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ARTICLES

LEGAL IMPLICATIONS OF EU ECONOMIC GOVERNANCE FOR PUBLIC FINANCE IN A MEMBER STATE: THE CASE OF SLOVENIA

Rado Bohinc[1]

ABSTRACT

This research analyses the legal implications of the EU economic governance framework reforms for the public finance system of a Member State (MS).
In the article, we first present theoretical insights regarding the European model of economic governance. We discuss the questions of the economic sovereignty of MSs, the balance of economic and social goals, the democratic nature of procedures in relations between EU authorities and MSs, the application of EU law versus intergovernmental cooperation, legal sanctions for MSs, and violations of the EU fiscal rules, etc.
This article discusses the 10-year development and tightening of the legal framework of European economic governance with an analysis of the legal bases for the obligations of MSs in the European Semester (ES) process and the legal sanctions they suffer in the event of a violation of European rules. The timeline of the ES, in particular, is presented both by deadlines (months) and by documents that must be submitted for assessment by the MSs or those that they receive from EU authorities and bodies.
An analysis follows on the effect of the presented EU regulations on the development of an MS's legal order in the field of public finance - in this case Slovenia's. This analysis specifically focuses on the constitutional and legal framework of fiscal rules and the annual budget preparation and execution laws. The analysis shows the all-round conformity, even subordination, of the Member States' constitutional order and legislation on public finances to the European economic governance through the agreed process of the European Semester.

KEYWORDS

European economic governance
fiscal coordination
fiscal rule
European Semester

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economic sovereignty
budgetary and macroeconomic surveillance

1. Background

The reforms of European economic governance during the period 2011–2013, the amended rules of the Stability and Growth Pact (SGP),[2] and the Intergovernmental Treaty on Stability, Coordination and Governance (TSCG)[3] are currently (in 2023) undergoing intensive political and professional debate.[4]

The aim of this paper is to identify and assess the effect of the respective EU regulation on the legislative and policy processes in the field of public financial planning in MSs from the point of view of their economic and social sovereignty and the principles of proportionality and subsidiarity. The following hypotheses are checked during this research:

1. European economic governance, especially the ES, has produced enviable results in the past decade in terms of the coordination (mainly fiscal and monetary) of MSs' policies, although in many ways it has simultaneously pushed MSs into the position of executors of professional instructions and timelines of European officials and side-lined democratic processes; thus, the question of the economic (developmental) sovereignty of the MSs in relation to EU bodies arises.

2. The procedures and tasks arising from the ES are excessively burdensome for MSs and for the EU administration; simplification and reorientation of fiscal planning and action from the annual to the medium term are needed.

3. The EU deals mostly with economic policies (mainly fiscal and monetary) and fiscal balance in the MSs but neglects the sustainability and strategic planning of the EU's competitive position at the global level.

4. In terms of the importance and weight of the sanctions in the European economic governance system, fiscal criteria are far ahead; lately, social and sustainability aspects are in principle being taken into consideration, but they are not part of binding EU law and are therefore less strictly adhered to.

5. The reform of the European economic governance system must also include the 2023 Commission and Council proposals for more gradual paths and the

2 | The SGP was formed by the conclusions of the Amsterdam European Council of 16 and 17 June 1997, Regulation 1466/97, Regulation 1467/97, amended by Regulation 1177/2011, and Regulation 1175/2011. SGP– An Overview, Directorate-General for Internal Policies, Economic Governance Support Unit (EGOV) 30 September 2014. Hereinafter : Stability and Growth Pact – An Overview, 2014.

3 | Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also referred to as the TSCG, or simply the Fiscal Stability Treaty). Intergovernmental Treaty, 2 March 2012.

4 | In February 2020, the Commission published a communication entitled the Economic Governance Review, in which it reported on the extent to which the various elements of control, as introduced or modified by the 2011 and 2013 reforms, are effective in achieving its key goals, namely: sustainable public finances, comprehensive supervisory framework, closer coordination of economic policies, convergence of the economic development.

introduction of national medium-term (at least four-year) fiscal-structural plans. The duration of the medium-term fiscal structural plan could be extended if an MS commits to an eligible set of reforms and investments. A stricter enforcement regime and more control over the medium-term plans to ensure that MSs deliver on the commitments (economic, social, and sustainability) made in their medium-term fiscal-structural plans is acceptable. Sanctions must also apply to violations of social and sustainability goals. Treaty reference values of 3% of GDP deficit and 60% of GDP debt and the excessive deficit procedure based on a breach of the 3% deficit criterion should, despite critical views of the theory, remain unchanged.

The proposed amendments to the basic EU regulations (Regulation 473/2013[5], Regulation 472/2013[6]) tighten the fiscal discipline rules and at the same time introduce more individual treatment of MS; determine common budgetary time-frames for all euro-area MSs and rules for the monitoring and evaluation of MSs' budgetary plans by the Commission. In case of serious violations of the SGP rules, the Commission can request a revision of the plans. The regulation also requires euro-area MSs subject to an excessive deficit procedure to detail the policy measures and structural reforms needed to ensure an effective and sustainable reduction of the excessive deficit. MSs that have been affected or are threatened with serious problems related to their financial stability will be subject to enhanced supervision and financial assistance.

2. Methodology

The methodology of this research follows analytical, comparative, and partly historical research methods. In the parts dealing with how the relevant EU public finance and budgetary laws are implemented in an MS's legislation, a case method and comparative legal analysis are applied. In addition to the presentation and legal analysis of the rules on state debt and budget deficit, an overview of EU rules related to the ES follows, as well as some statistical data analysis. The relevant theoretical analysis of theory standpoints on public finance policy in the academic literature is a part of the research.

5 | Regulation 473/2013 of the EU and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the MS in the euro area.
6 | Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

3. European economic governance: a theoretical perspective

3.1. Key issues related to EU economic governance and national sovereignty

3.1.1. Economic sovereignty

The issue of sovereignty is one of the most complex and contentious issues in EU economic governance. It refers to a country's ability to exercise control over its economic policies, resources, and decision-making processes without external interference. The EU has developed economic governance that involves a mix of supranational, intergovernmental, and national-level decision-making. This has raised concerns among some MSs about the erosion of their sovereignty and their ability to control their own economic policies.

The EU's dominance in the process of the ES is obvious, and the issue of sovereignty appears to be a concern of MS. However, it must be taken into consideration that the MSs themselves, upon joining the EU, voted for the transfer of a part of their sovereign rights to the EU bodies, and some MSs even constitutionally defined the transfer of part of their sovereign rights to the EU (as, for example, Slovenia with an amendment to the Constitution in 2003).

Some MSs have raised concerns about the impact of EU economic governance on their national sovereignty and economic interests (economic nationalism). They argue that the EU's policies favour larger and more powerful MSs at the expense of smaller states, and that the EU's focus on market liberalization and competition has led to job losses and economic inequality. Stiglitz, for example, says: 'Sovereignty is at the root of challenges to the EU'[7], and states that the EU is an organization of sovereign nations that is asking those countries to relinquish their economic sovereignty to build a strong currency.

The EU's system of fiscal policy coordination has long been a source of tension. Some MSs argue that the EU's fiscal rules limit their ability to pursue their own economic policies, while others argue that greater coordination is necessary to prevent economic imbalances and crises. Some researchers[8] are of the opinion that today the need for fiscal rules is greater than ever.

3.1.2. Social and economic objectives

The economic and social policy coordination procedures that existed until 2010 were implemented independently of each other. The MSs therefore saw a need to synchronize the timetables of these procedures in order to streamline the process and to better align the goals of national budgetary, growth, and employment and social policies, while taking into account the objectives set at the EU level. Furthermore, there was a need to extend monitoring and coordination to broader macroeconomic and social policies.

7 | Stiglitz, 2016.
8 | Beetsma et al., 2018.

Theory evaluates the balance of planning economic and social goals very differently. For example, Crespy and Menz[9] argue that the Semester's governance architecture inherently prioritizes economic goals and actors over their social counterparts, as do de la Porte and Heins.[10] Bekker finds instead that this more integrated socioeconomic co-ordination process offers new opportunities for defending and 'mainstreaming' EU social objectives,[11] and observes that the European Semester's socioeconomic coordination process might be considered both economic and social. However, it is noted that the subsuming of social policy goals into economic cycles of governance does not necessarily result in the subjugation of social policy to economic imperatives and concludes that there is still an opportunity to achieve complementary modes of coordination.

One criticism put forward by many authors is the prioritization of economic objectives over social objectives in the ES. For example, Zeitlin et al.[12] observe that many critics argue that social policy has been largely dominated by economic policy and that economic policy actors have dominated the Semester process as well as the decision-making process.

We can agree that the ES established a coordination framework in which social policy coordination gained importance during the second half of the last decade.[13] Even though its social aspect has been criticized as being overwhelmed by the economic goals, there is increasing evidence that the Semester is undergoing progressive socialization, as it constitutes a new opportunity for social actors to further enter the process and seize their legitimate role,[14] even though the involvement of social players thus far remains mainly country-specific.

However, the need to implement legal rules and sanctions in the event of non-compliance with the agreed social and development recommendations (as well as recovery and resilience) remains. We can agree that the social aspects of planning only came into force after the adoption of the European Charter on Social Rights,[15] but it is indisputable that the social goals are far underestimated compared to the economic ones in the process of the ES. This is also because legal sanctions for non-compliance with mandatory recommendations refer only to violations of the rules on fiscal deficit and indebtedness, while the social aspect is governed by so-called soft law.

3.1.3. Democratic deficit

In theory, the question of respecting the democratic principles of decision-making arises in the context of strengthening the EU; according to these opinions, EU as an integration cannot succeed solely through intergovernmental

9 | Crespy and Menz, 2015.
10 | de la Porte and Heins, 2015.
11 | Bekker, 2015.
12 | Zeitlin et al., 2018.
13 | Zeitlin and Vanhercke, 2014.
14 | Vanhercke and Verdun, 2022.
15 | The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights.

cooperation and similar ways, without strengthening the powers of the EU bodies by changing EU primary law.

Bickerton et al.[16] point to increased European integration in these areas without a transfer of powers to supranational institutions, which they term 'new' inter governmentalism. Others[17] instead point to the emergence of a new supra nationalism, resulting from the enhanced role of the Commission and the ECB in the EU's post-crisis economic governance.

Theoretical views might turn into criticism of disrespect for the fundamental principles of democracy. Crum[18] has expressed concern that governance responsibilities have been shifted away from democratic institutions, such as parliaments, into the hands of unelected and unaccountable technocrats. Contrariwise, Alberto Miglio[19] is of the opinion that it was the EP, rather than the Commission, that pushed hardest for the inclusion of the Semester and RQMV in the Six-Pack legislation.

Zeitlin and Vanhercke note[20] that MSs frequently experience this as imposition from above.However, in their study, they note that although the Semester was largely driven by economic considerations when it was initiated, there has been a partial and progressive socialization of the ES.

It is difficult to support the position of a democratic deficit in the implementation of European economic governance procedures. The rules on these procedures have been adopted by MSs within the framework of generally accepted European democratic process of decision-making and are a part of European primary law. Another question is whether these rules, which presuppose waivers by MSs in the exercise of economic sovereignty, are consistent with the principles of modern democracy, such as sovereignty, subsidiarity, and proportionality.

3.1.4. Legal challenges

The EU's system of economic governance is also subject to legal challenges, particularly in relation to the balance of power between EU institutions and MSs. Some MSs have challenged EU decisions in court, arguing that they violate national sovereignty or infringe on their constitutional rights. Authors who have written on this issue include Weatherill and Bruno De Witte.[21]

The ES combines hard and soft (non-binding) law. Indeed, during the ES, there is coordination between the MSs that are not legally engaged and not forced to comply with its outcomes or its targets. Nevertheless, the ES also has a hard law component.

Within hard law, the processes of budgetary as well as macroeconomic assessments and recommendations put in EU Regulations or in treaties must be observed. That means that MSs can be subject to sanctions in case of non-compliance.

16 | Bickerton et al., 2015.
17 | Schmidt, 2016; Dehousse, 2016.
18 | Crum, 2017.
19 | Miglio, 2019.
20 | Zeitlin and Vanhercke, 2018.
21 | Wetherill, 2017; de Witte, 2008.

We can conclude that the first and the second pillars of the ES form the hard law, though the third pillar is dealt with in soft law.

3.1.5. Summary of theoretical views on European economic governance

The ES has evolved considerably since its creation in 2010 from purely reinforced monitoring of national budgets and reforms to drive convergence towards agreed binding standards, including in the social field. Verdun and Zeitlin[22] assess the Semester as already having reshaped the architecture of EU governance in ways that challenge established theoretical understandings by integrating the pursuit of social and economic objectives into an interactive cycle of deliberation between national and supranational actors.

We conclude that European economic governance undoubtedly strongly interferes with the relations between the EU and its MSs and justifiably raises questions of sovereignty and the democratic governance of the EU, as well as the balance of economic and social development. On the other hand, the coordination of economic policies through the ES contributes decisively to greater stability and balanced development in the MSs and in recent times has increasingly contributed to resilience, recovery, and sustainable development. However, European economic governance needs to be upgraded and its deficiencies eliminated, and above all to be simplified and democratically consolidated.

The key here is a balanced treatment of economic (fiscal, monetary, development) and social goals (following the UN SDG), which must also be reflected in legal sanctions. The EU must overcome the current approach where only fiscal and monetary rules are subject to binding rules and legal sanctions for MSs, while the social sphere is regulated solely by EU soft law.

4. EU legal framework of the European economic governance system

4.1. The objectives of the European Semester (ES)

The ES is the process of socio-economic policy coordination in the EU. Although it was initially mainly an economic exercise, the ES has evolved, integrating other relevant policy fields into the process, and is now a part of the EU's economic governance framework. During the ES, MSs align their budgetary and economic policies with the rules agreed at the EU level.

The key objectives of the ES are to contribute to convergence and stability in the EU and to ensure sound public finances. It aims to prevent excessive macroeconomic imbalances in the EU. Currently it is also a coordination mechanism to monitor the implementation of national recovery and resilience plans and to coordinate and monitor employment and social policies. Social goals are gaining in importance, although their realization is not sanctioned by EU law.

22 | Verdun and Zeitlin, 2017.

As already mentioned, the ES covers different fields of economic and social policy coordination such as fiscal policies (sustainability of public finances in line with the SGP), prevention of excessive macroeconomic imbalances, structural reforms (growth and employment), recovery and resilience reforms, and employment and social policies (the European Pillar of Social Rights). In addition to fiscal goals and macroeconomic balance, in the recent period, recovery and resilience related to exiting the epidemic and the energy crisis, as well as social goals, have come to the fore as key goals. The Recovery and Resilience Facility, as part of Next-GenerationEU 2014, was integrated into the ES framework.

The ES started out as budgetary cooperation among the EU MSs. It was created in a context of crisis in 2008 and adapted in 2021 in response to the COVID-19 crisis. However, it has evolved over the years with the gradual inclusion of social, economic, and employment objectives. ES is governed mainly by three pillars, which are a combination of hard and soft law.

The 2008 economic crisis revealed the need for stronger economic governance and better social policy coordination between the EU MSs. Enhanced economic and social policy coordination helped to prevent discrepancies and contributed to ensuring convergence and stability in the EU. The first ES cycle took place in 2011.

4.2. Legal framework of the ES: the three pillars

The ES was created under the legal basis of the so-called Six-Pack. In particular, the legal bases for the process are Arts. 121 and 148 of the TFEU and six legislative acts that reformed the SGP (the 'Six-Pack'). The SGP started in 1997 as the legal framework (based on primary and secondary EU law) that seeks to ensure sustainable public finances to contribute to the stability of the Economic and Monetary Union (EMU). It consists of two main building blocks: the preventive arm and the corrective arm.[23]

At present, the ES consists of three pillars: budgetary surveillance, macroeconomic surveillance, and socioeconomic coordination. In 2017, the scope of the ES was widened with the inclusion of a social dimension within the third pillar through the European Pillar of Social Rights.

Before 2010, the European economic governance system consisted of two pillars, budgetary surveillance after the adoption of the SGP in 1997, and socioeconomic coordination, initiated by the Lisbon Strategy in early 2000.

There is a fourth pillar based on financial solidarity (formed by different acts: the Two-Pack, the European Stability Mechanism, and the Fiscal Compact) which does not play a relevant role during the Semester because all the macroeconomic and budgetary processes that form its core are part of the three pillars.

In 2020, with the outbreak of the COVID-19 crisis, the ES requirements were simplified. During the 2020 round of the ES, the main steps basically remained the same, but some measures were made more flexible for the MSs. In contrast with other years, the 2020 ES recommendations mainly focused on broad areas that were mostly related to the health crisis, such as investments in healthcare,

23 | Stability and Growth Pact – An Overview, 2014.

preservation of employment, research, and development, and the preservation of the single market.

4.2.1. Budgetary surveillance (first pillar)

Budgetary surveillance was strengthened with the legislative acts reforming the SGP. Regulation 1466/97[24] (the preventive arm of the SGP) set out the rules covering the content, submission, examination, and monitoring of Stability Programmes and Convergence Programmes as part of multilateral surveillance by the Council. The aim was to prevent the occurrence of excessive general government deficits at an early stage and to promote the surveillance and coordination of economic policies. Each Member State had to submit to the Council and Commission information necessary for the purpose of multilateral surveillance at regular intervals. It was replaced by Regulation 1175/2011[25].

Regulation 1467/97 (the corrective arm of the SGP)[26] set out the provisions to speed up and clarify the excessive deficit procedure; the objective was to deter excessive general government deficits and, if they occurred, ensure their prompt correction. According to Regulation 479/2009[27], MSs report to the Commission (Eurostat) their planned and actual government deficits and levels of government debt twice a year (before 1 April and before 1 October). MSs inform the Commission (Eurostat) which national authorities are responsible for the excessive deficit procedure reporting.

Finally, Regulation 472/2013 strengthened the economic and budgetary surveillance of the MSs (in the euro area). It lays down provisions for strengthening the economic and budgetary surveillance and for enhanced economic policy coordination of the euro-area MSs which are threatened with serious difficulties or which request or receive financial assistance.

Regulation (EU) No 473/2013 sets out provisions for enhanced monitoring of budgetary policies in the euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the ES. This was done by the ES, as established in Art. 2a of Regulation 1466/97, with a common budgetary timeline and by the procedure for the prevention and correction of excessive macroeconomic imbalances, as established by Regulation 1176/2011.

24 | Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.
25 | Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.
26 | Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.
27 | Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community.

4.2.2. Macroeconomic surveillance (second pillar)

The macroeconomic surveillance created by the Six-Pack relates to the six regulations and the directive in the field of fiscal policy. Regulation 1173/2011[28] set out a system of sanctions aimed at enhancing the enforcement of the preventive and corrective parts of the SGP in the euro area. Regulation 1175/2011 amends Regulation 1466/97 on the strengthening of the surveillance of budgetary positions; Regulation 1177/2011[29] amends Regulation 1467/97 on the excessive deficit procedure; and finally, Directive 2011/85/EU concerns the requirements for the budgetary frameworks of the MSs.[30]

The next two regulations relate to macroeconomic imbalances: Regulation 1176/2011[31], covering all EU MSs, sets out detailed rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union. Regulation 1174/2011[32] lays down a system of sanctions for the effective correction of excessive macroeconomic imbalances in the euro area applied to MSs whose currency is the euro. The regulation focuses on the possibility of sanctions and other procedures for enforcement of the required 'corrective action plan', to satisfy the EIP recommendation from the Council.

In addition, Directive 2011/85/EU lays down detailed rules concerning the characteristics of the budgetary frameworks of the MS. Those rules are necessary to ensure MSs' compliance with obligations under the TFEU with regard to avoiding excessive government deficits.

4.2.3. Socioeconomic coordination (third pillar)

The application of Regulation 1176/2011 observes Art. 152 of the TFEU, and the recommendations issued under this Regulation in respect national practices for wage formation. This Regulation also takes into account Art. 28 of the Charter of Fundamental Rights of the EU.

The socioeconomic coordination was strengthened by the Euro Plus Pact[33] that came into force on 13 December 2011. Following the proclamation of the European Pillar of Social Rights in 2017, the ES also provides a framework for coordinating and monitoring MSs' efforts in delivering on the pillar. The pillar sets out 20 key principles for a strong social Europe in the fields of equal opportunities, access to

28 | Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.
29 | Regulation 1177/2011 amending Regulation 1467/97, on speeding up and clarifying the implementation of the excessive deficit procedure.
30 | Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.
31 | Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances.
32 | Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.
33 | The Euro-Plus Pact (or Euro+ Pact, also initially called the Competitiveness Pact or later the Pact for the Euro) was adopted in March 2011 under the EU's Open Method of Coordination as an intergovernmental agreement between all MSs of the European Union (except Croatia, Czech Republic, Hungary, Sweden, and the UK).

the labour market, fair working conditions, social protection, and inclusion. The ES also includes an assessment of how MSs are performing on the UN Sustainable Development Goals (SDGs),[34] although there are no sanctions for not following the SDGs.

4.2.4. Fiscal Pact

At the European Council meeting in March 2012, all MSs (except the United Kingdom and the Czech Republic) signed the intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). The Fiscal Pact became a part of EU law in 2018.

The treaty defines a balanced budget as a general budget deficit not exceeding 3.0% of the gross domestic product (GDP), and a structural deficit not exceeding a country-specific Medium-term Budgetary Objective (MTO). The Fiscal Pact envisages the incorporation of the 'golden rule' of a balanced budget with a structural deficit floor of 0.5% of GDP (if public debt is below 60% of GDP, this floor is 1% of GDP) in national legislation and possibly in the constitution ('debt brake').

There is a legal remedy in the TSCG. If an individual MS does not implement this rule properly, other MSs can initiate proceedings against it before the Court of Justice of the EU. Additional provisions include the automatic triggering of a correction mechanism and stricter rules for countries in excessive deficit procedures. Financial assistance within the framework of the European Stability Mechanism will only be provided to MSs that have signed the TSCG.

4.3. General withdrawal clause of the SGP, the 2022 recovery, and resilience facility

The COVID-19 crisis in 2019 led to a decline in economic activity in the EU. In March 2020, the Council used the general withdrawal clause under the SGP for the first time to give MSs room to take emergency measures with major budgetary consequences.

By using the general withdrawal clause, an MS that is in preventive action has the possibility of temporarily withdrawing from the adjustment path to reach the medium-term budgetary objective, provided that this does not jeopardize fiscal sustainability in the medium term.

If the MS is in the corrective phase, in accordance with the clause, the Council may adopt a revised fiscal policy on the recommendation of the Commission. In short, the general withdrawal clause does not hold back the procedures of the SGP but allows the Commission and the Council to deviate from the budgetary requirements that otherwise apply.

In March 2021, the Commission adopted a Communication one year after the COVID-19 outbreak with the following statement: 'A decision on whether to deactivate or continue to apply the general opt-out clause in 2022 would have to be adopted on the basis of a comprehensive assessment of the state of the economy,

34 | The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030.

which would be based on quantitative criteria. A key quantitative measure would be the level of output in the EU or euro area compared to pre-crisis levels'[35].

In response to the COVID-19 crisis, the EU adapted its socioeconomic governance and decided to provide financial support to all MS in order to help them recover. In that context, as a key tool of the NextGenerationEU Plan,[36] the Recovery and Resilience Facility emerged as a form of financial support for MSs through loans and grants. The ES became 'the main institutional vehicle' for the Recovery and Resilience Facility, and they now encompass each other.[37]

In order to use the financial support, the Recovery and Resilience Facility requires from the MS plans and strategies with reforms and public investment projects. The main ES tools used to integrate the Recovery and Resilience Facility are the Country-Specific Recommendations and the National Reforms Programmes, facilitating the elaboration of plans in order to assess the reform trajectories.[38] In addition, the ES timeline is used.

Although the use of the ES as the tool for the COVID-19 recovery plan faces criticism, it is also seen[39] as an opportunity for increased effectiveness of the ES, as this process makes the soft governance dimension of the ES harder.

The Commission classified the four main dimensions of the 2022 ES, integrating the Recovery and Resilience Facility:[40]

1. National Reform Programmes and Stability/Convergence Programmes—as usual, MSs must submit their economic and fiscal policy strategies, this time taking into account a new dimension of the National Reform Programme, which includes bi-annual reporting requirements under the Recovery and Resilience Facility.
2. Publication of streamline country reports – country reports include a general overview of their economic and social development, the difficulties that states are facing, and an analysis of their resilience.
3. Proposals for country-specific recommendations (CSRs); these recommendations highlight the in-depth analyses to identify the requirement of policy analyses.
4. Continued integration of the SDGs into the ES, the Commission is working to integrate the SDGs into the European Semester, and annual SDG monitoring reports including information on each State's progress are available from all the MSs.

4.4. European Semester Timeline

The ES runs from November to June and is preceded in each country by a national semester running from July to October in which the recommendations

35 | Communication from the Commission to the Council, One year since the outbreak of COVID-19: fiscal policy response, Brussels, 3.3.2021, COM(2021) 105 final.
36 | The Next Generation EU (NGEU) fund is a European initiative to provide financial support to all MS to recover from the adverse effects of the COVID-19 pandemic.
37 | EC 2021, Recovery and Resilience Facility.
38 | Vanhercke and Verdun, 2021.
39 | D'Erman and Verdun, 2023.
40 | EC 2022, Recovery and Resilience Facility.

introduced by the Commission and approved by the Council are to be adopted by national parliaments and construed into national legislation.[41]

The timetable for adopting the budget documents of an MS is very demanding; it is divided into four periods, starting with autumn and then is followed by the winter, spring, and summer forecasts. The political and professional bodies of the EU and MSs cooperate intensively in all periods. It is a huge organizational, professional, and political task that subjects the adoption of national budgets to compliance with EU rules (e.g. regarding indebtedness and budget deficit) and recommendations. The process is logistically and substantively complex and should be simplified or at least reduced in time.

In the preparation of the CSRs, Country Teams are led by the Secretariat-General of the Commission with contributions from desk officers and several EU officials from the relevant Directorates-General of the Commission. It must follow a deliberative and evidence-based process. At the national level, the Commission engages ES Officers (ESOs), who are economic policy experts charged with the task of bringing the Semester closer to national stakeholders by overseeing the implementation of the CSRs, feeding the Country Teams with CSR analysis, national insights and sentiments, and sometimes explaining complex details of EU economic governance to the national stakeholders.[42] When the draft has been formulated by the Country Teams, it is then submitted to the Directors-General of the Secretariat-General of the European Commission, Directorate-General for Economic and Financial Affairs, Directorate-General for Employment, Social Affairs and Inclusion, and Directorate-General for Taxation and Customs Union for discussion, and finally sent to the college of commissioners for approval.[43]

4.4.1. October, submission of MS draft budgetary plans, EU documents

The ES begins with the submission by the Eurozone MSs of their draft budgetary plans. Before the budget of each MS is debated in its national parliament, the Commission needs to assess it according to numerous elements, such as the macroeconomic and budgetary situation of the country. The following EU documents are produced in this period:

1. The Annual Growth Survey is a Communication from the Commission to the other EU institutions, a document of the Autumn Package, which analyses the most recent trends in terms of economic and social policies.

2. The Alert Mechanism Report identifies and addresses the risks of macroeconomic imbalances in accordance with Arts. 3 and 4 of Regulation 1176/2011.

3. The Joint Employment Report (Art. 140 of the TFEU) outlines the social and employment achievements or developments. The MSs are monitored by a scoreboard of indicators set up in the European Pillar of Social Rights (Council Decision 2018/1215[44]).

41 | Papadopoulos and Piattoni, 2019.
42 | Munta, 2020.
43 | Natali and Vanhercke, 2013.
44 | Council Decision 2018/1215 of 16 July 2018.

4. The Commission's recommendation for the euro area prescribes measures that the Eurozone MSs must implement for the functioning of the single currency area.

5. The Commission's opinion on draft budgetary plans assesses the conformity of the draft budgetary plan of each MS in line with the fiscal and budgetary rules (first pillar). It also gives an overview of the implementation of each MS regarding the CSR.

4.4.2. November, overall EU recommendations, EU opinions on the draft budgetary plans

The Commission releases three documents which explain and demonstrate the overall situation of employment, social priorities, and economic stability inside the EU. It also delivers overall recommendations for the Eurozone and a specific opinion on the draft budgetary plans of the Eurozone countries.

4.4.3. December and January, Council recommendations, adoption of budgets

In December and January, the Council adopts the recommendations on the economic policy of the euro area based on the Commission's recommendation and conclusions on the Alert Mechanism Report and the Annual Growth Survey. In December and January, the national parliament of each Member State adopts its budget.

4.4.4. February, March, Country Reports, Council priorities

In February, the Commission publishes its Country Reports, which underline the economic situation and forecasts for each State and its progress regarding the implementation of the CSRs addressed by the Council in the previous years for the country. The Country Reports are important for MSs for the preparation of their National Reform Programmes as well as their Stability or Convergence Programmes. In March, the Council lists the broad economic priorities that need to be adopted by the MS. These guidelines allow MSs to develop their Stability Programmes (for euro-area MSs) or Convergence Programmes (for non-euro-area MSs) and their National Reform Programmes.

4.4.5. April, May, National Reform Programme, Stability Programme

In April, each MS sends two documents to the Commission and the Council: the National Reform Programme (a detailed project of a country's economic reforms) and the Stability Programme (for Eurozone countries) / the Convergence Programme (for non-Eurozone countries; stating the orientation and the objectives of its budgetary policies for three years, the planned deficit, the level of indebtedness, and some macroeconomic scenarios).

In May, the Commission publishes and sends to the Council its proposal of recommendations in view of the adoption of the CSRs (the macroeconomic, fiscal, and budgetary reforms that need to be taken). These recommendations need to be followed and implemented by the MS. The CSRs are drafted after a thorough assessment of the progress made from the previous year's CSRs, and a detailed analysis of the National Reform Programmes and Stability or Convergence Programmes.

4.4.6. June and July, Country-Specific Recommendations

In June and July, the Council, after discussions in different formations (Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), and advisory bodies such as the Economic Policy Committee (EPC), the Employment Committee (EMCO), and the Social Protection Committee (SPC)) formally adopts the CSRs; the MSs are supposed to take these recommendations into account in their national decision-making and in the next year's national budget.

As this makes clear, the ES has a very tight schedule in terms of content and time, which MSs strictly follow; there is almost no room for manoeuvre. All national budget procedures, dates, and main restrictions (fiscal deficit, public debt) are, so to speak, prescribed from above, so criticism of the encroachment on the development autonomy of the MSs is justified.

At the same time, this process brings great long-term benefits for MSs, as it makes it easier for them to overcome periods of crisis or less responsible governments.

5. Legal consequences in case of the violation of the EU fiscal rules

5.1. Legal basis for the European System of Financial Supervision (ESFS)

The objective of the ESFS[45] is that the fiscal policy of the EU is designed with the aim of establishing a solid and efficient framework for the coordination and control of the fiscal policies of the MSs. The amended framework was designed taking into account the shortcomings of the original design of the EMU and with the aim of strengthening the guiding principle of sound public finances, set out in Art. 119(3) of the TFEU.

The question that arises in this regard is whether the ESFS, with its mechanisms that encroach on the jurisdiction of the MSs, goes too far and already represents a systemic obstacle to the fiscal sovereignty of the MSs and thus interferes with the constitutional position of the MSs in relation to the EU. In the following, we will pay attention to precisely these aspects and the effects of the functioning of the ESFS as an important part of the economic governance of the EU MSs.

The legal basis for the ESFS are Arts. 3, 119 to 144, 136, 219, and 282 to 284 of the TFEU and protocols nos. 12 (on the excessive deficit procedure) and 13 (on convergent criteria) attached to the Treaties.

However, the rules are becoming increasingly detailed and increasingly encroach upon the procedures, policies, and criteria of fiscal decision-making

45 | The ESFS was introduced in 2010 and became operational on 1 January 2011. The ESFS consists of the European Systemic Risk Board (ESRB), the three European supervisory authorities (ESAs) – namely the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) – the Joint Committee of the ESAs, and the national supervisors.

of the MSs. Secondary EU legislation specifies more precisely how the rules and procedures of the TFEU are to be implemented. The amended SGP provides the main instruments for controlling the fiscal policies of MSs (preventive part) and reducing excessive deficits (corrective part). With the strengthening of control over the budgets of the MSs and the implementation of economic policies, the sanctioned implementation of the rules on excessive deficit procedures already strongly interferes with the fiscal independence determined by the legislation of the MSs.

Such coordinated economic governance and monitoring increases the effectiveness of the implementation of national Recovery and Resilience Plans. In this connection, it is justified to ask what should prevail in the balance of values: fiscal sovereignty versus the greater individual and joint efficiency of the MSs and the EU. In addition, the question arises as to whether disciplining countries by ordering additional coordination and additions to their documents and even financial sanctions is appropriate from the point of view of the constitutionally determined position of the members in the community.

5.2. Alert mechanism

Regulation (EU) No 1176/2011 sets out the alert mechanism established to facilitate the early identification and the monitoring of imbalances. The Commission prepares an annual report containing a qualitative economic and financial assessment based on a scoreboard with a set of indicators. The report contains an economic and financial assessment putting the movement of the indicators into perspective that draws, if necessary, upon other relevant economic and financial indicators when assessing the evolution of imbalances.

The annual report identifies MSs that the Commission considers may be affected by, or may be at risk of being affected by, imbalances. The Commission transmits the annual report to the EP, the Council, and the European Economic and Social Committee.

As part of the multilateral surveillance in accordance with Art. 121(3) of the TFEU, the Council discusses and carries out an overall assessment of the Commission's Annual Report. The Euro group discusses the report insofar as it relates to MSs whose currency is the euro.

The Alert Mechanism Report is an overview of macroeconomic developments in individual EU MSs. Based on this report, the Commission may decide to conduct an in-depth review of the situation in individual countries in which there is a high risk of possible macroeconomic imbalances. Such reviews make it easier to determine whether there are any macroeconomic imbalances and, if so, to accurately determine their nature and extent. In addition, the Commission can make policy recommendations to MSs based on reviews.

In the case of significant deviations from the adjustment path to achieve the medium-term budgetary objective, the Commission sends a warning to the MSs concerned in accordance with Art. 121(4) of the TFEU (Arts. 6 and 10 of the amended Regulation 1466/97).

The amended SGP also provides for the possibility of imposing sanctions in the form of an interest-bearing deposit in the amount of 0.2% of the GDP of the

previous year on MSs that do not take appropriate adjustment measures. Fines are also foreseen for manipulation of data on debt or deficits.

5.3. In-depth reviews (IDRs)

The in-depth reviews (IDRs) are analytical documents prepared by the Commission aimed at identifying and assessing the severity of macroeconomic imbalances. The annual Alert Mechanism Report (AMR) selects the MSs for which an IDR is prepared by the Commission. IDRs can also be prepared in case of unexpected significant economic developments that require urgent analysis.

IDRs aim to identify the nature and severity of macroeconomic imbalances in EU MSs. In its analysis, the European Commission takes into account existing Council recommendations and policy commitments of the MSs concerned. Since 2015, IDRs have been incorporated in the European Semester's Country Reports.

The Commission Communication accompanying the Country Reports includes the IDR results, which may be as follows: no imbalances, imbalances, excessive imbalances, and excessive imbalances with corrective action.

A process of specific monitoring is applied to EU MSs with imbalances or excessive imbalances, which is adapted to the degree and nature of their imbalances and involves an intensified dialogue with national authorities, as well as progress reports and policy recommendations in their annual CSR. Countries found to be experiencing 'excessive imbalances with corrective action' are liable to face the Excessive Imbalance Procedure.

5.4. The Excessive Deficit Procedure (EDP)

Protocol 12 based on the Art. 126(2) of the TFEU gives as the reference values on deficit (3% for the ratio of the government deficit to GDP) and debt (60% for the ratio of government debt to GDP). The main framework for the EU fiscal rules is the SGP, which consists of two main components: the Excessive Deficit Procedure (EDP) and the Preventive Arm.

According to the EDP, if an MS exceeds the budget deficits limit of 3% GDP, it is subject to closer monitoring and may face corrective measures.

These criteria are numerically defined in the same way for all MSs, regardless of the large differences between them, both in terms of economic development and structural characteristics of the economies, and it is not easy for many MSs to fulfil them.

The EU bodies' opinions and specific recommendations in this respect are not just non-binding recommendations of the EU authorities, but sanctioned fiscal limits imposed by the EU upon MSs to improve fiscal balances. Whether this entails encroaching upon their sovereignty and fiscal autonomy is a question that will weigh in theoretical and political discussions about the future of the EU.

Paras. 3 to 6 of Art. 126 of the TFEU determine the procedure for assessing and deciding whether the deficit is excessive. If an MS does not fulfil at least one of the two criteria, or there is a risk that it will not fulfil it, the Commission prepares a report.

5.5. Procedures and sanctions in case of violation of the EU fiscal rules

EU fiscal rules are therefore not only a political commitment, but rather a sanctioned legal rule which is directly applicable and enforceable. The procedure that follows a violation of the rules is clearly defined: 1) If the Commission finds that an excessive deficit exists (or may arise), it sends an opinion to the MS concerned and informs the Council; based on the Commission's proposal, the Council takes the final decision on whether an excessive deficit exists (Art. 126(6) TFEU). 2) On the basis of the Commission's recommendation, Council adopts a recommendation for the relevant MS (Art. 126(7) TFEU) and sets a maximum six-month deadline within which the

MS must take effective measures to reduce deficits.

This alone, i.e. concrete recommendations to the MS and an order to take effective measures, is generally enough, but sanctions can also be imposed. The excessive deficit procedure provides for sanctions in cases of non-compliance with recommendations (Art. 126(11) TFEU). For euro-area MSs, this sanction is in principle a fine consisting of a fixed part (0.2% of GDP) and a variable part (maximum 0.5% of GDP for both parts combined).

In addition, Regulation 1173/2011 on the effective implementation of budgetary control in the euro area provides additional sanctions for euro-area MSs that are imposed at various stages of the excessive deficit procedure and include interest-free deposits of 0.2% of GDP and a fine of 0.2% of GDP from the previous year. The regulation also provides for sanctions for the manipulation of statistical data.

These rules are strict and enforceable and far from mere recommendations that an MS should follow or not. They thoroughly and directly interfere with the sovereignty of the EU MSs in relation to their autonomy in the field of public finances. Another question is whether this is in a long-term harmful or beneficial intervention to the democracy and sovereignty of the MSs. In any case, it certainly contributes to long-term solid public finances as a basis for health economy and democratic society.

5.6. The Preventive Arm

This component focuses on the medium-term budgetary position and aims to prevent the emergence of excessive deficits. MSs are required to achieve their Medium-term Budgetary Objectives (MTOs) and ensure a sustainable path for public finances. The MTOs are based on each country's specific circumstances.

In addition to the SGP, the Fiscal Compact (Treaty on Stability, Coordination, and Governance) was agreed upon by EU MSs in 2012. The Fiscal Compact introduced further fiscal rules, including the requirement for a balanced budget or a surplus in structural terms.

The enforcement of fiscal rules in the EU involves regular monitoring, assessment, and coordination among MSs and the Commission. The Commission assesses MSs' compliance with fiscal rules and can recommend corrective actions if necessary. Ultimately, EU MSs have the responsibility to implement and adhere to the fiscal rules to ensure sustainable public finances and economic stability within the EU.

In any case, the preventive role of the SGP is important. The Stability and Convergence Programmes are the key instruments of the preventive work of the SGP and represent the medium-term budget strategy of individual MSs, i.e. how these countries intend to achieve or maintain a sound fiscal position in the medium term in accordance with the requirements of the Pact.

The goal of preventive work is to ensure healthy public finances through multilateral control based on Art. 121 of the PDEU, amended Regulation 1467/97, and the new Regulation 1173/2011.

As presented in the chapter of ES, a part of the multilateral surveillance referred to in Art. 121 of the TFEU is that each MS must submit a Stability Programme (euro-area MS), or a Convergence Programme (non-euro-area MS) to the Commission and the Council in April of each year. That includes Medium-term Budgetary Objectives, adjustment paths for their achievement, and a scenario analysis in which the effects of changes in fundamental economic assumptions on the fiscal position are examined.

6. Legal implications of the EU fiscal rules on public finance in a Member State (The case of Slovenia)

6.1. The impact of EU fiscal rules on constitutional regulation in a Member State

The fulfilment of the Maastricht criteria entry into the EU (in 2004) and the conditions for inclusion in the Euro group (in 2007) required Slovenia to adapt not only its economic policies but also its constitutional arrangements and legislation. Slovenia consciously renounced the exercise of sovereignty in this area, even amending Art. 3a of the Constitution of the Republic of Slovenia (CS) [46] to this effect.

Slovenia, like other EU MSs, has harmonized its financial law with EU law; therefore, in the part covered by the acquis communautaire, it does not differ significantly from the financial law in force in other MSs. Slovenia has adopted extensive modern legislation, both in the field of fiscal and monetary law. Public finance planning in Slovenia, as an EU Member State and as a country of the euro area, is subject to extensive EU rules designed to ensure sound public finances and coordinated fiscal policies, based on Arts. 121 and 126 of the TFEU.

The national financial regulatory framework has been developed strictly following a set of macroeconomic rules, policies, and objectives determined in a number of EU Regulations (European economic governance).

Legislation related to public budget and macroeconomic balances is to a large extent subject to EU Regulations with direct effect; that fact substantially affects

46 | Constitution of the Republic of Slovenia (CS) (Official Gazette of the RS, no. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a).

the issue of MS sovereignty. However, the SGP, related EU Regulations, and intergovernmental treaties, as a set of rules designed to ensure sound public finances and coordinated fiscal policies of the EU MSs, are all legally based on Arts. 121 and 126 of the TFEU. However, there is no doubt that MSs including Slovenia voted for that piece of EU primary legislation.

As explained in detail in the chapter on the EU Semester Timeline, each year each MS draws up a draft Budgetary Plan (main orientations and elements concerning fiscal objectives and measures for the coming year) at the end of each year and submits it to the EU bodies prior to adoption by the National Assembly.

Following the SGP, MSs annually draw up a Stability Programme (a multi-year macroeconomic and fiscal framework and key fiscal projections) and National Reform Programme (planned work priorities and measures and key policies of the government for the next two years) and forward them to the respective EU bodies for recommendation (the so-called CSRs). As explained, some of these CSRs (for example, those related to fiscal deficit and public debt) are binding and legally sanctioned.

Recently, in 2020, 2021, and 2022, due to COVID-19 and the energy crisis (Ukraine-Russia war), significant shifts have been made in EU fiscal policy, as well as deviations from the previously established fiscal rules, due to measures to eliminate economic damage and strengthen resilience and economic recovery during and after the pandemic. Like other MSs, Slovenia strictly follows these new directions and limits. It is hard to talk about sovereignty here.

6.2. The transfer of the exercise of a part of sovereign rights (Constitutional amendments in Slovenia)

Immediately before joining the EU, Slovenia amended the CS, namely Art. 3a. and thereby created the constitutional basis and conditions for the transfer of a part of its sovereignty to international organizations (EU). More specifically, the amended Art. 3a stipulates the transfer of the exercise of certain sovereign rights due to the country's involvement in international organizations, rather than the transfer of sovereignty itself.

The amended Art. 3a of the CS stipulates that Slovenia, with an international agreement, can transfer the exercise of a part of its sovereign rights to international organizations, but not to any international organization. The CS sets the condition that the exercise of a part of sovereignty can only be transferred to international organizations based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law (EU). The same constitutional rule with the supplementary Art. 3a of the CS also applies to entering into a defence alliance (NATO) with countries based on respect for these values.

In addition, the amended constitutional provision stipulates that before the ratification of such an international treaty, the National Assembly can call a referendum. The proposal is accepted at the referendum if the majority of voters who have validly voted vote for it and the National Assembly is bound by the outcome of the referendum. On this basis, a referendum was held in Slovenia regarding both issues (EU and NATO) on 23 March 2003, supported by a large majority of voters

(89.64% for Slovenia's entry into the EU and a slightly smaller majority of 66.05% for Slovenia's entry into NATO).

Even then (2003), the issue of sovereignty related to Slovenia's entry into the EU was an extremely sensitive political issue, mainly due to bad experiences in the previous federal state. That is why Slovenia raised this issue to the level of the CS, which even in the adopted diction does not allow the transfer of sovereignty; thus, the diction used is the transfer of the exercise of part of sovereign rights. Even with the addition to the CS in 2003, therefore, the renunciation or transfer of even the smallest part of sovereignty is not permissible. Under strict constitutionally determined conditions, it is permissible to transfer only individual sovereign rights to be exercised.

Therefore, the constitutional provision additionally requires that the international treaty by which Slovenia transfers the exercise of part of its sovereign rights to international organizations must be ratified by the National Assembly with a two-thirds majority of all deputies. International treaties, including intergovernmental pacts within the EU, are subordinated to this constitutional provision, if they concern any transfer of the exercise of sovereign rights and not just the TFEU.

Otherwise, the provision of Art. 3a allows that legal acts and decisions of the international organizations to which the Republic of Slovenia (RS) transfers the exercise of a part of its sovereign rights (EU) be used in RS in accordance with the legal regulations of these organizations. However, the government is committed to regularly inform the National Assembly of proposals for such acts and decisions and about its activities.

The National Assembly can adopt positions on this, and the government takes them into account in its activities. The relations between the National Assembly and the government are regulated in greater detail by the law, which is adopted with a two-thirds majority of the votes of the deputies present (FRA).

6.3. Fiscal rules in the Constitution of the Republic of Slovenia

Art. 148 of the Constitution in its current text was introduced into the Slovenian legal order by UZ 148.[47] The first sentence of the Art. 148/2 of the CS, which regulates the constitutional fiscal rule, stipulates the medium-term balance of revenues and expenditures of state budgets without borrowing, or that revenues must exceed expenditures. Art. 148 also provides an exception to this rule, namely that this principle may be temporarily deviated from, but only in exceptional circumstances for the state.

