonnik/Obciansky-zakonnik.aspx.

7 Jurčová, 2007, p. 498.

8 Consumer contract, which was incorporated into the Civil Code via amendment no. 150/2004 Cc, found its place in the first (general) part of the Civil Code, in § 52f Cc, rather than in the general part on contractual law; for more information, see: Dulaková Jakúbeková, 2004, pp. 907–913; Dulaková Jakúbeková, 2008, p. 936–946.

9 Which explicitly contained a reference to the Civil Code; see § 104: '*The provisions of the Civil Code are to be used in instances when the law does not explicitly state differently.*'

of the new market economy, yet, from a long-term perspective, was not viewed as a conceptual solution.

In the subsequent years, academic discussions were held among legal theorists and practitioners alike. These discussions had the advantages—in contrast with the years immediately following 1989—of incorporating experience that resulted from the creation, implementation, and application of law within the framework of a market economy, which, in turn, resulted in a more developed degree of critical thinking.

The 'real recodification' of the Civil Code in the Slovak Republic began in 1996, when a commission, led by Professor Karol Plank (1927–1997), was established to prepare the new Civil Code. This commission worked under extraordinary time pressure caused by the Ministry of Justice of the Slovak Republic itself, which expected a new draft of the Civil Code to be delivered by the commission *in paragraph form in the same calendar year*; the expected deadline was set for October. *'It was an unrealistic expectation that put the head of the commission in an unenviable position. There was no time for a discussion or deeper analyses. After delivering the first draft in 1997, the members of the recodification committee never gathered again.'*[10] After his death, Prof. Plank was replaced as head of the committee by Prof. Ján Lazar.[11] Under his leadership, the committee created a second draft of the Civil Code in 1998, but this version only amended or completed the previous draft. Despite the fact that this draft had also not been subjected to a wider expert discussion,[12] it was approved by the Government of the Slovak Republic that same year. The expert public raised serious objections against the draft,[13] which, combined with political and personal changes at the corresponding ministries,[14] resulted in the draft not being picked up again, and it was withdrawn from the legislative process.

This effort as well as those that followed can be well captured by the following quote: *'Unfortunately [...] the recodification of private law is influenced by politics to the extent that they not only affect the start and speed of work on the codex, but its evaluation as well.'*[15]

10 Vojčík, P., in: http://wwwold.justice.sk/kop/inf-rek.htm.

11 Prof. Lazar is a personal friend of the influential Hungarian civil lawyer, Prof. Lajos Vékás. Prof. Lazar and Prof. Vékás regularly attended academic conferences dedicated to private law (especially to recodification of private law) together. As a sign of their friendship, Prof. Vékás contributed to Prof. Lazar's collection of articles *Liber amicorum Ján Lazar, Pocta profesorovi Jánovi Lazarovi k 80. narodeninám* with an article on this topic titled *Der Schutz der menschlichen Persőnlichkeit in dem neuen ungarischen Ziviligesetzbuch / Ochrana ľudskej osobnosti v novom maďarskom Občianskom zákonníku*, 2014, p. 715.

12 However, to say that the draft had not been discussed at all would be false; the V. Luby's Laeyer Days, which took place in September 1998 at the law faculty of Comenius University in Bratislava, were dedicated to it, for example—'On the draft of the new Slovak Civil Code'; see: http://iuridica.truni.sk/lubyho-pravnicke-dni-0. However, the conference took place only after the draft had been approved by the government of the Slovak Republic.

13 See the conference report: Dies Luby Iurisprudentiae, Nr. 5, 1999.

14 Parliamentary elections took place on 25 and 26 September, 1998.

15 Dulak, 2009, p. 5.

Legislative work began again in 1999 under the expert guidance of Professor Peter Vojčík,[16] yet the recodification efforts had to begin from scratch. Although this committee completed its role and in 2002, the government of the Slovak Republic approved[17] the legislative intent of the Civil Code that the committee developed, the political will to continue further works on a paragraph version of the codex had not been found again.

After the next election, legislative works ceased for an entire electoral period[18] (no minister of justice at the time considered the recodification of private law to be a priority).

In November 2006 (again, shortly after a new parliamentary election),[19] the Minister of Justice of the Slovak Republic at the time, Štefan Harabin, named the previous head of the recodification committee, Prof. Lazar, to lead the body again. Subsequently, in January 2007, a new recodification committee was established and was tasked—as expressed in the coalition plan of the government at the time for the period 2006–2010—with developing a draft of the law on material private law (Civil Code) by the first quarter of 2010, with the ultimate goal being recodification of private law in the Slovak Republic. The commission worked within work groups focused on particular sections of private law. Only a year and a half later, this commission delivered a document titled 'The Legislative Intent of Codification of Private Law, which was then approved by the government in its amended form in January 2009. Despite the relatively intense efforts, the commission did not manage to develop a first discussion version in paragraph form in the originally defined framework, that is, before the end of calendar year 2009.

Another general election was held in 2010,[20] after which Lucia Žitňanská became the new Minister of Justice, and the matter of recodification of private law unfortunately entered a latent state.

This only changed after the next (early) election,[21] after which Tomáš Borec, an attorney, became the Minister of Justice. Recodification work again found political support, and a new recodification committee was established. In 2013, Prof. Lazar was replaced by the committee's previous member, Anton Dulak,[22] who was suggested for the position by Prof. Lazar himself.[23] After a deal with the Minister of Justice and the General Director of the Civil Law Section at the time, Marek Števček, the committee was tasked with delivering the first working draft in paragraph form by September 2015.

16 See: https://www.osobnosti.sk/osobnost/peter-vojcik-1754.
17 Resolution of the Government of the Slovak Republic No 827 of 7 August 2002.
18 Parliamentary election took place in the Slovak Republic on 20 and 21 September.
19 Parliamentary election took place in the Slovak Republic on 17 June 2006.
20 Parliamentary election took part on 10 June 2010.
21 Early parliamentary election took place on 10 March 2012.
22 Prof. JUDr. Anton Dulak, PhD., currently in function as the Head of the Private Law Department at Pan-European University, Faculty of Law.
23 Prof. Lazar lost his position as head of the recodification committee but remained its 'expert sponsor' within the Ministry of Justice.

Under the leadership of Prof. Dulak, the committee completed its duty and delivered *the first unified working version of the new Civil Code under preparation* on 16 September, 2015[24]. This was achieved particularly because of the dedicated determination of the committee's members and other enthusiastic colleagues. The work the committee delivered consisted of 1756 paragraphs,[25] while the members of the committee supported their work with numerous commentary materials, both expert and scientific articles, suggestions received from applied practice, and reports from both domestic and international conferences—all meant to serve as an argumentative contribution to the expected expert discussions.

To their surprise,[26] and in violation of the previous agreements with the representatives of the Ministry of Justice, the members of the committee discovered, via 'unofficial sources,' that the ministry intended to establish an entirely new recodification committee[27] (tasked with the 'dynamisation' of the efforts to prepare the new Civil Code').[28] This happened in November 2015, with the new head of the appointed committee being the General Director of the Civil Law Section, Marek Števček.

4. A brief comment on the overall concept of the Draft Law of 2018 amending the Civil Code

In October 2018, the Minister of Justice of the Slovak Republic introduced their vision of reform of Slovak private law. Despite the fact that changes in the field of civil law have been eagerly anticipated for a long period of time, the appearance of the ministry's representatives greatly surprised the expert public.[29] Instead of rebuilding private law, a step meant, with its significance and essential character, to signify its recodification, the ministry (without a broader expert discussion and without changing the legislative purpose of a new Civil Code) announced a proposal for an *amendment* to the existing Civil Code,[30] primarily focused on 'reforming' the law of obligation. This was labelled

24 Dulak, 2016. See: https://www.digitalmag.sk/k-novej-kodifikacii-sukromneho-prava-cast/ as well as: Dulak, A. (2016) In: https://www.digitalmag.sk/k-novej-kodifikacii-sukromneho-prava-cast-ii-hladanie-inspiracii/

25 The delivered draft consisted of the following six parts: 1. General, 2. Family Law, 3. Rights in rem, 4. Inheritance law, 5. Contractual law, 6. Concurrent, close and repeal provisions – the first five in paragraph form. The final (sixth) part was to be edited into a paragraph version in sequence and with regard to the results of the interinstitutional reflection and the approved version of the draft. See the delivered draft IN: https://www.najpravo.sk/clanky/paragrafove-znenie-prvej-pracovnej-verzie-navrhu-noveho-obcianskeho-zakonnika.html.

26 Dulaková, 2015. See: http://www.lexforum.sk/565.

27 See https://www.justice.gov.sk/Stranky/Nase-sluzby/Nase-projekty/Obciansky-zakonnik/Zoznam-clenov.aspx.

28 See https://www.najpravo.sk/clanky/minister-spravodlivosti-menoval-novych-clenov-komisie-pre-pripravu-obcianskeho-zakonnika.html.

29 Ovečková, 2018, p. 607.

30 https://www.justice.gov.sk/.../OZ/Legislativny%20zamer%20OZ.pdf.

by its authors as the *first stage of recodification of the Civil Code* and was published, along with a justificatory announcement, on their official websites.[31]

As stated above, the conceptual change in the approach to civil law reform surprised the expert public, which accepted the new objective with hesitation. Without the need to look up the term in a specialised dictionary, recodification is generally understood as a '*new codification'* of the corresponding legal sector. In the case of private law in a post-socialist country, this legal sector should not merely be revised, modified, or subjected to so-called horizontal reform. *'At times, the difference between revision and recodification is emphasized. While a revision is based on the old legal regulation and its derivatives, a recodification is an implementation of a modern legal regulation with the aim to capture a current reality. Recodification means a reconstruction of a systematic, synthetic and syncretic approach to law; it is a reformation of the initial principles of codification (currently abolished or undervalued) for the purposes of a new order. A recodification, similarly to a codification, is expected to have its own central motive.'* [32]

The vision of the latest Recodification Committee thus seems to have lost the path set forth by the government in the Legislative Objective of the new Civil Code in 2009 (which, naturally, expected the whole of private law to be recodified *en block*) and instead presented a novel intention: to recodify private law *per partes*, beginning with the law of obligation, since, according to the Minister of Justice, who is a proponent of this concept, 'the area of private legal obligations is least socially sensitive area; hence, we expect a consensus of the whole society in this matter.'

In April 2019, information was published that suggested the Ministry of Justice concluded the informal reflection process for the recodification of the law of obligation.[33] This was, however, shortly before the election, which meant that the political parties involved shifted their focus to their electoral campaign rather than the issue of reforming the Civil Code.

5. Conclusion

As stated in the beginning, since March 2020, Slovakia has had a new government, which, at least according to its declared program, plans to devote some focus to the reforming of private law. Using the text from this document (declared program), '*The Government of the Slovak Republic is committing to creating a new Civil Code and law on commercial entities'*, it seems that the Ministry of Justice will likely focus on a complex reform of private law, that is, to creating a code en block rather than separate changes for specific areas. However, as is the case in politics, major legislative changes need to be carried out within the first two years of governing as the next two are dedicated to preparing for the new election, which is reflected in the political decisions made

31 http://www.justice.gov.sk/Stranky/Ministerstvo/Aktuality-obcianskeho-zakonnika.aspx.
32 McAuley, 2003, p. 274; Dulak, 2019, pp. 76–95.
33 http://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=2522.

throughout that latter period. Hopefully, the claim cited above from a previous Recodification Committee chair, Anton Dulak,[34] on politics and political influence exerted on private law can be applied during this political period (2020–2024) in a positive light.[35]

34 'Unfortunately, [...] the recodification of private law is under the influence of politics to the extent that not only does politics affect the beginning and speed of the project, but also its evaluation.' See Dulak, 2009, p. 5.

35 Lazar, 2020, p. 355.

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The PSPP Judgment of the *Bundesverfassungsgericht* and the Slovenian Constitutional System

ABSTRACT: *The BVerfG's judgment on the PSPP marks another important part of the EU constitutional mosaic. It was the first time that the court declared an EU act ultra vires. Intense academic commentary ensued, mostly adopting a critical attitude towards the judgment. However, a summary rejection of the underlying idea of an exceptional national constitutional review of EU acts does not seem warranted. Unconditional primacy has been disputed by different national courts for some time now, and on two occasions, national apex courts already declared EU acts ultra vires. Considering its inherent diversity, the EU should be able to accommodate legitimate national constitutional concerns. A common frame of reference, possibly provided by Art. 4(2) TEU, could facilitate such accommodation if very high standards of violation were adopted by national courts, which would also respect the principle of loyal cooperation. In this regard, EU law also marks red lines when it comes to its fundamental principles, limiting the possibility of abuse. The Slovenian Constitution introduces EU law through Art. 3a, adopted for the purpose of accession to the EU. The Slovenian Constitutional Court's case law is generally very EU-friendly, and it could be marked by cooperative vagueness, echoing the doctrines of the CJEU. A clear answer regarding the relationship between national (constitutional) law and EU law is lacking in its jurisprudence. The court explicitly left the question of absolute primacy open. The substantive preconditions for the transfer of sovereign rights in Art. 3a, namely, respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law, have been interpreted in different ways in academia. However, considering the inalienable right to self-determination, in exceptional cases of serious encroachment on fundamental constitutional values, the SCC would probably adopt its version of the BVerfG's doctrines.*

KEYWORDS: German Federal Constitutional Court, Constitutional Court of Slovenia, Court of Justice of the European Union, PSPP, ultra vires review, constitutional identity.

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1. Introduction[2]

It seems that Eric Stein's words about the CJEU being blessed with '*benign neglect from the powers that be*' in the fairyland Dutchy of Luxembourg[3] faded into the past in May 2020, if not before, due to the *BVerfG's* PSPP judgment. National (constitutional) courts are now more vigilant of any attempts at progressive interpretation of EU law, and are not particularly uneasy or hesitant even to dismiss them.

The impetus for this article was provided by this most recent judgment of the *BVerfG* related to European integration. The primary aim is to discuss the judgment briefly, analyse its underlying proposition, and consider the possibility of applying it to the Slovenian constitutional system. With this in mind, I first address the judgments of the CJEU and the *BVerfG* in the Weiss case. I mostly focus on the underlying idea of constitutional exceptionalism, which means that national constitutional standards may function as standards of review of EU law, materialised forcefully by the *BVerfG's* judgment. This provides the basis for the second part of the article, dealing with the elucidation of the case from the perspective of Slovenian constitutional law. In this section, I present the constitutional bedrock of EU law in the Slovenian Constitution, the relevant (relatively vague) case law of the Slovenian Constitutional Court on the subject, and conclude with theoretical discussions related to the issue.

2. The PSPP and the *ultra vires* problem

At the beginning of May, the *Bundesverfassungsgericht* (*BVerfG*) delivered a judgment on the public sector purchase programme (PSPP) of the European Central Bank (ECB).[4] It was delivered after the CJEU had issued its judgment regarding the PSPP in C-493/17 Weiss, responding to the *BVerfG's* preliminary reference.[5]

The PSPP is a programme enabling the ECB and the national central banks to buy (*inter alia*) government bonds on the secondary market. The scope of the programme extended to over 2 trillion EUR in August 2020.[6] The main legal issue brought up before the *BVerfG*[7] was that the Decisions[8] of the ECB, which formed the legal basis for the

2 The manuscript was closed on 14 December 2020, therefore it reflects the legal situation of that date.
3 Stein, 1981, p. 1.
4 For an overview of the programme, see: BVerfG Judgment 2 BvR 859/15 of 5 May 2020.
5 C-493/17 Weiss of 11 December 2018.
6 European Central Bank, 2020a.
7 Among the complainants was Peter Gauweiler, one of the applicants behind the BVerfG's first preliminary reference in BVerfG 2 BvR 2728/13 of 21 June 2016. Also see: C-62/14 Gauweiler and Others of 16 June 2015.
8 The ECB Governing Council's Decision (EU) 2015/774 OJ EU L 121, p. 20 and the subsequent Decisions (EU) 2015/2101 OJ EU L 303, p. 106, (EU) 2015/2464 OJ EU L 344, p. 1, (EU) 2016/702 OJ EU L 121, p. 24, and (EU) 2017/100 OJ EU L 16, p. 51. Hereinafter: the Decisions.

enactment of the Programme, amounted to *ultra vires* acts. The complainants argued that the ECB disregarded the distribution of competences between the Member States (MS) and the EU (in violation of the principle of conferral)[9] and acted outside Art. 119 TFEU,[10] exceeding its competences under Art. 127 TFEU and Arts. 17 to 24 of Protocol no. 4 on the Statute of the ECB.[11] They also claimed that it infringed the prohibition of monetary financing in Art. 123 TFEU as well as the principle of democracy, and that it undermined German constitutional identity by infringing the budgetary powers of the *Bundestag*[12] due to possible sharing of losses.[13]

In *Weiss*, the CJEU sustained the validity of the Decisions. It adopted the position that by implementing the PSPP, the European System of Central Banks (ESCB) did not exceed its mandate. The distinction between monetary and economic policy was one of the crucial points because if the Decisions corresponded to measures of economic policy, they would represent an overreach of the ESCB's competences.[14] The CJEU found that the main objective of the ESCB was tied to monetary policy,[15] that there is no absolute separation between monetary and economic policy in the Treaties,[16] and that indirect effects on economic policy do not make the PSPP an economic policy measure.[17] Considering the broad discretion afforded to the ESCB in the field, the Decisions were also held proportionate to the objectives pursued.[18] The CJEU further found that the purchasing of state-issued bonds on the secondary market did not amount to monetary financing contrary to Art. 123(1) TFEU.[19] The issue of a potential violation of Art. 4(2) TEU was dismissed as hypothetical, as no provisions laid down an obligatory sharing of losses.[20]

The response is already (in)famous[21] in European constitutional academia as another stepping-stone in the series of the *BVerfG's* expositions on the possibility of reviewing EU legal acts and its implicit limits to the European integration project.

9 Art. 5(1) Treaty on European Union, OJ C 326 (TEU).
10 Treaty on the Functioning of the European Union, OJ C 326 (TFEU).
11 OJ C 202, p. 230.
12 C-493/17 Weiss, para. 14.
13 *Ibid.*, para. 15. For an overview of the arguments, also see: BVerfG 2 BvR 859/15, para. 1.
14 The EU enjoys exclusive competence with regard to monetary policy (Art. 3(1)(c) TFEU), but only coordinating competences with respect to economic policy. On this issue, see: Watson and Downing-Ide, 2020.
The issue was addressed before by the CJEU in C-62/14 Gauweiler and C-370/12 Pringle of 27 November 2012.
15 C-493/17 Weiss, para. 57.
16 *Ibid.*, para. 60.
17 *Ibid.*, para. 61.
18 *Ibid.*, para. 73 *et. seq.*
19 *Ibid.*, para. 101 *et. seq.*
20 *Ibid.*, para. 159 *et. seq.*
21 Labelled as 'an unprecedented act of legal vandalism' in: Eleftheriadis, 2020.

Considering the vast amount of commentary and research already published,[22] a very short overlook of the judgment should suffice.

In its judgment, the *BVerfG* found the Decisions[23] as well as the judgment of the CJEU *ultra vires*.[24] Generally, the *BVerfG*, in line with its established jurisprudence, may find an act *ultra vires* when '*the European Union* [*has*] *exceeded the limits of* [*its*] *competences in a manner that specifically runs counter to the principle of conferral*'.[25] The overreach of competences has to be manifest, meaning that the exercise of such competence would require a Treaty amendment or an evolutionary clause, requiring the involvement of the legislator.[26]

In particular, the *BVerfG* first found that the CJEU manifestly failed in its consideration of whether the ECB exceeded its monetary policy mandate, not paying sufficient attention to the actual effects of the PSPP, effectively not applying the principle of proportionality in an acceptable manner, rendering the principle of conferral meaningless.[27] While recognising in principle the primary competence to interpret EU law to the CJEU in line with Art. 19(1) TEU,[28] it considered the judgment '*not comprehensible*' and '*objectively arbitrary*'.[29] Since it '[*could*] *not rely on the Weiss judgment of the CJEU*' concerning the validity of the Decisions,[30] it performed its own review. It found that the Decisions neither contained, nor were based on, the required balancing of economic policy effects, violating Arts. 5(1) and (4) TEU, namely the principle of proportionality.[31]

The consequence of finding an act *ultra vires* is that German constitutional organs *'may participate neither in the development nor in the implementation, execution, or operationalisation*' of these acts, making them inapplicable in Germany.[32] The *Bundesbank* was ordered not to participate in the PSPP subject for a transitional period of three months, during which the ECB would adopt a new Decision, implementing the court's expectations.[33] The *BVerfG* also charged the Federal Government and the *Bundestag* to take steps to ensure that the ECB conduct a suitable proportionality assessment in relation to the PSPP.[34]

22 See, for example, the German Law Journal Special Collection on European Constitutional Pluralism and the PSPP Judgment (Volume 21, Issue 5 of July 2020). Also see publications referenced in this article, esp. n. 34.
23 BVerfG 2 BvR 859/15, paras. 164–178.
24 *Ibid.*, para. 117 *et. seq.*
25 *Ibid.*, para. 110.
26 *Ibid.*, para. 110. Despite this clear reference to the exceptionality of such review, Eleftheriadis notes that this standard was in fact not reached in Weiss. Eleftheriadis, 2020.
27 BVerfG 2 BvR 859/15, para. 123 *et. seq.*
28 *Ibid.*, para. 111.
29 *Ibid.*, para. 118 *et. seq.*
30 *Ibid.*, para. 164.
31 *Ibid.*, para. 167 *et. seq.*
32 However, it should be noted that this is therefore not a ruling on the validity of the Decisions.
33 BVerfG 2 BvR 859/15, para. 235. For a follow-up during the following months, see: Utrilla, 2020.
34 BVerfG 2 BvR 859/15, para. 232.

3. Exceptional constitutional exceptionalism?

A distinction between two issues concerning the judgment should be made. The first is its persuasiveness. In the present case, this covers the issues related to the distinction between monetary and economic policy, the ECB's mandate, and the application of the principles of proportionality and conferral. The second issue is the viability of the underlying premise of the judgment, which is that national (constitutional) courts have the competence to perform a review of an EU act exceptionally – which I refer to as constitutional exceptionalism.

Regarding the first issue,[35] it is hard to add much to the very poignant analyses already provided elsewhere.[36] The response of the EU institutions, somewhat unconventionally, followed the German judgment as well.[37] Further discussion of these points would be a digression from the aim of this article.

The overwhelming criticism of the *BVerfG's* reasoning on proportionality meant that the second issue was also rejected more or less summarily by academia. The most open dismissal was the joint statement signed by more than thirty well-renowned academics in May 2020, also arguing against the idea of constitutional pluralism,[38] which supposedly brought about this type of reasoning, as inherently prone to such abuse.[39] While the overall circumstances surrounding the judgment, especially concerning possible ramifications for the Pandemic Emergency Purchase Programme,[40] beg for its refusal, I argue that a complete rejection of its underlying approach based solely on this *BVerfG* judgment is unwarranted.

The argument behind the *ultra vires* review is that the constitutional court should review EU acts in cases of manifest and structurally significant exceeding of competences.[41] As stated by the *BVerfG*:

'*[…] 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*'.[42]

This means that the national authorities are bound by EU law; however, if the act exceeds the EU's competences, contradicting the national constitution, the national authorities (courts) may be authorised to depart from it.

35 Is the CJEU's judgment really 'not comprehensible'? The question was craftily reversed by: Marzal, 2020.

36 See, for example: Fabbrini, 2020; Galetta, 2020; Marzal, 2020; Meier-Beck, 2020; Nowag, 2020; Viterbo, 2020, p. 679 n. 45; Ziller, 2020.

37 Court of Justice of the European Union, 2020; European Central Bank, 2020b; European Commission, 2020.

38 Kelemen and Pech, 2018. For a response, see: Avbelj, 2020.

39 Kelemen *et al.*, 2020. For a response, see: Baranski, Brito Bastos, and van den Brink, 2020.

40 Maduro, 2020a; Viterbo, 2020.

41 BVerfG 2 BvR 859/15, para. 105, 110. See: Calliess, 2019, pp. 170–171. Also see below, n. 45.

42 BVerfG 2 BvR 859/15, para. 118.

The broader idea behind the national review of EU legal acts stems from the well-known line of *BVerfG* judgments dealing with European integration, referring to the *BVerfG's* residual competence to review EU acts.[43] The *BVerfG* developed human rights review (Solange I[44] and Solange II[45]),[46] *ultra vires* review (Maastricht[47]), and identity review (Lisbon[48]).[49] In these cases, albeit in a more EU-friendly manner, the *BVerfG* established the doctrines, which first came to life in Weiss. As any European constitutional law scholar is aware, the *BVerfG* is not alone in retaining competence for scrutiny of EU acts in exceptional circumstances.[50] From the very beginning of European integration, nods in the German direction emerged from Italy.[51] Similar doctrines were later developed for example, in Spain,[52] France,[53] Poland,[54] and the Czech Republic,[55] among others.[56]

Furthermore, despite the fact that the terminology utilised by the *BVerfG* in the PSPP case is unprecedented,[57] this is not the first time a decision like this has been made by a national court either. The first to declare an act of EU law *ultra vires* was the Czech Constitutional Court.[58] Recently, the Danish Supreme Court also refused to recognise

43 Tomuschat, 2013; de Abreu Duarte and Delgado, 2020; Nowag, 2020, p. 12.

44 BVerfG 37, 271 of 29 May 1974.

45 BVerfG 73, 339 of 22 October 1986.

46 Hassemer, 2004, pp. 35–37; Denham and Burke, 2009, pp. 114–115.

47 BVerfG 89, 155 of 12 October 1993. In this regard, see: Hassemer, 2004, pp. 37–40; MacCormick, 2010, pp. 259–260. In this regard, the Honeywell judgment BVerfG 2 BvR 2661/06 of 6 July 2010 is also relevant.

48 BVerfG 2 BvE, 2/08 of 30 June 2009. See, for example: Denham and Burke, 2009, pp. 120–125; Reestman, 2009; Zwingmann, 2012; López Bofill, 2013.

49 For an overview of the development and meaning of the doctrines, see: Calliess, 2019, p. 158 *et. seq.*

50 For an overview by a Slovenian author, see: Accetto, 2013, pp. 426–451. Also see: Hoffmeister, 2007; Dobbs, 2014, pp. 303–305. For an in-depth study on the national constitutional limitations to EU law and integration, see: Besselink *et al.*, 2014.

51 Frontini v. Ministero delle Finanze, Judgment No. 183 of 18 December 1973; SpA Granital v. Amministrazione delle Finanze, Dec. 170 of 8 June 1984; SpA Fragd v Amministrazione delle finanze dello Stato, Dec. 232 of 21 April 1989. More recently, see: Judgment No. 115 of 10 April 2018.

52 DTC 1/2004 of 13 December 2004; DTC 26/2014 of 13 February 2014. See, for example: Torres Pérez, 2012, pp. 119–121.

53 For example: 2004-496 DC of 10 June 2004; 2004-498 DC of 29 July 2004. See: Reestman, 2009, p. 386 *et. seq.*

54 Judgment K 18/04 of 11 May 2005.

55 Judgment Pl. ÚS 50/04 (re Sugar Quota Case II) of 8 March 2008; Judgment Pl. ÚS 19/08 (Lisbon I) of 26 November 2008; Judgment Pl. ÚS 29/09 (Lisbon II) of 3 November 2009; Judgment Pl. ÚS 5/12 of 31 January 2012. For an overview of the Czech judgments regarding the Treaty of Lisbon, see: Denham and Burke, 2009, pp. 126–129. For an overview of early jurisprudence of new member states from the 2004 and 2007 enlargements, see: Łazowski, 2010, esp. Albi, 2010. Also: Rideau, 2013.

56 Joined by Hungary as well in Decision 22/2016. (XII. 5.) AB. of 30 November 2016. See: Halmai, 2018.

57 Maduro, 2020b.

58 In relation to C-399/09 Marie Landtová of 22 June 2011. Judgment Pl. ÚS 5/12 of 31 January 2012. See: Komárek, 2012.

the horizontal application of the prohibition of discrimination as a general principle of EU law in the Ajos case.[59] A similar incident was narrowly avoided in the Taricco saga[60] by the Italian Constitutional Court.[61] This brief overview should suffice to show that absolute primacy is only one side of the coin – dissenting voices endure on the MS side.[62] Unconditional supremacy proclaimed by the CJEU in Costa[63] has been disputed from the outset,[64] and after the failed attempt of the Treaty in establishing a Constitution for Europe,[65] which included the primacy clause in Art. I-6, it has not been included in the text of the ensuing Treaty of Lisbon.[66]

Two key problems are usually put forward as arguments against such constitutional exceptionalism: (1) it runs counter to the principle of *effet utile* of EU law[67] and (2) the danger of its abuse (uncovered in the present political situation in the EU).[68]

Regarding the first point, it should be noted that constitutional exceptionalism is not exceptional in the EU's constitutional structure. A whole field of research dealing with the different types of differentiation, including judicial,[69] is devoted to differentiation in the EU.[70] Differentiation is considered a systemic feature[71] of the EU, and important adaptations are granted to MS at all levels of EU law. Catastrophic projections are, in my view, overstated, and some negative effects on uniformity do not necessitate (or even facilitate) disintegration.[72] We should also keep in mind that this debate, however consequential it may seem to European constitutional law scholars, is taking place at the margins of EU law. This is demonstrated by the fact that the ECB and German authorities are moving on with the PSPP more or less unaffected. Similarly, no Armageddon followed the Czech and Danish judgments.[73]

59 Danish Supreme Court, judgment no. 15/2014 of 6 December 2016. See: Krunke and Klinge, 2018.
60 For an overview of the case, see: Kos, 2019, pp. 51–53.
61 Weiler and Sarmiento, 2020.
62 For an overview of the main arguments in the debate between supremacy of state constitutions and EU law, as well as the pluralist account, see, for example: Torres Pérez, 2009, p. 41 ff.
63 C-6/64 Flamino Costa v E.N.E.L. of 15 July 1964. Recently most problematically applied in C-399/11 Melloni of 26 February 2013. On primacy in general, see, for example: Denham and Burke, 2009, pp. 109–113.
64 Baranski, Brito Bastos, and van den Brink, 2020. For a historic overview, see, for example: De Witte, 2011.
65 OJ C 310, p. 1–474.
66 It was relegated to a declaration, namely, 17. Declaration Concerning Primacy. See: von Bogdandy and Schill, 2011, p. 1417 nos. 2 and 3 and references therein.
67 C-314/85 Foto-Frost of 22 October 1987, para. 15. Ironically, this was acknowledged in the *BVerfG's* judgment: BVerfG 2 BvR 859/15, para. 111. Also see: Weiler and Sarmiento, 2020.
68 Maduro, 2020b, 2020a; Ziller, 2020.
69 Avbelj, 2013, pp. 192–193.
70 See, for example: de Witte, 2018. For one of the most comprehensive accounts, see: Tuytschaever, 1999.
71 Schimmelfennig, Leuffen, and Rittberger, 2015, p. 765.
72 In that sense, see: Baranski, Brito Bastos, and van den Brink, 2020.
73 Arguments to the point that these courts are minor players, to me, seem somewhat condescending.

On the other hand, important arguments can be made in favour of this form of exceptionalism.[74] The argument from national law is certainly endowed with legitimacy because one cannot expect national constitutional courts to act in violation of what they perceive to be national constitutional law.[75]

Indeed, therein lies the '*structural dilemma of a jurisdictional conflict*'.[76] However, it could be addressed by mutual accommodation that leaves margin for dissent, respecting some common set of principles.[77] If a common frame of reference (rules of engagement) were established, these types of disputes would be much less likely. In my view, Art. 4(2) TEU[78] could function as a hub for these types of disputes.[79] While this approach would offer an opportunity to express national constitutional concerns, it would also maintain the possibility of uniform applicability of EU law.[80] Exceptionally, if a certain (part) act of EU law infringed national constitutional identity, that (part) act would be (if possible)[81] inapplicable in the present case,[82] while retaining its full application in all other cases. This would only be accepted if, in line with the CJEU's practice, there existed a genuine and sufficiently serious threat to the fundamental interest of society.[83] Both parties' decisions would be based on valid EU law. Both courts should also proceed with respect for the principle of loyal cooperation in mind. For this approach to work, very high levels of violation of the principle of conferral or national constitutional identity would be necessary to validate a departure by a national constitutional court.[84] This approach could be possible under Art. 4(2) TEU, even considering the existing, albeit scarce, case law.[85] This option would even be possible regarding the *BVerfG's* judgment in Weiss, since *ultra vires* review is, as its subcategory,[86] inherently tied to identity

74 On this issue, see: Jakab and Sonnevend, 2020.
75 Kos, 2019, p. 49.
76 Weiler and Sarmiento, 2020.
77 Maduro, 2020a.
78 '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, inclusive of regional and local self-government. [...]'. It should be noted that the reference to fundamental constitutional structures makes the identity clause a constitutional, rather than a cultural concept. See: Besselink, 2010, pp. 44, 47; von Bogdandy and Schill, 2011, pp. 1427–1429.
79 Lately, similar proposals have been made by: Garner, 2020; Jóźwicki, 2020. For the substantive and functional aspect of Art. 4(2) TEU, important for its operationalisation, see: Kos, 2019, pp. 44–51. It is noteworthy in the context of the Weiss case that Article 4(2) TEU was initially intended to prevent overreach of competences. See: Guastaferro, 2012, pp. 271–284.
80 Garner, 2020.
81 As concisely explained by *Jóźwicki*, if that was not possible, the act could be overturned by the CEJU, or upheld despite the constitutional conflict. In the latter case, political solutions (as put forward by the Polish Constitutional Court in its jurisprudence) would apply: amending EU law, amending the national constitution, or the MS leaving the EU. Jóźwicki, 2020.
82 Jóźwicki, 2020.
83 C-438/14 Bogendorff von Wolffersdorff of 2 June 2016, para. 67 and C-208/09 Sayn-Wittgenstein of 22 December 2010, para. 86.
84 Eleftheriadis speaks of '*important constitutional transformations*'. Eleftheriadis, 2020.
85 Kos, 2019, pp. 48–51.
86 Calliess, 2019, pp. 174–175.

review and the corresponding concept of German constitutional identity, which fits well with Art. 4(2) TEU.[87]

It must be stressed that, by now, the almost paradigmatic loyal and sincere cooperation must permeate judicial dialogue at the highest level for the approach to be viable. The highest national courts must reserve such a contestation for only the most problematic encroachments on national constitutional values, simultaneously informing the CJEU of their concerns via the preliminary reference procedure. They also have to adopt a deferential approach to the CJEU's approach to the problem. The latter has to take strong consideration of national constitutional concerns, voiced in a coherent and legitimate matter, and engage in dialogue.[88] Only in exceptional cases, where these would not be possible to accommodate within EU law, may the CJEU reject them. Only judicial dialogue, by and of itself inherent to Art. 4(2) TEU, performed in this spirit may enhance the legitimacy of the EU and preserve the trust vested in it.

The problem with the present *BVerfG* judgment is that it was mostly considered an example of how constitutional problem-solving among EU courts should not be conducted.[89] I would nevertheless argue that this approach does not entail an inherent possibility of abuse – at least no more than any other approach.[90]

Under this proposal, national identity could, in line with Art. 4(2) TEU, be used to express national constitutional concerns pertaining to core national constitutional values. In this way, it is essentially an argument for disapplication of a deviation from EU law, which supposedly encroaches on core national constitutional values. There are different possible operationalisations with respect to the type of EU act deemed problematic.[91] However, in all of these, it has to be kept in mind that the endeavour occurs within the realm of EU law: since this argument essentially pertains to the interpretation, validity, or application of EU law, it can only be accepted if accommodation of national constitutional concerns is legally possible within EU law. The invoked national constitutional value must be compatible with EU law to be deemed legitimate.[92] In that sense, it must be noted that EU law itself marks red lines in this regard: the departure

87 For a different view on the relationship between *ultra vires* and identity review, see: Jóźwicki, 2020.

88 See, for example: von Bogdandy and Schill, 2011, pp. 1449–1451; Torres Pérez, 2013, pp. 155–156.

89 As noted by Strumia, it marks a betrayal of the long-upheld spirit of cooperation among courts. See: Strumia, 2020.

90 Even if we accept the idea of a supranational body, as proposed by Sarmiento and Weiler, national courts could still declare the decisions of this body in violation of national constitutional law – if the latter was not changed accordingly. Weiler and Sarmiento, 2020. Similarly (regarding possible abuse), see: Baranski, Brito Bastos, and van den Brink, 2020.

91 Due to space constraints, these cannot be fully addressed here. See, however: von Bogdandy and Schill, 2011, p. 1442 ff; Kos, 2019, pp. 48–49.

92 Kos, 2019, p. 50. For a practical application of this requirement, related to Art. 4(2) TEU, see: C-438/14 Bogendorff von Wolffersdorff, para. 71 and C-208/09 Sayn-Wittgenstein, para. 89.

from fundamental values in Art. 2 TEU[93] and (at the very least)[94] human rights as they result from constitutional traditions common to the MS (Art. 6(3) TEU).

If an MS wanted to use the identity argument to the detriment of a certain EU law provision, when such a deviation also meant going against (or even endorsing the violation of) the core principles of integration, this could not be accepted.[95] National constitutional arguments for a deviation from EU law, which would, if accepted, lead to lower standards of fundamental rights protection following from Art. 6(3) TEU,[96] or infringe the fundamental EU values in Art. 2 TEU,[97] cannot be justifiably accommodated under EU law, since such acceptance would constitute a violation of EU law. In this sense, Arts. 2 and 6(3) TEU function as safeguards regarding which national constitutional arguments can be validly invoked under Art. 4(2) TEU. Flexibility under EU law can only be accommodated within these parameters. If a case arose where accommodation of national constitutional concerns was not possible, the proposed method would not offer a solution; such a solution would have to be found within the realm of politics.[98]

Despite there being different approaches to national constitutional exceptionalism, it would generally be apposite to argue that when invoking the respect of national constitutional essentials under the identity clause, it must be kept in mind that the goal of this endeavour should be to maintain and develop legal safeguards, protecting the individual from disproportionate exercise or abuse of public authority[99] – or, at the very least, such arguments may not deteriorate those safeguards. If anything, the

93 Esp. the values of respect for human dignity, freedom, democracy, equality, the rule of law, and human rights. Also see: Hillion, 2016, p. 63.

94 Despite the fact that the EU Charter is reaching beyond that, it is (also) an emanation of the core constitutional principle of the EU: respect for fundamental rights as stemming from common constitutional traditions of MS (see Art. 52(4) EU Charter). Therefore, it could also be argued that any arguments of national identity should respect the standards of fundamental rights protection developed in the EU Charter, especially since all MS agreed to adopt these common standards. It should also be noted here that the application of the EU Charter in such cases should generally not be questioned under Art. 51 EU Charter. If an MS wishes to invoke national identity against the application of an act of EU law, since it is also acting within the field of application of EU law, the EU Charter applies. Charter of Fundamental Rights of the European Union, OJ C 326, p. 391–407.

95 Kos, 2019, pp. 44, 50, 56. Similarly, see: Avbelj, 2020, pp. 1029–1031.

96 See above, n. 92.

97 It should be noted that this also raises the question of whether a conflict of EU and MS fundamental values is even possible, since EU values were derived from national values. While addressing this issue would go beyond the scope of this paper, I would argue that such a conflict is indeed possible. In practical terms, this has already been happening in some instances, while theoretically, fundamental EU values from Art. 2 TEU can be seen to have decoupled, meaning that they have gained an independent normative foundation. Namely, it should be understood that the values enshrined in Art. 2 TEU are not merely the sum of its parts, gathered from MS, but also contain separate and collective normative foundation. A change in the understanding of the fundamental values in an MS does not therefore also mean a change in its understanding at the EU level. For a more extensive argument, see: Zagorc and Kos (forthcoming).

98 The possible solutions are: (1) changing EU law, (2) changing national constitutional law, or (3) the MS leaving the EU due to an insurmountable incompatibility in fundamental values.

99 Bardutzky, 2007, p. 23.

protection of the individual from (ab)use of state power can be considered a constitutional principle common to all EU MS.[100] Attempts to (ab)use the method described above to erode the rule of law, democracy, or human rights standards in the EU cannot be validly acknowledged.

4. EU law in the Slovenian constitutional system

■ ***4.1. What is the place provided for EU law in the Slovenian Constitution?***

To consider the possibility of adopting similar doctrines in the Slovenian constitutional system, EU law's place within the system must first be established.

Constitutional foundations for accession to the EU were mostly created in 2004.[101] The main provision is Art. 3a of the Slovenian Constitution (SC), the so-called 'Europe Clause'. Art. 3a, para. 1 provides that *'Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law'.* Further, para. 3 states that *'*[*L*]*egal acts and decisions adopted within international organisations* [*from para. 1*] *shall be applied in Slovenia in accordance with the legal regulation of these organisations*'.[102]

A constitutional amendment was considered necessary as the transfer of sovereign rights would otherwise be unconstitutional, and collision rules had to be established as well due to the symbolic and constitutive value of sovereignty.[103] The insertion of a new article into the SC is a testament to the refusal to treat the EU as a regular international organisation, international law being governed by Art. 8 of the SC.[104] During the discussions, the key issue was whether to adopt an abstract or a casuistic approach.[105] The final version adopted the former, which was considered more suitable given the changing nature of the EU, the existing tradition of relatively general and abstract constitutional regulation, and the uncertainty of accession due to a pre-accession referendum and the possible eventual rejection by the EU.[106] Although the text does not mention the EU, it was drafted precisely for the purpose of accession (partly also for accession to NATO). In theory, the article is marked as out-dated, as most EU MS since the '70s include an explicit EU-related constitutional provision.[107]

100 One example of this was the Melloni case, where the concern of the Spanish Constitutional Court (which did not however form part of the state's constitutional identity) was the level of protection of the individual's right to a fair trial, the Spanish standard being higher than the EU standard.

101 See: Bardutzky, 2019, pp. 690–692. In Slovene, see: Avbelj, 2012a, pp. 344–346.

102 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, and 75/16.

103 Cerar, 2003a, pp. 6–7, 2011, pp. 83–84. Also see: Bardutzky, 2019, pp. 692, 697–699.

104 Cerar, 2011, pp. 83–84. For a general overview on the role of international law in the SC, see: Bardutzky, 2019, pp. 730–732.

105 Cerar, 2003b, p. 1463 *et. seq.*

106 Cerar, 2011, pp. 76–77; Bardutzky, 2019, p. 692.

107 Avbelj, 2012a, p. 350, referencing Claes, 2005.

■ *4.2. What is the stance of the Slovenian Constitutional Court on its competence to review acts of the EU?*

The Slovenian Constitutional Court (SCC) has so far failed to provide a clear answer regarding the interpretation of Art. 3a, paras. 1 and 3 of the SC, which means that the constitutional relationship with the EU is not yet completely apparent. An estimate of restraint in the formulation of a clear understanding of the relationship between EU law and national law[108] seems to be still accurate. Additionally, initial post-accession observations, that the case law shows no substantial deviations from the jurisprudence of the CJEU,[109] still hold true today.

In general, the SCC seems to be taking an 'EU-friendly' approach.[110] The SCC interpreted Art. 3a, para. 3 as binding all state institutions, including the national courts, to act in line with EU law when exercising their jurisdiction.[111] This position is exemplified by the view that '*all state authorities, including the Constitutional Court, must apply EU law in accordance with the legal order of this [international] organisation*'.[112]

Regarding its powers to review EU acts, the SCC also seems to be clear and equally in line with the general doctrines of the CJEU. It considers that (1) it is not competent to review the compatibility of national legislation with secondary EU law,[113] (2) it is competent to review the compatibility of national legislation with EU primary law,[114] (3) it does not have the power to review EU acts from the point of view of national (constitutional) law, (4) while retaining the power to review the compatibility of the national implementing measures,[115] (5) and the competence to interpret and review the legality of secondary law is the exclusive competence of the CJEU.[116]

The SCC also considers itself competent to initiate a preliminary ruling procedure. It was first put on the spot in U-I-113/04,[117] where it avoided posing a preliminary

108 Avbelj, 2012a, p. 346.

109 Zagorc and Bardutzky, 2010, p. 421 *et. seq.*

110 Similarly: Zagorc and Bardutzky, 2010, p. 421 *et. seq.* Avbelj, 2012a, p. 348.

111 Up-105/13-17 of 23 January 2014, para. 8.

112 U-I-146/12 of 14 November 2013, para. 32.

113 This position was criticised as formalistic in: Accetto, 2013, pp. 454–461. Nerad proposed that such a review could be possible with the upper premise being Art. 3a of the SC. See: Nerad, 2012, p. 389.
The SCC's jurisprudence concerning directives: U-I-32/04 of 9 February 2006, para. 19; U-I-116/07 of 25 May 2007, para. 6; U-I-44/05 of 11 September 2007, para. 6; U-I-17/11 of 18 October 2012, para. 6; U-I-146/12, para. 31. For regulations, see: U-I-186/04, Up-328/04 of 8 July 2004, para. 10.