The law, which was adopted by the National Assembly with a two-thirds majority of the votes of all deputies (the so-called Fiscal Rule Act, FRA 2015[48]), determines the method and time frame of the implementation of the principle of balance, the criteria for determining exceptional circumstances, and how to act when they occur.

47 | Constitutional Act on Amendments to Art. 148 of the CS as of 24 May 2013.

48 | Fiscal Rule Act (FRA), Official Gazette of the Republic of Slovenia, no. 55/15, 177/20, compr. and 129/22.

Art. 148 of the CS mandates a rational and long-term sustainable public finance policy and seeks to prevent excessive borrowing and the creation of high budget deficits and high levels of public debt, which could lead to illiquidity and insolvency of the state, and thereby to the inability of the state to fulfil its obligations to provide constitutionally protected values.

'Medium-term' in the constitutional provision refers to the duty of such fiscal management and planning which focuses on the state of public finances throughout the entire economic cycle, and not only on the current budget year, and takes into account the current state of the national economy in the cycle in each year. The medium-term balance of the country's budgets without borrowing can be achieved in several ways, with the CS leaving the choice to the legislature.

The CS also provides a rule on the method of financing in the event that the budget is not adopted by the first day when it is necessary to start implementing it. In this case, the beneficiaries who are financed from the budget are temporarily financed according to the previous budget.

6.4. Fiscal Rule Act

The FRA is an implementing act for the constitutional fiscal rule, i.e. at the legislative level the method of implementing the principle from the Art. 148/2 of the CS is defined. The FRA was adopted based on the legal reference in the Art. 148/3 of the CS that instructs the National Assembly to regulate more detailed issues related to the implementation of the constitutional fiscal rule.

The FRA specifies that it determin**es** the method and time frame for implementing the principle of medium-term balance of revenues and expenditures of the state budget without borrowing, the criteria for determining exceptional circumstances in which medium-term balance may be deviated from, and the manner of dealing with their occurrence or termination (Art. 1).

For our discussion, it is important to add that with this law Council Directive 2011/85/EU on requirements related to the budget frameworks of MS is partially transposed into the legal order of the RS. Directive 2011/85/EU lays down detailed rules concerning the characteristics of the budgetary frameworks of the MS. Those rules are necessary to ensure MSs' compliance with obligations under the TFEU with regard to avoiding excessive government deficits (Art. 1). Therefore, if the FRA is an implementing act of the amended Constitution of the RS, and at the same time the FRA implements an EU directive, it can be concluded that the constitutional amendment was also the result of adaptation to the EU directive, which opens up additional aspects of sovereignty.

In the Proposal for the initiation of the procedure for amending Art. 148 of the Constitution of the RS with the draft of the Constitutional Act of 8 March 2012, the Government highlighted excessive borrowing as a major problem of public finances. For the stability of public finances, it is said to be necessary that the budget be balanced and that a legal basis be adopted for the limitation of public borrowing. The strengthening of public financial discipline and the placement of the fiscal rule in the Constitution are said to be necessary to prevent further deterioration of Slovenia's position on the international financial markets.

The purpose of Art. 148 of the Constitution was to limit the state, i.e. the Government and, upon its proposal, the National Assembly in making decisions on the amount of revenues and expenditures, borrowing, and the public financial deficit. Since it is a question of limiting the decision-making right of the National Assembly, the proponent decided to determine this limitation by amending Art. 148 of the CS and not, as was originally planned, only by adopting the relevant law.[49]

In the discussion, opinions were also put forward that it is important for Slovenia to maintain its fiscal sovereignty, which over-indebted countries lose sooner rather than later, given that it is a small open economy in a monetary union without monetary sovereignty (Proposal for the initiation of the procedure for amending Art. 148).

6.5. Fiscal Rule Act and Fiscal Pact comparison

To understand the Constitutional fiscal rule, given the involvement of the RS in the EMU, one must also take into account the common goal of the parties that have committed themselves internationally with the Fiscal Pact.

The main content of the Constitutional fiscal rule from the Art. 148/2 of the CS is the principle of medium-term balance, which is worded such that revenues and expenditures of state budgets must be 'balanced in the medium term without borrowing, or revenues must exceed expenditures'.

Linguistically, this principle does not differ much from the rule under point (a) 1.3 of the Fiscal Pact, which stipulates that the budgetary position of the sector of the contracting state must be balanced or in surplus. It is a fundamental principle that can be derived at the legal level in several ways, as already shown by a comparison of the remaining part of Art. 3 of the Fiscal Pact and Art. 3 of the FRA.

Art. 3 of the Fiscal Pact essentially limits the structural deficit to a maximum of −0.5% of GDP (for low-indebted countries, at least −1% of GDP), defines exceptional circumstances in which a temporary deviation from this goal is permissible, and requires the so-called corrective mechanisms by which the Party should eliminate deviations from its medium-term goal or the adjustment path for its achievement. Art. 3 of the FRA defines the legal implementation of the principle of medium-term budget balance much more precisely and in much greater detail, including with mathematical formulas.

6.6. Public Finance Act

The composition, preparation, and execution of the state and municipal budgets, state or municipal borrowing, guarantees and management of their debts, accounting and internal control of public finances, and budget inspection are governed by the Public Finance Act (PFA)[50]. This law also sets out the rules that apply to the Health Insurance Institute of Slovenia (health fund) and the Institute

49 | Decision of the Constitutional Court U-I-129/19-26.

50 | Public Finances Act (PFA) (Official Gazette of the Republic of Slovenia, No. 11/11 – official consolidated text, 14/13 – compr., 101/13, 55/15 – FRA, 96/15 – ZIPRS1617, 13/18, 195/20 – dec. US, 18/23 – ZDU-1O and 76/23).

for Pension and Disability Insurance of Slovenia (pension fund), both in the compulsory part of insurance, for public funds, public institutions, and agencies.

The PFA was adopted in 1999 and has since been amended almost 20 times to date, which we may definitely associate with extensive EU legal regulation and ongoing development of EU regulation in the field of economic governance.

The PFA stipulates that the extent of borrowing and all anticipated guarantees of the state and the extent of public sector borrowing at the state level in an individual year are determined by the annual law regulating the execution of the State Budget.

6.7. Annual execution of the state budget

The Budget Execution Act (BEA), specifics the implementation of the budget of RS for each year. The designated revenues and receipts of the state, the extent of borrowing and guarantees of the state and the public sector at the state level of obligations, and other issues related to the execution of the budget are also determined.

In the BEA, the use of cohesion policy funds and Recovery and Resilience Mechanism funds is also determined annually. The execution of annual state budgets each year is thus directly dependent on EU economic, especially fiscal, and lately also cohesion and development policies or recovery and resilience policies.

Thus, for example, according to the BEA, which transposes EU financial support mechanisms for recovery and resilience to mitigate the economic and social effects of the coronavirus pandemic, the Russia-Ukraine war energy crisis, or to increase the sustainability and resilience of the economy and to improve preparedness for the challenges of the green and digital transition. In this way, the EU's support and development policies towards MSs are reflected to the greatest extent in each annual BEA; to a lesser extent, development concepts that derive from the sovereignty of individual countries are thus expressed.

Funds of the Recovery and Resilience Mechanism are financial support from the EU to the MSs intended to finance the measures included in the Recovery and Resilience Plan. The Recovery and Resilience Plan[51] is a document containing the measures eligible for EU funding under the Recovery and Resilience Mechanism, as defined by Regulation 2021/241. The Recovery and Resilience Fund is a subaccount that collects the funds of the Recovery and Resilience Mechanism.

It is also clear from the above that annual budgets and the amount of funds available for on-budget spending largely depend on the policies and are related to the financing limitations of various forms of public spending, as defined at the EU level. EU policies and rules related to such funds, normally converted (or not) into domestic budget spending, certainly constitute a special aspect of the debate on the economic sovereignty of MSs.

51 | The Recovery and Resilience Facility (RRF) is a temporary instrument that is the centrepiece of NextGenerationEU – the EU's plan to emerge stronger and more resilient from the current crisis.

7. Conclusions

The reforms of European economic governance are currently undergoing intensive political and professional debate. This paper has demonstrated that the effect of the respective EU regulations on the economic and social sovereignty of MSs is substantial. European economic governance undoubtedly strongly interferes with the relations between the EU and the MSs and reasonably raises questions of the sovereignty and democratic governance of the EU, as well as the balance of economic and social development.

On the other hand, the coordination of economic policies through the ES contributes decisively to greater stability and balanced development in the MSs and in recent times has increasingly contributed to resilience, recovery, and sustainable development.

However, European economic governance needs to be upgraded and its deficiencies eliminated, and above all it needs to be simplified and democratically consolidated. The key here is a balanced treatment of economic (fiscal, economic) and social goals (following the UN SDGs), which must also be reflected in legal sanctions. The EU must overcome the existing approach that only fiscal and monetary rules are subject to binding rules and legal sanctions for MSs, while the social sphere is regulated by EU soft law alone. The research for this paper led us to the following conclusions regarding the hypotheses put forward:

1. European economic governance, especially the European Semester, has had enviable results in the past decade in terms of the coordination (mainly fiscal and monetary) of MSs' policies. However, it has pushed MSs into the position of executors of professional instructions and timelines of European officials and has side-lined democratic processes; the question of the economic (developmental) sovereignty of the MSs in relation to EU bodies is real. However, the MSs (including by amending their constitutions) sovereignly consented to the transfer of part of their sovereign rights to the EU. It is important that the strengthening of the EU level be based on consciously defined primary and secondary EU law. It definitely brings benefits to the MSs and the EU and is in their interest.

2. It is true that the procedures and tasks arising from the ES are excessively burdensome for the MSs and for the EU administration; simplification and reorientation from the annual fiscal planning and action to the medium term are needed. In doing so, the democratic principles on which the EU is built must be strictly observed, especially subsidiarity and proportionality.

3. The EU deals very much with economic policies (mainly fiscal and monetary) and fiscal balance in the MSs but neglects the MSs' reflection of the development and strategic planning of the EU's position in the global space. It is important that the process also enable a thorough consideration of the strategic issues of the EU's competitive position in the world and aspects of global sustainable development, and that the MSs decisively participate in this process as well. European economic governance is not only the governance of the MSs, but also of the EU as a whole.

4. In terms of the importance and weight of the sanctions in the European economic governance, fiscal criteria are far ahead; social and sustainability

aspects are taken into consideration in planning in principle, but they are not part of binding EU law and are therefore less strictly adhered to. In the recent period, in addition to fiscal and monetary goals, social and development goals have gained increasing ground in European governance. This is an important shift, but it will only be decisive when legal sanctions are also determined and imposed on the MSs for non-compliance with the social and sustainable development parameters set by the EU.

5. The reform of European economic governance must include the 2023 Commission and Council proposals for more gradual paths and the introduction of national medium-term (at least four-year) fiscal-structural plans. The duration of the medium-term fiscal structural plan could be extended if an MS commits to an eligible set of reforms and investments. A stricter enforcement regime and greater control over the medium-term plans to ensure that MSs deliver the commitments (economic, social, and sustainability) made in their medium-term fiscal-structural plans is acceptable. Treaty reference values of 3% of GDP deficit and 60% of GDP debt and the excessive deficit procedure on the basis of a breach of the 3% deficit criterion need further reflection from the point of view of the new European economic governance concept.

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PERSECUTION DUE TO SEXUAL ORIENTATION AS A REASON FOR ASYLUM IN THE JURISPRUDENCE OF THE CJEU

Gyula Fábián[1]

ABSTRACT

Sexual orientation is both normal expression of human sexuality and immutable, is generally not chosen and highly resistant to change and represents each person's capacity for profound emotional, affectional and sexual attraction to individuals of a different gender or the same gender or more than one gender.
Against the backdrop of a historical, even biblical, criminalisation that continues even today in 65 countries around the world, those with a homo- or bisexual orientation, or those who more recently identify themselves as members of the lesbian, gay, bisexual and transgender (LGBT) community, cannot feel safe and secure in their countries of origin that penalise such sexual acts criminally or even with capital punishment.
Discrimination on grounds of sexual orientation was first recognised by the European Court of Human Rights only in 1981; today, no European state criminalises homosexual acts or behaviour.
In the last two decades, in the framework of the common asylum policy promoted by the European Union, sexual orientation has started to be invoked as a ground for asylum by refugees from countries that criminalise so-called 'unnatural sex'.
The current study seeks to capture the opinion of the Court of Justice of the European Union expressed in this area through three preliminary rulings adopted between 2013 and 2018 in order to formulate some useful conclusions for both scholars and practitioners in the field of asylum procedures.

KEYWORDS

'unnatural sex'
Qualification Directive
Asylum Procedures Directive
'questioning based solely on stereotyped notions of homosexuals'
to infringe human dignity

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phallometric testing
culture of disbelief
sexual attraction as persecution reason
‘refugee receiving nations’

1. Introduction

In addition to the references about Sodom and Gomorrah found in Genesis in the Bible, the first written references to the criminalisation of homosexual relations come from English law and date back to 1290 and are expressed in Fleta, xxxviii.3, which states that : ‘Those who have dealings with Jews or Jewesses, those who commit bestiality, and sodomists, are to be buried alive after legal proof that they were taken in the act, and public conviction’[2]. Subsequently, over the centuries, most penal codes in Europe and around the world have criminalised sexual acts between people of the same sex. The decriminalisation of such acts began with the implementation of the 1924 Peruvian Penal Code which decriminalised private, consensual sexual activity between people of the same sex. Published in the UK in 1957, the Wolfenden Report was another important step, which, disregarding the conventional ideas of the time, not only established that it was not the role of the law to interfere in the private lives of citizens, but also rejected the *idea that homosexuality was a disease*[3].

However, the 1950s and 1960s was an era in which being gay was viewed as so indubitably wrong that not even a justiciable human rights claim was seen to be involved, because such applications to the European Court of Human Rights (ECtHR) did not even pass the preliminary procedure of the European Commission of Human Rights[4].

In 1981, a landmark ECtHR decision in this area was reached in Dudgeon v. United Kingdom[5] with six separate opinions. The Court recognised the legitimate need in a democratic society for some degree of control over homosexual behaviour, in particular to provide safeguards against exploitation and corruption of those who are particularly vulnerable. However, the Court held that setting other age limits for sexual relations for homosexuals than for heterosexuals constituted an unjustified interference with the right to respect for private life and thus a violation of Art. 8 ECtHR. The UN bodies are not lacking in this line of favourable rulings[6].

2 | Hartn, 1955, p. 145.
3 | The Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, after Sir John Wolfenden, the chairman of the committee) was published in the United Kingdom on 4 December 1957.
4 | Millbank, 2004, p. 201.
5 | Case of Dudgeon v. The United Kingdom *(Application no. 7525/76)*, Judgement from 22 October 1981.
6 | Case of Toonen v. Australia, HUMAN RIGHTS COMMITTEE, Communication No. 488/1992, 31 March 1994, CCPR/C/50/D/488/1992.

In the field of decriminalising homosexual acts, some Eastern European countries, such as Poland (1932), the Czech Republic (1961), Slovakia (1962), Hungary (1962), Bulgaria (1968), Croatia (1977), Montenegro (1977), and Slovenia (1977), acted at the same time as the countries of the 'Western world' while others acted only after the fall of the Iron Curtain[7].

However, the fact that 65 states still criminalise private, consensual, same-sex sexual activity and the majority of these jurisdictions explicitly criminalise sex between men via 'sodomy', 'buggery', and 'unnatural offences' laws should be noted. Of these states, 31 are in Africa, 22 in Asia, six in the Caribbean and South America and six in the Pacific. A total of 41 countries criminalise private, consensual sexual activity between women using laws against 'lesbianism', 'sexual relations with a person of the same sex', and 'gross indecency'. A total of 14 countries criminalise the gender identity and/or expression of transgender people, using so-called 'cross-dressing', 'impersonation', and 'disguise' laws. A total of 12 countries have jurisdictions in which the death penalty is imposed or at least a possibility for private, consensual same-sex sexual activity. At least six of these implement the death penalty, Iran, Northern Nigeria, Saudi Arabia, Somalia, and Yemen, and such punishment is a legal possibility in Afghanistan, Brunei, Mauritania, Pakistan[8], Qatar, UAE, and Uganda[9]. Finally, the fact that so-called 'anti-sodomy' laws were introduced in many of these countries centuries ago by colonial powers, which criminalised 'carnal intercourse against the order of nature'[10], should also be noted.

In the European Union, amidst the huge progress made in terms of non-discrimination, no state has criminalised LGBT (lesbian, gay, bisexual, and transgender) people for at least three decades, which is both a guarantee and a magnet for people who want to express their sexual orientation and who live in the 65 states mentioned above, that is, in the third of the world that has not been able to overcome the 'criminalisation of sodomisation'. Moreover, 22 EU Member States explicitly consider sexual orientation as a ground for asylum, and even the United Nations High Commissioner for Refugees (UNHCR) specifically addresses this ground for asylum[11].

This is not to say that new and emerging issues in the case-law of the Court of Justice of the European Union (CJEU) do not arise in the area of equality treatment claimed by LGBT people[12].

7 | Lithuania (1993), Estonia (1992), Romania (1996), Serbia (1994), Ukraine (1991), Albania (1995), Latvia (1992), North Macedonia (1996), Moldova (1995), Russia (1993), Bosnia and Herzegovina (1998-2001), Georgia (2000), Armenia (2003), Azerbaijan (2000), Kazakhstan (1998).

8 | Millbank, 2004, p. 218.

9 | Map of Jurisdictions that Criminalise LGBT People. Available at: https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (Accessed: 27 November 2023).

10 | Aldrich, 2003; Gupta, 2008.

11 | UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23.10.2012, Paras. 40–50.

12 | Jeney, 2010.

In this context, the question arises as to whether sexual orientation can constitute a ground of persecution justifying a claim to refugee, asylum seeker, beneficiary of subsidiary protection, or beneficiary of a removal order status under EU asylum law. If we consider the prospect of capital punishment for homosexual acts in some countries, the answer tends to be affirmative and with empathy; however, the legal answer is much more nuanced and has been facilitated by the preliminary rulings of the CJEU in Luxembourg over the last two decades.

As presented in the literature, according to the jurisprudence of the US Supreme Court[13] sexual orientation is both a normal expression of human sexuality and immutable, generally not chosen, and highly resistant to change[14].

However, the literature increasingly uses the definition from the preamble to the Yogyakarta Principles[15] that:

> Understanding 'sexual orientation' to refer to each person's capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;
> Understanding 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

2. Relevant case law

2.1. Minister voor Immigratie en Asiel v. X, Y, Z case

The issue of sexual orientation as a ground of persecution justifying refugee protection was first raised in the *Minister voor Immigratie en Asiel v. X, Y, Z* case[16]. In this case, three citizens of Sierra Leone, Uganda, and Senegal invoked their homosexual orientation to obtain asylum in the Netherlands.

According to Art. 1(A)(2), first subparagraph, of the Geneva Convention[17], the term 'refugee' applies to any person who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of

13 | Obergefell vs Hodges, 135 S Cr. 2584, 2595 (2015).
14 | Ziegler, 2018, pp. 105–106.
15 | The Yogyakarta Principles.
16 | C-199 to 201/2012 X, Y, Z Judgment of 7 November 2013, ECLI:EU:C:2013:720.
17 | The Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954 and was supplemented by the Protocol relating to the Status of Refugees, concluded at New York on 31 January 1967, which entered into force on 4 October 1967 (hereinafter referred to as the 'Geneva Convention').

> the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return.

From a simple reading of this text, we can deduce that sexual orientation cannot be attributed to a race, religion, nationality, or group with certain political views. Therefore, sexual orientation as a ground for persecution is legally tenable only if it can be demonstrated that those with such sexual practices belong to a certain social group.

The Geneva Convention was the inspiration for EU Directive 2004/38/EC[18] on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or those who otherwise need international protection and the content of the protection granted (hereafter Qualification Directive or QD).

From the perspective of sexual orientation as a ground for asylum, the following provisions of the Qualification Directive are relevant:

(a) Art. 4 of the Directive, which defines the conditions for the assessment of facts and circumstances and provides in Para. 3:)
The assessment of an application for international protection must be carried out individually, taking into account the following elements:

> (a) all the relevant facts concerning the country of origin at the time of taking a decision on the application, including the laws, regulations and administrative provisions of the country of origin and the manner in which they are applied;
>
> (b) the relevant information and documents submitted by the applicant, including information enabling it to determine whether the applicant has been or may be subject to persecution [...].
>
> (c) the individual status and personal circumstances of the applicant, including factors such as the applicant's background, gender and age, in order to determine whether, taking into account the applicant's personal circumstances, the acts to which the applicant has been or risks being exposed could be considered persecution [...].

Additionally, under Art. 4(4) of the Directive, the fact that the applicant has already been persecuted or the subject of direct threats of such persecution is a 'serious indication of the applicant's well-founded fear of being persecuted', unless there are substantial grounds for believing that such persecution will not recur.

(b) Paras. 1 and 2 of Art. 9 of the Directive define acts of persecution as follows:

> (1) Acts considered to be persecution within the meaning of Art. [1 Sec. A] of the Geneva Convention shall:
>
> > (a) be sufficiently serious by their nature or repetition as to constitute a serious violation of fundamental human rights, in

18 | Council Directive 2004/83/EC of 29 April 2004 was published in OJ 2004 L 304, p. 12, with corrigendum in OJ 2005 L 2004, p. 24, Special Edition 19/vol. 7, p. 52 – was in force from 30.09.2004 until 21.12.2013.

particular those rights from which no derogation is possible under Art. 15(2) of the [ECHR], or

(b) be an accumulation of various measures, including violations of human rights, which is sufficiently serious to affect an individual in a manner comparable to those referred to in point (a).

(2) Acts of persecution within the meaning of Para. 1 may in particular take the following forms:

[...] (c) prosecution or sanctions that are disproportionate or discriminatory; [...]

(c) Art. 10 of the Directive, entitled 'Grounds for persecution', which provides that:

(1) When assessing the reasons for persecution, Member States shall take the following elements: [...]

(d) a group shall be regarded as a particular social group in particular where:

– its members share an innate characteristic or a common history which cannot be changed or a characteristic or belief so fundamental to identity or conscience that a person should not be required to renounce it, and

– that group has its own identity in the country concerned because it is perceived as different from the surrounding society.

Depending on the prevailing conditions in the country of origin, a specific social group may be one whose members share a common characteristic of sexual orientation.

X, Y, and Z, born in 1987, 1990, and 1982 respectively, came from countries that sanction 'unnatural sex', namely Sierra Leone[19], Uganda[20] and Senegal[21]. The Dutch authorities rejected their application for asylum on the basis of their sexual orientation on the grounds that the three had not adequately proved the facts and circumstances invoked and had therefore not demonstrated that, once back in their respective countries of origin, they had a well-founded fear of persecution on account of their membership of a particular social group, namely that they should not necessarily be free to express their orientation publicly in the same way as they might do in the Netherlands.

In response to questions raised by the Raad van State in the Netherlands in 2013, its interpretation of Art. 10 Para. 1 lit. d and Art. 9 Para. 1 of the Qualifications Directive, the CJEU stated, that:

19 | Under Sec. 61 of the Offences against the Person Act 1861, acts of homosexuality in Sierra Leone are punishable by imprisonment for 10 years to life.

20 | In Uganda, according to Sec. 145 of the Penal Code Act 1950, a person convicted of an offence described as a 'sexual act against nature' is punishable by imprisonment with a maximum of life imprisonment.

21 | In Senegal, according to Art. 319.3 of the Penal Code, the penalty for committing acts of homosexuality is imprisonment for 1 to 5 years and a fine.

1. The existence of criminal legislation in a third State such as that at issue, which specifically targets homosexual persons, allows a finding that such persons must be regarded as forming a particular social group.

2. The mere criminalisation of acts of homosexuality does not, in itself, constitute an act of persecution; on the other hand, a custodial penalty which punishes acts of homosexuality and is effectively enforced in the country of origin which has adopted such legislation must be regarded as a disproportionate or discriminatory penalty and therefore constitutes such an act.

3. when assessing an application for refugee status, the competent authorities may not reasonably require the asylum seeker to conceal his homosexuality in his country of origin or to be reserved in expressing his sexual orientation to avoid the risk of persecution. Specifically, a 'discretion order' has no legal basis[22]. Moreover, in its previous case-law in the field of religious persecution as a ground for asylum, the CJEU has stated that 'in the individual assessment of an application for refugee status, the authorities concerned cannot reasonably expect the applicant, on his return to his country of origin, to renounce those religious acts which expose him to a real risk of persecution'[23]. The fact that the person concerned could avoid the risk by renouncing certain religious acts is in principle irrelevant[24].

Maarten den Heijer best captures the essence of this ruling in three key points:

> First, persecution for reason of sexual orientation can be brought within the refugee definition. Second, mere criminalization of homosexual activity does not amount to persecution, but the actual application of penal sanctions does. And third, it cannot reasonably be expected that an asylum applicant conceals his homosexuality in his country of origin in order to avoid the risk of persecution[25].

The same author considered that:

> The ruling in X, Y and Z is important for its confirmation that persecution for sexual orientation is a ground for refugee status and that it may not simply be assumed that a homosexual can avoid persecution by concealing his sexual identity[26].

2.2. A, B, C v. Staatsecretaris van Veiligheid en Justitie case

However, this judgement could not provide an answer to all the legal problems that may arise in asylum procedures based on sexual orientation and in Cases *A, B, C v. Staatsecretaris van Veiligheid en Justitie*[27] in 2014, the very question of the

22 | However, in their rulings, some courts in Germany or Austria have imposed an obligation on some asylum seekers to behave discreetly in Braun, Dörr, and Träbert, 2020, pp. 81–84.
23 | Judgment of 5 September 2012, Y and Z (C-71/11 and C-99/11) ECLI:EU:C:2012:518.
24 | Ibid., p. 79.
25 | Den Heijer, 2014, p. 1217.
26 | Ibid., p. 1233.
27 | C-148/13 to C-150/13, A, B, C, Judgment of 2 December 2014, ECLI:EU:C:2014:2406.

provability/credible establishment of sexual orientation was raised in the light of the provisions of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter the Asylum Procedures Directive – APD)[28].

The Dutch authorities rejected the asylum applications of A, B, and C as not credible:

1. In the case of A, on the ground that although he indicated that he agreed to undergo a 'test' that would prove his homosexuality or to perform a homosexual act to prove the reality of his declared sexual orientation, he did not contest a first refusal decision and made a second application for asylum on the same ground.

2. In the case of B, on the grounds that his statements on his homosexuality were vague, summary, and lacking in credibility, as he could not provide details of his feelings and inner process regarding his sexual orientation.

3. In the case of C, on the ground that although he had submitted a video recording of intimate acts with a person of the same sex to the authorities, he only remembered that he was homosexual after an asylum application had been rejected on another ground without contesting that decision. Furthermore, he did not contest that first decision and submitted a second asylum application, this time based on the fear of persecution in his country of origin on account of his homosexuality. The authorities also noted that C did not clearly explain how he became aware of his homosexuality and could not answer questions about Dutch gay rights organisations.

With regard to assessing the credibility of the allegations of sexual orientation, note that in I.K. v. Switzerland[29] the ECtHR held, for example, that the asylum seeker's claims regarding his sexual orientation were not credible, even though in Sierra Leone, the applicant's country of origin, homosexual acts are criminalised under criminal law. During the trial, it came to light that he had submitted false documents attesting that he had been arrested for homosexual acts, and the gay rights organisation in which the applicant claimed to have been active in his country did not exist; therefore, the accumulated inadequacies and inconsistencies undermined the credibility of his claims. In the relevant literature[30], in this context, the negative concept of 'heteronormative praxis' has emerged and should be avoided by those conducting asylum interviews. Heteronormativity is seen as a conception of values that accepts only female and male gender and does not accept 'non-binary' or 'enby' people or those who identify as 'trans' or 'inter', whom it considers 'othering', that is, 'abnormal'.

28 | Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, corrigendum in OJ 2006 L 236, p. 36).
The above Directive was repealed by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013, pp. 60–95.
29 | Case No 21417/2017 ECHR, Judgement of 19 December 2017.
30 | Fluchtgrund sexuelle Orientierung und Geschlechtsidentität, 2021.

In response to questions raised by the Raad van State of the Netherlands in 2014, in interpreting Art. 4 Para. 3 lit. c and Art. 9 Para. 1 of the Qualifications Directive and Art. 13 Para. 3 lit. a of the Procedural Directive, the CJEU stated, that:

1. In the examination by the competent national authorities, acting under the control of the court, of the facts and circumstances relating to the declared sexual orientation of an asylum seeker whose application is based on a fear of persecution on account of such orientation, the statements of that applicant and the written or other evidence submitted in support of his application may not be assessed by those authorities by means of questioning based solely on stereotyped notions of homosexuals.

2. In the context of this examination, the competent national authorities must not conduct detailed questioning on the sexual practices of an asylum seeker, as these are contrary to the fundamental rights guaranteed by the Charter and in particular the right to respect for private and family life as enshrined in Art. 7 thereof; that is, subjecting them to possible 'tests' to establish their homosexuality or even the presentation by the applicants in question of evidence such as video recordings of their intimate acts, in addition to not necessarily having probative value, would be likely to infringe human dignity, respect for which is guaranteed in Art. 1 of the Charter[31].

3. In the same examination, the competent national authorities must not conclude that the statements of the asylum seeker in question are not credible for the sole reason that the applicant's stated sexual orientation was not invoked by the applicant when first given the opportunity to present the grounds of persecution. The Court highlighted that the applicant is under an obligation to submit all the necessary elements in support of his application for international protection 'as soon as possible', thereby leaving the timing to his discretion[32].

The doctrine condemns intrusive methods of establishing sexual orientation such as physical demonstrations, consummation of sexual acts or phallometric testing, consisting of testing the physical reaction to heterosexual pornographic material[33]. Otherwise, the question as to whether physical impotence could lead to the disappearance of the invocability of sexual orientation as a ground for persecution may even arise.

2.3. F v. Bevándorlási és Állampolgársági Hivatal case

In the case of *F v. Bevándorlási és Állampolgársági Hivatal* (Citizenship and Immigration Office)[34], following the clarifications made by the judgement in joined cases A, B, and C on the credibility assessment, a court was curious to know whether scientific methods could be used in the procedure for establishing/evaluating sexual orientation.

31 | Paras. 64 and 65 of the Judgement in the Case A, B, C.
32 | Para. 68 of the Judgement in the Case A, B, C.
33 | European Union Agency for Fundamental Rights (FRA), 2010, pp. 58–60.
34 | C-473/2016, Judgement of 25 January 2018, F (C-473/16) ECLI:EU:C:2018:

More specifically, in April 2015, F submitted an asylum application to the Hungarian authorities, documenting, since the first interview held by the authorities, that he had reasons to fear that he would be persecuted in his country of origin because of his homosexuality, but the application was rejected as lacking credibility on the basis of an expert opinion by a psychologist[35]. Although he was neither physically examined nor forced to view pornographic photographs or films, F claimed that the psychological tests he was subjected to seriously infringed his fundamental rights and did not allow his sexual orientation to be assessed with certainty. At the request of a judge, the Hungarian Institute of Judicial Experts and Investigators produced an expert report which indicated that the methods used during the asylum examination procedure do not violate human dignity and can, together with 'proper exploration', provide insight into a person's sexual orientation.

To questions raised by the Szegedi Közigazgatási és Munkaügyi Bíróság (Szeged Administrative and Labour Court) of Hungary in 2018, in interpreting Art. 4 of Directive No 2011/95/EU (hereinafter the New Qualification Directive)[36], the CJEU stated, that:

1. The authority responsible for examining applications for international protection or the courts notified, where appropriate, of an action against a decision of that authority may order an expert opinion to be carried out in the context of the assessment of the facts and circumstances relating to an applicant's stated sexual orientation, provided that the modalities of such an expert opinion are in accordance with the fundamental rights guaranteed by the Charter, and provided that that authority and those courts do not base their decision solely on the conclusions of the expert opinion and that they are not bound by those conclusions when assessing the applicant's statements concerning his or her sexual orientation;

2. Art. 4 of Directive 2011/95, read in the light of Art. 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the carrying out and use of a psychological experts report for the purpose of assessing the true nature of the declared sexual orientation of an applicant for international protection, such as that at issue in the main proceedings, the purpose of which is to provide, on the basis of prospective personality tests, a picture of that applicant's sexual orientation.

In the recent past, it was revealed that in the Czech Republic and Slovakia in 2010-12, sexual arousal tests (also called penile plethysmography and vaginal photoplethysmography) were a practice used to test whether alleged homosexual

35 | This included an exploratory examination, a personality examination, and several personality tests, namely a test based on a drawing of a person in the rain, as well as Rorschach and Szondi tests, and concluded that it was not possible to confirm F's claim about his sexual orientation.

36 | Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

asylum seekers were indeed homosexual. Developed in the 20th century (developed in the 1950s by Kurt Freund) as a diagnostic tool to aid in aversion therapies to cure homosexuality and as an objective method of proving sexual deviance or paraphilia, Czech immigration officials hooked gay and lesbian asylum seekers up to machines that determined levels of sexual arousal by measuring the asylum seekers' physical reactions while exposed to gay and heterosexual pornography[37].

In the grounds of its judgement, the CJEU discouraged the carrying out of such expert opinions in the future, stating that

> the performance and use of a psychological expert opinion such as that at issue in the main proceedings constitute an interference with that person's right to respect for his or her private life, since even where the psychological tests on which an expert opinion is based are carried out, such as that at issue in the main proceedings, is formally conditional on the expression of the consent of the person concerned, it must be held that that consent is not necessarily free, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves[38].

Moreover, such expertise cannot be considered indispensable to confirm an applicant's statement for international protection concerning his sexual orientation for the purpose of deciding on an application for such protection based on a fear of persecution on account of that orientation[39], since it appears disproportionate to the objective pursued[40]. Such expertise may help to identify the sexual orientation of the person concerned with some reliability, but it could only provide a picture of that sexual orientation and is therefore of limited interest in assessing an applicant's statements for international protection, particularly if those statements are free of contradictions[41].

The extraordinary interest surrounding these three cases is reflected in the large number of Member States which 'intervened' as participants in these cases: Belgium in one case, the Czech Republic in one case, France in three cases, Germany in two cases, Greece in two cases, the Netherlands in three cases, Hungary in one case, and the European Commission in one case in each of the cases mentioned above. Finally, the UNHCR also participated in two cases[42]. In conclusion, those entities for which the issue of immigration on grounds of sexual orientation is a central theme of their activity or policy participated.

37 | Jansen, 2014, cited in Gartner, 2015, pp. 39–66.
38 | See by analogy Judgement of 2 December 2014, A and Others, C 148/13-C 150/13, EU:C:2014:2406, para. 66.
39 | Para. 65 of Case F.
40 | Para. 59 of Case F.
41 | Para. 69 of Case F.
42 | Joined cases A, B, C and joined cases X, Y, Z. See in this respect UNHCR Observations in the cases of Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Arts. 9 and 10 of the EU Qualification Directive. Available at: https://www.refworld.org/pdfid/5065c0bd2.pdf (Accessed: 27 January 2024).

3. Conclusions

1. Both the CJEU and the ECHR have consistently held that sexual orientation is a fundamental aspect of a person's identity and conscience, from which it follows that such a person cannot be required to express/live their sexuality in secret. On the contrary, we must not forget that although a person's other identities such as ethnicity, language, or culture can be changed voluntarily, real sexual orientation is acquired by birth, is immutable, and resistant/reliable to change.

2. Sexual orientation in itself is not automatically a ground for persecution, but a causal link between the two must be proven. Basically, the three 'court decisions' have unlocked that 'culture of disbelief' focused strictly on 'assessing the true sexual orientation of the applicant' and reoriented it towards effective control of perceived or potential persecution.

3. The prospect of criminal sanctions for sexual orientation does not automatically constitute a ground for persecution if these provisions are not applied by the State authorities. On the contrary, a custodial penalty which penalises acts of homosexuality and which is actually applied in the country of origin that has adopted such legislation must be regarded as a disproportionate or discriminatory penalty and therefore constitutes an act of persecution.

4. The danger of persecution based on sexual orientation may come not only from state authorities, but also from private actors[43]; for example, in the form of blackmail from non-homosexual entourage or in the form of violent reaction from family members. In this regard, the fact that fundamental rights specifically linked to sexual orientation, such as the right to respect for private and family life, which is protected by Art/ 8 of the ECHR, to which Art. 7 of the Charter corresponds, in conjunction, where appropriate, with Art. 14 of the ECHR, from which Art. 21(1) of the Charter draws its inspiration, are not among the fundamental human rights from which no derogation is possible should be noted from the outset[44]. In this context, that the fact that LGBT asylum seekers are exposed to 'hate crimes' even in the EU after receiving refugee status should be remembered[45].

5. The burden of proof of sexual orientation lies primarily with the asylum seeker, and verification of their credibility is the obligation of the State in which the asylum application was lodged, but the former's statements can nevertheless only constitute the starting point in the process of examining the facts and circumstances given the particular context of asylum applications[46]. Thus, the burden of 'probatio diabolica' has been divided between the applicant and the authorities who will check its admissibility.

43 | Homosexueller Mann aus Sierra Leone darf weggewiesen werden, 30.01.2018. Available at: https://www.humanrights.ch/de/ipf/rechtsprechung-empfehlungen/europ-gerichtshof-fuer-menschenrechte-egmr/erlaeuterte-schweizer-faelle/egmr-artikel-3-emrk-ik-v-schweiz (Accessed: 29 December 2023).
44 | Para. 54 of the Judgement in the Case X, Y, Z.
45 | FRA – European Union Agency for Fundamental Rights, 2017, p. 13.
46 | Para. 49 of the Judgement in the Case A, B, C.

6. Given that, according to the case-law of the CJEU, the provisions of the Qualification Directive must be interpreted in the light of its general structure and purpose, in compliance with the Geneva Convention and the other treaties in this field[47], and in compliance with the rights recognised by the EU Charter of Fundamental Rights[48], when applying national law transposing the Directive, national courts will have to apply a principle of double middle ground, since they will have to take not only the purpose and spirit of the Directive, but also the content of the Geneva Convention into account.

7. When determining sexual orientation, asylum seekers must be given the 'benefit of the doubt'/'in dubio pro reo' presumption. Furthermore, in view of the sensitive nature of questions relating to a person's personal sphere, and in particular their sexuality, such questions must be of a subsidiary, supplementary, or complementary nature, without being decisive. Given the problem of distinguishing between 'bona fide' and 'false claims', with queer identities being hard to prove, a fear of 'fraudulent' applications is not unjustified[49].

8. Invoking sexual orientation is the surest way to obtain asylum protection because: it does not have to be proven; it does not have to and cannot be tested on grounds of human dignity; its credibility cannot be questioned.

9. The only way to stop the misuse of this ground remains to prove the insufficiency of the seriousness of the criminal persecution in the country of origin, but this is undermined by the waiver of the 'discretion order'. However, given the strict and discriminatory regime applied to women in most Muslim countries, from the perspective of 'European standards of freedom', all female persons from these countries who apply for asylum in Europe would qualify.

10. The pan-European solution to this kind of asylum could be the political-economic pressure exerted on the 65 'non-LGBTQ friendly' states by the EU institutions and those EU Member States that are notorious for their hyperactivity in this area and are 'refugee receiving nations'. The individual/paleactive solution would be to verify the reality of sexual orientation after granting refugee status along the lines of tracing and annulling marriages of interest/appearance entered into for the fraudulent acquisition of citizenship, with the aim of tracing those who invoke their sexuality solely to fabricate a right of residence. Cases of post-operative transgender applicants would constitute an exception.

Based on a study titled 'Fleeing Homophobia' which addressed this topic, some authors[50] have estimated that 8000-9000 asylum claims based on sexual persecution are filed annually in Europe[51]. Over 175 million queer individuals worldwide are estimated to live under persecutory environments[52].

47 | Para. 40 of the Judgement in the Case X, Y, Z.
48 | Para. 43 of the Judgement of 19 December 2012 in the Case C 364/11 Abed El Karem El Kott and Others.
49 | Gartner, 2015, pp. 39–66.
50 | Ruppacher, 2014/2015, p. 7.
51 | Jansen, 2011.
52 | Gartner, 2015.

At the end of this attempt to investigate the issue of sexual orientation as a reason for persecution justifying the granting of asylum as objectively and detached as possible, this study offers the following hypothesis for consideration: will Europe, and in particular the EU Member States, from now on grant asylum to all those persons who in their own countries may commit acts or adopt attitudes that fall under the scope of local criminal law, but which are no longer considered crimes on the European continent?

If the answer is yes, then it means that the court rulings discussed above have opened a Pandora's box or a vicious circle from which the real way out is not in the 'safe country' Europe.

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THE INTERNATIONAL AND SUPRANATIONAL RULE OF LAW IN THE SLOVENIAN LEGAL SYSTEM: 'LESSONS' FROM EUROPEAN COURTS

Benjamin Flander[1]

ABSTRACT

This paper examines the status of the international and supranational rule of law within the legal system of the Republic of Slovenia. It begins by providing an overview of the evolution of the rule of law concept in constitutional, international, and European Union (EU) law. In the main sections, this article analyses the constitutional provisions governing, first, the status of international law; second, the provisions concerning the status and implementation of EU law; and third, other provisions determining the relationship between the international and supranational and the domestic law in Slovenia. This study scrutinises how issues concerning disparities between Slovenian domestic law and international and supranational law are addressed both in theory and practice. Furthermore, this article investigates the 'lessons' on the international and supranational rule of law conveyed to Slovenia by European courts, such as the European Court of Human Rights and the Court of Justice of the EU. Focusing also on the Constitutional Court's role, the present study aims to determine whether there are instances where this court acts as a guardian of the Slovenian constitutional identity, considering that its interpretation of the rule of law may not always align with the international and supranational understanding of the concept.

KEYWORDS

rule of law
international and supranational rule of law
constitution
legal system
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1. Introduction: An outline of the development of the international and supranational concept of the rule of law

The principle of the rule of law is the cardinal concept of the modern law associated with the rise of the liberal democratic form of government in the West. It can be considered the product of historical developments over centuries that declares the supreme authority of law over power, encompassing the idea that the law should govern society, rather than arbitrary decisions or the will of entities and individuals in positions of power.[2] While the early history of the rule of law might be conflated with the history of law itself,[3] the modern conception of the rule of law (i.e., the Rechtsstaat, *L'*État *de droit,* stato di diritto, estado de derecho, etc.) originally arose and developed within the framework of the legal order of the early modern liberal state, hand in hand with constitutionalism and with significant differences in the Anglo-American and European legal and cultural traditions.[4]

The origin of the concept, however, dates back to ancient times when the role that law played in society was the subject of philosophical discussions of Greek and Roman thinkers who maintained that laws must be promulgated for the common good and that the government should be subservient to the law.[5] But it was in medieval Europe, a period that was marked by the fragmentation of Europe following the disintegration of the Roman empire, that the rule of law truly began to take shape. The medieval era's major contribution to the development of the concept was to displace the idea that the monarch was above the law that had been inherited from Roman law by giving way to the opposite convention that the sovereign was bound by law. The famous Magna Carta and other historically significant documents of the time are seen by many as protecting not only individuals from the arbitrary will of the monarch but also the predecessors of modern constitutionalism and fundamental rights.[6]

In the late medieval period, the religious wars; Protestant Reformation; Renaissance; gradual separation of church and state; far-reaching social, economic, and

2 | Pavčnik, 2019, pp. 78–83. See also Cejie, 2022, pp. 287–288 and Krygier, 2016, p. 200.

3 | The ancient codifications of written and publicly available laws, such as the Code of Hammurabi from around 1760 BC, were a significant advance toward a legal system. Yet, few would argue that Babylon was governed according to the rule of law in any modern sense. See Chesterman, 2008, p. 4.

4 | Chesterman, 2008, pp. 2–3. See also Cejie, 2022, pp. 292–293.

5 | For instance, Plato's assertion that the government ought to be subservient to the law underwent further refinement by Aristotle who characterised the rule of law as a rational concept, contrasting it with the rule of man driven by passion. to explain why the government should be bound by laws means to prevent arbitrary rule and the abuse of power. The influence of ancient Greek philosophy extended notably to Roman legal thought, as seen in the writings of Cicero who emphasised the necessity for laws to serve the greater good of the community, thereby placing the law under the auspices of justice. Valcke, 2012, p. 4.

6 | As a revolt by the nobility against the crown, the principle that the king was bound by the law was a prominent feature of the *Magna Carta in England and similar historical documents in the continental Europe. Ibid.*

demographic changes; and bourgeoisie desire for greater political influence and legal recognition of their interests set the stage for the Enlightenment and the emergence of liberalism as the core political theory of the new era.[7] These processes placed emphasis on personal liberty and other individual rights (e.g., the freedom to contract, provisions of means to enforce contracts, and protection of property rights) and the rule of law. In the late 18th century, the idea of the rule of law began playing a central role in shaping the architecture of a modern state and society.

The culmination of these processes, which simultaneously marked a new beginning, was the promulgation of the English Bill of Rights, the first modern constitutions (i.e., American and French), the American Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen. In the second half of the 19th century and the beginning of the 20th century, constitutionalism gradually spread across continental Europe and the rest of the world. The idea of the rule of law was at the heart of these developments. On the one hand, it was a product of social processes during the transition from medieval to modern society, while on the other hand, the conceptualisation of the rule of law has been the subject of theoretical discussions, both in England and continental Europe, as well as in the 'New World'.[8]

European thinkers such as English philosopher John Locke, widely regarded as the 'father' of liberalism, alongside his French counterpart Charles de Montesquieu, who introduced theories on the social contract, separation of powers, and the independence of the judiciary as means to prevent governmental abuse, safeguard liberty, and ensure the rule of law, exerted a profound influence on figures like Alexander Hamilton, James Madison, and other framers of the 1787 US Constitution. However, the phrase 'rule of law' only entered common parlance in the 19th century, thanks to the writings of British constitutionalist *Albert v. Dicey*, who argued, *inter alia*, that the rule of law was incompatible with the exercise of wide, arbitrary or discretionary powers of constraint by government officials and that under the rule of law everyone was equal in the eyes of the law.[9] In continental European tradition of the legal thought, the concept of the rule of law was influenced by Austrian legal theorist Hans Kelsen who introduced in his Pure Theory of Law the notion of the 'basic norm' (German: *Grundnorm*) to denote the basic law underlying the entire legal system and helped draft the Austrian Constitution of 1920. According to Kelsen, the rule of law (*Rechsstaat*) requires a hierarchy of norms within the legal order, with the constitution at its apex. All laws are subject to compliance with the constitution, and government action is constrained by this legal framework. Kelsen's formulation also inspired the French legal concept of *état de droit*.[10]

Compared to the Anglo-American tradition, continental Europe developed a slightly different understanding of the concept, with the former placing

7 | Perenič, 2010, p. 17.
8 | Grad et al., 2018, pp. 67–72.
9 | Valcke, 2012, pp. 7–8.
10 | Ibid.

emphasis on judicial process and the latter focusing on the legal nature of the state. An important substantive distinction was the role of constitutionalism: whereas Britain never developed a written constitution, in Europe the establishment of a basic law that constrained state power in general and government in particular came to be seen as axiomatic. This distinction lives on in the different approaches to legal interpretation epitomised by common law precedent-based argument and civil law doctrinal analysis. It also rests in the weight accorded to fundamental rights in civil law as opposed to common law countries, with the US being a prominent exception.[11]

Despite the general consensus that the rule of law should be understood as the antithesis of arbitrary rule and that the extent to which a government adheres thereto is indicative of the degree of its legitimacy, the modern rule of law is the subject of competing theories and definitions.[12] While for some, the concept has a purely formal meaning, for others, it has a wider, more substantive meaning that incorporates ideals of justice and fairness.[13] The concept carries different connotations across countries and their jurisdictions, and even more so, across legal cultures and traditions.[14] The meaning of the concept varies even within the West, notwithstanding that the rule of law is held to be a Western concept. While, accordingly, it seems impossible to find a universal meaning of the concept rule of law, some common core characteristics (elements) of the rule of law can be identified. Considering definitions made by the mainstream legal theory and doctrine,

11 | Chesterman, 2008, p. 8.

12 | Different views on the notion differ to the extent that some declare the concept to have attained the status of a new universally accepted political ideal following the end of the Cold War, others have on the contrary gone as far as to assert that the term has been misused and abused to such an extent that it has become a meaningless phrase, devoid of any true meaning. See Valcke, 2012, pp. 3–4.

13 | In legal doctrine, a distinction is commonly made between the narrow and broad definitions, also referred to as the thin and thick conceptions, of rule of law. The narrow definition focuses on the formal and instrumental aspects, meaning that the content of the law is not relevant. For example, according to the narrow definition, the law must be set forth in advance, public and readily accessible, clear, stable and certain, consistent and applied to everyone according to the terms of transparency and equality. In contrast to the narrow definition, the broader definition (thick conception) contains elements of political morality such as democracy as a form of government, free market economic systems and fundamental rights. See Cejie, 2022, pp. 293–294.

14 | Craig, 2017, pp. 2–24. See also Cejie, 2022, p. 288. Rule of law is often held to be good for everyone. In Western legal traditions, there is an orthodox belief that it serves to enhance liberty and economic development. In contrast to this view (represented by the so-called liberal theory and doctrine), critical Marxist and postmodernist theories proceed from the assumption that modern law is so imbued with the ruling economic and political ideology that it is virtually impossible to recognise the true nature of its bias. In view of the protagonists of these theories, the logic of the 'rule of law' is characterised by social inequalities and unjust relations of economic and political power in society. Human rights and the 'rule of law' are viewed by critical theorists as an ideological ballast and a means of legitimising a sclerotic political and economic regime of power. They also claim that in the coordinates of the liberal concept of human rights, the oppression of unprivileged is incorporated into the meta-narrative of the progressive development of modern society. See Ward, 1997, p. 113 and Edgeworth, 2003, pp. 241–246. See also Flander, 2012, pp. 76–80.

as well as those used by different organisations that pay particular attention to the rule of law, the latter can be understood as a durable and transparent system of institutions and norms that redelivers: the accountability of the government and private actors under the law; clear, publicised, stable, efficient, and just laws which are applied evenly; security of persons, contracts, and property; respect for fundamental rights; open and limited government (i.e., efficient constraints on government powers); and accessible and impartial dispute resolution through an independent judiciary and extrajudicial dispute resolution institutions (meaning that justice is delivered in a timely manner by competent, ethical, and independent representatives of judicial and quasi-judicial entities who are accessible, have adequate resources, and reflect the makeup of the communities they serve). In addition, the rule of law, as commonly understood, implies absence of corruption and a robust legal profession.[15]

Over time, the notion and concept of the rule of law experienced significant progress on the one hand, and underwent unimaginable declines, such as the outbreak of totalitarianisms in the first half of the 20th century, on the other hand. From the end of the Second Word War onward, however, the development of the rule of law gained a new impetus by its internationalisation and supranationalisation through the establishment of universal and regional international organisations and the European Union (EU) and the development of the international and supranational legal orders. The concept has been promoted through a variety of international and supranational legal and political acts, including international declarations and conventions on human rights,[16] and mechanisms such as international and supranational courts and tribunals. Although there has been no consensus on the definition of the 'international rule of law', the majority of international organisations and institutions seem to agree on its notion and define its principles and elements in a similar (albeit not identical) vein.

The United Nations (UN), for example, defines it as 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. It requires measures to ensure adherence to the principles of supremacy of the 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. The rule of law is an integrated part in the three pillars of the

15 | Cejie, 2022, pp. 293–298 and Chesterman, 2008, pp. 12–15. See also Valcke, 2012. Pavčnik, 2019. Perenič, 2010.

16 | For example, the Universal Declaration of Human Rights, a milestone document in the history of international law, drafted by representatives with different legal and cultural backgrounds from all regions of the world, and proclaimed by the UN General Assembly as a 'common standard of achievements for all peoples and all nations', sets out in the Preamble that ' /…/ it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. See the Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948, Preamble.

UN: to support the rule of law in domestic settings to establish peace and security, to secure human rights, and to enforce sustainable development.[17]

The Council of Europe (CoE) has referred systematically to the rule of law in major political documents and numerous legal instruments. First, reference to the rule of law is made in the European Convention on Human Rights[18] (hereinafter the Convention). Its preamble famously places the rule of law as an indispensable part of 'the common heritage' of European countries (see below). Other important documents referring to the rule of law include the Vienna Declaration (1993), Strasbourg Final Declaration and Action Plan (1997), and the Warsaw Declaration (2005). In these and numerous other CoE documents, the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, separation of powers, democratic participation, transparency, prevention of corruption, independence and efficiency of judiciary, respect for human rights, and so on, are identified.[19]

As far as the EU is concerned, the Treaty on European Union (hereinafter TEU) enshrines the rule of law as one of the fundamental values of the EU. The rule of law is a prerequisite for the protection of all the other fundamental values of the Union, including for fundamental rights and democracy. The European Commission defines it as a bedrock of the Union's identity and a core factor in Europe's political stability and economic prosperity. Its annual Rule of Law reports 'take the pulse of the rule of law situation in each Member State and the EU as a whole, detecting and preventing emerging challenges and supporting rule of law reforms'. The Commission examines rule of law developments in Member States under four pillars: justice, anti-corruption, media freedom and pluralism, and broader institutional issues related to checks and balances.[20]

On a large scale, similar to its constitutional version, the international concept of the rule of law imports broader notions of justice and protection from the arbitrary use of public power. It encompasses a range of principles and elements, including, *inter alia*, legal certainty, completeness, predictability, transparency, accountability, and respect for human rights.[21] It also requires not only that the law be enforced impartially and without discrimination but also that legal proceedings be conducted fairly and in accordance with due process. In addition to the above, what is commonly understood as the international rule of law has its own peculiar characteristics. As the founding principle of most international and supranational organisations, it provides a legal structure of relations between states as members of the international community. Regarding the international rule of law, equality before law should also manifest itself in the principle of sovereign equality of states (i.e., all states which come within the scope of a rule of law must be treated equally in the application of that rule to them without any exceptions). The international

17 | United Nations, 2023. See also Ramberg, 2019, p. 334 cited in Cejie, 2022.
18 | The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. Council of Europe, 4 November 1950.
19 | Council of Europe, 2023. See also Polakiewicz and Sandvig, 2015, p. 1.
20 | European Union, 2023. See also European Commission, 2023.
21 | Chesterman, 2008, p. 15.

rule of law is a powerful tool not only in human rights protection but also in their effective promotion. Moreover, it possess the merit to serve as a development strategy, an international standard, and a tool of interpretation of international sources of law.

The rule of law has a special place in the practice of numerous international and supranational supervision and advisory bodies established by international and supranational organisations, and in the case law of international and supranational courts, among which the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR) are the most important. For example, the latter has stated in its judgements that the principle of rule of law is 'one of the fundamental principles of a democratic society' (*Klass v. Germany*, 8 September 1978, paragraph 55); that it 'inspires the whole Convention' (*Engel v. the Netherlands*, 8 June 1976, paragraph 69); and that it is 'inherent in all the Articles of the Convention' (*Amuur v. France*, 25 June 1996, paragraph 50).[22] The ECHR determined the content and meaning of the whole range of principles and elements of the rule of law, such as legality, foreseeability of and trust in the law, proportionality, procedural safeguards, equality of individuals before the law, control of the executive whenever a public freedom is at stake, and possibility of a remedy before a court and the right to a fair trial (i.e., procedural safeguards of a suspected or an accused person). Some of these principles and elements are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the state power.[23] In its case law, the ECHR also determines the limits of admissibility of interferences with the rights entrenched in the Convention that are inextricably linked to the rule of law.[24]

Although the international rule of law is widely recognised as a key component of good governance and a cornerstone of modern democratic societies, just like its constitutional counterpart, it remains contested. The conception of the rule of law was originally developed domestically, keeping the nation-state as a sovereign entity. In contrast, the international rule of law, and even more so its supranational version enforced by the EU, necessarily entails certain limitations to national sovereignty. As indicated above, the European Convention on Human Rights, for example, maintains in its preamble that 'the governments of European countries

22 | Sicilianos, 2020. Other cases where the ECHR stated that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention, are *Former King of Greece and Others v. Greece* (no. 25701/94, paragraph 79) and *Broniowski v. Poland* (no. 31443/96, paragraph 147).

23 | Ibid.

24 | The concept of the rule of law first appeared in the ECHR's case law in the *Golder v. United Kingdom* (1975). In this case, the Court based its broad interpretation of the right to a fair trial (Article 6, paragraph 1 of the Convention), from which it inferred the inherent right of access to the courts, on the reference to the 'rule of law' made in the Preamble of the Convention. According to the Court, it would be a mistake to see the principle of 'rule of law' as a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. While there is no abstract definition of the rule of law in the Court's case law, the Court has developed various substantive guarantees which may be inferred from this notion. See Sicilianos, 2020.

are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law'. Similarly, the TEU[25] states in Article 2 that the EU is based, *inter alia*, on the values of the rule of law, which are common to all Member States.[26] Over the past decade, these provisions have proven both important and controversial. They determined minimal standards of a democratic government and a just legal system, but it became clear that due to the difference in the historical and political context within which the rule of law evolved, each nation's notion of the concept might not be the same and that in certain countries, the interpretation and practice of the rule of law might not correspond with the international or/and supranational understanding.

In the following sections, the present article explores the status of the international and supranational rule of law within the legal system of the Republic of Slovenia. It analyses, first, the constitutional provisions on the ratification and status of international treaties and other general international laws in the Slovenian legal system; second, the provisions on the status and implementation of EU law; and third, other provisions that determine the relationship between international and domestic law in the Slovenian legal system. The study scrutinises how issues concerning disparities between the Slovenian domestic law and the international and supranational law are addressed both in theory and practice. Furthermore, the article investigates the 'lessons' on the international and supranational rule of law conveyed to Slovenia by European courts, such as the European Court of Human Rights and the CJEU. Focusing also on the Constitutional Court's role, the study aims to determine whether there are instances where this court acts as a guardian of the Slovenian constitutional identity, considering that its interpretation of the rule of law may not always align with the international and supranational understanding of the concept.

2. The international and supranational rule of law in the Slovenian legal system

2.1. The constitutional principle of Rechtsstaat [Pravna država]

Understood as a synonym and equivalent of the principle of the rule of law, the principle of *Rechtsstaat [Pravna država]* is entrenched in Article 2 of the Slovenian Constitution.[27] This provision together with that of Article 1, which defines Slovenia

25 | Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5, 24 December 2002.

26 | Striving to create a common rule-of-law culture, the European Commission suggests focus on (1) legality, legal certainty, and equality before the law and separation of powers, (2) prohibition of arbitrariness and penalties for corruption and (3) effective judicial protection by independent courts. Cejie, 2022, p. 296.

27 | The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije* [Constitution]), Official Gazette of the Republic of Slovenia nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16, 92/21.

as a democratic republic, determines the fundamental constitutional quality of the Slovenian state. It implies several other principles and provisions explicitly stipulated by the constitution. Some of these are the principle of separation of powers; limitations on restrictions of human rights; binding of the executive to legislation; hierarchy of legal acts and norms; principle of legality and prohibition of the retroactive effect of legal norms in criminal law; obligation to publish legal norms; inviolability of human life; protection of personal dignity and prohibition of torture; inhuman or degrading treatment or punishment; protection of personal liberty; principle of equality before the law and prohibition of discrimination on any personal circumstance; protection of privacy; right to appeal and judicial review; right of everyone to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent and impartial court constituted by law; and provisions determining a system of procedural guarantees across the different procedures conducted by organs and other entities of public power.[28]

The constitutional principle of *Rechtsstaat* also entails principles and provisions not expressly stipulated in the text of the Constitution, which have been recognised as such by the Constitutional Court. These principles and provisions are: (a) the principle of proportionality, which means, *inter alia*, that limitations on human rights and fundamental freedoms have to pass a proportionality test; (b) the principle of the protection of trust in the law, which requires that legal regulation be stable and foreseeable, and sets a limit on the de facto retroactive effect of legal norm; and (c) the principle of clarity and coherence of legal norms, which aims at determining legal relationships to a sufficient level of exactness to exclude the arbitrariness of the state organs and other entities of public power.[29]

In Slovenia, as in other countries that belong to the democratic tradition, the principle of *Rechtsstaat* is inextricably linked to the constitutional protection of human rights and fundamental freedoms.[30] The Constitution provides for a comprehensive catalogue of human rights and fundamental freedoms and establishes the duty of the state to protect them. It guarantees equality in the exercise of human rights and provides for structural rules on their exercise and limitation. It also guarantees judicial protection of human rights and restitution of the consequences of their violations. Among the various mechanisms for the protection of human rights, the role of the Constitutional Court is the most important. An individual alleging a human rights violation by a court judgement, administrative acts, and so on, can access the Constitutional Court via a constitutional complaint after other legal remedies have been exhausted.[31]

28 | Bardutzsky, 2019, pp. 701–703. See also Avbelj et al., 2019a, pp. 38–40.
29 | Bardutzsky, 2019, p. 702. See also Avbelj et al., 2019a, pp. 40–49 and Šturm et al., 2010, pp. 59–90.
30 | Avbelj et al., 2019a, pp. 38–39.
31 | Constitution, Articles 14–65.

2.2. Between sovereignty and pluralism: The status of the international and EU law in the Slovenian legal system

The Slovenian Constitution contains several provisions that determine the position of international law and EU law vis-à-*vis* internal law and thus incorporate the international rule of law in the legal system as a whole. Pursuant to Articles 8 and 153 of the Constitution, laws and other general acts must comply with generally accepted principles of international law and international treaties ratified by the National Assembly, whereas general acts except laws must also be in conformity with international treaties ratified by the Government. While the Constitution distinguishes between international treaties that are to be ratified by the parliament and other international treaties, all ratified treaties shall be applied directly. The former also enjoy an elevated position in the hierarchy of legal acts: while they are superior to laws, government regulations, and other general legal acts, they are inferior to and must be in conformity with the Constitution. In this regard, the authors of the new commentary on the Constitution maintain that international law obligations, either from international treaties or international customary law, which would be inconsistent with the Constitution, cannot be implemented, as this would be unconstitutional. According to them, international legal provisions and obligations that are inconsistent with the Constitution are without legal effects.[32]

It follows from the above that, in principle, the Slovenian internal legal order in relation to the international law preserves constitutional sovereignty. In reality, however, the question of the relationship between both legal corpuses is not so simple. To avoid the situation that the Republic of Slovenia would commit to something in an international treaty that would be in conflict with the Constitution and therefore would be unable to fulfil the accepted obligations according to the principle of *pacta sunt servanda*, the legal order provided for a safeguard. Pursuant to Article 160 of the Constitution, in the process of ratifying an international treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution (the National Assembly is bound by its opinion). While this preventive type of review of constitutionality solves the problem of new international treaties to which Slovenia would decide to accede, a problem would arise if an international treaty already ratified and valid in Slovenia turned out to be unconstitutional. In such a case, in the light of respecting the principle of *pacta sunt servanda*, a constitutional amendment would be necessary. Another situation in which international law would take precedence over the Constitution can potentially arise in the circumstances provided for in the fifth paragraph of Article 15. This so-called non-enumeration clause opens the Constitution's human rights catalogue by stipulating that no human right entrenched in legal act that is in force in Slovenia may be restricted on the grounds that it is not recognised by the Constitution. This means that if an international treaty provides a higher standard of protection of human rights or the rule of law

32 | Avbelj et al., 2019b, pp. 82–87.

than the Slovenian Constitution, priority should be conferred to the international treaty.[33]

A somewhat different constitutional regime applies to EU law. To provide a legal basis for the accession of the Republic of Slovenia to the EU, a new Article 3.a (the so-called European Article) was adopted by the 2003 amendments to the Constitution.[34] This article places the Republic of Slovenia in a constitutional and legal position, which is significantly different from the one it had before joining the EU. While this article does not refer explicitly to EU, but generically to international organisations, it provides a constitutional basis for transfer of the exercise of part of 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.[35] So far so good! The problem arises in the paragraph three of Article 3.a, which states that legal acts and decision adopted by the EU institutions shall be applied in Slovenia in accordance with EU law. The fact that this provision misses an explicit and precise determination of the hierarchical position of EU law in relation to domestic law, brought considerable discomfort into the Slovenian legal system.

In Slovenia, in theory and practice, two different views emerged regarding the position of EU law in relation to domestic law in general and the Constitution in particular. Historically speaking, the so-called 'supranational approach' first took hold. In accordance with this view, with the accession to the EU, the Republic of Slovenia partially renounced the constitutional principle of sovereignty and recognised the principle of supremacy of primary sources of EU law. Although the Constitution mentions only the transfer of the implementation of part of sovereign rights, this entails that in Slovenia, the legal rules in the EU treaties should prevail and have supremacy over all legal rules of internal law. Accordingly, the Slovenian authorities would have no ground to refuse the use of individual acts or provisions of primary or secondary EU legislation if they would be found contrary to the Slovenian Constitution. Therefore, the sovereignty in its entirety—as a power to independently make legal decisions—is transferred to the EU. Over time, however, some EU law experts have begun to warn that the practice of the Constitutional Courts of EU Member States, as well as the CJEU alone, has shown that the supranational approach to viewing the relationship between EU law and internal law is not convincing neither on the normative nor on the interpretive level.[36]

In contrast, the 'pluralist approach' emphasises that the leading principle underlying the relationship between the two corpuses of law is the relational principle of primacy. This principle includes two types of conditions—national and supranational—when deciding on the primacy of one or another. While the former are contained in the founding treaties of the EU and their interpretation by the

33 | Avbelj et al., 2019b. See also Ribičič, 2004.

34 | The Constitutional Act amending Chapter 1 and Articles 47 and 68 of the Constitution of the Republic of Slovenia [*Ustavni zakon o spremembah I. poglavja ter 47. in 68. člena ustave Republike Slovenije*], Official Gazette of the Republic of Slovenia, No. 24/03.

35 | Šturm et al., 2010, pp. 72–103; Avbelj at al., 2019a, pp. 66–74.

36 | Avbelj et al., 2019b, pp. 68–69. See also Avbelj, 2012, p. 348.

CJEU, the latter can be found in Article 3.a of the Slovenian Constitution. In the context of this approach, the relationship between the national law and EU law is not strictly hierarchical, but heterarchical. The national law is not subordinate to EU law and to the decisions of EU institutions (including courts), and the effectiveness of this law and these decisions in the territory of the Republic of Slovenia is not unconditional, as it comprises two independent yet interrelated legal systems. In the coordinates of this 'plural sovereignty', the Republic of Slovenia remains sovereign in the usual sense, while the EU has acquired functional sovereignty within the framework of transferred competences.[37]

According to Matej Avbelj, a renowned Slovenian expert on EU law, the theory of plural sovereignty was proved by the German federal Constitutional Court in the Weiss Case in which the Court held that a CJEU judgement was arbitrary and not binding in Germany. He explains that the German Constitutional Court has been building the pluralist doctrine from the 70s onward. Similarly, the Spanish and Czech Constitutional Courts and the Danish Supreme Court also decided not to follow the CJEU judgements. In contrast to these courts, so far, the Slovenian highest courts have not taken a challenging stance towards EU primary sources of law and/or the decisions of the EU institutions. Paraphrasing Avbelj, in the case of a serious conflict between the law/decision of the EU and the Slovenian national law, the Slovenian Constitutional Court as the final defender of Slovene constitutionality should take a position of critical restraint in relation to the EU. The principle of primacy of EU law should apply only if the EU respects the principles of democracy, rule of law, and human rights, and if it operates within the boundaries of transferred powers. If that is not the case, the Constitutional Court could exceptionally decide that EU law should not be applied in Slovenia.[38]

3. International and supranational versus national rule of law: 'Lessons' from the ECHR and the CJEU

3.1. The ECHR

Before 2006, Slovenia[39] was convicted by the ECHR for violating convention rights only six times. After that year, both the number of filed complaints and number of convictions increased sharply. By 2021, 10,136 complaints had been filed with the ECHR against Slovenia, and 9,634 appeals were declared inadmissible

37 | Avbelj et al., 2019a, pp. 67–68.
38 | Avbelj, 2020.
39 | The National Assembly of the Republic of Slovenia ratified the European Convention on Human Rights on June 28, 1994. With the ratification of the Convention, citizens of Slovenia and other individuals were given the opportunity to file a complaint with the ECHR if their Convention rights were violated.

or struck out. The ECHR delivered 392 judgements altogether.[40] While it found no violation in 24 judgements, at least one violation was established in 342 judgements.[41]

My review of randomly selected case law shows that in the vast majority of judgements the ECHR does not explicitly refer to the rule of law. I also separately reviewed 29 cases/judgements that the ECHR Press Unit selected as 'noteworthy cases' that concerned Slovenia. These explicit references to the rule of law were found only in two judgements. However, given that the Court states in several decisions that the rule of law is inherent in all the Articles of the Convention (see above), the violations of convention rights established by the ECHR may also be considered violations of the principle of the rule of law (in a broader sense), even if the Court does not explicitly refer to the violation of this principle. Additionally, it should be noted that in some reviewed judgements, the ECHR refers to principles and components that constitute the principle of the rule of law or are inextricably linked to this principle.

An explicit reference of the ECHR to the principle of the rule of law can be found, for example, in the *Case of* Šilih *v. Slovenia*.[42] The applicants complained that their son had died as a result of medical negligence and that their rights under Article 2 (right to life) and several other articles of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for his death. More particularly, the applicants complained that the

40 | ECHR, 2022. A comparison with countries in the region shows that 17,491 complaints were filed against neighbouring Croatia; 16,540 complaints were declared inadmissible or struck out, while the ECHR delivered 530 judgements; 25,352 complaints were filed against Hungary; 23,775 complaints were declared inadmissible or struck out and the ECHR issued 931 judgements; and 34,858 complaints were filed against Serbia. Among these, 32,786 complaints were declared inadmissible or struck out and the ECHR delivered 880 judgements. The highest number of complaints were filed against Poland (75,599); 72,164 complaints were declared inadmissible or struck out and the ECHR issued 1,246 judgements, which is more than anywhere else in the region; 14,016 complaints were filed against the Czech Republic, of which 13,612 were declared inadmissible or struck out and the ECHR delivered the lowest number of judgements among all countries in the region (287); 9,576 complaints were filed against Slovakia, and 8,910 were declared inadmissible or struck out and the Court issued 448 judgements.

41 | Ibid. As regards violations by Article, the Court found that by far most frequently violated rights are the right to an effective remedy (267 violations) and the right to a fair trial due to the length of proceedings (263 violations). The Court also found 25 violations of the right to a fair trial for other reasons than length of proceedings, 21 violations of the prohibition of inhuman or degrading treatment, 12 violations of the right to respect for private and family life, 8 violations of protection of property, 6 violations of the right to liberty and security, 6 violations of the authorities' obligation to carry out an effective investigation in cases concerning the prohibition of inhumane or degrading treatment, 3 violations of freedom of expression, and 3 violations of the prohibition of discrimination. The ECHR established that in 3 occasions domestic courts decisions have not been implemented by the Slovenian authorities. Last but not least, the Court established 3 violations of the obligation to carry out an effective investigation in cases concerning the right to life but found no violation of the right to life (i.e., it found no deprivation of life). The ECHR found no violation whatsoever with regard to other convention rights.

42 | Šilih v. Slovenia, no. 71463/01, 9 April 2009.

criminal and civil proceedings they had instituted did not allow for the prompt and effective establishment of responsibility for their son's death. The ECHR held, *inter alia*, that if in the specific sphere of medical negligence there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law. It found that there had been a violation of Article 2 of the Convention in its procedural limb.

Another example is the *Case of Ribič v. Slovenia*.[43] In this case, the ECHR held that the overall prison sentence of 30 years imposed on the applicant by the judgement of a national criminal court was in breach of the principle of legality enshrined in Article 7 of the Convention. The Court noted that the provisions of the Criminal Code were deficient and that the domestic courts interpreted them by resorting to the canons of interpretation that were clearly to the detriment of the applicant and led to the conclusion that the provisions should be understood as imposing a sentence of 30 years. The domestic courts did so despite the fact that such a penalty was heavier than the maximum sentence explicitly provided for in the applied legal provision and that, having regard to the actual wording of that provision, it was clearly to the detriment of the applicant. Accordingly, the Court concluded that the domestic courts failed to ensure the observance of the principle of legality enshrined in Article 7 of the Convention. It further found that the overall penalty imposed on the applicant was in violation of both the principle that only the law could prescribe a penalty and the principle of retrospectiveness of the more lenient criminal law. The Court states, *inter alia*, that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction, and punishment (the Court referred to the cases of *Del Río Prada v. Spain* and *Vasiliauskas v. Lithuania*).

In the case of *Benedik v. Slovenia*,[44] the ECHR found a violation of Article 8 of the European Convention on Human Rights because the Slovenian criminal procedure law, which provided that the police could obtain information on the owner or user of a certain means of electronic communication from the Internet service providers without a court order, was *not* compatible with principles of the rule of law. More particularly, the Court found that the provisions upon which the law enforcement authorities had relied to request the relevant subscriber information without having obtained a court order contained no rules on adequate safeguards and effective guarantees against abuse. I will delve into this case in greater detail since, in the specific circumstances of this case, the principle of the rule of law is interpreted differently by the ECHR than by the Slovenian Constitutional Court.

Based on the data obtained by the Swiss police regarding a group of Internet users who owned and exchanged child pornography in the form of pictures or

43 | Ribič v. Slovenia, no. 20965/03, 19 October 2010.
44 | Benedik v. Slovenia, no. 62357/14, 24 April 2018.

videos, the Slovenian police requested the Slovenian Internet service provider to disclose the data regarding the user to whom it assigned an IP address recorded by the Swiss colleagues. The police based its request on the paragraph 3 of Article 149b of the Criminal Procedure Act[45] (hereinafter the CPA) requiring the operators of the electronic communication networks to disclose to the police the information on the owners or users of a certain means of electronic communication whose details are not publicly available. In response, the Internet service provider gave the police the name, surname, address, and telephone number of the user to whom the IP address was assigned. Upon finding that the person in question was the applicant's father, the police obtained an order issued by the investigating judge and carried out a house search of the applicant's family home in which they seized four computers and made copies of their hard disks. Reviewing the hard disks, the police found that one of them contained files with pornographic material involving minors. The court of first instance found Mr. Benedik guilty of the criminal offence of displaying, manufacturing, possessing, and distributing of pornographic material and sentenced him to a suspended prison term of eight months with a probation period of two years.[46]

Confirming that the first-instance court had correctly established the facts of the case, the appellate court dismissed the applicant's appeal holding that the data on the applicant's father's IP address concerned solely the name of an owner or user of electronic communication; thus, the data that could be obtained, according to the provisions of the CPA, without a court order. The applicant challenged the appellate court's decision, arguing that the Swiss police should not have obtained his father's dynamic IP address without a court order and neither should the Slovenian police have obtained the data on the identity of his father to whom the IP address had been assigned without such an order. He argued that such data should be considered as traffic data constituting circumstances and facts connected to the electronic communication and attracting the protection of privacy of communication. The Supreme Court dismissed the applicant's appeal on points of law with the reasoning that, given the general accessibility of websites, such communication could not be considered private and thus protected by Article 37 of the Constitution. Moreover, in the Supreme Court's view, the Slovenian police had not acquired traffic data about the applicant's electronic communication, but only data regarding the user of a particular computer through which the Internet had been accessed.[47]

The applicant lodged a constitutional complaint reiterating the arguments adduced before the regular courts. The Constitutional Court dismissed the complaint, holding that his constitutional rights had not been violated. The Constitutional Court pointed out that in addition to the content of communications, the Constitution also protects traffic data, that is, any data processed for

45 | The Criminal Procedure Act (*Zakon o kazenskem postopku* [CPA -UPB16], Official Gazette of the Republic of Slovenia, No, 176/21 – officially consolidated text.

46 | See Decision of the Constitutional Court of the Republic of Slovenia No. Up-540/11, dated February 13, 2014. See also *Benedik v. Slovenia*.

47 | Up-540/11.

the transmission of communications in an electronic communications network or for the billing thereof, which included the IP address. However, given that the applicant had not hidden in any way the IP address through which he accessed the internet, and neither was access to the peer-to-peer network used by him in any way restricted, in the Constitutional Court's view, the applicant had not clearly expressed his intention that he wanted to keep his communications and identity private. On the contrary, he had established an open line of communication with an undetermined circle of strangers using the Internet worldwide who had shown interest in sharing certain files. Therefore, according to the Constitutional Court, the applicant's expectation of privacy was not legitimate and the fact that the Swiss police had obtained his IP address did not interfere with his right to communication privacy, so a court order was not necessary to access it.[48]

Final decision on the matter was issued by the ECHR. In contrast to the Slovenian Constitutional Court, the Strasbourg Court held that there had been a violation of Article 8 (right to respect for private and family life) with regard to the failure of the Slovenian police to obtain a court order before accessing subscriber information associated with a dynamic IP address. The ECHR assessed that 'not hiding a dynamic IP address, assuming it is possible to do so, cannot be decisive in assessing whether there is a reasonable expectation of privacy in relation to a person's identity'. It maintained that 'the assigned dynamic address, even if visible to other users of the network, could not be traced to the specific computer without the internet service provider's verification of data following a request from the police', and the online activity of the applicant was in fact found to carry a high degree of anonymity. It concluded that Mr. Benedik's interest in having his online activity protected fell within the scope of the notion of 'private life' under Article 8 of the Convention. The Court also assessed the measure's compliance with Article 8 by questioning whether the police's interference with the applicant's rights had been 'in accordance with the law'. To meet this condition, the legal provisions on the police measures ought to have basis in domestic law which is *compatible with the rule of law standards*. The domestic law also ought to be accessible and the person affected had to be able to foresee the consequences of his or her actions.[49]

The Court found that provision upon which the law enforcement authorities had relied to request the relevant information without having obtained a court order contained no rules covering the link between a dynamic IP address and subscriber information and no adequate safeguards and effective guarantees against abuse. In the Court's view, the Constitutional Court's finding that it had not been necessary for the police to obtain a court order, as the applicant had effectively waived his right to privacy by revealing his IP address and the contents of his communications on the file-sharing network, was not reconcilable with the scope of the right to privacy under the Convention. According to the Court, the law enforcement authorities should and could have obtained a court order. Moreover, the Court detected at the time a lack of regulations on retaining relevant data, a lack of safeguards against abuse by State officials in the procedure of accessing

48 | Up-540/11.
49 | Benedik v. Slovenia.

and transferring them, and a lack of independent supervision of the use of the police's powers with regard to obtaining information from the Internet service providers.[50]

Assuming that the obtaining by the police of the subscriber information associated with the dynamic IP address had a basis in domestic law (the CPA provided that the police could obtain information on the owner or user of a certain means of electronic communication from the Internet service providers), the Court concluded that this law was not compatible with principles of the rule of law. The ECHR pointed out that compatibility with the rule of law required that domestic law provided adequate protection against arbitrary interference with the right to private and family life from Article 8. According to its own words, the Court must be satisfied that there exist adequate and effective guarantees against abuse, its assessment depending on all the circumstances of the case, such as the nature, scope, and duration of the possible measures, as well as the grounds required for ordering them; the authorities competent to permit, carry out, and supervise them; and the kind of remedy provided by the national law.[51]

To summarise, in *Benedik versus Slovenia*, the ECHR's, in contrast to the position of the Slovenian Constitutional Court, held that the Slovenian legislation (i.e., the provisions of the CPA concerning a particular covert investigation measure) did not provide adequate safeguards and guarantees pertaining to the rule of law under the European Convention on Human Rights.

In the presented and other cases of established violations of convention rights, the ECHR interpreted the principle(s) of the rule of law differently from the Slovenian authorities (in the *Benedik* case, also differently from the Constitutional Court). Obviously, the ECHR interpreted the (international) rule of law in such a way that it established more strict standards of this principle than those provided by the Slovenian judicial and other authorities. It should be also noted that, with rare exceptions, Slovenia has been consistently enforcing the judgements of the ECHR and even in the public and professional discourse, with rare exceptions, the decisions of the ECHR in general and the Court's understanding of the rule of law in particular have not been seriously challenged. In addition, until now Slovenia did not take advantage of the possibility of appealing the judgements at the Grand Chamber of the ECHR. The above indicates that Slovenia recognises the ECHR's full sovereignty, within the scope of its powers under the Convention.

3.2. The CJEU

During the two decades of Slovenia's membership in the EU,[52] dozens of court proceedings were held at the CJEU against or in connection with Slovenia, which in most cases did not end in Slovenia's favour. Most often, cases were brought against Slovenia by the European Commission due to delays in the implementation of

50 | Benedik v. Slovenia. See also Chatzinikolaou, 2018.
51 | Benedik v. Slovenia.
52 | Slovenia has been a full member of the EU since 1 May 2004. With the membership, Slovenia transferred the exercise of part of its sovereign rights to the EU institutions including the CJEU.

directives and non-fulfilment of obligations from the European treaties. Several cases before the CJEU took place on the basis of requests for a preliminary ruling by the CJEU. Only rarely cases were brought to the CJEU by Slovenia, corporations, or individuals against an act or failure to act of the European Commission.[53]

My review of four randomly selected preliminary ruling cases (Detiček No. C-403/09, Omejc No. C-536/09, Pelati No. C-603/10, and Grilc No. C-541/11) revealed that the CJEU did not explicitly refer to the rule of law in any of them. The first request for a preliminary ruling by the CJEU was made in 2009 in the Detiček case (No. CC-403/09). This reference for a preliminary ruling was made in the course of proceedings between two litigants concerning custody of their daughter. Filed by the appellate court, the request concerned the interpretation of Article 20 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1). Since joining the EU, all the Slovenian courts have submitted to the CJEU 39 requests for a preliminary ruling in total, of which no less than 24 were lodged by the Supreme Court, and 4 by the Constitutional Court. Among first-instance courts, only the administrative court has made four references.

An explicit reference to the rule of law was found in the judgement delivered by the CJEU on 17 December 2020 in the case C-316/19 Commission versus Slovenia.[54] The judgement resulted from a dispute between the European Central Bank (ECB) and Slovenia on the interpretation of the concept of EU archives and the proper application of Protocol No 7 on the Privileges and Immunities of the EU[55] (hereinafter the Protocol on privileges and immunities) in the national legal order of a Member State. The Grand Chamber of the CJEU held that Slovenia infringed the inviolability of the ECB's archives by unilaterally seizing documents connected to the tasks of the European System of Central Banks (ESCB) and the European System at the premises of Slovenia's national central bank (Bank of Slovenia). The Court also ruled that Slovenia did not sincerely cooperate with the ECB after that seizure to remedy this violation. In this judgement, the rule of law is one of the key concepts referred to by the CJEU.[56]

The case relates to the fallout of the financial crisis of the late 2000s when Slovenia saved banks with taxpayers' money, which revealed sharp divergences regarding the allegedly overly high cost of those bank bail-ins and related questions of responsibility of national authorities. In an attempt to gather evidence from the Bank of Slovenia in criminal proceedings related to those bail-ins, national law enforcement authorities carried out house search in the Bank of Slovenia. The investigation sought national documents as evidence in the prosecution of certain members of staff including the governor in his national capacity. The Bank of Slovenia claimed that the investigation was not admissible because

53 | See, for example, Case No. T-187/09.

54 | Judgement of 17 December 2020, Commission versus Slovenia C-316/19, EU:C:2020:1030.

55 | Protocol (No. 7) on the privileges and immunities of the European Union, *OJ C 326, 26.10.2012, pp. 266–272.*

56 | Commission v. Slovenia C-316/19. See also Croonenborghs, 2021.

it interfered with the ECB's archives protected by the Protocol on privileges and immunities, to which the Slovenian authorities were not to have access without the express agreement of the ECB. Ignoring the arguments of the Bank of Slovenia, upon prior court authorisation, the Slovenian law enforcement authorities carried out the search and seizure of documents without involving the ECB.[57]

The CJEU ruled that, by unilaterally seizing documents connected to the performance of the tasks of the ESCB and of the European System and, as regards the period after that seizure, by failing to cooperate sincerely with the ECB on that matter, the Republic of Slovenia had failed to fulfil its obligations under Article 343 of the Treaty on the Functioning of the European Union (TFEU); Article 39 of the Protocol on the ESCB and ECB; Articles 2, 18, and 22 of the Protocol (No 7) on privileges and immunities; and Article 4(3) of the TEU.[58] In its arguments, Slovenia referred several times to the rule of law and so did the CJEU in the reasoning of its judgement.

Contending that it did not infringe the principle of the inviolability of the archives of the Union, Slovenia argued that it resulted from both international law and the case law of the CJEU, as well as from the fundamental values of the EU such as the principles of transparency, openness, and the rule of law, that the concept of 'privileges and immunities' must be strictly interpreted and that, far from being of an absolute nature, the exercise of those privileges and immunities was restricted in functional terms to the extent necessary to guarantee the functioning of the EU and its institutions to achieve their objectives. It argued that the investigation and the independent and impartial execution of criminal proceedings, which fell within the competence of the Member States, constituted a 'fundamental premiss of the rule of law' and that the principle of the rule of law took precedence over the privileges and immunities of the EU.[59]

In its findings, the CJEU agreed with Slovenia that although the functional immunity of international organisations constituted a legitimate public interest, it was not absolute and must be reconciled with the other public rights and interests. These include, in particular, the principle of the rule of law and, more specifically, the need to guarantee the independent and impartial investigation and persecution of criminal offences, in addition to avoiding the impunity of persons against whom criminal investigations are conducted, including the governors of national central banks. However, according to the CJEU, the existence of privileges and immunities for international organisations and their institutions is not in itself contrary to the principle of the rule of law. Hence, in the CJEU's view, the fact that Article 2 of the Protocol on privileges and immunities precludes, in principle, the seizure of documents by the authority of a Member State where those documents are part of the archives of the Union and the institutions concerned have not agreed to such seizure does not deny the rule of law.[60]

57 | Commission v. Slovenia C-316/19. See also Croonenborghs, 2021 and Avbelj, 2020.
58 | Commission v. Slovenia C-316/19, paragraph 130.
59 | Commission v. Slovenia C-316/19, paragraphs 52 and 54.
60 | Commission v. Slovenia C-316/19, paragraphs 52 and 54.

Avbelj rightfully assessed this judgement of the CJEU as clearly wrong. Admitting that immunities and privileges are common in international law, he claims that it is obvious that they are in principle incompatible with a constitutional system based on the rule of law. Privileges and immunities are an exception to the requirement of the rule of law, that we are all equally subject to the law, that there are no special rules for anyone, except in exceptional, narrow cases, if they are convincingly justified. Avbelj is convinced that the existence of privileges and immunities is an aberration in the allegedly constitutionalised autonomous legal order of the EU. For him, it was inconceivable that any entity could act in a constitutional manner, using international legal mechanisms such as immunities and privileges when it suited them. Slovenia, in his opinion, convincingly and correctly warned that the CJEU's interpretation transcended what was stipulated in international law, that it opposed the trend of narrowing the functional immunity of international organisations, which was also confirmed by the ECHR, and that it was inherently incompatible with the supposed constitutional nature of EU law.[61]

We should also be critical of the way in which the CJEU defined the archive. According to Item 75 of the CJEU's judgement, the term archive, which has never been defined in EU law, represents 'all documents of any kind, regardless of their date, form and physical medium, created or received by institutions, bodies, offices or agencies of the Union, or their representatives or officials during the performance of their functions and which relate to the activities of these entities or are related to the performance of their tasks'.[62] As Avbelj argues, it is clear from this that the CJEU has defined the archive not only broadly but also extremely broadly. According to the interpretation of the CJEU, the archives of the EU institutions, especially in today's digital age, are omnipresent. They are practically everywhere, residing in the computers and smart phones of Member State's ministers (as representatives of the EU Council), Prime Ministers (as representatives of the European Council), and ministers (as representatives of the EU Council), and in general, of all public administration officials of the Member States who deal with EU affairs and documents. All these documents and their holders are consequently inviolable, as they enjoy immunities and privileges under EU law. In relation to them, national criminal prosecution is no longer possible in the Member States without the permission of EU institutions.[63]

With such a broad interpretation of the term 'archive', Slovenia could not succeed with its arguments also because the Court retroactively applied the Latvian case of Rimševics C-202/18. In February 2019, the CJEU ruled that the ECB and the national central banks formed a unified construct, that they were in some way united and that therefore national central banks had become subsumed under the EU institution. Even if the CJEU is right here, the undisputed fact remains that

61 | Avbelj, 2020. Interpreting privileges and immunities as broadly as the CJEU does in its judgement in the case C-316/19 means a departure from the established jurisprudence of the CJEU and the entire telos of European integration, which advocates for the enforcement of the fundamental values of the rule of law and democracy, a necessary part of which is the transparency of the functioning of institutions. See ibid.

62 | Commission versus Slovenia C-316/19, paragraph 75.

63 | Avbelj, 2020.

the Slovenian law enforcement authorities conducted the investigation in 2016 and the Rimševics case was issued in 2019. They searched for national documents and they certainly could not have known the CJEU's decision from the Rimševics case, as it did not exist.[64]

4. The international and supranational rule of law in the Constitutional Court's case law

In a research project within the framework of the Central European Professors' Network which was carried out in 2021, I analysed 30 cases of the last 10 years.[65] The study revealed, *inter alia*, that in my sample of case law the Constitutional Court made references to the international treaties[66] and decisions of the ECHR and CJEU,[67] as well as to constitutional and general legal principles. In particular, the Constitutional Court made several references to the specific principles and elements of the international principle of the rule of law.[68] Searching the Constitutional Court's case law database furthermore, one can find numerous decisions where the Constitutional Court addresses the substantive meaning of or simply refers to important parts of the so-called constitutional material core (i.e., principles of democracy, the rule of law, the separation of powers, of human dignity, personal liberty and privacy in a democratic state, etc.) by making references not only to the constitutional but also to the international and supranational rule of law.

64 | Ibid. Avbelj also points to the fact that the Court actually departs from its established case law, according to which the European Commission bears the burden of proof of a violation of EU law. However, as the archive has not been defined in EU law yet, and since the ECB has not yet defined the criteria by which its documents could be separated from the national ones, the European Commission was also unable to define the documents that have been seized illegally. The court solved this by saying that Slovenia seized so many documents that the ECB's archives must have also been among them. Since, according to the CJEU, an archive is everything that an EU institution and its staff creates or receives, inviolability is absolute and no longer functional.
65 | The research aimed at providing a record of the common features of the constitutional adjudication in fundamental rights cases, and the methods and techniques of legal interpretation that are used by the Slovenian Constitutional Court.
66 | Most references were made to the European Convention on Human Rights, while significantly less frequently the Constitutional Court referred to the Charter of Fundamental Rights of the EU, TEU, TFEU, and other international treaties and legal instruments.
67 | In the decisions from my sample of case law, the Constitutional Court made no reference to judicial practice of other international courts.
68 | For example, in Decision no. U-I-24/10, when interpreting the meaning of the principle of legal certainty as a component of the principle of the rule of law, the Constitutional Court referred to the general legal principle of *res iudicata*. The Constitutional Court stated that '/…/ according to the ECHR, ensuring legal certainty requires respect for the principle of *res iudicata* or finality of court decisions, from which it follows that a party cannot, in the absence of special circumstances, request re-examination of such decisions /…/'.