114 U-I-17/11-7, paras. 7–9.

115 U-I-113/04-33 of 7 February 2007, para. 12. Also see: U-I-411/06 of 19 June 2008, esp. para. 12; U-I-37/10 of 18 April 2013, esp. para. 11; U-I-146/12, paras. 30–31; U-I-65/13-16 of 26 September 2013, para. 7; U-I-295/13-260 of 19 October 2016, para. 76.

116 U-I-113/04-33, para. 12; U-I-280/05 of 18 January 2007, para. 14; Up-1056/11 of 21 November 2013, para. 6; U-I-155/11 of 18 December 2013, para. 18; U-I-65/13-16, para. 8; Also see: U-I-295/13-260, para. 68. The SCC also understands issues regarding the interpretation and validity of EU law as a question of division of competence between national courts and the CJEU. See: Up-1056/11, para. 11; Up-561/15 of 16 November 2017, para. 10.

117 For an overview of the facts of the case, see: Ribičič, 2005, pp. 11–14.

question[118] because the procedures were already in motion before the CJEU.[119] The SCC stayed the procedure and waited for the CJEU's judgment.[120] Similarly, in U-I-65/13, the SCC waited for the CJEU's judgment in the already pending cases.[121] This approach can be considered a reflection of the internalisation of the principle of loyal interpretation.[122] The SCC first used the preliminary reference procedure in U-I-295/13, in which the issue was the validity of the Commission's banking communication.[123] Only recently, the SCC decided to issue a second preliminary reference in U-I-152/17, related to the validity of Directive (EU) 2016/681,[124] despite the fact that preliminary references with the same substance are already pending before the CJEU.[125] In all cases so far, including in Kotnik, where the standards of the Slovenian rule of law appear to be higher than those adopted by the CJEU,[126] the SCC fully complied with the CJEU's judgments.

In this context, a recent peculiar case[127] should be noted, in which the ECB and the Bank of Slovenia (BS) brought a constitutional complaint as well as challenged the Criminal Procedure Act concerning the search of premises, electronic devices, and seizure of documents performed on the premises of the BS connected to a suspected criminal offence of abuse of office or official authority. They argued that the orders of the District Court, *inter alia*, violated Protocols No. 7[128] and No. 4, concerning the inviolability of archives, proposing a reference for a preliminary ruling as well. The SCC rejected the complaints based on the lack of standing of public law entities when acting *ex iure imperii*, without engaging with substantive submissions. The epilogue

118 Accetto, 2013, pp. 453–454.
119 C-453/03 ABNA and Others of 6 December 2003.
120 For a summary of the case, see: Zagorc and Bardutzky, 2010, pp. 426–428.
121 C-293/12 Digital Rights Ireland of 8 April 2014.
122 Zagorc and Fajdiga, 2018, p. 417.
123 C-526/14 Kotnik and Others of 30 September 2016. As a follow-up to the violations established by the SCC in U-I-295/13, the National Assembly adopted a statute (Act on Judicial Protection Procedure for Former Holders of Eligible Liabilities of Banks) establishing a compensation scheme for subordinate creditors. This statute produced further issues regarding the independence of the Bank of Slovenia under Art. 130 TFEU and the prohibition of monetary financing in Art. 123 TFEU, prompting another proposal for a preliminary reference. An interim measure was issued by the SCC without engaging with EU-related substantive arguments. The case is currently pending. See: U-I-4/20-19 of 5 March 2020 (not currently available in English).
124 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime, OJ L 119, pp. 132–149. The Ombudsman challenged the validity of the Police Tasks and Powers Act implementing the directive, specifically points 8 and 12 of Annex I of the directive on the ground that it violates the provision on the protection of personal data (Art. 38) of the SC and Arts. 7 and 8 of the EU Charter due to its indeterminate character. Case reference before the CJEU: C-486/20 (pending).
125 U-I-152/17-53 of 3 September 2020.
126 Bardutzky, 2007, p. 30.
127 U-I-157/16-12, Up-729/16-15, Up-55/17-20 of 19 April 2018.
128 Protocol (No. 7) on the privileges and immunities of the European Union, OJ C 326, p. 266–272.

will regardless ensue before the CJEU since the European Commission initiated an infringement procedure against Slovenia concerning the said matter.[129]

On the issue of the role of fundamental principles that govern the relationship between national and EU law, the SCC ruled, in line with Art. 3a, para. 3, that they are also national constitutional principles, binding with the same effect as the Constitution.[130] The principles of primacy,[131] consistent interpretation,[132] direct application, direct effect, transfer of competences, subsidiarity, and proportionality are, '*as national constitutional principles, […] also binding on the Constitutional Court when carrying out its competences in the framework of the legal relations concerning EU law*'.[133] The principle of the effectiveness of EU law is also categorised as a national constitutional principle.[134]

Regardless, the answer on absolute supremacy, a key point when comparing the SCC with the *BVerfG*, has explicitly been left open:

> '*[The decision of the court] is true regardless whether we interpret this provision of the Constitution and the law of the European Union […] to entail that due to the principle of the supremacy of the law of the European Union such law unconditionally also prevails over the provisions of the Constitution, […] or in a manner such that in certain exceptional cases the law of the European Union has to give way to the Constitution. In the case at issue, it is namely not necessary for the Constitutional Court to take a position on this […]*'.[135]

Considering the above, the case law of the SCC on EU matters can be marked by cooperative vagueness. The SCC echoes the positions of the CJEU; however, a final decision on the interpretation of Art. 3a, para. 1 has yet to be made. Furthermore, as quoted above, the issue of primacy over the constitution has explicitly been left open, showing that the option of constitutional exceptionalism is not off the table. Therefore, the question of the relationship between national constitutional law and EU law

129 C-316/19 Commission v Slovenia (pending).

130 U-I-155/11, para. 14; U-I-146/12, para. 32; U-I-295/13, para. 66.

131 Also labelled the most important fundamental principle. See: U-I-146/12, para. 33; U-I-295/13, para. 67.

132 The SC confirmed the principle of loyal interpretation very early on in U-I-321/02 of 27 May 2004, para. 23. When exercising a judicial review of national legislation, the SCC has to, when interpreting national law, consider EU law following form EU acts and the CJEU's decisions. U-I-146/12, paras. 32, 34; U-I-129/13-16, Up-429/13-18 and U-I-138/13-16, Up-456/13-17 of 4 June 2015, para. 12; U-I-194/17-21 of 15 November 2018, para. 16; U-I-189/14-13, Up-663/14 of 15 October 2015, para. 20; Up-951/15-27 of 18 May 2017, para. 15; U-I-59/17-27 of 18 September 2019, para. 23.
For a general overview of the principle of loyal cooperation in Slovenia, see: Zagorc and Fajdiga, 2018.

133 U-I-295/13, para. 67. Also see: U-I-155/11, para. 14; U-I-146/12, para. 34.

134 U-II-1/12, U-II-2/12 of 17 December 2012, para. 53. The SCC could therefore in the future declare itself competent to review national legislation from the perspective of these principles.

135 U-II-1/12, U-II-2/12, para. 53. References omitted.

remains open.[136] While the constitutional text may allow it, no clear answer regarding whether the *BVerfG's* models of review of EU acts can be adopted within the Slovenian constitutional context follows from the jurisprudence of the SCC.[137] Nevertheless, if a situation of direct and insurmountable conflict between the SC and EU law arises, it would be safe to assume that the SCC would first initiate a preliminary reference procedure.[138]

■ *4.3. Are there constitutional limits to EU law under the Slovenian Constitution?*

Considering the lack of clear guidance from the SCC on the subject, the exact meaning and consequences of Art. 3a of the SC are subject to debate in academia.

The third paragraph of Art. 3a provides that legal acts adopted within the EU shall be applied in Slovenia in accordance with the legal regulation of these organisations, taking into account that it is all but in explicit wording directed at the EU. This is very broad authorisation,[139] which provides, among other things, for a complete acceptance of all the doctrines, especially those of primacy[140] and direct effect,[141] developed by the CJEU with regard to the relationship between national (constitutional) and EU law.[142] It covers both the validity and legal effects of EU law in the internal legal order, and it directs towards primary and secondary EU law as well as the CJEU's case law.[143] As already accepted by the SCC, it also makes these fundamental principles domestic constitutional principles.[144] All of this significantly affects and supplements other constitutional provisions.[145] However, it has to be read in conjunction with the first paragraph of Article 3a.[146] This is the key part of Art. 3a of the SC for the purpose of this paper, as it entails substantive preconditions for the transfer of sovereign rights, namely respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law.[147] These are understood as the fundamental constitutional principles of the Slovenian constitutional system.[148] This provision was inspired by Art. 23, para. 1 of the

136 Avbelj and Trstenjak, 2019, p. 70; Bardutzky, 2019, p. 695.
137 Avbelj, 2019, p. 72.
138 Even before the first preliminary reference by the SCC, this was suggested by Nerad, who highlighted that in such a conflict, the SCC is primarily bound by the constitution. Nerad, 2012, pp. 386, 391–392. Also see: Zagorc and Fajdiga, 2018, p. 416.
139 Also marked as a '*crack in the constitution*'. Testen, 2003.
140 Trstenjak, 2012, p. 275.
141 Bardutzky, 2019, pp. 693, 725.
142 In Testen's view, the effects of EU law on national constitutional provisions (primacy and direct effect) were the main reason Art. 3a, para. 3 had to be adopted in the first place. Testen, 2011, p. 91.
143 Nerad, 2012, p. 382.
144 Nerad, 2012, p. 383.
145 Namely, Arts. 125, 120, and 153 of the Slovenian Constitution. See: Nerad, 2012, p. 383.
146 The two provisions were marked as being in a 'dialectic opposition'. See: Ribičič, 2006, p. 22 *et. seq*.
147 These reflect a general perception of what the essential constitutional principles of the Slovenian constitutional system are. Bardutzky, 2019, p. 694.
148 Cerar, 2011, p. 78.

German Basic Law.[149] The values listed in Art. 3a of the SC are considered substantive conditions, which have to be fulfilled for Art. 3a, para. 3 to take effect and for the legal acts and decisions adopted by the EU to be applied in Slovenia in accordance with the legal regulations of the EU, as described above.[150] In fact, this provision could function as a source of rights for individuals, even in relation to the EU.[151]

At the time of the constitutional amendment, at least in theory, it seems that the supranational view of EU law, according to which EU law may enjoy a supra-constitutional rank,[152] had been dominant in Slovenia.[153] In line with this view, echoing the Solange doctrine,[154] the substantive safeguards described above do not warrant the rejection of the EU acts in violation of the constitution, *as long as* the EU, in its fundamentals, continues to be governed by the values described therein.[155] Only then can the SCC reject the application of EU acts,[156] which could, as a last resort, lead to a withdrawal from the EU.[157] This approach seems to conform with the textual interpretation of the provision since it authorises the transfer of sovereign rights to international organisations, which are *based* on the values listed therein. In other words, under this interpretation, sporadic divergences from these standards would not be constitutionally relevant, as long as they do not amount to a fundamental change in the value base of the EU.[158]

Approaches that are more recent, advocated most notably by *Avbelj*,[159] promote pluralistic interpretation, which treats the primacy of EU law as a relational principle.[160] In this sense, the issue is not which legal acts enjoy a hierarchical advantage because there should be a harmonious coexistence of the systems, in which primacy would depend on the circumstances of the case.[161] Accordingly, the SCC should remain open to a possible review of EU acts from the perspective of fundamental rights, in

149 Cerar, 2003b, n. 9.
150 Avbelj and Trstenjak, 2019, p. 67.
151 Avbelj, 2019, p. 68.
152 Cerar, 2011, p. 74.
153 Avbelj, 2011, p. 755, 2012b, p. 6.
154 Ribičič, 2006, p. 22 *et. seq.*
155 Cerar, 2011, p. 78.
156 This view is supported by Novak, who argues that such exceptional cases would entail a major decline in the protection of the democratic setup or fundamental rights protection. See: Novak, 2004, pp. 100, 105.
157 Cerar, 2011, p. 78.
158 A similar position, which argues against the competence of the SCC to review EU acts unless a serious and continual breach of constitutional principles would occur, also follows from Zagorc and Bardutzky (2010), pp. 432-433. Similarly, as Zagorc and Fajdiga argue, only continuous violations of human rights could justify an intervention by the SCC. However, they do leave the door open in extreme situations, if fundamental values of the Slovenian legal order were at stake. See: Zagorc and Fajdiga, 2018, pp. 415–416.
159 Avbelj, 2012a, pp. 349–351.
160 Avbelj and Trstenjak, 2019, p. 68.
161 In that sense, Zalar argues that a constitutional provision establishing primacy over the constitution is not appropriate. Art. 3a of the SC, enabling such an understanding, is hence not optimal. See: Zalar, 2005, p. 14 *et. seq.*

line with the *BVerfG's* doctrine.[162] In the view of the commentators, the substantive limits defined above were intended to create a sort of emergency brake on the broad concession of Art. 3a, para. 3, and they could be understood as a possibility for the SCC to review EU acts,[163] especially in cases of violations of fundamental rights.[164] In this sense, *Avbelj* notes that Art. 3a could also be interpreted as an anchoring point for inalienable fundamental rights and constitutional identity, adopting the doctrines of the *BVerfG*, since the article is inspired by the German model,[165] as was the case with many other constitutional courts.[166] *Jambrek* takes a similar view, arguing that despite differences in the constitutional text,[167] the SCC could adopt both human rights reviews as well as the identity review developed in the *BVerfG's* Lisbon judgment. He bases his argument not only on Art. 3a, but also on the right to self-determination[168] in Art. 3 of the SC, suggesting that the said article could be used to substantiate the adoption of the German doctrines within the Slovenian constitutional system.[169] Starting from the understanding that national constitutional courts, as guardians of the constitution and fundamental rights, should not be underestimated and degraded,[170] *Ribičič* argued that in line with Art. 3a, the SCC has three possible approaches to the review of an EU (or national implementing) act: (1) negative or passive – the SCC strictly follows the CJEU and EU law, (2) neutral – the SCC decides on the (in)compatibility of implementing the act with the SC, without solving the conflict, and (3) positive or active – where the SCC reviews the constitutionality of an EU act.[171] The latter would be exceptional and, in his view, could be based on Art. 3a of the SC.[172] As noted above, the negative approach was followed in nearly all cases.[173]

We can see that by going beyond the textual interpretation of Art. 3a of the SC and acknowledging historical and systemic considerations, arguments can be proposed in favour of granting substantive limits more power than initially advocated by some

162 Zalar, 2010, p. 183.
163 Testen, 2011, pp. 91, 92.
164 Ribičič, 2006, p. 22 *et. seq.*
165 Testen, 2011, pp. 91, 93. Testen explicitly states that with regard to human rights, Art. 3a, para. 3 interpretations should take into consideration the judgments of the BVerfG on the issue.
166 Avbelj, 2019, pp. 71–72.
167 The main doubt was whether identity review could be adopted, since based on the text, there are no unamendable provisions (no 'eternity clause') in the SC. Jambrek, 2011, p. 55.
168 He asserts that the right to self-determination entails the republican form of government (Art. 1 of the SC), democratic legitimacy of state power (Arts. 1 and 3 of the SC), principles of rule of law and social state (Art. 1 of the SC), the protection of fundamental rights and freedoms (Art. 5 of the SC), and local self-government (Art. 9 of the SC). These would form an inalienable constitutional identity of the Slovenian nation. Jambrek, 2011, pp. 56–57.
The right to self-determination is closely related to the principle of sovereignty. For the most comprehensive elaboration on the principle of sovereignty by the SCC, see: Rm-1/02 of 19 November 2003, esp. paras. 22–25.
169 Jambrek, 2011, pp. 52–57.
170 Ribičič, 2006, p. 22 *et. seq.*
171 Ribičič, 2005, p. 14.
172 Ribičič, 2005, pp. 5–6.
173 Zagorc and Fajdiga, 2018, p. 416.

commentators. Although the constitution does not empower the SCC to reject the application of individual EU acts that would be incompatible with the SC,[174] in cases of serious encroachment on fundamental constitutional values, this could be possible.

Without too much speculation, although here too, the SCC lacks a clear stance, critical areas that prompt the SCC to be more inclined to resort to constitutional exceptionalism can preliminarily be determined. Regarding the substance of the constitutional core of the SC, *Avbelj* argues that the SCC has already joined other constitutional courts in establishing the irreducible epistemic core of the SC, identified mainly in the Basic Constitutional Charter,[175] although it has not used it in relation to the EU.[176] The case was, however, singular, as it dealt with the determination of the border with Croatia. *Jambrek* more broadly argues that human dignity,[177] freedom and equality, the right to self-determination, independent statehood, and the guarantee of human rights and fundamental freedoms, as well as the principles of democracy, rule of law, and social state can be considered the core of Slovenian constitutional identity. Both historical legitimacy and the current constitutional setup grant these values the status of permanence and inviolability. In that sense, the SC shares many parallels with other states born of totalitarian regimes, based on the 'never again' principle.[178] Similarly, *Novak* argues that Art. 3a has to be read in conjunction with Art. 3, para. 1, according to which any transfer of sovereignty cannot entail an infringement upon the permanent and inviolable right to self-determination.[179] A partial transfer of sovereignty should also not legalise a (substantial) diminishing in the standards of fundamental rights protection.[180] The latter in particular might find some indirect support in the SCC's case law because in U-I-113/04, the court rejected the review of an EU act, among others, because the standard of human rights under the SC was identical to that of the EU.[181] With regard to human rights review, the SC in general would preclude any decrease in the existing standards of human rights protection. In cases of contradictions between national constitutional law and EU law, the SCC would probably maintain a higher standard, or at least attach a Solange-type condition to the EU act's validity within the national legal system.[182]

174 Cerar, 2003b; Bardutzky, 2019, p. 694.

175 Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia Nos. 1/91-I and 19/91 – corr. He builds on the Opinion of the Constitutional court on the Arbitration Agreement between Slovenia and Croatia in Rm-1/09 of 18 March 2010. See: Avbelj, 2010, pp. 141–142.

176 Also see: Zagorc and Fajdiga, 2018, p. 418.

177 In a famous case, the SCC already held that human dignity is at the centre of the Slovenian constitutional order, directly following from Art. 1 of the SC, which provides that Slovenia is a democratic republic. See: U-I-109/10 of 26 September 2011, paras. 7, 10.

178 Jambrek, 2012, p. 32. Also see above, n. 166.

179 See the SC, Art. 3, para 1: 'Slovenia is a state of all its citizens and is founded on the permanent and inalienable right of the Slovene nation to self-determination'. See: Novak, 2004, p. 96.

180 Novak, 2004, p. 105.

181 U-I-113/04, para. 17.

182 Bardutzky, 2019, pp. 722–723 and references included therein.

In line with all of the above, we see that some rudimentary elements, which could be taken up to introduce the German doctrines discussed above, especially those of human rights and identity review, into the Slovenian constitutional system are already scattered throughout the SCC's jurisprudence and are discussed in the academia, including in connection with EU law. It is very likely that the SCC would take up all of the abovementioned constitutional values, which, looking at the text of the SC, especially considering the above-discussed Art. 3a, para. 1, can definitely be seen as enjoying special protection, into its understanding of Slovenian constitutional identity, should such a case arise.

Asking more concretely what the decision of the SCC would be with regard to the PSPP, should the case be submitted to it, would amount to pure speculation, considering the inconclusive stance of the SCC. Parallels to the interpretations of the right to vote (entailing the 'right to democracy'),[183] budgetary powers of the Parliament,[184] and corresponding duties of constitutional organs,[185] which form the base of the *BVerfG's* judgment, could hardly be traced in the SCC's case law. Nevertheless, a thorough comparison would require a separate paper devoted to each of these issues. The only general rule that is directly relevant to the PSPP judgment which can be inferred from the SCC's case law for certain is that it will adopt a deferential attitude when reviewing monetary and economic measures (including in connection with the EU), meaning that a wide margin of appreciation will be accorded.[186] In addition, only a general outline, which has been provided above, can be established.

In conclusion, it can be argued that should a case that raises doubts regarding EU law's compatibility with the fundamental constitutional values of the SC identified above come before the SCC, the constitutional text (esp. Art. 3, para. 1 and Art. 3a, para. 1) and its current case law enable it to adopt doctrines similar to those of human rights, *ultra vires,* and identity review. In line with what has already been said, the SCC would probably follow the German approach, adapted to the text of the SC. In doing so, it should be stressed that this could only be an *ultima ratio* measure. Only clear violations of the core constitutional values could trigger such a review, and the SCC should, considering its EU-friendly attitude, which is discernible from its case law, act in line with the principle of loyal cooperation. This means that it would first have to initiate a preliminary ruling procedure, and then, considering the provided interpretation of EU law by the CJEU, recognise the latter's interpretation of EU law. Only if the CJEU failed to address the SCC's concerns could the national court reserve for itself the option of giving precedence to the SC, as the *BVerfG* did in Weiss. Considering all the safeguards – if respected by the parties involved – this is more or less a hypothetical possibility.

183 BVerfG 2 BvR 859/15, para. 99. See: Calliess, 2019, pp. 172–173.
184 *Ibid.*, para. 104.
185 *Ibid.*, para 106.
186 U-II-1/12, U-II-2/12, para. 47. Also see: U-I-178/10 of 3 February 2011, para. 9; U-I-129/19 of 1 July 2020, paras. 64–65, 83.

5. Conclusion

The *BVerfG's* PSPP judgment spurred intensive debates regarding possible constitutional repercussions for the EU. Admittedly, there is the possibility that the court's uncooperativeness might sprout illiberal mimicry from some of the constitutional courts in the continent. However, as far as national constitutional courts are concerned, exceptional constitutional exceptionalism has never been completely off the table, and, without catastrophic consequences, has already materialised before the *BVerfG's* judgment in May. I believe that national constitutional exceptionalism in the context of EU law should not be disregarded as categorically unacceptable, as inevitably damaging European integration, and as being inherently prone to abuse. National restraints stemming from genuine concern about maintaining and developing legal safeguards against disproportionate exercise or abuse of public authority are certainly endowed with legitimacy. However, when arguing for exceptions under EU law due to national constitutional concerns in line with Art. 4(2) TEU, these can only be accommodated if possible within the general framework of EU law. Red lines should always be drawn when attempts at breaking down the fundamental values in Art. 2 TEU and the standards of fundamental rights as stipulated in Art. 6(3) TEU emerge before the CJEU in the guise of genuine national constitutional concerns. Regardless, in a system of such prevalent diversity, the EU should be able to accommodate inherent fundamental differences if it wishes to integrate sustainably. *Ab initio* rejecting national constitutional concerns would be counterproductive.

Although the SCC has not yet expressed a clear view on the issue, some limits to EU integration already follow from the text of the constitution. The SCC's approach can be marked by cooperative vagueness, echoing the doctrines of the CJEU. However, the answer to absolute primacy has explicitly been left open by the court. Considering its existing case law as well as its doctrinal affinity to German constitutional law, I would argue that when a clear case arises, the SCC would probably frame the rules of engagement in similar terms as the *BVerfG*. Viewed from the perspective of its general EU-friendly attitude, it would be safe to assume that any departure from established EU law doctrines would only be undertaken in exceptional cases of encroachment on core constitutional values and it would be exercised in the spirit of loyal cooperation with the CJEU.

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Intergenerational Transfer of Family-run Enterprises by Means of Civil Law in Serbia[3]

ABSTRACT: *Family-run enterprises are business organisations in which the reins of control are concentrated in the hands of a single family or an individual who for the enterprise aims to continue operation through successive generations of the family. In Serbia, family-run companies usually begin as an individual entrepreneurship, a form of closed company (general and limited partnership) or relatively closed company (limited liability company). The legal difficulties that arise following the death of an individual entrepreneur (natural person) differ from those following the death of a member in a company (legal entity). Companies are imbued with rights and responsibilities separate from the personal rights and responsibilities of their members. Members of a company, including the head, are not considered owners of the company's property in legal terms. Instead, they have shares in the company, and those shares entitle them to membership (management and proprietary) rights. Thus, when a member dies, the company's property, in whole or in part, is not subject to inheritance (although that deceased member's share is). This differs from the situation following an individual entrepreneur's death. The law does not recognise a natural person conducting business as an individual entrepreneur as having two legal personalities (personal and business); everything is treated as personal. Therefore, all the assets and debts of a deceased individual entrepreneur are subject to inheritance, regardless of whether or not they were accrued in the course of business. The succession of a share following a member's death is regulated separately for each company form, and all issues not governed by the Companies Act or a company's incorporation document are subject to the rules of Serbia's Law of Inheritance. Inheritance rules differ greatly for a share in a personal company (general or limited partnership) and a share in a capital company (limited*

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liability or joint-stock company). In principle, whether or not a deceased member's rights and responsibilities can be passed through inheritance depends on the company's form, its incorporation document, and the relevance of the heirs' connection to the deceased and the company. The less complicated these are, the fewer the legal obstacles to inheritance.

■ **KEYWORDS:** family-run enterprises, inheriting company shares, individual entrepreneurships, general and limited partnership, limited liability companies.

1. Introductory remarks

Family-run enterprises in Serbia, similar to other countries in the region, usually hold the legal form of an individual entrepreneurship or a closed-type company (general or limited partnership)[4] or a relatively closed-type company (limited liability company).[5] Only rarely are family-run companies established as joint-stock companies because that form is more suitable for enterprises with greater business volume.[6] Thus, this paper focuses only on the succession (intergenerational transfer) of the assets gained and debts arising from individual entrepreneurs' activity and the succession of shares in partnerships and limited liability companies. The Serbian Companies Act regulates the legal status of entrepreneurs and recognises four forms of companies: general partnerships (Serb. *ortačko društvo* or O.D.), limited partnerships (Serb. *komanditno društvo* or K.D.), limited liability companies (Serb. *društvo s ograničenom odgovornošću* or D.O.O.), and joint-stock companies (Serb. *akcionarsko društvo* or A.D.). However, the statutory regulation does not have special rules for the inheritance of entrepreneurs' assets and shares in family-run companies; thus, it does not recognise the special nature of family-run enterprises. The rules for the succession of shares in companies differ by

4 Partnerships, either general or limited, are imbued with the personal relationships of their members. They are considered a closed company form since their ownership structure rarely changes, if ever. This is primarily attributable to the rule that a share of a general or limited partner can be transferred to a third party only with the other partners' consent. Likewise, when a partner dies, that person's share is not generally subject to succession but is added proportionately to the other partners' shares.

5 A limited liability company is usually considered a relatively closed company because the other members have a right of pre-emption if one member intends to transfer his or her share to a third party. Similarly, if a member dies, his or her share is regularly subject to succession. However, the incorporation document might call for the compulsory sale of the share by the heir on behalf of the other members or the company, allowing them to prevent the heir from gaining part ownership in the company. See Marjanski and Dudás, 2020, p. 131–146.

6 Banks, insurance companies, and similar major enterprises are usually established as joint-stock companies.

company form. However, the same rules apply to all companies of the form, regardless of whether their ownership is intertwined with family relationships or not.

This paper is divided into two parts. The first covers the succession of shares in companies. The second covers succession of the assets and debts arising from the activities of individual entrepreneurs.

2. Succession of shares in companies

■ *2.1. General remarks*

Under Serbian law, companies are legal entities established to generate profit.[7] They gain legal/corporative personality through incorporation at a registry in accordance with the statute pertaining to the registration of business organisations.[8] The Agency administers the registry for commercial registries (Serb. *Agencija za privredne registre*), following the Agency for Commercial Registries' rules on registration procedures.

All companies are considered independent legal entities under Serbian law. This means that they have their own juridical and contractual capacity; acquire rights, assets, and obligations in legal transactions independently; can be a claimant or respondent in litigation; and can be a party in administrative, tax, and similar procedures. Likewise, they have their own property, separate from the property of their members. The members are not considered owners (or joint or co-owners) of the company's assets. They merely have specific membership rights based on their shares (managing[9] and rights related to the property of the company[10]). Thus, when a member dies, the company's property is not subject to inheritance; only the decedent's share—that is, the membership rights—is subject to inheritance.

Therefore, the members of a general or limited partnership or a limited liability company are the owners of shares (expressed as a percentage)[11], registered by the Agency that administers commercial registries. Since the members are the owners of their company shares, they have the right to dispose of their shares as they see fit. Furthermore, as part of their separate property, the shares might be subject to inheritance according to the rules of the Companies Act, the enterprise's incorporation document, and the general rules prescribed by Serbia's Law of Inheritance.

General and limited partnerships and limited liability companies are predominantly family-run companies. The Companies Act does not define the notion of family-run companies; however, the Code of Corporate Governance adopted by the Serbian Chamber of Commerce does. The Code defines a family-run company as follows: 'the

7 Companies Act, Art. 2.
8 Companies Act, Art. 3.
9 Management rights include the right to participate in an assembly, vote at an assembly, obtain information, and challenge the decisions of an assembly, among others.
10 Members' proprietary rights include the right to participate in the distribution of profits and liquidation surplus, among others.
11 The share is a membership relationship in the company.

majority of voting rights belong to the family controlling the company, including the company founder intending to transfer the company to his or her descendants and make company operation sustainable down through the generations of this family'.[12] Family-run companies represent a large portion of the total number of companies and contribute significantly to the national economy and employment. Therefore, the emergence, growth, and sustainability of these companies are of major importance to the prosperity of the national economy. Nevertheless, in contrast to public joint-stock companies, they have not attracted special attention from the legislature or other regulatory bodies.[13]

When a member of a family-run company dies, the decedent's share can be subject to succession. This implies that the management and property rights can be transmitted—that is, the company's controlling mechanisms can be passed down from one generation to another.[14] The Companies Act does not have special rules that apply to the death of an owner–operator of a family-run company; hence, the rules that apply are those applicable to all companies. However, the Act allows family-run companies to include their own succession plans in the incorporation document to specify what happens to shares following an owner–operator family member's death. Similarly, the Code of Corporate Governance adopted by the Serbian Chamber of Commerce also contains principles and recommendations that are not mandatory; instead, they represent a form of soft law on the best practices of corporate governance recommended to all members of the Chamber of Commerce.[15] These soft-law rules are partially related to the transfer of management from one generation to another. The following are some of the most important recommendations from the Code: A family must have a general plan of inheritance, including one for extraordinary situations, outlining the course of action to be taken when the members are hindered in managing the company and its business. Deferring succession-planning for executive members until the latest possible moment can create crises and is one of the most common reasons why most family-run companies cease to exist before they reach the hands of the family's third generation. First and foremost, the succession plan should regulate the criteria and procedure for the successor's election and financial, tax, and other implications. The family protocol[16] should define the criteria for choosing a successor when multiple family members lay claim to the position.[17] Family-member candidates should be subject to the same conditions in a free competition that other professionals would apply to the positions. The contracts on managerial position concluded by family members should be the same as

12 Code of Corporate Governance, Glossary, Sec. 6.

13 For the economic aspects of inheritance in family-run enterprises, see Đulić, Kuzman & Radosavljević, 2012, pp. 123–140.

14 Code of Corporate Governance, Glossary, Sec. 7.

15 Code of Corporate Governance, Scope of Application, Sec. 1.

16 For the best practices in family protocols, see Koeberle-Schmid, Kenyon-Rouvinez & Poza, 2014, pp. 222–243.

17 For a content analysis of documents on managing family-run companies, see Đurić-Kuzmanović & Ljubojević, 2016, pp. 95–110.

those concluded with the company's non-family executives. The transfer of knowledge and preparation of the heir requires careful planning and time. The plan of succession is only complete when it includes policies on employing family members.[18]

As indicated earlier, the Code is not a binding source of law. The transfer of a deceased family member's share to an heir is regulated specifically for each company form in the Companies Act; however, for all legal questions not regulated by the Companies Act or incorporation document, the general rules of Serbia's Law of Inheritance apply.

Considering that general and limited partnerships and limited liability companies are considered closed or relatively closed, the Companies Act prescribe some limitations regarding the share succession following a member's death. However, the Act enables members to develop company-specific rules on share succession in the incorporation document.

Generally speaking, the succession rules for shares in partnerships differ significantly from those in limited liability and joint-stock companies. In principle, the possibility of inheriting a share depends on the relationships of the members to the decedent and their liability for the company's debts. Usually, the closer the relationship, the easier the inheritance.[19]

■ *2.2. Inheritance of a member's share in a general partnership*

2.2.1. General remarks

A general partnership is a company organised by two or more legal entities or natural persons who are jointly and severally liable for all obligations.[20] It bears all the traits of personal companies (e.g., the unlimited liability of members for company debts, all partners conducting actions in the course of regular company business and representation,[21] decision-making based on the principle of 'one partner, one vote'[22] rather than representation based on share percentage, etc.). A general partnership is a closed company. The membership structure rarely changes; the founding members usually remain the only members until the company's dissolution. This general partnership feature is also supported by the rules restricting transferring shares to third parties[23] and restricting the inheritance of shares.[24]

2.2.2. The share of a deceased general partner usually not subject to inheritance

The share of a partner who dies is not subject to inheritance. It shall be distributed to other partners in proportion to the shares they possessed on the day the partner died

18 Code of Corporate Governance, Glossary, Second Part: Additional principles and recommendations for family-run limited liability companies and joint-stock corporations.
19 Vukotić, 2018, p. 167.
20 Companies Act, Art. 93, Sec. 1.
21 Companies Act, Art. 101–114.
22 Companies Act, Art. 110.
23 Companies Act, Art. 99.
24 Companies Act, Art. 119.

unless the incorporation document mandates that the company continue carrying out its activity with the decedent's heirs.[25] Therefore, the general rule is that the deceased partner's share is not subject to inheritance unless the incorporation document specifies another course of action. This rule is in line with the nature of general partnerships and their requirement for deep mutual trust among the partners in the closed-form company.[26] Thus, the Act departs from the presumption that the partners will not want another person to take over the late partner's position and enables the partners to establish a different set of rules in the incorporation document.[27]

The heirs who did not take over the position of the deceased partner (either because the incorporation document precluded this or they did not agree to do so; the latter case will be discussed in detail later) are entitled to compensation for the proportionate value of the share they inherited, according to the rules applicable to a withdrawal from the partnership.[28] Death, along with withdrawal, is one form of termination of a partner's membership;[29] thus, the heirs' rights and duties are regulated by referring to the article of the Companies Act on the consequences of a partner's withdrawal. The effects are the same: the share of the partner who withdraws from a partnership or dies shall be distributed to other partners proportionately unless the incorporation document provides otherwise. However, the partnership is obliged to compensate the withdrawing partner or the deceased partner's heirs for the share's value within six months from the day the partner withdrew or died, unless the incorporation document specified a different deadline. The payment obligation amounts to the sum the partner would have been entitled to if the partnership had been liquidated without considering the ongoing and unfinished business transactions.[30]

The legislature seems to have made a mistake with the aforementioned rule concerning heirs who do not take over a deceased partner's membership position. According to the rules of universal succession, the right to compensation belongs to the estate until its division of all the heirs' joint ownership. This means that the allocation of the right to compensation depends on the heirs' decision on the division of the estate. Thus, when a partner dies, the right to compensation for the share's so-called liquidation value belongs to the decedent's assets. Therefore, the heirs could decide that it belongs to only one or divide it in some proportion other than that of their shares in the inheritance.[31]

25 Companies Act, Art. 119, Sec. 1.

26 The same arguments for this rule can be found at Babić, 2019, pp. 97–111.

27 Vukotić, 2018, p. 179.

28 Companies Act, Art. 119, Sec. 4, and Art. 122. The former Companies Act from 2004, in force until 1 February 2012, did not clarify the heirs' rights following the death of a partner in a general partnership. For a critique of the regulatory framework, see especially Jovanović, 2012, pp. 23–44.

29 There are different grounds for terminating a partner's membership status: withdrawal, exclusion, death (of a natural person), deletion (of a legal entity from the competent registry), or share transfer to another partner or a third party. The incorporation document could add other grounds. Companies Act, Art. 117, Sec. 2.

30 Companies Act, Art. 122, Sec. 2.

31 Vukotić, 2018, p. 187.

Conversely, suppose the value of the partnership's assets on the day of a partner's withdrawal or death is not enough to meet its debts. In that case, the withdrawing partner or deceased partner's heirs are obliged to make sufficient contributions to the company to cover the debts. Their contributions must be proportionate to the value of the share of the withdrawing or deceased partner and are payable in six months unless otherwise specified by the incorporation document. In other words, the deceased partner's heirs need to make up the difference between the company's debts and the companies' assets. As a matter of course, the heirs' liability is limited to the estate's value, according to Serbian inheritance law's general rules.[32] Thus, the heirs can be held liable for the decedent's debts only up to the value of the estate inherited.[33] This rule is supported by the general rule on partners' joint and several liability for the partnership's debts.[34] After five years from the day of the partner's withdrawal or death, the liability for the partnership's current debts ceases unless the incorporation document specifies a longer period.[35]

Finally, the withdrawing partner or the deceased partner's heirs participate in the profit and losses from business transactions that were not yet finished at the time of the partner's withdrawal or death unless the incorporation document specifies otherwise.[36]

2.2.3. The continuation of business with the deceased partner's heirs when the incorporation document so provides

The incorporation document can allow the company to continue to perform its business further with the deceased partner's heirs. This can happen in one of two legal situations, depending on which the heirs have agreed to.

First, suppose the incorporation document specifies that the company will continue its business with the deceased partner's heirs, but the heirs disagree. In that case, the deceased partner's share is distributed to the other partners in proportion to the value of the shares they held when the partner died.[37] Additionally, the heirs are entitled to compensation for the share's value in proportion to their share in the estate, according to the rules on a partner's withdrawal.[38]

Second, suppose the incorporation document specifies that the company will continue its business with the deceased partner's heirs, and the heirs agree. In that case, there are two legal alternatives: (a) the heirs can take over the deceased partner's membership position, or (b) they can request that the form of the company be changed legally to a limited partnership and register as limited partners.[39]

32 Vukotić, 2018, p. 180.
33 Law of Inheritance, Art. 222, Sec. 1.
34 Companies Act, Art. 93, Sec. 1.
35 Companies Act, Art. 122, Sec. 4.
36 Companies Act, Art. 123, Sec. 1. For more on the attribution of profit and loss to a partner in general partnership, see Šogorov, 2000, pp. 1–10.
37 Companies Act, Art. 119, Sec. 2.
38 Companies Act, Art. 119, Sec. 4, and Art. 122.
39 Companies Act, Art. 119, Sec. 5.

In variant (a), the heirs have 30 days from the probate procedure's conclusive ending to ask the company to declare them partners. The regulation's wording implies that the deceased partner's share is not subject to inheritance.[40] However, the heirs have the right to exercise the option granted by the incorporation document (that is, to request to step into the deceased partner's position) within the 30-day deadline.

In variant (b), the deceased partner's heirs can request that the company's legal form be changed to a limited partnership and register as limited partners. This rule enables the heirs to become limited partners in the company, protecting them from being personally liable for the company's debts. (They would be liable if they became general partners.) However, the other partners can refuse to transform the enterprise into a limited partnership. In that case, the heirs become general partners in the general partnership, but they can withdraw according to the rules on the withdrawal of a partner from a general partnership.[41] In the case of a withdrawal caused by the refusal of the surviving partners to transform the enterprise from a general to a limited partnership, the heirs remain liable for the company's existing debts up to the value of the estate received, according to the general inheritance rules on the heirs' liability for the decedent's debts.[42] Changing the company's form can occur if all the surviving partners agree; it cannot be the deceased partner's heirs' exclusive decision.

Finally, the incorporation document can specify a ratio in which the heirs can participate as limited partners in the company's profits should the surviving partners agree to transform the enterprise into a limited partnership. This ratio depends on the degree to which the deceased partner participated in the profit distribution as a general partner.[43]

■ *2.3. Inheritance of a share in a limited partnership*

2.3.1. General remarks

According to the Companies Act, a limited partnership is a company organised by two or more legal entities to conduct business under a common name. At least one of the partners must accept unlimited liability for the company's debts (general partner), and at least one partner's liability will be limited to the value of that partner's agreed contribution (financial or otherwise) to the company's capital (limited partner).[44] Thus, a limited partnership presupposes at least two founding members who are in different legal positions: at least one is a general partner, and at least one is a limited partner.

The general partner is the 'active member' of the company who conducts the business and represents the company[45] [46] and has unlimited liability for the company's

40 Similarly, Vukotić, 2018, pp. 186–187.
41 Companies Act, Art. 119, Sec. 6.
42 Companies Act, Art. 119, Sec. 7, and Law of Inheritance, Art. 222, Sec. 1.
43 Companies Act, Art. 119, Sec. 8.
44 Companies Act, Art. 125.
45 Companies Act, Art. 119, Sec. 8.
46 Companies Act, Art. 131, Sec. 1.

debts. The legal position of a general partner in a limited partnership is the same as the legal position of a partner in a general partnership in terms of liability for the company's debts, authority to conduct business and represent the company, different company roles that partner can assume, and the shares and transfers of shares, including through inheritance.[47]

A limited partner is a 'passive member' of the company who is not entitled to conduct business or represent the company.[48] Limited partners' rights are restricted to participation in the profit distribution and the right to exert control over the company's business activities. Limited partners are only liable for the company's debts up to the amount of their agreed contribution (financial or otherwise). Once they have fulfilled their obligations to pay or enter contributions to the company's capital, their personal liability for the company's debts ceases.

The inheritance rules for the shares of general and limited partners also differ.

2.3.2. The continuation of company activity with the heirs of a general partner in a limited partnership

If a limited partnership has two or more general partners, and one of them dies, the rules on the legal consequences of a partner's death in a general partnership apply. A deceased general partner's share shall be distributed among the surviving partners unless the incorporation document specifies that the company will continue to conduct business with the heirs in place of the deceased partner. Thus, if a limited partnership has two or more general partners, and one of them dies, the deceased partner's share will not be subject to inheritance; instead, the share will be distributed among the surviving general partners (unless the incorporation document specifies otherwise). In such cases, the same rules apply as those in the case of a continuation of business with the heirs of a deceased partner in a general partnership.[49]

However, if a limited partnership has only one general partner (the usual case), and that general partner dies, different rules apply. When a sole general partner dies, the company continues to conduct business with the deceased partner's heirs, providing that the heirs file claims with the registry to be recognised as general partners; they must do so within three months of the probatory procedure's conclusive ending.[50] This rule is quite unusual since the legislature departed from its presumption that a general partner's personal standing is relevant only as it relates to other general partners, not limited partners, which is certainly not the case.[51] Since general partners conduct the business and represent the company, the company's success depends on their personal efforts and facilities.[52] Thus, the general partner's personality is relevant to all partners in a limited partnership. Limited partners, who provide some or all of the limited

47 Companies Act, Art. 126, Sec. 2.
48 Companies Act, Art. 131, Sec. 2.
49 Companies Act, Art. 119.
50 Companies Act, Art. 137, Sec. 4.
51 Vukotić, 2018, p. 191.
52 Ibid.

partnership's capital, have a practical interest in the business being conducted well and represented by reliable and skilled persons. The rule prescribed by the Serbian legislature puts limited partners in a delicate situation by requiring them to accept that the company will continue to conduct business with the heirs in place of the deceased general partner—whether or not they believed those heirs possess the required knowledge, skills, and facilities.[53]

Furthermore, the heirs who decide not to take over the deceased general partner's position are entitled to reimbursement of a part of their share in proportion to their share in the estate. However, the Companies Act does not regulate what happens with the share of a deceased general partner when none of the heirs submits a request to the registry within 30 days requesting recognition as a general partner. In this respect, the rules of the Companies Act need amending.