In Decision No. U-I-64/22, U-I-65/22,[69] for example, the Constitutional Court referred to both the constitutional and international and supranational rule of law in connection to the prohibition of the retroactive effect of legal acts. It states that the first paragraph of Article 155 of the Constitution prohibits the retroactive effect of legal acts by providing that laws, other regulations, and general acts cannot have a retroactive effect. The purpose of this constitutional prohibition is to ensure an essential element of the rule of law, that is, legal certainty, and thus to preserve and strengthen confidence in the law Article 2 of the Constitution. However, according to the Constitutional Court, the prohibition determined by the Constitution is not absolute. An exception thereto is determined by the second paragraph of Article 155 of the Constitution, in accordance with which only a law may establish that certain of its provisions have a retroactive effect, if this is required in the public interest and provided that no acquired rights are infringed thereby.[70]

The Constitutional Court then refers to the prohibition of retroactivity, as enshrined in the Convention. It maintains that Article 6 of the Convention, unlike Article 7, does not provide for a prohibition of retroactivity; however, both provisions have in common that they are based on the principle of legality, which is a general legal principle of the Convention. It is clear from the case law of the ECHR that one of the elements of the principle of legality is the foreseeability of legal rules, which entails that a legal rule must be clear, precise, and general, and it must not have a retroactive effect. While the legislature is not prevented from adopting new and retroactive rules of civil law that entail a legislative interference with open judicial proceedings with a view to influencing the outcome of the proceedings, the principle of the rule of law and the right to a fair trial determined by the first paragraph of Article 6 of the Convention require that the interference by the legislature be justified on compelling public interest reasons.[71]

With regard to EU law, the Constitutional Court has stated that the prohibition of retroactivity is based on the principles of the protection of legitimate expectations and legal certainty, which are part of the EU legal order. They must therefore be respected by EU institutions, as well as by the Member States, when exercising the powers conferred thereon by EU law. The principle of legal certainty requires that rules of law be clear, precise, and predictable in their effect, especially where they may have negative consequences for individuals and undertakings, so that persons may unequivocally ascertain what their rights and obligations are and may take steps accordingly. The Constitutional Court also makes a reference to the CJEU case law by stating that, according to the CJEU, the principle of legal certainty precludes a new legal rule from applying retroactively, namely, to a situation established prior to its entry into force. The principle also requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation

69 | U-I-64/22, U-I-65/22, dated 17 November 2022.

70 | Ibid.

71 | Ibid. Here, the Constitutional Court also makes reference to Lautenbach's The Concept of the Rule of Law and the European Court of Human Rights (Oxford University Press, Oxford 2013, pp. 54 and 70–79).

obtained, the new rules thus being valid only for the future and also applying, save for derogation, to the future effects of situations that have come about during the period of validity of the old law.[72]

Another illustrative example among many can be found in Decision No. U-I-79/20.[73] Addressing the principle of legal certainty in the context of the statutory regulation of interferences with human rights in exceptional circumstances of a state of emergency or crises, the Constitutional Court has stated that the requirement that the statutory regulation of interferences with human rights in exceptional circumstances be specifically determined also follows from the case law of the ECHR. With respect to several Convention rights, the ECHR stresses that from the provisions of the Convention, in accordance with which interferences with human rights must be prescribed by law, there follows not only that the requirement that interferences be regulated by national law but also that this law corresponds with the principle of a state governed by the rule of law, which entails that it attains some quality criteria. The Constitutional Court stated that according to this principle, the statutory regulation of interferences with human rights must be sufficiently clear, formulated with sufficient precision, accessible, and foreseeable.[74]

Analysing the Constitutional Court's case law, I attempt to establish whether there are instances where its interpretation of the rule of law does not align with the international and supranational understanding of the concept and where this court acts as a guardian of the Slovenian constitutional identity. I found out that in all cases under scrutiny the Constitutional Court's references to the international and supranational rule of law were aimed at strengthening its argument, that is, its interpretation and understanding of the constitutional concept/principle of the rule of law, human rights provisions, and other constitutional provisions, while ruling that the challenged statutory provisions were unconstitutional. So far, the Slovenian Constitutional Court as the final defender of Slovenian constitutionality (and constitutional identity)[75] has not taken a position of critical restraint in relation to the ECHR and CJEU and to the international and supranational concept of the rule of law.

72 | Ibid.
73 | U-I-79/20, dated 13 May 2021.
74 | Ibid. In this decision, the Constitutional Court also makes reference to the Council of Europe Report 'The Impact of the COVID-19 pandemic on human rights and the rule of law'.
75 | The concept of constitutional identity has only begun to develop in Slovenian constitutional theory and is, at the moment, still very modest. According to Bardutzky, in addition to the national identity (*Slov. samobitnost slovenskega naroda*), the essentially European constitutional tradition is one of its important components (Bardutzky, 2022, pp. 190–191). Perhaps this explains, partly at least, why the Slovenian Constitutional Court, in explaining and understanding the rule of law, has so far not come into conflict with the international and European understanding of the concept.

5. Conclusion

The rule of law has become almost universally supported at the national and international level, in both the formal (institutional) and informal (theoretical and political) discourse. As to the latter, it has been embraced across the political spectrum: while the right placed it at the heart of development policy,[76] the left (i.e., the Marxists) called it an 'unqualified human good'.[77] As Chesterman vividly maintains, 'it is a term endorsed by both the World Social Forum and the World Bank'. He opines, however, that the widespread support for the rule of law is possible precisely because of widely divergent views of what it means not only in practice but also on a conceptual level. While at times the term is used as if synonymous with 'law' or 'legality,' on other occasions, it appears to import broader notions of justice. Nevertheless, in other contexts, it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole.[78]

In contrast to the constitutional concept of the rule of law, which developed domestically, keeping the nation-state sovereign, the post-war development of the international and supranational rule of law introduced certain limitations to national sovereignty. The present study of the status of the international and supranational (rule of) law within the legal system of the Republic of Slovenia shows that, in principle, the Slovenian internal legal order in relation to international law preserves constitutional sovereignty. A different constitutional regime applies to EU law: in the absence of an explicit constitutional rule on the hierarchical position of EU law in relation to domestic law, two different views emerged regarding the position of EU law in relation to domestic law. Gradually, at least in theory, the 'supranational approach' recognising the principle of supremacy of primary sources of EU law is replaced with the 'pluralist approach' and the relational understanding of the principle of primacy where the relationship between the national law and EU law is not strictly hierarchical but heterarchical.

With special regard to the concept/principle of the rule of law, the study explored the 'lessons' on the international and supranational rule of law conveyed to Slovenia by the two most important European courts. In all cases under scrutiny, the domestic interpretation and understanding of the rule of law differed, to a greater or lesser extent, from the international and supranational one; however, I noticed an important difference between the judgements of the ECHR and CJEU. The ECHR interpreted the (international) rule of law in such a way that it established more strict standards of this principle than those provided by the Slovenian judicial and other authorities, and neither by the authorities nor by legal experts, its decisions have not been seriously disputed in Slovenia. In contrast, in one of the

76 | See Hayek, 1969, pp. 220–233 cited in Chesterman, 2008, p. 2.
77 | While most Marxist scholars and critical legal theorists offered scathing criticism of the liberal concept of the rule of law, E. P. Thompson, a prominent Marxist historian, argued that even if the rule of law serves an ideological function it must promote values that are, in fact, valuable and capable of being at least partially realised. See Waldron, 1995, pp. 21–25 cited in Chesterman, 2008, p. 2.
78 | Chesterman, 2008, pp. 2–3.

reviewed judgements, the CJEU interpreted the rule of law in such a way that it was at odds not only with the interpretation and understanding by domestic courts but also with the established international standards of the rule of law. However, once the judgement was issued, the Slovenian courts or other national authorities did not challenge it in any way.

Finally, analysing the Slovenian Constitutional Court's references to the international and supranational rule of law, I endeavour to establish whether there are instances where this Court's interpretation of the rule of law does not align with the international and supranational understanding of the concept and where it acts as a guardian of the Slovenian constitutional identity. I found out that so far the Slovenian Constitutional Court had not taken a challenging position in relation to the ECHR and CJEU and the international and supranational concept of the rule of law. When it comes to the CJEU case law, at least, some Slovenian European law experts suggest that in the future, the Slovenian Constitutional Court, as the final defender of Slovene constitutionality and constitutional identity, should strive to align itself with more 'courageous' national constitutional courts and, if/when necessary, take a more critical stance in relation to EU law and the decisions of EU institutions.

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THE GLOBAL MINIMUM TAX AND ITS POTENTIAL IMPACT ON THE COMPETITIVENESS OF THE HUNGARIAN CORPORATE TAX SYSTEM

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ABSTRACT

In 2021, an agreement on the application of a global minimum tax was concluded, which was later adopted at the EU level in the binding form of a Directive. Such tax reforms entail significant changes in the operation of international and domestic tax rules. This study examines the expected effects of the global minimum tax on the tax incentives that function in the Hungarian corporate income tax system. This issue is approached by examining various types of tax incentives (general, entity-related, and economic activity-related) considering the features of global minimum tax rules. Furthermore, the study aims to identify the aspects and circumstances inherent in either the rules of the global minimum tax or the Hungarian tax system that can potentially mitigate the adverse effects of the global minimum tax on tax incentives. In the light of these findings, this study also provides tax policy considerations that can contribute to preserving the current corporate income tax system and its incentives in the most intact form.

KEYWORDS

global minimum tax
tax incentives
Hungarian tax system
tax competition
tax credits
local business tax
tax coordination

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1. Introduction

Recently, one can observe a plethora of reform proposals in the field of tax law at both international and EU levels. Developments under the auspices of the OECD/Inclusive Framework (IF) bear particular relevance, as 137 participating countries succeeded in reaching an agreement regarding the Pillar One and Pillar Two Proposals[2] of the OECD. While Pillar One[3] entails, inter alia, the creation of a new nexus rule to allocate taxing rights to market jurisdiction under certain circumstances, Pillar Two[4] or the Global Anti-Base Erosion (GloBE) proposal is meant to introduce a global minimum corporate tax on large multinational enterprises (MNEs).

This study focuses on the second reform, that is, the implications of the global minimum profit tax for MNEs. More specifically, it analyses which parts of the Hungarian corporate income tax (CIT) system will be affected by the GloBE rules. The focal point of such an analysis is the tax incentives that are meant to maintain the competitiveness of the CIT system to attract foreign direct investment (FDI) into the country, which is crucial for an open and relatively small economy such as Hungary. This study does not intend to discuss each and every technical provision of the Hungarian CIT system. Rather, it considers the big picture and most remarkable features of this system.

The remainder of this paper is organised as follows. After the introduction, the development of international tax reforms, which has led to a long-awaited consensus on GloBE rules, is briefly presented (Section 2). This section discusses the evolution of GloBE materials at both the international and EU levels. Section 3 presents the main features and mechanisms of GloBE rules. It does not aim for comprehensive immersion in the detailed rules; rather, the rules are presented to the extent that it is necessary to understand their impact on domestic tax systems. Section 4 examines how GloBE rules would affect the current Hungarian CIT system. In this section, GloBE impacts are analysed with respect to the general characteristics of the tax system, special tax incentives, and entity-related features of tax incentives. Section 5 deals with how the identified impacts can be mitigated or resolved. Finally, concluding remarks are presented in Section 6.

2. Development of a global minimum tax system

Before the GloBE proposal, the OECD had already contemplated addressing the tax challenges that have arisen from the emergence of new digitalised business models of MNEs, to which the prevailing, traditional international tax architect could no longer be adequately applied. Within the framework of its BEPS (base erosion and profit shifting) Project, it addressed the problem of the digital economy

2 | OECD, 2021a.
3 | OECD, 2021b.
4 | OECD, 2021c (hereinafter: GloBE Model Rules).

in the Final Report on BEPS Action 1.[5] However, it left all pressing questions in this area unanswered.[6]

There was yet another attempt at the EU level that aimed to find a long-term and temporary solution to the challenges arising from the digital economy: significant digital presence and digital services tax (DST) directive proposals.[7] Regarding the latter, the DSTs targeted the taxation of revenue streams derived from the supply of certain digital services. The 2018 EU Commission Proposal – although it has never been adopted and was eventually abandoned – functioned as a model for DST legislation in EU Member States.[8] The DST Proposal determined three types of digital services, the proceeds of which would have been subject to the DST: 1. digital advertising (placing advertising targeted at the users of an interface on a digital interface); 2. digital intermediary services (making a multi-sided digital interface available to users which allows users to find other users and interact with them, which may also facilitate the provision of underlying supplies of goods or services directly between users); 3. monetisation of user data (transmission of data collected about users and generated from user activities on digital interfaces)[9]

The proposal aimed to align the taxation of income from the aforementioned economic activities with the place where the underlying value was created.[10] The DST Proposal identified the contribution of users' participation by providing their data as the core value-creation element in the supply of covered digital services. The proposal indicated that the revenues would otherwise go untaxed in the state where the users are located because the threshold for allocating taxing rights to the source state requires the existence of a permanent establishment based on the physical presence of the economic operator.[11] Although the DST Proposal failed to be adopted at the EU level, several Member States implemented a national DST.[12]

The failure of the OECD and EU proposals highlighted above demonstrates that, in addition to the common interest in finding an answer to these tax challenges together and in consensus, there is a counterbalancing individual interest of states in preserving their fiscal sovereignty to devise their tax systems in a manner that best fits their economic and political aims. Against this backdrop, it

5 | OECD, 2015.
6 | Kofler, Mayr and Schlager, 2017, p. 524.
7 | Council Directive Proposal on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM (2018) 148 final. As the Member States could not reach an agreement on the Proposal, it was abandoned, see: Martin, 2019.
8 | Council Directive Proposal on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM (2018) 148 final.
9 | Council Directive Proposal on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM (2018) 148 final, Article 3.
10 | Council Directive Proposal on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM (2018) 148 final, Explanatory Memorandum, p. 2.
11 | Ibid., p. 2.
12 | Several Member States introduced (Austria, France, Italy, Spain) or postponed to introduce or apply (until an agreement to tax the digitalized economy was finalised internationally) some form of DSTs (the Czech Republic, Portugal, Poland, Hungary). See: Asen and Bunn, 2021.

is surprising that in October 2021, a bulk of the international community agreed to an international commitment to the Two-Pillar solution, including a commitment to implement the GloBE rules to achieve the taxation of multinational groups at an effective tax rate of minimum 15%. The consensus also ended the unilateral application of the DSTs, as it ensued with the abolishment/suspension of such temporary measures.[13]

After the global agreement, the OECD began to publish related materials on the GloBE rules. First, it released the GloBE Model Rules[14] in December 2021, followed by the publication of a related Commentary[15] and Illustrative Examples[16] in March 2022.

However, committed states did not rush to transpose model rules into their domestic legal systems. At the end of December 2022, the implementation of GloBE rules got an important impetus as they acquired a binding form at the EU level when, following a fierce and politicised bargaining process,[17] the Member States eventually unanimously reached an agreement on the GloBE Directive Proposal[18] with an implementation deadline set by the end of 2023.[19] After the groundbreaking consensus, several other countries followed suit and announced the introduction of GloBE rules or certain elements into their domestic legal systems.[20]

It is noteworthy that since the adoption of the EU GloBE Directive, new OECD documents, among others, two pieces of Administrative Guidance have been issued.[21] These documents intended to provide further clarification on the correct interpretation of the GloBE rules; however, in some instances, they go beyond mere clarification and provide new rules that would not stem from the original wording of the Model Rules. Such a situation can raise many problems at the EU level, where the adopted Directive is based on the Model Rules. Thus, new developments at the OECD level are not binding on the interpretation of EU law, that is, that of the GloBE Directive, which jeopardises the consistent application of GloBE rules worldwide.[22]

13 | OECD, 2021a. More recently: OECD, 2023d.
14 | OECD, 2021c, GloBE Model Rules.
15 | OECD, 2022c, (hereinafter: Commentary to the GloBE Model Rules).
16 | OECD, 2022a, (hereinafter: GloBE Examples).
17 | *EU Member States unanimously adopt Directive implementing Pillar Two Global Minimum Tax rules*, 2022.
18 | Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM/2021/823 final.
19 | International taxation, 2022.
20 | For example Japan and South-Korea, see: PwC, 2023; Orbitax, 2023.
21 | OECD, 2023b (hereinafter: July Administrative Guidance). OECD, 2023a (hereinafter: February Administrative Guidance).
22 | For an analysis to what extent the Court of Justice of the European Union (CJEU) considers OECD developments prior and after the birth of the EU legislation, see: Geringer, 2023. Nevertheless, it must be submitted that it is problematic in the lack of clear reference by the EU legislation itself to the OECD material to pay any heed to the latter from a democratic perspective, as not all the Member States are members of the Council of the OECD.

3. The main features of the GloBE rules

3.1. The mechanisms to achieve a minimum level of taxation under the GloBE rules

The GloBE's scope affects MNEs that reach a certain size in terms of revenue. It covers the constituent entities (CE) of multinational groups that generate an aggregate annual revenue (in at least two of the four preceding years) of at least EUR 750 million, based on the consolidated financial statements of the ultimate parent entity (UPE).[23] The scope of the EU GloBE Directive covers purely domestic groups to which the same revenue threshold applies. This extension of the scope is meant to ensure the compliance of the GloBE rules with the fundamental freedoms.[24]

The GloBE rules entail three main sets of technical rules that serve the same purpose — to ensure that the in-scope MNEs are taxed at an effective rate (ETR) of at least 15% in each jurisdiction where they operate. These are the Income Inclusion Rules (IIR), the Undertaxed Payment (or, as recently referred to, Undertaxed Profits) Rules (UTPR), and the Subject-to-tax Rules (STTR). The first two are meant to be implemented in domestic legal systems, whereas the STTR, which has priority in the order of application of these rules, would ensue from the modification of double tax treaties. The STTR rule is not included in the Model Rules, nor in the EU GloBE Directive, consequently its date of implementation and its details remain uncertain.[25]

The IIR will function as a sort of Top-up Tax that the residence state of the UPE of the multinational group can primarily (preceding the intermediate parent companies) levy on the low taxed profits of a subsidiary that had not been subject to the minimum profit tax of 15 % in its home state.[26] It is specific to the GloBE rules, that the minimum effective tax rate (ETR) is calculated at a jurisdictional level.[27] Unlike a CFC (controlled foreign corporation) rule, the IIR does not apply the prevailing tax rate in the UPE country, rather the Top-up Tax is levied up to the extent that the ETR of the CEs concerned reaches the 15%.

The second pillar of the charging provisions of the GloBE rules is the UTPR, which will be applied as a backstop rule if the IIR is not applicable. In such situations, when the IIR cannot be applied because the low-tax jurisdiction is the country of the UPE or no qualifying IIR rules are in force in the UPE country (or in any other lower-tier parent entity country), the UTPR comes to the fore. It would function by denying the deduction of certain otherwise deductible items or requiring them

23 | GloBE Model Rules, Article 1.1.
24 | Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM/2021/823 final, Explanatory Memorandum, p. 6.
25 | As it stands now, it will entail an additional taxation of certain cross-border payments between connected companies where the recipient is subject to a nominal corporate tax rate below 9%. It will only apply to specific type of payments, such as interest, royalties, insurance premiums, guarantees, certain rental payments as well as payments for services. See: OECD, 2023c, pp. 1–2.
26 | GloBE Model Rules, Article 2.1.1.
27 | GloBE Model Rules, Article 5.1.1.

to make an equivalent adjustment under domestic law (in an amount that results in an additional tax expense for the affected CEs equal to the UTPR Top-up Tax).[28] The allocation of Top-up Tax under the UTPR is determined based on a formulaic apportionment calculated based on the number of employees and the total value of tangible assets in the given jurisdiction.[29]

As aforementioned, the ETR is calculated on a jurisdictional rather than a CE basis. This is the result of the division of Adjusted Covered Taxes and GloBE Income or Loss in the given jurisdiction. The Adjusted Covered Taxes category entails the current tax expense with respect to Covered Taxes and certain adjustments to it, such as total deferred tax adjustments.[30] Covered Taxes include taxes recorded in the financial accounts of the CE with respect to its income or profits, taxes on distributed profits, taxes imposed in lieu of a generally applicable CIT, and taxes levied with reference to retained earnings and corporate equity.[31]

GloBE Income or Loss can be found in the denominator of the formula. The starting point for calculating this amount is the financial accounting net income or loss of the CE in a given fiscal year.[32] This is subject to certain adjustments. One is the net tax expense[33] (such that taxes are not included both into the numerator and denominator of the fraction). The other adjustments are related to adjustments that are typically recognized by domestic tax systems in the calculation of the tax base. Accordingly, certain types of dividends, equity gains or losses, gains or losses from the disposition of assets or liabilities, and from the use of asymmetric foreign currencies are also excluded.[34] Furthermore, accrued pension expenses, policy-disallowed expenses, and prior-period errors are also excluded.[35]

When one has the amount of Adjusted Covered Taxes and the GloBE Income or Loss, the fraction shall be calculated. To the extent that the received jurisdictional ETR is lower than the minimum rate of 15%, the difference will be the Top-up Tax Percentage.[36]

GloBE rules also contain an exception related to substantive economic activities, labelled Substance-based Income Exclusion (SBIE). In the long term, it entails that an amount of the GloBE Income equal to 5% of the value of tangible assets and 5% of the payroll costs will be exempt from the Top-up Tax obligation.[37] At the beginning of the application of the GloBE rules, a higher rate will be at place that will constantly decrease to the aforementioned 5% in ten years.

Consequently, the Top-up Tax Percentage will be imposed only on Excess Profit, that is, on the part of the GloBE Income that is in excess of the SBIE amount.[38]

28 | GloBE Model Rules, Article 2.4.1-2.4.2.
29 | GloBE Model Rules, Article 2.6.1.
30 | GloBE Model Rules, Article 4.1.1.
31 | GloBE Model Rules, Article 4.2.1.
32 | GloBE Model Rules, Article 3.1.1.
33 | GloBE Model Rules, Article 3.2.1. a).
34 | GloBE Model Rules, Article 3.2.1. b)–c), e)–f).
35 | GloBE Model Rules, Article 3.2.1. g)–i).
36 | GloBE Model Rules, Article 5.2.1.
37 | GloBE Model Rules, Article 5.3.
38 | GloBE Model Rules, Article 5.2.2.

This Top-up Tax must be paid by the MNE. However, the mechanism by which it is collected is not necessarily IIR or UTPR. The jurisdiction where the Low-Taxed CEs are located may decide to introduce a Qualified Domestic Minimum Top-up Tax (QDMTT), in which case tax revenue will not be shifted to the budget of another jurisdiction. GloBE rules intend to ensure that the MNE is exposed to a minimum level of taxation everywhere it operates and do not intend to prescribe where this taxation should occur.[39] Thus, extra taxation under the IIR and UTPR occurs only when the low tax jurisdiction does not collect the Top-up Tax itself.

3.2. The aim of the GloBE rules

It is worth examining the true objectives of the GloBE rules. Initially, it was to address the tax avoidance and profit-shifting strategies of MNEs, in particular, technology giant companies that engage in digital business segments.[40] Indeed, the GloBE rules were presented as part of the Two-Pillar solution to address the tax challenges arising from a digitalised economy.

Subsequently, the rhetoric changed, and the objective of establishing a floor for tax competition among countries began to be mentioned.[41] Nevertheless, the objective of limiting (even fair) tax competition did not acquire undisputed and universal approval among countries; consequently, in more recent documents, this objective remained more tacit.[42] However, formal or declared objectives are not decisive and require closer scrutiny — examining the provisions and their effects — whether these statements are mere slogans or indeed genuine objectives.

Furthermore, the GloBE proposal has been sold so that it is in the interest of all countries to participate; otherwise, they would lose their tax revenue. However, it is not straightforward that its implementation would bring about a fairer allocation of tax revenues between developing and developed countries,[43] and the economic rationale necessitates the participation of all countries.[44]

Although such an agreement may contribute to tackling certain BEPS issues and to curb or at least mitigate harmful tax competition among jurisdictions (that comes with the jeopardy of a race-to-the-bottom), the GloBE rules certainly go beyond what the previous proposals aspired to achieve. They not only affect situations involving non-taxation or BEPS strategies, but also aim to establish that large MNEs are subject to tax at a minimum rate in each jurisdiction in which they operate. Such an outcome is meant to be realised irrespective of what causes low taxation in a certain jurisdiction. Harmful tax avoidance through aggressive strategies and intended low taxation of real and genuine investments are equally targeted by these rules. Consequently, GloBE rules intersect with domestic tax policy considerations, most notably those that revolve around enhancing the competitiveness of the tax system.

39 | Csabai et al., 2022, p. 27.
40 | OECD, 2018.
41 | OECD, 2019. See also: Dourado, 2022, p. 283.
42 | Englisch, 2022, p. 861.
43 | Brauner, 2022, p. 2.
44 | Cui, 2022, p. 22.

3.3. The Hungarian standpoint regarding the adoption of GloBE

Initially, Hungary was one of the most reluctant states to join and commit to the GloBE agreement; however, this situation changed by October 2021. The Hungarian Secretary of State for Tax Matters underlined four important changes in the proposal that led the country to review its position.[45]

First, the expansion of substance-based carveouts has made the proposal more attractive. As the Secretary of State highlighted, although Hungary is interested in tackling artificial profit shifting and aggressive tax planning, it also insists on its sovereign right to tax real economic activity within its territory, as it deems fit. This aspect of fiscal sovereignty can be safeguarded through a substance-based carve-out.[46] As a dominant share of the Hungarian economy is based on car manufacturing, which is both labour- and tangible asset-intensive, this standpoint is understandable.

Second, Hungary, being a small economy, is a capital importing country. Therefore, it is crucial that the GloBE agreement ensures equal conditions for the countries of parent companies (capital exporting countries) and for the countries of subsidiaries. Under the October proposal of GloBE, this is realised through the inclusion of the UTPR that applies the minimum tax rules with respect to the UPE when it is not subject to sufficient tax in its state of residence. It is not only essential for aligning the rules in conformity with the EU fundamental freedom rules but also for maintaining the competitiveness of the EU market vis-á-vis third countries that potentially do not apply the IIR to their UPEs.[47]

Third, the updated agreement proposal created the possibility that the countries of subsidiaries where the tax burden of those subsidiaries does not reach the minimum level can collect the Top-up Tax on their own, rather than passing on this option to the parent company's country, and thereby, greater respect for the fiscal sovereignty of these countries is granted.[48]

Fourth, the October 2021 version of GloBE created the opportunity to include not only classical corporate income taxes but also other types of taxes on corporations where certain elements of costs (but not all related costs) are deductible. In the Hungarian context, this would mean that the energy supplier tax, local business tax, and innovation contribution are encompassed.[49]

45 | portfolio.hu, 2022.
46 | Ibid.
Similar consideration played a role in Ireland joining the GloBE. Paschal Donohoe (Minister of Finance) emphasised that in addition to the set of the minimum tax rate at 15% (instead of the provision of 'at least 15%'), the substance-based carve-out and thus the possibility of tax incentives for R&D activities resulted in changing Ireland's position. Available at: https://www.gov.ie/en/press-release/59812-ireland-joins-oecd-international-tax-agreement/ (Accessed: 19 February 2022).
47 | portfolio.hu, 2022.
48 | Ibid. This approach cannot be explicitly found in the OECD GloBE Proposal, however, the EU Directive Proposal on the GloBE expressly authorises the state of the undertaxed CE to apply the Top-up Tax domestically in respect of its own CEs. See: Article 10 of Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM/2021/823 final.
49 | portfolio.hu, 2022.

4. The impact of the GloBE rules on the Hungarian tax system

4.1. Tax incentives and the GloBE rules in general

As discussed in previous sections, the GloBE rules contain a sophisticated set of mechanisms aimed at ensuring that the MNEs are subject to at least 15% ETR in each jurisdiction where they are present. It was also demonstrated that it has more far-reaching effects than merely addressing the challenges arising from the digitalised economy or BEPS or tax avoidance strategies. Instead, it generally sets the floor for tax competition. In the field of tackling abusive practices, Member States already have several obligations stemming from EU law to curb these practices. Most notably, the provisions of the ATAD 1(anti tax avoidance directive) and ATAD 2 Directives are already in force, requiring Member States to legislate general anti-abuse rules (GAARs), CFC rules, anti-hybrid rules, rules on the limitation on interest deduction, and exit taxation rules.[50] However, at the EU level, the primary rule was, from the perspective of taxpayers, that exercising their fundamental freedoms, even for tax-driven purposes, is acceptable to the extent that such an exercise of free-movement rights reflects genuine cross-border economic activity.[51] Placing this statement from the perspective of Member States meant that they were at liberty to establish a competitive tax system to attract FDI to the extent that they did not allow tax avoidance. This paradigm appears to have changed with the adoption of the GloBE Directive, because it constitutes a clear barrier to tax competition, irrespective of the form of competition. This study does not evaluate whether the ensuing positive effects would outnumber the negative ones, rather it analyses how the GloBE rules affect the Hungarian tax system and its tax incentive elements.

In order to evaluate this, OECD analysis regarding the interference of tax incentives with the GloBE rules. is worth being taken as a starting point.[52] This document highlights that tax incentives that target the amount of Covered Taxes (by reducing them) are most likely to be affected by GloBE rules. In this respect, reduced tax rates, exemption of part of the income for tax purposes) and tax allowances (depreciation in excess of the cost of the asset) are the most affected items. By contrast, the tax incentives that target GloBE Income (by way of increasing it), that is, the denominator of the fraction for the calculation of the ETR, have a lesser impact on the ETR and thus are less likely to bring about a Top-up Tax liability.[53] In that category, particularly the Qualifying Refundable Tax Credit (QRTC) should be mentioned. QRTC is defined by the GloBE rules as a refundable tax credit

50 | Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016.
51 | CJEU, 12 September 2006 Case C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, Paragraph 75.
52 | OECD, 2022b.
53 | OECD, 2022b, p. 39.

designed such that it must be paid as cash or available as cash equivalents within four years when a Constituent Entity satisfies the conditions for receiving credit under the laws of the jurisdiction granting credit.[54] Further, it is noteworthy that tax deductions (that reduce the taxable base) and tax credits (that reduce the tax liability) have different relevance in the context of the GloBE rules: to the extent a tax credit does not qualify as a QRTC, it is more strongly affected by the GloBE rules than an expenditure based tax deduction.[55] This outcome can be supported based on economic literature according to which expenditure-based tax incentives can be more targeted and more apt to achieve the objective of attracting real, genuine investments with less spillover effects.[56] Within the category of tax deductions, we can distinguish between permanent and temporary incentives. The latter encompasses tax incentives that provide a temporal benefit in the form of a deferral in taxation (for instance, accelerated depreciation or the immediate deduction of the cost of an asset for tax purposes). As ETR fluctuations owing to these timing differences are considered in the GloBE rules by providing for a deferred tax adjustment mechanism (to the extent that the recapture rules are not activated), these temporal benefits are not likely to be affected because the GloBE rules iron out such differences to the extent that the depreciation for tax purposes does not exceed the cost of the asset.[57]

4.2. Affected attributes of the Hungarian tax system

As the OECD analysis put forward, for a jurisdiction to evaluate the impact of the GloBE rules on its corporate tax system, several layers must be examined: jurisdiction, entity, and incentive levels.[58]

Under the jurisdictional level, the attributes of the standard CIT system are relevant: how the tax base and tax rate(s) are determined as a general rule. Bearing in mind that the GloBE Income or Loss calculation is based on some type of Financial Accounting Net Income, it is easy to see that if the national tax rules draw the boundaries of the tax base in a narrow manner–that is, excluding many items of income that form part of the financial accounting income–then it will result in permanent book-to-tax differences that are likely to increase the probability that the GloBE rules will have an impact on the national tax system.[59] The rules on the computation of GloBE Income or Loss also encompass adjustments to eliminate book-to-tax differences that are typical in most countries' CIT systems; for instance, it excludes certain dividend income, capital gains or losses, and asymmetric foreign currency gains or losses from the computation.[60] Therefore, the liberal Hungarian participation exemption regime does not appear to have caused problems under the GloBE. Similarly, exempted dividend income and income from capital gains are excluded as the primary rule from the computation of the ETR for GloBE

54 | GloBE Model Rules, Article 10.1.1.
55 | OECD, 2022b, p. 37.
56 | Perez-Navarro, 2023, p. 102.
57 | OECD, 2022b, p. 40.
58 | OECD, 2022b, p. 29.
59 | OECD, 2022b, p. 30.
60 | GloBE Model Rules, Article 3.2.1. Points b), c), f).

purposes. Therefore, it is particularly important that the taxpayer does register its newly acquired shareholding for the application of participation exemption (it is a formal requirement in Hungary); otherwise, not only will the gains upon later alienation be subject to the Hungarian CIT, but such tax payments will be ignored in the context of the GloBE rules, reducing the amount of Covered Taxes and thus the ETR. However, the exclusion of dividend income from the computation of GloBE ETR is not unrestricted; it only applies to dividends derived from a non-portfolio shareholding (10% or more), while the Hungarian rules do not contain such a limitation. Consequently, the GloBE rules affect the dividend exemption regime when applied to portfolio investments.[61]

Although the Hungarian CIT system does not contain any reduced rates, the one single standard rate of 9% can be considered as outstandingly low within the EU. As the 9% rate applies enerally, irrespective of the economic activity concerned or any characteristics of the taxpayer who earns income, it is certainly a strong indicator of a low ETR; therefore, it is strongly affected by the GloBE rules.

When entity-level factors are examined, it is important to compare the extent of a given tax incentive with that of the GloBE rules. For instance, the Hungarian CIT system contains a special tax credit for the implementation of debt-financed investments in tangible assets that is available only for small and medium-sized enterprises (SMEs).[62] SMEs are defined as enterprises in which the overall number of employees is less than 250 and their annual net revenues do not exceed EUR 50 million or their balance sheet total does not exceed EUR 43 million. Based on this definition, it is clear that although such a tax credit could significantly reduce an SME's Hungarian ETR, it does not interfere with the GloBE rules which target a different group of enterprises, that is, those whose annual net revenue exceeds EUR 750 million. Similarly, incentives that are only available to standalone companies are not relevant for GloBE purposes as a general rule; however, as the EU Globe Directive also applies to large-scale domestic enterprises to eliminate potential discrimination against cross-border situations (which is prohibited under the EU fundamental freedom rules), incentives targeting standalone companies can compromise the GloBE ETR. Nevertheless, the Hungarian CIT system does not encompass incentives directed solely at standalone companies.

The detailed design elements of tax incentives must be scrutinised when it comes to the tax incentive factor. The width of economic activity within the grip of tax incentives can strongly influence the extent to which it is affected by GloBE rules. For example, if it is connected to activities outside the scope of GloBE (such as international shipping), it will not be affected. On the other end of the spectrum, these incentives can be found that are applicable to a broad range of economic activities (e.g. export-related incentives that cover any economic activity that deals with the supply of goods directed abroad).[63] In the middle, one can find rather narrowly shaped tax incentives that encourage a specific income-generating activity, such as royalty income from R&D activities. Hungary also has an intellectual

61 | Liotti et al., 2022, p. 39.
62 | Section 22/A. of CITA.
63 | OECD, 2022b, p. 32.

property (IP) box regime in force, in accordance with the OECD requirements laid down in the BEPS Action Plans. Accordingly, half of qualifying royalty income earned by the taxpayer is exempt from CIT, and a 30% uplift is available for non-qualifying royalty income (i.e. for royalty income in relation to which the R&D costs were not incurred by the taxpayer).[64] Assuming that all royalty income qualifies for the benefit, such an incentive practically halves the applicable tax rate for royalty income and, consequently, is strongly affected by the GloBE rules. However, owing to its narrow scope, the ETR-reducing effect can be counterbalanced by other items of income of the taxpayer. This holds particularly true if the taxpayer is engaged in labour- or asset-intensive economic activity which also gives rise to SBIE under the ambit of the GloBE rules. It is important to highlight that not only are the taxpayer's other sources of income relevant in this respect, but also any income that is derived by another CE of the same group in the same jurisdiction because the ETR under the GloBE rules is calculated on a jurisdictional basis, blending all the GloBE Income and Loss as well as all the Covered Taxes.

One of the most important Hungarian tax incentives is development tax credit.[65] These rules enable the taxpayer, upon the fulfilment of certain conditions related to implementing a certain level of new investment, to reduce its calculated tax liability up to 80%.[66] As it can be seen, it can be an important and significant tax incentive for companies to invest in development. However, considering the GloBE rules, it does not qualify as a QRTC because the government does not repay any unused tax credit to the taxpayer in cash or cash equivalents.

The accounting treatment for the development tax credit is as follows: Pursuant to the IFRS, it can be accounted for either as a state grant under International Accounting Standard (IAS) 20 or as a deferred tax under IAS 12. In the first case, there is a profit and loss (P&L) effect, resulting in other revenues.[67] However, the Hungarian tax system neutralises the P&L effect by decreasing the tax base based on the aforementioned revenue.[68] In the second case, when the development tax credit is accounted for as a deferred tax, such a deferred tax cannot be shown because of the prohibition pursuant to IAS 12.33 and 12.22 c) thus, there is no revenue effect.

Under Hungarian accounting rules (HU GAAP), the development tax credit is shown as a reduction in current corporate income tax expenses, and there is no P&L impact.[69] GloBE rules have specific provisions[70] that ensure that QRTCs are treated as income for GloBE purposes, irrespective of their financial accounting treatment. However, the non-qualified tax credits leave GloBE Income or Loss untouched (i.e. not added to it) but decrease the Covered Taxes.[71] It is easy to see

64 | Section 7 (1) s), (14), (22)–(24) of CITA.
65 | Section 22/B of CITA.
66 | Section 23 (2) of CITA.
67 | IAS 20.12, IAS 20.24–27.
68 | Section 18/B. (1) c) of the CITA.
69 | Tormáné dr. Boris, 2022, p. 9.
70 | For the elimination from the Covered Tax element: Article 4.1.2. d), while for the inclusion in the GloBE Income or Loss: Article 3.2.4. of the GloBE Model Rules.
71 | GloBE Model Rules, Article 4.1.3. b).

that in the case of a tax credit that does not qualify as QRTC and that is capable of contributing to an 80% reduction in the taxpayer's tax liability is particularly susceptible to be affected by the GloBE rules, as it can significantly reduce the ETR which may result in a corresponding Top-up Tax liability.[72]

5. Aspects with mitigating impact of GloBE rules on the domestic tax system

5.1. Preliminary remarks

The previous section examined some focal points of the competitive features of the Hungarian CIT system considering GloBE rules. It is clear that some of them will be strongly affected by the GloBE rules that is capable of compromising their underlying tax policy objective, that is, attracting FDI by means of creating a beneficial tax environment for them.

This section scrutinises these aspects that could be able to mitigate the identified impacts. Considering the outcome, it identifies the tax incentives that can 'get away' with their ETR reducing effect even in the post-GloBE era and those that should be modified to prevent them from being devoid of their very purpose.

5.2. Scope of the GloBE rules and the QDMTT

The scope of the GloBE rules covers only large MNEs whose annual revenues exceed EUR 750 million. Consequently, even strongly affected tax incentives can remain effective for any taxpayer that does not qualify as a CE of such a large MNE. Therefore, it is reasonable to maintain tax incentives if they are otherwise apt to pursue their intended tax policy objectives. This standpoint can be further supported by the fact that the states have the possibility to introduce a QDMTT. It entails that while their tax incentive system remains intact vis-á-vis out of the scope taxpayers, the additional budgetary consequences for the in-scope taxpayers can be collected by the incentivising country itself.[73] Furthermore, the QDMTT applies after the calculation of the Top-up Tax, meaning that it will not be levied on routine profits, as calculated in a formulaic way under the SBIE.[74] This further mitigates the impact of the GloBE rules. Clearly, this is not ideal, because there was a reason (in the form of other benefits for the country) for not collecting those taxes before the GloBE; however, it is better than losing both competitiveness and tax revenue.

72 | It is noteworthy that the transitional rules (Article 9.1.1.) of the GloBE Model Rules allow to consider the deferred tax assets that has been created in previous years with respect to a development tax credit. Thus, the development tax credits that have already been granted prior to the GloBE rules entering into force and whereby deferred tax assets have been created, will be capable of reducing the tax liability without causing Top-up Tax liability. In more detail, see: Tormáné dr. Boris, 2022, pp. 12–13.
73 | Liotti et al., 2022, p. 27.
74 | Bammens and Bettens, 2023, pp. 162–163.

Therefore, the combination of the scope of GloBE rules and the option to introduce a QDMTT indicates that the application of GloBE rules will not require a complete overhaul of a tax incentive system that is deemed well-functioning.

5.3. Covered taxes under the GloBE rules

As mentioned earlier, Hungarian reception of the Two-Pillar solution was not delightful. However, as the Secretary of State pointed out, one reason Hungary eventually committed to the GloBE Agreement, was that in the Covered Taxes category, not only CIT but other corporate non-income taxes such as energy suppliers' tax, the local business tax, and innovation contribution have been encompassed as well. This standpoint also played an important role in Hungary surrendering its veto at the EU level during the course of the GloBE negotiations, providing a green light to the unanimous adoption of the GloBE Directive. However, the only proof of this understanding is a letter[75] written by the Legal Service Director of the General Secretariat of the Council of the European Union, which nevertheless does not have a binding effect.

Therefore, it is worth examining whether such an understanding can be deduced from the wording of the GloBE Model Rules or the EU GloBE Directive.

Article 4.2.1. of the GloBE Model Rules defines the scope of the Covered Taxes such that it includes:

(a) Taxes recorded in the financial accounts of a Constituent Entity with respect to its income or profits or its share of the income or profits of a Constituent Entity in which it owns an Ownership Interest;

(b) Taxes on distributed profits, deemed profit distributions, and non-business expenses imposed under an Eligible Distribution Tax System;

(c) Taxes imposed in lieu of a generally applicable corporate income tax; and

(d) Taxes levied by reference to retained earnings and corporate equity, including a Tax on multiple components based on income and equity.[76]

The EU GloBE Directive Proposal defines the scope of the Covered Taxes in an identical manner.[77]

However, this catalogue does not support the optimism of the Hungarian Secretary of State for Tax Matters that the Covered Taxes of the GloBE would include the local business tax and other business taxes with similar features. These taxes can be classified as hybrid taxes because their basis of assessment is a hybrid between revenue-based and income-based taxes. It allows deduction of various costs from the net sales revenues; however, the tax base is wider than that of a CIT.

The list from (b)-(d) relates to specific situations that do not appear relevant in the context of hybrid business taxes. Hybrid taxes have no effect on profit distribution, retained earnings, or equity. Furthermore, they are not levied in lieu of

75 | vg.hu, 2022.

76 | GloBE Model Rules, Article 4.2.1.

77 | Article 19 of the Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM/2021/823 final.

corporate income taxes but rather in parallel with them, and they are typically not expected to be considered when it comes to the elimination of economic or juridical double taxation.[78]

Regarding point (a), the question is how the terms income or profits are interpreted and whether they can be perceived as widely as including hybrid taxes, such as the Hungarian local business tax that stands close to a classic corporate income tax base. However, certain cost elements are not allowed to be deducted or they are added back for the purposes of these special taxes.

In the context of double tax treaties, the concept of income typically keeps these taxes out of scope[79], unless the contracting parties explicitly add the given tax to the list of covered taxes. This solution could also enhance legal certainty regarding the covered taxes in the context of the GloBE; therefore, it would be desirable to have a country-by-country list of covered taxes. Based on the current wording of the list, it is ambiguous whether the GloBE covers the hybrid taxes mentioned by the Secretary of State. However, legal analyses and political realities are often not aligned. As the inclusion of Hungarian hybrid taxes was a crucial point in the adoption of the GloBE Directive as a political deal, it is likely that these taxes will indeed be included in the Covered Tax category.

Such an outcome is of particular importance because companies with substantial economic operations in Hungary can be subject to high local business tax liabilities that often exceed their CIT liabilities, which, as their tax base is wider, may result in a high ETR in the GloBE system. These CEs may avail themselves of various ETR-reducing tax incentives because of the counterbalancing effect of local business tax liabilities. The local business tax base excludes interest and royalty revenue. Thus, CEs engaged merely in intragroup financing or licencing activities are likely to have a low ETR for GloBE purposes. However, owing to jurisdictional blending, such a low ETR can be reversed by other operating CEs, incurring a high local business tax liability.

6. Conclusion

Although with several transitional rules and without the UTPR, the GloBE rules will become effective by 2024 within the EU and many other countries. This fundamental tax reform will bring about tremendous changes and affect CIT systems worldwide, in particular, the tax incentives provided for taxpayers by the states to create an attractive investment environment.

From a Hungarian perspective — being a country known for its beneficial CIT system — it can be concluded that beneficial features of the tax system that apply generally, such as the 9% nominal CIT rate, will interfere with the GloBE rules. Other narrower incentives, such as the IP box regime, can also be compromised;

78 | Pistone, 2021, p. 407.
79 | For a detailed analysis of the scope of income taxes in the context of double tax treaties, see: Pistone and Ullmann, 2021, pp. 167–200; Kotha, 2021, pp. 25–43.

nevertheless, it is possible that the taxpayer can avail of the ensuing benefit owing to its other income, which is taxed heavier. Furthermore, the jurisdictional blending under the GloBE rules enables that the heavier taxed income of other CEs of the same MNE group be considered as well to counterbalance the ETR effect of the low-taxed income.

The most problematic element of the Hungarian tax incentive system through the lens of the GloBE is the development tax credit because it can significantly reduce the ETR and, classified as a non-qualifying tax credit, it will have a direct impact on the Covered Tax element of the GloBE's ETR calculation. This entails a significant disadvantage compared with QRTCs, which only affect GloBE Income or Loss rather than the Covered Tax calculation, resulting in milder implications. Restructuring the development tax credit to include QRTC attributes could be a desirable policy option.

The most important factor in mitigating the GloBE effects on tax incentives appears to be outside the scope of the Hungarian CIT system, and the current opinion that some hybrid business taxes – most importantly, the local business tax liability – will also be included in the ETR calculation will result in a significantly higher ETR for GloBE purposes for operating Hungarian CEs. Moreover, it may enable groups to exploit this benefit at the group level and balance out low-taxed entities (e.g. licencing or financing entities) with the high ETR of operating CEs.

In the light of the specific scope of the GloBE rules (only applicable to large MNEs), the mitigating effect of other hybrid business taxes, and the possibility of introducing a QDMTT, a complete overhaul of the tax incentive system does not appear to be necessary.

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SETTING THE LIMITS OF THE MEMBER STATES' INSTITUTIONAL AUTONOMY IN THE CASE OF ROMANIA, HUNGARY, AND POLAND: CHANGES IN THE CASE LAW OF THE CJEU CONCERNING THE CONTROL OF NATIONAL JUDICIAL SYSTEMS

Ágoston Korom[1]

ABSTRACT

Until recent years, the measures taken for EU law implementation in domestic legal systems did not address the institutional issues of national courts, namely the institutional autonomy of Member States in the context of domestic judicial systems. The application of EU law in domestic law is based on two principles: institutional and procedural autonomy. In the interpretation of procedural autonomy, EU law is to be enforced by applying national procedural rules, subject to the limits of effectiveness and the principles of equal treatment. The principle of equal treatment requires that the procedural rule of a Member State for the enforcement of EU law should not be less favourable than the procedural rule of a Member State for the enforcement of claims arising under national law in a comparable situation. The principle of effectiveness requires that national procedural rules should not make it impossible or excessively difficult to enforce rights deriving from EU law. The institutional autonomy meant that the enforcement of EU law took place within the framework of the Member States' institutions: they were not bound by EU law, except in very specific areas or criteria. Before the change under our examination occurred, the Court of Justice of the European Union defined specific criteria for the establishment of national courts, but these were not aimed at ensuring the independence of domestic courts. Instead, they were limited to the cases in which the CJEU found questions referred for the preliminary ruling admissible; these criteria guaranteed, inter alia, that the given court is established by law, operates permanently, applies the law, and renders binding decisions. In recent decades, a change occurred in the case law of the CJEU, and while issues regarding the judicial system remain under the Member States'

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competence, EU law defines several criteria in that regard. In this paper, we will examine the decisions taken in the three Member States under review, Hungary, Romania and Poland, but we will also look at the background: the limitation of institutional autonomy by the practice of the CJEU was not 'without precedent', i.e. this case law started to be applied in other Member States already in the first half of the 2010s. Following an examination of the decisions concerning the three Member States, an attempt is made to compare the EU criteria set out in those decisions in relation to the national courts with each other and with the decisions examined in the precedents. An analysis will also be made of whether the EU requirements for courts can be systematised on the basis of the current decisions.

KEYWORDS

EU law implementation
institutional and procedural autonomy
Member States
national judicial systems
case law
CJEU
comparative analysis

1. Introduction

Since the first decades of integration, the implementation of European Union (EU) law in the domestic laws of Member States has led to vigorous debates, raising serious related issues. This, in part, stems from the fact that the founding Treaties did not provide the means to deal with Member State conflicts of interest mostly regarding the internal market. The case law of the Court of Justice of the European Union (CJEU) was supposed to establish, inter alia, the principles of primacy, direct applicability, and state liability. Although the principles and institutions set by the case law of the CJEU to guarantee EU law implementation in national law were subjects of debate, they have undoubtedly been necessary for maintaining integration based on the internal market.

The evolution of the case law of the CJEU has also been limited by the institutional and procedural autonomy of the Member States. For at least three or four decades, the CJEU has consistently striven to set the limits of the procedural autonomy of Member States,[2] but rarely have we seen examples of limits being imposed on the institutional

2 | The principles of effectiveness and equal treatment serve to set the limits of the procedural autonomy of Member States. The former principle provides that the procedural rules of Member States must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law; according to the latter principle, the procedural rules of Member States aimed at enforcing the rights arising from EU law must not be less favourable for that type of action than for similar actions of a domestic nature (C-676/17). The principle of legal certainty should also be outlined as it is also applicable in EU law; according to this principle, in the event of the expiration of the time limits specified in the procedural rules of Member States or of the exhaustion of the remedies available, as a

autonomy of Member States in the case law of the CJEU.[3] The CJEU addressed the concept of national courts only in connection with the preliminary ruling procedure. According to the definition developed by the CJEU, a body can be considered a Member State Court if it is established by legislation, exists permanently, its decisions are legally binding, and it applies the law in rendering its decisions.[4] From this jurisprudence, it becomes clear that the CJEU only dealt with the national courts in relation to the preliminary ruling procedure. Furthermore, the established criteria merely served to determine whether the questions formulated by the court regarding the CJEU in the preliminary ruling procedure are admissible in the given context.[5]

Meanwhile, the CJEU refrained from excessive, clear condemnation of Member State courts when establishing principles related to EU law implementation in domestic laws.[6] In the case of inadequate EU law implementation by national courts, the CJEU often 'held against' the Member State legislature;[7] specifically, the

general rule, EU law does not require for the national court to dispense with these procedural rules, even if this would open up the possibility of remedying situations that violate EU law. Overall, the actual enforcement of the procedural autonomy of Member States and the principles of equal treatment result in a relatively limited 'review'.

3 | In the case law of the European Convention on Human Rights, numerous judgements are contrary to this.

4 | The case law of the CJEU in that regard will be analysed in detail below.

5 | The national institutional autonomy allows, inter alia, for Member States to adjudicate legal disputes regarding EU law within their institutional frameworks, to which, in principle, no criteria are attached by EU law. This institutional autonomy plays a more significant role especially in terms of national courts, as the case law of the CJEU reaffirms that the CJEU did not formulate criteria regarding, among other things, national court independence. As we shall see below, until the 2010s, the case law of the CJEU formulated requirements only in terms of the questions referred for a preliminary ruling. The 'sanction' applied in the case of non-compliance with these requirements was limited to the inadmissibility of the given question. The case law of the CJEU examined below, which changed the criteria of the institutional autonomy of Member States in terms of national courts, also formulated criteria related to the independence of the courts for cases where the national court adjudicates legal disputes potentially related to EU law.

6 | According to the case law established in the judgement handed down by the CJEU in the Köbler case (C-224/01), the State is liable for damages sustained by individuals arising from the violation of EU law even if such violation can be attributed to the decision rendered by the court adjudicating at last instance. Still, the CJEU considered the specificities of national judicial systems, rendering this form of liability enforceable on the basis of more strict criteria. Incidentally, the establishment of this liability has been criticised on numerous occasions in the literature, voicing concerns that, in practice, lower courts will not rule against Member States in cases where damage was caused by courts adjudicating at last instance. Many authors believed that the liability system established by the Köbler test is some kind of 'sword of Damocles', existing only in theory with little chance of practical implementation, especially since the CJEU does not intend to alienate national courts. However, practice has thoroughly refuted these concerns; in recent years, numerous judgements implementing the Köbler test have been delivered, especially in connection with Central European Member States that acceded to the EU after 2004. In that regard, the Hotchtief (C-620/17) (in relation to Hungary) and the Târșia (C-69/14) (in relation to Romania) cases can be mentioned.

7 | CJEU, European Commission v Italian Republic. In this judgement, the CJEU clearly wanted to 'spare' the national judicial system.

CJEU 'came to the aid' of the concerned national court when domestic legislation or other circumstances prevented it from referring questions to the CJEU in the preliminary ruling procedure.[8]

In this study, we will examine the case law (i.e. on the restriction of Member States' institutional autonomy) that significantly advanced the aforementioned jurisprudence, paying particular attention to whether this law had any relevant antecedents prior to the most important judgements related to the Member States examined in this paper. After engaging in a comparative analysis of judgements related to the Republic of Poland, Hungary, and Romania,[9] we attempt to systematise the case law concerned and answer the question of why this change of direction was necessary on the part of the CJEU. Importantly, our analysis does not cover the problems experienced by the examined Member States regarding the implementation of the principles established in these judgements. It also does not address the secondary EU legal acts adopted based on these judgements, nor to what extent the provisions of such acts influenced the Member States' access to EU funds.

2. Judgement in the IS case[10]

In the main proceedings of the judgement[11] handed down in relation to Hungary,[12] the criminal proceedings brought against a Swedish national for the infringement of the provisions of Hungarian law governing the acquisition or transport of firearms or ammunition were conducted by the Central District Court of Pest.[13] The person concerned was interrogated with the help of an interpreter, but interpretation quality was not ensured during the procedure. In particular, the referring court had no information regarding whether the person concerned and the interpreter understood each other. The person concerned was subsequently released and then left the territory of Hungary. Since the prosecutor did not propose a custodial sentence, it was not possible to issue a national/European arrest warrant according to the relevant legislation. The referring court informed the CJEU that the responsibility for the central administration and management of the judicial system had lain since 2012 with the President of the National Office for the Judiciary. The latter, in turn, had extensive powers that encompass

8 | The judgement of the CJEU in the Cartesio (C-210/06) case can also be classified here.
9 | For reasons of length and other reasons, we will not examine all judgements related to Member States under scrutiny and mentioned in the title. Instead, we selected judgements and strove to provide an unbiased, detailed, and independent analysis of the relevant parts in an attempt to answer the questions posed in the title, focusing on the heated debates surrounding the area and the challenges related to the absorption of EU funds.
10 | Judgement of the CJEU, C-564/19.
11 | Ibid.
12 | We will primarily focus on the analysis of the court-related parts.
13 | In relation to the judgement, we primarily focus on the restriction of the institutional autonomy of Member States in the context of the judicial system.

decision-making on judicial appointments, making senior judicial appointments, and commencing disciplinary proceedings against judges.[14] The referring judge added that the National Judicial Council[15] was responsible[16] for overseeing the actions of the President of the National Office for the Judiciary, and approving the President's decisions in certain cases.

The most significant findings formulated in the opinion of Advocate General Priit Prikamae may also be relevant in relation to our topic. In conclusion, he rather considered the national legislation to be incompatible with Art. 267 of the Treaty on the Functioning of the European Union (TFEU); under certain circumstances, the national legislation allows the Supreme Court of the concerned Member State to establish that the order referring the questions in the preliminary ruling procedure infringes the law on the grounds that the questions have no relevance in deciding the legal dispute.[17] The CJEU came to the following conclusion:[18] it is not compatible with Art. 267 TFEU if the Supreme Court of a Member State finds that an order of a lower court referring questions to the CJEU in a preliminary ruling procedure is unlawful on the grounds that the questions referred are not necessary[19] nor relevant in resolving the legal dispute. Based on EU law, the referring national court must ignore the decision of the national Supreme Court rendered in that regard.[20] The CJEU also found that it is contrary to Art. 267 TFEU[21] if disciplinary proceedings are initiated against a judge of the national court on the grounds[22] that he turned to the CJEU in the framework of the preliminary ruling procedure.

14 | Judgement of the CJEU, C-564/19, Paras. 33–36.

15 | It is clear from one of the questions referred for preliminary ruling that the NJC adopted a report which described that a cardinal act was violated by the President of the National Office for the Judiciary's practice of invalidating applications without due justification, and filling the judicial positions by direct temporary appointments. At the same time, the President of the National Office for the Judiciary stated that the NJC's functioning did not comply with the law, and refused to cooperate with it.

16 | Ibid.

17 | As opposed to that, the CJEU focused on the Supreme Court of the given Member State.

18 | These findings are set in Para. 148 of the operative part of the CJEU's judgement.

19 | At this time, the CJEU followed the case law established in the Ognyanov case (C-614/14), where it is contrary to EU law to narrow down the opportunities to initiate a preliminary ruling procedure, as it is a procedure necessary to enforce the rights of legal entities arising from EU law.

20 | The CJEU referred to the establish case law where a Member State cannot hinder the uniform application and effectiveness of EU law in the context of the primacy enjoyed by EU law over domestic laws, even if the given Member State relies on constitutional provisions. It follows that, in this respect, the issue concerned is not the limitation of the institutional autonomy of the Member States, but the principle of implementing EU law in domestic laws.

21 | Ibid.

22 | The fifth question referred to by the CJEU in the preliminary ruling procedure is of particular importance. The question was aimed at whether the Art. 19 (1) TEU and Art. 47 of the Charter should be interpreted in such a way that is contrary to the said provisions to initiate disciplinary proceedings against a judge of a national court on the grounds that he or she referred questions to the CJEU in the framework of a preliminary ruling procedure. In the end, the CJEU did not examine the issue on the basis of Art. 19 (1) TEU and Art. 47 of the Charter, but with regard to Art. 267 of the TFEU concerning the preliminary ruling

3. Judgement in the Asociatia case

In the Asociatia joined cases,[23] the CJEU examined the proper functioning of the mechanism for monitoring the progress achieved in the field of judicial reform and the fight against corruption, focusing on the Treaty of Accession of Romania. Decision 2006/928, made in connection with Romania's accession to the EU, also covers[24] the investigation of crimes regarding the organisation of the national judiciary, and crimes committed within the judicial system. From the opinion of the Advocate General,[25] it is clear that the evaluation criteria specified the commitments undertaken by Romania in the Treaty of Accession, which served to remedy the shortcomings identified by the European Commission in the field concerned before accession to the EU.[26]

The question referred to the CJEU for a preliminary ruling in relation to the limitation of the institutional autonomy of Member States by EU law is also relevant to our topic. The referring court asked whether Arts. 2 and 19 (1) Treaty on European Union (TEU) and Decision 2006/928 should be interpreted in such a way that a national regulation is contrary to the said provisions if it allows for the temporary appointment of the heads of judicial bodies entrusted with procedures related to the conduct of disciplinary proceedings against judges and prosecutors without the application of the criteria set for the ordinary procedure. Based on the settled case law, Member States must guarantee the functioning of an effective legal remedy system in cases regulated by EU law,[27] where the requirement of courts' independence is fundamental.

In its judgement, the CJEU clarified the fact that the senior officers of the body entrusted with conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors are appointed by the government of a Member State is not such as to give rise to doubts that the powers and functions of the given body will be used as an instrument to exert pressure on judicial activity.[28] Similar criteria, as established by EU law, must be applied to national provisions if a management position in such a body falls vacant and substitution is required until the position is filled in compliance with legal requirements.[29] According to

procedure; according to the CJEU's interpretation, the former provisions call into question the competences of the referring court set forth in Art. 267 of the TFEU.
The CJEU referred to the jurisprudence of the Republic of Poland, remarking that the provision of the national law allowing disciplinary proceedings to be initiated against judges of the national court on the grounds of turning to the CJEU in the framework of a preliminary ruling procedure is contrary to judicial independence. It should be noted that the CJEU examined the issue based on Art. 267 of the TFEU, inter alia, in relation also to the judgement in the Miasto case.

23 | Judgement of the CJEU, C-83/19.
24 | Ibid., Para. 185.
25 | Opinion of the Advocate General, Para. C-355/19, 152.
26 | Judgement of the CJEU, Para. 171.
27 | Judgement of the CJEU, C-216/18.
28 | Judgement of the CJEU, C-83/19, Para. 202.
29 | Ibid., Para. 203.

the CJEU's interpretation, national legislation is likely to give rise to doubts about the risk of external pressure put on or political control exercised over the judiciary where, even if temporarily, it has the effect of allowing the government of the Member State concerned to make the said appointments by disregarding the ordinary appointment procedure laid down by the national law.[30] It might seem odd that the CJEU found that 'it is for the referring court to ascertain' whether the national legislation at issue has the effect of conferring on the national government a direct power of appointment, and whether that power is used for putting pressure on or exercising political control over the judiciary.[31]

The above question referred for a preliminary ruling was somewhat refined by the CJEU in the section summarising the relevant findings, as follows: Art. 2 and the second subparagraph of Art. 19 (1) TEU and Decision 2006/928 must be interpreted as precluding Member State national legislation allowing the government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.[32]

In another question referred for preliminary ruling, the referring court asked whether Art. 2 TEU and the second subparagraph of Art. 19 (1) TEU are to be interpreted as provisions that preclude a national regulation governing the material liability for damages resulting from judicial errors and on the personal liability of judges if it defines 'judicial error' succinctly and in the abstract.

Also potentially relevant, in the Köbler case, the CJEU ruled that the establishment of the liability of the national court adjudicating at last instance for decisions that violate EU law does not pose a threat to the independence of that court.[33] This assessment, provided in the judgement handed down in the Köbler case, is also relevant in the case under discussion, noting that this possibility applies to the responsibility of the State arising from judicial acts. The CJEU also clarified that the fact that the substantive legal conditions related to the concept of judicial error are only defined in abstract and in general terms by national legislation and that its clarification is left to jurisprudence, does not jeopardise courts' independence.[34] The CJEU recognised that the organisation of the justice system falls within the competence of the Member States, including the determination of the personal responsibility of judges within the framework of a claim for action for indemnity.[35] This system can contribute to increasing judiciary efficiency, but Member States must also consider the requirements set by EU law in that regard.[36]

30 | Judgement of the CJEU, C-83/19, Paras. 204–205.
31 | Ibid., Para. 206.
32 | Judgement of the CJEU, C-83/19, Para. 207.
33 | Judgement of the CJEU, C-224/01, Para. 42.
34 | Judgement of the CJEU, C-83/19, Paras. 227–228.
35 | Ibid., Para. 229.
36 | Ibid.

For the CJEU, it was clear from the files submitted in the preliminary ruling procedure that the existence of a judicial error is definitively established in the proceedings brought against the Member State for financial liability and that that finding of error is binding in the action for indemnity seeking to establish the personal liability of the judge concerned, although that judge was not heard in the first set of proceedings.[37] The CJEU acknowledged that such a rule is not only likely to create a risk of external pressure on judge activity,[38] but is also liable to infringe their rights of defence guaranteed by EU law. Nonetheless, the CJEU ruled that this is for the referring court[39] to ascertain.[40] Specifically, it is for the referring court to determine whether the decisions regarding the claim for an action for indemnity, where the report to that end drawn up by the Judicial Inspectorate is not binding and where it is ultimately for the Ministry of Public Finance alone to decide on the basis of its own assessment, are suitable for being used as means of putting external pressure on the judiciary.[41]

4. Judgement in the Commission v Republic of Poland case[42]

In the introductory section of his opinion, Advocate General Evgeni Tanchev described that this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement,[43] on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set forth in the second subparagraph of Art. 19 (1) TEU combined with Art. 47 of the Charter.[44] Pursuant to Art. 19 (1) TEU,[45] Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, while Art. 47 of the Charter enshrines the right to an effective remedy and a fair trial.[46] According to the opinion, the complaints based on Art. 19 (1) TEU are well founded, albeit the Advocate General concluded that the

37 | Judgement of the CJEU, C-83/19, Para. 239.
38 | Ibid.
39 | Ibid.
40 | We do not see the reason why the CJEU found that it is 'for the national court to examine' the compatibility of the national provision at issue with EU law.
41 | Judgement of the CJEU, C-83/19, Para. 240.
42 | Judgement of the CJEU, C-619/18.
43 | In his opinion, the Advocate General noted that several other similar proceedings are pending.
44 | The Advocate General also noted that prior to the proceedings at issue, the European Commission initiated proceedings in 2017 against the same Member State on the basis of Art. 7(1) TEU.
45 | In this case, we examined the verbatim interpretation of the concerned provisions of the primary EU law.
46 | In principle, the Charter is applied only if Member States implement the EU law. We will not touch upon that issue in this paper.

complaints should be rejected as inadmissible in so far as they are based on Art. 47 of the Charter, given that no implementation of EU law occurred.[47] The opinion also made it clear that the concerned action is not barred by the initiation of the mechanism[48] based on Art. 7 TEU.[49]

As just mentioned, the European Commission based its action on the violation of the interpretation of Art. 19 (1) TEU in conjunction with Art. 47 of the Charter. The Republic of Poland maintained that the two provisions must be examined separately. Based on the case law of the CJEU,[50] the Advocate General shared the Polish position, according to which there is a connection between the two provisions; at the same time, Art. 47 of the Charter can only be applied under the conditions set forth in Art. 51 of the Charter (i.e. if the Member State is implementing EU law).[51] Regarding the application of the second subparagraph of Art. 19 (1) TEU to the present case, the opinion was based on[52] the judgement handed down by

47 | Opinion of the Advocate General, C-619/18, Para. 42.

48 | The opinion referred also to a part of the literature, according to which Art. 7 TEU functions as a kind of *lex specialis* regarding EU value monitoring and implementation, implying that it takes precedence over infringement proceedings or may even exclude them. In that regard, the opinion made reference to 'Safeguarding EU values in the Member States – Is something finally happening?' Common Market Law Review, Vol. 52, 2015, p. 619.

49 | Opinion of the Advocate General, C-619/18, Para. 42.

50 | Judgement of the CJEU, C-685/15, C-384/16.

51 | The opinion referenced the case law established in the cases of EUB ASJP (C-64/16), Achemea (C-284/16), and the Minister for Justice and Equality (C-216/18). In those judgements, the CJEU recognises the relationship between the two articles at issue in the interpretation of the opinion, and that the second sub of Art. 19 (1) TEU and Art. 47 of the Charter have different material scopes. According to the opinion, the CJEU recognises the limits of Art. 47 of the Chater, but without decreasing its significance. The judgement in the Minister for Justice and Equality case concerned a European arrest warrant within the framework of police and judicial cooperation in criminal matters. In the interpretation given by the CJEU in the operative part of the judgement, the relevant provisions of the Council Framework Decision on the European arrest warrant and extradition procedures between Member States must be interpreted as follows. If the judicial authority responsible for deciding on the extradition of a person affected by a European arrest warrant issued for the purpose of conducting criminal proceedings has such evidence as those included in the proposal adopted by the European Commission on the basis of Art. 7 TEU—which may be suitable for supporting the fact that there is a real risk of violation of the right to a fair trial enshrined in Art. 47 of the Charter (e.g., owing to systemic or other general shortcomings affecting the independence of the judiciary of the issuing Member State)—then the said authority must carry out accurate and specific investigations regarding whether (considering the personal situation of the person concerned, the nature of the crime, and the factual situation of the arrest warrant) it can be assumed for reasons supported by hard evidence that the right to a fair trial of the transferred person would be endangered.
In the judgement handed down in the Achmea case, the CJEU found, inter alia, that by concluding the BIT within the EU, the Member States and the investor created a mechanism that can exclude their legal disputes—although they may also affect EU law application—to be arranged in a way that ensures the enforcement of the requirements set forth by EU law. Art. 8 of the BIT also violates EU law autonomy because, by its very nature, it threatens EU law enforcement, especially through the system of the preliminary ruling procedure.

52 | Judgement of the CJEU, C-64/16.

the CJEU in the ASJP case.[53] The opinion then examined the merits of the claim submitted by the European Commission, which was initiated on the grounds that, first, the national measures lowering the retirement age of the judges appointed before 3 April 2018 infringe the principle of irremovability of judges. Meanwhile, the Polish government emphasised the guarantees of independence regulated in its constitution, and the fact that the measure in question essentially adjusts the retirement age of judges to the general retirement age. It also maintained that the Commission did not adequately demonstrate that the contested measures violate the principle of judicial independence, considering the limited number of judges affected.[54]

The Advocate General acknowledged that in the case Commission v Hungary initiated on the grounds of decreasing the retirement age of judges,[55] the CJEU recognised that certain objectives relating to the alignment of retirement age may be legitimate from the aspect of EU law. Concomitantly, the Advocate General emphasised that in another judgement of the CJEU that also affected Hungary,[56] the CJEU did not allow the operation of a supervisory authority established on the basis of EU law to be reduced by the authorities of the Member States in order to

53 | In the main proceedings of the judgement handed down in the ASJP case, the Portuguese legislator periodically reduced the salaries of public sector workers, including the salaries of judges of the Court of Auditors. On behalf of the members of the court in question, that court filed a lawsuit with the Portuguese Supreme Administrative Court, requesting the annulment of the provisions in question. The claim relied on a violation of judicial independence, which is guaranteed by EU law in the second subparagraph of Art. 19 (1) TEU and in Art. 47 of the Charter, as well as by the Portuguese constitution. In the interpretation of the CJEU, Member States must, among other things, ensure national courts' independence, which is closely related to the right to a fair trial enshrined in Art. 47 of the Charter. In the interpretation of the CJEU, the independence of national courts is also of fundamental importance regarding participation in the preliminary ruling procedure. In its ruling, the CJEU established that the independence of the courts presupposes that judicial duties can be exercised in a completely autonomous manner, which excludes any hierarchical relationship (i.e. the possibility that the judge is subordinate to anyone or can receive instructions from anywhere). Adherence to these criteria means that judges are protected against external influence or pressure that could affect their independence. In the interpretation of the CJEU, a precondition for courts' independence is a remuneration to judges at a level that corresponds to their activity. However, the CJEU emphasised that, in this case, the reduction of remunerations was temporarily defined as one of the conditions of the EU financial support program within the framework of another program aimed at reducing the excessive budget deficit of the Portuguese state. The CJEU also highlighted that the measures at issue apply not only to the members of the court in question but to the public sector in general. As a result, the reduction of remuneration at issue could not be assessed as a measure capable of undermining the independence of the court concerned. The CJEU also referred to the judgements handed down in the Wilson, Panicello, El Hassani, and Online Games, which resulted in significant 'evolution' of the law.

54 | Opinion of the Advocate General, C-619/18, Para. 70.

55 | Judgement of the CJEU, C-286/12.

56 | Judgement of the CJEU, C-288/12.

achieve[57] an effective objective.[58] According to the interpretation of the motion, despite the above, the contested Polish measures do not meet the requirements of EU law, as they constitute specific legislation adopted in respect of members of the concerned court. In addition, the adoption of the contested measures entailed a sudden and unforeseen removal of various judges, inevitably creating difficulties regarding public confidence.[59]

In its second complaint, the European Commission basically alleged that the relevant Polish provisions violated the principle of judicial independence,[60] as the President of the Republic's discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age allows him to exert influence on the Supreme Court and its judges. The Commission added that the President of the Republic's decision is not subject to binding criteria or judicial review, and his duty to request an opinion of the National Council of the Judiciary does not eliminate his excessive discretion because that opinion is linked to general criteria and is not binding on him. Poland contended that no violation of judicial independence was made out, particularly considering the role of the President of the Republic as guardian of the Polish constitution.[61] The opinion concluded that the position of the European Commission should be accepted by the CJEU.

At this point, it is worth examining the extent to which the findings of the opinion of the Advocate General were followed by the judgement of the European Court of Justice. The structure of the CJEU's judgement is very similar to that of the opinion: taking essentially a similar case law into account, it concludes that the legislation referred to in the claim can be examined from the point of view of the second subparagraph of Art. 19 (1) TEU. The CJEU found that the contested Polish measures were applicable retroactively to all judges in office, without any safeguards in place by way of appropriate measures to guarantee the irremovability of judges.[62] For similar cases, the CJEU essentially introduced a test, which can be called a test for limiting the competence of the Member States in the context of judicial systems (i.e. setting the limits of institutional autonomy): national measures resulting in the removal of judges are only allowed if they can be justified by a legitimate objective and are proportionate to the objective set. An additional requirement is that the measures at issue do not raise any concerns in individuals regarding external influence put on[63], or the impartiality of, the given court.[64]

57 | Opinion of the Advocate General, C-619/18, Para. 82.
58 | In this statement, the opinion did not consider that the referenced judgement related to Hungary was established based on EU law; thus, in our opinion, the situations cannot be fully compared.
59 | Opinion of the Advocate General, C-619/18, Paras. 76–78.
60 | Law on the Supreme Court, Paras. (1) and (4) of Sec. 37, and Paras. (1) and (1a) of Sec. 111.
61 | Opinion of the Advocate General, C-69/18, Paras. 85–88.
62 | Judgement of the CJEU, C-619/18, Para. 78.
63 | The criteria established by the CJEU, such as proportionality, necessity, and whether the regulation is aimed at a legitimate goal, are widely applicable in the jurisprudence. However, the criterion of whether the measures introduced by a Member State in this area raise legitimate doubts is very difficult to apply in practice.
64 | Ibid., Para. 79.

In accordance with these mentioned criteria, the CJEU first examined whether the measure in question could be justified by a legitimate objective. The Polish government contended that the lowering of the retirement age of the judges in question was introduced to harmonise the retirement age applied in this area with the general retirement age of employees, thus improving the age composition of the courts in question. According to the case law established by the CJEU, among others, in the judgements handed down in the Fuchs and Köhler[65] and the Commission v Hungary cases,[66] objectives seeking, on the one hand, to standardise the age limits for mandatorily ceasing activity and, on the other hand, to encourage the establishment of a more balanced age structure by facilitating the access of young people to, inter alia, the profession of judge may be regarded as legitimate,[67] just like in the case at hand. However, the CJEU also considered the positions of the European Commission for Democracy through Law ('Venice Commission') and the European Commission, which argue that the reasoning of the legislation in question raises serious doubts as to whether the reform at issue was made in pursuance of the aforesaid legitimate objectives, and not with the aim of side-lining a certain group of judges.[68]

According to the second complaint of the European Commission, the new law proposed by the Supreme Court of the Republic of Poland did not comply with the second subparagraph of Art. 19 (1) TEU because the President of the Republic enjoys discretionary powers to extend, beyond the statutory retirement age, the term of service of the judges of the Supreme Court two more times for periods of three years. Particularly in cases involving the interpretation and application of the provisions of EU law, the Commission contended that the independence of the judges of the Supreme Court could be threatened by possible pressure attempts of the President of the Republic, as there were no defined criteria for extending the term of service, these decisions need not be justified, and the judges themselves had to apply to the President of the Republic[69] with their requests.[70]

The Republic of Poland held that the Polish constitution grants the President of the Republic a prerogative, to be exercised personally by the President, in order to protect the judiciary from possible interference by the legislature and the executive branch.[71] In exercising this prerogative, the President of the

65 | Judgement of the CJEU, C-159/10.

66 | Judgement of the CJEU, C-286/12.

67 | Judgement of the CJEU, C-619/18, Para. 81.

68 | Ibid., Para. 82.

69 | The European Commission acknowledged that the President of the Republic is obliged by law to consult the National Council of the Judiciary, albeit that has no effect on the merits of the Commission's position, as the result of the consultation is not binding for the President of the Republic and the criteria set for the said consultation are too abstract. Meanwhile, the Republic of Poland contended that, in compliance with the legislation on the National Council of the Judiciary, the workload and the interest of the system of justice are considered. The Polish government also posited that the opinion of the National Council of the Judiciary cannot be binding as that would violate the prerogatives of the President of the Republic enshrined in the constitution.

70 | Judgement of the CJEU, C-619/18, Para. 99.

71 | Judgement of the CJEU, C-619/18, Para. 103.

Republic is obliged to consider the constitutional rules and principles, rendering this activity not a 'public administration activity' under Polish law; accordingly, these decisions could not be the subject of a judicial remedy either.[72] The Republic of Poland put forward additional arguments; first, regarding the Commission's objections to the composition of the National Judicial Council, Poland held that it was not relevant to the decision of the present procedure, since the European Commission essentially objected to the fact that the President of the Republic can make the relevant decision without considering the opinion of the National Judicial Council.[73] Second, the Polish government argued that the President of the Republic would not, in practice, influence the judges of the Supreme Court, given that the rule that deliberations are in secret would prevent the President from having any information as to how each judge voted.[74] The Polish government added that similar systems for the extension of the period of judicial activity beyond the normal retirement age furthermore exist in Member States other than the Republic of Poland,[75] and the renewal of the mandate of a judge of the CJEU also itself depends upon the discretion of the government of the Member State of the judge concerned.[76]

In response to these arguments, the CJEU did not question that it is for the Member States alone to decide whether they will authorise such an extension to the period of judicial activity beyond normal retirement age. Nonetheless, according to the interpretation of the CJEU, where those Member States choose such a mechanism,[77] they must ensure that the relevant conditions and the procedure do not undermine the principle of judicial independence. The fact that an organ of the State, such as the President of the Republic, is entrusted with the power to decide whether to grant any such extension is admittedly not sufficient in itself to conclude that that principle has been undermined. However, the provisions governing that procedure must be developed in such a way that they meet the criteria established by EU law. In this regard, the CJEU referred to the case law established, inter alia, in the cases D. and A.[78], Commission v Hungary[79], and Commission v

72 | Ibid.
73 | Judgement of the CJEU, C-619/18, Para. 105.
74 | Judgement of the CJEU, C-619/18, Para. 106.
75 | Importantly, unlike international public law, the breach of obligations of a Member State in EU law cannot justify the breach of obligations of another Member State. If there is a solution similar to the examined Polish regulation in several Member States, it indicates that in the case of Poland, political reasons also contributed to the initiation of the infringement procedures by the European Commission.
76 | Judgement of the CJEU, C-619/18, Para. 107.
77 | Judgement of the CJEU, C-619/18, Para. 110.
78 | Judgement of the CJEU, C-175/11, particularly Para. 103. It is a judgement resulting from a preliminary ruling procedure where the main procedure concerned a third-country national's application for refugee status in connection with a Common European Asylum System. The person concerned in the procedure referred, inter alia, to the fact that the court in question cannot be considered independent due to organisational relationships, and that the members may be exposed to external pressure.
79 | Judgement of the CJEU, C-288/12, Para. 51.

Austria.[80] The CJEU finally concluded that the examined legislation does not meet the criteria established above.

In that respect, first, the CJEU emphasised the discretionary power of the President of the Republic, which is not governed by any objective and verifiable criterion, for which reasons need not be stated, and which cannot be challenged in court proceedings.[81] The CJEU did not consider nor respond to the position of the Polish government, according to which the powers of the President of the Republic are necessary for the sake of the separation of powers and the independence of the judiciary.[82] Second, the CJEU referred to the role of the National Judicial Council in the procedure at issue, whose opinion—in so far as it is delivered on the basis of criteria which are both objective and relevant and is properly reasoned—may contribute to rendering the procedure at issue objective.[83] Finally, the CJEU explained its position regarding the arguments put forward by the Polish government on the existence of the examined provisions in other Member States, and on the similarities pertaining to the extension of the mandate of the judge of the CJEU. The CJEU did not see the Polish objections related to other Member States as proven[84] and referred to the established case law,[85] which posits that Member States cannot refer to the principle of reciprocity in EU law.[86] Much more interesting is the CJEU's response to the Polish objections to the new appointment of judges of the CJEU. CJEU judges are appointed for a fixed period of six years, and a possible extension requires the joint agreement of the governments of the Member States following the opinion of the Committee pursuant to Art. 255 of the TFEU.[87] According to the interpretation of the CJEU,[88] the said articles of the Treaties, which apply to the judges of the CJEU,[89] do not apply to the obligations of Member States regarding the second subparagraph of Art. 19 (1) TEU, nor do they modify their content.

In the end, the CJEU fully upheld the European Commission's second complaint that the regulation that grants the President of the Republic discretionary powers to extend the service of judges beyond their retirement age does not comply with Art. 19 (1) TEU.[90]

80 | Judgement of the CJEU, C-614/10, particularly Para. 43.
81 | Judgement of the CJEU, C-619/18, Para. 114.
82 | Here, a question can be raised as to what the administration of justice could be protected from by the competence at issue in the case under investigation regarding an interference on the part of the legislature or the executive power.
83 | Judgement of the CJEU, C-619/18, Para. 115.
84 | In accordance with the principles developed in this judgement, we must ask in which cases can similar problems be considered proven in other Member States.
85 | Judgement of the CJEU, C-619/18, Para. 120.
86 | Judgement of the CJEU, C-101/94.
87 | It is unclear from the relevant articles whether the opinion issued by this Commission complies with the requirements established by the CJEU regarding the Member States.
88 | Judgement of the CJEU, C-619/18, Para. 122.
89 | In EU law, cases in which EU legal acts do not have to meet the criteria that are binding on the Member States can be considered as the main rule rather than the exception.
90 | Judgement of the CJEU, C-619/18, Paras. 123–124.

5. Judgement in the second Commission v Republic of Poland case[91]

The infringement procedure against the Republic of Poland was initiated by the European Commission due to the disciplinary system developed for judges. The European Commission basically claimed that the CJEU should declare that the disciplinary board established by the Polish legislation does not meet the criteria set by EU law. First, the European Commission requested the declaration of the second subparagraph of Art. 19 (1) TEU, which requires Member States to guarantee that the bodies qualifying as courts within the meaning of EU law, and which may apply EU law, meet the requirements of effective legal protection related to, among others, independence and impartiality.[92] In our view, this means that it is not necessary for a Member State court to implement EU law in a given case; according to the Commission, the foregoing applies to all national courts[93] that could potentially apply EU law.

The CJEU recalled,[94] inter alia, the judgement handed down in the Repubblica case,[95] where—in a preliminary ruling procedure related to Malta—the CJEU examined the role of the Prime Minister in the appointment procedure of judges of the national courts, focusing primarily on the guarantees related to judge independence. Based on the settled case law, the national rules regarding disciplinary proceedings are clearly amenable to review, inter alia, in the light of Art. 19 (1)

91 | Judgement of the CJEU, C-791/19.
92 | Judgement of the CJEU, C-791/19, Para. 46.
93 | This definition 'improves' the previous concept of 'national court' developed by the CJEU. The previous definition was limited to whether the given national court could participate in a preliminary ruling procedure.
94 | Judgement of the CJEU, C-791/19, Paras. 50–51.
95 | Judgement of the CJEU, C-896/19. It is worth briefly summarising the most important findings of the judgement. First, the procedure started with an *actio popularis* type of action filed by a non-governmental organization based on the Maltese Constitution, claiming that the Maltese regulations on the appointment of judges are incompatible with the interpretation of Art. 19 TEU in conjunction with Art. 47 of the Charter. The action was also aimed at establishing that the appointment of a judge based on the regulation at issue should be considered null and void. In support of its claim, the Repubblika made reference to the Prime Minister's discretionary power regarding judge appointment, pointing out the active membership of the appointed judges in the ruling Labor Party, or the interference of political power in the justice system in the case of a group of judges. In the interpretation of the CJEU, after the 1016 reform of the Maltese Constitution, the establishment of the committee responsible for the appointment of judges set limits to the discretionary power of the Prime Minister of Malta regarding judge appointment, thus contributing to the improvement of the objectivity of the procedure. The body at issue must also be independent from the executive and legislative powers, as well as from the authority obliged to issue a resolution. In the interpretation of the CJEU, the established body meets these criteria, especially the rules on the prohibition of the participation of politicians.

TEU.[96] According to the second complaint submitted by the European Commission, the Disciplinary Chamber established by the Polish law infringes Art. 19 (1) TEU inasmuch as it does not meet the necessary requirements of independence and impartiality. Importantly, according to the Commission, the intervention of an executive body in the process of judge appointment is not, in general and in itself, such as to affect the independence or impartiality of those judges. Nonetheless, the Commission also remarked that the combination and simultaneous introduction of various legislative reforms in Poland no longer made it possible either to preserve the appearance of independence and impartiality of justice and the trust which courts must inspire in a democratic society, nor to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the Disciplinary Chamber to external factors and its neutrality with respect to the interests before it.

In its defence, the Republic of Poland contended that the procedure for appointing members of the Disciplinary Chamber ensures the independence of that chamber, which is similar (according to the Polish government) to judiciary committees established in other Member States. The Polish government maintained that the independence of the Disciplinary Chamber is supported by safeguards relating in particular to the indefinite duration of the term of the office of Disciplinary Chamber members and their irremovability.[97] It was added that the Disciplinary Chamber enjoys a high degree of administrative, financial, and judicial autonomy, further strengthening its independence.[98] Upon examining the jurisprudence established by the Disciplinary Chamber, the Polish government found that its decisions are actually not influenced[99] by the Minister's opinion in practice.[100]

Second, in its assessment, the CJEU acknowledged that the Prime Minister of Malta has certain powers regarding judge appointment, but this is limited by the requirements for professional experience defined in the relevant legislation. The CJEU also recognised that the appointment of judges not recommended by the committee at issue are to be presented to the President of the Republic, a statement on the decision is to be made to the House of Representatives, and a declaration is to be published in the Official Gazette of Malta. Based on these, the CJEU found that it does not appear that the national provisions at issue are, per se, such as to give rise to legitimate doubts, in the minds of individuals, as to the imperviousness of the appointed members of the judiciary to external factors and as to their neutrality, and thus lead to those members of the judiciary not being regarded as independent or impartial. The consequence here would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

96 | Judgement of the CJEU, C-791/19, Paras. 59–62.

97 | Judgement of the CJEU, C-791/19, Paras. 70.

98 | Ibid.

99 | Importantly, based on the case law of the CJEU, in examining the compatibility of a national provision with EU law, the decisive aspect is whether the administrative or even more judicial practice is compatible with EU law or leads to a result contrary to it.

100 | Judgement of the CJEU, C-791/19, Para. 71. The Minister for Justice brought 18 appeals against decisions of disciplinary tribunals delivered at first instance in respect of judges. In seven cases, the decisions under appeal were confirmed; in five cases, they varied by the imposition of more severe disciplinary penalties; in two cases, the Disciplinary Chamber imposed varied exonerating decisions and disciplinary penalties.

Based on the judgement in A. K. and Others, the Commission disputed the arguments of the Polish government by which it maintained that the members of the Disciplinary Chamber are protected after their appointment. According to the Commission, in addition to the safeguards mentioned by the Polish government, it remains necessary to ensure—by means of an overall analysis of the provisions of the national legislation relating to the creation of the body concerned and relating, in particular, to the powers conferred on it, its composition, and the manner in which the judges called upon to sit in that chamber are appointed—that those various factors are not such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned and their neutrality.[101]

The CJEU recalled that according to its case law, the mere prospect of judges running the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is likely to affect their own independence.[102] The CJEU listed various factors in that regard, including that the Disciplinary Chamber consists of new judges appointed by the President of the Republic, and that the members of the Disciplinary Chamber receive remuneration exceeding that of other judges by approximately 40% as they must abandon research work, yet they are entitled to waive these rights.[103]

The Commission also submitted[104] that, pursuant to the relevant Polish law,[105] the disciplinary liability of judges of Polish ordinary courts could be put in issue on account of the content of their judicial decisions, which, according to the CJEU, is not compatible with the criteria set forth in the second subparagraph of 19(1) TEU. The Commission argued that the relevant law defines a disciplinary offence as encompassing, inter alia, cases of 'obvious and gross violations of the law'. Such wording permits an interpretation according to which the disciplinary liability of judges extends to the performance, by those judges, of their adjudicating duties.[106] To support that argument,[107] the Commission relied on the decisions of the Disciplinary Officer, who opened an investigation in respect of judges who submitted requests for preliminary ruling to the CJEU, and ordered each of those judges to file a written statement concerning a possible exceeding of jurisdiction relating to those requests.[108]

In its defence, the Republic of Poland contended that the Disciplinary Officer is merely an investigating and prosecuting body whose assessments are not binding on the disciplinary court. The Polish government also referred to the case law of the Supreme Court, which interpreted the concept of disciplinary penalty restrictively. It follows that a disciplinary offence cannot be the result of a common error

101 | Judgement of the CJEU, C-791/19, Para. 76.
102 | Ibid., Para. 82.
103 | Ibid., Paras. 93–96.
104 | Judgement of the CJEU, C-791/19, Para. 115.
105 | Sec. 1 of Art. 107 of the Law on ordinary courts and Secs. 1 and 3 of Art. 97 of the Law on the Supreme Court.
106 | Judgement of the CJEU, C-791/19, Para. 116.
107 | The Commission underpinned its position by numerous similar references.
108 | Judgement of the CJEU, C-791/19, Para. 117.

in the interpretation or application of the law stemming from a judicial decision, but solely of 'obvious and gross' violations of the law.[109]

According to the CJEU's interpretation, the second subparagraph of Art. 19 (1) TEU requires the disciplinary regime applicable to the judicial system of a Member State to be operated in such a way that it cannot be used as a system of political control of the content of judicial decisions.[110] The disciplinary regime applicable to judges falls within the Member States' competence, and can indeed be a factor which contributes to the accountability and effectiveness of the judicial system.[111] However, with reference to the judgement in the Asociatia case related to Romania,[112] the CJEU pointed out that Member States are obliged to exercise that competence in compliance, inter alia, with the principle of courts' independence.[113] The CJEU further builds on an analogy with the judgement in Asociatia when finding that, in order to preserve independence and prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressure on judges, the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law—or in the assessment of the facts and the appraisal of the evidence—cannot in itself trigger the disciplinary liability of the judge concerned.[114] Consequently, in the CJEU's interpretation, the judiciary disciplinary system only meets the criteria set forth in EU law if the disciplinary liability of a judge as a result of a judicial decision is limited to entirely exceptional cases, and is governed, in that regard, by objective and verifiable criteria, with guarantees designed to avoid any risk of external pressure on the content of judicial decisions, thus helping to dispel, in the minds of individuals, any reasonable doubts.[115]

The fourth complaint is also relevant in the context of the legal dispute; according to the interpretation of the CJEU, the law on Polish courts[116] does not comply with Art. 19 TEU, because it fails to ensure, inter alia, that the judges' cases concerning disciplinary proceedings can be heard within a reasonable time and that the requirements regarding the right of defence are met. Further elaborating on the first part of the fourth complaint, the European Commission contended that the Minister of Justice can appoint a disciplinary officer at any stage of the procedure or after the decision concluding the disciplinary procedure; as a result, the charges against a judge can be maintained permanently, and, therefore, compliance with the reasonable time requirement would not be guaranteed.[117] The Com-

109 | Judgement of the CJEU, C-791/19, Paras. 120–123.
110 | Judgement of the CJEU, C-791/19, Para. 134.
111 | Ibid., Paras. 135–136.
112 | Judgement of the CJEU, Para. C-791/19, Para. 138.
113 | The CJEU clarified, in relation to judicial independence, that the safeguards required by EU law cannot have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in very exceptional cases, be triggered as a result of a judicial decision, particularly in cases of acting arbitrarily or denying justice.
114 | Judgement of the CJEU, C-791/19, Para. 138.
115 | Judgement of the CJEU, C-791/19, Para. 139.
116 | Arts. 112b, 113a, and 115a of the Law on ordinary courts.
117 | Judgement of the CJEU, C-791/19, Para. 179.

mission submitted that the principle of the rights of defence is, among other things, infringed inasmuch as the relevant Polish provisions prescribe that proceedings before a disciplinary court may be continued without the appointment of a defence counsel to represent a judge who cannot participate in the proceedings on health grounds, or where the defence counsel appointed by that judge has not yet taken up the defence of his or her interests.[118] The Commission also noted that the provision allows for the disciplinary court to continue the disciplinary proceedings despite the justified absence of the accused judge or his or her defence counsel.[119]

According to the Polish government, the complaint of the Commission concerning the provision allowing for the Minister of Justice to maintain the charges permanently despite a final decision was a purely hypothetical reading, and it had never been verified in practice.[120] In addition, according to Polish law, the principle *ne bis in idem* precludes a fresh action in the same case. Regarding the right of defence, the Polish government argued[121] that the relevant law is to ensure effective conduct.[122]

According to the CJEU, Art. 19 TEU requires[123] disciplinary procedures for judges who can potentially apply or interpret EU law to consider the provisions of Arts. 47 and 48 of the Charter; namely, the right to effective legal remedies and to a fair trial, the right of defence, and the presumption of innocence. The CJEU recognised that the Commission's argument, according to which the possibility that the Minister of Justice can appoint a disciplinary officer based on the legislation at issue,[124] does not in itself lead to the systematic exceeding of reasonable deadlines.[125] Despite the aforesaid, the CJEU found that the complaint of the Commission—according to which, based on the relevant legal provisions,[126] the Minister of Justice may again appoint a disciplinary officer after the decision refusing to initiate disciplinary proceedings or concluding such proceedings—appeared to be well founded. In the CJEU's reading, the judge concerned is exposed to the threat of investigations of that kind, even if no such decision has been rendered so far.[127]

The CJEU also did not accept the arguments of the Polish government that the principle *ne bis in idem* precludes the application of investigations and procedures after the final decision.[128] This finding is underpinned by the CJEU in two remarkable ways. First, in the interpretation of the CJEU, the fact that the provisions at issue may prove to be incompatible with fundamental principles other than that to which the Commission referred in support of the first part of its fourth

118 | Judgement of the CJEU, C-791/19, Para. 180.
119 | Ibid., Para. 181.
120 | Ibid., Para. 183.
121 | Ibid., Paras. 185–186.
122 | According to the Polish government, it is for the court to decide whether, based on case facts, the procedure can be continued in the absence of the judge.
123 | Judgement of the CJEU, C-791/19, Paras. 187–188.
124 | Art. 112.b of the Law on ordinary courts.
125 | Judgement of the CJEU, C-791/19, Para. 194.
126 | Sec. 5 of Art. 112b of the Law on ordinary courts.
127 | Judgement of the CJEU, C-791/19, Paras. 196–197.
128 | Judgement of the CJEU, C-791/19, Para. 198.

complaint cannot in any way preclude a finding that the concerned Member State has committed infringement[129] by ignoring the referred principles.[130] Second, in the interpretation of the CJEU, the relevant Polish legislation does not ensure the independence of ordinary courts because the cases cannot be heard within a reasonable time limit. The fact that, so far, no new disciplinary officer has been appointed by the Minister of Justice after a final decision has no relevance in this respect; the adoption of the legislation in itself gives rise to the infringement[131] on the part of the Member State.[132]

The right to be heard is also part of the right to defence, which, however, is not an absolute right,[133] meaning that it can be limited by case law. The CJEU found that the procedural rules at issue are liable to restrict the rights of judges against whom disciplinary proceedings have been brought to be heard effectively by the disciplinary court and to be able to benefit from an effective defence before that court.[134] The CJEU further held that, contrary to the Republic of Poland's assertions, a sufficient guarantee does not follow either from the fact that the relevant provisions specify that the disciplinary court is to conduct the proceedings only if this is not contrary[135] to the interests of those proceedings, or from the fact that they provide that, when it serves the summons to appear, the disciplinary tribunal is to invite the accused judge to provide explanations[136] in writing and all the evidence that he or she considers useful.[137]

In its fifth complaint, the European Commission argued that, as evidenced by the jurisprudence, the relevant Polish provisions may expose a judge to disciplinary

129 | With this finding, the CJEU certainly disregarded the possibility of considering the principle of *ne bis in idem* referred to by the Polish government, which is also applied in national and EU law. This means that legally closed proceedings cannot be restarted in practice nor under Polish law.