The Companies Act rules only cover the situation in which a company loses all its general or limited partners, regardless of the cause (e.g., withdrawal, transfer, or death). In such cases, the partnership needs to do one of three things: register a new partner (limited or general, depending on which position is vacant) within three months, change from a limited to a general partnership in compliance with the Companies Act or initiate voluntary liquidation. Otherwise, a compulsory liquidation will be initiated; the Companies Act prescribes a six-month deadline for this decision.[54] If the decision is to change the legal form, there must be a unanimous agreement by all the remaining limited partners (if the company is left without general partners) or all the remaining general partners (if the company is left without limited partners). If the limited partnership is left without general partners, the limited partner(s) can decide to re-form the enterprise as a limited liability company or joint-stock company. Similarly, if the company loses all its limited partners, the general partners can decide to re-form the enterprise as a general partnership, or, if only one general partner remains, that person can choose to continue the business as an individual entrepreneur.[55]

2.3.3. Inheritance of the share of a deceased limited partner

If a limited partner who is a natural person dies, that partner's heirs can take over the decedent's position in the limited partnership. If a limited partner is a legal entity that ceases to exist, that entity's legal successors can take over its position in the company.[56] This rule is mandatory; the incorporation document cannot specify a different regime of legal succession. It could be inferred from this rule that a limited partner's position in a limited partnership is subject to inheritance. That would be in line with the nature of the legal position of a limited partner. As indicated earlier, limited partners cannot conduct business in the name of the company nor represent it; they are not personally liable for the company's debts, so their skills, knowledge, and facilities are not crucial

53 Ibid.
54 Companies Act, Art. 546, Sec. 1, Subsection 3
55 Companies Act, Art. 137, Secs. 3–7.
56 Companies Act, Art. 137, Sec. 2.

for the business success of the limited partnership. Therefore, there is no reason to deny the heirs the right to inherit the limited partner position in a limited partnership.

■ *2.4. Inheritance of the share of a member in a limited liability company*

2.4.1. General remarks

According to the Companies Act, in a limited liability company, one or more members must have shares in the company's share capital, and none of them can be held personally liable for the company's debts except in the cases described in Article 18 (cases of piercing the corporate veil).[57] However, the company is fully liable for all its debts with all its assets.

Limited liability companies belong to the group of capital companies. Since there is a mandatory share capital, specific organs of the company must be nominated, members cannot be held personally liable for company debts, and the enterprise can be established as a uni-personal company. However, limited liability companies also share some of the features of personal companies. For instance, the membership structure is relatively stable since there are restrictions on the transfer of shares to third parties. They also usually have a small number of members.

Limited liability companies can have only one member (uni-personal LLC) or multiple members.[58] Membership in an LLC is acquired when the applicant (natural person or legal entity) has been duly recorded in the registry.[59] The members are the owners of their shares in the LLC, and every member can have only one share,[60] although the shares need not be equal. The shares are expressed as a percentage and represent the member's participation in the share capital of the company. This means that if one member acquires another's share, that new share will be added to his or her existing share, which will lead to an increase in percentage.[61] The members' percentage of share ownership in an LLC gives them different rights (proprietary and management rights) in proportion to the shares' value.[62]

2.4.2. Inheritance of a member's share in an LLC

The Companies Act prescribes that if a member of an LLC dies, that partner's heirs acquire his or her share according to the statute governing inheritance.[63] Thus, a share of the LLC is regularly subject to inheritance. If there are multiple heirs, they become co-owners of the deceased partner's share. Nonetheless, there is only one share; they own a percentage of the share. This means that the heirs are considered to be one member of the LLC, and they all share joint and several liability for the company's

57 Companies Act, Art. 139.
58 Companies Act, Art. 139.
59 Companies Act, Art. 143, Sec. 1.
60 Companies Act, Art. 151, Sec. 2.
61 Companies Act, Art. 151, Sec. 3.
62 Companies Act, Art. 152, Secs. 1–2.
63 Companies Act, Art. 172, Sec. 1.

obligations.[64] However, the Companies Act requires co-owners to regulate their mutual relationship in relation to the share by a special agreement.[65] They exert their voting rights via a common representative whose identity they must report to the company.[66] Until they have notified the company of their representative's identity, their shares cannot be taken into account at the assembly. At the same time, legal acts taken against one of the co-owners will have a legal effect on all of them.[67] Once the legal co-owners (multiple heirs) have nominated a common representative and notified the company thereof, any legal acts and notifications effected to the common representative will have a legal effect on all the co-owners.[68] The individual shares held by the co-owners in the LLC do not have to be equal. The situation of unequal shares usually occurs when the co-owners obtain the percentage of a deceased partner's share under Serbia's Law of Inheritance, which recognises orders of inheritance as defined by the heirs relationships with the decedent. In any case, the co-owners are always free to dissolve the co-ownership by agreement. The Companies Act forbids adding a clause in the incorporation document that would restrict the co-owners' dissolution of the co-ownership of a share.[69]

For the sake of protecting the company's and heirs' interests while the probate procedure is ongoing, the Companies Act allows the company or any of the heirs to ask the court to nominate a temporary guardian who will act in the name and on behalf of the deceased member's heirs and exert membership rights.[70] The guardian has the mandate to exert the membership rights until the probate procedure has ended conclusively, at which point the heirs legally acquire the share in the LLC; from that moment, the heirs can exert their membership rights in relation to the inherited share without a proxy.

2.4.3. Compulsory purchase of the share from the heirs

LLCs are relatively closed companies, so the Companies Act enables members to devise different succession regimes. The incorporation document can specify the right of the company or one or more members to exert the right of compulsory purchase and buy a deceased member's share from the heir(s). This must happen within six months from the day of the member's death and within three months of the day when the heir(s) registered their membership status in the registry (the Companies Act uses the wording 'decide on the compulsory purchase of the share').[71] Suppose a company institutes the compulsory purchase of the share. In that case, it must express its intention to exert the right in the form of a decision adopted by the majority of all members, unless

64 Companies Act, Art. 153, Sec. 4
65 Companies Act, Art. 153, Sec. 2.
66 Companies Act, Art. 153, Sec. 3.
67 Companies Act, Art. 153, Sec. 6.
68 Companies Act, Art. 153, Sec. 5.
69 Companies Act, Art. 176, Sec. 2.
70 Companies Act, Art. 172, Sec. 2.
71 Companies Act, Art. 173, Sec. 1. See Marjanski, 2015, pp. 679–680.

another majority is prescribed by the incorporation document (note: the deceased member's share is not considered when determining whether there is a quorum for the decision).[72] This would be the case of the company acquiring an own share by an onerous contract—that is, by paying compensation equal to the value of the share.[73] The company's decision to exercise the right of compulsory purchase is a decision on acquiring an own share. Nonetheless, no qualified majority of 2/3 is prescribed for this decision. On the other hand, such a majority is required for the decision to acquire an own share by an onerous contract, that is, by paying compensation to a member.[74] Since this would be a case of compulsory purchase, the deceased member's heirs' consent is not required. Thus, the change of a member in the registry will be effected based solely on the company's decision to exercise the right of compulsory purchase (acquisition of an own share), and there is no need to conclude a contract on the share transfer.[75] However, the company's acquisition of an own share through compulsory purchase is subject to certain restrictions. First, if the incorporation document allows the compulsory purchase of a share, it must also prescribe a means for determining the amount of compensation and the deadline for payment to the heir(s); otherwise, the incorporation document's clause on compulsory purchase must be considered non-existent.[76] If the company, a member, or multiple members decide to exercise the right to compulsory purchase, the deceased member's heirs have the right to a compensation determined by the incorporation document, payable in the same Act's specified deadline.[77] Unless the incorporation document (or a decision of the assembly on the exercise of the compulsory purchase) provides otherwise, the deadline for the payment of compensation starts from the delivery date of a conclusive decision declaring the heirs the legal successors of the deceased member's share.[78] These rules have been instituted to protect the heirs' interests. However, they remain incomplete since the Companies Act does not prescribe further rules on the means of effecting compensation payments. Furthermore, by enabling the members to determine the compensation payment deadline in the incorporation document—there is no definitive mandatory statutory deadline—it is possible for companies to delay the payment to the heirs endlessly.

Of course, the company might not decide to exercise its right to compulsory purchase if doing so would be contrary to the Companies Act's rules on restricted payments.[79] Finally, the Companies Act does not require that the share must be entirely paid for or entered into the company's capital when it is obtained from the deceased member's heirs unless it is an own share (or part of one) purchased from an existing

72 Companies Act, Art. 173, Sec. 2.
73 Companies Act, Art. 157, Sec. 2, Subsection 4.
74 Companies Act, Art. 211, Sec. 2.
75 Marjanski, 2015, p. 679.
76 Companies Act, Art. 174, Sec. 1.
77 Companies Act, Art. 174, Sec. 2.
78 Companies Act, Art. 174, Sec. 4.
79 Companies Act, Art. 174, Sec. 3.

member.[80] Similarly, the Companies Act does not specify mandatory reserves[81] to secure the payments to the heirs in case the compulsory purchase is effected on behalf of the company, regardless of whether it concerns an own share acquired by an onerous contract (by purchasing a share or part of it from a living member).[82]

3. Inheritance of an individual entrepreneur's assets

■ *3.1. General remarks*

Family-run enterprises in Serbia most often begin as individual entrepreneurship. Individual entrepreneurs are natural persons who conduct business to generate profit and are registered according to the statute pertaining to business organisations' registration.[83] Individual entrepreneurs have unlimited liability for debt accrued in relation to their entrepreneurial activity. Their liability extends to all assets, regardless of whether they were obtained in the course of conducting business.[84] Entrepreneurs' unlimited liability for their companies' debts does not end with their removal as private entrepreneurs from the registry.[85]

The individual entrepreneurship enterprise form does not create separate legal and corporate personalities. Individual entrepreneurs are not considered legal entities, as companies are. When they obtain rights, accrue obligations, act as parties in litigation or administrative procedure, or obtain assets, they do so as individuals, not legal entities—that is, they are people, not companies.[86] There are no shares in enterprises formed through individual entrepreneurship; the property, rights, and debts are intertwined with the owner personally, the one natural person. Therefore, the inheritance of shares does not apply, but the inheritance of the owner–operator's (the natural person) rights and assets do apply.

■ *3.2. Inheritance of an individual entrepreneur's assets and debts*

Since individual entrepreneurs do not have separate legal–corporate personalities, when they die, all their assets and debts are transmitted to their heirs through Serbia's Law of Inheritance, including those attained or accrued in the course of business. Legal succession comprises the assets and debts related to the decedent's activity as individual entrepreneurs in addition to those that are not. For individual entrepreneurs, in

80 Companies Act, Art. 157, Sec. 3.
81 For information on the relationship between payments from the non-allocated profit account and those from the reserves, see Marjanski, 2020, pp. 218–221.
82 When the company acquires an own share by purchasing all or part of the share, the compensation payment to the heir must be effected from the reserves allocated for this purpose. Companies Act, Art. 157, Sec. 4.
83 Companies Act, Art. 83, Sec. 1.
84 Companies Act, Art. 85, Sec. 1.
85 Companies Act, Art. 85, Sec. 2.
86 Arsić & Marjanski, 2018, p. 26.

principle, there is no difference between the assets obtained in the course of conducting business and those obtained as private persons.[87] For instance, if an entrepreneur owned a vehicle used for business purposes and another used for personal purposes, both vehicles pass to the heirs under the same inheritance rules.[88]

If there is only one heir, the fate of the enterprise depends on that person's decision of whether to continue the decedent's business. However, the situation becomes more perplexing if there are multiple first-order heirs (spouse and children, whether natural or adopted). In this case, the estate belongs to all the first-order heirs in undivided joint ownership.[89] Before the estate's division, the heirs manage and dispose of it unanimously.[90] Thus, the fate of the enterprise depends on the heirs' decisions. There are no restrictions on the heirs' decision. They could nominate one of the heirs to continue the family-run enterprise.[91] They could agree that the right to use the name of the enterprise and the assets needed for conducting business also belonged to one of the heirs. If such an agreement is reached in the probate procedure, the court will include it in the probate decision; thus, the nominated heir can register to continue the business on the grounds of the court's decision.[92] However, after the probate decree becomes conclusive, there is no requirement for the heirs to agree on the division of the estate. Resolution after the conclusion of probate would necessitate an out-of-court settlement concluded in written form and signed by all heirs to enable the designated heir to register as the a member continue operations.[93] If the settlement involves real estate, the agreement must be confirmed by a notary public. If the heirs cannot reach a common understanding, the court decides how the inheritance will be divided, and that procedure can be initiated by any heir, not just a first-order heir. When deliberating on the division of the inheritance, the court must consider the 'legitimate claims and interest of joint owners'.[94] If a joint owner requests sole ownership of a certain asset, the court must examine the 'special reasons' on which the request is based. These broadly defined legal standards have major significance in the division of deceased entrepreneurs' estates. Weighing these standards appropriately, the court could decide to allocate an enterprise's assets to one heir whom the court considers the most suitable to continue the business.[95] In any case, it seems undisputable that the regulations allow outcomes in which one of the heirs takes over decedent's enterprise, either through

87 Vukotić, 2018, p. 168.
88 Ibid.
89 Vukotić, 2018, p. 173.
90 Law of Inheritance, Art. 229.
91 Vukotić, 2018, p. 174.
92 Law on Non-Contentious Procedure, Art. 122, Sec. 3.
93 Companies Act, Art. 91, Sec. 7.
94 Law on Non-Contentious Procedure, Art. 153, Sec. 1.
95 For instance, suppose one of the heirs has training, experience, and qualifications relating to the decedent's trade or profession, but the others do not. The court would likely assign the enterprise-specific assets to that heir. Such a solution would be advantageous not only for the heir who wants to continue the deceased entrepreneur's business but also for the public since it would allow the enterprise to outlive the entrepreneur who developed it.

unanimous agreement among the first-order heirs or through a court's decision on the division of the inheritance.[96] It is also possible for a prospective heir to take over a family enterprise before the death of the original individual entrepreneur if the two parties sign a contract to that effect specifying the division of the future estate, according to the Law of Inheritance.[97]

Concerning the heirs' liability for the deceased individual entrepreneur's debts accrued in relation to business activities, Serbian law does not have special regulations that apply if an heir continues the decedent's enterprise. Thus, the general rules of inheritance apply: all the heirs are liable for all of the debts accrued as of the decedent's death, but each is only liable for a portion of the debt up to the value of the estate that person inherited.[98] That is, no one owes more than they inherit.

4. Conclusions

Family-run enterprises in Serbia usually begin their legal form as individual entrepreneurship, a form of closed (general and limited partnership) or relatively closed company (limited liability company). Thus, this has focused on the inheritance (intergenerational transmission) of assets and debts arising from conducting business in the form of general and limited partnerships, limited liability companies, and individual entrepreneurship.

Different legal difficulties arise following the death of an individual entrepreneur and the death of a member of a company. Company forms establish a separation between personal and business property. Company members, even the titular heads, are not considered legal owners of the company's property. Instead, they are owners of shares in the company, and those shares entitle them to specific membership (management and proprietary) rights. Thus, when a company member dies, its property (or even a part of it) is not subject to inheritance, but the deceased member's share is. In contrast, there is no such personal–business separation in individual entrepreneurship. Natural persons conducting businesses as individual entrepreneurs do not have two separate legal identities. Therefore, when they die, all their assets and debts are subject to inheritance, including those accrued in the course of conducting business.

Serbia's statutory framework does not offer specific rules pertaining to the inheritance of assets and debts of individual entrepreneurs or shares in family-run companies. Thus, Serbia's company and inheritance statutes fail to address some circumstances and their social implications. The specific rules that have been devised are currently applied only according to the enterprises' form (i.e., general partnership, limited partnership, limited liability company, or joint-stock company), with no distinction of whether they are family-run or not.

96 Vukotić, 2018, p. 174.
97 Companies Act, Art. 91, Sec. 9.
98 Law of Inheritance, Art. 222, Sec. 1.

A company is considered family-run if most of the voting rights belong to a single family that exerts control over the enterprise, including its founding member who intends to transfer the company to his or her descendants to continue operations throughout generations within the same family.[99] The death of the owner–operator of a family-run company triggers succession by inheritance, which comprises the transfer of management and proprietary rights (control) from one generation to another.[100] The Companies Act does not establish a special legal regime for the death of a family-run company's head. Thus, any rule that applies to all companies of the same form must also apply to family-run companies. However, the Companies Act does provide some freedom for the members to set up different succession schemes in their incorporation documents, the scope of which varies depending on the company's form.

The succession of a decedent's share is regulated separately for each form of company. For all issues not governed by the Companies Act or an incorporation document, the rules of Serbia's Law of Inheritance apply. General and limited partnerships are closed companies, and limited liability companies are relatively closed; therefore, in these cases, the succession of decedent's share to one or more heirs is subject to certain limitations specified in the Companies Act. In addition, the Act allows members include int the company's incorporation document a different succession scheme for a deceased member's share.

Furthermore, the Serbian Chamber of Commerce adopted a Code of Corporate Governance, a set of voluntary principles and recommendations for its members to follow. The Code contains soft-law rules on the best practices of corporate governance, including those relating to the intergenerational transfer of companies' management. The gist of these principles and recommendations is that a family-run company ought to have a general succession plan and a special succession plan for extraordinary situations.

In conclusion, Serbia's company and inheritance laws do not distinguish between family-run and other companies. This lack of distinction can lead to difficulties when a member dies because of the difference between inheriting a share in a general or limited partnership and share in a capital company such as a limited liability or joint-stock company. In principle, whether or not a deceased member's rights and responsibilities can be passed through inheritance depends on the company's form, its incorporation document, and the relevance of the heirs' connection to the deceased and the company. The less complicated these are, the fewer the legal obstacles to inheritance.[101]

99 Code of Corporate Governance, Glossary, Sec. 6.
100 Code of Corporate Governance, Glossary, Sec. 7.
101 M. Vukotić, 167.

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BERTRAND MATHIEU[1]

Redefining the Relationship Between National Law and European Law

ABSTRACT: *Relations between European legal orders and national legal orders present specificities that call into question the principles dictating how states are governed. As the scope of European activities expands, whether it is the European Union or Council of Europe, the potential for conflict is created. In this context, it is important to redefine these relationships and create regulatory mechanisms. This article aims to suggest avenues in this direction.*

KEYWORDS: national law, European law, relationship between national law and European law.

Relations between legal orders, more specifically, between national legal orders and European legal orders – the Council of Europe and European Union – have upset legal mechanisms (the connection between legal norms no longer follow Kelsen's pyramid) and political systems – the creation of polities that are neither unitary States, federations, nor empires – while borrowing from each of those categories.[2]

1. Impact of developments in European construction on state structures

Without calling into question the necessity and fruitfulness of European construction, it should be noted that the developments and directions taken by this construction affect the states' institutional systems. Thus, the notion of democracy is at stake, the organisation of powers is affected by the rise of the judge, and the decision-making ability of national politicians is diminished.

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2 Cf. Bonnet, 2013.

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■ *1.1. Democracy affected by the evolution of European construction*

Liberal democracy has been considerably affected by the evolution of legal orders. First, democracy was born within the framework of state structures to the extent that it can be considered consubstantial with the state.

For its part, the European Union has its own particular characteristics. Originally organised around an essentially economic system, it has gradually extended its competence to issues that traditionally fell within the main core of state sovereignty and constitutional identity, and which are linked to the broad concept of the rule of law of which democracy is but a component. This applies not only to the concept of fundamental rights, but also to the organisation of state power.

The will – and from this viewpoint it does not matter that it has not succeeded – to draw up a Constitution of the European Union; the adoption of a Charter of Fundamental Rights and from another perspective, considerable broadening of the scope of rights protected by the European Convention on Human Rights; and ongoing process of ideological integration have profoundly modified the nature of the European project.

This has resulted in both a gradual submission of States to these logics as well as reactions of defence or closure in the face of encroachments on what constitutes the identity of certain States.

Brexit, the inclusion in the Russian Constitution of the primacy of constitutional rules over those stemming from the case law of the European Court of Human Rights, resistance of certain States to the European Union's migration policy, and use of measures aimed at regulating the power of judges bear witness to this resistance. Regarding national judges, the recourse to the functional notion of national identity as a (often theoretical) limit to European supremacy, and more firmly the recent decision of the German Constitutional Court (5 June 2020) resisting a form of financial integration also testifies to the difficulties in reconciling national sovereignty and European construction. From this perspective, trying to reconcile national sovereignty with European sovereignty is a deadlock, because while competences that touch on matters of sovereignty can be shared, sovereignty itself, by its very nature, cannot.

As a result of these developments, the requirements of the rule of law tend to take precedence over those imposed by the democratic principle.[3]

■ *1.2. The judge as an essential actor in the evolution of European construction*

Apart from the substantial implications of this evolution, which explain many of the tensions, the result is a profound change in the mechanisms of the separation of powers. Indeed, democracy implies the primacy of politics, corrected in its liberal version by the judge's control of the conditions in which power is exercised. In reality, the rule of law tends to transfer power from the politician to the judge. There are many reasons for this: fundamental rights law is essentially created by the judge, and this law tends to

3 Cf. Mathieu, 2017.

prevail over any other requirement in all areas of social life and hence, in all branches of law. This development is generally regarded as positive, and overall, it is positive. However, behind this generic term of fundamental rights lies ideological issues that may call into question core elements of certain national identities. Moreover, the upholding of fundamental rights is achieved by balancing different or even opposing rights, which the judge controls using the powerful but sometimes arbitrary tool of the principle of proportionality. What interests us here in particular is the judge who is gradually gaining control of the system's relationships. In the absence of hierarchy or faced with multiple hierarchies, which amounts to the same thing, between norms belonging to several legal systems, the judges regulate system relationships, thereby directly intervening in the field of politics.

Realistically, and briefly, European integration in the system of the European Union and European Convention on Human Rights is the work of courts. These courts have taken upon themselves not only the task of settling disputes, but also effectively legislative and even constitutional work. In this sense, it has been described as jurisdictional federalism.

Judges regulate the relationship between legal systems. This is largely a factor in strengthening judicial power versus political power. The wide range of legal standards, particularly European ones, themselves fairly widely formulated by European courts, provides the national judge with more freedom than constraint. It provides him with the tools to assert his power in the face of political power. In this regard, it is interesting that the conflict between Germany and the European Union over the economic recovery plan is a conflict between the German Constitutional Court and Court of Justice of the European Union, not between political authorities.

Ultimately, only the national judge grants itself the ability to limit the expansion of European power beyond what he considers to exceed its limits, either because the contested decision contradicts requirements that fall within the core of national identity, or because it is seen as exceeding European competences.

The formulation or resolution of conflicts is essentially in the hands of judges, and these are decisions in which political power is largely supplanted by a technocratic power, a form of epistemocracy, that is, power based on the legitimacy of the expert.

■ *1.3. The structural weakness of national political powers*

Faced with this construction, national political powers are weak and the protection of national identities, which is part of their mission, is difficult to ensure.

The crisis affecting national identities and their relationship with the European identity is first a crisis of political power. In this sense, the lack of citizens' confidence in their political leaders stems from the fact that the reality of power largely escapes those. Financial powers, economic powers, GAFA (which are as much economic powers as they are instruments for the standardisation of values), NGOs, and European structures tend to curb national political powers, which enjoy only marginal action or are given free rein in increasingly few areas (e.g. think of family law or bioethics).

In fact, in many countries, one key factor in the crisis of democracy is the disconnection between a citizen's vote and political decision-making. The real power lies elsewhere.

2. A potentially conflictual situation that calls for the search for solutions

The state of relations between European structures and their constituent nations is at once ill defined, evolving, and a source of conflict.

Beyond attempts to re-establish a pre-established and rigid hierarchy between systems that would lead either to the break-up of European structures or to the submission of States, it is a matter of reflecting on ways of regulating conflicts.

■ *2.1. An observation: the development of conflicts*

Between the power of European institutions on one hand and exponential extension of their field of competence and normative system they produce on the other, the weakening of state power, which remains the theoretical framework of democratic political will, gives rise to the significant potential for conflict. From these conflicts, which are not assumed and are poorly resolved by jurisdictional procedures, nothing good can come. Either we will move towards a de facto federalism, which in the long term will give rise to revolts by citizens who will become mere spectators, or towards a breakdown of European structures due to the refusal of certain nations to submit and abdicate their sovereignty. In my opinion, the failure of Europe would bring with it many dangers; thus, we more than ever need an economic Europe, a social Europe, a financial Europe, a geopolitical Europe.

It is then necessary to reflect on a transformation of the European formula, which avoids both the negation of national identities and destructive inward-looking attitudes. One fruitful path in my viewpoint is that of the Europe of Nations. However, it is important not to stick to a slogan or cover with this formula some unacknowledged identity-based insularity. We probably need both Europe and Europe, and above all, a different Europe.

■ *2.2. Finding mechanisms of regulation*

Within the very limited framework of this intervention, I would like to outline a few leads, which are both partial and too schematic.

2.2.1. Redefining the link between national and European competences

This definition must be the work of politicians. From this viewpoint and to the judges' credit, note that the development of judicial power takes place in the context of a refusal by politicians to exercise their power or inability to reach agreement.

This is a question of clearly determining what competences should be entrusted to European structures and which competences and powers should remain in the

hands of the States. To do this, what belongs to a European identity, which justifies the association of a number of States, and what belongs to national identity must be distinguished.

Reflection must face two directions, namely mapping out both national and European competences more precisely. This is a matter of reflecting on what the Member States intend to pool together. Europe is endowed with an economic and geopolitical purpose; it is less about regulating the daily life of citizens or interfering in the organisation of national powers. Similarly, the European Convention on Human Rights is a common heritage of essential fundamental rights that State Parties have undertaken to respect. It must not be used to impose on States the adoption of rules, values, or principles to which they have not subscribed and which result from the judges' conception of an evolution, suitable in their view, of a society without frontiers and roots.

2.2.2. Enforcing the principle of subsidiarity

In addition to this division by areas of competence, the principle of subsidiarity, which is affirmed in particular by the Treaty of Lisbon but also recognised in the framework of the European Convention on Human Rights, must be more rigorously implemented. This principle provides support to States that wish to defend their 'own corner'. However, the division of competences cannot be left solely to the case law of the Court of Justice of the European Union and European Court of Human Rights. Within the latter framework, this implies that an issue must be dealt with at the European level only if constitutional protection proves insufficient. Today, the European Court of Human Rights seems to be moving towards recognising the principle of subsidiarity on certain so-called societal issues,[4] leaving them to the discretion of the national legislator. However, the assessment of the scope of this principle remains in its hands.

2.2.3. Shifting from an obligation of submission to an obligation of constructive dialogue

A conflict of the kind that has pitted the German Constitutional Court against the Court of Justice of the European Union (see above) is evidence both of the impasse that the requirement of a single vertical relationship between European and national courts constitutes and of the need to find a way to resolve conflicts. Thus, it is conceivable that in terms of the relationship between courts, national courts could re-interrogate European courts when a conflict occurs or is likely to occur. One could also imagine the creation of a kind of Tribunal des Conflits, composed—for problematic cases—of national and European judges to arbitrate conflicts of jurisdiction. This exists in France for conflicts of jurisdiction between the judicial and administrative judge. Some formations would be composed of European judges and judges from the country concerned to adjudicate conflicts regarding a specific State. Other formations could arbitrate conflicts

4 For example, in relation to parentage, see the judgments of the European Court of Human Rights in the case of Ahrens v. Germany (Application no. 45071/09) and in the case of Kautzor v. Germany (Application no. 23338/09).

involving European and national competences in general. This 'court' should not constitute a new structure of the Union, but a place for debate, dialogue, and even conflict resolution between judges. This obligation of dialogue would be institutionalised. This form of dialogue is particularly important at a time when the European Union is led to impose on States the respect of criteria related to the rule of law, although these criteria are not predefined except in a general manner. This procedure would also be necessary in the framework of the Council of Europe to avoid or try to avoid conflicts linked to the sometimes very constructive case law of the European Court of Human Rights. However, political authorities should be given the power of the last word in this matter.

These are mere lines of approach to open a debate necessary for a lack of evidence of solutions.

2.2.4. Strengthening the democratic function of the European Parliament

This proposal may seem marginal in view of the issues raised here. However, it appears crucial to create a democratic debate at the European level in the field of competences, which will have been previously redrawn.

Recognising that the Parliament is the democratic body of the European Union, the conditions for a genuine European political debate should be created, not on all subjects, but on matters falling within the competence of the Union. The election of Members of the European Parliament by proportional representation in the national context on issues of national policy falls short of this requirement. The identity of MEPs, their political distribution, and their 'playing field' are largely beyond citizens' understanding. True democratisation of the European Union implies the existence of a political life at the Union level on European issues. If the European Union fails to materialise as a genuine competitive political area, democracy cannot exist within it.

To encourage this political and democratic emergence outcome, the lists of candidates for the European elections should be transnational to avoid being based solely on national political frameworks. However, to maintain the link between States and the European Parliament, a significant number of members (e.g. half) should also be elected by the national parliaments. One could logically fear that this reform could be part of federalism, which is at odds with the aforementioned Europe of the Nations. This would be the case if it were part of the design of a parliament composed of two chambers, one representing the People and the other the States. In contrast, combining deputies elected by the European people and those elected by national parliaments in a single chamber seems to me to be apt to avoid such a development.

Furthermore, the role of the European Parliament, like that of the national parliaments, must refocus on monitoring the action of European bodies, particularly the Commission, emphasising the role of the Council in determining the Union's policy and that of the Commission in an executive function in the true sense of the word.

3. Closing thought

Nevertheless, these changes require the agreement of all States. In this area, as in others, before launching a debate on the institutional mechanisms, it is necessary to reflect on what we want the Europe of tomorrow to be.

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Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?

ABSTRACT: *The world trade system's bedrock was laid more than seventy years ago and its architecture and structural principles were shaped by the societal paradigm of western democracies. The last two decades have seen the admission of various government-dominated economies to the WTO. This raised serious paradigmatic challenges. The system tailored to the needs and characteristics of western democracies proved to be inadequately equipped to frame government-dominated economies. This paper addresses one of these new challenges: government subsidies. First, it gives an overview of the status and treatment of product and service subsidies in WTO law and the gaps and shortcomings that result in the system's failure to address trade-distortive state aids. Second, it examines the European Commission's White Paper on Levelling the Playing Field as Regards Foreign Subsidies ("White Paper"), which ushers a comprehensive European response to the problems raised by subsidization in international trade. Third, the paper analyzes the WTO framework that governs and confines unilateral actions targeting foreign subsidies. Fourth, the paper makes a proposal for a complementary way to address the world trade system's "subsidies problem".*

KEYWORDS: Countervailing duties, fair trade, GATS, GATT, subsidies, WTO.

1. Introduction

It is no exaggeration to say that the last few years have seen the paralyzation of the world trade system. Even though the Trump administration has been reprimanded for being the culprit, the root cause has been a set of real and genuine institutional

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problems and, hence, the WTO's "constitutional" crisis is expected to linger on after the expiry of President Trump's term of office. The world trade system's bedrock was laid more than seventy years ago (with the adoption of GATT 1947) and reached its full-blown institutional architecture three decades ago (with the establishment of the WTO in 1994). Its architecture and structural principles were shaped by the societal paradigm of western democracies, featured by a democratic political system based on democratic sovereignty, free market, autonomy of economic operators and a clear separation between the private and the public sector, which implied that private enterprises cannot be aligned to serve foreign policy aims.

This paradigm has lately come into conflict with the realities of the world trade club. The last two decades have seen the WTO's large-scale enlargement, with China joining in 2001, Saudi Arabia in 2005, Viet Nam in 2007 and Russia in 2012. While this was a very welcome development, which enhanced the strength of the world trade systems and turned the club of western democracies into a truly universal global trade system,[2] it raised serious paradigmatical challenges. The system tailored to the needs and characteristics of western democracies proved to be inadequately equipped to handle the problems raised by government-dominated economies.

This enlargement process not only brought some of the world's biggest economies into the club, it also extended the WTO to countries where the state has a central role in the economy. These polities have a different view on the relationship between the state and the market, the autonomy of state-owned enterprises and their (in)dependence from political governance, the relationship between rule of law and political hierarchy. "Government-dominated economies", as coined by this paper, are not planned economies but market-based economic systems where the government has a decisive formal and informal influence over market operators and informal governmental rules play a central role. Furthermore, these systems have a higher tendency to subsidize economic activities[3] and quite often this occurs via state-owned enterprises. Finally, intellectual property rights benefit from a lower level of protection and the legally recognized intellectual property rights are quite often not enforced via effective means. These traits challenge the system of WTO in various way. Some of these issues are simply not caught in the net of WTO law at all, while other, although covered by WTO rules, emerge with such a high intensity that the WTO cannot handle effectively.

This paper addresses one of these new challenges of the world trade system: government subsidies. It distinguishes among three categories of subsidies. Domestic subsidies, the most traditional category, are financial contributions granted to recipients who are located in the territory of the granting state. Foreign and transnational subsidies are extraterritorial state aids. Foreign subsidies are financial contributions provided to recipients located in a foreign country concerning activities to be pursued in that country. For instance, if the Chinese government grants a favorable (non-market-based) loan to a company established in the EU (a subsidiary of a Chinese company)

2 *See* Nagy, 2019.

3 Lim, Wang and (Colin) Zeng, 2018; Hancock and Jia, 2019.

to submit a bid to a European public tender or to carry out an infrastructure project in one of the Member States, this will be a foreign subsidy. The term "transnational subsidy" refers to three-country scenarios where the granting authority, the recipient company and the economic impact are in different states: country "A" grants a financial contribution to a company located in country "B", which, in turn, sells its products or services in country "C".[4]

WTO law encompasses rather week disciplines when it gets to subsidies. First, although product subsidies are regulated, these rules are incapable of handling lavish subsidization policies. The GATT and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") address subsidies in relation to goods. In essence, these rules prohibit trade-restrictive subsidies and give member states a powerful tool to unilaterally offset the competitive advantage of subsidized products: they may impose countervailing duties. Nonetheless, the prohibition on subsidies is rather ineffective and hidden state aid (provided by state-owned enterprises via favorable contractual terms) remain largely under the radar. Furthermore, it is doubtful if extra-territorial subsidies[5] are covered by this regime at all. Second, service subsidies are not subject to any discipline. They are, in themselves, not prohibited and member states need to identify a GATS-conform legal basis to impose countervailing measures in the service sector. It has to be stressed that in WTO law "services" encompass a wide range of activities and the definition goes way beyond the meaning in EU law.[6] Notably, services, in addition to cross-border provision and consumption, also include the commercial and physical presence of foreign undertakings.[7] In EU internal market law, some of these scenarios may come under the rules of freedom of establishment[8] and free movement of capital.

This paper addresses the issue of subsidies in international trade against the above context. First, it gives an overview of the status and treatment of product and service subsidies in WTO law and the gaps and shortcomings that result in the system's failure to address trade-distortive state aids. Second, it examines the European

4 Cf. White Paper, p. 47 ("a foreign subsidy is a financial contribution benefitting directly or indirectly an undertaking in the EU, offering goods or services, or engaging in investments").

5 Benitah, 2019.

6 Article 57 TFEU ("Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.").

7 Article I(2) GATS ("For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.") & XXVIII GATS.

8 Article 49 TFEU ("Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.").

Commission's White Paper on Levelling the Playing Field as Regards Foreign Subsidies ("White Paper"), which ushers a comprehensive European response to the problems raised by subsidization in international trade. Third, the paper analyzes the WTO framework that governs and confines unilateral actions targeting foreign subsidies. Fourth, the paper makes a proposal for a complementary way to address the world trade system's "subsidies problem."

2. Subsidies in WTO law

WTO law contains a comprehensive regime on subsidies in respect to trade in goods. Article VI GATT confines member states possibilities to provide product subsidies and empowers members that are hit negatively by such subsidies to adopt countervailing measures. The SCM Agreement contains a specification of these provisions. Nonetheless, these rules apply only to product subsidies, that is, aid provided to manufacturers. Furthermore, it is questionable if they apply to extra-territorial subsidies. The beneficiary of an extra-territorial subsidy may be located in the country where the goods are sold or in a third country where the goods are produced and from where they are exported. It is uncertain, if the GATT's regime and the accompanied SCM Agreement applies merely to subsidies provided to manufacturers located in the territory of the providing state.

No disciplines are in place concerning services (at least as to the export-oriented aspects of service subsidies, as the national treatment obligation may apply to subsidies and, hence, require member states to treat foreign and domestic enterprises located in their territory alike). While Article XV GATS contains an inbuilt mandate to negotiate and work out a regime on service subsidies, it establishes no discipline, aside from the duty of consultation with the members adversely affected.

The GATT prohibits only export subsidies for non-primary products, in Article XVI(4), and authorizes member states, in Article VI, to impose countervailing duties. Article XVI GATT, although confirming that export subsidies "may have harmful effects for other contracting parties", confines itself to obliging member states who engage in subsidization to notify other members and be ready to enter into discussion with the affected ones. Special rules are set out for agricultural subsidies (Agreement on Agriculture).[9]

The general prohibition of trade-restrictive product subsidies was introduced by a special WTO treaty, the SCM Agreement, which provides special rules on countervailing duties. The SCM Agreement defines three categories of subsidies: export and local content subsidies are *per se* prohibited (prohibited subsidies), other subsidies are prohibited only if they have proven adverse effects on the interests of another member. Some subsidies are pronounced *per se* lawful (non-actionable subsidies).

9 *See* Bartels, 2016.

The SCM Agreement has a broad scope of application owing to its wide definition of subsidies; still, it is doubtful if it applies to extraterritorial subsidies.

> *Article 1*
> *Definition of a Subsidy*
> *1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:*
> *(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:*
> *(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);*
> *(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);*
> *(iii) a government provides goods or services other than general infrastructure, or purchases goods;*
> *(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in*
> *(i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or*
> *(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and*
> *(b) a benefit is thereby conferred.*
> *1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.*
> *(…)*
> *2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.*

In principle, every specific financial contribution provided by the government or any public body that confers a benefit is considered to be a subsidy. State aids of general application are not caught in the net of the above disciplines: for a financial contribution to be covered by the SCM Agreement, it needs to be specific, that is, it needs to apply to particular enterprises, a particular sector or region (enterprise-specificity, industry-specificity, regional specificity). Prohibited subsidies (export and local content subsidies) are regarded specific *per se*. The term "financial contribution" is conceived broadly to encompass (at least theoretically) all benefits not available under free market circumstances.

The SCM Agreement's definition contains, however, two important loopholes that make the regime wanting in relation to government-dominated economies: the status of benefits provided by state-owned enterprises[10] and extra-territorial subsidies.

First, the application of the SCM Agreement to benefits provided by state-owned enterprises is not straightforward. Although a state-owned enterprise may be regarded as a "public body", this can be established only on a case-by-case basis. In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body[11] held that a public body is "an entity that possesses, exercises or is vested with governmental authority"[12] and "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body",[13] hence, the determination is subject to a rather demanding case-by-case analysis.

> *Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.*[14]

The status and autonomy of state-owned enterprises is obviously not uniform in the member states, which feature extremely huge differences. The Appellate Body introduced a presumption in favor of independence. This may be a realistic assumption in some member states but, in others, it may appear to be credulous and repugnant to the reality. This presumption is apparently based on the WTO's original paradigm (western

10 *See* Chiang, 2018.
11 Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).
12 Para. 317.
13 Para. 320.
14 Para. 318.

constitutional democracies) and turns a blind eye to the realities of government-dominated economies.

Second, there is some uncertainty as to whether the WTO regime applies to subsidies provided by a member state to a recipient located in the territory of another member state (extra-territorial subsidies). The depth of the problem is revealed by a recent decision of the European Commission, where the EU adopted countervailing duties on imports from certain Chinese enterprises located in Egypt for their receiving subsidies from the Chinese government. Lead by the desire to ensure a firm legal basis, the Commission argued that the Chinese subsidies granted to Chines enterprises located in Egypt could, on the basis of general international law, be regarded as subsidies provided by Egypt itself, hence, the regime on countervailing measures applied.[15]

Article 1 of the SCM Agreement defines "subsidy" as "a financial contribution by a government or any public body *within the territory of a Member* (referred to in this Agreement as 'government')."[16] Furthermore, Article 2.1. of the SCM Agreement makes a similar implicit reference: "[i]n order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') *within the jurisdiction of the granting authority*, the following principles shall apply…".[17] As to Article 1 one may forcefully argue that the phrase "within the territory of a Member" is related to the term "public body" and not the term "subsidy", that is, this phrase simply confirms that solely subsidies provided by public bodies located "within the territory of a Member" are relevant. This is reinforced by the fact that in the brackets the text provides a shorthand for "a government or any public body." If the phrase "within the territory of a Member" were aimed to provide a territorial confinement for the payment of the subsidy, it would be after the brackets. Furthermore, less convincingly, but one may still argue in respect to Article 2 that the phrase "within the jurisdiction of the granting authority" may embrace not only territorial but also personal jurisdiction, thus extending the scope of this provision to recipients located outside the territory of the member state concerned. Finally, Article 2.1. inserts the phrase "within the jurisdiction" into the definition of specificity but, at the same time, Article 2.3. provides that *per se* prohibited subsidies (that is, export and local content subsidies) are legally presumed to be specific, hence, they do not come under the definition set out in Article

15 Commission Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt. OJ L 189/1, 15.6.2020. para 699.; Commission Regulation 2020/870 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt. OJ L 201/10, 25.6.2020.

16 Emphasis added.

17 Crochet and Hegde, 2020.

2.1.[18] So it can be safely argued that at least transnational export and local content subsidies are caught in the net of the SCM Agreement, in addition to the prohibition of Article XVI(4) GATT on export subsidies for non-primary products.

All in all, the WTO's legal architecture appears to have various shortcomings, which make it incapable of confronting mass subsidization. The status of benefits provided by state-owned enterprises and the burden of proof faced by member states who want to have state-owned enterprises acts attributed to their home state open a wide playing field for government-dominated economies. The status of transnational subsidies is uncertain, while service subsidies are subject to no explicit WTO law discipline.

3. The EU's response to extra-territorial 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, which disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity."[19] 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 to 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 to ensure a level playing field in international trade and in the EU internal market.

Interestingly, the White Paper addresses merely extra-territorial subsidies and envisages no special rules as to product subsidies, even though, as noted above, subsidies provided by state-owned enterprises may raise serious issues in government dominated systems.

The White Paper confirms the Commission's position that EU (and international) anti-subsidy rules do apply to transnational subsidies (presumably because they are attributable to the state where the recipient enterprise is located). However, "trade in services, investment or other financial flows in relation to the establishment and operation of undertakings in the EU" are not covered by anti-subsidy disciplines.[20] "On the international level, the EU can bring litigation against a WTO Member for breaches of the SCM Agreement, in particular when a WTO Member grants subsidies, prohibited under that Agreement, or subsidies that cause adverse effects to its interests, and have the matter adjudicated by a WTO panel. However, the scope of application of the SCM Agreement is also limited to trade in goods. The WTO GATS contains an inbuilt

18 Crochet and Hegde, 2020.
19 Crochet and Hegde, 2020, p. 4..
20 Crochet and Hegde, 2020, p. 10.

mandate to develop rules for subsidies in the area of trade in services, but thus far, no such rules have been developed."[21]

The proposed measures are made up of three layers. A set of measures of general application is proposed to cover all foreign subsidies granted to economic 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 to 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[22] and, hence, do not cover subsidies provided by foreign governments. The term "subsidy" has to 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 as a result 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 re-payment.

The investigation extends to three core issues: existence of a subsidy, distortion in the internal market and the subsidy's redeeming virtue, that is, "the positive impact that the supported economic activity or investment might have within the EU or on a public policy interest recognised by the EU."[23] If a distortive subsidy has a redeeming virtue, the distortion and the positive effects have to 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.

21 Crochet and Hegde, 2020, p. 10.

22 According to Article 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 favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." (emphasis added)

23 Crochet and Hegde, 2020, p. 14.

4. WTO law concerns

The White Paper is a novel and unprecedented attempt to address extra-territorial subsidies and may call for the interpretation of various aspects of WTO law, which so far have simply not been tested in practice.

As to trade in goods, there are two important WTO law restraints that need to be considered. First, Article VI GATT permits countervailing duties only up-to the amount of the subsidy. Second, Article 32.1 of the SCM Agreement rules out unilateral measures against subsidies beyond the ones allowed by the Agreement itself.

Article VI GATT authorizes member states to adopt anti-dumping and countervailing duties. Absent this provision, members would not be allowed to adopt such measures, as these may go counter to their tariff-bindings[24] and the MFN principle.[25] As a corollary, they may adopt countervailing (and anti-dumping) measures only to the extent enabled by Article VI, which, in turn, caps countervailing duties at the amount of the subsidy.

> *3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

Second, Article 32.1 of the SCM Agreement rules out unilateral measures against subsidies that are not compliant with the Agreement.

> *No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.*

This may raise problems of interpretation. Arguably, the above provision might prevent members from adopting unilateral measures in response to transnational subsidies (except they can attribute the subsidy, on the basis of international law, to the state where the recipient is located), if the meaning of "subsidy" in Article 32.1 is not equated with the definition in Article 1. According to this line of interpretation, Article 1 defines the subsidies that may be potentially prohibited under the SCM Agreement, implying

24 Article II GATT.
25 Article I GATT.

that subsidies not coming under this definition qualify as permitted subsidies. This is corroborated by Article 32.1's reference to the SCM Agreement as an interpretation of the GATT ("in accordance with the provisions of GATT 1994, as interpreted by this Agreement."). This suggests that the SCM Agreement is an authoritative and binding interpretation of Article VI GATT and, hence, subsidies not covered by the Agreement are not covered by Article VI GATT either.