130 | Judgement of the CJEU, C-791/19, Para. 199.

131 | Judgement of the CJEU, C-791/19, Paras. 201–202.

132 | It must be emphasised that, in the interpretation of the CJEU under the present circumstances, the mere possibility that the Minister of Justice may appoint a new disciplinary commissioner after the final decision is made jeopardises the courts' independence. This is despite the fact that the CJEU also acknowledged that such a case did not occur in practice, and according to Polish law, such a decision would be contrary to the principle of *ne bis in idem*. However, it is unclear to us to what extent this finding was influenced by the circumstances of the given procedure, as well as by the complaints formulated by the European Commission and recognised by the CJEU.

133 | Judgement of the CJEU, C-719/19, Para. 207.

134 | Judgement of the CJEU, C-791/19, Para. 210.

135 | Sec. 3 of Art. 115a of the Law on ordinary courts.

136 | The CJEU did not explain in detail why the legal provisions put forward by the government in question are not suitable for ensuring the right to defence of the judges involved in the proceedings. In the following paragraphs, the CJEU indicated that the examined provisions, or their absence, should be regarded as shortcomings in the system of judge liability, which could entail the risk that, owing to the violation of the right to defence, the said system could be subject to political control over court decisions. In this regard, the discretion of the disciplinary court regarding the interests related to the procedure was not considered adequate by the CJEU. A clearer legal provision most likely would have met the criteria established by Art. 19 (1) TEU.

137 | Judgement of the CJEU, C-791/19, Para. 211.

proceedings upon the adoption of a decision to submit a request for a preliminary ruling to the CJEU. According to the European Commission, if proceedings are initiated against judges participating in a preliminary ruling procedure, it may deter them from participating in this procedure and violate their independence. In its defence, the Republic of Poland explained that a clear distinction is drawn between two procedural stages: the first part represents an investigation stage, which is not initiated in respect of a particular person, while the second part represents a disciplinary procedure in the actual sense, which can be initiated based on the result of the first stage.

The CJEU emphasised that in its settled case law, the keystone of the judicial system established by the Treaties is the preliminary ruling procedure. The widest discretion of national courts is of particular significance in the preliminary ruling procedure, implying that Member State legislation must safeguard that national courts are not hindered in exercising their rights and fulfilling their obligations related to the preliminary ruling.[138] Consequently, in the interpretation of the CJEU, national law provisions which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the CJEU are incompatible with EU law, and the protection from such practice constitutes a guarantee that is essential to judicial independence.[139] The CJEU upheld the first objection, according to which the Polish legislation at issue concerning the courts does not meet the requirements of Art. 19 TEU; that is, it does not adequately ensure the protection of the courts against political pressure, and this risk covers also the orders rendered in the framework of requests for preliminary ruling.[140] In the interpretation of the CJEU, the aforementioned investigations, initiated against judges participating in preliminary ruling procedures, underpin the risk of political pressure on judges.[141] In this respect, the arguments of the Polish government, according to which the investigative and disciplinary phases must be separated, are irrelevant.

6. Summary

Although not the primary analysis in this paper, as indicated in the title, it is definitely justified to examine how the limits of the Member States' institutional autonomy are set by EU law, that is, the case law of the CJEU. It is also important to clarify whether the related far-reaching change in case law was formulated in the judgements related to the examined Member States, or whether it had additional precursors. It is worth briefly addressing the reasons underlying this change and the questions about its necessity.

138 | Judgement of the CJEU, C-791/19, Paras. 223–225.
139 | Judgement of the CJEU, C-791/19, Paras. 226–227.
140 | Judgement of the CJEU, C-791/19, Paras. 229–230.
141 | Judgement of the CJEU, C-791/19, Para. 231.

As mentioned, prior to setting the limits of the institutional autonomy of Member States, the CJEU essentially defined the concept of national court on the basis of Art. 267 of the TFEU, namely the preliminary ruling procedure. It also refrained from developing any control criteria related to the judicial systems of Member States. Pursuant to this practice—which, by the way, remains relevant after the limits of institutional autonomy are set with regard to the admissibility of questions formulated by Member State courts in the preliminary ruling procedure—a body that was created on the basis of legislation, operates on a permanent basis, has mandatory powers, is independent, and its procedure is adversarial, qualifies as a national court. Importantly, the CJEU 'gave a preferential treatment' to the judicial systems of the Member States in other areas as well. The question arises as to what factors may have contributed to the CJEU having altered its case law regarding the judicial system of Member States. In our opinion, it is important to implement[142] EU law in this area of integration built on the internal market,[143] otherwise economic conflicts of interest could mean the end of integration.[144]

The infringement procedure initiated by the European Commission has not proven to be a sufficient tool for EU law implementation. Instead, practice shows that the preliminary ruling procedure, despite having been originally intended to ensure a uniform interpretation of EU law, plays a significant role in EU law implementation.[145] In the preliminary ruling procedure, national courts play a central role as the procedure takes place from judge to judge. Even today, courts adjudicating at last instance dispense with their obligation to request a preliminary ruling procedure,[146] ignoring the criteria established in the Cilfit case. The question arises as to whether the intent to remedy this problem could have led the CJEU to change its case law regarding the limitations of the institutional autonomy of the judicial systems of Member States. This, however, is contradicted by the fact that even before the CJEU's case law, there were plenty of examples of hindrances to Member State judges requesting preliminary ruling,[147] and the literature also mentions situations where the founding Member States prevented their judges from referring cases to the CJEU in areas they found important.

The assumption that the disputes between the Member States under our examination and the EU could have led the CJEU to limit the institutional autonomy

142 | Importantly, in addition to the rules of the internal market, the last decade saw consumer protection and the combat against unfair contract terms 'catch up' with the practice of the CJEU. Still, this is demonstrably not an essential condition for the continuation of integration, since this area did not appear prominently in the legal order of the European Union for decades.
143 | The special importance of the internal market is also tangible in relation to the judgements in the Köbler and Traghetti cases; the former is not classified as a sufficiently serious violation, but is more likely linked to EU citizenship; the latter related to prohibited state aid, which caused other companies to go bankrupt.
144 | This approach appeared in the judgement of CJEU in the Köbler case, where the CJEU found that the implementation of EU law in the law of Member States can be considered as a *sine qua non* condition for integration continuation.
145 | Simon, 2001, p. 662.
146 | Naomé, 2001, p. 219.
147 | Broberg and Fenger, 2010, pp. 861–885.

of the judiciary[148] is not supported by the earlier CJEU case law in that regard. At this point, it is worth briefly recalling the jurisprudence establishing the limits of institutional autonomy. The judgement handed down by the CJEU in the Achmea case had a very serious impact on arbitration clauses within the EU; the evasive arbitration clauses that hindered the initiation of the preliminary ruling procedure did not prove to be compatible with EU law. However, this had little effect on the institutional autonomy of Member States. The judgement in the Minister for Justice and Equality case concerned a European arrest warrant; the CJEU considered the findings related to the independence of the judiciary of the given Member State based on Art. 7 of the TEU. Since the case concerned the implementation of a secondary EU legal act, this judgement does not yet cover all national courts that could potentially apply or interpret EU law.

Thus, it is clear that one of the most important decisions regarding the limitation of Member States' institutional autonomy in the judicial field is the judgement in the ASJP case. In this case, the Portuguese legislature periodically reduced the salaries of public sector workers, and the remuneration of the judges of the Court of Auditors was also reduced according to this framework. In the interpretation of the CJEU, the Member States must ensure, inter alia, the courts' independence, which is closely related to the right to apply to a court as enshrined in Art. 47 of the Charter. In its judgement, the CJEU established that the independence of the courts presupposes that the judicial duties can be exercised in a completely autonomous manner, hence excluding any hierarchical relationship (i.e. the possibility that the judge is subordinate to anyone or can receive instructions from anywhere). Adherence to these criteria provides protection for the members of the judiciary against external influence or pressure that could affect their independence. In the interpretation of the CJEU, one of the preconditions for the courts' independence is to grant remuneration to judges at a level that corresponds to the activity they perform. However, the CJEU emphasised that in the ASJP case, the reduction of salaries cannot be assessed as being capable of undermining the independence of the court in question under certain circumstances. The judgement clearly separated itself from the preliminary ruling procedure, and the safeguards to be provided for that procedure. This ruling clearly affects the institutional autonomy of Member States.

Undoubtedly, important judgements have been made in the area analysed by this study in relation to the Member States under scrutiny and mentioned in the title. Nonetheless, there are significant differences in the examined judgements. The decisions related to Hungary and Romania resulted from preliminary ruling procedures; in addition, the judgement resulting from the Hungary-related case concerned an EU directive, implying that the CJEU did not examine a court potentially applying and interpreting EU law. Meanwhile, the European Commission's decision played a role in the ruling related to Romania, which included the

148 | The judgement handed down by the CJEU in the Achmea case had a very serious impact on arbitration clauses within the EU. The evasive arbitration clauses that hindered the initiation of the preliminary ruling procedure did not prove to be compatible with EU law. Nonetheless, this case had little effect on the institutional autonomy of Member States.

commitments related to the administration of justice undertaken upon accession to the EU. The procedures resulting in the judgements related to Poland were initiated by the European Commission, and as a result and due to the nature of such proceedings, the CJEU gave a more definite answer, and the court of the participating Member State[149] had fewer opportunities for assessment based on the criteria established by the CJEU. No procedure according to Art. 7 TEU is pending against Romania, which, in the case of the other examined Member States and based on the judgements of the European Court of Justice, did not constitute an obstacle to the judgements resulting from the preliminary ruling procedure or from the infringement procedure.

In the judgement rendered in the Commission v Republic of Poland case, the CJEU examined the discretionary power of the President of the Republic regarding the retirement of judges and the extension of their service period, which were both affected by the provision at issue. The CJEU judgement marked a change of the case law because, in earlier decisions, the retirement of judges could be regarded as a legitimate goal with regard to provisions of discrimination based on age, and reducing the independence of an organisation could violate EU law. In the decision under examination concerning Hungary, nonetheless, the body at issue was established on the basis of EU law. After this decision, the Member State legislature must consider the principles of impartiality and irremovability of judges in the event of implementing similar measures, and the CJEU's case law established in this area must be considered when justifying the national measures in question. Regarding the discretion of the President of the Republic, the Member States may still allow the extension of the service period of judges, but they must do so in such a way that it cannot jeopardise the independence and impartiality of the judges, and the exclusion of direct influence must be ensured. In the case under examination, according to the CJEU's reasoning, the national provisions at issue do not meet the criteria established by Art. 19 TEU owing to the broad discretion of the President of the Republic and the lack of judicial review. In our opinion, it is not clear to what extent the procedure was initiated on the basis of Art. 7 TEU and the report of the so-called Venice Commission had an influence on EU court decisions.

According to the judgement in the second Commission v Republic of Poland case, the establishment of a disciplinary board related to Polish courts did not meet the criteria set by EU law. Although the CJEU recognised that the independence of the established council is ensured by several factors, and that the participation of the executive power in itself does not constitute a factor that fundamentally affects the independence of the courts, it also established that the national measures cannot cause the neutrality of the judges to be impaired, nor can they raise doubts in individuals regarding the courts' neutrality. The CJEU ruled that the possibility of being brought before a disciplinary committee whose independence is not guaranteed is in itself capable of undermining the independence of the courts. The European Commission also complained that a disciplinary offence

149 | At the same time, the *erga omnes* scope of judgements resulting from infringement procedures is somewhat different compared to judgements resulting from preliminary ruling procedures.

determined on the basis of the relevant legislation can be established for a judge erring in interpreting the law, and as a result, the established liability system can also be used to exert political pressure. In the interpretation of the CJEU, Member States can operate a disciplinary system, but it must be borne in mind that the system cannot give rise to legitimate doubts in individuals regarding the courts' impartiality. In the interpretation of the CJEU, according to EU law requirements, a judge's disciplinary responsibility cannot be established solely on the basis of their activities related to legislation interpretation and evidence assessment. The CJEU further found that the Polish regulation did not meet the criteria established by EU law because proceedings were initiated against a judge in relation to a preliminary ruling procedure. In the CJEU's interpretation, the infringement on the part of the Member State can be established regardless of whether it occurred during the investigation phase, which cannot yet be interpreted as an actual disciplinary procedure.

The CJEU also accepted the Commission's argument that the right to defence of a judge subject to the procedure and the principle of reasonable doubt are violated in Poland, since the Minister of Justice can initiate a new procedure after the conclusion of the procedure. This was despite the Polish government contending that this reading has never been verified in practice, and that the principle of *ne bis in idem* in Polish law precludes a fresh action in the same case.

In the CJEU judgement regarding Romania, a significant role was played by compliance with the commitment, undertaken upon the accession of the Member State to the EU, to the gradual elimination of deficiencies related, inter alia, to the judiciary's functioning. The examined legislation allows for the temporary assignment of the heads of the bodies entrusted with the conduct of disciplinary proceedings against judges and prosecutors, in which case the criteria required by law do not have to be complied with. In the interpretation of the CJEU, it is for the acting national court to examine whether the regulation actually allows temporary appointments that do not meet the criteria defined by legislation, or whether it is used for political control over the judiciary. According to the CJEU, it is also for the referred jurisdiction of the acting Member State court to establish whether the government uses the possibility that the Ministry decides on the claim for indemnity brought against a judge for political pressure on the judiciary, and whether the judge's right to defence is violated by the provision prescribing that a hearing may take place in their absence.

The CJEU judgement regarding Hungary has little to do with the limitation of institutional autonomy, but rather is a continuation and expansion of the case law that has existed for decades. The effort here was to eliminate Member State measures that prevent the acting national court from referring questions to the European Court of Justice in a preliminary ruling procedure. It is also a decades-old practice to apply the principle of direct effect and the primacy enjoyed by EU law over Member State law, which in this case required not dispensing with the application of a piece of law but that of a judicial decision.

With regard to the limitation of the institutional autonomy of Member State judicial system by EU law as established by the CJEU, in the two judgements under examination related to Poland, Art. 19 (1) TEU requires the neutrality and

impartiality of the courts, but does not require the national courts concerned to be implementing or having been established by EU law.[150] However, it remains somewhat unclear what caused the CJEU to show ‘more understanding’ in the above-mentioned judgement regarding Malta. Although the case law shows that the role of the executive power alone does not lead to the undermining of judge independence, according to the non-governmental organisation that expressed doubts in the main proceedings, political appointments and judicial appointments contrary to the position of the Venice Commission were also made. All of these may be suitable for raising doubts in individuals regarding the independence of judges and political control over the judiciary. At this point, it becomes difficult to understand why the CJEU found a violation of the judges’ right to defence in the case related to Poland, seeing that the concerned reading of the provision at issue was not verified in practice, and that this practice was in fact not allowed by the principle of *ne bis in idem* applied also in Polish law.

In the case of Romania, it is also not entirely clear why would it be ‘for the acting national’ court to decide—especially considering the criteria set for the area at the time of accession—the question of whether the judges’ right to defence is violated if they are not heard in certain cases, and whether the independence of the courts is infringed if the head of the body conducting the disciplinary proceedings of judges can be appointed on a temporary basis; that is, disregarding the criteria set out in the legislation. Moreover, it remains uncertain why the independence of the courts is not necessarily infringed if the initiation of the indemnity procedure against a judge is essentially decided by the Ministry.

The limitation of the institutional autonomy of Member States by the CJEU does not necessarily mean that the CJEU broke with its decades-long practice of showing the utmost respect vis-á-vis Member State courts and the related institutional issues. This legal development can also be interpreted, most likely in accordance with the CJEU’s intentions, as the CJEU striving to ‘protect’ Member State courts from potential attempts of pressure by the executive power, the legislature, or the head of state.

Based on the above, it cannot be concluded that the case law of the CJEU aimed at limiting the institutional autonomy of Member States would have been absolutely necessary from the point of view of EU law,[151] as we have seen, for example, with the Köbler formula, and the case law did not indicate this either. The

150 | It is clear that the establishment of Member State courts is based on the law of the Member State, and this area falls within the Member States’ competence, even if they must bear in mind the requirements imposed by the EU legal order. This legal development is to be pointed out, as the criteria laid down by EU law must also be observed in the case of courts established by Member State law, and not only in the case of an authority required by an EU regulation and established in its implementation.

151 | At developing this statement, we started from the fact that in order for the internal market to survive, a tool facilitating EU law implementation in internal law is absolutely necessary. However, if the centre of gravity of integration in the future is no longer the internal market and the economy, but the interpretation of values such as the rule of law by the CJEU and the European Convention on Human Rights, this legal development can also be identified as a fundamental element.

examination of future decisions is necessary to answer questions surrounding this area. As to the current situation, it is difficult to draw *erga omnes*-type conclusions, since the role that the CJEU manifested of engaging in case-by-case decisions can be of key importance in deciding individual cases compared to other areas.

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SOME REMARKS ON THE ‘HUNGARIAN EURO’

György Marinkás[1]

‘There was a bright optimism.’

– *Ferenc Bartha*’s[2] thoughts on the professionals’ opinion around the Millennium on the possibility of introducing the Euro soon after Hungary’s EU accession.[3]

ABSTRACT

The author strives to answer why Hungary has stayed out of the Eurozone thus far and whether there is any chance of accession in the near future. To do so, in the first part of the paper, the author briefly introduces the ‘half-built house’ characteristic of the Economic and Monetary Union and, then, in the second part, introduces how the Hungarian Central Bank and the Hungarian scientific literature evaluate the pros and cons of the accession to the Eurozone. Finally, the author briefly analyses the Hungarian convergence data to draw a conclusion on whether Hungary could have—and should have—accessed the Eurozone.

KEYWORDS

euro
Hungarian euro
Eurozone
European Central Bank
Hungarian Central Bank

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2 | The last governor of the HCB prior to the change of regime (1988–1990) and the member of the Medgyessy Government’s governmental working group mandated to prepare the introduction of the Euro.
3 | Kenessei, 2022c.

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1. Introduction

György Matolcsy,[4] the current Governor of the *Hungarian Central Bank* (HCB), stated in a 2023 interview that:

> Perhaps around 2030 or a bit later we could reach […] 90% of the EU's average in terms of development, then it is worth entering the Eurozone as the Euro has many advantages […] Until then, it is worth using the extraordinary room for manoeuvre that having a national currency allows the HCB to boost the economy.[5]

The recent thoughts of Matolcsy on introducing the Euro in Hungary have made this topic relevant again as the date of accession has been off the agenda for the high-ranking public officials of Hungary. Notably, however, Matolcsy's statement does not indicate an official date for Hungary's accession to the Eurozone since the introduction of the Euro, and the target date would require a government decision. The last known official target date was announced back in 2006. The then government indicated 2010 as the year of the country's accession. The current governing party came to power in 2010, and no target date has been set ever since. In addition, in 2011, Matolcsy – then as the minister of finance – stated that the country's accession to the Eurozone was no longer a desirable goal as the Greek Sovereign Debt Crisis proved the weakness of the Eurozone. In 2015, Prime Minister *Viktor Orbán* stated that 'the introduction of the Euro in Hungary shall be abandoned'.[6] In January 2020, the Prime Minister reaffirmed the government's view that the country was not prepared to access the Eurozone. Accession should happen only after the country's real economic indicators approximate the same indicators of Austria.[7] In July 2023, when asked whether the past year would have been easier if Hungary had used the Euro, finance minister *Mihály Varga* said that it probably would have been, adding that the Euro was not a 'panacea' and, in itself, did not make an economy better or worse as the quality and effectiveness of economic policies matter. The Czech economy was performing better than the Slovak economy, even though the Slovaks have the Euro, and the Czechs have their own currency. 'We need to think about the opportunity, but the government should not rush into this',[8] he added.

Hungarian citizens are the most supportive (66%) among the citizens of the non-Eurozone V4 countries. In comparison, the Czechs are the most dismissive in this regard.[9] Economic operators, as well, seem to support Hungary's membership in the Eurozone: in their view, Hungary is ready for the introduction of the common currency, which would be useful for the Hungarian economy.[10]

4 | Governor of the HCB (2013–).
5 | Heinrich, 2023.
6 | Menich-Jónás, 2021, p. 71.
7 | Menich-Jónás, 2021, p. 71.
8 | Rádai, 2023.
9 | Republicon, 2022, p. 5.
10 | Sipos, 2019.

2. The half-built house – Is it still half-built?

Early critics, prior to the creation of the Economic and Monetary Union (EMU) and primarily outside Europe, were extremely sceptical about the European common currency project. An investment expert from the US was concerned when the common currency came into effect:

> The Euro is nothing more than a system of fixed exchange rates covered by a glossy coat of political paint. The malfunctioning rules of the Euro area unite countries that would otherwise be economically incompatible and which could easily be wrecked by a handful of global hedge funds. The luck of the Euro is that – for the time being – it is not in the interest of hedge funds to do so.[11]

The abovementioned statement may sound harsh; however, the Eurozone, in its original form,[12] had a regulation deficit, which indicated an almost complete lack of supervision authorities that could forecast potential risks and intervene in case of a crisis. It was a 'half-built house', as labelled by Fred Bergsten.[13] There were no backup plans in the case of a crisis, and no institution was vested with the power to apply fiscal rescue packages. As pointed out earlier by the author[14], it was a result of the founding fathers' 'original sin': due to their political dissent, they gave up the creation of a real economic and monetary union and created an asymmetric monetary union with severe structural weaknesses instead.[15] *Lorina Buda*, in her PhD thesis[16], provides a good analysis of the structural problems of the Eurozone through the so-called 'economic impossible trinities'. These are namely: (i) the fiscal sovereignty – independent monetary politics – 'no-bailout' clause, (ii) the democratic political decision-making – full economic integration – nation-state sovereignty, (iii) the prohibition of joint liability (i.e., a 'no-bailout' clause) – the prohibition of monetary financing – financial interdependence between states and banks, and (iv) the denial of secession – 'no-bailout' clause – bankruptcy denial.

To summarise the above, the Eurozone is far from being an *Optimum Currency Area* (OCA) as first portrayed by *Mundell*[17] and *Balassa*[18]; it will never become an OCA without creating a fiscal and political union, as pointed out by *György Surányi*, the former governor of the HCB[19] in 2017.[20] In the same year, Mihály Varga, the then Minister for Economic Affairs, made a very similar statement:

11 | Marján, 2014, p. 76.
12 | See Angyal, 2008b, pp. 245–260.
13 | Bergsten, 2012, pp. 16–22.
14 | Marinkás, 2018, pp. 437–471.
15 | Marinkás, 2018, pp. 437–471.
16 | Buda, 2017, p. 234; See also: Buda, 2016, p. 22.
17 | Mundell, 1960, pp. 657–665.
18 | Balassa, 1961, p. 324.
19 | Terms of office 1990–1991, 1995–2001.
20 | Czelleng, 2018, p. 103.

> It is not possible to run a healthy currency system in the long run where monetary policy is unified but fiscal policy is different; no harmonisation can stabilise the exchange rate while the European Central Bank sets the interest rate uniformly. [21]

The 'million dollar question' was raised by *Péter Gottfried*[22] in a 2021 study; namely, will the European decision-makers ever reach the consensus on 'crossing the red line' and introducing the fiscal union? As he pointed out, until this date, attempts to do so were in vain, and there is no sign that this political will ever come into existence. Every step backwards, however, would cause irreparable harm.[23] This became evident in 2010 in the wake of the Greek Sovereign Debt Crisis. Many contemporaneous economists had buried the Euro. According to *Joseph Stiglitz*, 'It is going to be extremely difficult now to return from scrambled eggs back to intact ones.'[24] *Tim Worstall,* an economist of the *Adam Smith Institute* and a stubborn Eurosceptic, believes that one of the main causes for the member states to keep the Euro alive is that they cannot even estimate the costs of its possible wind-up.[25] This consideration may played a role in the decision of *Mario Draghi* – the then president of the European Central Bank (ECB) – to hold his famous 'Whatever it takes speech' in 2012. In his words: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the Euro. And believe me, it will be enough'.[26]

Decision-makers were well aware of the possible risks. In October 2007, the *Ecofin Council* acknowledged – though not *expressis verbis* – that the then shaping crisis of the US finance sector could affect the single market and, in conjunction with this, scholars,[27] think tanks,[28] and, in 2009, the expert group chaired by *Jacques de Larosière*[29] suggested that the EU should create some sort of community-level supervisory system.[30] The EU legislator was lagging behind, however; it was not until 2011 when the EU—as a belated response to the crisis and to eliminate any possible threats, which could jeopardise the stability of the EMU's financial systems—established the *European System of Financial Supervision*.[31]

The change in the ECB's director seat in 2011 gave an impetus for the already ongoing policy shift: while *Jean-Claude Trichet* insisted that the restrictive

21 | MTI, 2017.
22 | Member of the Monetary Council of the HCB (2021–).
23 | Gottfried, 2021, p. 115.
24 | Stiglitz, 2010.
25 | Worstall, 2015.
26 | ECB, 2012.
27 | Kelleher, Hall and Medina, 2016, pp. 145–147; Dabrowski, 2009, pp. 17–18.
28 | Lannoo, 2008, p. 59.
29 | De Larosiére Report, 2009.
30 | On the ECB's role in this newly established supervisory system see: Angyal, 2008a, pp. 116–131; Angyal, 2009, pp. 109–119.
31 | Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, pp. 1–11.).

dispositions of the TFEU—namely the 'no-bailout'[32] and 'no default'[33] assumptions—shall be maintained under all circumstances, the new president Draghi held his abovementioned 'whatever it takes' speech giving the green light to the *Outright Market Transactions* (OMT).[34] The European legislature created the *European Banking Union* (EBU), which was proposed by several scholars years ago and which became the warrantor of the EMU's stability. As *Luigi Chiarella* pointed out,[35] the new institutions were necessary because the previous banking supervision and resolution framework, which was based on cooperation, failed during the crisis;[36] this was because domestic authorities were prone to either turn a blind eye when it came to their *national champions* or be reluctant to use public money for bailouts. In accordance with the European Commission's proposal,[37] the EBU should have been based on multiple pillars: (i) the *Single Rule Book,* (ii) the *Single Supervisory Mechanism*[38] (SSM), (iii) the *Single Resolution Mechanism*[39] (SRM), and (iv) the *European Deposit Insurance Scheme* (EDIS). While the EDIS still has not been completed, in his 2020 study[40], the author of the current article concluded that the initial years of both the SSM and SRM prove their viability as institutions despite the hardships experienced at their launch.

However, creating such a system was a huge step; one must remember that the newly established measures and institutions—such as the ESMA,[41] OMT,[42] and ESM[43]—had to tackle one final obstacle, that is, to withstand the supervision of the Court of Justice of the European Union (CJEU), which they did very well. The

32 | Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47–390, Art. 125.
33 | Ibid., Art. 9.
34 | Cœuré, 2013.
35 | Chiarella, 2016, pp. 41–46, 85.
36 | This failure is well-portrayed by *Advocate General Gerard Hogan,* who wrote in his opinion in the *Landeskreditbank Baden-Württemberg v. ECB* case: '[...] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.' – C-450/17 P - *Landeskreditbank Baden-Württemberg v. ECB*, opinion of Advocate General Gerard Hogan, 5 December 2018, para. 2.
37 | Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union. Brussels, 12.9.2012, COM (2012) 510 final.
38 | Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central BankECB concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63–89) (*SSM Regulation*).
39 | Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a SRM and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, pp. 1–90) (*SRM Regulation*).
40 | Marinkás, 2020, p. 140.
41 | C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014 (also known as the ESMA-case).
42 | C-62/14, Gauweiler and Others, Judgement, 16 June 2015.
43 | C-370/12, Thomas Pringle vs. Government of Ireland and Others, Judgement of the Court, 27 November 2012.

CJEU, considering the necessity of these measures and institutions, exhibited an amicable attitude[44] towards them and so did the national constitutional courts,[45] except for the German Federal Constitutional Court's (*Bundesverfassungsgericht*, BVferG) 2020 decision on OMT.[46]

3. Undue delay or a cautious approach

3.1. HCB governors' (ex- and current) point of view during their terms: Stories of the 'Hungarian Euro'

In the following section, the author introduces the viewpoint of ex-governors and the current governor of the HCB regarding the common currency during their terms of office. Their opinions expressed after their terms expired—which, in some cases, differ from their opinions as governors—are introduced in the scientific literature section of the current paper.

Péter Ákos Bod, who served as the Governor of the HCB between 1991 and 1994, recalled in an interview in 2007 that when he became president, the question of the common currency was already 'on the table'. In 1993, the HCB had to decide whether to renew the national currency, the Forint or not. According to him, the main questions were how many years the HCB should plan, that is, how long the Forint would remain the official Hungarian currency and when the country would adopt the Euro. At that time, they supposed that Hungary could access the EU around 2000 and would be among the first countries to adopt a common currency. 'I was optimistic',[47] he added.

During his second term (1995–2001), György Surányi[48] expressed a sceptical attitude towards the common currency: he held that its positive effects were overrated. According to sources, he even withheld reports from the public that he deemed too optimistic.[49] Later, his opinion started to display a pro-Euro attitude, which will be introduced in the part titled 'scientific literature' of the current writing.

Zsigmond Járai, who held the office of the HCB's governor between 2001 and 2007, stated in 2002:

> The Euro is strong and stable money, and Hungarian businesses and individuals will clearly benefit from Hungary's accession to the Eurozone. The Hungarian economy

44 | Angyal, 2015, p. 129.
45 | Austrian Constitutional Court on ESM Treaty (SV 2/12-18, Judgement of 16 March 2013) and the Fiscal Compact (SV1/2013-15, Judgement, 3 October 2013); French Constitutional Court on the Fiscal Compact (2012-653 DC, Judgement, 9 August 2012); German Constitutional Court on the ESM Treaty (2 BvR 1390/12, Judgement, 12 September 2012).
46 | BVerfG, Urteil des Zweiten Senats vom 05. Mai 2020 -2 BvR 859/15 -, Rn. 1-237; see also: Marinkás, 2021, p. 328.
47 | Kenessei, 2023a.
48 | After the change of regime, he already held the office between 1990 and 1991.
49 | Mihályi, 2012, p. 918.

> can also meet the Maastricht Criteria by 2007 and has a realistic chance of becoming a full member of the financial union.[50]

However, in 2006, faced with the economic realities of the country, he pushed the estimated target date to 2014, adding that this was the most optimistic version.[51] In a 2007 interview, he mentioned some disadvantages of the common currency, namely that the HCB would lose its money-issuing income, which, according to the HCB's calculations, would not be substituted by income from the Euro issue distributed on a country-by-country basis. Moreover, monetary policy would cease to be autonomous; consequently, economic and political responses would not be tailored to specific Hungarian interests. He stated, however, that while many economists considered some features of the Eurozone to be disadvantageous, he considered them the opposite. Namely, adopting the Euro means that Hungarian decision-makers have to respect the conditions of the Stability and Growth Pact, that is, the country has to pursue a disciplined public finance policy with a low budget deficit and a solid public debt. In his view, this is a warranty of economic growth.[52]

András Simor, who served as the governor of the HCB between 2007 and 2013, stated in July 2007—a few months after his inauguration to office—that:

> To some extent, we are giving up a piece of our national sovereignty in order to eliminate the exchange rate risk for Hungarian businesses and the Hungarian population. [...] In my opinion, this is a sacrifice that is worth making, because we here at the HCB believe that economic growth will accelerate [...], and the country's prosperity will also increase; in my opinion, we have to responsibly assess whether it is worthwhile for us to introduce the Euro in Hungary in the foreseeable future under these conditions. If we try to think at least in the medium term, the answer is clearly yes.[53]

He maintained his pro-Euro attitude during his term. In a 2012 interview, he stated, 'the weakness of the Eurozone does not diminish the need for Hungary to adopt the Euro'.[54]

The current governor, Matolcsy, who has held office since 2013, has a view contradictory to those of Járai and Simor. Notably, in his words in 2011—as the then Minister of Finance—, the country's accession to the Eurozone was no longer a desirable goal, as the Greek Sovereign Debt Crisis proved the weakness of the Eurozone. He maintained his—in the author's view—extreme scepticism until recently. The best example is most probably his 2019 article published in the *Financial Times*[55], in which he stated that the common currency was the result of the following 'harmful dogma': the Euro was the 'necessary' or 'normal' next step

50 | MTI, 2002.
51 | MTI, 2006.
52 | Kenessei, 2022a.
53 | Kenessei, 2022b.
54 | MTI, 2012.
55 | Matolcsy, 2019.

towards a unified Europe. His attitude changed completely based on his 2023 statement cited in the introductory part.

3.2. Scientific studies issued under the aegis of the HCB

In their 2002 study[56] co-authors, *Csajbók* and *Csermely* emphasised the importance of raising the question of whether an OCA will come into existence between the member state country and the Eurozone. In their view, it is also important to answer whether the common monetary policy can be as efficient as the member states' monetary policies in countering the economic cycles. Their main finding was that the introduction of the Euro may raise the growth rate of Hungarian GDP by 0.6–0.9% in terms of a long-term (e.g., 20-year) average. They identified and quantified three benefits and costs. The benefits are namely (i) reduced transaction costs, (ii) expansion of foreign trade, and (iii) a drop in real interest rates. The costs in their view are (i) lower *seigniorage* revenues and (ii) the loss of independent monetary policy. They also identified certain dangers of the accession; namely, if non-resident investors are confident that Hungary will join the Eurozone soon, it may trigger speculative capital inflows and initiate a 'convergence play' similar to the ones that happened to other countries in the process of accessing the Eurozone. Finally, they warned that the rapid fulfilment of the Maastricht Criteria on inflation and the fiscal deficit might cause economic discrepancies. There is a danger that rapid disinflation and fiscal adjustment—aimed at a changeover in 2007—might entail excessive sacrifice of growth. They summarised their cost-benefit analysis as follows: 'The quantifiable benefits arising from joining the Eurozone considerably exceed the costs entailed, resulting in higher economic growth and faster real convergence towards Western Europe'.

Later studies seemed to be more cautious regarding the issue of accession. Co-authors *Kisgergely* and *Szombati* argued in their 2014 study[57] that the accession would mean the loss of the country's monetary sovereignty. They also examined if the SSM and SRM were more efficient than the domestic supervision mechanisms and had a negative conclusion. They argued that (i) competence between community and domestic authorities was not clear enough (i.e., it was not clear who would have the final say), (ii) the mechanism seemed to be bureaucratic, and (iii) no clear rules existed on the burden of crisis management. As for the advantages, they argued that accession would secure a place at the 'core' and would also mean access to the crisis management fund – a sum of 55 billion € in 2014 – which was greater than Hungary could alone have allocated. They also highlighted the professionalism of the ECB's staff that would contribute to enhancing the national staff's knowledge.

In their 2017 study, co-authors *Nagy* and *Virág*[58]—and later *Virág*[59] and also *Nagy* in 2020[60]—argued that while the accession to the Eurozone did not result

56 | Csajbók and Csermely, 2002, p. 208.
57 | Kisgergely and Szombati, 2014, p. 30.
58 | Nagy and Virág, 2017.
59 | Virág, 2020, p. 309.
60 | Nagy, 2020.

in 'automatic real convergence', failure was certain if the country introduced the common currency before a given level of real convergence was reached. To avoid such a scenario, they elaborated the so-called 'Maastricht 2.0.' criteria. In their view, the following criteria should be met before the accession: (i) GDP per capita and wage levels should reach at least 90% of the Eurozone, (ii) synchronised business and financial cycles, as well as available, effective countercyclical political toolkit should be established, (iii) the economy should be close to full employment, (iv) an advanced, stable, and competitive financial sector, with approximately 90% convergence, should be established, and (v) structural balance should be achieved depending on government debt between 0–2% of the GDP, with a debt target of 50%.

3.3. Scientific literature

In the last twenty years, the basic thesis agreed by the majority of academics and practising economists was that in the case of a premature, politically motivated accession without economic convergence, serious economic harm was inevitable. However, such thinking changed before and around the Millennium. As Bartha characterised that era in an interview, 'There was a bright optimism [...]'.[61]

At that time, most scholars and decision-makers expected two advantages from the accession, namely, disciplined economic governance and economic growth. Ferenc Bartha argued, '[after the accession], politicians could no longer manipulate fiscal or monetary policy to suit their own short-term interests.'[62] Notably, he was not the only ex-governor who emphasised that the common currency would have a very strong disciplining role on the decision-makers. Ákos Bod emphasised the same advantage of the common currency: 'It would make the undisciplined, short-sighted public life and public policy think and act sensibly'.[63] The author of the current paper would like to reiterate that Járai noted in 2007, 'If we adopt the Euro, we have to respect the conditions of the Stability and Growth Pact, that is to say, we have to pursue a disciplined public finance policy with a low budget deficit and a solid public debt'.[64]

Ákos Bot stated that the financial consequences of falling behind would be very serious. In his view, investors would otherwise go places with less bureaucracy and less costly administration under similar conditions, namely, countries that use the common currency. He added that it is cheaper and faster to produce and, then, issue an invoice because there is no exchange loss. It is also safer because no unpredictable exchange rate fluctuations exist. He argued that countries that adopt the Euro early will have an advantage.[65] In the abovementioned interview, Bartha emphasised other advantages of the common currency; for example, it makes money cheaper and makes it easier to compare prices and, hence, to evaluate and finance investments. He did not omit, however, to emphasise the benefits

61 | Kenessei, 2022c.
62 | Kenessei, 2022c.
63 | Kenessei, 2023a.
64 | Kenessei, 2022a.
65 | Kenessei, 2023a.

of a stable national currency, which is better able to serve and support the nation's development. A country that introduces the common currency loses this tool.[66]

The so-called 'Maastricht Criteria' and their economic reasonableness became a central topic for scientific discussions. In 2007, Bartha stated that the criteria for introducing the common currency are important in themselves because these conditions are required to stabilise a country and make it eligible for predictable long-term development.[67] The fulfilment of the Maastricht Criteria is necessary and, simultaneously, insufficient to reach real convergence, as argued by *Péter Mihályi*.[68] Moreover, *Zsolt Darvas* argues that the Maastricht Criteria are not a proper tool for measuring a country's readiness for accession and neither are the above-cited 'Maastricht 2.0.' criteria. In his view, the level of economic development is not that important.[69] Others emphasised the arbitrary nature of the Maastricht Criteria. Bod stated in 2007 that *'[...] if we were to ask why the criteria for measuring the appropriate inflation rate are as they were conceived, we would not be able to give a scientifically valid answer. [...] The honest answer would be "just because"'*.[70] Surányi also criticised them as being inconsistent and one-sided.[71] Simor was more diplomatic, when he stated:

> It is not my job [as the governor of the HCB], to debate these regulations [the Maastricht Criteria], whether I agree with them or not. Here is a club that we want to join, the rules of which were laid down by the members who founded the club.[72]

János Fekete—former deputy governor of the HCB[73]—also labelled them as arbitrary and argued that the Maastricht Criteria were drawn up and adopted by the leaders of the European Commission at a time when Europe was experiencing a major economic boom. In such a case, a favourable turn of events would allow for much tougher conditions. In his view, the European decision-makers have made the mistake of requiring the conditions to be met in less favourable circumstances. He reiterated that even [Eurozone] countries do not meet the Maastricht standards. '[...] It looks bad when members of a team do not consider themselves bound by the standards required of newcomers',[74] he added.

The Greek example must be further highlighted as it proved the importance of disciplined economic governance. As Darvas argued in 2017, the main issue was not the introduction of the common currency, which in itself induced serious problems in the Mediterranean countries. In his view, the main problems were: insufficient demand, poor budget structure, and wage increases in excess of productivity.[75]

66 | Kenessei, 2023b.
67 | Kenessei, 2023b.
68 | Mihályi, 2005, pp. 716–717.
69 | Czelleng, 2018, p. 105.
70 | Kenessei, 2023a.
71 | Hvg.hu, 2012.
72 | Kenessei, 2022b.
73 | Deputy-governor 1968–1980; Senior deputy-governor (1980–1988).
74 | Kenessei, 2023b.
75 | Czelleng, 2018, p. 104.

One may ask how such weak economies were considered eligible for accession to the Eurozone, the 'elite club' of strong economies. There are several explanations. First of all, it is a widely accepted fact that Italian and Greek officials forged their countries' 'books' to secure entry to the Eurozone.[76] This leads to another question, namely: how did the other members not discover the fraud? Co-authors *Artner* and *Róna* offered a sinister explanation: in their 2012 study, they argued that the more developed countries—led by Germany—let Greece access for self-seeking interest.[77] The argument is based on the fact that the German economy was the greatest beneficiary of the introduction of the common currency, which protected the country's economy from currency appreciation; if Germany still had its own currency, appreciation—as an inevitable economic phenomenon[78]—should have occurred, counter-balancing the unprecedented expansion of the country's export. Instead, the weak economies of the Southern countries—including Greece—kept the exchange rate of the Euro low, allowing the undisturbed growth of German exports. Consequently, Germany and the other well-performing 'Northern' states experienced a superfluity of capital. This capital, then, flowed to the South; having regarded that the EMU countries have identical credit ratings, countries with a weak and underperforming economy could, as well, obtain exorbitant loans at low interest. The Greek government obtained cheap loans in Euro with an interest rate of 3% instead of the Drachma era's 18%. That is, according to co-authors *Darvas* and *Szapáry*[79], the common monetary policy induced the less developed member states to borrow excessively.[80]

The Greek Sovereign Debt Crisis proved 'once and forever' the dangers of premature, politically motivated accession because the process in itself does not bring real convergence, as proved by co-authors *Neményi* and *Oblath* in their 2012 study.[81] In the author's view, the Greek Sovereign Debt Crisis was also the turning point that made the 'real convergence first' thesis the most accepted among Hungarian scholars.