On the other hand, the exhaustive nature of the SCM Agreement is falsified by the fact that the Agreement contains a detailed list of expressly permitted subsidies (in Part IV), labelled as "non-actionable." Why did member states permit transnational subsidies by means of a narrow definition of "subsidy" and not by a specific rule, if they really wanted to exempt them? The language and structure of the SCM Agreement suggests that transnational subsidies were left out because they did not exist (or at least they were not widespread) at the time and the drafters' imagination did not extend to them. This is reinforced by the footnote attached to Article 32.1 of the SCM Agreement (footnote 56), confirming the intention that the Agreement was not meant to be the exhaustive regulation of countervailing measures adopted in response to subsidies.

> *This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.*

Taking the above into account, it seems to be more plausible that by adopting the SCM Agreement, member states did not give up the authorization conferred on them by Article VI, which applies to subsidized products at large, irrespective of whether the source is a domestic or an extraterritorial subsidy. It would be contradictory to argue that Article 32.1 of the SCM Agreement uses the term "subsidy" in a wider sense than the definition of Article 1 that sets out the very scope of the Agreement. If the scope of the Agreement does not extend to a subsidy, none of its provisions should apply to it, including Article 32.1.

While WTO law contains no disciplines on service subsidies, it sets out limitations on unilateral measures adopted in response to them. The most important question is whether these countervailing measures may go counter to National Treatment as provided in Article XVII GATS and the Agreement on Government Procurement.

Because extraterritorial subsidies very likely target foreign or foreign-owned companies, countervailing measures adopted in response to them may amount to *de facto* discrimination or a restriction on market access. Of course, these provisions of the GATS are relevant only if a member state made the corresponding commitments under its schedule. However, the EU would have a good case in this regard. First, in the decisional practice of the DSB, asymmetric impact does not equal discrimination and, hence, in itself, does not violate the requirement of National Treatment. To prove such a violation, the complainant needs to prove that the distinction is based

on national origin and asymmetric impact, in itself, does not prove that. For instance, the WTO Dispute Settlement Body's decision in *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* suggests that asymmetric impact, at least in itself, may not be sufficient to establish discrimination: it needs to accrue from national origin.[26] Furthermore, legitimate regulatory distinctions do not violate National Treatment. As to both of these arguments it is decisive that the EU has a very comprehensive and rigorous state aid regime in place and the treatment of foreign subsidies is modelled after this regime. In fact, in the EU there is an inverse discrimination in place: EU member states are prohibited from granting subsidies restrictive of competition in the internal market, while foreign states are not. The White Paper merely envisages extending to foreign governments the rules that, for the time being, apply solely to EU Member States. This circumstance also justifies a reference to the GATS' General Exceptions. Article XIV(c) GATS exempts measures aimed to comply with internal regulations. EU state aid law, which is part of EU competition law, may be regarded as such a regulation. As EU state aid law applies to intra-EU transactions, no arbitrary or unjustifiable discrimination or disguised restriction on trade may emerge.

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*
> *(...)*
> *(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.*

The Agreement on Government Procurement contains no general exceptions, however, a "legitimate regulatory distinction" test may be reasonably applied here.

Of course, in terms of WTO law assessment, the devil will lie in the details. The validity of the claim that the extension of EU state aid rules to extra-territorial subsidies is not discriminatory will ultimately depend on how this regime is shaped. There are some points that should be mentioned here. One the one hand, EU state aid rules will not be applied in their entirety but will serve only as a model for the treatment of foreign subsidies. There may be some minor differences, for instance, the block exemption regulations may not apply. On the other hand, although it could be argued that this is due to the different characteristics of domestic and extra-territorial subsidies, the application and enforcement of these rules will be different, the same as the remedies available.

26 *See e.g.* Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WTO Doc. WT/DS302/AB/R (adopted Apr. 25, 2005), para 96.

5. Alternative means to address excessive subsidization: proposal for an offensive strategy

In the wake of the emergence of government-dominated economies, most trading nations reacted to the increasing level of subsidization via defensive measures. Some of these were traditional regulatory measures well-known for the world trade system, such as adopting countervailing duties on subsidized import products. As seen above, this policy, framed by the SCM Agreements, was extended to transnational subsidies, where the recipient of the aid is located outside the providing country and ships the subsidized products to a third country. Some other measures tried to use novel, creative ways to react. An example of these is the US tariffs on aluminum and steel, which hit a major blow to WTO law.[27] Nonetheless, one aspect of the subject has been largely overlooked: subsidies are reprehensible not only because they distort competition in the targeted markets, but also because they should be made equally available to foreign enterprises settled in the territory of the granting member state. National treatment is a central principle of both trade in goods and services. Even though GATS National Treatment is conditional in the sense that it is subject to the member's schedule of commitments, if a commitment was entered and state aid was not excluded from it, the requirement of national treatment extends to subsidies as well.

Although the GATS contains no explicit disciplines on subsidies, it does apply to them.[28] Article I(1) provides that the GATS applies to "measures by Members affecting trade in services" and, as confirmed by the *travaux préparatoires,* subsidies are just that.[29] This also follows from the fact that the GATS contains rules on subsidies in Article XV: although this provision has no practical significance, as it provides merely for consultation, it corroborates that the GATS itself applies to subsidies. As a corollary, GATS provisions, if not specifically excluded, apply to service subsidies. These include Article II on Most-Favoured-Nation Treatment, Article III on Transparency, Article VIII on Monopolies and Exclusive Service Suppliers and last but not least Article XVII on

27 Nagy, 2019.

28 Note that "services supplied in the exercise of governmental authority" ("any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."), as provided in Article I(3)(b)(c) GATS, we well as, traffic rights and services directly related to the exercise of traffic rights, as provided in Article 2 of the Annex on Air Transport Services, are not covered by the GATS.

29 GATT Document MTN.GNS/W/164, 3 Sep. 1993 "Scheduling of Initial Commitments in Trade in Services: Explanatory Note", para 9-10 ("9. Article XVII applies to subsidy-type measures in the same way that it applies to all other measures. Article XV (Subsidies) merely obliges Members to "enter into negotiations with a view to developing the necessary multilateral disciplines" to counter the distortive effects caused by subsidies. Therefore, any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that
Article. Subsidy-type measures are also not excluded from the scope of Article II (M.f.n.). An exclusion of such measures would require a legal definition of subsidies which is currently not provided for under the GATS.")

National Treatment. The language of the GATS also suggests such a conclusion, as the GATT excludes subsidies from the scope of national treatment in Article III:8(b) and there is no such exclusion in the GATS. This implies that without such an exclusion subsidies are covered by the principle of National Treatment.

All in all, once a subsidy, let it be a favorable loan or a bailout, affects trade in services, it is covered by the GATS, including the principle of National Treatment. Consequently, WTO members are, in principle, expected to treat domestic and foreign services and service providers even-handedly concerning subsidies, subject to the terms of their respective schedules of commitments.

> *Article XVII GATS*
> *1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*
> *2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.*
> *3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.*

Member states are not obliged to take measures outside their territorial jurisdiction,[30] however, within their territory they are subject to National Treatment. This implies that there is no legal basis to extend subsidies provided to an enterprise in a foreign market. On the other hand, contrary to extra-territorial subsidies, domestic subsidies are governed by the principle of National Treatment. For instance, if China subsidizes a Chinese company located in the EU, Article XVII GATS does not apply; however, if China subsidizes companies located in China, this benefits has to be extended to the enterprises of other WTO members which are located there. Commercial and physical presence are two of the four modes of supply of services, hence, investments are covered by the GATS. Commercial presence is defined by Article XXVIII(d) GATS as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of

30 GATT Document MTN.GNS/W/164, 3 Sep. 1993 "Scheduling of Initial Commitments in Trade in Services: Explanatory Note", para 9-10 ("10. There is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member.")

a branch or a representative office, within the territory of a Member for the purpose of supplying a service."

Of course, the GATS' National Treatment obligations are conditioned on the provisions of the individual member's schedule of commitments, which may contain horizontal limitations or exclude or confine national treatment in individual sectors. Hence, the effectiveness and practical relevance of the above constructions is conditional. Nonetheless, absent exclusions and limitations, National Treatment fully applies to subsidies and may be a useful tool to counteract excessive subsidization policies.

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Constitutional Issues of the Judicial Career in Western Balkan States (Serbia, Montenegro, Bosnia and Herzegovina, North Macedonia)

ABSTRACT: *In all four states analysed in this study, the judiciary and judicial career have been undergoing years-long legislative changes, with this 'reform', however, still pending finalisation. Another common feature is the effort to take judicial career decision-making away from political factors and entrust it to independent authorities wherein judges have the final word. It is considered the attainment of the principles of independence and autonomy of the judicial branch of power. However, the adoption of legal acts over the past decade was not sufficient to achieve entirely objective elections and decisions on the promotion of judges. The reality in these states reveals that there are strong and, in numerous cases, decisive informal (political and interest) influences on judicial career development decisions. The author's basic assumption is that for the full effect of the adopted regulations to occur, it will take more time for the constitutional institutions to be strengthened, and the political awareness of citizens will increase.*

KEYWORDS: judicial power, judicial career, Constitution, Serbia, Montenegro, Bosnia and Herzegovina, Macedonia.

1. Introduction

The system of government of present-day states is, in the significant majority, based on the division of power. Amongst the highest branches of power lies, besides the legislative and the executive, judicial power. It is, organisationally and functionally, separated from political powers, legislative, and executive. This means that courts are organised separately from the government, parliament, and public administration, and that their operations cannot be influenced externally. The basis of this status of courts is in the

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constitutional principles of independence and autonomy, which guarantee that courts are functionally independent and organisationally autonomous.[2] Every legal state presumes the functioning of an independent judiciary, which excludes any influence and pressure from the political branch.[3]

Besides the principles of independence and autonomy, constitutions also usually provide for other guarantees for the independent operation of courts and judges, such as the legal basis for trial (constitution, law, international treaty...), the publicity of trial, two-instance procedure, permanency of courts and of the judicial function, non-transferability and immunity of judges, and material security. Constitutions make no provisions for the organisation (network) of courts – except for the Supreme Court; rather, they provide a constitutional-legal basis upon which to build (institutionalise) the judiciary, which includes the prosecution. Apart from the said principles and provisions governing the highest court, there are provisions on the manner of election and dismissal of judges, on authorities electing and dismissing judges, the prohibition of courts-martial, and others. Other issues in the judicial branch are a matter of law.

Legal regulation of the judicial career involves more than a few issues: election and term of office of judges, eligibility requirements and criteria for the promotion of judges to higher instance courts, and termination of judicial office. While key aspects of the judicial career, such as election and termination of office, are regulated by the constitution and elaborated by law, professional advancement requirements for judges are enshrined in the law, and standards and criteria of career development made a matter of by-laws (usually the rulebooks).

The study addresses a few issues related to the status of the judge, namely, the manner of election of judges and the role of autonomous judicial bodies in the election and dismissal procedures, as well as the composition of those judicial bodies, which can be crucial.[4] Furthermore, it outlines the methods of evaluating the quality and effi-

2 Judicial independence comprises: the essential (substantive) independence of the judge, which means that judges rule based on their knowledge, bound by law, and beyond external influence; and personal independence of the judge; thus, judges have a permanent and protected position and they rule objectively and free from bias. Ljubanović, 2013, p. 127.

3 Pejić, 2013, p. 113.

4 According to comparative experience, judicial council can comprise three types of members: representatives of the judiciary – judges, representatives of the legislative and/or executive branch, and representatives of the legal profession, in some states even of the unions. Ibid, p. 118. For autonomous decision-making by that body, it is crucial who comprises it and who elects its members, but there is no uniform model. Different solutions are offered: judicial council solely comprising judges elected by judges (excellent solution, existed in France under the law from 1883); Judicial Council of mixed composition with three variants: Council comprising a majority of judges and a minority of non-judges (In Italy, the minority is made up of law professors and law practitioners; in Poland, they are members of Parliament), Council comprising a minority of judges (France, under 1946 Constitution), or one with equal number of judges and non-judges (Belgium, under 1999 Constitution); judicial council comprising solely judges elected by the Parliament (in Spain, under the Organic law of 1985); council composition is political, members are elected by the Parliament or the Government. Petrov, 2013, p. 44.

ciency of judges and their impact on career advancement, the possibilities for electing as judges legal professionals from outside the judiciary, and the possible participation in trials by persons being legal professionals but not elected as judges.

The comparative study includes four states of the 'Western Balkans': Serbia, Montenegro, Macedonia, and Bosnia and Herzegovina. From the analysis of the constitutional and other provisions regulating the above issues, accompanied by a presentation of the theoretical basis of positive law solutions, a picture will be grasped of whether the constitutional-legal status of judges and their professional development in the respective states are appropriate. Moreover, whether they form part of the 'European standards' regarding the judicial branch of power.

2. Judicial career in Serbia

The parliamentary system in the Republic of Serbia is based on the separation of powers into the legislative, executive, and judicial, where judicial power is independent (Art. 4 of the Constitution).[5] The Constitution, regarding the judicial career, makes provisions only for the election and term of office of judges and for their legal status (immunity, non-transferability) that protect them against external influences. The questions of who can become a judge and what criteria they must satisfy for the first and higher instance courts are regulated by law. By-laws lay down the criteria for the professional advancement of judges and the manner of assessing their performance.

■ *2.1. Judicial election procedure and role of autonomous bodies in judicial career*

In Serbia, judges are elected in two ways. The first concerns the election of a novice judge to a term of office for three years, following the end of which they can be elected to a permanent function.[6] Formal eligibility requirements for applying for the position of a judge at any court include that the candidate must be a citizen of the country, meet general conditions for employment in public authorities,[7] have graduated from the Faculty of Law, have passed the bar exam, and have law-related work experience. Experience in the judiciary means that the candidate has passed the training

5 The constitutional provision of the same Article that 'the relationship among the three branches of power shall be based on balance and mutual control' is not acceptable in view of the nature and manner of operation of the judicial branch, nor is it consistent with another constitutional provision that 'court decisions may not be a subject of extrajudicial control' (Art. 145, para. 3).

6 This solution is not alone in the comparative constitutionalism. France, Greece, the Netherlands, Germany, and Austria are some of the states with probationary period for judges that makes it possible 'to eliminate from the judiciary the persons unworthy of the judicial calling'. Simović, 2013, pp. 96-97.

7 Not having been convicted to a prison sentence of at least six months and other requirements from Art. 45 of the Civil Servants Act (2005).

programme, the so-called mentoring training system.[8] In addition to these criteria, the candidate must also meet the requirements of expertise, competence, and worthiness. The required experience is that of law (potentially also from outside the judiciary) gained upon passing the bar exam. It varies depending on the court applied for – from two years for a judge of the Misdemeanour Court to 12 years for a judge of the Supreme Court of Cassation. A judge of the Court of Appeal must have at least 10 years of post-bar exam experience.

The requirement for expertise and competence means possessing theoretical and practical knowledge, which is verified by the quality of passed judgements for judges applying for a higher court or for a permanent judicial function. For novice judges, the proof of expertise refers to the passed professional exam organised by an independent authority (autonomous body), the High Judicial Council, or the final mark from the Judicial Academy training assigned to its trainee. The requirement for worthiness concerns the moral traits of the judge, such as honesty, conscientiousness, dignity, and others, and is evaluated by the High Judicial Council.

The High Judicial Council is a body of constitutional category, independent and autonomous, with its major responsibility being to elect all judges, except for those to be elected for the first time. Its composition, members' status, and powers are regulated by the Constitution, with more specific provisions being enshrined in the High Judicial Council Act (2008). Judges comprise the majority of this body, with a total of seven members (besides the President of the Supreme Court of Cassation, SCC), while other elected members include law professors and law practitioners (solicitors). Members by function, besides the SCC President, are the Minister of Justice[9] and the Chairperson of the Parliamentary Judiciary Committee. All eight elected members were selected by the National Assembly for a five-year term. Apart from deciding on the election and dismissal of judges, the SCC makes proposals to the National Assembly for judges for the first election and presidents of courts, participates in the procedure for the termination of office of court presidents, and performs other duties as required by law. These powers of the Council allow it to act as a guarantor of the independence and autonomy of courts and judges. However, for it to be so, there are views, it must be granted full power over the process of election and dismissal of all court presidents and judges, and particularly those elected for the first time, but for no fixed term of office.[10]

8 "The European continental system generally features three models of lawyers' training for the exercise of judicial duties: mentoring training system (Austria, Germany, Serbia), training system within a training institution – academy (France, Spain, Portugal) and a combined system (the Netherlands, Italy) where training is a combination of the mentoring system and seminars held within training centres". Boljević et al, 2019, p. 40. In the process of formation of a judge, there must be a uniform training programme wherein stakeholder institutions (Faculty of Law, courts, Judicial Academy, High Judicial Council) will cooperate with one another. Ibid., p. 63.

9 The experience with previous 'reform' *(cited by S.O)* of judiciary in Serbia (2008-12) implies that the Minister's membership in this body should be discontinued. Marković, 2017, p. 211.

10 Petrović Škero, 2020, p. 37.

A candidate who is elected to the judicial office for the first time is finally decided by the National Assembly, by a majority vote of the total number of members (absolute majority). The public vacancy announcement is followed by the verification and evaluation of election eligibility requirements. It involves a judicial entrance exam – a testing of theoretical and practical knowledge (expertise) and skills of applying the acquired knowledge (competence), for which an appropriate mark is assigned.[11] The examination is not required for candidates who have graduated from the Judicial Academy, and this practice has been subject to criticism by professional circles.[12] Although the Academy no longer holds a monopoly over the election of new judges, as a 'recruitment centre', it has still been under the considerable influence of politics.[13] The High Judicial Council will, for each judicial post, propose one candidate for the National Assembly. The Assembly can only choose those specific candidates rather than other, non-proposed and qualifying candidates. The election of the first-time judge on a limited-term basis is, in fact, a kind of probation.

Judges with permanent tenure are elected from among the candidates responding to public vacancy announcements. The High Judicial Council verifies and assesses their fulfilment of general and specific election requirements, conducts interviews (through its Committee), and makes a final decision on the election of a judge. The High Judicial Council decides on the termination of the judicial function, particularly on the dismissal that may be subject to the right of appeal.[14]

Performance assessment is a key step for the promotion of judges. The aspects evaluated were quality and quantity of work.[15] A regulation passed by the High Judi-

11 „Правилник о програму и начину полагања испита на коме се оцењује стручност и оспособљеност кандидата за судију који се први пут бира", 2018. *('Rulebook on the programme and manner of taking the exam assessing the expertise and competence of judicial candidates being elected for the first time')*

12 Its trainees take the final exam at the Academy. '(...) by no means can we speak of autonomy of the Public Prosecutorial Council and High Judicial Council with respect to determining candidates for the first election to the judicial function, given that the said legislative solutions prevent them from testing the expertise and competence of candidates coming from the Judicial Academy, that is, when, as autonomous and independent bodies, they have one more time been bound by the final grade from the initial training at the Judicial Academy, having to accept it as a pre-determined one'. Lazović, 2018, p. 10.

13 What gives rise to concern is the fact that the Ministry of Justice has a substantial influence on the Academy's composition: three of nine members of the Managing Board are nominated by Government directly, including one officer from the respective Ministry. The Ministry is also responsible for supervising the Academy's overall performance. Fagan and Dimitrova, 2019, p. 229.

14 On the procedure for the dismissal of judges, see Spasojević, 2016, pp. 44-61. Importantly, the protection of judges' rights in the decision-making on the termination of the judicial office, or the dismissal of the judge, has retained the status of a constitutional matter, namely through the institution of appeal to the Constitutional Court. Pajvančić, 2011, p. 19.

15 Spasojević, 2015, pp. 49-56

cial Council sets out the means for judicial performance assessment.[16] This rulebook should establish objective criteria and standards for the assessment of eligibility for the election and promotion of judges with permanent tenure: expertise, competence, and worthiness (the latter is assumed). It is crucial for the promotion requirements not to be such as to make judges feel the internal pressure to focus their work on deciding as many cases as possible in a short time, which, eventually, makes it impossible to make quality decisions.[17]

The judicial branch is not closed for lawyers who have gained experience in other social fields. Although most of the novice judges are elected from the judiciary, from among former trainees and expert associates, a person from another social field, the economy or finance, for example, can be elected as a judge if he/she meets general and specific requirements for election. Candidates from the judiciary are not formally preferred to other candidates, although at the interview, they can be valued as an advantage.

There are no obstacles to choosing a lawyer from outside the judiciary even as a judge in a higher court, all to the Supreme Court of Cassation, provided that, career-wise, he/she had already performed the judicial function (left the court once and now reapplies for a judge). If this requirement is not satisfied, then in a higher court as well, the candidate must first be elected to a three-year term of office (as a person who is being elected for the first time), and only after that to a permanent tenure. While legally possible, there have been no cases in practice, since the formation of the judicial council of electing novice judges to higher courts; instead, the judicial career commenced with election to the first-instance courts.

Judicial vocation is performed professionally, and the Constitution forbids performing, along with the judicial, of any other functions and duties as an occupation or those incompatible with judicial ones. What functions, activities, or private interests are incompatible with judicial duties regulated by law? The Constitution explicitly prohibits 'political activity of judges' (Art. 152). What in a trial represents the 'citizens' voice' – final judgements are passed 'in the name of the people' is the participation therein of lay judges. In the jury system of Serbia, lay judges form the majority in the trial court panel (sometimes, cases are tried by a single judge, a professional one), and this practice, as explained, prevents the seclusion of courts as public authorities that would comprise professional judges alone (as some kind of 'coterie'). Lay judges constitute a layman element of the trial panel and one that influences the passing of not only lawful but also fair judgements. Participation in a trial is not made possible for other legal professionals, such as professors of law, who concurrently exercise judicial function (it is only possible within the Constitutional Court).

16 „Правилник о критеријумима и мерилима за оцену стручности, оспособљености и достојности за избор судије на сталној судијској функцији у други или виши суд и о критеријумима за предлагање кандидата за председника суда", 2016. *('The Rulebook on the criteria and standards for the evaluation of expertise, competence, and worthiness for the election of judges with permanent tenure to another or higher court and on the criteria for proposing candidates for court presidents)*

17 Boljević, 2017, p. 90.

3. Judicial career in Montenegro

In Montenegro, the basis of the parliamentary system is the division of power into three branches: legislative (parliament), executive (government), and judicial. There is the exact same provision as in the Serbian Constitution that 'the relationship of powers shall be based on balance and mutual control' (Art. 11, para. 3). Therefore, the same criticism stands that the judiciary cannot be independent and, at the same time, controlled by the parliament and the government. A rule of a legal state resulting from the division of power is that court decisions can be reviewed solely by a higher court directly. The Constitution contains principles on the judiciary (independence and autonomy, collective trial, publicity, permanence, immunity, and incompatibility of functions), several provisions on the election and dismissal of judges, the Supreme Court, and, thoroughly, on an autonomous body responsible for electing judges, the Judicial Council.[18] The issues of eligibility and evaluation of candidates for judges and the election procedure itself are a matter of law.[19] Sub-legal level norms also exist: the Judicial Council adopted a regulation concerning the standards for the development of the career of a judge, 'Rules for the Assessment of Judges and Court Presidents' (2015).[20] The fact that the Constitution fails to proclaim that the establishment, organisation, powers, and composition of the judiciary be regulated by law made it possible to regulate all these issues by by-laws, which increases the influence of the executive branch on the independence of the judiciary.[21]

■ ***3.1. Judicial election procedure and role of autonomous bodies in the judicial career***

The manner of election of judges (and presidents of courts) is determined by the Constitution and the election procedure, more precisely, by the Act on the Judicial Council and Judges (2015). Unlike in Serbia, there is no mention of a time-limited judicial term of office in Montenegro; rather, the judicial function is permanent. All judges are elected by an autonomous body, the Judicial Council, as an 'independent and autonomous body that ensures the independence and autonomy of courts and judges '(Art. 126 of the Constitution). Under the Act, the Judicial Council is 'perceived as a key actor of the judiciary expected to exercise its powers entirely transparently, responsibly, and efficiently'.[22] It also decides on the termination of the judicial office, including the dismissal. The Judicial Council conducts a procedure wherein the qualification

18 A special body in charge of human resources in the judiciary was introduced already by the Act on Courts of 1991, since the point of which, its composition and powers have been subject to continual revisions. Vukčević and Bošković, 2016, p. 22.

19 For details on the judicial election body, criteria, performance evaluation, and accountability of judges, see. ibid., pp. 18-25.

20 The new matter of measuring the productivity of judges was considered a basis for the judicial system in Montenegro to take a step closer to the standards of EU members. Ibid., p. 18.

21 Čupić, 2011, p. 7.

22 Vukčević and Bošković, 2016, p. 19.

of judges for promotion is evaluated (performance assessment, interview) and passes decisions on judicial promotions, i.e., election to a higher instance court. Therefore, the entire judicial career, from the first election to office, through promotion, up to the termination of office is 'covered' and decided by the Judicial Council.

While the Judicial Council is constitutionally proclaimed as an independent and autonomous body entrusted with all essential authorities within the judicial system, its composition reveals that it is not immune to the influence of political power. This influence can even become dominant in decision-making because representatives of judicial power can potentially remain in the minority. Despite recommendations for making judges comprise a majority in this body and for revoking the Justice Minister's membership by function, these constitutional changes have never become a reality.[23] In the composition of 10 members, the judiciary is represented by the President of the Supreme Court and four judges elected by the Conference of Judges. They suspend exercising their judicial duties during this mandate, which is what the theory in fact required.[24] 'Representatives' of the political power are four 'prominent lawyers' elected by the Parliament, and as the fifth, the Minister responsible for the judiciary.[25] The President of the Judicial Council comes from among the 'prominent lawyers' and has a casting vote if the vote is tied, five to five ('a golden vote'). This arrangement significantly undermines the autonomy of the Judicial Council from the viewpoint of judicial independence and autonomy.

Upon the public vacancy announcement, a judge is elected from persons who meet general requirements for employment in public authorities (citizenship, fitness for work, non-conviction, etc.), who have graduated from the Faculty of Law and passed the bar exam. Specific requirements concern the law-related experience gained before and after the bar exam. The required experience ranges from at least two years of post-bar exam experience for a judge of the Misdemeanour Court to at least 15 years, as needed for a judge of the Supreme Court.

Notably, for the process of election of judges of first-instance courts (Misdemeanour, Basic, Agricultural, Administrative), the Act distinguishes between candidates who have been gaining experience in the judiciary and those engaging in other law-related activities. The latter need to have twice as long working experience. The respective institutions provided opinions on candidates from both groups. As judges at higher

23 In 2015, the Council of Europe's Group of States against Corruption *Groupe d'Etats contre la corruption* – GRECO) recommended that Montenegro take additional measures to strengthen the independence of the Judicial Council against undue political influence. It was also recommended to abolish the membership by function held by the Minister of Justice in the Council, that half of the members be judges, and that the function of the President of the Council be entrusted to a member from the ranks of judges, as well as to establish the objective and measurable criteria for the election of non judicial Council members. Gorjanc Prelević, 2019, p. 8.

24 Bogićević, 2014, p. 83.

25 In practice, with the criteria being political and non-legal, it is difficult to elect 'prominent lawyers' for members of the Judicial Council. Even the Act on the Judicial Council and Judges was changed in a way that allows the extension of the expired mandate of the existing members until new members are elected (virtually for an indefinite period). Beharović, 2021.

courts (Higher Misdemeanour, High, Appellate, and the Supreme Court), only those candidates who have previously served as judges or public prosecutors. As an exception, candidates for judges at the Supreme Court can also be lawyers from outside the judiciary, with at least 20 years of working experience.

Additional requirements for candidates for judges at the Basic Court include grades from the written test and the interview,[26] Also, all candidates must pass the 'initial training' (18 months) at the Basic Court in Podgorica.[27] The written test, interview, and initial training (of varied duration) also apply to the election of judges of the Misdemeanour Court, the Administrative Court, and the Agricultural Court. The law makes separate provisions for the requirements (criteria) for the election of the Supreme Court judges and judicial promotion requirements. A candidate for a judge of the Supreme Court, besides knowledge and skills, needs to meet a range of 'sub-criteria': professional development, scientific and professional work, working experience, performance quantity and quality, motivation, communication skills, competence, and understanding of the role of a judge in society (Arts. 66-71 of the Act).

The prevalence of 'non judicial' members in the decision-making in the Judicial Council is mitigated by the fact that the Commission for compliance assessment with judicial promotion requirements comprises, among Council members, four judges (including the President of the Supreme Court) and one prominent lawyer. The Commission assesses candidates on a proposal of the judicial deciding panel (president of the court from which the respective candidate comes from and four judges from higher instance courts). Besides performance, a contributing factor to the candidate's overall assessment necessary for election to a higher instance court is the interview.

The assessment of judges is regulated by law (Arts. 87-101), and more precisely defined in a regulation ('The Rules for Evaluating Judges and Presidents of Courts' 2015). The law governs the following issues: grades (excellent, good, and unsatisfactory), assessment criteria (professional knowledge and general competence), and many sub-criteria for measuring professional knowledge and general competence. In the procedure, a judge undergoing assessment is also making his/her case. Material sources for the assessment of professional knowledge and general competence of a judge include a selection of cases adjudicated by the given judge, statistical reports, supervision records, and judicial training reports. The ratings 'excellent' and 'good' mean a possibility for advancement, while the ratings 'satisfactory' and 'unsatisfactory' indicate that it is not possible to advance and a referral of a judge for (continuous) judicial training.[28]

26 The interview is led by the President of the Judicial Council and conducted following the Interview Guidelines, adopted by the Council in 2016. Gorjanc Prelević, 2019, p. 25.

27 In 2017 and 2018, cumulatively, a total of four candidates completed the initial training and were subsequently elected as judges. Ibid., p. 29.

28 This Montenegrin system of assessment (still in the draft form) was seen by the Venice Commission as detailed and of good technical quality. However, it was also stressed that such a system properly implemented will take a lot of time, personal and economic resources to produce long-term results. Hirschfeldt, 2014, p. 13.

4. Judicial career in North Macedonia

One of the fundamental values of the parliamentary system of the Republic of North Macedonia (RNM) is the division of state power into legislative, executive, and judicial powers (Art. 8 of the Constitution of 1991). This Constitution makes no provision, to which we agree, for the mutual control of powers (in contrast to Serbia and Montenegro) – one that would relate to all three branches of power and made even the courts subject to the control of the political powers (legislative and judicial). Other constitutional provisions on the judiciary are grouped under a special chapter ('Judiciary', Arts. 98-105) and revised by amendments XX-XXX (2005).

The Constitution regulates the grounds for the independence and autonomy of the judicial branch, while more specific provisions are found in the law. The Constitution provides for the manner of election and the conditions for termination of the judicial function, judicial immunity, the principles of publicity of trial and adjudication by a panel of judges, and the incompatibility and permanency of the function. The Constitution proclaims that the Supreme Court is the highest court in North Macedonia, while the organisation (network) of courts is regulated by law. The most prevalent constitutional provisions are those concerning the Judicial Council of the RNM, namely the legal status of its members and their powers.

The amendments to the 2005 Constitution brought numerous changes in the organisation of the judicial system, aimed at increasing its independence and autonomy. Judges have no longer been elected by the Parliament (Собрање), but by an autonomous judicial body, the Judicial Council. Dismissal was separated from other forms of termination of the judicial office. The composition of the Judicial Council and the manner of election of its members were completely changed and its powers defined in greater detail.

More specific provisions on the judicial branch and certain issues relevant to the judicial career are found in the Act on Courts (Закон за судовите, 2006),[29] Act on the Judicial Council of RNM (Закон за Судскиот совет на РСМ, 2019), and Act on the Academy for Judges and Public Prosecutors (Закон за Академијата за обука на судии и јавни обвинители, 2015). Regulations applicable to the judicial career include the Rulebook on the ranking of candidates for election as judges at higher instance courts (Правилник за начинот на рангирање на кандидатите за избор на судија во повисок суд, 2020) adopted by the Judicial Council, while of relevance to novice judges are those passed by the Academy for Judges and Public Prosecutors on the entrance exam and initial training.

The years-long reform of judiciary in the RNM[30] was only in the EU Progress Report of 2018 assessed as 'good progress (...) towards the beginning of the restoration

29 Apasijev, 2019, pp. 1-43.

30 See Lance, 2000, pp. 34-36, Radovanovik, 2012, pp. 1-10.

of independence of the judiciary', and one noted indicator of its independence and impartiality is the permanent tenure of judges.[31]

■ ***4.1. Judicial election procedure and role of autonomous bodies in the judicial career***

The manner of election of judges and termination of judicial office are defined by the Constitution and, more specifically, by the Act on the Judicial Council of RNM (Arts. 38-64).[32] RNM is another state without a probationary period for judges of a specified length; instead, all judges are elected to a permanent function. Judges are no longer elected by the Parliament but, since the amendments in 2006, by an autonomous authority, the **Judicial Council** of RNM, 'an independent and autonomous body of the judiciary' (Amendment XXVIII), from among the candidates who meet general and specific requirements for judges (Arts. 45-46 of the Act on Courts). The Council also elects court presidents and lay judges. The Judicial Council 'ensures and guarantees the autonomy and independence of the judicial authority by exercising its competences in accordance with the Constitution and law' (Art. 2 of the Judicial Council Act). The Council is responsible for deciding on the termination of judicial office, and the dismissal of judges – if a judge is unworthy, incompetent, or neglectful in the exercise of duties or commits a serious disciplinary offence (Arts. 74-76 of the Act on Courts). It is thoroughly described what is considered a neglectful and unprofessional exercise of function. According to the Constitution, the Council monitors and assesses the performance of judges, and the laws stipulate that the election to the basic and courts of higher instance requires a positive assessment of the candidate by the Judicial Council.

It follows that all steps in the judicial career – election, promotion, and termination of function fall within the remit of the Judicial Council, which, if that body is genuinely autonomous, truly is a guarantee of independence and autonomy of the judge and the entire judicial branch. Nevertheless, in its operation to date, the Judicial Council has on several occasions confirmed that 'the focus of political influence is on the judiciary'.[33] It is still considered that the Judicial Council is only formally an independent and autonomous authority, failing *de facto* to free itself from political influence.[34] On the other hand, the mere insisting on the strong Judicial Council being the key to the independence of judges is not a thorough approach to the problem because even the judicial 'self-isolation' can make way to informal influences by the legislative

31 Veljanoska and Dukoski, 2020, p. 213.

32 Thus, there is a 'dual' legal regulation, overlapping in one part. Nevertheless, the provisions of the Judicial Council Act are more 'procedural' in nature, determining the Council's conduct in electing and dismissing judges, while there are also ones 'substantive' in nature, like those in the Act on Courts.

33 Preshova, 2020, p. 76.

34 Veljanoska and Dukoski, 2020, 210. Judicial Council has constantly been in the focus of the reports of international organisations, including the EU, where RNM is assessed in a negative context. *Ibid.*

and executive branches on the judiciary (example of a 'notepad' in RNM as a path to judicial appointment).[35]

Whether the Judicial Council of the RNM will manage its staff-related authorities within the judiciary as an independent and autonomous body largely depends on its composition.[36] A crucial question is the extent to which its 15 members stand free from the influence of the political arm of the government? To provide an effective response , one should be aware of the politically sensitive nature of the moment of election of Council members, or the fact that they select them and how. The majority of this body consists of judges (eight) elected by judges themselves. If we add the President of the Supreme Court of RNM, this majority becomes overwhelming (three-fifths) and clear compared to other members elected by the political authorities. These five members of the Judicial Council are prominent lawyers – professors, solicitors, and others elected by the Parliament, with two of them being proposed by the President of the Republic (one from the minority community). The remaining member is the Minister of Justice.

Upon the public announcement of the vacant post, a person to be elected as a judge must meet numerous general requirements (under the Act on Courts): the possession of citizenship, knowledge of the Macedonian language, fitness for work and health, a law school degree and a passed bar exam, knowledge of a foreign language (English, French, or German), proof of not having been convicted of a crime, computer knowledge, and integrity and social skills (tested by exams). 'Specific requirements' for elections differ in the required years of service for a particular type and level of the court being applied for (Basic, Appellate, Supreme Court, Administrative, and Higher Administrative Court). The higher the court, the longer the service required. A common requirement for all, except for Basic Court candidates with a completed Academy training, is the positive assessment of their previous performance by the Judicial Council.

As for the Supreme Court, election to the post of a judge is not necessarily made solely from the ranks of career judges; it is also possible to elect a full or associate university professor with more than 10 years of experience teaching a subject related to judicial practice. This is the only way that makes it possible to elect to the court of higher or the highest instance a candidate without previous professional experience as a judge (the same applies in Montenegro).

Both laws (on the Judicial Council and on courts) stipulate 'specific' eligibility requirements for election to a higher instance court for the promotion of a judge. Promotion criteria are set out in a regulation, the Rulebook on the Ranking of Candidates for Election as Judges at Higher Courts – Appellate, Administrative, Higher Administrative, and Supreme Court (Art. 3 and further). The Candidate Ranking Committee (comprised

35 Preshova, 2018, p. 17.

36 Already in 2016, in a public survey asking the citizens whether they consider the Judicial Council as an independent and autonomous body, they almost unanimously, over 90 % of them, answered 'no'. See. Caca Nikolovska, Koco, Aleksijevski, 2016, p. 35.

of three members of the Judicial Council), in compiling the ranking list, uses six criteria on the basis of which it assigns points, following detailed formulas (the maximum score is 100 points): professional knowledge and specialisation (maximum 40 points) and training (maximum five points); positive performance assessment (maximum 20 points); written and oral expression skills (maximum five points); additional work on resolving case backlogs (maximum five points); additional work through mentorship, education, and other activities (maximum five points), and years of service (maximum 20 points). Based on the ranking list and upon completion of the process of deciding complaints against the (preliminary) ranking list, the Judicial Council determines the final list for election to the court of a higher instance.

5. Judicial career in Bosnia and Herzegovina

The political system of Bosnia and Herzegovina (BiH) is distinctive because the BiH Constitution (1995, Annex to the Dayton Agreement) makes no provisions on the judicial branch of government. This omission is not typical of the political systems founded on the principle of separation of powers, nor the states with the federal system of government to which that of BiH is closest.[37] Nevertheless, BiH has a special constitutional-legal order, based on the equality of the three constituent peoples and two entities (plus the District of Brčko), which means that the government operates on the principle of parity of nations and entities. The same applies to judicial institutions.

Judicial power at the state level was established subsequently (formerly exercised by the entities: Republic of Srpska, Federation of BiH, and the District of Brčko), namely, in an unusual way, first with the decision of the High Representative for BiH, and then with laws of the Parliament (parliamentary assembly).

Despite the absence of the constitutional principle of the separation of powers that would contain the first and foremost characteristic of the judiciary – independence, the existence of a guarantee of independence is implied by other principles, including the election and dismissal of judges by an independent (autonomous) authority, which is also responsible for determining judicial promotion requirements, the permanency of the judicial function, and the immunity of judges.

The first step in the formation of judicial power at the state level was the passing of the Act on the Court of Bosnia and Herzegovina by the High Representative for BiH in 2000, which the Parliamentary Assembly of BiH adopted as its own law in 2002 (the new law was enacted in 2009). The Court of BiH (in operation since 2007) exercises criminal jurisdiction over certain criminal offences (first and second instance), administrative, appellate, and jurisdiction of an electoral court.[38] The constitutional matter on the

37 Marković, 2012, p. 253.

38 Initially, it included foreigners, only to subsequently be composed solely of judges who were domestic citizens, leaving thus the Constitutional Court of BiH as the only judicial institution to retain a 'foreign dimension'. Schwartz, 2019, p. 7.

judiciary is also enshrined in the Act on the High Judicial and Prosecutorial Council, passed by the Parliament in 2004 (amended in 2005 and 2007).

The condition of entities retaining their own court organisation systems created dual regulation of the judiciary: courts and judges belong to the entities, while their election requirements and other status-related issues are subject to regulation by the state. The state has thus assumed the regulation of fundamental issues of the judiciary and set up a council that, by way of its powers, should establish an efficient justice system throughout the state. It is this 'court fragmentation' as viewed by some authors, which impedes the judiciary from developing strong power over the political branches.[39]

However, even after the establishment of the Council, a conflict continued between the judicial and the executive branch due to misunderstanding by both sides of the principle of independence, which also means non-interference in specific court cases. It has been disregarded that independence is the citizen's right to an independent court rather than a privilege of the courts.[40] Concurrently with establishing judicial power at the state level, measures were taken to strengthen the courts, whereas the appointment of judicial office holders was one of the systemic problems.[41] The situation improved with the establishment of the High Judicial and Prosecutorial Council (HJPC).

■ *5.1. Judicial election procedure and role of autonomous bodies in the judicial career*

Although the organisation of courts was regulated at the substate, entity level (courts, except the Court of BiH, are bodies of the entities rather than of the state), BiH has a uniform procedure for the election of judges, laid down by the Act on the High Judicial and Prosecutorial Council. This law also uniformly regulates disciplinary liability, promotion criteria, and the supervision of judges.

The manner of election (the Act states 'appointment') of judges, as well as the presidents of courts, prosecutors, and lay judges, is regulated by the Act on the High Judicial and Prosecutorial Council. All judges, upon the announced vacancy, are elected by the HJPC to a permanent term of office. This practice, given the non-political composition of the Council, attests to judicial independence on the one hand, but on the other hand, can be criticised for being exclusive of the connection with popular sovereignty. The latter is evident from the fact that directly elected bodies of the legislative and executive (the BiH Presidency) branches take no part, not even formally, in the election of judges.

The powers of the Council to autonomously elect judges, decide on their promotion, accountability, and dismissal, shows that this body has the greatest influence on the judicial branch. However, whether the HJPC is up to the task of establishing an independent and well-functioning judiciary depends in many respects on its

39 Bonifati, p. 11. 'Judicialisation of politics' like in other democratic states is impossible. Ibid.
40 Perić, 2019, p. 26
41 Murret, 2008, p. 305.

members. The HJPC consists of 15 members, elected for four years, with a significant majority being members of the judiciary (in the broadest sense). Only two members are elected by the political authorities – one is elected by the House of Representatives (lower house) of the Parliament and another by the Council of Ministers of BiH (the Government). Judges at courts of different levels elect five or six members of the Council (depending on whether the Brčko District chooses a judge or a prosecutor), prosecutors from different prosecutorial offices also choose five or six members, one member (a judge or a prosecutor) is elected by the Judicial Committee of the Brčko District, and one member – a solicitor, each by the Bar Association of Republika Srpska and that of the Federation of BiH (Art. 4 of the Act on HJPC). Membership requirements concerning personal qualities are contained in a general (unquantifiable) formulation to be 'persons of high moral standing and professional impartiality, with a reputation for efficiency, competence, and professional impartiality' (Art. 4, para. 2 of the Act).

Although there are 13 'non-political' of the 15 members of the Council, we cannot safely claim that this body is a guarantor of judicial independence. Judges are always the least represented group (five or six) in the Council, and only when joined together with prosecutors or solicitors can they make up the majority. However, courts and prosecutors' offices are separate authorities, differing in their status and responsibilities, let alone that law practice represents something completely different within the judiciary. Hence, the only solution would be to split this body into two separate ones – one for judges and another for prosecutors (like in Serbia, Montenegro, and North Macedonia).[42] In such a judicial council that elects and dismisses judges and decides on their promotion, judges could or would have to constitute a majority.

Within the Council, there are four sub-councils (formed by the Council members) that propose judges to the four tiers of government (BiH, the entities, and the District of Brčko), whereby Council members from the Republic of Srpska and those from the Federation of BiH are at the same time members of two sub-councils that propose judges in those ('own') entities. On proposals from the sub-councils, the Council decides if it has a quorum of at least 11 members, by the majority vote of members present and voting (double criterion, Art. 14 of the Act).