However, the comparative study of co-authors *Kutasi* and *Nagy*[82] proves that pursuing a disciplined economic policy and reaching a level of real convergence does not necessarily mean entering the Eurozone; in their study, they scrutinised the economic indicators of the V4 countries, that is, how the economic performance of Slovakia—the only V4 country that adopted Euro—compares to those of countries with their own national currencies, namely Hungary, Poland, and the Czech Republic. Notably, both the Polish and Czech central bank governors seem to categorically refuse the accession to the Eurozone.[83]

76 | See: Johnson, 2010; Kwak, 2010; Smith, 2013.
77 | Artner and Róna, 2012, pp. 98–99.
78 | Sanjay, 2015, p. 115.
79 | Darvas and Szapáry, 2008, p. 873.
80 | Notably, the great availability of global credits in the 2000s would have induced the Greek government to obtain large amount of credit anyway, as Imre Tarafás argues. – Tarafás, 2013, p. 362.
81 | Neményi and Oblath, 2012, pp. 673–677.
82 | Kutasi and Nagy, 2019, pp. 7–23.
83 | EJ/MD, 2023; Reuters, 2022.

According to the abovementioned study by Kutasi and Nagy, the Slovakian labour force became the most expensive in the region because Slovakia—lacking a sovereign monetary policy—could no longer devaluate its own currency (to keep the Slovakian labour force cheap). Regarding price stability, they concluded that compared to the Slovakian currency, the Czech and the Hungarian national currencies' inflation rates seemed to better fit the Maastricht Criteria, which was unexpected. In 2015–2016, Slovakia experienced deflation, similar to contemporaneous Hungary and Poland. Only the Czech Republic was not affected by deflation. Kutasi and Nagy further argued that only the Slovakian debt to GDP rate displayed growth during the examined period. When considering the current account, they found that the common currency did not provide any advantage in this regard to Slovakia. Finally, they argue that the amount of Foreign Direct Investment data shows almost the same trajectory in the cases of Hungary and Slovakia, while the Czech Republic and Poland perform better. The author of the current paper found that the 'government debt to GDP ratios' declined until 2019–2020 in all the V4 countries and started to rise in 2020,[84] which is a year excluded in Kutasi and Nagy's study.

Co-authors *Bod, Pócsik* and *Neszmélyi* more positively evaluate the results of the Slovakian Euro. Although they also mention the Slovak firms' disadvantage in terms of the wage share cost compared to producers in floating currency countries, they argue that as the price of imported materials and parts have fallen more than that of exported goods, the improvement in the exchange rate mitigated the effects of the more 'expansive' wages. While they acknowledge, as well, that the actual benefits of Euro adoption have been somewhat lower than initially expected, this may be attributed to external factors such as the global economic crisis and the prolonged crisis in the Eurozone. In their view it can be even risked to state, that the EMU—and its strict fiscal rules—had protected the national economy from suffering greater losses from those fiscal shocks. However, Eurozone membership is not in itself a guarantee of sustainable growth. Instead, it is the long and strong commitment to the integration process and obeying its rules that warrant the growth: disciplined economic policies minimise the risk of economic policy 'slippage' and help to avoid costly forced adjustments.[85]

As an interim conclusion—articulated by Darvas and Gottfried—one may state that a country may be successful with our without Euro as well. Surányi states that no country is immune from bad, irresponsible economic policies, neither as a member of the EMU nor as an outsider.[86]

Regarding the expected economic advantages, two further things should be emphasised. On the one hand, Hungary's import-export volume to the EU is already really high and has almost reached its maximum potential.[87] The same was true 15 years ago according to the then governor of the HCB, Járai, who stated

84 | Based on the data available at: https://tradingeconomics.com/ (Accessed: 18 August 2023).

85 | Bod, Pócsik and Neszmélyi, 2020, pp. 339, 343, 345–346.

86 | Hvg.hu, 2012.

87 | Menich-Jónás, 2021, p. 72.

in an interview: '[...] we are perhaps the most integrated of the 25,[88] with the EU accounting for the largest share of our external trade.'[89] That is, the accession to the Eurozone does not offer any room for improvement in this regard as concluded by Gottfried in 2021.

The loss of monetary sovereignty is maybe the most often cited argument against the introduction of the common currency, which can be refuted by highlighting 'the reality'; that is, the Hungarian economy is a small and open one. Therefore, a fully independent monetary policy—in Surányi's words—is only an 'illusion' and losing it is not an unacceptable sacrifice, —in his view. According to Székely, the tool of devaluation is overestimated. He argues that it is only enough to buy limited time and to facilitate other economic measures to solve the problem.[90]

According to Gottfried, the accession in itself does not have any prestige value, as we are already tied to the EU and NATO. He adds, however, that Brexit eroded the possibilities of non-Eurozone members to empower their interests. In addition, the more countries decide on accession to the Eurozone, the less power non-members will have in the long run.[91] Brexit and its effect on the ability of 'outsiders' to enforce their interests were emphasised in Surányi's opinion as well. He, however—unlike Gottfried—, thinks that the accession does have a prestige value:

> The financial and economic crisis, the crisis in the Eurozone, the influx of refugees, Brexit and the election of Donald Trump, all together clearly push the EU in the direction of deepening cooperation between member states. In this process, a country that is unable or unwilling to come into the inner circle could be marginalised or effectively left out of the EU.[92]

Vértes argued in a very similar way. In his opinion, the main dilemma here is the fear that 'missing out means to be left behind'.[93] It is also worth mentioning that Kisgergely and Szombati, in their 2014 study conducted under the HCB's aegis, also emphasised that acceding to the Eurozone would mean belonging to the core.

In Mihályi's opinion, the 'original sin' was committed by the subsequent Hungarian governments, when they pushed the deadline repeatedly, inducing unfounded expectations in the economic operators and the population. They should either manage the introduction to the Euro or inform that they do not plan for accession to the Eurozone in the near future.[94] As co-authors Bod, Pócsik and Neszmélyi argue, not a single date is, from an economic point of view, absolutely perfect for the accession: all calculations are questionable. Furthermore, a serious role can be played by unpredictable circumstances or, simply put, good and bad luck. This is an issue to be decided by politics, but the decision should not be shortsighted: only a political consensus over several government cycles is eligible for

88 | The EU had 25 member states at the time when the interview was conducted.
89 | Kenessei, 2022a.
90 | Czelleng, 2018, p. 105.
91 | Gottfried, 2021, p. 113.
92 | Hvg.hu, 2017.
93 | Czelleng, 2018, p. 103.
94 | Mihályi, 2012, p. 918.

the success of the currency exchange and to comply with the resulting financial conditions.[95]

4. Convergence reports of the ECB and the consequences

In 2004, the year when Hungary accessed the EU, the price stability (inflation) rate (6.5%) was above the reference value. The government finance measures, namely, annual government deficit and government debt were 6.2% and 59.1%, respectively. That is, the deficit and debt were above and below the reference value, respectively. The long-term interest rates (8.2%) were above the reference value. Legal compliance was not complete, and the country did not participate in the ERM II mechanism.

In 2010, when the current governing party emerged to power in the elections, the inflation (4.8%) was above the reference value as well. The annual government deficit (4%) and government debt (78.3%) were above and below the reference value, respectively. Long-term interest rates reached 8.4%, which meant that they were above the reference value. Legal compliance was not complete, and the country did not participate in the ERM II mechanism.

In 2014, one year after Matolcsy became the governor of the HCB, the convergence indicators displayed improvement. The inflation rate was 1%, which was below the reference value. The annual government deficit and the long-term interest rates were 2.2% and 5.8%, respectively; thus, the country fulfilled the Maastricht Criteria in this regard. In terms of government debt (79%), legal compliance, and ERM II participation, the country did not fulfil the criteria.

In 2020, before the negative economic effects of the COVID-19 pandemic, the price stability indicator was 3.7%, somewhat higher than the Maastricht requirements. The annual government deficit was 2%; that is, the country complied with this reference value. The government debt to GDP ratio was 66.3%, which was above the reference value. The long-term interest rates (2.37%) were below the reference rate. Legal compliance was not complete, and the country did not participate in the ERM II mechanism.

According to the 2022 report—the latest available—Hungary does not comply with any of the criteria. The inflation rate was above 6.8% in April 2022[96]; according to the report, the annual government deficit reached 7.17%, and the government debt was also above the reference value at 76 %. The long-term interest rates (4.1%) were also above the reference value. Legal compliance was not complete, and the country did not participate in the ERM II mechanism.

As Menich-Jónás concluded, comparing the target dates for introducing the Euro with these data indicated that, in 2002, it was unrealistic to expect accession in 2007. According to Mihályi in a 2012 study, fulfilling the Maastricht Criteria has

95 | Bod, Pócsik and Neszmélyi, 2020, pp. 321, 323–324.
96 | Which clearly do not indicate the extremely high inflation rate throughout the year after the 'Russo-Ukrainian War's economic effects peaked.

been relegated to the bottom of the list of priorities of successive governments. Instead, as Neményi and Oblath argue, short-term political considerations have successively overridden medium-term stability-oriented macroeconomic policies. The instability and unpredictability of economic and political policy caused Hungary to lag in the region.[97] As summarised by Bod: 'The peculiarly Hungarian [...] story is that we were closer to meeting the Maastricht Criteria in 2000 than in 2006, which is (if I may say so) a laughing stock'.[98]

5. Summarising thoughts and conclusions

In the first part, the author examined whether the EMU is still a half-built house – as it was labelled by Bergsten. This issue was important because in the studies conducted under the HCB's aegis, the insufficiency of the EMU's supervision mechanisms—including the then unclear competencies and the lack of practical lessons—was identified as a major negative characteristic. In that regard, the author opines that a lot has changed ever since. Although the EMU remained asymmetrical—that is, the fiscal policy remained in the hands of the member states—, a proper system of supervision has been created. The ECB gained authority to supervise the functioning of the EMU: among others, it was empowered in 2014 to liquidate the so-called 'ill enterprises' within the framework of the SRM. These systems endured the difficulties of practice and the supervision of the CJEU. That is, while the HCB's reservations regarding the insufficient supervision mechanism were valid back in 2014—and also in 2017—, the latter developments, in the author's view, rendered them unfounded by the time of writing the current paper.[99] Moreover, these studies show that the HCB—after the initial optimism displayed in the study of co-authors Csajbók and Csermely—implemented and retained a very cautious approach regarding Hungary's Eurozone accession. The key idea was that real convergence should be prioritised, which is regarded as completed after the country fulfils the so-called 'Maastricht 2.0.' criteria first elaborated in the 2017 study of Nagy and Virág.

However, three out of the five governors of the HCB since the change of regime—namely Bod, Járai, and Simor—displayed a rather realistic 'pro-Euro' attitude during their terms of office, while the other two—Surányi and Matolcsy—proved to be sceptical. Bod, Járai, and Simor were—in the author's view—optimist realists regarding the evaluation of the Eurozone and the expected positive consequences from the accession. They were in favour of accessing the Eurozone as soon as viable; however, they were also fully aware of the poor economic situation in the first decade of the 2000s and the hazards of premature accession. Surányi and Matolcsy were Eurosceptic; however, both of them seem to have changed their minds. Surányi did so well after the end of his term, while Matolcsy did the same

97 | Neményi and Oblath, 2012, pp. 587–588.
98 | Kenessei, 2023a.
99 | July 2023.

during his term between 2019 and 2023. The author of the current article wonders if the governor's seat has an invisible power that sooner or later turns the governor's sceptical approach into a supporting one.

The author of the current article also examined the 'evolution' of the Hungarian scientific community's opinion throughout the decades. In this regard, the author concludes that the initial mild optimism—before and around the time of the country's EU accession—started to erode as more and more voices warned about the 'risks and undesired effects' of the common currency. While the early opinions suggested that accession may facilitate economic growth and convergence, as soon as the lessons from the Greek Sovereign Debt Crisis were concluded, that is, the risks of premature accession, 'real convergence first', which is a more realistic approach, became dominant. In the author's view, the Greek Sovereign Debt Crisis was the turning point in this regard. Moreover, later studies came to the conclusion that a country could achieve economic growth with or without Euro as well; while the introduction of the Euro may not protect the country from negative economic trends, a country with its own currency may outperform those with the common currency. That is, the introduction of the common currency in itself does not grant economic success. In addition, some studies suggest that the accession could offer no prestige value. However, even those who argue so, acknowledge that Brexit and the growing number of Eurozone countries will erode the political weight of those retaining their own currency. In this regard, the author of the current writing argues that even if one does not see the prestige value, one should be aware of the above political reality.

The convergence reports clarify that while before 2014, the Eurozone accession was rather wishful thinking due to the undisciplined fiscal policy of the former governments and the financial crisis started in 2007, somewhere between 2014 and 2020, Hungary would have had the opportunity to fulfil the Maastricht Criteria and access the Eurozone with additional effort. Gottfried asks, in his 2021 paper, whether we should rush to the safe haven or wait to see how the Eurozone evolves and how our economy performs. The author of the current paper—with the ease of an academic, who lacks any political responsibility towards the voters—also asks whether we should have rushed to the safe haven when we had the opportunity to do so and answers in the affirmative. Other considerations than the stability offered by the common currency proved to be more important for the decision makers, however. Sadly enough, after 2020, Hungary's indicators started to deteriorate as the COVID-19 pandemic and the Russo-Ukrainian War affected the country's economic performance. It seems that our ship was washed farther away from the safe haven by the currents. The author wonders when it will be in close sight again.

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THREE CASE STUDIES ON MIGRATION-RELATED DETENTION

Gregor Maučec[1]

ABSTRACT

The European Union (EU) has recently adopted a series of legal and policy instruments and actions to strengthen protections from various forms of arbitrary asylum- and return-related detention. Further measures are planned, including those with potentially binding legal effects for EU Member States. Such laws and measures—intended to protect asylum seekers and other migrants from arbitrary deprivation of their liberty—involve rather abstract and ambiguous concepts that leave broad margins for legal interpretation and, consequently, a high degree of flexibility and discretionary powers to EU Member States. Therefore, the actual meaning and impact of these provisions is difficult to grasp. This research critically examines the latest jurisprudence of the Court of Justice of the European Union (CJEU or Court) on the (alleged) incidents and practices of arbitrary detention of migrants in EU Member States. It analyses how the supreme judicial authority of the EU construes the concept of 'arbitrariness' of deprivation of liberty of person and related notions, such as 'necessity' and 'proportionality', within the context of EU migration governance and the functioning Common European Asylum System. This analysis can give a preview of where the EU legislator and Court may be heading in terms of their quest for a more humane, dignified, and fair treatment in restricting migrants' liberty. It also yields some valuable insights into the ways in and extent to which the interpretations and decisions of the CJEU uphold the prohibition of arbitrary deprivation of liberty of migrants and uniform international human rights norms—including those enshrined in the EU Charter of Fundamental Rights—that EU Member States are bound by when depriving migrants of their personal liberty.

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1. Introduction

The detention of migrants—people who have violated no criminal law of an EU Member State (except perhaps a criminal law about migration control) but who are detained during their asylum application procedure or pending their return/removal from an EU Member State—is arguably one of the most controversial aspects of EU immigration and asylum law. In the EU asylum debate, too, a controversial issue is how asylum seekers are treated before a decision is made on their asylum application, particularly as regards issues like their detention. A new European migration environment has been shaped, *inter alia*, by the continued effects of flows of refugees and mass arrivals of irregular migrants at the EU's external borders. Consequently, the use of generalised immigration detention (i.e. administrative custody of asylum seekers and immigrants)[2] as a widespread control measure and its 'institutionalization' across the EU (potentially leading to arbitrary use and abuse of detention measures and derivative measures that similarly deprive migrants of their right to liberty) has become a major agenda point for European legislation in recent years.[3] In view of these latest developments in the EU return and asylum frameworks, many experts and commentators have criticised both practices that erode the exceptional nature of immigration detention and thus contravene the applicable provisions in international and EU law as well as the proposed new EU law (the EU legislative measures currently under negotiation). They are noted as not having helped strengthen the protection of the right to liberty and security of returnees and asylum seekers but rather

2 | Immigration detention in the global migration context is a non-punitive administrative measure imposed by an administrative or judicial authority to restrict the liberty of a person through confinement such that another procedure may be implemented in parallel. In the EU migration context, such a detention can be described as the confinement of an applicant for international protection by an EU Member State within a particular place, whereby the applicant is deprived of their personal liberty. Mentzelopoulou and Barlaoura, 2023, p. 2. This kind of administrative measure must be distinguished from criminal detention—the imposition of a term of imprisonment following criminal conviction of an asylum seeker/immigrant on the basis of a criminal offence, which is not the subject of this work.

3 | Angeli and Anagnostou, 2022, pp. 97–131; Imbert, 2022, pp. 63–95. For a more general discussion of this issue, see Moraru and Janku, 2021, pp. 284–307.

undermining it in several important ways.[4] These include broadening the scope of asylum detention and adding new detention grounds primarily over concerns regarding asylum seekers posing a threat or danger to national security or public order of EU Member States as well as legitimising current trends in some EU Member States towards the use of detention as a first response and emergency measure rather than a measure of last resort.[5] In the same vein, the UN Special Rapporteur on the Human Rights of Migrants observed in 2013 that 'the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of European Union migration management'[6] and that 'the harmonization of European Union law, and in particular the passing of the Returns Directive, can be said to have institutionalized detention within the European Union as a viable tool in migration management'.[7]

These recent observations are particularly problematic given that European legal standards have established a clear presumption against the detention of migrants and refugees in particular. Everyone (including migrants) must be

4 | For example, the new Pact on Migration and Asylum further endorses provisions on the detention of migrants in asylum border procedures, return crisis management procedures, and the new border procedure for carrying out the return of rejected asylum applicants. A main feature agreed upon by EU Member States as part of the reform of EU asylum law is that more procedures may be managed in detention. In the same vein, the expanded use of border procedures may result in more people being arbitrarily detained at external borders, potentially raising concerns about the upholding of human rights standards in migrants' treatment. Similarly, the proposal for a new regulation on screening third-country nationals at the EU's external borders—aimed at clarifying and streamlining the rules on dealing with third-country nationals who are not authorised to enter or stay in the EU—leaves the determination of the situations in which the screening requires detention and the modalities thereof to national law. According to Recital 12 of this proposal, the EU Member States are 'required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening', which 'in individual cases may include detention'. Thus, during the screening phase, a possible use of detention is generally based on national laws of EU Member States. However, during the border procedure, the use of immigration detention is regulated by EU law. Moreover, in line with the provisions of Directive 2008/115 (the Return Directive), where an applicant who was detained during the asylum border procedure no longer has the right to remain, EU Member States are allowed to continue applying detention for the purpose of the return procedure. It is also possible to detain a person who was not detained during the asylum border procedure and is subject to a return border procedure. Likewise, under the recast Return Directive (Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]), irregular migrants in a return border procedure would not be subject to detention as a rule but only in exceptional situations where it is necessary to prevent irregular entry during the assessment of the asylum application or there is a risk of absconding, of hampering return, or a threat to public order or national security. On a more positive note, with the recast Return Directive, a new and shorter maximum detention period for returnees would be introduced, ranging from three to six months, with a possible extension for up to 12 months. Mentzelopoulou and Barlaoura, 2023, pp. 9–10. See also Majcher, Flynn, and Grange, 2020, p. 8.

5 | European Council on Refugees and Exiles (ECRE), 2017, p. 12.

6 | United Nations, 2013.

7 | Ibid.

protected from arbitrary, disproportionate, and discriminatory deprivation of the right to liberty. Detention in the context of immigration is only permissible as an exceptional measure of last resort, which is a particularly high threshold to be satisfied in the context of ascertaining a non-arbitrary deprivation of liberty of migrants. While the use of immigration detention is generally on the rise in European countries as an integral part of their response to migration flows, the detention of persons applying for international protection raises significant questions of legality, necessity, and proportionality. Thus, arbitrary deprivation of migrants' personal liberty in the context of immigration detention may be one of the most pressing concerns of contemporary migration in Europe.

However, empirical data regarding the detention of migrants are lacking and reliable data collection on asylum detention has significant gaps and inconsistencies at the European level. The general unavailability of relevant and reliable data and the lack of systematic data collection have posed challenges to the study of migration-related detention trends in different European countries.[8] However, migration-related detention numbers have increased since the 2015 mixed migration flows to the EU. Approximately 100,000 people are detained yearly in the EU for reasons related to migration.[9] In some EU Member States, the detention of migrants has been broadly applied as an immediate tool in deterring irregular migration, countering irregular border crossings, and enforcing returns. EU Member States continue to largely resort to migration-related detention, despite calls that practices of the default use of immigration detention should be abolished and that the use of such detention, according to the law, should be exceptional, based on individual assessment, and correctly tested for its necessity and proportionality.[10] Thus, automatic detention of migrants continues to be the norm in a number of EU Member States, a situation that deviates from international law.[11] Meanwhile, allegations of ill treatment, violence, and abuse of migrants by officials in EU Member States persist.

Although EU law sets clear and unambiguous constraints to the use of border procedures and accompanying measures of detention, these constraints are not well understood and adequately implemented across all EU Member States. Moreover, there is a lack of clarity over when, for example, detention of migrants in the EU may be legally justified. There is a strange combination of certain provisions in the (recast) Reception Directive (Directive 2013/33/EU) that creates a loophole or an ambiguity in the law that allows EU Member States to legally detain asylum seekers at their borders. In particular, as shown in the joined cases of *FMS and Others* (the second case study) discussed below, under the terms of this directive an asylum seeker in a transit zone may be detained, accommodated, or both.[12] The most pertinent question that arises here concerns the blurred lines between the arbitrary detention and lawful restriction of the movement of migrants. This

8 | WHO Regional Office for Europe, 2022, p. 31.

9 | Mentzelopoulou and Barlaoura, 2023, p. 2.

10 | Ibid.

11 | United Nations, 2016.

12 | European Council on Refugees and Exiles (ECRE), 2018, p. 15.

gives rise to an apparent ambivalence, whereby some provisions of the Directive allow the use of detention of migrants in a wide range of circumstances, while pursuant to other provisions of the same directive, such a detention should only be an exceptional measure. This contradictory nature of the provisions in question constitutes a potential source of legal uncertainty and leaves a high degree of flexibility and discretion to EU Member States with regard to both the applicable legal regime as well as procedural guarantees intended to protect asylum seekers from arbitrary detention.[13] EU Member States detain, without exception, persons applying for international protection at the border or in transit zones, even though EU asylum law does not *per se* impose such an obligation on them.[14] A precise and accessible legal framework governing the use of detention under human rights law and refugee law is also clearly lacking. Furthermore, national laws and regulations of EU Member States are often insufficient, leaving too much discretion to immigration officials, while their detention policies are not always transparent. Consequently, migrants are vulnerable to abuse and arbitrariness as far as their detention is concerned.

Rather than at the time of their adoption, the actual impact and meaning of abstract and vague legal provisions often becomes better understood once courts of law have begun to interpret and clarify the content of such norms and define the scope and limits of their application in concrete instances. This is particularly true of the EU directives that have been adopted to enhance the protection of migrants from arbitrary detention and the legislative measures taken by EU Member States to transpose and implement them. EU asylum and immigration legislation tends to be based on certain complex concepts and terms that EU Member States are required to adequately transpose and implement through the adoption and application of appropriate legislative, policy, and other measures. EU law relating to the detention of migrants involves or refers to a number of highly abstract concepts and principles, such as 'arbitrariness', 'necessity', and 'proportionality'. Indeed, the language and scope of EU asylum and immigration *acquis* pertaining to the deprivation of liberty of a person for reasons related to their migratory status is of such a general and imprecise nature that it leaves many questions relating to the detention of migrants unanswered.

These complexities and ambiguities in wording and content of asylum and immigration legislation may leave bewildered even the most advanced and experienced legal expert who is well versed in various aspects and issues of immigration detention, not to mention a lay person. Such abstract legal definitions and principles leave a considerable margin of interpretation to both immigration and monitoring authorities as well as judges who are to apply them, thus exposing asylum seekers and other migrants to great uncertainty. For the same reasons, many of the state representatives and politicians voting in favour of such laws may not fully understand the content, meaning, and possible impacts of the measures they are adopting. While it can certainly be a gratifying feeling for a state representative or a politician to have stood up against the various incidents of arbitrary

13 | Ibid.
14 | Ibid.

detention of migrants, the practical consequences of such a political action might, if examined more closely, turn out to be far less appreciated. Because of the lack of legal clarity, the legal and factual implications of the EU law regulating migration-related detention are difficult to predict.

The tension between the migrants' right to liberty and migration control prerogatives has been mediated both before the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU or Court). Jurisprudence of the two most important judicial authorities in Europe has been seminal in shaping standards on the control of migration-related detention in European countries. The CJEU has thus become a key part of the supranational human rights adjudication over most of the immigration detention by EU Member States. However, the CJEU has failed to clarify existing ambiguity on the legality of detention of asylum seekers in light of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and EU Charter of Fundamental Rights.

The present research examined a number of recent cases where asylum and migration laws regarding arbitrary detention of migrants have been used by the court at the supranational level. The author aimed to elucidate how CJEU judges interpret the concept of 'arbitrariness' of deprivation of liberty of persons and related notions of 'necessity' and 'proportionality' in the context of EU migration governance and the functioning Common European Asylum System (CEAS). The author also aimed to shed light on how these interpretations seem to depart from more traditional conceptions of lawfulness, as well as elements guarding against arbitrariness, including appropriateness (reasonableness), justice, and predictability. To achieve this goal, the author focused on the legal regimes regulating—albeit under different legal bases—the detention of irregular migrants and asylum seekers, given the links between these two policies and increasing use of generalised deprivation of liberty policies when it comes to these two categories of migrants. Adopting a critical approach and seeking to distil common trends and highlight exceptional approaches and particularities, the author also commented on the impact of the Court's decisions and legal interpretations on the EU instruments concerned.

2. Grounds for detention and arbitrary deprivation of liberty: *I. L. v. Politsei- ja Piirivalveamet*

2.1. Facts of the case

The first recent case is the *I. L.* Judgment of the CJEU,[15] which builds on previously developed jurisprudence of the Court based on preliminary ruling procedures under Article 267 of the Treaty on the Functioning of the European Union

15 | *I. L. v Politsei- ja Piirivalveamet*, Case C-241/21, Court of Justice of the European Union, Judgment of the Court (Second Chamber) of 6 October 2022, ECLI:EU:C:2022:753.

(TFEU). It is particularly extensive as regards the detention of irregular migrants (as opposed to the relatively modest Luxembourg case law on the detention of asylum seekers).[16]

The facts of the case are as follows. I. L. is a Moldovan national and a resident in Estonia on the basis of a visa exemption. The Estonian Police and Border Guard Board (Politsei- ja Piirivalveamet, PPA) prematurely terminated his stay in Estonian territory and ordered his detention at the Estonian district court, justifying this decision by the presence of a 'risk of absconding' within the meaning of Paragraph 15(2)(1) of the Estonian Law on forced departure and prohibition on entry (VSS). The PPA ordered I. L. to leave Estonian territory on the grounds that he was residing there illegally. The PPA also found reasons to believe, in the existing circumstances, that I. L. might seek to evade removal, despite his promise to leave the country voluntarily and his request for an order for voluntary departure. Upon the application lodged by the PPA, the administrative court in Tallinn issued an order authorising I. L.'s placement in a detention centre until the date of his removal. This order was subsequently reviewed and confirmed by the Court of Appeal in Tallin. In the meantime, I. L. was removed to Moldova. He then appealed to the Estonian Supreme Court to have his detention declared unlawful and the order of the Court of Appeal set aside. I. L. stated that he would be entitled to bring an action for damages against the PPA if the Supreme Court ruled that his detention was unlawful.

The Estonian Supreme Court referring the case to the CJEU for a preliminary ruling stated that the dispute in the main proceedings relates solely to the question of whether I. L.'s detention was authorised. Disagreeing with the PPA's assessment, the referring court considered that I. L.'s detention could not be ordered on the basis of a 'risk of absconding' within the meaning of the relevant provisions of the VSS and that none of the situations listed in that law—the purpose of which is to define the concept of 'risk of absconding'—matched the circumstances of the main proceedings. The decision sentencing I. L. became final only after the decision of the administrative court to authorise his detention. Such a detention, according to the referring court, could not be based on Paragraphs 15(2)(2) and (3) of the VSS, which refer, respectively, to a failure to cooperate and the absence of the necessary documents for the return journey. Therefore, the Estonian Supreme Court

16 | A recent example of the Court's decision on detention of the applicants for international protection is *European Commission v. Hungary* (Reception of applicants for international protection), Case C-808/18, Court of justice of the European Union, Judgment of the Court (Grand Chamber) of 17 December 2020, ECLI: EU:C:2020:1029. Previous cases concerning the detention of asylum seekers include the following: *J. N. v. Staatssecretaris van Veiligheid en Justitie*, Case C-601/15 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 15 February 2016, ECLI:EU:C:2016:84; *K. v. Staatssecretaris van Veiligheid en Justitie*, Case C-18/16, Court of Justice of the European Union, Judgment of the Court (Fourth Chamber) of 14 September 2017, ECLI:EU:C:2017:680; *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, Case C-528/15, Court of Justice of the European Union, Judgment of the Court (Second Chamber) of 15 March 2017, ECLI:EU:C:2017:213; *Mohammad Khir Amayry v. Migrationsverket*, Case C-60/16, Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 13 September 2017, ECLI:EU:C:2017:675.

found that the lawfulness/non-arbitrariness of I. L.'s detention was dependent on whether the list of detention grounds in Paragraph 15(2) of the VSS transposing the Return Directive (Directive 2008/115) was to be considered exhaustive: risk of absconding, failure to cooperate, or absence of the necessary documents for the journey.

If interpreting the three grounds for pre-removal/pre-return detention set out in Paragraph 15(2) of the VSS as being exhaustive, then the referring court regarded that none of those grounds would be applicable to I. L., thereby rendering his detention unlawful. However, if those grounds were to be interpreted, by way of teleological interpretation,[17] as being non-exhaustive, they could instead be seen as being only illustrative of a general criterion—the risk that the effective enforcement of the removal would be compromised. The referring court considered that the circumstances of the main proceedings could entail such a risk, in so far as there was a genuine risk that I. L. would seek to resolve the conflict between him and his former partner and, while doing so, he would commit another criminal offence. Therefore, if such an incident was to happen, the prosecution, establishment, and punishment of a new offence by a court decision and, where appropriate, the enforcement of the sentence imposed, would result in the enforcement of I. L.'s removal being postponed indefinitely. This would frustrate the underlying purpose of the Return Directive, which seeks to establish an effective removal and repatriation policy that fully respects the fundamental rights and dignity of irregular migrants. To achieve this goal, the Return Directive imposes the obligation on EU Member States to take all necessary measures to ensure the return of illegally staying third-country nationals.[18]

Against this backdrop, the Estonian Supreme Court questioned the compatibility of the latter interpretation (that is, the list of the three pre-removal/pre-return detention grounds in Estonian law not being exhaustive) with Article 15(1) of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive). In particular, the referring court was interested in whether Article 15(1) of the Return Directive may be interpreted as authorising detention on the basis of the general criterion identified above—the risk that the effective enforcement of the removal would be compromised. It was also concerned over whether the correct interpretation of this provision requires that one of the two grounds explicitly set out in that provision needs to be satisfied. In such circumstances, the Estonian Supreme Court referred the case to the CJEU for a preliminary ruling, asking whether under the Return Directive (Directive 2008/115) EU Member States may detain a third-country national who, while at liberty prior to removal, presents a risk of committing a criminal offence the establishment and punishment of which

17 | Teleological interpretation may be defined as the method of interpretation used by courts when they interpret the purpose, values, legal, social, and economic goals of legislative provisions.

18 | See also *M and others v. Staatssecretaris van Justitie en Veiligheid*, Case C-673/19, Court of Justice of the European Union, Judgment of the Court (Fifth Chamber) of 24 February 2021, ECLI:EU:C:2021:127, para. 28.

is likely to considerably hamper the effective enforcement of their return/removal process.

2.2. Court's judgment

The CJEU ruled in I. L.'s favour, stating that any deprivation of liberty of a third-country national for the purposes of their removal procedure is subject to compliance with strict safeguards, namely, the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.[19] According to the CJEU, a general criterion based on the risk that the effective enforcement of the removal would be compromised does not satisfy these requirements of clarity, predictability, and, in particular, protection against arbitrariness. Regarding the legal basis for a limitation on the right to liberty in the form of detention, the CJEU took the view that the individual discretion of the authorities concerned needs to be exercised on the basis of and within certain predetermined limits/criteria. Essentially, these limits/criteria need to be clearly defined by a legislative act that is binding and foreseeable in its application, to help the relevant authorities avoid any danger of arbitrariness. The safeguards relating to liberty of a person, such as those enshrined in both Article 6 of the EU Charter of Fundamental Rights and Article 5 of the ECHR, serve precisely the objective of protection of the individual against the competent authorities' arbitrariness in authorising detention measures. In other words, the execution of a measure depriving a person of liberty needs to be consistent with the objective of protecting the individual (in our case, the irregular migrant) from authorities' arbitrariness, which requires, in particular, that there is no element whatsoever of bad faith or deception on the part of the decision-making authority.[20] Therefore, the CJEU held,

> By reason of its lack of precision, in particular as regards the determination of the factors to be taken into account by the competent national authorities for the purposes of assessing the existence of the risk on which it is based, such a criterion does not enable the persons concerned to foresee, with the necessary degree of certainty, in what circumstances they might be placed in detention. For the same reasons, such a criterion does not offer those persons adequate protection against arbitrariness.[21]

In essence, fundamental rights, such as the right to personal liberty, are individual rights calling for an autonomous individual assessment. They can be complemented but not replaced by a general assessment. Only where, in the light of an assessment of each specific situation, the enforcement of the removal decision risks being compromised because of the conduct of the person concerned (trying to abscond, non-cooperation with competent authorities) could a Member State deprive that person of their liberty and detain them, whereby such a detention

19 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 50.
20 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 49.
21 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 54.

decision must be based on objective criteria.[22] Thus, although detention decisions should be adopted on a case-by-case basis in accordance with the conduct of the person concerned, they should nevertheless be based on certain objective criteria.[23] Moreover, detention of an illegally staying third-country national for removal purposes (i.e., to ensure the effective return procedure in accordance with the Return Directive) must not pursue any punitive purpose.[24] While finding that the two grounds for detention of a third-country national as specified in Article 15(1) of the Return Directive, based on the presence of a risk of absconding and on the fact that the person concerned avoids or hinders the preparation of the return or removal procedure, are not exhaustive (meaning that Member States may provide for other specific grounds for detention, in addition to the two grounds explicitly set out in that provision), the CJEU concluded that Member States are not permitted to detain an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised. For a Member State to be able to authorize a detention, one of the specific grounds for detention must be provided and clearly defined by its national legislation implementing that provision of the Return Directive in its domestic law.[25] Where a Member State provides in its national law grounds for detention additional to those set out in the Return Directive, these grounds must comply with the Return Directive itself as well as the EU Charter of Fundamental Rights and ECHR.

This analysis of the scope of Article 15(1) of the Return Directive is consistent with the Court's case law on the interpretation of the first sentence of Article 8(3) of Directive 2013/33/EU. This lays down standards for the reception of applicants for international protection, according to which each of the grounds that may justify the detention of an applicant for international protection, listed exhaustively in that provision, meets a specific need and is self-standing.[26] The same is also true of Articles 28(1) and (2) of Regulation (EU) No 604/2013. These establish the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III Regulation), which provides for a single ground for detention—the significant risk of absconding by the person concerned.[27] EU Member States are free to adopt additional grounds for

22 | *WM v. Stadt Frankfurt am Main*, Case C-18/19, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 2 July 2020, ECLI:EU:C:2020:511, para. 38.
23 | See also *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 14 May 2020, ECLI:EU:C:2020:367, para. 274 and the case law cited.
24 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, paras. 31–32.
25 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 55.
26 | See *European Commission v. Hungary*, 2020, ECLI: EU:C:2020:1029, para. 168 and the case law cited.
27 | See *Mohammad Khir Amayry v. Migrationsverket*, 2017, ECLI: EU:C:2017:675, para. 25. In this judgment, the CJEU noted that a Member State may not detain a person to secure transfer procedures for the sole reason that that person is subject to the procedure established by the Dublin III Regulation.

detention other than those referred to in Article 15(1) of the Return Directive and to define the criteria for applying them, provided that the objectives pursued by that directive are met. They may thus supplement the provisions of Article 15(1) of the Return Directive by providing for other grounds for detention precisely defined by law, based on objective, specific, actual, and current elements. This requires the Member States to set out, for example, the criteria that may indicate the existence of a risk of absconding and qualify under national legislation certain objective circumstances as constituting a rebuttable presumption. In this regard, as the CJEU observed, the possibility of detaining a person on the grounds of public order and public safety cannot be based on the Return Directive.[28]

When making choices regarding the grounds for detention, EU Member States should follow several principles, given that the right of an individual to liberty is at stake in such decisions. First, recital 16 of the Return Directive indicates the intention of the EU legislature for the use of detention to be strictly limited; recourse to measures less coercive than detention should be made by both legislators and immigration authorities in the Member States. In this context, the CJEU held the following in its previous judgments.

> The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.[29]

The CJEU also stressed that the use of detention, as an exceptional measure, for the purposes of removal should be limited and subject to the principle of proportionality, as provided for in recital 16 of the Return Directive. Any detention covered by this directive and used by a Member State must both strictly comply with the principle of proportionality as to the means used and objectives pursued as well as observe the fundamental rights of the third-country nationals concerned. An implication is as follows:

| The addition of a further ground of detention by a Member State cannot, under any circumstances, cover a situation in which the application of less coercive

28 | *Said Shamilovich Kadzoev,* Case C-357/09 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 30 November 2009, ECR 2009 I-11189, para. 70. This observation of the CJEU to exclude such grounds was formulated in general terms. It is based on the strict limitation of having recourse to the deprivation of individual liberty, in line with other provisions of the Return Directive that provide for grounds based on public policy reasons, unlike Article 15(1) of that directive.

29 | *Hassen El Dridi, alias Soufi Karim*, Case C-61/11 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 28 April 2011, ECR 2011 I-03015, para. 41; *European Commission v. Hungary*, 2020, ECLI: EU:C:2020:1029, para. 248 and the case law cited.

measures, in particular those which respect the fundamental rights of the persons concerned, is sufficient to guarantee the effectiveness of the return procedure.[30]

By the same token, the CJEU explained that authorising the detention of a third-country national who is the subject of return proceedings, to prepare for their return and/or carry out their removal pursuant to Article 15(1) of the Return Directive, constitutes a serious interference with the fundamental right to liberty of a person enshrined in Article 6 of the EU Charter of Fundamental Rights. Furthermore, under Article 52(1) of the EU Charter of Fundamental Rights, any limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality. Strictly regulated detention to ensure observance of the fundamental rights of the third-country nationals concerned serves as a constant reminder in the Court's case law on the return procedure for third-country nationals.[31]

2.3. On the Court's ruling

The above ruling of the CJEU elaborates on critical issues concerning the reasons for and lawfulness/non-arbitrariness of detaining irregular migrants in return procedures. As such, it can be hailed as a significant jurisprudential step forward in reinforcing protection against arbitrary migration-related detention in EU Member States. A problem with the Return Directive is that it lacks precision regarding the limits within which the Member States may add grounds for detention to those set out in its Article 15(1), or even amend them. Adopting a teleological approach in its interpretation of the provisions in question (in light of the purpose of the Return Directive to achieve the result pursued by that directive), the CJEU focused on the principles of proportionality and legal certainty rather than on the effectiveness of the return procedure. Where an order to detain is issued, it must be based on sufficiently precise and objective grounds, established and clearly defined in a binding legal provision contained in domestic law, which must also be sufficiently predictable in its application, to prevent any arbitrary deprivation of liberty.[32] Accordingly, EU Member States must define precisely the grounds that justify detention for the purposes of return/removal, whether or not they are provided for in the Return Directive. On the question of arbitrariness of detention in the immigration context, the message of the CJEU is clear: it is not in line with the principle of legal certainty to accept that the detention of an illegally staying third-country national can be decided on the basis of imprecise grounds, not based on objective, pre-established criteria set out in a binding legal act in respect of which their application is foreseeable. In other words, adding a new ground for

30 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 43.
31 | See, in particular, *Hassen El Dridi, alias Soufi Karim*, 2011, ECR 2011 I-03015, para. 42; *Bashir Mohamed Ali Mahdi*, Case C-61/11 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 28 April 2014, ECLI:EU:C:2014:1320, para. 55; *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, Case C-47/15, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 7 June 2016, ECLI:EU:C:2016:408, para. 62.
32 | Raimondo, 2022, p. 2.

detention to those listed, by way of example, in Article 15(1) of the Return Directive, must always meet the requirement of legal certainty to do away with any danger of arbitrary deprivation of liberty of the persons concerned. Therefore, the existence of a credible risk that the person concerned will commit a criminal offence before being removed from the territory of a Member State, as in the present case, cannot make up for the vagueness of the general ground for detention. This criterion, in the first place, has no legal basis.

Moreover, such a concept of 'risk that the person concerned will commit a criminal offence' before being removed, which justifies that person's detention, is highly problematic for other reasons. First, it relates to the likelihood that a criminal offence is committed in the near future. As such, it does not concern situations on the basis of which the CJEU ruled while criminal proceedings were ongoing, either at the investigation or judgment stage, by setting strict requirements and which presumed that the offence had already been committed.[33] The second issue with applying this criterion is that the existence of the 'risk' of committing a criminal offence, or repeating it, requires a subjective assessment, and is based on material facts, unlike, for example, the risk of absconding or hampering the removal process. Following the same logic of interpretation, it would be possible to justify detention on other recurring grounds as well—for example, a risk of suicide or any other foreseeable serious health risk that could lead to the person concerned being hospitalised, thus automatically delaying that person's removal.[34] Therefore, such an assessment of the likelihood that the person concerned will commit a criminal offence cannot be considered to be consistent with the requirement of legal certainty. Moreover, for the assessment of the likelihood that the person concerned will commit a criminal offence to be effective, it will need to be based on clear criteria as well as solid and reliable evidence.[35] Third, adequate vigilance needs to be exercised to avoid circumventing the exclusion of a justification based on reasons of public order, especially where that assessment is made as part of the decision to grant a period for voluntary departure.[36] As the European Commission noted,

33 | In *Z. Zh. V. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I. O.*, for example, the CJEU held that the concept of 'risk to public policy' presupposes 'in addition to the perturbation of the social order which any infringement of the law involves, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. The CJEU stated in this case that 'with regard to the assessment of that threat, in the case of a third-country national who is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, the nature and the seriousness of that act and the time which has elapsed since it was committed may be relevant matters'. *Z. Zh. V. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I. O.*, Case C-554/13, Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 11 June 2015, ECLI:EU:C:2015:377, paras. 50–52, 60, 62. As for the existence of such a threat to justify detention for the purpose of removal being carried out in prison accommodation, see *WM v. Stadt Frankfurt am Main*, 2020, ECLI:EU:C:2020:511, paras. 45–46.

34 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 56 and a corresponding footnote.

35 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 57.

36 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 59.

> It is not the purpose of Article 15 of the Return Directive to] protect society from persons which constitute a threat to public policy or security. The legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. … If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify the decision that there is a risk of absconding.[37]

Overall, this judgment also seems to confirm a laudable trend towards greater jurisprudential convergence in matters of migrants' detention between Luxembourg and Strasbourg Courts. The CJEU appears to rely more explicitly on the relevant Strasbourg jurisprudence not only as a toolbox but also as a benchmark (i.e., as mandatory minimum protection level), thereby protecting domestic judges in EU Member States from falling below that level when applying EU law.[38] This 'benchmark function' of the ECHR is less frequently mentioned in CJEU jurisprudence and refers to the fact that pursuant to Article 52(3) of the EU Charter of Fundamental Rights, the ECHR protection level also applies under EU law. However, EU law may provide more extensive protection of migrants' fundamental rights, including the right to liberty. In interpreting Article 6 of the EU Charter of Fundamental Rights, Article 5 ECHR serves as the minimum threshold of protection of migrants' right to liberty. In other words, the CJEU must interpret the human rights aspects of EU asylum and immigration law, notably issues of migrants' detention, in conformity with the ECtHR case law, which acts as the lowest common denominator. In doing so, the CJEU itself draws the relevant conclusions on the content of Strasbourg jurisprudence.[39]

This preliminary ruling seeks to strengthen the protection of irregular migrants against arbitrary detention by requiring EU Member States to define clear, foreseeable, and accessible grounds for detention in return procedures in line with international human rights law and EU law. However, it can also be criticized for overlooking the aim of promoting voluntary return that the Return Directive pursues. Specifically, the non-exhaustive nature of the grounds for detention stemming from Article 15(1) of the Return Directive seems to be in contrast with that aim, thus hindering further harmonisation in this particular area. Furthermore, this decision has important implications for the further development of EU asylum and immigration *acquis*, notably in light of the current proposed recast Return Directive, which shortens the term for voluntary departure, on the one hand, and extends the grounds for detention of irregular migrants for the purposes of transfer, on the other.[40]

37 | European Commission, 2017, p. 140.
38 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, paras. 47 et seq.
39 | Tsourdi, 2020, pp. 185–186.
40 | European Commission, 2020.

3. Restriction of the freedom of migrants unable to meet their own needs in transit zone: FMS and Others

3.1. Facts of the case

Another recent decision relevant for the interpretation of the concept of 'arbitrariness' with respect to detention of both irregular migrants and asylum seekers under EU law was rendered by the CJEU in joined cases *FMS and Others*.[41] In this judgment, delivered in the context of the urgent preliminary ruling procedure, the CJEU ruled on a number of questions relating to the interpretation of the right to asylum and return of illegally staying third-country nationals under Directives 2008/115 (Return Directive), 2013/32 (Procedures Directive), and 2013/33 (Reception Directive).