To qualify for election or promotion, judges must meet the following general requirements: citizenship of BiH, intellectual and physical capacity to perform the judicial function, a degree from the Faculty of Law in BiH (or in SFR Yugoslavia, or abroad, with diploma being lawfully validated), a passed bar exam in BiH (or in SFR Yugoslavia or, exceptionally, in the former Yugoslav republics). Besides these, there are special election requirements, also common in other legal systems, and they refer to the working experience in courts, prosecutors' offices, law-practicing firms, or in other relevant fields after passing the bar exam. The required experience varies from three years (for judges at basic courts in the Republic of Srpska, municipal courts in

42 From 2001 to 2006, Serbia had a similar body in operation, the High Council of the Judiciary, as a predecessor of today's High Judicial Council, which was responsible for the election of both judges and public prosecutors.

the Federation of BiH, and those at the Basic Court of the Brčko District), five years (for judges at district courts in the Republic of Srpska and those at cantonal courts in the Federation of BiH), to a minimum of eight years (for judges at the Court of BiH, the entities' Supreme Court, and those at the Appellate Court of the Brčko District).

If candidates meet these requirements, they can be elected under legal criteria that measure the following: professional knowledge, experience, and performance; published scientific works and other professional activities; professional competence and development training; ability to analyse legal problems; impartiality, conscientiousness, diligence, determination, responsibility, communication skills, collegiality, conduct outside the office, and reputation (Art. 43 of the HJPC Act).[43] In the selection of candidates, the account is taken of national representation and gender equality. Interviews with candidates are mandatory, with the possibility of conducting a qualifying exam to test the knowledge of positive law.

The procedure for the election and promotion of judges is more specifically regulated by the Rules of Procedure of the HJPC (2013) and the Rulebook on the Qualification and Written Testing Candidates. The Rules of Procedure govern issues related to public vacancy announcements, candidate interview committees, ranking criteria, testing, interviews, candidate interview scoring, competence scoring, ranking, nomination, and appointment. The competence of candidates entering the judiciary' for the first time is determined based on qualification and written testing. As for candidates from the judiciary, the criteria[44] for the promotion were verified based on their performance rating in the past three years.[45] The performance assessment has been thus criticised that, as 'a statistical cult, it turned into absurd that made the assessment pointless'.[46]

Improvement in the way in which judges are elected still seems insufficient for the judicial branch to be considered independent and efficient. There are many reasons for these ideals continuing to be unfulfilled, including lengthy proceedings, high case backlogs, lack of judges, underpaid judges, low information technology level, poor communication between the media and the judiciary, and rarely invoked disciplinary proceedings.[47] What is noted as a systemic shortcoming is a discrepancy between formal (written) and informal rules (influences) in the recruitment of judges, where the

43 However, standards that fall under personal integrity, morality, and professionalism are difficult to recognise, and even more difficult to compare and measure. Muhamerović, 2013, p. 5.

44 In 2018, the HJPC adopted the existing Criteria for assessing the performance of judges in BiH. One professional criticism is that this by-law unconstitutionally and unlawfully establishes the obligation on judges of higher courts to assess and monitor the operation of judges of lower courts. It can be imposed only by a law. Blagojević, 2019.

45 In 2019, there were four public announcements for a total of 117 vacant posts in the judiciary (courts and prosecutor's offices); there were 1191 applications, 779 applicants, 154 candidates were invited for qualification testing, while the written test was taken by 79 candidates. Tegeltija, 2020, pp. 35-36.

46 Perić, 2019, p. 16. Monitoring and assessing the performance of judges (and prosecutors) has adverse effects on the justice system because the primary motivation is focused on meeting the monthly caseload quota rather than on quality and most complex cases. Ibid.

47 Purić and Savić Božić, 2016, p. 89.

informal rules can virtually annul the written. The institutionalisation of the election and promotion of judges in terms of the procedure itself is still inadequate, which is evident from the conduct (decision-making) of members of the HJPC.[48]

6. Conclusion

Legal frameworks governing the status of judges and the development of the judicial career in the analysed states of the Western Balkans, including Serbia, Montenegro, BiH, and N. Macedonia, show significant similarities. In some respects, there are even identical legal solutions, but we also find legal differences. One notable characteristic that these legal systems have in common is the intent to ensure the independence and autonomy of courts and judges through constitutional, legislative, and regulatory rules. They did so by setting out objective and measurable criteria for the election and career advancement of judges. The presented overview of the judicial careers in the respective four states makes it possible to draw certain conclusions.

Judges in Montenegro, Bosnia and Herzegovina, and North Macedonia are elected to a permanent term of office regardless of the court they are applying to and whether it concerns the first or another election to office. In Serbia, the first election to the judicial office is of limited tenure; the term of office is three years. This solution has positive sides but is also deficient, which makes the opinions on the probationary term of office divided. On a positive note, during the probation, judges demonstrate their actual possession of the required judicial knowledge. If a judge, however, fails to demonstrate that knowledge – many repealed decisions–for example, his/her term of office ceases after three years. Thus, the judiciary will be freed from low-quality judges in a simple way. The negative side of the probation is its potential to make a judge more susceptible to external (political, interest) influences and therefore non-independent in the exercise of his/her duties. A judge with a limited term of office is aware that election to a permanent tenure is yet to come and that this election can be affected by various lobbying. To this lobbying, they can simply adapt through their judgements. By contrast, in Serbia, the post-probation election to a permanent term of office was reduced to a mere form – all judges, upon expiration of three years, are, by automation, elected to a permanent term of office. Another distinct feature of Serbia is the solution by which the first term of office judges is elected by the National Assembly. Although the Assembly acts on proposals of an autonomous authority, the High Judicial Council, it has been criticised because of the general consideration that a political body should not elect non-political government officials, as judges are.

In all four states, an autonomous body, the Judicial Council, plays a central role in decision-making regarding judicial careers. It makes decisions on the election and promotion of judges and the termination of judicial function. The Judicial Council is

48 Fagan and Dimitrova, 2019, pp. 232-233.

in those states empowered with decisions with respect to judges alone, except in BiH, where there exists a Judicial and Prosecutorial Council, which is also responsible for the prosecutorial office holders. Since the functions of judges and prosecutors are separated, we find it a better solution to have two co-existing authorities – one in charge of judges and the other for prosecutors.

We believe that the composition of this body contributes in many respects to the possibility that it is both a guarantor of judges' independence and impartial in making decisions on the election, promotion, or termination of the judicial office. A crucial question, therefore, is who has the required majority – judges or other members? In all councils, members from the judiciary constitute the majority, and virtually, they alone can make decisions, except in Montenegro. In Montenegro, half of the Council members come from the ranks of judges, and they may be in the minority in the case of a split vote, five to five. Then, a casting vote is that of the Council President, who is not from the ranks of judges. Justification for this solution lies in the apprehension that the judicial branch, if judges had a majority in the Council, could, in time, alienate itself from the popular sovereignty, retreat into isolation, and lose its legitimacy. Nevertheless, lawmakers in the other three states do not share this opinion, as the composition of the autonomous body shows that its presently being dominated by judges is considered a guarantor of independence and impartial decision-making. The exceptional situation with the composition is in BiH, where judges are always in the minority, and it is so because a single body is responsible for both judges and prosecutors. Joined with prosecutors, judges in the Council of BiH have the majority (11 out of 15 members).

The analysis of the status of judges across these states has also shown that higher instance courts are virtually inaccessible to lawyers not coming from the judiciary. Although no formal prohibition exists for nonjudicial lawyers to be elected, the Appellate Court in Serbia, for example, it has not become a practice. In the courts of higher instance, all to the Supreme Court, the election is virtually made exclusive to previous judges, possibly also for prosecutors. This practice speaks that judges in higher instance courts are, in fact, always career judges who have advanced within the judicial branch. It can be criticised as a form of closure of the judiciary within itself, which may lead to the judicial branch being distanced from the surrounding reality. The practice of not electing as judge lawyers from other fields undoubtedly contributes to this.

Also observable in all four states is that criteria for the election of judges, and particularly those for career advancement, are sought to be objectivised as much as possible. Different standards, credit accumulation, and the assessment, specified in regulations, not only serve the purpose of visibility ('transparency') with respect to career advancement, but also bring some degree of certainty. If a judge achieves successful results capable of being measured precisely, he or she will advance in his/her career. However, it also entails some disadvantages if a judge focuses solely on achieving as many statistically solved cases as possible to gain better prospects for promotion. It is of general interest for a judge to make a greater and more sustained

effort in high-quality decision-making on the most complex cases, even if doing so means deferring the final decision.

While statutory standards and criteria for progression in the judicial career, as well as the evaluation of compliance with the requirements for the first election to office, can be assessed as legally good, the influence of non-legal factors is still present. In the previous practice of election and promotion of judges across all four states, intervention by informal factors has not always been negligible. These factors may come from the political sphere, the government, or the ministry, which is most often the case, or from other centres of unwritten power. To fully eliminate them, it is not adequate to have just quality laws in place; also, there is a higher political culture in that society in general. It is only then that progress in the career of the judge will be entirely fair.

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Constitutional Identity and Ultra Vires Review in Germany[2]

ABSTRACT: *This article aims to provide insight into the relationship between constitutional identity and ultra vires review in Germany. First, a brief introduction is provided on the issue of the relationship between EU law and national law, then the diverging grounds for validity are presented concerning the interpretation of the CJEU and of the German Federal Constitutional Court. After the detailed analysis of the German case law, limits of a national reservation are scrutinised. In the end, a conclusion is drawn up.*

KEYWORDS: constitutional identity, ultra vires review, Germany, EU law, Bundesverfassungsgericht, CJEU.

1. The relationship between Union and national law

Unlike regular international treaties, Union law has a direct effect on the national legal systems of Member States, raising the question of hierarchy between the two legal orders. Although the doctrines differ as to why, there is a consensus on the essence of the relationship between the two levels: national courts and the Court of Justice of the European Union (CJEU) have gradually come to agree that Union law should, as a matter of principle, have primacy over any conflicting national law. This was enshrined

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2 This paper is an adaptation of the author's professorial thesis on the boundaries of German constitutional law in the European integration process: Simon, 2016.

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in Declaration 17[3] of the Lisbon Treaty. This primacy also extends to national constitutional law.[4] There is also a broad consensus that Union law not only has primacy of validity but also primacy of application over every level of national law.

2. Diverging grounds for validity

There are considerable differences of opinion regarding the basis for the validity of Union law. The CJEU and Federal Constitutional Court (*Bundesverfassungsgericht*; BVerG) have a different basic understanding of Union law as either separate or derived from national law and, consequently, on the extent of the primacy of Union law.

■ *2.1. The grounds for validity put forward by the CJEU*

Since its landmark decision in the Costa v ENEL case, the CJEU has held that Union law has primacy over national legal provisions by virtue of its autonomy.[5] The CJEU emphasises the autonomous nature of Union law and maintains that it takes precedence over any provision of national law, including constitutional law;[6] otherwise, the requirement that Union law should apply in the same way throughout the European Union could not be guaranteed. The CJEU maintains that the contracting parties to the EU Treaties have, unlike the signatories to regular international treaties, established an autonomous legal order. On the relationship between the law of this autonomous legal order and national law, it argues

'that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed,

3 Declaration 17 of the Lisbon Treaty reads: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): Opinion of the Council Legal Service of 22 June 2007: It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) 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 shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.'

4 CJEU, Case 6/64, Costa/E.N.E.L., ECR 1964, 1251/1269: Case 11/70, Internationale Handelsgesellschaft, ECR 1970, 1125, paragraph 3. Case 106/77, Simmenthal, ECR 1978, 629, paragraph 17 et seq.

5 CJEU, Case 6/64, Costa/E.N.E.L., ECR 964, 1251/1269 et seq.; settled case-law: see also CJEU, Case 106/77, Simmenthal, ECR 1978, 629/644; Case 190/87, Oberkreisdirektor des Kreises Borken et al./Moormann, ECR 1988, 4689/4722; Haack, 2007, pp. 165 et seq.

6 CJEU, Case 11/70, Internationale Handelsgesellschaft, ECR 1970, 1125, paragraph 3.

without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.[7]

In the Internationale Handelsgesellschaft case, the Court of Justice clarified that the primacy of Community law over national law also extended to the constitutional law of Member States. The judgement reads thus:

'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in light of Community law. [...] Therefore, the validity of a Community measure or its effect 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 a national constitutional structure.'

The CJEU therefore justifies Union law taking uniform, direct effect in the Member States and precedence over all levels of national provisions on the grounds that this is necessary to ensure the effectiveness of the Union, the uniform application of laws across Member States,[8] and the autonomy of the supranational legal order. It understands an autonomous *sui generis* legal order to be one that exists in and of itself rather than one derived from the Member States. Its rationale is based on a teleological interpretation of the Treaties, in particular Article 189(2) TEEC, Article 14(2) ECSC, and Article 161(2) TFEU.[9] In the CJEU's view, the Union can only carry out the duties conferred upon it if there is a guarantee that Union law will take full effect in the same way in all Member States, regardless of their respective constitutions.

If, then, Union law has, as a matter of principle, a primacy of application over national law which stems directly from the Treaties, it follows that the powers of the EU institutions also arise from the Treaties and, necessarily, so too do the boundaries of these conferred powers. This model casts the CJEU as the guardian of the division of powers under Union law. Its rulings are therefore predicated on the assumption that it alone has jurisdiction to decide on the validity of legal acts of the European Union and, thus, to determine whether there has been a transgression of powers.[10] In the Foto-Frost case, the CJEU held that national courts may consider the validity of Union acts and may conclude that a legal act is completely valid because, in so doing, 'they are not calling into question the existence of the Community measure'.[11] However, the CJEU went on to rule that national courts do not have the power to declare acts of EU institutions invalid.[12] This reading finds confirmation in the history of the CJEU's creation, as Germany's call for the primacy of national constitutions to be codified

7 CJEU, Case 6/64, Costa/E.N.E.L., ECR 1964, 1270.
8 CJEU, Case 11/70, Internationale Handelsgesellschaft, ECR 1970, 1125.
9 These are the provisions in each treaty which provide for the direct application of regulations under that treaty in the Member States.
10 See CJEU, Case 314/85, Foto-Frost, ECR 1987, 4199.
11 CJEU, Case 314/85, Foto-Frost, ECR 1987, 4199, paragraph 14.
12 CJEU, Case 314/85, Foto-Frost, ECR 1987, 4199, paragraph 15; see Bast, 2014, p. 171.

was flatly rejected.[13] This does not mean, however, that Union law is of a higher order than national law. A national law that infringes on Union law is not automatically nullified. Union law does not override national law; it must simply be granted primacy of application.

■ *2.2. The grounds for validity put forward by the Federal Constitutional Court*

The Federal Constitutional Court accepted the primacy of the application of Union law. However, in its view, primacy is not absolute or intrinsic to Union law but is enshrined in, and therefore also circumscribed by, constitutional law.[14] According to the case-law of the Federal Constitutional Court, Union law has primacy of application by virtue of the constitutional mandate, or, more specifically, by virtue of German act of approval, which acts as a bridge between the two legal systems.[15] The national order of application contained in the act of approval is the basis for the integration programme, but at the same time it imposes a limit on the validity of Union law in Germany.

3. Limits on integration under the third sentence of Article 23(1) of the Basic Law

In 1992,[16] Article 23 was added to the Basic Law (GG). Paragraph 1 provides special constitutional consent for the transfer of sovereign powers in the context of the European integration process. The first sentence of Article 23(1) of the Basic Law binds the Federal Republic of Germany to participation in the development of the European Union, which, according to the 'structure safeguard clause' in the second half of the sentence, 'is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'. The second sentence authorises the federal authorities to transfer sovereign powers by law with the consent of the German government. Finally, the third sentence explains that any regulations that establish or amend the foundations of the Union, as established in the Treaties, will be subject to paragraphs (2) and (3) of Article 79 of the Basic Law. This provision is the yardstick against which the legality of Germany's European policies is measured.

A provision of this type is relatively unusual. While national constitutions often lay down provisions governing participation in the creation of European law, it is rare for them to comment on the form that European democracy is to take. In this respect, Article 23(1) makes the German Basic Law an exception.[17] Should the European Union

13 Huber, 1991, p. 216 citing Friauf, 1990, p. 19.
14 Voßkuhle, 2007, pp. 158 et seq.
15 See, in particular, BVerfGE 73, p. 339 (374 et seq.) – Solange II; 123, 267 (396 et seq.) – Lisbon.
16 *Federal Law Gazette*, 1992 I, p. 2086.
17 Grimm, 2014, p. 27.

fail or cease to satisfy the structural requirements laid down in the first sentence of Article 23(1) of the Basic Law, then the mandate under the act of approval for Union law to take effect and have primacy in Germany either does not or ceases to exist. According to the third sentence of Article 23(1) of the Basic Law, the structural requirements therein should be read in light of Article 79(3) of the Basic Law. A reading of the first and third sentences of Article 23(1) in conjunction with Article 79(3) of the Basic Law therefore makes the transfer of sovereign rights to the Union conditional on the observance of the State structural characteristics safeguarded by Article 79(3) of the Basic Law. Conversely, Union law applicable by virtue of the transfer of sovereign power can only take precedence over national law in Germany if it is without prejudice to the constitutional identity within the meaning of Article 79(3) of the Basic Law. The act of approval, the substantive legal content of which is derived primarily from the EU Treaties,[18] may therefore later become unconstitutional, (in part) as a result of CJEU interpretations of the EU Treaties that are also binding on the Federal Constitutional Court.[19]

4. Development of the case-law of the Federal Constitutional Court

The Federal Constitutional Court was one of the first European constitutional courts to expressly confirm the basic primacy of Union law.[20] On 18 October 1967, the First Senate of the Federal Constitutional Court held that Regulations of the Council and Commission of the European Communities could not be directly challenged by constitutional complaints because they had been issued by a new public power, which was autonomous and independent with respect to the State power of the individual Member States. As such, its acts neither needed to be confirmed ('ratified') by the Member States, nor could they be abrogated by them.[21]

■ *4.1. Reservations of the Federal Constitutional Court*

It became clear with the Solange I judgement,[22] however, that vital questions remained unanswered. The Federal Constitutional Court certainly recognised that the process of European 'supranational' integration was a new type of inter-state cooperation, which, conceptually, defied classification under the current system. It spoke of a 'sui generis' legal order, or even an 'autonomous' source of law.[23] In its decision of 29 May 1974, however, it also clearly established the limits within which the transfer of sovereign rights was acceptable. Contrary to the wording of Article 24 of the Basic Law, the First Senate of the Court argued that absolutely no sovereign rights were ceded in the context of European integration. The applicable provision at the time, Article

18 See BVerfGE 12, 281 (288) – Devisenbewirtschaftungsgesetze.
19 See Dederer, 2014, p. 315.
20 BVerfGE 31, 145 (175) – Milk powder; see, in that connection, Alter, 2001, pp. 80 et seq.
21 BVerfGE 22, 293 (296) – EEC Regulations.
22 BVerfGE 37, 271 – Solange I.
23 BVerfGE 37, 271 (277) – Solange I.

24 of the Basic Law, did not offer a carte blanche to change the basic structure of the constitution on which its identity was based without a constitutional amendment.[24] The decision reads:

'Article 24 of the Basic Law deals with the transfer of sovereign rights to interstate institutions. This cannot be taken literally. [...] That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity. [...] Certainly, the competent Community organs can make laws that the competent German constitutional organs could not make under the law of the Basic Law and that are nonetheless valid and to be applied directly in the Federal Republic of Germany. However, Article 24 of the Basic Law circumscribes this possibility, as it precludes any Treaty change that would be incompatible with the constitutional identity of the Federal Republic of Germany insofar as it would encroach on its constituent structures. [...] Article 24 of the Basic Law does not authorise the transfer of sovereign rights; rather, it opens up the national legal order (as appropriate) by retracting the claim to regulatory exclusivity staked by the Federal Republic of Germany in an area within the scope of the Basic Law, and by making way for the direct validity and applicability of a law from another source within the national territory. [...] The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one that forms part of the constitutional structure of the Basic Law.'[25]

The Court thus draws attention to the limits of Article 24 of the Basic Law: Article 79(3) of the Basic Law rules out any measure that entails the forfeiture of core constitutional identity. On this point, the dissenting opinion[26] was also in complete agreement. As a result, the headnote to the decision states that the Federal Constitutional Court may continue reviewing European law until such time as (*solange* in German) a European catalogue of basic rights exists that ensures a comparable level of protection. The minority opinion was that, looking at CJEU case-law, these requirements had already been met at that time.

In contrast to the 'Solange I' decision, the 'Vielleicht' (or 'Perhaps') decision of the Second Senate, on 25 July 1979,[27] concerned the compatibility of provisions of primary Community law with the Basic Law. After the CJEU handed down its interpretation of Articles 92-94 TEEC in a preliminary ruling procedure, the administrative court, seised of the matter, referred to the Federal Constitutional Court, pursuant to Article 100(1) of the Basic Law, the question of whether these Treaty provisions were inapplicable in the Federal Republic of Germany since, according to the CJEU's interpretation, they violated the Basic Law (in particular, the guarantee of legal recourse under Article 19(4) thereof). The Court made clear that, bound by the CJEU's preliminary ruling, it did *not*

24 BVerfGE 37, 271 (279) – Solange I.
25 BVerfGE 37, 271 (279 et seq.) – Solange I.
26 See BVerfGE 37, 271 (291 et seq.) — Solange I, dissenting opinion of judges Rupp, Hirsch and Wand.
27 BVerfGE 52, 187 – Perhaps decision.

have the authority to decide, within the framework of the judicial review procedure, on the applicability in the German jurisdiction of provisions of primary Community law that, according to the CJEU's interpretation, were incompatible with the Basic Law.

'Article 177 TEEC [now Article 267 TFEU] assigns the Court of Justice, rather than the national courts, ultimate authority to rule on the interpretation of the Treaty and the validity and interpretation of Community acts derived therefrom.'[28]

The Solange II decision of 22 October 1986[29] upheld the basic prohibition on violating the 'identity of the applicable constitutional order of the Federal Republic of Germany'.[30] At the same time, it was deemed that a measure of protection of fundamental rights has been established [...] within the sovereign jurisdiction of the European Communities which, in its conception, substance and manner of implementation, is essentially comparable with the standard of fundamental rights provided for in the Basic Law'.[31] Provided that the Court of Justice of the European Community ensured effective protection of fundamental rights, the Federal Constitutional Court would, it said, refrain from conducting its own review. Legal protection under the Basic Law would then cease once the validity of fundamental rights at the European level was essentially equivalent, in substance and effectiveness, to the protection of inalienable rights under the Basic Law.[32] It should be noted that the Solange II decision is based on the same doctrine as its predecessor. The Federal Constitutional Court also assumes in this decision that it is, in principle, within its jurisdiction to review secondary Community law for compatibility with the structures and values that underpin the Basic Law.

■ *4.2. Principle of democracy*

After the Solange decisions essentially laid down the constitution's red lines in terms of the inalienable rights not to be violated during integration, with the Maastricht judgement, the principle of democracy moved to centre stage. The judgement imposed limits on the transfer of sovereign rights. Articles 38(1) and (2) of the Basic Law guarantee that a citizen has the right to vote for the German Federal Parliament and that the constitutional principles of the right to vote are observed in an election. In addition, this guarantee is extended to the fundamental democratic content of this right: 'Should the German Federal Parliament relinquish its duties and responsibilities, particularly concerning legislation and the election and control of other holders of State power, then this affects the area to which the democratic content of Article 38 of the GG relates. [...] Article 38 of the GG forbids the weakening, within the scope of Article 23 of the GG, of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the

28 BVerfGE 52, 187 (202) – Perhaps decision.
29 BVerfGE 73, 339 – Solange II.
30 BVerfGE 73, 339 (378) – Solange II.
31 *Ibid*.
32 *Ibid*., 376.

Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Article 79, paragraph 3, in conjunction with Article 20, paragraphs 1 and 2 of the GG, is violated.'[33]

From Article 38 of the Basic Law, the Court thus construed a subjective claim for compliance with the requirements of democratic legitimation. At the same time, it laid claim, on this basis, to the authority to declare European legal acts not binding in Germany if 'European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Consent is based [...].' Thus, the Federal Constitutional Court considers, within the context of its 'cooperative relationship' with the CJEU, whether legal acts passed by European institutions and bodies are within the limits of the sovereign rights conferred on them or whether they transgress such limits.[34] The Court continues thus: 'If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Consent is based, any legal instrument arising from such activity would not be binding within German territory.'[35]

Heavily criticised by experts,[36] the Lisbon judgement of 30 June 2009 further delimited the boundaries of constitutional commitment. The Federal Constitutional Court considered the constitutional complaints lodged against the act approving the Treaty of Lisbon to be admissible 'to the extent that they challenge a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany, and a violation of the principle of the social state on the basis of Article 38.1, the first sentence of the Basic Law'.[37] At the heart of this wide-ranging judgement is the Federal Constitutional Court's intention to hold the European Union to its identity as a treaty-based association of sovereign states that possesses no statehood itself, thereby preventing a sovereignty grab or any encroachment on Member States' powers.[38] First, the Constitutional Court cites specific areas where powers must not be transferred to the European level as doing so would mean 'that insufficient space is left to the Member States for the political formation of economic, cultural, and social living conditions'.[39]

Quite remarkably, the Court then substantiated five domains that would have 'always' been '[p]articularly sensitive for the ability of a constitutional state to democratically shape itself'. It listed 'decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue

33 *Ibid*., 171 et seq.
34 Both citations are from BVerfGE 89, 155 (188) – Maastricht.
35 *Ibid*.
36 See, for example, Grimm, 2009, pp. 475–496; Halberstamm and Möllers, 2009, pp. 1241 et seq.; Jestaedt, 2009, p. 503; Schönberger, 2009, pp. 535–559.
37 BVerfGE 123, 267 (328) – Lisbon.
38 Grimm, 2009, p. 486.
39 BVerfGE 123, 267 (357) – Lisbon.

and public expenditure (3), decisions on the shaping of living conditions in a social state (4), and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)'. The constitution would not completely bar a transfer of powers in this 'democratic primary area', but such a transfer would be particularly sensitive.

In all its case-law on the euro rescue, the Court used the example of parliament's right to decide on the budget to highlight the real crux of the matter: 'For adherence to the principles of democracy', the question is 'whether the German Bundestag remains the place in which autonomous decisions on revenue and expenditure' should be made, even with regard to international and European commitments. 'If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the Bundestag's consent, or if supranational legal obligations were created without a corresponding decision by free will of the Bundestag, Parliament would find itself in the role of merely re-enacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget.'[40] 'Against this background, the German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular, it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue.'[41]

The prohibition on relinquishing budgetary responsibility does not inadmissibly curtail the legislature's budgetary powers, but rather aims to act as a safeguard. For this reason, the Federal Constitutional Court ruled that no permanent mechanisms may be created under international treaties 'that are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences that are hard to calculate [...] [I]n addition, it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with.'[42]

■ *4.3. Qualifying the case-law on reservations*

In its Honeywell/Mangold decision of 6 July 2010, the Federal Constitutional Court ruled that there had been no transgression of powers and qualified certain statements in the Lisbon judgement. The claimed right to perform an ultra vires review means 'that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.'[43] The decision reads: 'If the

40 BVerfGE 129, 124 (179) – EFSF.
41 *Ibid*.
42 BVerfGE 129, 124 (180 f.) – EFSF.
43 BVerfGE 126, 286 (303) – Honeywell.

supranational integration principle is not to be endangered, ultra vires review must be exercised reservedly by the Federal Constitutional Court. Since it also has to find on a legal view of the Court of Justice in each case of an ultra vires complaint, the task and status of the independent suprastate case-law must be safeguarded. This means, on the one hand, respect for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them [...]. Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court, in questions of the interpretation of Union law that, with a methodical interpretation of the statute, can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise that constitute a burden or do not oppose domestic compensation for such burdens."[44]

The Federal Constitutional Court thus claims to have the authority to perform an ultra vires review, but grants the CJEU wide discretion in interpreting the Treaties within the confines of a 'methodical interpretation of the statute [...] in the usual legal science discussion framework'. In its ultra vires review, the Court therefore simply wants to examine whether the action of an EU institution constitutes an act of transgression that encroaches on Member States' powers 'manifestly' and in a 'structurally significant' way.[45] The rationale applied here is that the European Union can only invoke the primacy of Union law if the measures it takes fall within the mandate conferred on it by the Member States.

■ *4.4. Conclusion*

Since handing down its Maastricht decision on 12 October 1993, the Federal Constitutional Court has maintained that the legal acts of EU institutions must not overstep the sovereign powers conferred on them. Should such a transgression occur, the Federal Constitution Court has the right to instruct the German authorities not to implement the impugned legal acts. Against this background, the Federal Constitutional Court issues constitutional review reservations in the form of an ultra vires review,[46] an identity review,[47] or a fundamental rights review,[48] and considers such a remedy to be an integral part of the German constitution.

44 BVerfGE 126, 286 (307) – Honeywell (author's emphasis).

45 See BVerfGE 89, 155 (187 et seq.) – Maastricht; BVerfGE 123, 267 (357 et seq.) – Lisbon; BVerfGE 126, 286 (303 et seq.) – Honeywell.

46 BVerfGE 75, 223 (240 et seq.) – Kloppenburg decision; 89, 155 (188, 209 et seq.) – Maastricht; 123, 267 (353 et seq.) – Lisbon.

47 BVerfGE 123, 267 (353 et seq.) – Lisbon having regard to BVerfGE 75, 223 (235, 242) – Kloppenburg decision; 89, 155 (188) – Maastricht; 113, 273 (296) – European arrest warrant.

48 See, in particular, BVerfGE 37, 271 (280 et seq., 285) – Solange I; 73, 339 (376, 387) – Solange II.

5. Limits of a national reservation

It is obvious that the solution proposed by the Federal Constitutional Court, derived from the Basic Law, may conflict with the unconditional primacy claim developed by the CJEU on the basis of Union law. Advocate General Pedro Cruz Villalón put it quite plainly in his opinion concerning the referral for a preliminary ruling in the OMT case: 'It seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as "constitutional identity". That is particularly the case if that "constitutional identity" is stated to be different from the "national identity" referred to in Article 4(2) TEU.'[49]

■ *5.1. No blanket constitutional power of review*

Legal problems arise, then, if the CJEU comes to a different interpretation of the law to that of the Federal Constitutional Court. It is also clear in such a case that the Federal Constitutional Court cannot rule on the validity or invalidity of Union action. It can, at most, conclude that the provision in question cannot be applied by the authorities or courts of the Federal Republic of Germany. In such a case, however, the question arises as to the scope of the Federal Constitutional Court's power of review. First, in principle, the German legal system makes way only for the application of Union acts covered by competences conferred on the Union. Union law stems from an *autonomous*, but not *original*, source, and its scope, therefore, extends only as far as provided for in the Treaties. If the Union asserts vis-à-vis Member States a competence that has not been conferred on it under primary law, that is, by the Treaties, this action is not covered by the Treaty Act by means of which the competent German institutions have approved the TFEU in its applicable form. In principle, the German legal system makes way only for the application of Union acts covered by competences conferred on the Union.

However, this does *not* mean that the Federal Constitutional Court also has the authority to consider whether the European Union is acting ultra vires. The question of the power of procedural constitutional review must be distinguished from the substantive-law question of the scope of Union competences. The Member States have conferred on the CJEU the power to interpret Union law. Under the second sentence of Article 19(1) TEU, the Court of Justice is to ensure that in the interpretation and application of the Treaties, the law is observed. It follows from Article 263(1) and (2) TFEU that this also encompasses the power to review the EU institutions' competence to act. There may be times when the European public authorities exceed their powers under Union law, but it is for the CJEU to rule whether they have acted ultra vires. That is also the thrust of Article 344 TFEU, under which Member States undertake not to

49 AG Villalón, Opinion of 14.1.2015, Case C-62/14, Gauweiler et al., paragraph 59.

submit a dispute concerning the interpretation or application of the Treaties to *any method of settlement other than those* 'provided for therein'.[50]

Safeguarding the unity of the law is the task of the CJEU, which has the fundamental power to make the final decisions in this respect.[51] This is to be guaranteed through the use of the instrument of judicial dialogue codified in Article 267 TFEU, by means of the rights and obligations of national courts to make referrals for preliminary rulings.[52] In the context of an ultra vires complaint, pursuant to Article 267 TFEU, each national constitutional court must therefore not only give the CJEU the opportunity to rectify, by means of the cassation of the Union legal act, a breach of the limits to the integration programme as identified [by national courts], but the Federal Constitutional Court also has no choice but to accept the judgement of the CJEU. It is true that the Federal Constitutional Court may make the constitutional conformity of Union legal acts conditional on their conformity with Union law. However, the binding final ruling as to whether a particular action on the part of the Union institutions is in conformity with Union law must be handed down by the CJEU.

■ *5.2. Power of review in the event of a breach of constitutional identity*

Restrictions can only be imposed on this construct if the ultra vires action by the Union, as identified by the Federal Constitutional Court, also results in a breach of constitutional identity.

5.2.1. Protection of constitutional identity

Before we get to the stage where a dispute is referred to the courts, it is primarily the responsibility of the political authorities to ensure that the constitutional identity of the Member State concerned is protected.

5.2.1.1. Identity protection by the political authorities

Decision-making procedures in the European Union, in particular in the Council, make it possible for any government and, indirectly, national parliament to lodge objections citing the need to protect constitutional identity. Although national parliaments have thus far made little use of this means of exerting influence, the legal basis for it has been established. In that connection, the identity clause in Article 4(2) TEU, which is addressed to the Member States in the context of the Council's legislative procedure, comes into play. The Council must respect 'the equality of Member States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The Council is thus the primary locus of the political debate on identity.

50 See, in that connection, CJEU, Case C-459/03, MOX Plant (Commission v Ireland), ECR 2006, pp. I-4635 et seq.

51 See Skouris, 2008, pp. 343 et seq.; see also Bast, 2014, pp. 167 et seq.; Kumm, 2014, pp. 203 et seq.

52 Sauer, 2008, p. 463.

5.2.2.2. Identity protection in dialogue between courts

Despite the availability of this means of exerting influence, conflicts may arise once the political process is complete. In such cases, it is primarily for the CJEU to enforce the identity clause in Article 4(2) TEU. In these cases, too, under Article 19(1) TEU in conjunction with Article 267 TFEU, the CJEU is required to decide on its interpretation and, if necessary, give effect to it in the proceedings for annulment under Article 263 TFEU. Since it is not possible to determine whether national identity is at stake without the involvement of the national courts, however, national constitutional courts have a crucial role to play in this regard.

5.2.2. Emergency mechanism under Union law (Article 4(2) TEU)

Of course, the CJEU's power of interpretation leaves room for conflict if the 'constitutional identity' issue identified by the national court cannot be squared with the CJEU's interpretation of the concept of 'national identity' under Union law. Given the general interest in the uniform interpretation and application of the law, there is a need to discuss how to settle what for many years has been seen as an insurmountable difference of opinion between those who regard provisions of Union law as having absolute primacy and those who accept restrictions in order to protect constitutional identity.

The first sentence of Article 4(2) TEU holds the key. It provides that the Union must respect the national identities of its Member States, as reflected in their fundamental political and constitutional structures. Article 4 TEU establishes, for the Member States of the European Union, an emergency right under Union law in the event of failure to observe the constitutional principles of a Member State that are fundamental to its identity. It is therefore necessary to weigh up the issue of whether Member States have a right, as a last resort, to suspend the implementation of Union acts under certain circumstances.

5.2.2.1. Background

The beginnings of this approach predate the establishment of the European Union. In 1992, at the request of Ireland, a protocol[53] was annexed to the Maastricht Treaty and the idea of preserving the inviolability of national constitutional provisions of particular importance for the country in question was first conceived. The Irish Protocol concerned provisions on the banning of abortion. Possibly inspired by this protocol, even prior to the entry into force of the Treaty of Lisbon, national courts began to cite constitutional identity as a criterion justifying restrictions on the application of Union law. The *Conseil Constitutionnel* implied in 2004 and 2006[54] that national constitutional

53 See Protocol No 17 to the Treaty on European Union and the Treaties establishing the European Communities, which states the following: 'Nothing in the Treaty establishing a Constitution for Europe or in the Treaties or Acts modifying or supplementing it shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.'

54 Treaty establishing a Constitution for Europe 2004 O.J. (C 310) 1; Loi 2006-961 du 3 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1).

identity could constitute a limit to the primacy of Union law.[55] A similar approach can be found in a 2004 ruling of the Spanish Constitutional Court.[56] The CJEU[57] itself took this on board and began in 2010 to recognise the concept of constitutional identity as a limit to the primacy of Union law.

The first sentence of Article 4(2) TEU-Lisbon defines the concept of national identity more clearly than its predecessor did. It takes over the identity clause contained in Article 6(3)-Amsterdam and the first clause of Article F(1) TEU-Maastricht and formulates it in a more nuanced way. Previously, the provision in question merely stated the following: 'The Union shall respect the national identities of its Member States.' Now, the concept of national identity is linked to 'fundamental political and constitutional structures'. The provision thus inserted in the Treaty of Lisbon can be seen as recognition under primary law of the possibility of constitutional objections to the absolute primacy of provisions of Union law, a possibility that is simultaneously circumscribed under Union law. Seen in this way, the concept of 'national identity' is an 'opening clause in respect of the constitutional law of the Member States'.

According to the wording of Article 4(2) TEU, national identity does not encompass every particularity of the constitution of a Member State, only 'fundamental political and constitutional structures'. However, this provision of Union law opens up the possibility of taking account of Member State constitutional structures that are part of a country's national identity when justifying exceptions to the primacy of application of Union law. The legal interests protected under Article 79(3) of the Basic Law represent – at least in relation to the basic elements removed from the purview of the legislature with the power to amend the constitution[58] – just such a constitutional structure and may therefore be regarded as forming part of the 'national (constitutional) identity'.

Although criticised in dissenting opinions,[59] at an early stage, and at the time still taking Article 24 of the Basic Law as the point of reference, the Federal Constitutional Court cited the protection of that identity and stated in the Solange I ruling that the transfer of sovereign rights should not lead to any change to 'the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law; that is, it does not open any such way through the legislation of the inter-state institution'.[60] In any event, this applies to the inviolable core identity of the

55 See, in that connection, Mayer, 2011, p. 782.

56 Tribunal Constitucional, DTC 1/2004 (Dec. 13, 2004).

57 CJEU, Case C-36/02, Omega, ECR 2004, I-9609, paragraph 39; Case C-208/09, Sayn-Wittgenstein v Landeshauptmann von Wien, ECR 2010, I-13693, paragraphs 25 et seq., 92 et seq.

58 Similar provisions can also be found in the constitutions of other Member States. See Art. 197 of the Belgian Constitution, Art. 89(5) of the French Constitution, Art. 9(2) of the Czech Constitution.

59 See BVerfGE 37, 271 (296) – Solange I, dissenting opinion of judges Rupp, Hirsch and Wand.

60 BVerfGE 37, 271 (279) – Solange I.

Constitution, such as the federal state principle,[61] the substance of fundamental rights,[62] the ban on retroactivity,[63] and other fundamental constitutional principles.[64]

5.2.2.2. Prevention of conflicts

Conflicts can naturally arise if the interpretations of the Union law concept of national identity laid down in the first sentence of Article 4(2) TEU, handed down by the CJEU by virtue of the sole power conferred on it by the second sentence of Article 19(1) TEU, differ from the views held by national constitutional and supreme courts. The question therefore arises as to how Article 4 TEU can be used to prevent conflicts as much as possible. In abstract terms, there must be interaction between the national constitutional court and the CJEU. This is in line with the concept of a 'cooperative relationship',[65] developed by the Federal Constitutional Court and the CJEU, and the 'cooperation instrument'[66] for dealings between the Court of Justice and national courts in connection with the interpretation and application of Union law. The concept of a 'cooperative relationship' is apt here. It would also make sense to talk about dialogue or, even better, 'direct interaction'[67] between the Court of Justice and the Member State courts, the term used by the CJEU in its OMT ruling. On that basis, the Federal Constitutional Court must, in principle, accept that legal protection against EU measures by means of an action before the CJEU has priority, and must limit its own task to verifying whether acts of the European institutions and bodies encroach on national identity. Since the CJEU also has a margin for discretion, which it can exercise in favour of the Member States and their constitutional and supreme courts in order to safeguard the concept of national identity, this should remain the absolute exception.

'While the Court of Justice has the sole power to interpret the concept of national identity under Union law laid down in the first sentence of Article 4(2) TEU, its interpretation must leave room for the power of national constitutional courts to determine the constitutionally based national identity. The jurisdiction of the constitutional courts of the Member States must, in turn, be exercised in the light of European interests. The question of an overarching power of final decision, which cannot be resolved in a pluralistic constitutional association, is thus circumscribed procedurally to a very large extent by the mutual obligation of the CJEU and the constitutional courts to have regard to each other's rulings.'[68]

61 BVerfGE 92, 203 (237) – EC Television Directive.

62 BVerfGE 37, 271 (280) – Solange I; 58, 1 (40) – Eurocontrol I; 73, 339 (376) – Solange II; Polish Constitutional Court, ref. K 18/04 of 11.5.2005, EuR 2006, 236 (239 et seq.); Danish Supreme Court, ref. I 361/1997 of 6.4.1998, EuGRZ 1999, 49 (50); Spanish Constitutional Court, Case 1/2004 of 13.12.2004, EuR 2005, 339 (343); Czech Constitutional Court, ref. Pl ÚS 19/08 of 22.11.2008, paragraph 110, 196.

63 BVerfGE 73, 339 (381) – Solange II.

64 von Bogdandy and Schill, 2010, pp. 720.

65 BVerfGE 89, 155 (188, 209 et seq.) – Maastricht.

66 CJEU, Cases C-297/88 and C-197/89, Dzodzi, ECR 1990, I-3763, paragraph 33.

67 CJEU, Case C-62/14, Gauweiler et al., ECR 2015, I-0000, paragraph 15.

68 von Bogdandy and Schill, 2010, pp. 733 et seq.

In this respect, the first sentence of Article 4(2) TEU can be described as a *built-in weak point*, similar to that forming part of the design of a mechanism, to be used in interpreting the law. In the event of damage or overload, this element will fail, as it is supposed to do, in order to minimise the potential damage – for example, in the form of a withdrawal from the Union (Article 50 TEU) – in an overall system.

5.2.3. Concept of 'national identity'

It is clear that the concept of national identity is a Union law concept. However, the first sentence of Article 4(2) TEU does not define the national identity of each Member State. The provision in the first sentence of Article 4(2) TEU does not provide for a uniform concept of national identity under European law, but refers the matter back to the Member States. Accordingly, the CJEU cannot interpret the 'core substance of national identity' with binding effect on the Member States; rather, it is for the national constitutional or higher courts to formalise the substance of the identity recognised under EU law, but at the same time protected by constitutional law. The Treaty allows for national 'particularities', which form part of national identity. Determining the boundaries of that identity is a task that needs to be carried out by means of cooperation between national constitutional courts and the CJEU in a context of mutual respect.

5.2.3.1. Union law framework

Under Union law, the protected core area of national identity can only encompass what is 'reflected in the fundamental political and constitutional structures, including regional and local self-government' (first sentence of Article 4(2) TEU). Hints as to how the CJEU intends to deal with the issue can be found in its case-law. In a dispute concerning the admissibility of a constitutional reservation of nationality for public education in Luxembourg, the Court of Justice determined in 1996 that, in connection with the restriction of fundamental freedoms, 'the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order'.[69] Following the entry into force of the Lisbon Treaty, the CJEU recognised that, in order to protect the constitutionally guaranteed republican state form of a Member State, a proportionate interference in the right to free movement is possible in the form of non-recognition of a noble title acquired abroad by adoption.[70] It also subsumed the protection of official national language(s) under the concept of national identity.[71] In opinions of the advocates general, the concept of national identity has been linked to the protection of local self-government,[72] the regulatory sovereignty of the Member

69 CJEU, Case C-473/93, Commission v Luxembourg, ECR 1996, I-3207, paragraph 35.

70 CJEU, Case C-208/09, Sayn-Wittgenstein, ECR 2010, I-13693, paragraphs 81 et seq.;

71 CJEU, Case C-391/09, Runevic-Vardyn and Wardyn, ECR 2011, I-3787, paragraphs 84 et seq.; Case C-202/11, Anton Las, ECR 2013, I-0000, paragraphs 23 et seq.

72 AG Trstenjak, Opinion in Case C-324/07, Coditel Brabant, ECR 2008, I-8457, paragraphs 85 et seq.

States in the field of nationality law,[73] and the competence of the Member States for the composition and division of powers.[74]

5.2.3.2. Shaping by national constitutional law

By virtue of its purpose as a protective mechanism, the concept of national identity must be interpreted in the light of national identity as defined by Member State constitutions. In that connection, provisions that shape the constitutional identities of the Member States, such as Article 79(3) of the Basic Law, are of particular importance. In most other Member States, similar provisions are in force that remove certain decisions from the purview of the legislature with the power to amend the constitution, or make those decisions subject to a particularly burdensome legislative procedure. In terms of substance, the provisions concern, for example, the protection of fundamental principles of state organisation, state objectives, state symbols, the rule of law, the principle of democracy, human dignity, or the essence of fundamental rights.[75] For the Federal Republic of Germany, the question of the scope of the opening-up of the German constitutional area is synonymous with that of the substantive-law limits to integration. With regard to the review powers of the Federal Constitutional Court, it is therefore clear that breaches of competences of the EU institutions that are not challenged by the CJEU must have an import that corresponds, in substance, to a breach of core areas of the State structure principles protected in Article 79(3) in conjunction with Article 20(1) and (2) of the Basic Law.[76] In each individual case, it must be considered whether a legal act of the EU institutions systematically and seriously infringes the limits to integration laid down in the third sentence of Article 23(1) in conjunction with Article 79(3) of the Basic Law. The question of whether CJEU rulings should be taken into account and whether it is 'permissible to stand in opposition to them and thereby generate systemic conflicts'[77] must be answered in light of the reciprocal obligations of respect.

5.2.4. Obligation to make a referral for a preliminary ruling

A satisfactory solution certainly cannot be achieved unless the two courts are in direct contact with each other. It is therefore necessary to enter into dialogue with the CJEU in order to enter reservations concerning the primacy of Union law. In so doing, due

73 See AG Maduro, Opinion of 30.9.2009 in Case C-135/08, Rottmann, ECR 2010, I-1449, paragraphs 23 et seq.

74 AG Colomer, Opinion of 26.6.2009 in Case C-205/08, Umweltanwalt von Kärnten, ECR 2009, I-11525, paragraphs 47 et seq. See also AG Kokott, Opinion of 8.5.2008 in Joined Cases C-428/06 to C-434/06, UGT-Rioja, ECR 2008, I-6747, paragraph 54.

75 See Armin von Bogdandy/Stephan Schill, in: Grabitz/Hilf/Nettesheim (eds), *Das Recht der Europäischen Union*, Loseblattsammlung, 55. Ergänzungslieferung 2015, EL 51 September 2013, Art. 4 TEU, paragraph 22: Art. 162 of the Estonian Constitution, Art. 77 of the Latvian Constitution, Art. 148(1) of the Lithuanian Constitution, Art. 235(6) of the Polish Constitution, Art. 168 of the Spanish Constitution or Art. 44(3) of the Austrian Constitution.

76 Proelß, 2011, p. 249.

77 Sauer, 2011, p. 95.

account must be taken, in procedural terms, of the obligation under Union law to make a referral for a preliminary ruling, from which Article 267 TFEU allows no exception for constitutional courts. It follows that the referral to the Court of Justice under Article 267 TFEU to clarify the compatibility of the act in question with Article 4(2) TEU is mandatory before a Member State court or tribunal can begin the task of determining autonomously whether domestic application is to be refused on the grounds of incompatibility with national identity. Therefore, in proceedings under Article 267 TFEU, a national court must first give the CJEU the opportunity to correct the act that is held to be contrary to Union law. In that regard, the referral for a preliminary ruling serves as a *remedial procedure*. If the national constitutional or supreme court wishes to reject an EU measure on the basis of Article 4(2) TEU, it must formulate its concerns regarding respect for national identity in the context of the referral to the CJEU for a preliminary ruling and thus submit it to the European public at the same time.[78] The national court may not make a declaration of inapplicability until the CJEU has spoken its 'last word' on the matter, 'because, by virtue of the ex ante open nature of the judicial interpretation, the subject matter of the ultra vires review will only then have been established'.[79] In that connection, the 'principle of sincere cooperation' must, in accordance with Article 4(3) TEU, be 'mutually' upheld by the Member States *and* the Union in carrying out the tasks required under the Treaties.

■ *5.3. Outcome*

In this respect, Article 79(3) of the Basic Law does *not* constitute a systematic review reservation available to the Federal Constitutional Court, but rather a safeguard clause to be used to deal with extreme cases of transgressions of power; it thus corresponds to Article 4(2) TEU. In such extreme cases, the Federal Constitutional Court is empowered to review conformity with the core constitutional identity of the Federal Republic of Germany, as set out in Article 79(3) of the Basic Law, in the context of European integration as well. The subject matter of an identity review of this kind is conformity with extreme boundaries that cannot be shifted even by means of constitutional amendment.

6. Conclusion

Ultimately, the dispute stems from differing views on the legal basis for the application of Union law. While the CJEU assumes that Union law emanating from an 'autonomous source of law' has absolute primacy over any domestic legal provision by force of autonomy,[80] in the opinion of the Federal Constitutional Court, the primacy of Union

78 von Bogdandy and Schill, 2010, p. 730.
79 Klement, 2014, p. 192.
80 Landmark CJEU decision, Case 6/64, Costa/E.N.E.L., ECR 1964, 1251/1269; CJEU, Case 106/77, Simmenthal, ECR 1978, 629, paragraphs 17/18.

law exists by force of constitutional authority mandate and is therefore constitutionally limited.[81] In our view, the validity of an ultra vires review in the event of a breach of national identity can, in principle, be derived from both legal texts (the Basic Law and the TEU). The supranational legal order of the Union is established by the Member States under international treaty law; it is autonomous, but not original. The Member States have transferred to the Union, on the basis of the principle of conferral (Article 5 TEU), individual sovereign rights, but not the power to extend the Union's competences by means other than those provided for in the Treaties. Under the second sentence of Article 19(1) TEU, the CJEU's task is to ensure that in the interpretation and application of the Treaties, the law is observed. In principle, this also applies to the question of whether the Union has a specific competence under the Treaties. The true interpretation of Union law is a matter for the CJEU. The act of approval limited national jurisdiction accordingly. The CJEU alone decides whether Union law has been infringed by means of an ultra vires act (second sentence of Article 19(1) TEU in conjunction with Article 263(2) TFEU). This decision is to be accepted as a matter of principle by the Federal Constitutional Court, and on that basis, there is no scope for a 'cooperative relationship'. That is also the thrust of Article 344 TFEU, under which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those 'provided for therein'. If the CJEU has already ruled on a question, a referral for a preliminary ruling is inadmissible, and a constitutional complaint must also be dismissed as inadmissible.

On the other hand, questions of identity review cannot, a priori, be excluded from the scope of a final review by the Federal Constitutional Court, since the issue is not the interpretation of Union law, but the interpretation of national law. The power to determine whether there has been an infringement of Article 79(3) of the Basic Law has not been transferred to the CJEU because the first sentence of Article 23(1) of the Basic Law does not allow the legislature to disregard the so-called eternity clause. If, in its referral, the Federal Constitutional Court informs the CJEU accordingly of the extent to which the constitutional identity of the Federal Republic of Germany could be affected, the Court of Justice must, in a dialogue with the national constitutional and higher courts, verify whether the Union has encroached on national identity (Article 4(2) TEU). Only if the Federal Constitutional Court reaches a different conclusion, on the basis of the interpretation of Article 79(3) of the Basic Law, can it, as a last resort, declare the relevant legal act inapplicable in Germany or declare that a breach of the constitution has arisen that the federal authorities must strive to remedy.

81 In particular, BVerfGE 73, 339 (374 et seq.) – Solange II; 123, 267 (396 et seq.) – Lisbon.

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Compromise(d)? – Perspectives of Rule of Law in the European Union

ABSTRACT: *This paper introduces different perspectives of rule of law in the European Union starting out of the assumption that fear and (common) economic interests continue to be the primary motivator of European integration as to the European Union. The analysis touches upon the problematic tension between national specificities of the rule of law developed organically inside state frameworks of constitutionalism, through the practice of national constitutional courts and the practice and standards of international organizations and institutions in this matter. Starting out of problems brought about by open statehood and the "dialogical" development of rule of lawin the European Union, the paper also describes the institutions, concepts and processes relevant to the enforcement of the value of rule of law in the EU.*

KEYWORDS: Rule of law, TEU, Article 2, Article 7, constitutional courts, European integration, European Union, principles, values, national competences, conferral, statehood, international standard, compromise, dialogue.

1. When We All Have Our RoL(e) to Play. On the importance of crisis and compromise

The concept of European integration was born in a crisis: after World War II, the nations of Europe had no choice but to create a viable peace project as they could not risk the possibility of continued animosity. At the same time, there was no common European identity that would have allowed the construction of a federal system for Europe despite initial ideas to that effect. There were, however, common economic interests that were strong enough to serve as the focal points of integration spilling over from the field of economy to other areas of cooperation.

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For the EU, the integration process was thus brought to life by fear of crises (thereby fashioning a unique identity) and by common (economic) interests. We know this today as the European Union, and having undergone significant political, social and economic crises, having achieved great goals, we could argue that to some extent the core motivators supplying the life force of the integration still remain fear and economic interest.

In the conclusion of this paper, it will be argued that these days we see processes of integration working in a „reverse spill-over" mode, especially in the context of the rule of law. When all else fails in the eyes of the EU, mechanisms to enforce the fundamental value of the rule of law fall back on (common?) economic and financial considerations, trying to tighten the grip where it hurts the most. The question is, however, who will suffer most: the fist or the fingers, i.e. the Union or its constituents.

Economic interest as a motivator for integration is now apparent in the very real fear that Europe's nations can only become a unified competitive actor in the globalized market. This remains a key element of the future of the European Union as well as fears regarding the national economic interests of each Member State as part of the single market. This dynamic of fear is only exacerbated by the COVID-19 pandemic and the legal, constitutional and political challenges it brings about in the Member States who all struggle with upholding the rule of law in the face of social, political and legal challenges.

When we want to look at the European Union background of something as powerful as the rule of law, we need to keep all this in mind, because only then can we understand the interests and aspirations behind European integration. We need to be able to put into perspective the processes that brought the integration to life and those it went through during its seventy years of existence. This is both a temporal and a structural enterprise, it requires looking at the chronology of its evolution and the actors involved (in Part II).

We need to see that in the development of integration, nothing has ever been black or white: the last seventy years have been lined with regular cycles of conflict, crisis and compromise. We encountered conflicting interests that seemed to exclude each other already very early on, but the parties realized they could not exist without each other, so in the end, the necessary compromise was reached ending many deadlocks in several disputes. It is enough only to think of the *Luxembourg compromise*, when De Gaulle's France eventually abandoned its policy of "empty chairs" and returned to the Council after seven months, on the condition that the unanimity principle[2] should continue to apply if fundamental interests of a Member State were at stake.[3] Today, whenever we talk about Council decision-making (also in terms of the rule of law[4]), this rule is still a

2 Cf. https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/.

3 Legal historical research is directed at this approach, e.g. Philip Bajon: The Legacy of the Luxembourg Compromise, 1966–1986 (online), Available: https://www.rg.mpg.de/research-project/the-legacy-of-the-luxembourg-compromise

4 Cf. Article 7 (1)-(2) TEU, whereunder the Council can determine – by unanimous vote – if a Member State infringes upon the values of the Union, separating this from para. (3), whereby the Council can only vote via QMV. (This will be discussed in Part II in more detail.).

fundamental element of the process, and few may question its validity on legal grounds, while fundamental interests of Member States remain at stake many times. Another example is the Constitutional Treaty, which had undoubtedly met a premature demise,[5] but its core structures were included in the *Lisbon Treaty*. If nothing else, this indeed bore the hallmark of a *successful compromise* at the time of its creation.

Are we on the road towards a necessary compromise again, or had we perhaps passed by it already, leaving it unnoticed as a result of the deafening and unending noise of contempt and dissatisfaction with the European status quo.

RoL (rule of law) is a key issue for the European Union today, regarding which many conflicting (economic) interests and fears project themselves onto contemporary legal, constitutional and political processes. It is just as much a fundamental interest, a value and a principle of the Member States as it is one for the EU, and there is disagreement in how to grasp its essence due to diverging approaches. Regardless, the results achieved in efforts to try and define its place and content on a national and on an international and European level can still be looked at as compromises and evaluated as such.[6] However, in order to find solutions that are acceptable to all Member States, this time, too, we need what has always taken the European Union forward: a compromise. In this, *we all have our RoL(e) to play*, as the title of this introduction also suggests. This play on words intends to impress upon the fact that Member States' (and their constitutional structures') roles in defining what the rule of law means in and for their national contexts cannot and should not be disregarded as part of the next necessary and *successful compromise*.

The integration, in this sense, develops as language normally would. Certain words are used to mean certain things in the different regions, cultures, and in order for everyone to understand each other, a compromise is attempted requiring certain words to be understood with the same meaning everywhere, developing a usage. However, is such a thing at all possible if we talk not about language but about legal concepts and notions? Can there be unity in diversity in this sense?

On the way toward the next compromise, politics, law and academia all strive to accommodate the constitutional law concept of the rule of law to fit the current, exigent circumstances of the integration. As such, it is more often than not used as "both a carrot and a stick", a political slogan to resolve conflicts of political nature. Ascribing political content to inherently legal notions, however, has never before lead to successful compromises but more often gave birth to oppressive regimes.[7]

5 E.g. Hofmeister, 2008; Klabbers – Leino, 2013.

6 E.g. Uitz, 2020; Scheppele – Pech – Platon, 2020; Gros, 2020.

7 A photo of a local celebratory event in Szeged, a Southern town in Hungary, contained the following inscription above the podium of an event celebrating the Constitution in a Rákosist-Stalinist style (cca. 1950s): *"The constitution shall be a weapon in the hands of the working people"*. Constitutions, however, just as the legal foundations of European construction, are all "peace projects" not weapons, and can thus steer Europe towards compromises. (The photo can be found in the following digital archives: https://www.delmagyar.hu/galeria/eletkepek-1948-es-1989-kozott-2104909/222).

This is especially the case, if – according to many – there is no universal consensus on the exact meaning of this legal notion. Conceptualizing and condensing the constitutional content of the rule of law and then measuring how the concept performs in terms of political and legal processes is a tough nut, but some nonetheless have recently taken a few cracks at it in Hungarian academia.[8] While in the current political climate, Hungarian stances on the concept of the rule of law might not be welcomed with open arms, we consider it important to shed light on some key arguments made in recent years by Hungarian scholars.

(i) Tóth sees that the sole purpose of any academic endeavor in this respect can only to try and define its core as *the notion inflates* due to criticism that comes from an academic assessment of the elements of this concept over time. Therefore, he sees this inflation in the rule of law "shedding its skin", taking on new attributes while letting old ones go.[9]

(ii) Beyond this core, Pócza – in reference to Waldron – mentions a "minimalist definition"[10] referring thereby to the rule of men being substituted by the rule of law. This wording seems a touch unfortunate given the complexity of current European political debates regarding the rule of "certain men" and how they, and their rule of law, perform on the European scales of accountability. Also, logically, if we accept that the (political) rule of men is substituted by the rule of law, then not politics but law should dominate this discourse. Simply because if it lacks or circumvents legal considerations, this will erode the relevant discourse and dialogue itself, not the rule of law.

(iii) Varga sees another "dual factor" that erodes rule of law itself, and he calls it arbitrariness in terms of

(a) the interpretation of the principle by the Hungarian Constitutional Court as a form of activism before and after the entry into force of the Fundamental Law[11]; and

(b) the contemporary invocation and application of the principle of rule of law in terms of 'open statehood' (to be discussed below). In his view, the rule of law "*does not safeguard by itself the actual limitation of power, the liberty of legal subjects or primacy of law. In other words: the rule of law can also be interpreted (such exercise of power can be established in the name of the rule of law) as a form in which legal subjects benefit from less and less liberty, and where law dedicated in principle to defend their rights and liberties will ultimately lead to their comprehensive vulnerability. In other words, an application of the principle of the rule of law can start wearing marks indicating tyranny, and, in extreme cases, marks of totalitarianism*."[12]

8 E.g. Varga, 2019; Pócza, 2019 or Tóth, 2019.
9 Cf. Tóth, 2019, pp. 197-199.
10 Cf. Pócza, 2019, p. 143.
11 Varga, 2019, pp. 14-16.
12 Cf. Varga, 2019, p. 10.

Positioning this argument into the debate about the power relations (and competence limitations) between the EU and the Member States (as a form of 'open statehood'), Varga argues that an eventually erroneous interpretation of the value of the rule of law under Article 2 TEU by the CJEU would bind the Member States to be held liable under proceedings arising out of Article 7 TEU (in a domain of sovereignty that "*had not been formally yielded by the member states to the Union*"), without the actual possibility of holding the CJEU liable for erroneous interpretation, which fact he attributes to the absence of the statehood of the EU – as in a rule of law state, these mechanisms would be implicit in the rule of law operation of a state. That is why he is of the opinion that in Member States' relations with the European Union, the rule of law becomes an "*arbitrary means of discipline due to its vague content*".[13]

In this regard, we will soon elaborate on the problems of "dialogical development" of the rule of law debate between Member State constitutional courts and the CJEU in another perspective.

As a legal notion, shaping the bedrocks of the legal, constitutional and political structures of the different Member States, rule of law has organically matured over the decades in the different case laws of national supreme and constitutional (apex) courts, maintaining some commonalities.

In a seemingly simplistic approach to this, allow me to use another reference to language and what it represents, hidden in translation. The Hungarian constitutional law term used to describe the rule of law is very revealing in this respect. "*Jogállamiság*" (wherein '*jog*' corresponds 'law' and '*államiság*' literally means 'statehood') describes a condition where the law primarily and primordially originates from the state, law defines statehood, and due to this fact, the state is submitted to these laws. Pócza refers exactly to this when describing the notion in a formal sense to mean the preservation and maintenance of law and order through state means, contrary to the broader view specifying the importance of the necessary to limit (state) power.[14]

If we accept that the rule of law is primordially tied to states and state-made laws, then we could address the issue of statehood in the European Union as well and its effect on the rule of law. Rainer Arnold conceptualizes that the external aspect of rule of law appearing in the EU represents what he calls 'open statehood', existing in parallel with the internal (state-bound) aspect of the rule of law (both embodied simultaneously by a national constitution). Arnold also makes the argument that establishing the rule of law is what is basically understood under 'constitutionalization', and under its external aspect

(i) concepts originally anchored in national constitutional law start to appear in international, European contexts as
(ii) states regulate their relationship with the international community.

13 Varga, 2019, p. 18.
14 Pócza, 2019, pp. 148-149.

That is why we need to talk about rule of law in Europe, he posits.[15] Elsewhere, he is of the opinion that the *ultra vires* debates between the Member States' Constitutional Courts and the CJEU are manifestations of a balance sought between closed and open statehood, i.e. what falls within Member State competences and what falls within EU ones) and one of its central tenets is that the integration rests on rule of law foundations.[16]

Summing up: each Member State has its own constitutional rules on the concept of the rule of law and its relevant constitutional and court jurisprudence filling it with elements of meaning and interpretation. These are first and foremost the results of *national compromises* between national actors, with the ultimate role of constitutional courts being the authoritative interpreters of the constitution. Based on these, channels have opened up over time to engage with other states, forming cooperation and mark these alliances by a common commitment to the rule of law as established in the acquis of the resulting international organizations (such as Council of Europe and the European Union) and their institutions.

Kochenov and van Wolferen address this problematic in the form of what they describe as "dialogical rule of law", reflecting on the relationship of the CJEU and Member States' supreme or constitutional (apex) courts. As they argue, there is a tension between positive law (*gubernaculum*) and "*principles of law beyond the sovereign's reach*" (*jurisdictio*) supported by a variety of inherently dialogical means suitable "*for analysing the adherence to that essentially contested concept, regardless of the precise list of terms that fall within it*". They see the EU as "*a problematic example of a legal system where the Rule of Law defined in such a way is under constant attack. Even though there are clear sources from which it could derive jurisdictio, international law, the constitutional values of its members and its own constitutional principles, the Union places primacy in the value of its gubernaculum – the acquis, in combination with three deeply anti-dialogical principles: supremacy, autonomy, and direct effect, which threaten the substance of the core values and principles guiding the law in any liberal democracy.*"[17]

The cited authors also argue that dialogical rule-of-law-enforcement becomes problematic if national constitutional courts are put in a position where they would need to abandon their task of "*protecting inherent constitutional values and rights* [...] *in favour of vague euro-speak*." What they identify as an authoritarian monologue by the CJEU, impedes – in their view – the flourishing of rule of law conditions, thus preventing the EU from "*turning into a much richer constitutional system*."[18]

While effective dialogue not only shapes identity but also contributes to enriching consensus on the content of the rule of law, epistemological problems persist. Some legal scholars concede that there is some kind of mainstream approach regarding the meaning of the concept presupposing some sort of an *academic compromise* on certain

15 Arnold, 2020.
16 Arnold, 2016, pp. 6-7.
17 Kochenov, van Wolferen, 2018, p. 15.
18 Ibid.

definitional elements. If nothing else, some others argue that there is – at least – a European consensus embodied by the following statement: "*Final answers to debate are given by law and socially significant relations in life are regulated by law.*"[19] However, judging by the current landscape of debates and process in the European Union (described above and below), such compromise is not at all apparent, not even at a cursory look. Let us now nonetheless traces the origins of a *European compromise*, as represented by the work of the Council of Europe.

Based on the above, it is no coincidence that the Venice Commission of the Council of Europe, in its 10-year-old report on a comprehensive interpretation of the rule of law,[20] described it by three words taken from three different languages (English, German and French). Thereby, the Commission explicitly acknowledged that there are in fact at least three different (mainstream?) national origins in a historical, cultural, etc. context, and proposed their reconciliation.

With regard to the post-Soviet states of Europe, the report also raises doubts as to whether the rule of law should be used as a fundamental concept of public law in those systems, due to the many different state approaches (all burdened with the memory of Socialism and the ensuing discontinuity of the previously organic rule-of-law tradition). In relation to the emergence of the concept at the level of national constitutions, the Commission's report states that it is "*one of the principal characteristics of States*", thereby cutting back to my previous linguistic remark on the contextual meaning of the notion. (Although, recently it is "in fashion" to deny certain aspects of our collective past not comfortable to face in the current climate, such impressions on the European constitutional landscape as the ones left by the Venice Commission, should always be borne in mind.)

If we compare these different state approaches and the resulting European, *international compromise* created by the Venice Commission as to the "form and content" of the rule of law, we are faced with another obstacle of language ascribing certain meaning to certain words. How can the rule of law be best defined as a legal notion? Is it a principle or a value, is it an objective? Is it something that can only be interpreted (and assessed) as a result or consequence in itself or rather as a point of origin?

Stepping outside of national frames, and inserting this concept essentially developed in national constitutional law (and its interpretation) into political processes on the EU-level has its own challenges as well. The eventual question is whether such mechanisms serve the stability of the integration, the "master" of which is the supranational political machinery of the Union and whose interpretation of the rule of law may differ from that which can be deduced from the practice of the apex courts of the respective Member States. The interpretation of the concept of the rule of law must not be based on political considerations but on legal grounds and must remain in line and harmony with national approaches.

19 Pócza, 2019, p. 145.

20 CDL-AD(2011)003rev, Report on the Rule of Law.
https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e.

Against all this, it is undoubted that the European Union's interpretation of the rule of law is based on the provisions of the Treaties and as such an independent domain of legal interpretation can be established within the framework of EU law, taken care of by the Court of Justice.[21] However, the pitfalls of this "dialogical rule of law" have been presented above. Before moving on, we shall bear in mind that extra-judicial interpretations of the rule of law also have taken hold of European institutions, and – in light of the above – the circumstances and content of the establishment of the EU "rule of law mechanism" (and its successors and alternatives) will be presented below.

2. On how actors play their RoL(e). Toward an EU Compromise?

■ *2.1. Setting the Scene: The Framework*

The EU dimension of the value (and/or principle) of the rule of law – subject to this paper – was first christened "the EU Framework to strengthen the Rule of Law", developed and communicated by the European Commission.[22] According to the Commission, *"the rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership.[23] Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR."*[24]

In 2014, the Commission stated that the constitutions and judicial systems of the Member States are well designed and equipped to protect citizens against any threat to the rule of law. However, according to the Commission, *"in some Member States*[25] [it was] *demonstrated that a lack of respect for the rule of law and, as a consequence, also*

21 See e.g. von Danwitz, 2014. Danwitz, then a judge at the CJEU, identifies the context of the debate as resulting from the „*public perception that the political evolution in a Member State might be in contradiction with the values of the Union*". (p. 1336.).

22 COM/2014/0158 final: Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&from=HU.

23 For more on this subject, see e.g. Stephanie Ricarda Roos: The "Rule of Law" as a Requirement for Accession to the European Union. Lecture presented at a Summer School on "The Importance of the Rule of Law in the Context of Accession to EU and NATO" August 2007, Bucharest (online) https://www.kas.de/c/document_library/get_file?uuid=8279dfa9-5d97-fb5e-1015-d5b82483170c&groupId=252038.

24 COM/2014/0158 final, 1.

25 Ever since the beginning of this debate, the issue is mostly only focused on Hungary and Poland as being the "sole perpetrators", but EU concerns have been also raised in terms of Romania (together with Bulgaria as two "law-governed states") or Malta, to mention the most characteristic examples. (On Romania, see: Carp, 2014; on Malta, see: Borg, 2020).

for the fundamental values which the rule of law aims to protect, can become a matter of serious concern."[26] In developing the rule of law framework, the Commission stated that it is the Guardian of the Treaties and thus has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union.[27] In April 2013, the General Affairs Council discussed the topic[28], then thereafter the European Parliament requested that *"Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law."*[29]

Against this background, the Commission has established the rule of law Framework to address and resolve a situation in that Member States where there is a *systemic threat*[30] to the rule of law.[31] According to the Commission, the aim of the framework is to resolve potential future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU – considered by some as "only theoretically attractive procedures"[32] – would be met. The Commission emphasized that the framework is not an alternative to already existing Article 7 mechanisms and infringement procedures, it has a much more preventive / complementary nature,[33] which – however – both lexically confer the meaning that they are thus designed to lead to alternate paths of EU enforcement of European values.

In justifying the need for a 2014 rule of law framework, the Commission explained that the principle of the rule of law *„has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts."*[34]

The EU Commission – in line with similar conclusions drawn by the Venice Commission – acknowledged that the precise content of the principles and standards

26 COM/2014/0158, 1.

27 President Barroso played a major role in shaping the framework, who in September 2012, in his annual State of the Union speech to the European Parliament, spoke about the need for a more effective system of the protection rule of law. Cf.: http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm.

28 Cf. http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf.

29 Cf. COM/2014/0158, 1.

30 Many in legal academia have called on European institutions to define this concept to no avail, while the events surrounding the Constitutional Tribunal in Poland have been characterized by others as a systemic threat. (On the lack of a definition of systemic threat and relevant issues: Kochenov, Pech, 2015; on the Polish situation as a systemic threat: Pech, 2016).

31 This came – through Article 1 of the Nice Treaty – as a direct reaction or response to the Austrian events of 1999 leading up the rule of law procedure not being triggered due to lack of actual violations, but the adoption of the so-called "Wise Men Report" on the country's commitment to European values, by Martii Ahtisaari, Jochen Frowein and Marcelino Oreja (online) https://www.jstor.org/stable/20694076?seq=1.

32 Fekete – Czina, 2015; Orbán, 2016.

33 Cf. COM/2014/0158, 1.

34 COM/2014/0158, 2.

stemming from the rule of law may vary at the national level, depending on the respective Member States' own constitutional arrangements, however the Commission considered this much less significant than its CoE counterpart. In 2014, the EU Commission essentially adopted the interpretation of international judicial forums and bodies as the sole guideline, which approach, as we will see later, will form the basis of the 2020 rule of law Mechanism. According to the EU Commission, the case law of the CJEU and the ECHR, as well as documents drawn up by the Council of Europe, *„building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU."*[35]

On the basis of these sources, the Commission defined the content of the rule of law as

(i) legality „which implies a transparent, accountable, democratic and pluralistic process for enacting laws"[36],
(ii) legal certainty,
(iii) prohibition of arbitrariness of the executive power,
(iv) independent and impartial courts,
(v) effective judicial review including respect for fundamental rights, and
(vi) equality before the law.

However, the Commission did not define the content of the above, but referred to the case law of the CJEU and the ECtHR, according to which these are not purely formal and procedural requirements but vehicles *"for ensuring compliance with and respect for democracy and human rights".* It is then stated that the rule of law is a *„constitutional principle with both formal and substantive components",* but the Commission no longer ponders upon substantive difficulties of content. In essence, they developed the Framework circumventing the consequences of their finding that the elements of rule of law may have a different content in the respective national legal systems. The Commission resolved the problem by relying on the absolute supremacy of the CJEU's and ECHR's practice over the jurisprudence of the Member States. Frankly, in so deciding, the Commission may have assumed that these courts have already taken into account the practices of the Member States, but the fact remains that they did not wish to include these circumstances, such as national specificities, into the rule of law framework. This is, in part, understandable, given their mandate to promote European interests. Regardless, the resulting rule of law mechanism was (and is) based on this approach.

The Commission stated that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: *„there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa"* and *„fundamental rights are effective only if they are justiciable".* It is also stated that *„democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of*

35 COM/2014/0158, 2.
36 COM/2014/0158, 2.

expression, freedom of assembly and respect of the rules governing the political and electoral process."[37]

The processes identified by the Commission, which are to be protected by them and the EU at large are consequences in themselves: they are based on the national legal systems of the Member States, which includes, *inter alia*, not just the regulation of the MSs, but the case law of the national judicial systems and constitutional courts. They encompass legislation that has evolved organically over decades and that has contributed to the creation of a set of rules correlating a set of criteria referred to as the "rule of law". The Commission's approach is feared for its destabilizing effect regarding these foundations, trying to mold the rule of law into (and based on) the case law of our international (judicial) forums. It is not, of course, a question of these bodies playing a decisive role in determining the rule of law requirements, however, we must not forget *the role of these bodies.*

The ECHR is a complementary forum for the protection of human rights, while the CJEU is the forum for the protection of EU law. The practice of these bodies can therefore only be taken into account in determining the content of the rule of law in so far as the issue under consideration falls within the remit of these forums. Otherwise, we will disregard the requirements of the founding treaties regarding the division of powers when defining the content of the rule of law, whereas, in matters falling within the scope of national sovereignty, instead of the case law of national constitutional courts and judicial bodies, we establish a system of requirements based on *general principles* relying on the practice of supranational judicial forums, which may not have the power to decide on these questions. Consequently, the system of requirements thus established bears the risk of an *ultra vires* act. The Commission itself stated that the *"action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law."*[38]

The question is whether a measure complies with the ideal of the rule of law, in which a political body considers the possibilities available to it by the Treaties to be insufficient and itself creates extending competencies. In practice, the Commission itself states that, in the circumstances which it has identified above, it does not consider the Founding Treaties to be appropriate and therefore intends to create quasi new powers for itself. At the same time, it becomes problematic that the assessment of requirements is carried out by a political body which does not have an express competence to do so under the Treaties.[39]

37 COM/2014/0158, 2.

38 Ibid, 2.

39 According to the Commission 's reasoning, the EU intervene in those cases where the mechanisms established at national level to secure the rule of law cease to operate effectively and because of it there is a systemic threat to the rule of law and in such situations, the EU needs to act to protect the rule of law as a common value of the Union.

According to the Commission, the purpose of the Framework was „*to enable* [themselves] *to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched."*[40]

The process of this rule of law Framework is considered to be the predecessor of the rule of law Mechanism, and is activated in those situations when the Member States are taking measures or are tolerating situations which are *„likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law",*[41] and it comprises three stages:

(i) a Commission assessment,
(ii) a Commission recommendation and
(iii) a follow-up to the recommendation.

The aim of the first stage is to collect and examine the relevant information and assess whether there are clear indications of a "systemic threat" to the rule of law in a Member State. The Framework has not yet allowed for a joint examination of all Member States; the first comprehensive rule of law Report has been issued only in 2020, but more on this follows below.

The aim of the second stage of the framework is to issue a "rule of law recommendation" addressed to the examined Member State, if the Commission finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.[42]

The third and final stage of the Framework is the follow-up to the Commission's recommendation. In this stage, the Commission is monitoring the follow-up given by the Member State to the recommendation. The Commission examines whether the Member State concerned have (appropriately) implemented the recommendations made by the Commission in the meantime to resolve the situation. As it was presented earlier, the Framework was set up by the Commission as a procedure established in its own competence. Therefore, a separate sanction system was not (then) attached to it. Based on the Framework, in case the Member State concerned did not (satisfactorily) follow-up on the recommendations, the Commission assessed the possibility of activating one of the sanction-mechanisms set out in Article 7 TEU.

Before moving on to the next phase of the transformation of the Framework, a few thoughts are noteworthy hereby that have been provided by none other than the Legal Service of the Commission back in 2014. Regarding the division of competences between the Member States and the Union, the Legal Service argued that the Framework is "*not compatible with the principle of conferral which governs the competences of the institutions of the Union. The possibility exists, however, for the Member States to agree*

40 COM/2014/0158 final, 4.
41 Ibid. 4.1.
42 Ibid. 4.2.

among them on a review system of the functioning of the rule of law in the Member States [...]."[43] As a direct consequence, the Legal Service concluded that "*there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abased its powers by deciding without a legal basis*."[44]

Five eventful years have passed, and on 3 April 2019, the Commission issued a Communication in which it assessed the status of the rule of law and summarized the tools available, including on the basis of the Framework.[45] In this document, they defined the rule of law[46] (under Article 2 TEU) with the definition also adopted word-to-word by the 2020 Rule of Law Report, see below. The Commission's "rule of law toolbox"[47] was detailed in Chapter II of the Communication,[48] which included

(i) Article 7 TEU and the rule of law framework (described earlier),
(ii) infringement proceedings and preliminary rulings, and
(iii) other (alternative) mechanisms and frameworks (e.g. European Semester, EU Justice Scoreboard, Cooperation and Verification Mechanism, Commission's Structural Reform Support Service, etc.).

In the same year, on 17 July, the Commission issued another Communication, which was already a blueprint for action about strengthening the rule of law within the EU.[49] In this document, the Commission set out the possibility of a comprehensive annual rule of law Report covering all Member States, described below. As we saw above, the European clause of the rule of law requirements (values) is Article 2 TEU.[50] Thus, the legal basis for the rule of law mechanism established in 2020 also rests on this Article. In its Conclusions of 21 July 2020, the European Council stated that the Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU, as well as the respect of the rule of law.[51] Part II describes the process of how the Commission built the current character of rule of law enforcement in the EU, culminating in the adoption of Regulation 2020/2092.

43 10296/14 Opinion of the Legal Service, 27 May 2014, point 24. https://data.consilium.europa.eu/doc/document/ST-10296–2014-INIT/en/pdf
44 10296/14 Opinion of the Legal Service, 27 May 2014, point 28. https://data.consilium.europa.eu/doc/document/ST-10296–2014-INIT/en/pdf
45 COM(2019) 163: Further strengthening the Rule of Law within the Union. State of play and possible next steps. See: https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-163-F1-EN-MAIN-PART-1.PDF
46 COM(2019) 163, Introduction.
47 Cf.: https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf.
48 Cf. COM(2019) 163, Chapter II.
49 COM(2019) 343: Strengthening the rule of law within the Union.
50 For more information on the interpretation of Article 2, See: Blanke – Mangiameli, 2013, pp. 109-157.
51 EUCO 10/20, A24. See: https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf

■ *2.2. Building the Character: the Mechanism, the Report and the Regulation*

Based on the above, the "rule of law toolbox" has been further developed in 2020 by the *Rule of Law Mechanism* which is based on the so-called *Rule of Law Report*.[52] The Mechanism incorporates those set out in the Framework and has been complemented by a system of financial sanctions adopted on 16 December 2020.[53] The Commission produced its first comprehensive *Rule of Law Report* covering all Member States on 30 September 2020.[54]

According to the Commission's statement of purpose, the Mechanism is an annual process between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders.[55] The annual Report will be compiled as part of the Mechanism, and theoretically will serve as a basis for discussions in the EU as well as to prevent problems from emerging or deepening further. According to the Commission it helps *"identifying challenges as soon as possible and with mutual support from the Commission, other Member States, and stakeholders including the Council of Europe and the Venice Commission, could help Member States find solutions to safeguard and protect the rule of law."*[56]

The structure of the Report is based on four pillars:

(i) justice systems[57],
(ii) anti-corruption framework,[58]
(iii) media pluralism and media freedom,[59] and
(iv) other institutional issues linked to checks and balances.[60]

The first (2020) Report posits to that in the past years the EU had to develop numerous instruments to help enforce the rule of law and that further debates on how to strengthen the EU's ability to address such situations were triggered by severe rule of law challenges in some Member States.[61] The Report emphasizes that its approach,

52 For more information on the methodology of the report, see: https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_methodology_en.pdf.

53 The European Parliament and the Council adopted that Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget on16 December 2020 under ordinary legislative procedure aimed at complementing the protection system of rule of law, thereby creating a rule of law mechanism for financial sanctions. OJ L 433I , 22.12.2020., See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020R2092&qid=1614509244631&from=HU.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report – The rule of law situation in the European Union, COM(2020) 580. See: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en.

55 Cf. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

56 See: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

57 COM(2020) 580, 2.1.

58 Ibid. 2.2.

59 Ibid. 2.3.

60 Ibid. 24.

61 In this part of the report, neither Hungary nor Poland are named.

as well as that of the Mechanism is based on *"close dialogue with national authorities and stakeholders, bringing transparency and covering all Member States on an objective and impartial basis."*[62]

However, the Report contains that it is the result of collaboration with Member States at a political level in the Council and "*through political and technical bilateral meetings, and relies on a variety of sources*".[63] Consequently, the Report itself admits to its political nature. In the future, therefore, these annual Reports will form the basis for the use of the tools at the disposal of the Commission and the European Union, as set out above, under the EU Rule of Law Mechanism.

In 2018, the Commission suggested that the budget of the European Union should serve the realization of the values of the European Union, consequently there is a direct link between the use of EU funds (represented by the MFF, Multiannual Financial Framework) and the respect of its values.[64]

Then in the same year, the Commission presented a legislative proposal entitled *"on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States."*[65] The Regulation 2020/2092 of the European Parliament and of the Council *on a general regime of conditionality for the protection of the Union budget* finally was adopted on 16 December 2020, and It shall be applied from 1 January 2021 (hereinafter: Regulation).

Based on the case law of the CJEU [and on the verbatim repetition of the definition laid out in COM(2019) 163], the reasoning of the Regulation declares that the rule of law requires that

(i) *all public powers act within the constraints set out by law,*
(ii) *in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and*
(iii) *under the control of independent and impartial courts.*

Going into some essence of its structural elements, it is said that the rule of law requires

(i) *in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process;*
(ii) *legal certainty;*
(iii) *prohibition of arbitrariness of the executive powers;*
(iv) *effective judicial protection, including access to justice, by independent and impartial courts;*

62 Cf. COM(2020) 580, Introduction.
63 Ibid.
64 Cf. COM(2018) 98: A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0098&from=en
65 COM(2018) 324, 2018/0136(COD).
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324&from=HU.

(v) *and separation of powers […].”*[66]

In its reasoning, the regulation refers to the pillars of the rule of law report and identifies the efficient use of EU funds as the basis for achieving the values enshrined in the pillars.[67] Based on the reasoning of the Regulation, Article 19 TEU expressly mentions the value of the rule of law set out in Article 2 TEU, and because of it *“requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget.”* The very existence of effective judicial review designed to ensure compliance with Union law – continues the reasoning – is the essence of the rule of law, and requires

(i) independent courts as well as

(ii) *“the judicial review of the validity of measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts.”*

In view of all this, the Regulation states in its reasoning – relatively generously – that with regard to the above there is “*a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management*.”[68]

In addition, the Regulation contains another concept of the rule of law,[69] according to which

(i) it refers to the Union value enshrined in Article 2 TEU[70], and it includes

(ii) *the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process;*

(iii) *legal certainty;*

(iv) *prohibition of arbitrariness of the executive powers;*

(v) *effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights;*

(vi) *separation of powers;*

(vii) *and non-discrimination and equality before the law.*

Article 3 of the Regulation sets out the three instances, which constitute a breach of the rule of law in relation to the Regulation. These are:

(i) endangering the independence of the judiciary;

(ii) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;

66 OJ L 433I , 22.12.2020., Reasoning (3).

67 Ibid. (6) – (11).

68 OJ L 433I , 22.12.2020., Reasoning (12) – (13).

69 OJ L 433I , 22.12.2020., Article 2.

70 The provision also states that the rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

(iii) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

However, the procedure and sanctions set out in the Regulation can only be applied if the violation of the rule of law concerns specific cases determined by the Article 4, which provision applies with familiarly rhetorical phraseology from the early days of the Framework. It talks about "serious risk" affecting the sound financial management of the Union budget or the protection of the financial interests of the Union „in a sufficiently direct way".[71]

Let us stop here for a brief moment of reflection on how this new financial narrative squares with our setting of the scene for this paper in the introduction. It has been argued above that fear and economic interests still provide the continuing motivation for European integration.[72] This time, it is economic interest, virtually translating legal rule of law conditions into statistics and data-sets. With economic interest as a political motivation for integration comes the essential need to quantify loss and profit, assign them a tangible number value. This, consequently, also brings about a myriad of ways to quantify the rule of law, translating (some of) its consensual content into numbers, measuring their performance along "compliance indicators".

This logic was what brought about first checklists[73] (in a less numeric fashion), then indexes, scoreboards[74] and conditionality lists.[75] [In the context of EU integration, the latter two have been introduced as later alternatives to Article 7 proceedings, adding to the initial duality that has been created by the Nice Treaty within Article 7 by introducing a "preventive alternative" (through unanimity) to the original sanctioning mechanism (through QMV).]

When addressing the methodological pitfalls of measuring rule-of-law performance through similar means, Pócza argues that the first challenge really is which layer (and which concept or definition) to measure, thereby referring to a very difficult

71 In the event of a violation of the rule of law as defined above in the Regulation, its Articles 5 and 6 set out the applicable measures and relevant proceedings) to protect the Union budget. (Examples are: a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget, an interruption of payment deadlines, a prohibition on entering into new legal commitments, etc.).

72 It can clearly be seen by the international reaction to the German Federal Constitutional Court's (GFCC) most recent PSPP ruling how the interplay of fear of certain economic impacts on Member State economic interests can trigger constitutional responses from within the integration. Previously, too, the most influential GFCC decisions regarding the limits of EU integration were the results of legal issues touching upon core economic interests and policies affecting Germany and the German national economy. Consider, for that matter, their OMT decision (2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13) or their ESM decision (2 BvR 1390/12) before the PSPP.

73 Cf. The Venice Commission's Rule of Law Checklist from 2016. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.

74 Cf. the EU Justice Scoreboard https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

75 In this regard, please refer to the 2018 Mechanism also dubbed „conditionality mechanism".

choice between the previously addressed broad and narrow interpretations of the rule of law concept (in the introduction and in setting the scene). Using an overly broad, more complex concept bears the risk of internal tensions as well: the more layers in encompasses, the more difficult it gets to render it measurable,[76] which leads up directly to our conclusion.

3. Ending the Scene: Back to Square One?

Having gone through the transformative elements of crises and their resolution through compromises in the context of European integration with our sights set on addressing the issue of the rule of law, we now need to assess where we stand.

We have dealt with the necessity of a legally anchored consideration of the foundational elements of the concept in all EU-level legal and political debates, from the point of view of the national, Member State level, referring to coexisting dimensions of 'closed' and 'open statehood', projecting the constitutional issues and relevant legal debates into the European sphere as well.

In light of the above and of what has been just argued regarding the challenges of rule-of-law performance indicators: we are right "back to square one", where we started. Successful measurement depends on the concept used as a baseline, but this time, we do not fully know what the concept really is, and how it should be interpreted for European interests and purposes. Add to this the problematic that the "performance indicators" measured firstly manifest on the national level, leaving the national legal and judicial systems to dispose of them – and the picture does not become clearer.

European efforts to clarify the content of the rule of law as an EU value have been put on the backburner by early attempts at creating rhetorical vehicles such as "systemic violation" or "clear risk of a serious breach" to be used as leverage against Member States considered "outliers", then the focus of the process shifted towards more than one enumerative exercise relying on pre-existing international compromises regarding the concept of rule of law, transformed into an EU-image. The efforts then quickly spilled over into the financial sphere, drawing another alternative concentric circle and the attached layer of uncertainty to the conceptual debate about the content of the rule of law.

In trying to grasp the constitutional, legal, political or even economic essence of the rule of law, we can create as many sets of requirements as we can think up, but we shall bear in mind that in the long run, creating more and alternating and alternative orbits around the same gravitational mass is futile and counterproductive. The intention might be to throw out the bathwater, but the action actually might hurt the baby itself – to paraphrase a well-known idiom tailored to the fate of the integration.

76 Pócza, 2019, 150.

Eventually, one might just find that only compliance with nationally-anchored legal criteria provide the most accommodating answer, and – for any European compromise to prevail – national specificities cannot and should not be disregarded or circumvented, with the necessary legal space afforded to those forums that are constitutionally empowered to settle matters in this context. Suppressing national specificities of and constitutional authorities in charge of rule of law might only contribute to the further chilling of interstate relations within the integration, creating yet another crisis, sliding backwards slowly towards disintegration, towards gradual erosion – but not that of the rule of law.[77] After such crisis, who knows what the next necessary compromise needs to be to preserve European unity in diversity.

The latest development in the EU rule of law saga is that on 11 March 2021, Poland and Hungary have announced to challenge the Regulation at the CJEU pointing to a lack of competence of the EU to define the rule of law and relevant conditionality for compliance.[78] So, the story goes on, with no possible end in sight.

77 For more on this topic, see: Jakab 2019.
78 https://euobserver.com/political/151211.

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BOJAN TUBIĆ[1]

International and European Norms on the Rule of Law from the Perspective of the Republic of Serbia

ABSTRACT: *This paper examines international and European norms concerning the principle of the rule of law and its implications for the Republic of Serbia's legal order. There is no universally accepted definition of the rule of law, but some common elements can be found in international legislative acts and jurisprudence. The European Union and Council of Europe have substantial legislation on this issue; with their courts' jurisprudence, they have a significant influence on their Member States' comprehension of the rule of law principle. The Republic of Serbia has embraced the principle in its Constitution and developed it in its legislation. It will also accept and include European interpretations of the rule of law in its legislation and judicial and administrative practice by joining the European Union.*

KEYWORDS: rule of law, EU, ECJ, ECHR, Council of Europe, international law, constitution.

1. Introduction

Discussions of the rule of law date back to Aristotle. It could be said that the rule is internal in origin, transferred to the international level and then shifted to the legal systems of individual states obligated to respect the rule's international norms and interpretations. In the past century, the European Union (EU) and the Council of Europe (COE) have contributed significantly to the discourse. International law has interpreted and developed the concept through the courts' case law: the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) have resolved some longstanding problems with their interpretation of this principle, shaping its meaning for the future. The courts' decisions have influenced the legal system of numerous states in the international community.

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The Republic of Serbia, which aims to accede to the European Union by 2025, has developed its legislation to be in accordance with international norms and standards. This article analyses some of the fundamental aspects of the rule of law, such as judiciary autonomy and independence and judicial review of state decisions, in the context of Serbia's current legal system to clarify how the rule of law is understood and implemented in Serbia. It concludes with suggestions for possible improvements.

2. Definition of the 'Rule of Law'

The rule of law is a universal principle, but there is no precise definition at the international level; 'regardless of the national legal system, it is always left to scholars and judges to flesh the principle out'.[2] Nevertheless, there are several analyses of its concept.[3]

The term itself is usually credited to A. Venn Dicey, the English jurist who used the phrase in his 1885 book. He wrote that rule of law comprises three elements: persons cannot be punished unless they breach the law; the same laws apply to every person in the country; and human rights are vital to the general principles of law.[4] The first element was mentioned as part of the principle of lawfulness and seen as crucial to the rule of law.[5] Other scholars have since agreed that the principle of rule of law exists to protect human rights.[6]

This idea of the rule of law falls is in line with the Rechtsstaat ('legal state') tradition of constraining governments' powers by legal means. The Rechtsstaat concept has been described as opposition to an absolutist state with no boundaries.[7] The rule of law is a process, a desire for freedom and justice, not an end product.[8] It should not represent the implementation of one government's laws or one power's norms supported by a state force's monopoly but a generalised and universally applied law.[9]

3. The Rule of Law in International Documents

The United Nations has been dealing with the issue of the rule of law for many decades. That body's Millennium Declaration (8 September 2000) promoting democracy and strengthening the rule of law at the national and international level has been endorsed

2 Pech, 2009, p. 42.
3 Emmert, 2009, p. 554.
4 Dicey, 1915, p. 110.
5 Garrido and Castillo, 2019, p. 10.
6 den Hertog, 2012, p. 211.
7 Jovanovic, 2015, p. 768.
8 Carter, 1991, p. 8.
9 Stanovcic, 2006, p. 63.

by all the UN Member States.[10] The UN International Court of Justice has also weighed in on the rule of law, interpreting and applying the UN Charter's rules and general procedures and respecting human rights.[11] The UN Charter set uniforms standards that should not be violated, and the global community needs to enforce these effectively.[12] Moreover, the United Nations' *Human Rights: Handbook for Parliamentarians* concentrated on the rule of law and protecting and promoting human rights and democracy.[13] A 2005 Resolution from the UN Human Rights Commission stated that the rule of law consists of the separation of powers, the supremacy of law, and equal protection under the law.[14]

A wider definition of the rule of law was made by former UN Secretary-General Kofi Annan, who stated that rule of law 'requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.[15]

The rule of law has also been espoused by other august regional bodies, such as the COE, the EU, the Inter-American Democratic Charter (IADC), the Constitutive Act of the African Union (CAAU), and the Organization for Security and Co-operation in Europe (OSCE). In accordance with Copenhagen Document, the rule of law is not 'merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value'.[16] On this level, states should strengthen the rule of law in the areas of judiciary independence, the right to a fair trial, access to a court, the accountability of state institutions and officials, and respect for the rule of law in public administration.[17]

10 United Nations Millennium Declaration, General Assembly Resolution 55/2 of 8 September 2000. See: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx (Accessed: 10 January 2021).

11 Wright, 1946, p. 51.

12 Carter, 1991, p. 7.

13 United Nations Human Rights, Human Rights, Office of the High Commissioner, *Handbook for Parliamentarians* No. 6, Inter-Parliamentary Union, 2016, p. 75. See: https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf (Accessed: 12 February 2021).

14 UN Commission on Human Rights, Human Rights Resolution 2005/32: Democracy and the Rule of Law, 19 April 2005, E/CN.4/RES/2005/32, https://www.refworld.org/docid/45377c4c0.html (Accessed: 12 February 2021).

15 United Nations Security Council, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, 23 August 2004, paragraph 6; Karakamisheva-Jovanovska, 2016, p. 7.

16 Organization for Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, 29 June 1990, paragraph 2.

17 Organization for Security and Co-operation in Europe, Ministerial Council, Decision no. 7/08, Further strengthening the rule of law in the OSCE area, 5 December 2008, paragraph 4, https://www.osce.org/files/f/documents/9/8/35494.pdf (Accessed: 12 February 2021).

Moreover, the assessment of Organisation for Economic Co-operation and Development (OECD) should not be neglected. The rule of law represents a set of elements that must be taken together, including the protection of human rights, the efficient application of the law, interpretation of law through an independent and impartial judiciary, and equal access of the law for all.[18]

4. The Rule of Law in the European Union

Today, the rule of law is not just a principle but one of the EU's constitutional values,[19] since the Treaty of the European Union (TEU) stated that one of the EU's main principles of the European Union is the rule of law.[20] That is why multiple international bodies have grappled with definitions of the rule of law, what it means, and why is it important. Article 2 of the TEU clearly stated that the EU's foundation was based on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[21] Additionally, the Court the of Justice (Court) played a pivotal role in ensuring that EU law respected 'the existence of mutual trust between the Member States that those values will be recognised'.[22] Any state that breaches Article 2 of the TEU can be sanctioned, according to Article 7 of the TEU,[23] known as the 'nuclear option'.[24] Article 49 of the TEU says that to be a member of EU, a state must respect the rule of law, making a commitment to the rule of law a condition of membership.[25] However, there is no universal law that applies to every country in the same way, which is why various organisations have tried to establish a global understanding of the rule of law.[26]

When an EU state does not respect the principle of the rule of law or breaches human rights, the EU reacts. For example, the European Commission's concerns about Poland's human rights breaches triggered the Rule of Law Framework.[27] The European Commission has undertaken numerous actions to strengthen the rule of law at the international level, and written that future avenues will rest on three pillars: promotion (building knowledge and a common rule of law culture), prevention (cooperation and support to strengthen the rule of law at the national level), and response (enforcement at the EU level when national mechanisms falter).[28] The Commission took actions because

18 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 27.
19 Van Elsuwege and Gremmelprez, 2020, p. 8.
20 Treaty of Lisbon (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union), signed on 13 December 2007, Preamble.
21 Treaty of Lisbon, Article 2.
22 Court of Justice of the European Union, Opinion of the Court, 18 December 2014, para. 168.
23 Treaty of Lisbon, Article 7.
24 Kochenov and Pech, 2015, p. 516.
25 Treaty of Lisbon, Article 49.
26 Florin, 2010, p. 8.
27 Oliver and Stefanelli, 2016, pp. 1080–1081.
28 Wahl and Riehle, 2019, p. 79.

until then there had not been secure processes and instruments to ensure effective reactions to threats to the rule of law.[29] Their actions were set out in a communication to the European Parliament and the Council, 'A New Framework to Strengthen the Rule of Law'. Their goal was to deal with any possible threat to the rule of law. When the national courts lacked the capacity to protect the rule of law, the New Framework would be activated.[30] The communication stipulated 'a public, comprehensive conceptualization of the concept by an EU institution'.[31] In the New Framework, the rule of law is seen as the vehicle that ensures compliance with respect human rights.[32]

According to Annex I of the New Framework and the Court's practice,[33] the rule of law contains the following constitutive principles that are valid within the EU system: 'the principle of legality,[34] legal certainty,[35] prohibition of arbitrariness of the executive powers, independent and effective judicial review, including respect for fundamental rights,[36] [and] equality before the law'.[37]

The Court of Justice affirmed that the principle of legality is crucial in the EU, stating that 'in a community governed by the rule of law, adherence to legality must be properly ensured'.[38] The Court wrote that in asserting legal certainty, the enforcement of EU regulation needs to be clear and predictable for its subjects.[39] Moreover, the Court emphasised that in every EU country, relating to prohibition of arbitrariness, 'any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified'.[40] About independent

29 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, 19 March 2014, p. 2.

30 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, 19 March 2014, p. 6.

31 Magen, 2016, p. 1051.

32 Unión de Pequeños Agricultores v. Council of the European Union, ECR I-06677, Judgment of the Court, 25 July 2002, paragraph 38.

33 Von Danwitz, 2014, p. 1315.

34 *De Compte v. Parliament*, Case C-90/95, Judgment of the Court, 17 April 1997, paragraph 35; *Conserve Italia v. Commission*, Case C-500/99, Judgment of the Court, 24 January 2002, paragraph 90.

35 *Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen*, Case C-143/93, Judgement of the Court, 13 February 1996, paragraph 27; *Belgium v. Commission*, C-110/03, Judgement of the Court, 14 April 2005, paragraph 30.

36 *AM & S v. Commission*, Case C-155/79, Judgment of the Court, 18 May 1982, paragraph 18; *Orkem v. Commission*, Case C-374/87, Judgment of the Court, 18 October 1989, paragraph 32.

37 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, Annex 1 and 2, 2014, Brussels, pp. 1, 2. https://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1-ANNEX-1.Pdf, (accessed: 13 February 2021).

38 *Commission v. CAS Succhi di Frutta*, Case C-496/99, Judgment of the Court, 29 April 2004, paragraph 63.

39 *Amministrazione delle finanze dello Stato v. Salumi and* others, Joined Cases 212 to 217/80, Judgment of the Court, 12 November 1981, paragraph 10.

40 *Hoechst v. Commission*, Joined Cases 46/87 and 227/88, Judgment of the Court, 21 September 1989, paragraph 19.

and effective judicial review, the Court underlined that 'individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order'.[41] Article 6 of the European Convention on Human Rights (ECHR) affirmed the relationship between a fair trial and the separation of powers, clearly declaring that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[42] The importance of equality before the law can be seen as a general principle of the EU,[43] and it is regulated under the Charter of Fundamental Rights of the European Union.[44]

The first decision regarding the rule of law before EU Court of Justice of the EU stated the following: 'It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[45] Moreover, it was emphasised that Court should guarantee that the law is observed as interpreted and applied in the Treaty.[46]

One landmark case was *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, in which it was asserted that 'the Community constitutes a new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights,' expressing the importance of the rule of law.[47]

Additionally, the Viviane Reding, vice-president of the European Commission and EU Justice Commissioner, discussed the issue in a speech on 4 September 2013:

> By 'rule of law', we mean a system where laws are applied and enforced (so not only 'black letter law') but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws. The rule of law means a system in which no one—no government, no public official, no dominant company—is above the law; it means equality before the law.[48]

41 Unión de Pequeños Agricultores v. Council of the European Union, Case C-50/00 P, Judgment of the Court, 25 July 2002, paragraph 39.

42 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950., Article 6, https://www.echr.coe.int/documents/convention_eng.pdf, (accessed: 13 February 2021).

43 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, Case C-550/07, Judgment of the Court, 14 September, paragraph 54.

44 Charter of the Fundamental Rights of the European Union, *Official Journal of European Union*, 26.10.2012., Articles 21 and 22.

45 *Les Verts v. European Parliament*, Case 294-83, Judgement of the Court, 23 April 1986, paragraph 23.

46 Fernandez Esteban, 1999, p. 104.

47 *Van Gend & Los v. Netherlands Inland Revenue Administration*, Case 26-62, Judgment of the Court, 05 February 1963, p. 11.

48 Viviane ReddingThe EU and the Rule of Law – What next? Centre for European Policy Studies, 4 September 2013. See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677 (Accessed: 11 February 2021).

The sheer number of cases dealing underscore its importance and explain the EU's efforts to define the principle.[49] For example, the case *European Commission v. Alrosa Company Ltd* case was important because it protected the rule of law in the post-modernisation EU competition law regime.[50] It is broadly accepted as a fundamental concept 'undergirding and legitimating all European constitutional systems'.[51]

The courts' findings have shown that failing to make a decision within a reasonable time can be seen as a breach of fundamental human rights requiring an effective remedy.[52] The courts view humans rights violations to be a breach of the rule of law since they consider human rights an 'integral part of [the] rule of law'.[53]

5. The Rule of Law in the Council of Europe

Nowadays, constitutional law and the charters of international governance organisations endeavour to establish guidelines and practices that uphold the principles of the rule of law, democracy, and fundamental rights.[54] Thus, the rule of law is one of the pillars of the COE, whose 1949 Statute stated that 'Every member of the Council of Europe must accept the principles of the rule of law'.[55] At a November 2008 meeting, the COE reasserted this:

> The rule of law is one of the three core principles of the Council of Europe, along with the enjoyment of human rights and fundamental freedoms and the concept of genuine democracy (1949 Statute, recital 3 of the preamble and Article 3). More particularly, the rule of law is, together with individual freedom and political liberty, referred to as "principles which form the basis of all genuine democracy" (recital 3 of the preamble).[56]

The Preamble of the ECHR affirmed that the governments of European countries should respect the rule of law.[57] Moreover, the rule of law has been systematically referred

49 Pech, 2010, p. 361.
50 Cengiz, 2011, p. 128; *European Commission v. Alrosa Company Ltd*, Case C-441-07, Judgment of the Court, 29 June 2010.
51 Kokott, 1999, pp. 97–102.
52 *Gascogne Sack Deutschland v. Commission*, Case C-40/12, Judgment of the Court, 26 November 2013; *Groupe Gascogne SA v. Commission*, Case C-58/12 P, Judgment of the Court, 26 November 2013; *Kendrion NV v. Commission*, Case C-50/12 P, Judgment of the Court, 26 November 2013.
53 Arnold, 2015, p. 19.
54 Lenaerts, 2020, p. 34.
55 Statute of the Council of Europe, London, 05.05.1949., Article 3. See: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0 (Accessed: 11 February 2021).
56 Council of Europe, The Council of Europe and The Rule of Law – An overview, 21 November 2008, paragraph 4.
57 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950., Preamble, https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 11 February 2021).

to in the COE's other significant political documents, conventions, and recommendations, such as Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ).[58]

Also, the rule of law is named as a priority objective in the Statute of the European Commission for Democracy through Law (hereafter, Venice Commission), which was established in 1990 to provide advisory support and constitutional assistance to states endeavouring to adjust their legal systems to democratic standards in accordance with the European legal tradition. The Venice Commission has become an increasingly consequential authority wielding significant influence in shaping Central and Eastern European countries' constitutions. At its 86th plenary session, held in 2011, the Commission adopted its Report on the Rule of Law, which recognised the common elements of the rule of law arrived at by a consensus of scholars, judges, and others on basic elements of the rule of law: (1) legality, including a transparent, responsible, and democratic process of legislation; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.[59]

When assessing the rule of law, the Committee of Ministers of the COE stated that 'the foregoing overviews are not sufficient to allow the drawing up of a list of key rules of law requirements accepted by the Council of Europe, let alone a definition'.[60] In 2007, the COE issued Resolution 1594: The Principle of the Rule of Law, in which they pointed out that 'the variability in terminology and understanding of the term, both within the Council of Europe and in its Member States, has elicited confusion': specifically, 'The Assembly emphasises the need to ensure the unification that encompasses the principles of legality and of due process, which has the same basic elements, found in particular in the case law of the European Court of Human Rights, by whatever name this concept is now used in the Council of Europe'.[61]

The COE's Parliamentary Assembly also dealt with the issues of the rule of law and judicial independence in other resolutions. For example, Resolution 2188 (2017): New Threats to the Rule of Law in Council of Europe Member States, focusing on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania, and Turkey.[62] Reso-

58 Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ), *Adopted by the Committee of Ministers on* 18 September 2002 at the 808th meeting of the Ministers' Deputies).

59 Venice Commission, Rule of Law Checklist CDL-AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016), endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016), paragraphs 15–18.

60 Council of Europe, The Council of Europe and The Rule of Law – An overview, 21 November 2008, paragraph 22.

61 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 22.

62 Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples, Textext adopted by the Assembly on 11 October 2017 (33rd Sitting).

lution 1594 (2007) indicated the need to ensure a correct interpretation of the terms 'rule of law', '*Rechtsstaat*', '*prééminence du droit*', and '*Etat de droit*', to clarify the variability in terminology and understanding.[63] They concluded that the terms 'rule of law' and '*prééminence du droit*' were substantive legal concepts that were synonymous and should be used in documents issued by the Parliamentary Assembly and by Member States in their official translations.[64] The Court of Justice of the European Union (CJEU) has stipulated that there rule of law contains six different principles. The Venice Commission's Report of the Rule of Law also recognised six, as previously stated.[65]

Case law before the ECHR often deals with the rule of law. One of the most relevant provisions in this regard is the ECHR's Article 6, which enumerates the essential features of a fair trial, a key component of the rule of law. These include the right to be heard promptly before an independent and impartial tribunal that pronounces its judgment publicly, the presumption of innocence, the right to be informed in detail about the nature of the charges, and the right to be defended with legal assistance.[66] Also, the Court has also asserted the right to court access, with a direct reference to the principle of the rule of law: 'one can scarcely conceive of the rule of law without there being the possibility of having access to the courts'.[67] In another case, the Court addressed the rule of law in relation to the principles of legality, the separation of powers, and equality before the law.[68] Elements of the rule of law can be found in other articles of the ECHR, such as Article 3, which prohibits torture and inhuman and degrading treatment; Article 5, which guarantees the right to liberty and security; Article 7, which prescribes the principle of legality; and Article 14, which guarantees the equality of individuals before the law, an essential element of the rule of law.[69]

6. The Rule of Law in the Republic of Serbia

The Constitution of the Republic of Serbia mentions the rule of law. Article 1 defines the Republic of Serbia as a 'state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values'.[70] Article 3

63 Resolution 1594(2007), The Principle of the Rule of Law, Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007, Article 3.
64 Ibid., Article 6.1.
65 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 21.
66 Article 6 of the ECHR.
67 Case of *Golder v. The United Kingdom*, Application no. 4451/70, Judgement of the Court, 21 February 1975, paragraph 34.
68 Case of *Iordachi and Others v. Moldova*, Application no, 25198/02, Judgment of the Court, 14 September 2009, paragraph 37.
69 Schukking, 2018, p. 156.
70 Constitution of the Republic of Serbia, Article 1. See: https://www.srbija.gov.rs/tekst/en/130144/constitution-of-serbia.php (Accessed :10 February 2021).

is devoted to the rule of law, calling it a fundamental prerequisite for the Constitution based on inalienable human rights. 'The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary, and observance of Constitution and Law by the authorities'.[71] These words clarify that the rule of law requires direct and free elections and respect for human rights (including minority rights). Thus, Article 1 names the rule of law as an autonomous principle on which the state is based, and Article 3 lists its constitutive elements.

The Republic of Serbia's Judicial Development Strategy for 2020–2025 establishes that developing the judiciary represents one of the country's key strategic priorities, along with continuing to modernise and adapt the judiciary to meet the needs of the state and society, uphold the rule of law, and increase legal certainty.[72]

The separation of powers is one of the basic principles of a democratic society and the rule of law. It allows mutual control of state organs to moderate state authority. In common law, it is known as 'checks and balances'. Article 4 of the Constitution of Serbia stipulates that 'the government system shall be based on the division of power into legislative, executive, and judiciary' and adds that the relationship among the 'three branches of power shall be based on balance and mutual control'.[73] The same article provides that judiciary power shall be independent.[74]

Article 145 stipulates that 'Court decisions shall be obligatory for all and may not be a subject of extrajudicial control'.[75] Mutual control does not mean that court decisions can be subject to the control of the legislative or executive power; this formulation was criticised by the Venice Commission in 2018 when it presented its comments on the draft version of the amendments to Serbia's Constitution. It proposed that instead of mutual control, the constitutional provision should be based on checks and balances.[76]

The EU Commission's Serbia 2020 Report devoted many pages to the rule of law. Fore example, Section 2.1 covered the functions of democratic institutions and public administration reform. Section 2.2, which covered the rule of law and fundamental rights. The Report emphasised that the EU's founding values include the rule of law and respect for human rights. It reiterated the importance of an effective judicial system

71 Ibid., Article 3.

72 *Strategija razvoja pravosuđa za* period 2020–2025. godine (Eng. Judicial Development Strategy for the 2020–2025 period), *Official Gazette RS*, No. 101/2020.

73 Constitution of the Republic of Serbia, Article 4, Paragraph 3.

74 Ibid., Article 4, Paragraph 4.

75 Ibid., Article 145, Paragraph 3.

76 European Commission for Democracy through Law (Venice Commission), Serbia – Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary. Adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), Opinion No. 921/2018, Strasbourg, 25 June 2018, CDL-AD(2018)011, para. 14:

(that is, independent, high-quality, and efficient), anti-corruption efforts, and respect for fundamental rights in the law and in practice.[77]

The Report also stated that Serbia needed more preparation to apply the EU *acquis* and the European standards in the area of the judiciary, and 'very limited progress was made overall'. The Report noted that the constitutional reforms to strengthen the judiciary were on hold until after the 2020 parliamentary elections, which delayed of the adoption of the judicial legislation necessary to safeguard judicial independence. The Report stated its concerns about the scope for continued political influence over the judiciary: 'Overall, corruption remains an issue of concern'.[78]

Vis-à-vis the judiciary, the Report specified two things Serbia needed to accomplish in the coming year: one, 'strengthen the independence of the judiciary and the autonomy of the prosecution, including through amendments to constitutional and legislative provisions related to the appointment, career management, and disciplinary proceedings of judges and prosecutors'; and two, 'amend the laws on High Judicial Council and the State Prosecutorial Council so that they are empowered to fully assume their independent role to proactively defend judicial independence and prosecutorial autonomy in practice in line with European standards.'[79]

7. The Rule of Law in the Process of Accession of the Republic of Serbia to the European Union

The Republic of Serbia is in the process of accession to the EU and has ratified the Stabilisation and Association Agreement (SAA).[80] This is an international treaty that entered into force on 1 September 2013, granting the Republic of Serbia the status of an associated country to the European Union.[81] The Preamble of SAA confirmed that all the parties are committed to respecting human rights and the rule of law as common values.[82]

77 Commission Staff Working Document – Serbia 2020. Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 2020 Communication on EU Enlargement Policy, p. 18.

78 Ibid., p. 5.

79 Ibid., p. 18.

80 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, *Official Journal of the European Union*, L 278, Volume 56, 18 October 2013.

81 The European Parliament ratified the Stabilisation and Association Agreement with Serbia on 19 January 2011, while the ratification process in the Member States of the European Union concluded on 18 June 2013 after Lithuania's ratification. National Assembly of the Republic of Serbia ratified SAA on 9 September 2008, prior to which the National Assembly of the Republic of Serbia adopted the Resolution on association to the European Union on 13 October 2004.

82 Ibid., Preamble.

Article 1 of the SAA stated that one of the aims of this association was to support Serbia's efforts to strengthen its democracy and the rule of law.[83] Article 2 emphasised that the basis of the domestic and external policies of the Parties and the essential elements of the agreement were these:

> Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation.[84]

The SAA's statement provides additional proof that the EU legal order is strongly connected with international legal norms on human rights and the rule of law. Article 80 of the SAA dealt with the 'Reinforcement of Institutions and Rule of Law', stating the following:

> [T]he Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training, and fighting corruption and organised crime.[85]

State candidates aiming to adjust their judiciary to the basic principles contained in the phrase 'rule of law' as defined by the EU must negotiate with the EU in accordance with the Conditions for Membership and the Chapters of the *Acquis*. The European Commission's Screening Report: Serbia focused on the *Acquis*'s Chapter 23: Judiciary and Fundamental Rights. That condition relates to the judiciary reform, the fight against corruption, and basic rights. It reiterated that according to Article 2 of the EU's charter, the European Union was 'founded on the principles of human dignity, freedom, democracy, equality, the rule of law, and the respect for human rights'.[86] Those principles were common to all the Member States, and candidates for accession were likewise required to uphold them.

83 Ibid., Article 1.
84 Ibid., Article 2.
85 Ibid., Article 80.
86 Screening report, Serbia, Chapter 23 – Judiciary and fundamental rights, Commission, WP Enlargement + Countries Negotiating Accession to EU, MD 45/14, 15.05.14, p. 2. See: http://www.europa.rs/upload/2014/Screening-report-chapter-23-serbia.pdf (Accessed: 8 February 2021).

On 5 July 2016, the Council's Working Party on Enlargement and Countries Negotiating Accession to the EU sent a communication to the Permanent Representatives Committee stating that the Working Party had reached an agreement on a draft EU common position on Judiciary and Fundamental Rights.[87] The communication summarised its requirement for Serbia's judiciary reform. To strengthen the independence of its judiciary, Serbia agreed to comply with the EU's recommendations, including these: adopt new constitutional provisions in line with the Venice Commission's recommendations and European standards and based on a wide and inclusive consultation process; amend and implement the Laws on the Organisation of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors' Offices, on Judges, on Public Prosecutor's Office, on the High Judicial Council, on the State Prosecutorial Council, and the Law on Judicial Academy; provide an adequate administrative capacity to the Judicial and Prosecutorial Councils and provide them with their own budget; and establish an effective mechanism allowing the Councils to react against political interference.[88]

8. Conclusion

During the second half of the twentieth century, the rule of law developed into a universal principle supported by the unification efforts of the United Nations, the Council of Europe, and the European Union, which were founded for the protection, improvement, and promotion of universal values and jurisprudence. The rule of law principle has become the primary organisational model of modern constitutional law and international organisations to regulate the exercise of public powers. This principle provides that all branches of government act within the limits established by law in accordance with democratic values and basic rights and under the control of independent and impartial courts.

The European Union considers the rule of law an essential common value for all Member States and a prerequisite for accession. Adherence to the rule of law means that the law applies equally to all: all public powers must always act within the constraints of the law, in accordance with the values of democracy and fundamental rights, under the control of independent and impartial courts. The rule of law includes such principles as legality, implying a transparent, responsible, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; access to justice and effective judicial protection by independent and impartial courts, including effective judicial review of administrative acts; respect for fundamental human rights; separation of powers; and non-discrimination and equality before the law. These principles have been recognised by the ECJ.

87 European Union – Chapter 23: Judiciary and Fundamental Rights, Common position on judiciary and fundamental rights, Brussels, 5 July 2016 (OR.en), 10074/16, ELARG 78.

88 Ibid., pp. 3–4.

The rule of law is one of the three pillars of the COE, along with democracy and respect for human rights. Every state and member of the COE must accept the principles of the rule of law and accept that all persons within its jurisdiction enjoy human rights and fundamental freedoms. The ECHR played a critical role in distinguishing and explaining these terms; its judgments have contributed significantly to the efforts to closely determine the content of the phrase 'rule of law', helping to clarify its elements. The Court's decisions indicate that legal predictability and the harmonisation of case law to protect judiciary independence are a precondition for all the other elements in the rule of law.

The Republic of Serbia's Constitution accepts the rule of law as a universal principle. In the process of its accession to the EU, Serbia is obligated to respect the EU legislation and the case law of the ECJ. Serbia's current legislation closely accords with international standards. However, it must enact certain modifications regarding the judicial branch of government. When it accomplishes the necessary judiciary reforms, it will have met all the EU's requirements for accession and conform to other international organisations' understanding of the rule of law.

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CSABA VARGA[1]

Rule of Law, Contesting and Contested

ABSTRACT: *The rule of law movement is a by-product of the post-WWII rebirth of human rights, which turned into a key political issue by the turn of the millennium. By becoming part of the language and blackmailing practice of international politics, it has self-emptied as well. It is an ideal; historically a function of human experience at individual places and times, shaped by local traditions. As a complex of heterogeneous values and principles, its ethos can at best be respected and approached via the never-ending balancing of compromise solutions.*

KEYWORDS: Rechtsstaat, État de droit, democracy, constitutionalism, judicialisation, UN, EU.

1. Post-WWII Rebirth and Transformation into a Catchword

The end of World War II was followed by shocks in politics worldwide and of course, in law. Both victory and defeat questioned the continuability of the uncritical survival of legal positivism and reconsidered the tenet of *Das Recht ist das Recht!*, which had once given the impetus to the easy transition of dictatorial regimes born of the dramatic changes of power between the two world wars. They were forced to rethink the need to ensure the fundamentals of natural law as the basic living conditions of any human society. They reversed the accepted order of the ultimate values in law, prioritising justice over the search for legal certainty, as interwar experience had taught that in the event of total dehumanisation, no legal certainty could be of any value. Last, they breathed life into concepts that had earlier been dispersed on the margins of previous movements and literature, such as human rights and the barely cultivated notions of the rule of law and *Rechtsstaatlichkeit*.

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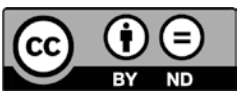

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After the abovementioned cataclysm, human rights first had to be accounted for, and what they were and what kind of legal protection they needed clarified. Even the creation of the United Nations (1945) was an ordeal for the parties drifting towards the Cold War, and the adoption of the Universal Declaration of Human Rights (1949) implied a straightforward multiplayer factional struggle over what and how to name it. Back then, it seemed sufficient to edify a 'law + rule/state' conglomerate as the broadest framework for their safeguard so that they would actually be implemented and not forced out by popular rebellion. For this reason, the Declaration had to state that 'human rights should be protected by the rule of law'[2] (where the term may have stood for some rule(s) of the law, not the classical rule of law[3]): 'Il est essentiel que les droits de l'homme soient protégés par un régime de droit'. (Since the term *État de droit* was translated from German, it never occurred to the drafters that this could have anything to do with the Anglo–American rule of law).

Presumably, in the disorganised turmoil of antinomic thought traditions, the opposition of the Euro-Atlantic West to the Bolshevik East led the former to clarify its own identity and as a political option, embrace the positive-sounding tradition of 'rule of law', only to thereby exorcise Muscovite dictatorship. Regardless, it was discussed in Chicago in 1957. A year later, in response, the Soviet bloc produced a socialist legality in Warsaw as its own version, only so that a new synthesis would be summoned in New Delhi within a year that encompassed Asian aspirations. Chicago summed up the Western tradition as the supremacy of law, which the French tradition simply enshrined as *légalité*. In addition, participants could still add further content to it in New Delhi. All this has reportedly been defined, the results of which may perhaps be educed from the four-page questions and hundreds of answers.[4] Under such conditions, from the end of World War II to the Soviet atomic bomb threat to the Western world, the notion of the rule of law as a fundamental element of a free society lurked. However, this happened without going beyond idealising what the Atlantic mainstream considered good and desirable in public affairs.[5]

With this, a legally immature term began its triumphant journey. It soon became fertilised in use by politics and political science; was transferred to international

2 https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, p. 2, resp. https://www.un.org/fr/udhrbook/pdf/udhr_booklet_fr_web.pdf, p. 1.

3 Perhaps due to American universalism, not even Harvard's excellent Catholic thinker, Glendon, 2004, p. 4 did notice that instead of an early use of the term, it may have simply been an occasional formula used by the drafters.

4 *Rule of Law as Understood…*, 1959 and Katz, Schlesinger, Rheinstein (eds.), 1957, pp. 518–525; then *Le concept de la légalité*, 1961 and Tóth, 1965, pp. 274–278; in the end Marsh (prep.), 1960, particularly pp. 183–186.

5 The American statesman who served as an associate judge of the Supreme Court, then as one of the closest associates to Presidents Roosevelt and Truman, and as the Secretary of State in the end—Byrnes, 1947, p. 314—uses the term 'a system of collective security that will develop and enforce *the rule of law*' in the epilogical summary of his remarks on the tasks of the United Nations in a manner standing for a rule of ideal law thought of as an airy desire rather than an elaborate concept.

diplomacy; integrated into the language of the United Nations; and finally, into that of the World Bank and International Monetary Fund, set up as the latter's agencies.[6] Therefore, it is no coincidence that even the most committed student of the notion of the rule of law can only characterise the turn-of-the-millennium situation by saying, 'One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles'.[7] More striking is that the memory of its Cold War use seems to have been preserved. It was first used as a symbol of the excellence of the West, then as an expression of opposition to the shame of the Bolshevik East,[8] and finally by the UN international development financial organisations with explicitly blackmailing unilateralism to impose Western legal solutions on the rest of the world.[9]

This has already resulted in unspecified but rhetorical overuse, and the term has been inflated and wasted in international diplomacy and in the practice of the European Union, especially after its expansion by including countries of Central and Eastern Europe.[10] This increase can be inferred from the growth that made the term a buzzword, as seen in its text frequency and use in book titles:[11]

word	e-occurrence
rule of law	105.000.000
Rechtsstaat	4.000.000
État de droit	6.500.000
jogállam [=Rechtsstaat]	500.000
joguralom [=rule of law]	150.000

6 In the e-world, 'rule of law' in company of 'United Nations' occurs 15,000,000 times and 13.300,000 times in company of 'European Union'; with 'World Bank' 6,150,000 times and with 'International Monetary Fund' 1,510,000 times. In German, 'Rechtsstaat' coupled with 'Vereinte Nationen' occurs 113,000 times and with 'Europäische Union' 167,000 times.

7 Carothers, 1998, p. 95.

8 As a leading human rights movement today, the International Commission of Jurists was established with the support of the CIA in West Berlin in 1952 (https://www.icj.org/), designed to become a "Cold Warrior against Socialist Legality"; cf. Tolley, 1994, ch. I. It was made as a counterpart of the International Association of Democratic Lawyers established in Paris in 1946 (https://iadllaw.org/), with the foundational presidency of the Nobel Peace Prize winner René Cassin (a future drafter of the Universal Declaration of Human Rights), after the latter started documenting US war crimes committed during the Korean War.

9 Cf., e.g., Varga, 2007, pp. 85–96.

10 Cf., e.g., Varga, 2009, pp. 19–28.

11 Its occurrence as a title in the Hungarian language shows a different picture. It was once a current term because the journal *Jogállam* [Rechtsstaat] (1903–1938) used to publish case reports and book series. As a book title, it appears exclusively in Balogh, 1914, and then more recently, in the collection of Takács (ed.), 1995.

books	1944–1959	1960–1975	1976–1991	1992–2007	2008–2020
'Rule of law' in title in English[12]	32	96	64	544	1120
'Rechtsstaat' in title in German	30	120	180	180	270

Interestingly, the term came to the fore when the two-power world order collapsed by making Central and Eastern Europe a confusing international problem (or trump) anew, reclaiming and regaining the region's old place in the world.[13]

Thus, it has become a fashionably common catchword to express pride for the self and/or contempt for others. This lack of content, the fact that the word has become commonplace, is hitting those struggling for the underlying ideal to be implemented in the Third World,[14] and who must identify the enemy of their cause in those who are cheating with it by punting it as a panacea.[15] Carl Schmitt despised the use of *Rechtsstaat* from the early 1930s, because it can mean the *Recht* and *Staat* separately. Its only trait is that it sounds promising, which when held accountable, makes us free to denigrate any opponent.[16] Alternatively, as widely expressed, 'the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general overuse. It may well have become just another of those self-congratulatory rhetorical devices that grace the utterances of Anglo–American politicians [...]. No intellectual effort need therefore be wasted on this bit of ruling-class chatter'.[17] However, at the same time, its indefiniteness in content, which sounded as a cry for others, has become an inspiring source of truly exploratory and not infrequently monographic works. These, the absence of a theoretically developed background and established doctrinal structure or dogmatics,[18] have in the name of scholarly analysis often become like a program or creed that ensures good governance to achieve the public good by supplying the adequate quality of legal background with the available institutional procedures and techniques.

12 As a book title, 'rule of law' became widespread early because the International Commission of Jurists (note 7) preferred to use it as a starting point and contrast in processing conflicting situations, such as in, for example, International Commission of Jurists (ed.), 1957.

13 Even on the seemingly not politically sensitive issue of why and how the notion of the rule of law could reach its period of consummation, we cannot meet with either disinterest or clairvoyance. Despite his Polish roots, Krygier, 2014, pp. 327–346 sees the term coming to the fore in the surfeit of ideologies of the post-Cold War Atlantic and Western European world, while another interpreter—Janse, 2019, pp. 341–348—says it originated from the changing eras of European communality.

14 Humphfreys, 2010, pp. 1–26 laments its 'magical, or at least talismanic, role'. Drawing conclusions, Flake, 2000, p. vii states that 'the "Rule of Law" has become a buzzword of today and an oft-prescribed panacea for the myriad challenges of development faced by Asian nations. Yet seldom in such discussions is the concept of the "Rule of Law" carefully defined'. Note that as synonyms for buzzword, expressions like 'hokum' and 'bunk' make it even more accurate to understand what the author may have meant by this wording.

15 E.g. Peerenboom, 2004, p. 33.

16 Schmitt, 1932, p. 19.

17 Shklar, 1987, p. 1.

18 As characterised by Gárdos-Orosz and Szente, 2014, p. 267, in such a complex deficiency, 'the main difficulty is not that there is no widely accepted general definition of the rule of law, but that there is no consensus on its components'.

2. Limitlessness in Today's Use

The first finding jurisprudence can formulate is that the rule of law is a contested concept.[19] Inherently,[20] 'the meaning of the concept known as the rule of law is always open to debate'[21] as it belongs to those notions whose 'nature and meaning are contested and controversial'.[22] Or again, 'The rule of law is a flexible and contested concept that can be defined in different ways. [...] Its different definitions mean that the rule of law has no uniform accepted form.'[23] Considering it an undefined and uncertain notion from the beginning,[24] a 'mixture of implied promise and convenient vagueness',[25] it is 'exceedingly elusive' with 'rampant divergence of understandings'.[26] Thus, '[n]o one in the international community is quite sure' (as 'we are never quite sure') what it means at all,[27] because 'scholars are not agreed on the desiderata that would define the *Rechtsstaat*'[28] and what its scattered generalities may mean without any central thought.[29] 'In fact, the only thing that seems to consistently garner agreement within the "Rule of Law" discourse is that there is pervasive disagreement within this discourse'.[30] Such characterisations are often formulated not as rejection or destructive criticism, but to justify new investigations in the hope of reaching a consensus some time in the future.

Ronald Dworkin, who was astonishingly bold by basing his theorising on the values of a single time and place, ended his introductory speech at the London meeting of the Venice Commission on the Clarification of the Rule of Law in the European Union, perhaps the last public act of his life, by concluding: 'There is a paradox at the heart of the rule of law. That ideal demands certainty and condemns ambiguity in

19 According to Gallie, 1956, p. 169, those concepts are essentially contested, 'the proper use of which inevitably involve endless disputes'. This issue—Gray, 1977, p. 344 asserts—'cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone'. Furthermore, Garver, 1978, p. 168 opines that a good answer is excluded from the beginning. Within a few decades, artistic and political categories (with rule of law included) had also been categorised as such. Cf. Waldron, 2002, pp. 137–164 and Collier, Hidalgo, Maciuceanu, 2006, pp. 211–246.

20 See Bárd, Carrera, Guild, Kochenov, 2016, p. 80, who claim that 'defining it in the best possible way cannot cancel the nature of the rule of law, which is an essentially contested concept'.

21 Zimmermann, 2017, p. 10.

22 Allan, 1998.

23 Lautenbach, 2013, p. 19.

24 E.g. Ajani, 2003, pp. 3–18; Costa, 2007, p. 74; Fallon, 2007, pp. 1 and 6; Mattei and Nader, 2008, p. 10; Rodriguez, McCubbins, Weingast, 2010, pp. 1455–1494. As officially perhaps understated—House of Lords, 2007, p. 12, para. 24—,'the rule of law remains a complex and in some respects uncertain concept'.
Selznick, 2005, p. 29.

25 Kirchheimer, 1996, 244.

26 Tamanaha, 2004, p. 3 adds that it is like wishing for good: 'Everyone is for it, but have contrasting convictions about what it is'.

27 Bouloukos and Dakin, 2001, p. 145 as well as Fletcher, 1966, p. 12.

28 Borneman, 2007, p. 4.

29 Higgins, 2007 states this, referring mainly to UN documents.

30 Hamara, 2013, p. 12.

the law. But that is great uncertainty and alleged ambiguity in the ideal itself. Firm adherents are locked in great disagreement about what the rule of law really is'.[31] This is because it does not have an own object, and is largely an 'umbrella' or 'container' concept[32] used as an indicator when describing the law, the state, politics, or the general situation to disclose in respect of a given legal order that what is in is actually secure as regulated or in contrast, absent compared to its agreed minimum. However, this almost free capacity makes it a 'rhetorical balloon' that can be increasingly inflated and made almost unlimited. Here, as scholars claim,[33] the more it says, the less it is worth.

Thus, it is not simply that we can understand a certain object in multiple ways, but that we mean different objects in different ways although we call them by one name as if talking about a single object. As a result, there is a cacophony of naming and understanding. Regarding American constitutional law, Harvard's expert explores its comprehensibility from various perspectives and a plethora of variations of each perspective.[34] Another author distinguishes between at least four approaches that differ in subject matter and have different characteristics. According to him, 'One could [...] define the rule of law in terms of the values which that institution is designed to serve, such as human dignity or individual fulfilment through the full development of one's capacities; or in terms of the several principles whereby those institutions are to be safeguarded, such as the rule that a legal basis must be shown for every government action interfering with the rights of the citizen; or in terms of the institutions, such as the courts, the bar, the parliaments and the police who are responsible for doing the safeguarding, in their own distinctive ways; or, finally, in terms of the procedures which those institutions use for that purpose, such as public hearings, jury trial, habeas corpus and the like'.[35] In light of this multitude,[36] we may have the impression that the term was a kind of *desideratum*, a set of desirable standards backed by a complete edifice of theses and criteria on the state-organised legal regime of society, based on a given social philosophy, and elaborated to the depths doctrinally. This is not the case—if not perhaps for some minds exclusively, for private use only, and with no obligatory institutionalisation or valid measurement standards.

Today, we are in turmoil, because the term can simultaneously mean nothing and anything, everything or anything. We are discussing a word that has long since become empty with its arbitrarily adaptable meaning-bearing capacity and inflated overuse, formed in response to conflicts of interest. It has no standardised meaning within the law; consequently, it has no legally assertable or defendable criterial functionality. It is political mud wrestling with millions of teammates in the world's thousands of political think tanks as well as scholarly and media workshops. In fact, any of us can enrich it with whatever we want. In addition, it has no dogmatics, and thus

31 Dworkin, 2012, p. 11.
32 E.g. Bedner, 2010, pp. 48–74 and Belton, 2005, p. 6.
33 Frändberg, 1996, pp. 22–23 and Frändberg, 2014, p. 31.
34 Fallon, 2007.
35 Walker, 1988, p. 9.
36 Cf. as well Møller and Akaaning, 2014 and Yakushik, 2018, pp. 72–84.

no solid structure, support frame, or boundaries. Why should its expandability know any limitation? The theoretical literature commonly notes that 'It is very difficult to talk about the "Rule of Law". There are almost as many conceptions of the "Rule of Law" as there are people defending it',[37] as all kinds of authors 'use the term as a catch-all slogan for every desirable policy one might wish to see enacted'.[38] As an expert on the issue, one of New York's leading philosophical authorities paints as a *tableaux vivant*: 'Open any newspaper and you will see the "Rule of Law" cited and deployed—usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy'.[39]

The analysis reveals not only the uncertainty surrounding the concept, but also the extent to which the product that takes incessantly changing shapes amid historical contingencies is variable and environment-dependent, because it develops differently according to culture, tradition, and local conditions.[40] Thus, the rule of law is primarily and foremost a historical category. It is based on a wide variety of historical experiences that differ by nation and age, which define or condition its *hic et nunc* particularity. Consequently, as 'a product of historical development [...,] the rule of law [...] cannot be seen in isolation from the constitutional theories and traditions [...as it...] is closely tied to the historical and institutional setting in which the rule of law has come to development'.[41] 'What it rules out, what it allows, what it depends on, and indeed what it is, are all matters of disagreement that stem from differences between political and legal histories and traditions, and reflect dilemmas and choices that recur in different forms and weights in many such histories and traditions'.[42] We can generalise from these, but as the best-known French expert on the issue points out, then out of context, only an empty shell—*une coquille vide*—remains as the end-product.[43]

With this, we return to the specific problems of various national and other developments and to aspirations that inspire a solution, including their shoreless ambitions. However, what develops in this arbitrary and dispersed way locks down the chance of any orderly—or any—conceptuality, as the shape it takes will be a flow of continuous rearrangements. Moreover, 'The idea of the rule of law is characterised by its programmatic character, which means that it cannot be exclusively identified with one or another specific legal concept, but rather comprises a whole set of principles that govern the morality of the exercise of public authority in a society at a particular time of its history'.[44] As a result, uncertainty characterises not only the term as a whole, but also, in addition to its internal context, each of its elements separately, since each will be the product of the characteristics of a given historical development, that is, the

37 Taiwo, 1999, p. 154.
38 Bellamy, 2007, p. 54.
39 Waldron, 2008, p. 1.
40 E.g. May, 2014.
41 Lautenbach, 2013, pp. 35 and 210.
42 Krygier, 2015, p. 780.
43 Chevallier, 2003, p. 52.
44 Grote, 2010, p. 175.

diversity determined by place and time. However, as the analysis continues, behind the disguised commonality of its wording is again the case of multiple concepts. The notion of the rule of law is from the outset 'elusive and controversial [..., for...] there is an "embeddedness" of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. [...] This requirement of vagueness plays strongly against any Quichotean attempts to turn the rule of law into a shopping list of elements'.[45] Putting its building blocks together, the complete picture of an infinitely complex jigsaw puzzle emerges: elements with meaning and validity drawn from their historical *hic et nunc* formations, which in a given place and time, are stacked in an international space while preserving their generational local values to form a concept that can be widely shared and accepted in a given culture. Characteristically, when a Harvard constitutionalist analysed the components of how many innumerable perspectives can be identified only in legal practice in the US, with each of them having separate although equally defensible versions of the rule of law, he could do so simply by flinging them into the floating cloud of relativity, because each user is used to expecting to create his/her own version for his/her own use.[46] Because, he continues,[47] 'It is a mistake to think of particular criteria as necessary in all contexts for the rule of law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions'.

3. Roots and Development in Various Legal Cultures

Our age is characterised by a new ideocracy after the Christian mediaeval desire for spiritual brilliance. By surpassing both the historical past and human experience, it wants to see today's revolutionary thoughts (concerning our gender, skin colour, sexuality, growing up in a family, living as a nation, and so on), hoped to be world-shattering after the practice of millennia, as a latent but now discovered eternal quality of the universal human. The ideas that sparked the French Revolution also lead us back to our classical Greek predecessors, sometimes directly to the earliest traces of intellectual archaeology. However, we know that although 'human rights' were already mentioned—for example, in protest against the genocidal murder of natives in Latin America by a Spanish Dominican centuries ago—[48] today's movement is not rooted in this but comes from the Enlightenment and post-World War II conscience test, and to a smaller extent, as the aftermath of the 1968 uprisings. Equally obvious is that the

45 Bárd, Carrera, Guild, Kochenov, 2016, pp. 79, 80 and 80.

46 Similar to case law, where the judge will draw the *stare decisis* from what he can learn from precedents he has considered to serve as a rule for his pending decision, but without publicly stating it.

47 Fallon, 2007, p. 6.

48 Bartolomé de las Casas was the first in 1552 to mention 'las reglas de los derechos humanos'. Las Casas, 1971 and Corres, 2014; cf. also Pennington, 2018, pp. 98–115.

complexity of today's notion of the rule of law dates to the 19th century as a concept born mainly of German and English development.

The idea took shape largely because of the confrontation with feudal arbitrariness, specifically, with the omnipotence of the absolutist state. The recently deceased nestor of Italian jurisprudence called this a reversal, a rights-orientation surpassing the ethos of obligations by the advent of the age of individualism.[49] Its background was clearly formulated by the American revolutionary Thomas Peine in 1776: 'In absolute governments the King is law, so in free countries the law ought to be King'.[50] The notions maturing the root ideas of the rule of law can also be traced to classical Greek and Roman antiquity, and to early modern movements. However, it may be sufficient to recall the turn of the 18th and 19th centuries when the enlightened Prussian ruler had already included in the draft *Allgemeines Landrecht* that 'The laws and ordinances of the state may not restrict the natural freedom and rights of citizens more than the common end purpose requires'. To clarify further, the contemporary textbook added: 'All rights of the regent are to be regarded only as a means by which the state purpose is to be brought about'.[51]

The English version was moulded by Dicey, the father of British constitutionalism, who summarised his book-wide explanation in a few sentences. Accordingly, 'The rule of law [...] remains a distinctive characteristic of the English constitution. In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded'.[52] Its requirements, summed up in three theses, are the generalised principle of *nulla poena sine lege*, the right to bring any action before an independent court, and the recognition of the quasi-natural law grounds[53] of rights. Behind this, he saw on one hand, that an unwritten constitution with the affirmative seal of centuries is more difficult to move than any written charter, and on the other, the power of public opinion. The doctrine of the separation of the branches of state power, however, is known for him only in the case-law autonomy of the judiciary,[54] but hardly applies to the relation between the legislature and executive.[55] In addition, he entrusts the functions of constitutional control to the skill of the functioning of English parliamentarism for many

49 Bobbio, 1990, pp. ix and 58.

50 Peine, 1776.

51 *Entwurf eines Allgemeinen Gesetzbuchs für die Preußischen Staaten* von 1791, Einleitung § 79 as well as Gönner, 1804, p. 418.

52 Dicey, 1915, p. lv.

53 Although topically expanded, this is discussed by Opałek, 1999, pp. 91–98 as a system of claims formulated in the name of humanity by natural law.

54 Or, Jennings, 1941, p. 365 warns that 'The English lawyer usually speaks of the "rule of law" where the American lawyer speaks of "due process of law"'.

55 Wade and Forsyth, 2009, p. 18 reassert that 'There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading'. See also Phillips, Jackson, Leopold, 2001, p. 26.

centuries.[56] Similarly, he records reliance on judicial decisions instead of legislation as an additional safeguard, which because it builds the wisdom of generations atop each other, is in his view the best guarantee of individual freedom and freedom from arbitrariness.[57]

The first mention of the *Rechtsstaat* dates to the turn of the 18th and 19th centuries[58] when a government's intention to reform was expressed.[59] Classical political scientists such as Robert von Mohl and Friedrich Julius Stahl were already explicitly seeking to replace the administrative state (*Polizeistaat*) with enlightened changes.[60] Contrary to the 'rule of law' as worded in English, the Germans could rely on the *Staat*, because unlike the English tradition, the state was a legal concept for them[61] to the extent that the master of the Pure Theory of Law could simply refer to the *Rechtsstaat* as a pleonasm, as the *Staat* was already involved in the notional sphere of *Recht*.[62] In today's German public law, however, the *Rechtsstaat* is no longer an independent but a substitute notion. The Basic Law uses it only in relation to the territories [*Länder*] that make up the Federal Republic of Germany, and even then does not afford it more of or a different meaning than the itemised requirements of the Basic Law. As the latter states, 'The constitutional order in the *Länder* must conform to the principles of the republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law'.[63] This is tantamount to having no surplus over the law and order defined by the constitution. Consequently, as a surrogate, it is also a pleonasm in constitutional law—whether or not it is suitably used in other contexts and as a synonym in German jurisprudence and doctrine. However, it certainly has one proper message. That is, providing that *Rechtsstaatlichkeit* is expressive of already posited constitutional contents whose quality is part of constitutionalism itself, any idea or demand for its further substantive enrichment is already out of the professional profile of jurists. It cannot but be a direct political intention to amend the constitution.[64]

Compared to the previous ones, the French solution appeared late, as a translation from German, well after the First World War, although the institutional framework for its effective control was found half a century ago. The first wording of what is meant by *État de droit*—'the State is subordinated to a rule of law which is superior

56 Zolo, 2007, p. 9.
57 Hayek, 1982, pp. 55–56 & 85–88.
58 Placidus, 1798; later and in a reactionary sense, Müller, 1809, and in a liberal one Welcker, 1813; Aretin, 1824 ends this early series of using the term.
59 Bockenförde, 1969, pp. 53–54.
60 Mohl, 1832, p. 8 and Stahl, 1878, p. 137.
61 MacCormick, 1984, p. 65.
62 Kelsen, 1992, p. 314, reasserted by Troper, 1993, pp. 51–63, upon which the Belgian legal historian Caenegem, 1991, p. 185 can only dryly remark that here, 'the problems [...] start with the very word'.
63 *Grundgesetz* (1949), Article 28 (1).
64 Koetter, 2013.

to itself that it does not create and that it cannot violate'[65]—expresses Rousseau's live effect on *la culte de la loi*,[66] and stemming from that, the tradition of *le droit* and most important, of *la constitution* and the repulsion of the *gouvernement des juges* from pre-revolutionary times.[67] Interest was lacking for a long time because it had little or no distinct content.[68] However, Rousseau's tradition soon triumphed: In a democracy, law can be nothing more than an expression of *la volonté générale*, which has to take statutory form.[69] The basis, source, and root of this expression is the current constitution. This is complemented and confirmed, sanctioned and checked by the establishment of the Constitutional Council (1971) and by the indisputability of its official wording, declaring, 'The law as voted expresses the general will in so far as and to the extent it respects the Constitution'.[70]

What is expressed by these three legal traditions? First, we see the paradox that although due to random word usage, all three are historically marked by words that do not express what they say. Moreover, all three contradict the internal logic of language, since 'rule' stands here for either '*regula*' or 'authority'.[71] 'Rule of law' is not the sum of 'rule' and 'law', just as the *Rechtsstaat* is not summed up from *Recht* and *Staat*.[72] Regarding the third variation, an official clarification of the concept by the Council of Europe defines the content of *État de droit* not by either of the former terms, but as the primacy of the law [*la prééminence du droit*], noting that this concept is rarely used in the law itself. At most, it occasionally appears in professional literature only.[73]

Overall, the different roots of background thinking are clearly visible in the world map of laws. In the English development, Parliament, the king, and the judiciary had separate, sometimes conflicting, places. Although Parliament drafted the law, the precedent used in court practice is considered law. Therefore, the desire for the rule of law has meant not simply submission to the law, but extended justiciability, that is, the availability of courts to judge any conflict. In the German development, legislation has always defined the law, so progress has been made by subordinating the ruling power and thus the state to it. Finally, the French version, though a mirror translation from German, focuses not on the state, but as the culmination of Rousseau's *volonté générale* expressed in legislated form, in the imperativeness that any operation of the state is constitutional. However, the variety of approaches seems to converge in the need for the chance of ending conflicts by judgement from an independent body. On the

65 Duguit, 1923, ch. VI, § 88: 'L'État de droit«, p. 547; somewhat differently, cf. also Malberg, 1920–1922.
66 Burdeau, 1939, p. 9.
67 Zolo, 2007, p. 14.
68 Dyevre, 2010.
69 Rousseau, 1762, vol. II, ch. 6, para. 6.
70 Décision n° 85-197 DC du 23 août 1985 in https://www.conseil-constitutionnel.fr/decision/1985/85197DC.htm, para. 27.
71 According to https://www.etymonline.com/word/rule, both meanings are known from the beginning of the 13th century.
72 Flores, 2013, pp. 77–101.
73 Jurgens, 2007, B-5 resp. Appendix I, I-b.

Anglo–American side, this is justiciability for both power representatives and individuals, and on the German–French side, this is guaranteed by a separate body entitled to review the constitutionality of the acts by which the state is operated.

At a basic level, therefore, although considered that in its origin, the underlying ideal may have been conceived by the English in the judiciary, while the French and German may have been inspired by their written constitution,[74] there is some commonality. Specifically, for a good century in England, Dicey voiced the basic expression of both pertinent claims.

One is the availability of state rules that are formally capable of operating and enforcing law and order, as well as the law's normative force binding both the state and its population, that is, the primacy of law ensuring both address subordination. Nobel Prize-winner economist von Hayek gave a classic summary of this at the end of the Second World War: 'Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'.[75] The past Chief Justice of England used a similar tone: 'The core of the existing principle is [...] that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.[76]

The other is justiciability, that is, the availability of an independent decision-making forum for practically all possible cases and conflicts. In Germany, there is clear reference to judicial review, since the current content of the *Rechtsstaat* is provided for by the Constitution and its protection ensured by the *Verfassungsgerichtshof* in reviewing the constitution. In France, the discursive path led straight from the *contrat social* to *la volonté générale*, to its embodiment in *la constitution*, and consequently, from the need for *constitutionnalité* to effectively controlling it by the *Conseil constitutionnel*.[77]

Assuredly, 'The first necessary and inescapable desideratum of the rule of law is an independent judiciary'.[78] Currently, this is accepted and widespread not only in the United States, but also in Western Europe and elsewhere. Thus, the real issue is no longer the fact of it,[79] but of how to find and determine the extent of adequate control. This is

74 Wennerström, 2007, pp. 60–61.

75 Hayek, 1994, p. 80.

76 Bingham, 2007, p. 69.

77 Interestingly, we arrive at the same result if we approach it from a negative side, starting from the reason the ideology of the rule of law leaves Asia insensitive. Hager, 2000, p. 2 answers that it would be a foreign imposition upon them, being 'a reflection of the American bent for legalism and litigiousness'.

78 Sellers, 2016, p. 10.

79 Or, as the Prime Minister of Slovenia explained in an open letter to the President of the European Council on 17 November 2020—https://www.gov.si/assets/PV/November-2020/Letter-of-PM-Janez-Jansa-to-the-PEUCO-Charles-Michel.pdf—'By definition, "the rule of law" means that disputes are decided by an independent court and not by a political majority in any other institution'.

merely (we would say: again) the need for balance, namely that justiciability—which is used to gain increasing ground at the expense of various democratic representative institutions, that is, of further restrictions on popular sovereignty—shall not degenerate into juristocracy or judgeocracy, or perhaps the finality of the constitutionalisation of rights and judicialisation of politics.[80]

The dilemma in *scientia iuris* has been over for more than half a century, whether or not there are more layers added to the notion of rule of law beyond *one*, the availability of duly posited law, and *two*, the state's subordination to it, and in addition to *three*, justiciability. Only if the question arises at all—sharing the view that 'the rule of law is a multifaceted and layered concept' [81]—the distinction between their strata is usually made between formal and substantive, or in the English language culture, thick and thin.

It is easy now to recall my visits to Oxford, when in the first half of the 1990s I was able to talk to perhaps the most influential leaders of both directions in physical proximity to one another, namely Joseph Raz, who narrowed the concept to formalism, and Ronald Dworkin, who needed it to be saturated with extra content. The former correctly argued that this concept is not about what is good (e.g. the public good, with the political and legal conditions thereof, including their desirable order and institutionalisation), since then it would be redundant. Moreover, such a demand would presuppose 'propounding a complete social philosophy'.[82] This view is fairly general,[83] including the British Supreme Justice's professional creed at the turn of the millennium: 'Law should be accessible, clear and predictable; Questions of legal right and liability should be decided by application of the law; The law of the land should apply equally to all, except when objective difference requires differentiation; Public officials should exercise their powers in good faith, and not exceed their powers; The law must protect fundamental rights; A method should be provided, at reasonable cost, to resolve civil disputes; Adjudicative procedures must be provided by the state should be fair; The rule of law requires the state to comply with its obligations in international law'.[84] Notwithstanding, current liberalism still proclaims itself as the mainstream. As it advertises, the rule of law is not a 'rule-book', but a 'right-book',[85] which it attempts to fill with content taken from the fields of either human rights or judicialisation.[86]

Thus, the intentions of 'improvement' may emerge, and various previously proposed resolutions, no matter how exaggerated, uninterruptedly exceed one another in

80 Cf. Varga, 2019, pp. 192–214.
81 Lautenbach, 2013, p. 211.
82 Raz, 1979, p. 211.
83 See, as a classic in developing the internal technological minimal needs of law, Fuller, 1964; and in outlining another ideal, Bobbio, 1971, pp. 243–249; or MacCormick, 1984; Summers, 1988, pp. 154–161 and Summers, 1993, pp. 127–142; and last, the original classic in reducing rule of law to 'rule of rules', Scalia, 1989, pp. 1175–1188. Cf. Atienza, 1989, pp. 385–403; Borneman, 2007, pp. 40–41; Heydon, 2011, pp. 19–22; and Ekins, 2011, pp. 165–166.
84 Bingham, 2007.
85 Dworkin, 1978, pp. 259–287, reasserted by Craig, 1997, p. 479.
86 Jurgens, 2007, Appendix I, I-c-3.

an unceasing priority competition. This must lead to the free mixing of any desire with anything else, and ultimately, albeit with the intention of saying everything, proceed to the stage of saying nothing.[87] 'Sacrificing too many social goals on the altar of the rule of law—asserts Oxford's authority—may make the law barren and empty'.[88] The other limiting position? 'Elided with justice, rule of law becomes an empty vessel into which each person pours his or her hopes for a better tomorrow'.[89] However, as is usually the case, as soon as a flood[90] or the free dreaming of the arrival of a new golden age is indeed to begin,[91] the temptation of the gluttonous sphere always reappears: kneading itself until it bursts. This is because 'the "catalogue of rights" is constantly open to inflation by means of anomic accumulation through successive "generations" of rights or normative interpolations arising out of mere factual circumstances'.[92]

In addition, even the infinite path to the inclusion of a full social policy is in advance paved by accidental considerations, because as soon as any part of the rule of law project encounters sympathy, the surplus act of providing both an easy environment for it and the conditions for the community to live it becomes the express duty of the state to produce them in due time. This is because only the words are abstract—warns an author. However, the rights we propose to substantiate the words are no longer abstract entities: they are from this moment life pieces. Therefore, 'Any theory that understands rights outside the context of the community that gives them life will be blind to the meaning that those rights have and to implementing them in ways that can be effectively integrated into the everyday lives of people'.[93] Consequently, any effort to make it a reality must now include 'not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realised'.[94]

The idea of the rule of law naturally appears in international law as well, in its globalising development in the company of human rights as a quasi-religious supplement. The terrain is twofold. In today's cult, the issue of the need for and attempt at implementation of any kind of 'rule of law' appears in the workings of international organisations and international jurisprudence, while rule of law demands for the domestic law of states are most often also mediated by international organisations.

87 E.g. Sellers, 2016.

88 Raz, 1979, p. 229. Or, as quasi officially reasserted by Craig, 2007, p. 100, 'if the rule of law is taken to encompass the necessity for "good laws" [...] then the concept ceases to have an independent function'.

89 Peerenboom 'Varieties of Rule of Law' (2004), 1 and 13.

90 According to Carothers, 2006, p. 4, the rule of law should 'enshrine and up-hold the political and civil liberties that have gained status as universal human rights over the last half-century'.

91 E.g. Selznick, 1999, pp. 21–38 and Bedner, 2010, pp. 71–72.

92 Danilo Zolo, 2007, pp. 38.

93 Stewart, 2004, p. 7.

94 *Declaration of Delhi* (1959) https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf. Subsequent interpretation—Lautenbach, 2013, p. 23—links the expectation of genuine implementation to an earlier commitment to involved values.

The applicability of the rule of law to the domain of international law, and to its actors and acts, may be an interesting topic, since such an extension is in principle fully justified. Moreover, the search for the common root idea of the rule of law in justiciability also seems structurally conceivable in the international arena.[95] However, as sovereign states are the subject carriers of international law, it is difficult in general to imagine an appellate or arbitral forum capable of judging the stand of the rule of law concerned and of the global powers in particular, because the judiciary is part of what any rule of law control must address. However, if this is the case—because logically, anything else would not be conceivable—we must also rethink our answers to the English, German, and French versions. In principle, this objection applies to all domestic regimes.

It is clear from the English development that there may have been a creative antagonism between possible royal tyranny and a court that has always been considered independent, a division that may have had another bipolar version in Germany with the duality of the legislature and the executive powers. In both Germany and France, it may have taken decades (even after the need for *Rechtsstaatlichkeit* or *État de droit* was highlighted) to find the path to the special judicial control of constitutionality. According to this tenet, the applicability of the rule of law to a domestic state may long have been incomplete and partial from the outset, since it was only after a long time that a formula could be found for one branch or function of the state to be played off against another.

In the expansion of the concept, it is not singular states but international organisations and intellectuals as individual authors that excel. In the international arena, for example, the Secretary-General of the United Nations launched a campaign in honour of the rule of law at the turn of the millennium, with a definition attached to it. In his statement, venerable but devoid of legal force, he crammed into his notion everything he could bring from the various aspects of law and the state. The rule of law—he orated[96]—'refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency'.[97]

95 Lamm, 2010, pp. 297–303 shows strong affirmation regarding the implementation of decisions already made, but strong reservation in respect of the role of states in the decision-making process.

96 Annan, 2004, para. 6.

97 It is noteworthy that by smuggling 'international human rights norms and standards' into the proposed requirements, the Secretary-General is also to sanction hardly standardisable indefiniteness. Note that the UN Member States' individual interests differ from each other, but some may unite in occasional groups for either regional or historical reasons. This may be exemplified by the division between emitting and hosting countries in recent migration trends, singling out those left out from becoming target countries.

In contrast, the contemporary definitions issued by the World Bank[98] and Organization for Economic Co-operation and Development[99] are formal, reminiscent of Fuller's quasi legal-technological requirements of a rule's efficiency[100] formulated nearly four decades earlier. Last, not even the Venice Commission of the European Union, dedicated to 'democracy through law' clarifies the enigma of the rule of law beyond the former either in the general outline or when detailing the fundamentals.[101]

Regarding the European Union's perception of the rule of law,[102] initially, the EU position seems reassuring, both by its clauses in the Treaty and its judicial decision-making practice. Its court exhaustively determined the basis of the EU mandatory rules and availabilities of judicial review, as a Luxembourg decision ascertained three and a half decades ago that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty. In particular [...], the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.[103] The same reassuring effect may have been somewhat reinforced by the bipolarity of the construction and operation of European law, analogous to the solar and planetary systems, the true state of which at any time cannot be but the result of their mutual play.[104] Moreover,

98 'The rule of law prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy'. World Bank, 2004, pp. 2–3.

99 '[T]he rule of law is composed of the following separate fundamental elements, which must advance together: (1) The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution. (2) The law must govern the government. (3) An independent and impartial judiciary interprets the law. (4) Those who administer the law act consistently, without unfair discrimination. (5) The law is transparent and accessible to all, especially the vulnerable in most need of its protection. (6) Application of the law is efficient and timely. (7) The law protects rights, especially human rights. (8) The law can be changed by an established process that is itself transparent, accountable and democratic'. *Equal Access to Justice and the Rule of Law* OECD Development Assistance Committee (DAC) Mainstreaming Conflict Prevention (2005), quoted by European Commission, 2011, para. 27, p. 7.

100 Fuller, 1964. For the interpretation of its requirements—which are regardless of any morality, purely efficiency-oriented (i.e. instrumental and as such, purely technological) preconditions see Varga, 1970, pp. 449–450; cf. also Lyons, 1984, p. 77.

101 '(1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law'. European Commission, 2011, para. 37, then para. 41, 60, and also 15–16.

102 For an overview, see Pech, 2009.

103 E.C.J., April 23, 1986, *Les Verts v. Parliament*, 294/83, Rec. 1339, § 23.

104 Varga, 2012.

the analysis of the EU case law has led to a reassuring conclusion according to which in the possible simultaneous co-effect of centrifugality and centripetality, the bilateral cooperation of the EU centre(s) with any given member state is preferable to positional confrontation in the long run, prospecting 'most success if it is built upon existing national rule of law traditions'.[105]

Finally, the fact that some states in Central and Eastern Europe define themselves as rule of law formations in their constitutions, and that their constitutional courts may have ruled by propagating their understanding of the term 'rule of law' in a manner the population resent,[106] is relevant in the present context only as an illustration that the notion of the rule of law is powerless. The power of the rule of law can only rely on its overall societal support, owing to the society having experienced its blessings—in the manner that Dicey located its final strength in public opinion. Alternatively, formulated reversely, 'if [the ideal of the rule of law] is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny'.[107]

4. The Genuine Content

It is difficult to think of something that we know almost nothing about. It is hard to talk about something we want. The nonsense of such an enterprise becomes absurd when we try to qualify something in this way. Qualification would presuppose that we are holding a standard before us, and by measuring our subject, we will find out whether it meets it. However, if the standard is arbitrary, then our measurement will also be arbitrary—a false measurement, since it hardly expresses more than our like or dislike. No matter how normal such a procedure may be, something similar has been going on in the European Union for a long time. In this Union—that is, to those nations grown in undisturbed peace and prospered hopefully in wisdom since World War II—we joined with a sincere heart and sense of legitimate historical return after the fall of the dictatorship imposed upon. As an echo of the former and as a whip, this is also happening in

105 Lautenbach, 2013, p. 217. Note that it is questionable who, and on whose behalf, can judge or override the sovereign in matters of domestic law and rule of law in matters belonging to the preservation of constitutional identity. In a criticism of the latter, Rosenfeld, 2012, Abstract opines that '"Constitutional identity" is an essentially contested concept as there is no agreement over what it means or refers to'. It is only characterisable by 'an incurable lack of determinacy, which inevitably results in arbitrariness in its use [...]. [Its] practical use [...] is poised to weaken, if not undermine tout court, the process of European integration'. Cf. Fabbrini and Sajó, 2019, pp. 457–473 and Drinóczi, 2020, pp. 105–130 as well.

106 Cf., Varga, 1995 and Varga, 2008.

107 Hayek, 1960, p. 205. As expressed by Reynolds, 1989, p. 7, 'If people do not expect the rule of law and insist on it when officials move to compromise its effect, it is soon corrupted and replaced by rule of will'. This also includes recognising that the artificial meaning attributed to law cannot far precede what common sense suggests, because—as Pildes, 1996, p. 2058 claims—'laws will be self-defeating when they undermine social norms whose maintenance turns out to be necessary to make those very laws effective'.

Hungary: a hostile, embarrassing, openly blackmailing quarrel, and an immeasurable yardstick for all loudmouths everywhere—as if there were some hidden knowledge of the subject beyond what the mood of the word may suggest to the user.

When we let exact science speak, what may be its message has definite meaning in any language, because it is based on observation, verified connections, and precise definitions. Would it be different in law? Where anything we say is not a description or intellectual reflection, but prescription and formal expectation, a normative standard binding and secured by state coercion?

However, in this case, the question is now about the subject itself. What is often substituted, partly intertwined with other concepts, and sometimes downright redundant? In today's German public law, as mentioned, the 'rule of law' is nothing more than the guaranteed implementation into practice of the itemised requirements of the Basic Law. This is almost a pun on the term, similar to what is happening with human rights, where outsiders besiege the gates of the law by claiming their alleged 'human rights' (tacitly engaging everyone else in tolerating and perhaps also funding their alleged need). However, as soon as they will have succeeded, it will be indifferent in the law's normative sea why and how admission has taken place.[108]

The content of this object is not something that *is*, but what it *should be*, that is, not a simple mirror of something existing or prevailing, but a desire, an ideal.[109] Alternatively, this kind of perfection its confessors can only strive towards, since reaching it is impossible from the outset, and thus, only approaching it is possible.[110]

Now, back to our basic question: What are we talking about? In short, this is a set of rights and duties with values in the background, which are guaranteed to everyone as a chance vis-à-vis both the state power and any human fellow. Considering that it contains a variety of requirements, it is impossible to meet them simultaneously and with the same completeness and depth, as their competing support would lead to the extinction of the other. Thus, in any situation, consideration and balance with compromise are necessary for the relative totality of the requirements of the rule of law to be optimally approached and fulfilled.[111]

Thus, only provided we could use the concept as a benchmark, answering it would not be a simple 'yes' or 'no' even if considering it within a given section of time, culture, or tradition. Actually, it would presuppose a lengthy presentation, and a number

108 Cf. Varga, 2013a, pp. 1–15.

109 E.g. Oakeshott, 1983, p. 178. It is 'a legal ideal' for Lautenbach, 2013, pp. 23 & 210 and 'an aspirational ideal, pointing the way toward a more just world' for Peerenboom, 2004, pp. 1 & 13.

110 According to Hayek, 1960, p. 205, 'many of the applications of the rule of law are also ideals which we can hope to approach very closely but can never fully realize'.

111 It is a fundamental tenet of jurisprudence—Varga, 2002, pp. 219–232—that everything in law is relative and cannot have but a position ascribed to it by the law or its doctrine, or a function assigned to it by the conventions prevailing in the given society. This is why the president of the Supreme Court of Israel could uphold—Barak, 2015, pp. 6 and 119—that everything in law is 'dependent upon historical, cultural, religious, social and political contexts', condensed in such principles 'in state of constant conflict [...and which...] must be balanced'.

of cases analysed with balanced arguments and counter-arguments.[112] Therefore, we cannot speak of any sharp distinction between simple realisation and non-realisation, or of a more or less successful attempt at approximation in some kind of continuum,[113] or gradualness among intermediate states of the process. This is because the balance of the practice or the state of any given legal arrangement does not lie in semi-stages between the extreme points of a definite 'yes' or 'no', but in the impossibility of reaching a resolute answer. Therefore, we need to know that in real-world concrete situations it is compromise characterisations and not complete sets of features attributed to this concept[114] that are to be met. Essentially, what matters is the kind of compromise in the search between different notional directions, contents, and mutually extinguishing messages made, or simply, what is their ethos and value-orientation? This is what cannot be answered in a short way.[115]

Increasingly, the content itself is most often mixed and freely expandable. The main part of the notion of the rule of law is undoubtedly the proper formality and observance of the law, which is often supplemented with substantive content. Thus, it is filled with overarching core values blending in with democracy, distribution of power, human rights, and the like.[116] Therefore, the development of the German tradition, *Rechtsstaat* and *Rechtsstaatlichkeit*, came eerily close to the doctrine on the forms of the state [*Staatsformenlehre*] in continental Europe, almost as a developmental part thereof.[117] However, the more generalised it is, the more it loses its distinctiveness from others, and thus the meaning of its use.

112 In these circumstances, should we consider it an honour that out of a population of 520 million, the European Union entrusted a Dutch person with no learned profession (cf. https://en.wikipedia.org/wiki/Judith_Sargentini) to judge Hungary regarding her rule of law?

113 Gowder, 2016, p. 26 writes that 'The rule of law is a continuum, not a binary: states can satisfy it to a greater or lesser extent'.

114 Also practically nearly to all concepts, except those schematically projected to be found geometry and mathematics, for example.

115 As the German Constitutional Court has decreed, any situation can only be judged by considering all circumstances: 'dieser Verfassungsgrundsatz bedarf vielmehr der Konkretisierung je nach den sachlichen Gegebenheiten, wobei fundamentale Elemente des Rechtsstaates und die Rechtsstaatlichkeit im ganzen gewahrt bleiben müssen'. 1BVL14/76 [Urteil vom 21.06.1977] & https://openjur.de/u/60105.html, para. 193.

116 The Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) stipulated in para. 3 that 'democracy is an inherent element of the rule of law'. https://www2.ohchr.org/english/law/compilation_democracy/csce.htm, with Jurgens, 2007, para. B/5 adding human rights to these two components, thereby producing a 'trinity of three concepts'. This is why Chesterman, 2008, p. 361 explicitly admitted that 'the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies'. Moreover, resembling the colonial era, promoting the rule of law can easily turn into an act of imposing one's own law, involving 'a fairly complete vision of what society is and how it should look', which is also to be borrowed by the target country. Humphfreys, 2010, xx, exposed by Humphfreys, 2012, 475–510.

117 E.g. Tiedemann, 2014, pp. 170–192. It is no coincidence that at a time preceding the overwhelming rule of law boom in the West, socialist literature in Hungary—Sztodolnik, 1963, pp. 143–163; Péteri, 1973, pp. 309–316; Takács, 1986, pp. 521–530; Ficzere, 1988, pp. 105–111—treated the issue as one of the developmental aspects of the doctrine of the state [*Staatslehre*].

What does it cover? This is an ideal conception in the civilisational self-ennoblement of man on the terrain of what we project to and expect from our law and its practice. This is thought to be based on the state in Germany, concretised as case law by the judiciary in England, with emphasis on the constitution in France, and developed from their original—primitive—stands into forms according to what and how countries, peoples, and cultures learn from each other in random encounters. Its name stems from the time it was first described, and understood. Once some nations gain hegemonic position, they are induced to proclaim their own version extended to a universal pattern for mankind.

The idea of the rule of law is not a type of constructed abstraction. It has never been or has become anything other than what has been shaped through value-sensitive responses to challenges posed to the laws and cultures of the countries concerned: this way in England, and that way in the Netherlands and Italy. While it may have been polished through cultural contacts and may have become more common under a common name, it remained only a demand or signpost: a medium for the collection of possibilities and paths of the civilisational self-ennoblement of the nations that demand it, and not an inventory or a complete catalogue of items.[118]

In addition, the concept has evolved in recent times in the swamp fight that characterises today's political moves. It is used in the legal literature as part of an over-abundant vocabulary. Mostly, it is a group marker expressing civilisatory progress. It could not have been used for anything else or more demanding, as it has never become an operational term in law. Perhaps this is an important word? Spanning 20th-century Germany, it is mentioned three times only among the one thousand most important historical documents, and never with any emphasis.[119] After the defeat of the Third Reich, the Basic Law of Bonn uses the word, but only to name the constitutional order of *Länder* and with no independent meaning: only those requirements already arranged in the Basic Law are assigned to it. This is why a constitutional court had to be established as the protector of *Rechtsstaatlichkeit*, the essence of which is already inherent in what is called constitutionality.

In post-World War II advancement, it played and continued to play a sublime role. The disgraceful blackmail via rule of law mantra serves to expand power. In our brave new peaceful world, owing to the prohibition of war, only occupying economic space and acquiring dominance through the capital market can come to the fore. Therefore, it will be launched worldwide to have a unified, transparent, and secure legal environment for international economic transactions, a common regime that can be mastered by easy routine. The best is to replicate one's own arrangement. Thus far, various acceleration and modernisation programs are spreading worldwide, especially to neglected

118 For Chesterman, 2008, p. 361, this 'political ideal' should be seen 'as a means rather than an end, as serving a function rather than defining a status'. It is astonishing that this recognition has only been formulated by a single author and as relating to the use of the notion in the international arena.

119 Altrichter (ed.), 2020.

landscapes. Moreover, even scholarship is helping this dissemination, developing a genuine theoretical trend to prove its interest-driven lies, saying there is a correlation between the rule of law and level of economic development and performance.[120] That tested in transnational economic relations continues in international politics.

In vain does life refute, as interest is stronger. These two gigantic organisations are currently doing this to feature their most spectacular deficits with respect to democracy and the rule of law. After all, the literature on the United Nations and European Union shows that they refrain from accepting external influences. With their institutional structure and strength set in, they focus on protecting their own game of power from any counter-arguability in law. From the beginning, they rigidify and petrify their own law making by securing it from any provocation to change. Regarding the EU, by 'shield[ing] its law from potential internal and external contestation, [t]his is precisely the opposite of what the classical understanding of the Rule of Law would imply'.[121]

Thus, let us expand theoretically what we have simply named the rule of law so far. Its character, direction, and ontological nature were illuminated three decades ago by an Oxford celebrity invited by the recent graduates of Bibó College,[122] who paradoxically called his audience to listen to common sense instead of scholarly books on the rule of law. For, he claimed, in their books, every nation of every age articulates idealisms filtered through their own hard-won experiences. Well, while knowing others is undoubtedly a respectable undertaking, every nation must first cope with its own task—the torturous question of how to deal with its own challenges so as not only to succeed in its cause, but also to serve its civilisational self-ennoblement. With our demand for the rule of law, we want a moral rise to be more humane and civilised, through and owing to it. We do not want a mystic mandarin above us who as in the first decade of our constitutional judiciary, may turn a symbolic hammer over our heads, making it impossible for us to meet national strategic priorities by falling victim to important matters of national progress. In short, therefore, as he explained, no claim to the rule of law can serve as a collective suicide pact.[123] Not only have we become clear in

120 The World Bank, 2004, p. 2 postulates 'the rule of law as a sine qua non of development', followed by among others, Dam, 2006, Haggard, MacIntyre, Tiede, 2008, pp. 205–234, and Gowder, 2016, p. 3. Mere coincidence is observed by Matsuo, 2005, pp. 59–70 and Haggard and Tiede, 2011, pp. 673–685. Anything of direct interdependence is refuted by Ozpolat, Guven, Ozsoy, Bahar, 2016, pp. 107–117. As to further positions, Nedzel, 2014, p. 289 remarks that '"Englishness" [...] has traditionally provided greater stability, greater protection for liberty, and incentives for economic development'. According to a particular position, Asia is keen to enter the path to achieving economic development but without adopting its corollary, the rule of law, which is viewed there as an alien construct threatening their identity. Clarke, 1998, pp. 28–44, and similarly Hager, 2000, pp. 2–5, Oshimura, 2000, p. 141, and Hong, 2000, p. 149.

121 Kochenov, 2015, p. 74; Lietzmann, 2004, pp. 19–30; for an overview, see Hegedős, 2020, pp. 19–21.

122 https://bibo.elte.hu/ was the workshop of those students of law in Budapest who founded the political party governing Hungary from 1998 to 2002, and with a two-thirds majority, from 2010 presumably to 2022, involving the early law-graduate elite.

123 For detail on John Finnis' message, see Varga, 2019, p. 198 and note 28.

this way, but it is also the Supreme Court of Israel, which as a state that takes its national strategic agenda seriously, does not forget the lessons of this.[124]

Consequently, the experience of a given place and time, its specific particularity, works in any of the variations to the rule of law. Once it is peculiar, it cannot be declared to have become universal, as anyone would try. What may be generalised from this is only the result of learning and interaction. Although we are learning to become somewhat more, the result will only be a newer, more advanced form of particularity.

It follows from this logic that when I fight for the rule of law, I assume an idea or the conventionalised core of something, which I contend is lacking. However, all monographs, textbooks, and kinds of practical guidance begin with the sober statement that nothing like this is available, only a handful of authorial opinions. From references to existing law and from the vast rule of law literature, it may be hoped that a common message will ultimately be unravelled. Think of what kind of magically tricky problem solving this insecurity assumes in a combat situation in the deadly moments of a battle from an operations commander who can only remember the nightmare when law professors used to teach him at the military academy. What is he expected to do? Should he, who lives the profession of military commands with 'yes' or 'no' answers, now chew on lists compiled here and there from a number of legal documents and self-honouring stands taken by authors whose works he had to toil through during his academic studies? Now, facing the dangerous moments of battle noise, he is expected to make a compass out of these himself, one he will be able to justify even when the smooth-faced headquarters of law may examine for years what he was forced to command in situations where each moment varied. This picture is absurd, but realistic. This is exactly what military law is about.[125] Its latest handbook also provides no template solution. In the field of the rule of law, any briefing can be a benefit 'rather as a starting place and a supplement for other materials and, crucially, individual thought', for 'the difficulty may well be in knowing *what* to read, rather than in finding *something* to read'.[126] One cannot hope any added message from the NATO-accredited international centre of rule of law at the Hague. 'Unfortunately, there is no common definition of the Rule of Law. Many IOs, NGOs, governments, lawyers and judges associations, policy think-tanks,

124 Barely a decade ago, Judge Asher Grunis declared—High Court of Israel (11 January 2012); cf., among others, https://www.jurist.org/commentary/2012/02/jabareen-zaher-israel-citizenship/—that 'Human rights do not prescribe national suicide'. Mitchell, 2012 writes, 'if Israel's commitment to human rights clashed with policies that seemed necessary for the preservation of its current identity, Israel could permissibly abrogate its rights commitments by enacting discriminatory policies'. Exactly the lack of such awareness in Hungary has made me wonder whether we are still a nation that can stand up for herself, or are we already lethargically tired of our difficult twentieth century. Cf. Varga, 2015, p. 62.

125 In the field of military law, the quest for rule of law first appeared at the turn of the millennium. This is evident in the fact that the US Department of the Army, 1994 ignores it, but the US Department of the Army, 2003 stresses its importance. For an overview, cf. Lewis, 2010, pp. 155–200.

126 Bowman and Child (eds.) (2015), p. vi.

and private foundations are engaged in promoting the Rule of Law and most of them view Rule of Law in different ways'.[127]

Perhaps not as drastically, but this is happening every day in the EU witches' kitchens of Brussels, Luxembourg, and Strasbourg, as well as in Venice.[128]

Generalising the situation, we could also say that everyone has some Jolly Jokers in their hands, and none of them will tell you in advance how much their card is worth. Maybe even they do not know. However, each will receive exactly as much of his card as he will announce when he strikes it.

For nearly a century and a half, it has been a familiar lesson from sociology and other social sciences that overdoing anything can turn into the opposite. As a classic example, the extreme pursuit of rationality can lead to irrationality and over-regulation to collapse ending in anarchy.[129] It is no coincidence, therefore, that such unbridled over-cultivation of the notion of the rule of law leads to burnout and exhaustion from within. In addition to those who expect world redemption from the cult of the rule of law, an increasing number— particularly from the United States—swear with bitterness that this once-hopeful concept has become a mere shell, a rhetorical chatter.

Law offers a special example to demonstrate how anything can be called anything, and as long as the legal effect of this designation lasts, this is undoubtedly so in the normative order. Let us remember that Roman law already 'knew' in what order members of a family died in a boat sunk at sea at any unknown place and time (of course, only in terms of inheritance). In classical Jewish law, a woman is sometimes a man, and vice versa, and the dog and cat might become equally substitutable in Islamic law. Of course, the legislator could have the power at any time to really determine—which has never been done anywhere—the criterion by reference to which a state can be called to account in the name of the rule of law. Either there is a definition of those facts that constitute a case of the rule of law, but in the latter alternative, we remain at the amorphousness of a *Mädchen für alles*. On the other hand, once defined, it would be a subject, that is, a posited position in law. For its writing into the law would *eo ipso* transubstantiate it—in the manner we exemplified by human rights, transforming in nature when acknowledged by the law.

In conclusion, it would be a mistake to assume a different conception of the rule of law behind the conflict of opinions between Brussels and Budapest. All we can see is that as a fake card player, one party plays Jolly Joker with cards without definite value, and so there is actually no card game, and the other only warns of this as not an insignificant circumstance. Clearly, when the latter assumed the values of the *rule of*

127 *Civil-Military Cooperation Centre of Excellence* (The Hague) in https://www.cimic-coe.org/branches/cic/cimic-innovation/advanced-cultural-competence-aac/rule-of-law/ (2012).

128 Or, 'In the context of the Convention, the rule of law is a multifaceted and layered concept. Yet, it is possible to distil a core contents of the rule of law from the case law, based on the frequency and consistency of the argumentations that are linked to the rule of law and the results that are obtained when the Court has interpreted the Convention in line with the rule of law'. Lautenbach, 2013, p. 211.

129 Cf., e.g. Schlag, 1998 and as a Harvard case study reviewed, Varga, 2013b, pp. 63–77.

law, État de Droit, and *Rechtsstaat* when she joined, it was done so by tacitly accepting their understanding at the time, which no one could regard or mistake as an ever-at-please-refillable blank frame. Agreeing today that I will not war from now on, it will no longer mean tomorrow that I will also pass on my family and property. A new situation could only arise if States Parties had both the intention and legal option to prescribe qualities that could now be held accountable with a degree of accuracy that could be ascertained as a European Union definition of the facts that constitute what the rule of law is. With this, a yardstick could be created, and a measurement could be possible and available, which regardless of the name, would be a different object from the one we have just tried to outline.

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