The two cases concern the situation following the arrival in Hungary of a married couple of Afghan nationals and of an Iranian national with his infant child. They applied for asylum in the Röszke transit zone, but their applications were rejected as inadmissible because they had arrived to Hungary via a country where they would not be exposed to any risk of ill-treatment. Following the rejection of their applications, they were ordered to continue their forced stay in the transit zone, which is reserved for those whose asylum claims have been rejected. In both cases, the Hungarian authorities issued return orders to Serbia and contacted the Serbian authorities to organise the return. Serbia, however, decided that it would not readmit the applicants as they had lawfully entered Hungary and were thus excluded from the readmission agreement between the two countries. Subsequently, the Hungarian Migration Police Authority amended the return decisions, changing the destination country from Serbia to Afghanistan and Iran, respectively. In both cases, the applicants brought an action before the referring court seeking to annul the return orders, as they were return decisions and should be open to judicial review. In addition, they also submitted an administrative appeal requesting that the referring court recognise Hungary's failure to comply with its obligation to accommodate them outside the Röszke transit zone.

The domestic court (the Administrative and Labour Court in Szeged) ordered a stay of proceedings and referred to the CJEU for its preliminary ruling, focusing on the inadmissibility ground of a safe transit country and the nature of the Röszke transit zone, as well as possible *de facto* detention and its compatibility with EU law. With regard to the transit zone as a place of detention in the context of an asylum procedure, the referring court wondered, in the first place, whether Article 2(h) of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive, read in the light of Article 6 and Article 52(3) of the EU Charter of Fundamental Rights, is to be interpreted as meaning that accommodation in a transit zone (a zone which an applicant for international protection cannot lawfully leave on a voluntary basis regardless of destination) for a period exceeding the four-week

41 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367.

period referred to in Article 43 of the Procedures Directive constitutes detention and, thus, deprivation of liberty for the purposes of recitals 17 and 24 and Article 16 of the Return Directive. In connection with this, the referring court was also interested in whether Article 43 of the Procedures Directive is to be interpreted as precluding legislation of a Member State under which the applicant for international protection may be detained in a transit zone for more than four weeks.

The Hungarian court also asked the CJEU about the compatibility with recital 16 and Article 15(1) of the Return Directive, as well as with Article 8 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive, read in the light of Articles 6 and 52(3) of the EU Charter of Fundamental Rights, of the fact that the detention of a third-country national (the applicant for international protection) takes place solely because they are subject to a return order and cannot meet their needs (accommodation and food) owing to a lack of material resources to cover those needs. Furthermore, the referring court requested the CJEU to pronounce itself on the questions of whether the following facts are compatible with recital 16 and Article 15(2) of the Return Directive, read in the light of Articles 6 and 47 and Article 52(3) of the EU Charter of Fundamental Rights, as well as with Articles 8 and 9 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive: (i) accommodation, which constitutes *de facto* detention for a period exceeding the four-week period referred to in Article 43 of the Procedures Directive, has not been ordered by a detention order; (ii) no guarantee has been provided that the lawfulness of the detention and its continuation may be challenged before the courts; (iii) the *de facto* detention takes place without any examination of the necessity or proportionality of that measure, or whether there are any alternative measures; and (iv) the exact duration of the *de facto* detention is not fixed, including the date on which it ends. The last question referred to the CJEU addressing the issue of whether Article 47 of the EU Charter of Fundamental Rights could be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure until the administrative proceedings are concluded, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone that is not a place of detention.

3.2. Court's decision and reasoning

In response to a request (preliminary reference) from the Hungarian court, the CJEU delivered its high-profile judgment, ruling that the automatic and indefinite placement of asylum seekers in the transit zones at the Hungarian–Serbian border qualifies as unlawful detention. As for the detention of the persons concerned, the CJEU first examined their situation in the Röszke transit zone, in the light of the rules governing both the detention of applicants for international protection (Procedures and Reception Directives) and that of illegally staying third-country nationals (Return Directive). The CJEU held that detaining the persons concerned in that transit zone must be regarded as a detention measure. In reaching that conclusion, the Court stated that the concept of 'detention', which has the same meaning in the context of the various directives mentioned above, refers to a coercive measure that presupposes the deprivation of liberty and freedom of movement

(and not a mere restriction of the freedom of movement of the person concerned) and isolates that person from the rest of the population, by requiring him or her to remain at all times within a limited and closed area.[42] According to the CJEU, the conditions prevailing in the Röszke transit zone amounted to a deprivation of liberty, *inter alia*, because the persons concerned could not lawfully leave that zone of their own free will in any direction whatsoever. The Hungarian Government argued that the applicants could leave freely in the direction of Serbia and, therefore, their stay in the transit zone could not be classified as unlawful detention. However, the CJEU did not find this argument compelling for two reasons: first, the persons concerned could not leave that zone for Serbia, since such an attempt would be considered unlawful by the Serbian authorities and would therefore expose them to penalties; and second, leaving that zone might result in their losing any chance of obtaining refugee status in Hungary.

The CJEU stated that in view of the context of Article 2(h) of the Reception Directive, detention must be understood as referring to a coercive measure of last resort that is not met with restricting the movement of an applicant for international protection.[43] The Court also observed that no provision in the Return Directive contains a definition of that concept. In the absence of such a definition, the same meaning of the notion of 'detention' as in the context of the Reception Directive is to be applied, for there is nothing to suggest that the EU legislature's intention was to give the concept a different meaning. According to the Court's interpretation, the concept of 'detention', within the meaning of these two directives, covers one and the same reality. Therefore, the detention of a third-country national who is illegally staying on the territory of a Member State, within the meaning of the Return Directive, constitutes a coercive measure of the same nature as that defined in Article 2(h) of the Reception Directive.[44]

The CJEU also examined whether this kind of detention complies with the requirements imposed by EU law. As regards the requirements related to detention, the Court first noted that Article 8(3) of the Reception Directive provides an exhaustive list of grounds for detention and does not include any ground relating to the applicants' inability to support themselves.[45] Even if other grounds of detention may be applicable (e.g., under domestic criminal law), the objective of the

42 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 223.
43 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 221.
44 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 224–225.
45 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 250–251.

Reception Directive must always be respected.[46] Under the Reception Directive, Member States are required to provide material reception conditions to applicants who cannot ensure an adequate standard of living for themselves; detaining them for this reason would undermine the very essence of that Directive.[47] Regarding the imposition of a detention measure, Articles 8(2) and (3) and Article 9(2) of the Reception Directive preclude detention without any reasoning or any assessment of the measure's proportionality and necessity, including in the form of a written judicial or administrative decision.[48] A possibility for judicial review should always be provided under Articles 9(3) and (5) of the Reception Directive.[49]

Similar to its assessment of detention under the Reception Directive, the CJEU held that a detention measure under the Return Directive is permissible only if the removal process risks being jeopardized. No detention can be imposed solely because the applicant is not able to support themselves.[50] The detention measure may be imposed only following an individualized assessment of such measure's proportionality and necessity and in the form of a written decision stating the reasons for the detention.[51] A judicial review of the detention measure should always be available.[52] Thus, the Court held that under Article 8 of the Reception Directive and Article 15 of the Return Directive, respectively, neither an applicant for international protection nor a third-country national who is the subject of a return decision may be detained solely on the ground that they cannot meet their own needs.[53] It added that EU law precludes an applicant for international protection (Articles 8 and 9 of the Reception Directive) or a third-country national who is the subject of a return decision (Article 15 of the Return Directive) from being detained without the prior adoption of a reasoned decision ordering that detention

46 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 252.
47 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 253–256.
48 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 257–259.
49 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 257–259, 260–261.
50 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 269–270.
51 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 274–275.
52 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 276–277.
53 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 256, 266, 272, 281.

and without the need for and proportionality of such a measure having previously been examined.

The CJEU also clarified the requirements related to the continuation and, more specifically, duration of detention. It noted the lack of any provision in the Reception Directive laying down a maximum duration limit, with the applicants' right to liberty being only respected if effective procedural guarantees under Article 6 of the EU Charter of Fundamental Rights are in place.[54] In the absence of a time limit, the detention should be terminated as soon as it is no longer necessary or proportionate, with the authorities acting with all due diligence. Consequently, the absence of a time limit that, if exceeded, would render detention automatically unlawful is not contrary to Article 9 of the Reception Directive, so long as the aforementioned conditions are respected.[55] Moreover, Articles 15(1) and (4) of the Return Directive imply that detention may last only for as long as the removal process is taking place but Articles 15(5) and (6) of the same directive additionally require Member States to set a maximum period of detention and a possible extension for up to a further 12 months under specific circumstances (lack of documents). National legislation that does not set a time limit that, if exceeded, automatically renders the detention unlawful, and ensures that detention is maintained only for the procedure of removal is not in compliance with the Return Directive.[56] As regards applicants for international protection, the Court held that Article 9 of the Reception Directive does not require Member States to lay down a maximum period for continuing to detain such applicants, provided that their national law ensures that the detention lasts only for as long as the grounds for detention remain applicable and that the administrative procedures associated with such grounds are executed diligently. The lawfulness of the detention should be reviewed at regular intervals by a domestic judge. In the case of non-EU nationals who are the subject of a return decision, the CJEU interpreted Article 15 of the Return Directive as meaning that detention, even where it is extended, may not exceed 18 months and may be maintained only as long as there is a reasonable prospect of removal or removal arrangements are ongoing and executed with due diligence by the competent authorities.

As regards the detention of applicants for international protection in the particular context of a transit zone, the CJEU pointed out the need to take account of Article 43 of the Procedures Directive. Pursuant to that provision, Member States may require applicants for international protection to stay at their borders or in one of their transit zones, *inter alia*, to examine whether their applications are admissible, before taking a decision on the rights of entry of those applicants into their

54 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 264.
55 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 265.
56 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 279–280.

territory. However, such a decision must be adopted within four weeks, failing which the Member State concerned must grant the applicant for international protection the right to enter its territory and process their application in accordance with the ordinary procedure of civil law. Therefore, although the Member States may, in the context of a procedure referred to in Article 43 of the Procedures Directive, detain applicants for international protection who present themselves at their borders, such detention may not, under any circumstances, exceed the maximum period of four weeks from the date of application for international protection. Any extension is only possible under Article 43(2) of the Procedures Directive if there is a massive influx of applicants for asylum and the latter are accommodated in accordance with Articles 17 and 18 of the Reception Directive.[57] The Court concluded that asylum applicants cannot be detained in transit zones for more than four weeks, even in the event of arrivals involving a large number of third-country nationals or stateless persons.

The CJEU also considered whether a detention that is unlawful under EU law may require, under Article 47 of the EU Charter of Fundamental Rights, that domestic courts oblige the national authorities to provide the applicant with appropriate accommodation. It first noted that the absence of judicial review in national legislation is not only contrary to the provisions of the Reception and Return Directives but also contravenes Article 47 of the EU Charter of Fundamental Rights, and domestic courts are required to disapply any such legislation that hinders judicial review.[58] Second, where detention is unlawful, the national court must be able to issue its own decision ordering the release of the person, or an alternative measure if the detention ground is valid but the measure is disproportionate. In the present case, the CJEU held that the Hungarian courts can order the immediate release of the applicants for international protection if their placement in the transit zone is found to be unlawful.[59] Regarding the possibility for courts to order the applicants' placement in accommodation, the Court noted that the applicants remain asylum applicants after their release from detention and, as such, still benefit from Article 17 of the Reception Directive.[60] An appeal is provided under Article 26 of the Reception Directive against decisions affecting reception conditions provision. Courts are generally required to grant interim measures in cases covered by EU law, to fully ensure individuals' rights.[61] An applicant for international protection

57 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 244–245.
58 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 290–291.
59 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 293–294.
60 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 295.
61 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 296–298.

whose detention, which has been found to be unlawful, has ended must be able to rely on the material reception conditions to which they are entitled during the examination of their application. According to the Court, Article 17 of the Reception Directive implies that if the applicant has no means of subsistence, they are entitled to either a financial allowance enabling them to find accommodation or to housing in kind. Thus, Article 26 of the Reception Directive requires that such an applicant be able to bring an action before a court aimed at guaranteeing that right to accommodation. The primacy of EU law and right to effective judicial protection require domestic courts to declare themselves competent to hear and decide on any action relating to the granting of interim accommodation measures if no other court has jurisdiction under national law.[62]

Lastly, the CJEU explained that the lawfulness of a detention measure, such as the detention of a person in a transit zone, must always be amenable to judicial review under Article 9 of the Reception Directive and Article 15 of the Return Directive. Therefore, in the absence of national rules providing for such a review, the principle of the primacy of EU law and right to effective judicial protection require the national court hearing the case to declare its jurisdiction to rule on the matter. If, following its review, the national court considers that the detention measure at issue is contrary to EU law, then the court must be able to substitute its decision for that of the administrative authority that adopted the unlawful detention measure and order the immediate release of the persons concerned, or possibly an alternative measure to detention.

3.3. On the Court's decision

The joined cases raise important questions regarding the conformity with EU law of the asylum and return procedures that the Hungarian authorities conducted at the border transit zone between Hungary and Serbia, at Röszke. This judgment of the CJEU is of particular significance as it explains some of the legal intricacies surrounding border procedures in transit zones under EU law, dealing also with the way in which these procedures relate to migrants' fundamental right to personal liberty. The Court's decision firmly and boldly concludes that the practice of placing applicants in the transit zone constitutes detention under the EU directives at issue. The obligation imposed on a third-country national to remain permanently in the Röszke transit zone, which they could not legally leave voluntarily, amounted to a deprivation of liberty, characterised by 'arbitrary detention' within the meaning set forth in the relevant EU directives. The Court denounced the expansion of the European migratory detention policies, making clear that 'accommodation' in the form of holding asylum seekers in a camp located in the transit zone, which is guarded and surrounded by barbed wire and without any realistic possibility (neither practical nor legal) for them to voluntarily leave, amounts to unlawful deprivation of their liberty in the EU legal order, unless it is

62 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 299.

justified by a valid legal ground, necessary, and proportionate, and unless no other coercive measures are sufficient in an individual case.

In addressing this preliminary question, the CJEU largely followed the opinion of Advocate General Pikamäe,[63] who, despite the recent ruling of the ECtHR in *Ilias and Ahmed v. Hungary*,[64] which held that the accommodation of applicants of international protection in the Röszke transit zone did not amount to a deprivation of liberty, observed that because of the autonomy of EU law, the CJEU has a power to interpret provisions of the EU Charter of Fundamental Rights independently of the ECtHR when EU law provides for a higher level of individual rights' protection. The Advocate General noted, *inter alia*, that the applicants' situation of isolation, along with the severely restricted possibility to voluntarily leave the transit zone, constituted detention within the meaning of Article 2 of the Reception Directive. Pikamäe further opined that the detention of the applicants in the Röszke transit zone, which was not based on a formally adopted detention decision outlining its factual and legal grounds, and was not preceded by an individual examination as to the possible implementation of alternative solutions, must be classified as unlawful.[65]

The CJEU's reasoning and finding with regard to this salient question, clarifying that the accommodation in this transit zone amounts to a *de facto* detention of asylum seekers, differ from those of the ECtHR in its much criticized judgment previously issued in *Ilias and Ahmed v. Hungary*.[66] The ECtHR ruled in the latter case that the restrictions imposed upon the applicants as asylum seekers in the Röszke transit zone did not qualify as a deprivation of liberty that would deserve the protection of Article 5 of the ECHR, with the consequence that this provision was declared inapplicable. Applying a 'practical and realistic' interpretative approach, the ECtHR reasoned that in this particular case, despite the same living conditions experienced by the applicants in the same transit zone as in *FMS and Others*, there was not a *de facto* deprivation of liberty because the applicants could have easily and realistically returned to Serbia from the transit zone.[67]

Although the CJEU legally qualified the situation of the applicants in the transit zones at the Hungarian–Serbian border as *de facto* detention within the meaning

63 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367.
64 | *Ilias and Ahmed v. Hungary*, Application No. 47287/15, European Court of Human Rights (Grand Chamber), Judgment, 21 November 2019.
65 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:294, para. 186.
66 | *Ilias and Ahmed v. Hungary*, 2019.
67 | The ECtHR Grand Chamber stated that 'its approach should be practical and realistic, having regard to the present-day conditions and challenges', implying that States were entitled not only to control their borders but also 'to take measures against foreigners circumventing restrictions on immigration'. *Ilias and Ahmed v. Hungary*, 2019, para. 213. These findings and reasoning of the ECtHR received harsh criticism for narrowing and weakening the protection of Article 5 of the ECHR to the point that restrictions imposed upon asylum seekers might not even be qualified as deprivation of liberty worthy of the protection of this provision. See Stoyanova, 2019.

of the EU directives concerned, this does not necessarily mean that EU law offers asylum seekers better protection from detention in transit zones compared with the ECHR. The qualification as detention of the accommodation in a transit zone is a pre-condition for the start of the four-week deadline set by Article 43(2) of the Procedures Directive as the maximum length of detention of asylum seekers in such a zone. This implies that a detention of up to four weeks from the beginning of the stay concerned is in principle acceptable under EU law, irrespective of individual circumstances.[68] Article 5 of the ECHR allows for a case-based assessment of the living conditions in transit zones; the ban on arbitrary detention is activated as soon as those conditions exceed what is strictly necessary for the processing of asylum applications in the individual circumstances.[69] These methodological differences between the two European legal systems have practical implications for domestic courts of EU Member States—they should always examine such situations under both systems since, depending on the particular circumstances, either of them can provide the higher protection against arbitrary detention of asylum seekers.[70] In such cases pursuant to Article 52(3) of the EU Charter of Fundamental Rights, domestic courts of EU Member States are thus required to apply the higher protection afforded by whichever of the two systems.

4. Detention of asylum seekers at the border in the event of a mass arrival of migrants: *M.A. v. Valstybės sienos apsaugos tarnyba*

4.1. Facts of the case and Court's ruling

The third case regarding detention of asylum seekers that was also recently decided by the CJEU is *M.A. v. Valstybės sienos apsaugos tarnyba*.[71] The Court ruled that a domestic regulation which, by reason of the state of emergency created by a mass influx of migrants, precludes a foreigner who unlawfully entered a Member State from lodging an application for international protection, is incompatible with the Procedures Directive. More relevant for our analysis is the Court's declaration that the domestic regulation allowing in the same circumstances asylum seekers to be placed in detention for the sole reason that they are staying illegally on the territory of that Member State is incompatible with provisions of the Reception Directive.

The case concerns a third-country national, M. A., who was arrested in Poland on 17 November 2021, together with a group of persons from Lithuania, for having neither the travel documents nor the necessary visa to stay in Lithuania and in

68 | Callewaert, 2020.
69 | Ibid.
70 | Ibid.
71 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 30 June 2022, ECLI:EU:C:2022:505.

the EU. He was found to be irregularly residing in Lithuania. The incident occurred after the Republic of Lithuania declared an emergency throughout its territory on 2 July 2021 in response to a sudden mass influx of migrants at the Lithuanian–Belarusian border. This declaration was followed, on 10 November 2021, by a declaration of a state of emergency in parts of the territory owing to a mass influx of migrants from, *inter alia*, Belarus. After the 2021 amendment of Lithuania's Aliens Act, a non-EU national who entered the territory irregularly during declared situations of emergency because of a mass influx of migrants might be placed in detention solely on the grounds of their unlawful entry. M. A. entered Lithuania illegally from Belarus and was handed over to the Lithuanian authorities, which detained him on the grounds of irregular entry and stay, justified by the risk of absconding, pending the adoption of a decision on his legal status. In the days following that handover, he immediately made an application for international protection, which he made again in writing in January 2022. This written application was rejected as inadmissible on the ground that it had not been submitted in accordance with the requirements of the Lithuanian legislation on the submission of applications for international protection in an emergency caused by the mass influx of foreigners. Pursuant to that legislation, a foreigner who has entered Lithuania unlawfully is unable to make an application for international protection in that Member State. The same legislation also provides that, in such an emergency, a foreigner may be detained solely on account of having entered Lithuanian territory unlawfully.

The Lithuanian Supreme Administrative Court heard an appeal brought by M. A. against the decision ordering his detention and was thus called upon to determine the legality and validity of such a detention measure. It sought to ascertain whether the Procedures and Reception Directives preclude such national legislation. The CJEU, under the urgent preliminary ruling procedure, held that the Procedures Directive precludes legislation of a Member State under which, in the event of a declaration of a state of war or of emergency or in the event of a declaration of an emergency owing to a mass influx of foreigners, illegally staying third-country nationals are, *de facto*, denied access to the procedure for examining an application for international protection in the territory of that Member State. Moreover, the Court held that the Reception Directive precludes legislation of a Member State under which, in the event of such a declaration, an applicant for asylum may be detained on the sole ground that they are illegally staying in the territory of that Member State.

As regards the issue of detaining a third-country national for the sole reason that they entered the territory of a Member State unlawfully, the CJEU pointed out that, under the Reception Directive, an applicant for international protection may be detained only when, after an individual assessment of the case, this proves necessary and other less coercive alternative measures cannot be applied effectively. Moreover, the Reception Directive sets out an exhaustive list of the various grounds justifying detention. The fact that an applicant for international protection is illegally staying in the territory of a Member State is not one of those grounds. Accordingly, a non-EU national cannot be detained on that basis alone. As to whether such a circumstance may justify the detention of an applicant for asylum on the grounds of protecting national security or public order, in the exceptional

context represented by the mass influx of foreigners in question, the Court stated that the threat to national security or public order can justify the detention of an applicant for international protection only if the applicant's individual conduct represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned. An example is when the person concerned is a dangerous criminal and their detention will protect the public from the threat that their conduct represents.[72] In this regard, the fact that an applicant for international protection is staying illegally cannot in itself be regarded as demonstrating the existence of such a threat. In principle, such an asylum seeker cannot constitute a threat to the national security or public order of that Member State on the sole ground that they are illegally staying in the territory of a Member State. In the present case, the CJEU found that such a threat did not arise from the circumstance that the asylum seeker entered and resided in Lithuania unlawfully. The Court's finding is without prejudice to the possibility that an illegally staying applicant for international protection may be regarded as such a threat because of specific circumstances that demonstrate the applicant's dangerousness, in addition to the fact that the applicant's stay is illegal.

4.2. On the Court's judgment

As far as the right of asylum seekers to their liberty is concerned, the CJEU has ruled that provisions on detention in the new Lithuanian Aliens Act are not compatible with EU law. The referring court asked this preliminary question solely for the purpose of assessing the legality and merits of the detention measure imposed on M. A. by the court of first instance. As in the case of *I. L. v. Politsei- ja Piirivalveamet*, the CJEU again emphasized that, in principle, even in a state of emergency, the national authorities cannot impose detention measures on foreign nationals on the grounds other than those foreseen in the EU legal instruments. The possibility of such a detention would contravene the requirements of predictability and, in particular, protection against arbitrary use of detention measures. The Court's ruling also referred to the seriousness of the interference with the right of migrants to their liberty and thus limited detention within the meaning of EU law to strictly necessary situations where, after individual assessment, a serious threat posed by the asylum seeker concerned is soundly identified. According to the Court, an irregular stay of a third-country national who applied for international protection does not prove by itself such serious threat to society. In other words, an asylum applicant cannot be detained merely because they entered the territory of a Member State unlawfully. The CJEU concluded that EU law precludes Lithuanian legislation under which, in the event of a mass influx of foreigners, an applicant for asylum or any third-country national that entered and resided illegally in this Member State may be detained on the sole ground that they are staying illegally. In principle, the EU Member State to which an illegally staying applicant for asylum applies for international protection must demonstrate that,

72 | *M.A. v. Valstybės sienos apsaugos tarnyba*, 2022, ECLI:EU:C:2022:505, para. 89.

because of specific circumstances, the applicant constitutes a threat to national security or public order, to justify the applicant's detention.

The Procedures and Reception Directives regulate the possibility for the national authorities of EU Member States to detain an asylum applicant, but the grounds for and conditions of such a measure must be in accordance with Article 8 of the Reception Directive. Article 8(2) of the Reception Directive emphasises that the detention of asylum applicants should be the exception rather than the rule. Pursuant to this provision, an asylum applicant may be held in detention only where, following an assessment carried out on a case-by-case basis, detention is necessary and where other less coercive measures cannot be applied effectively. Moreover, Article 8(3) of the Reception Directive exhaustively lists the various grounds that may justify recourse to a detention measure. The CJEU rejected the Lithuanian Government's argument that the possibility of placing an applicant in detention when they have illegally crossed the national border meets the requirements of national security. The detention measure in question was one of those taken by the Republic of Lithuania to protect the border it shares with Belarus and, more specifically, to stem the illegal crossing of that border by migrants in the context of the 'mass influx' that the Republic of Lithuania was facing at the time and, accordingly, to ensure internal security in its territory and in the entire Schengen area.

According to the CJEU, the mere fact that a person is part of a flow of migrants that a Member State is seeking to stem to safeguard the internal security of its territory—understood in the broad sense of its 'migration policing'—cannot justify the detention of that person on the basis of the ground set out in Article 8(3)(e) of the Reception Directive. From the perspective of the Court's established jurisprudence, detention under this article implies an assessment of the dangerousness of the person concerned, taking into account factors other than the possible illegal crossing of the border, as such an offence does not, in itself, constitute a threat to national security or public order. In such a context, the presumption of national authorities that any person who has illegally entered the territory is dangerous is not sufficient to adopt a detention measure against an applicant for international protection. This implies that before adopting such a measure, national authorities must have consistent, objective and specific evidence establishing the dangerousness of an individual.

In addition to its noncompliance with EU Procedures and Reception Directives, such a national provision of a Member State that allows an asylum applicant to be detained on the sole ground of unlawfully crossing the national border is also incompatible with the fundamental rights enshrined in the EU Charter of Fundamental Rights and other relevant international legal instruments. For one, the ECHR establishes a minimum threshold of protection below which the EU cannot fall. Another is the 1951 Geneva Convention Relating to the Status of Refugees as supplemented by the 1967 Protocol Relating to the Status of Refugees.[73] This is

73 | Although the EU is not a contracting party to the Refugee Convention, Article 78(1) of the TFEU and Article 18 of the EU Charter of Fundamental Rights require it to observe the rules contained therein. Consequently, the CJEU must ensure that its interpretation of the relevant EU law is in line with the level of protection guaranteed by this convention itself. *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 135.

true even in the event of a mass arrival of migrants at that Member State's border. Specifically, a national law of a Member State that provides for such a detention measure gives rise to a particularly serious interference with the migrants' right to liberty guaranteed by Article 6 of the EU Charter of Fundamental Rights. In light of such a serious interference with this extremely important fundamental right, limitations on the exercise of that right are allowed solely if they are applied only inasmuch as is strictly necessary.[74]

The CJEU did not accept the argument put forward by the Lithuanian Government that the provision in question in national law was necessary for the maintenance of law and order and internal security in the territory of Lithuania and that the precise purpose of a detention measure foreseen by this provision was to prevent illegal secondary movements within the Schengen area of those migrants who have succeeded in entering national territory illegally. While the fact that an applicant has entered the territory of a Member State illegally may, in certain cases, constitute an indication of a risk of their absconding—possibly to other Member States—from the latter, this must always be supported by other evidence for such a risk to validly make it necessary to detain the person concerned, for a given period of time, as also permitted by Article 8(3)(b) of the Reception Directive. From this perspective, such a detention measure goes beyond what is necessary to protect public order and internal security. Therefore, as Advocate General Emiliou pointed out, in the absence of sufficient evidence, a detention measure based on illegal entry alone can be considered arbitrary.[75]

However, the CJEU should, in my view, also expand on, or at least mention in its judgment, another important aspect highlighted by the Advocate General—that a detention measure such as the one provided for in Lithuanian legislation is contrary to Article 31(1) of the Geneva Refugee Convention. Pursuant to that provision, States that are parties to that convention must not impose penalties on refugees, including asylum applicants, on account of their illegal entry to or presence in their territory, under certain conditions. This specific provision is intended to prevent those persons from being penalised for their illegal entry or presence in the territory of a State. In view of this purpose that the provision pursues, the concept of 'penalty' must be understood, autonomously and broadly, as covering any measure that is not only preventive but also deterrent or punitive, regardless of its classification under national law. The Lithuanian Government stated that the detention measure in question does not constitute a penalty under Lithuanian law. However, the Advocate General opined that it amounts to a 'penalty' with a deterrent effect for the purposes of Article 31(1) of the Geneva Refugee Convention, for it is also meant, to some extent, to punish applicants for international protection who have illegally crossed the national border and, at the same time, deter other migrants who might be tempted to do the same.[76]

74 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 145.
75 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 148.
76 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, paras. 149–152.

This CJEU ruling moreover demonstrated that by not allowing asylum seekers to be placed in detention for the sole purpose of the processing of their application for international protection, EU law applies a higher protection standard than the ECHR.[77] Overall, the Court's judgment is an implied rebuff to those national authorities who would like to resort to the extensive detention of asylum seekers as a means to address emergency situations such as a mass influx of migrants.

5. Conclusion

This work is not about three isolated cases without a broader significance. All the three cases discussed here have been decided by the CJEU, the supreme judicial body of the EU. They are preliminary rulings under Article 267 of the TFEU, through which the CJEU, in a manner that binds all domestic courts throughout the EU, has decided the interpretation and application of relevant parts of the EU legislation. The detention of irregularly staying third-country nationals in return procedure and asylum seekers in asylum and transfer procedures has been a subject of the preliminary rulings of the CJEU. In many of those judgments, referring to the EU Charter of Fundamental Rights, the CJEU interpreted EU law to protect migrants, underlining that detention is a serious interference with their right to freedom and should be made with exceptionally strict and precise interpretation of its provisions. The CJEU has a primary role in the interpretation of EU law to ensure that such law is interpreted and applied in the same way in all EU Member States and to settle legal disputes between national governments and EU institutions. The role of the CJEU jurisprudence on immigration detention is decisive in interpreting and applying the relevant EU law and, consequently, amending arbitrary/unlawful detention practices in EU Member States. Some of the CJEU's rulings have considerably affected the practice of EU Member States that allowed for the broad usage of detention of asylum seekers waiting to be transferred to another Member State under the Dublin III Regulation. Those rulings of the CJEU have significantly increased the level of protection against arbitrary detention of asylum seekers by making such detentions more predictable.

Is EU asylum and immigration law the remedy for a widespread problem of the deprivation of liberty of migrants, or is it itself a problem in need of a remedy? First, it is not only the law on paper not being fully realised in practice but, more fundamentally, it is also the question of understanding of the underlying rationale of the relevant EU norms and their practical implications. A closer look into the regulation of border procedures (i.e., procedures ordinarily carried out at the border or a transit zone, when applicants for international protection are not granted entry to the national territory of a Member State) in EU asylum law reveals that the purpose of the EU legislator is, *inter alia*, to accept that these procedures, in most

77 | Compare with *Z.A. and Others v. Russia*, Applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, European Court of Human Rights (Grand Chamber), Judgment, 21 November 2019, para. 162.

cases, involve a restriction or deprivation of freedom of persons concerned. This is evident from Article 43 of the Procedures Directive read in conjunction with the Reception Directive and Article 18 of the EU Charter of Fundamental Rights. In the same vein, forcibly retaining asylum seekers in a transit zone following the rejection of their applications for international protection without possibility to return or be removed in the sense of the Return Directive amounts to detention under the Return Directive. Acknowledging that these situations constitute deprivations of migrants' liberty does justice to the realities of migration control within the EU.[78] All three case studies discussed above demonstrate that the CJEU's restrictive approach to interpreting EU provisions on the detention of irregular migrants and asylum seekers (including its narrow interpretation of possible detention grounds) involves significant flashes of humane, dignified, and fair treatment of migrants when it comes to the deprivation of their liberty/freedom of movement.

Second, in the jurisprudence of the CJEU dealing with detention cases, the EU Charter of Fundamental Rights has started to play a more significant role as the EU primary law. In the vast majority of cases dealing with migration-related detention, the CJEU either directly referenced the Charter or referred to the need to observe fundamental and human rights without explicitly mentioning the Charter. The Court has shown a growing tendency to directly rely on the EU Charter of Fundamental Rights while adjudicating migration-related detention cases. This is reflected in the fact that almost all of the preliminary references concerning the detention of asylum seekers under the Dublin III Regulation and Reception Directive contain a direct reference and analysis of the Charter. In a number of its judgments, referring to the EU Charter of Fundamental Rights, the CJEU interpreted EU law to protect migrants from arbitrary deprivation of their liberty, underlining that detention is a serious interference with their right to freedom and should be made with exceptionally strict and precise interpretation of the relevant standards and provisions.

Although the CJEU frequently relies on the judgments or standards set by the ECtHR, it also proposes its own unique solutions based on the EU Charter of Fundamental Rights. Through its jurisprudence, the CJEU is seeking to find ways to reconcile the need to guarantee the fundamental rights of third-country nationals and effective deportation proceedings throughout the EU. Along with the ECtHR, the CJEU plays a major role in ensuring control of arbitrary detentions, with a view to affording a sufficient level of protection as regards asylum and immigration that, in social and human terms, are the most crucial issues facing the world in the years to come. The CJEU's strict approach to the limitation of the discretion of State authorities in imposing detention on asylum seekers and irregular migrants is understandable given the consequences the application of such an exceptional measure of last resort may have on the protection of fundamental rights, notably the right to liberty. Nevertheless, the Court's judgments regarding the validity of the grounds for immigration detention may also be seen as controversial. Specifically, the level of interference with the right to liberty, set out in the EU Charter of Fundamental Rights, in these judgments appear to be lower. This provides for the

78 | Cornelisse, 2020.

more extensive protection of migrants' rights compared with the guarantees by the ECHR, as is expressly permitted by Article 52(3) of the EU Charter. This, in turn, raises some doubts about the CJEU's correct application of Article 52(3) of the EU Charter.

A third point to be noted—and perhaps the most important one—is that there appears to be some decrease in convergence between the jurisprudence of the CJEU and the EU legislator's vision on the future of CEAS. Recently, the European Parliament and the Council of the European Union (consisting of EU Member States' ministers) reached a deal on five key pieces of a new EU asylum legislation, concerning asylum procedures, the Dublin system on responsibility for asylum applications, the Eurodac database supporting the Dublin system, screening of migrants and asylum seekers, and derogations in the event of crises. Looking at available texts, including the planned new Reception Directive (expected to be finally adopted in 2024 as part of a package of new or revised EU asylum laws), CJEU case law remains relevant to the new Reception Directive, unless the relevant text has been amended. According to this revised Reception Directive, asylum seekers cannot be detained solely for applying for asylum or based solely on their nationality, and their detention must be necessary based on an individual assessment. The new directive also introduces a provision that concerns detainees (or would-be detainees) who are special cases, who may be released from detention, or have their detention adjusted, in light of their personal circumstances. The new directive now specifies that the detention of applicants for international protection cannot be punitive.

The new Reception Directive also contains other amended provisions intended to reduce the risk of arbitrariness in applying detention measures in asylum cases (including the guarantees on detention for special cases, stronger language and new references regarding the detention of minors and those whose health would be put at serious risk, a new requirement to explain the disuse of coercive measures instead of detention, provisions on the judicial review of detention specifying a deadline with a useful remedy). However, some of its provisions seem to ignore CJEU case law. For example, there is a new possible ground for detention: it will be possible to detain an asylum seeker 'to ensure compliance with legal obligations imposed on the applicant through an individual decision requiring residence in a specific place in cases where the applicant has not complied with such obligations' and given 'a risk of absconding of the applicant'.[79] However, given that the list of grounds will remain exhaustive, it will still not be possible to detain asylum seekers purely because housing capacity has been exhausted, because of their inability to cover their needs, or because they entered a Member State illegally. Moreover, the new Reception Directive still has no time limits on the detention of asylum seekers in general, although CJEU case law on detention under the border procedure under the current asylum procedures law has set time limits. Failed applicants for international protection have time limits to their detention in the Returns Directive. The future will also show whether and to what extent revised rules on border procedure detention in the new Reception Directive might alter the

79 | Peers, 2024.

CJEU rulings against the Member State's transit zone detention under the current rules (*FMS and Others* judgment).

In the newly proposed Screening Regulation, the legal basis and modalities regarding cases in which the screening requires detention are left to EU Member States' national law. In legal doctrine, secondary EU law instruments on asylum confer too much discretionary power upon the Member States, as seen in lists of justification grounds for detention that are (too) extensive. This diminishes the protection of asylum seekers and other migrants in the EU by, *inter alia*, increasing the risk of arbitrary deprivation of liberty. Moreover, this screening will take place at the first point of entry, which means, for most asylum cases, those Member States that already have a reputation of unlawfully detaining asylum seekers by disregarding the requirements of necessity, proportionality, and maximum duration of the detention measures taken.[80] Thus, the proposed Screening Regulation will likely lead to *de facto* detention of migrants. Similarly, the revised proposal for the EU Asylum Procedures Regulation risks resulting in systematically applied (formal) migration-related detention as the European Commission failed to insert in its legislative proposal the principle of proportionality and assessment of less coercive measures. The proposed Asylum Procedures Regulation also envisages mandatory border procedure and mandatory border return procedure for non-EU nationals refused international protection in border asylum procedures, coupled with a mandatory application of the fiction of non-entry.[81] All these provisions raise legitimate concerns about the lowering level of protection of migrants against their arbitrary detention in such procedures in the EU.

Lastly, the EU is falling short of an asylum and immigration policy that is simultaneously fair, humane towards non-EU nationals, realistic, and coherent. The CJEU has, through its jurisprudential interpretations of EU law—including those contained in the three judgments examined in this research—taken some important steps aimed at improving this unsatisfactory situation. In light of further developments concerning the planned new legal framework for migration and asylum in the EU (New Pact on Migration and Asylum), it remains to be seen whether and to what extent this path paved by the CJEU will be followed by the EU's and Member States' legislative and other competent authorities, as well as by the Court itself.

80 | Bombay and Heynen, 2021, p. 255.
81 | Meikle, 2021, pp. 47–48.

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DOES THE CZECH PARLIAMENT FOLLOW TAX LAW DRAFTING PRINCIPLES?

Michal Radvan[1]

ABSTRACT

Tax law regulation must be clear and easy to understand and apply. It must consider the level of knowledge of taxpayers, and it must follow the terminology used in other branches of law. The legislator should also be receptive to the economic aspects of private and business life. The tax office should create conditions to make filing tax returns easy and not time-consuming, ideally online, with pre-filled fields and automatic calculation. Only if these requirements are fulfilled might tax administration be cheap and effective without additional compliance costs (for both taxpayers and tax administrators). To meet all of these requirements, it seems necessary for the legislator to follow tax law drafting principles. It should also be stated that these principles play an essential role not only in the process of tax law drafting but also in the interpretation and application of tax law norms. The main aim of this study was to answer the question from its title: Does the Czech Parliament follow tax law drafting principles? The hypothesis that the Czech Parliament follows tax law drafting principles when adopting tax law was confirmed. However, considering history, several exceptions and cases show that this statement does not apply in all situations. The breach of principles is not caused by a lack of the principles or unclear principles but by their application by the Parliament. To achieve a good quality tax law, it seems sufficient to follow the principles, especially for politicians. The legislator should know the tax law drafting principles described and critically analysed in this article: 1. basic principles, 2. self-application principles, 3. tax justice principles, 4. economic nature principles, and 5. professionality principles.

KEYWORDS

tax law
tax law drafting
law drafting principles
method of legal regulation

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1. Introduction

Legislative drafting is an art that is executed by specific professions, primarily lawyers; however, other professions may have the particular qualifications required to prepare the draft bill. Lawyers themselves cannot prepare draft bills because they likely do not have sufficient knowledge of the subject of regulation. Almost every act might serve as an example, with the exception of the procedural codes. For example, an act addressing nuclear energy and nuclear power plants can only be prepared with the help of experts in chemistry, physics, construction, etc. The same applies to tax law drafting: the substantive intent of the draft bill requires the input of experts in economics, the national economy, accounting, public budgets, statistics, etc. forth. Such substantive intent must then be accepted by politicians, as they almost always have their own ideas on how to design tax law according to their specific interests, the primary of which is being re-elected by voters. Only if the substantive intent is approved by experts from non-legal areas, including politicians, can lawyers start their work and prepare the sectional wording of the act, that is, the tax act itself.

As Thuronyi[2] states, 'drafting tax laws is a subspecialty of legislative drafting in general'. However, he does not explain why this is the case. In my opinion, this is hidden by the specific method of tax law regulation. This method is based on the general administrative law method of regulation, which is based on the effect of public authorities on its recipients. Public authorities enforce this effect through direct norms contained in normative administrative acts or sub-statutory regulations (bylaws and ordinances) issued by public authorities. These bylaws implement the law and can never exceed legal limits; they can only follow the limits stipulated by acts. Another way public authorities enforce the effect is through individual administrative acts. These individual administrative acts are decisions issued by public authorities authorised by law to make such decisions in specific administrative matters.[3] The administrative law regulation method is based on the public law nature of legal relationships and the protection of public interests.

The method applied in tax law is modified compared to the classical administrative law regulation method. Radvan[4] calls the former a modified version of the administrative law regulation method. The specifics are as follows:

1. Tax law has fewer sub-statutory regulations than administrative law, as tax acts give public administrative authorities very limited scope to issue bylaws. This is connected to the principle of nullum tributum sine lege: tax law regulation must primarily take the form of an act.

2. Tax law has not only fiscal functions but also regulative and stimulative functions. To affect the recipients of legal norms to behave or not to behave in the desired manner, the legislator applies economic instruments to a greater extent in the area of tax law than in other branches of law. These instruments are individual

2 | Thuronyi, 1996, p. 71.
3 | Radvan, 2020, pp. 12–13.
4 | Radvan, 2020, pp. 12–13.

taxes themselves (typically excise taxes), different tax rates for particular objects of taxation (e.g., gambling taxes), tax credits, and other corrective elements (e.g., tax relieves for students and disabled persons, tax allowances in the case of mortgage interests, etc.), or tax holidays (primarily for corporate income tax).

3. While tax law is a typical public law discipline, its regulations include several private law elements. For example, personal income taxpayers can pay a lump-sum tax instead of calculating regular personal income tax. Suppose the taxpayer does not have the current capacity to pay the tax, there exist the possibilities of postponing taxes or payment calendars, which are a kind of contract between the taxpayer and the tax office. Certain administrative activities are also delegated from the State to private law entities, typically withholding taxes: joint stock companies and limited liability companies must withhold the tax from dividends and shares on profits, and a bank withholds tax on the interest accrued. It is possible to identify typical private law relationships in tax law, such as the relationship between an employer paying wages or salaries to an employee. Such a relationship is primarily, of course, a labour law relationship; however, the employer is obliged to deduct (withhold) personal income tax advance payment as well as social security and health contributions and other levies stipulated by law from the employee's wages, and the employee is obliged to permit such conduct.[5]

4. The mandatory nature of legal norms may be moderated in specific instances by an element of choice. Several examples exist, including the aforementioned lump-sum personal income tax. Other examples include voluntary VAT payments, different methods of depreciation, and lump-sum expenditures for income taxes.

5. Besides the specifics mentioned above, there is another, the most crucial aspect from my perspective, namely the self-application principle. While in other administrative proceedings and negotiations, personal contact between the office and a (natural or legal) person is assumed, in tax proceedings, no negotiations between the administrative authority (tax administrator) and the taxpayer are expected, at least before the tax return is filed. At this stage, the knowledge and orientation of the tax entity in the tax law regulation are assumed. It is the task of the taxpayer to apply tax law norms to themself (to taxable incomes, property, or legal acts) so that the taxpayer can determine the tax base, apply relevant tax rates, and use appropriate corrective components to optimise tax duty. With this knowledge, the taxpayer is responsible for delivering the completed tax return to the relevant tax administrator on time and for tax payments. It is automatically expected that the tax return is completed correctly, and the tax code sets a fiction that the tax administrator assesses the tax tacitly (that is, implicitly) provided that it has no reservations regarding the correctness and completeness of such a return. Therefore, in most cases, there is no interaction at all between the tax administrator and the taxpayer. Only later, when the tax office controls the tax return and doubts the correctness and completeness of the tax return, can it start other proceedings (e.g., proceedings to remove doubts, tax control, local investigation, etc.).

5 | Radvan, 2020, pp. 12–13.

Considering the aforementioned specifics of the tax law regulation method and the principle of self-application, it is clear that the requests on the quality of tax law must be maximal. Tax law regulation must be clear and easy to understand. Thus, the taxpayer's level of knowledge must be considered. Tax law must follow the terminology used in other branches of law. The legislator should be receptive to the economic aspects of private and business lives. The tax office should create conditions that make filing tax returns easy and not time-consuming, ideally online, with prefilled fields and automatic calculations. Only if these requirements are fulfilled can tax administration be cheap and effective without additional compliance costs (for both taxpayers and tax administrators). Taxpayers will then be ready (if probably never happy) to pay their taxes and file their tax returns, and their rights will be protected. With regard to effectiveness, Thuronyi[6] notes that

> The effectiveness of a tax law is enhanced if its words are meaningful, intelligible, well thought out, and well organized. ... The tax laws of countries with established and sophisticated systems can be particularly impenetrable, as qualifications and exceptions have been heaped on top of existing rules. In this sense, those working in developing and transition countries have an opportunity to produce better laws than exist in developed countries. Poor drafting often leads to substantial problems in the implementation of a new tax law that could have been avoided.

To meet all of these requirements, it seems necessary for the legislator to follow tax law drafting principles. Note that these principles play an essential role not only in the process of tax law drafting but also in the interpretation and application of tax law norms. Etel[7] states that the principles consider both the public interest and tax subjects' individual interests or the interests of other tax law addressees. Although many of these principles are not of a normative nature, they allow for the formulation of the postulates of a rational tax system's functioning.

The following section addresses the principles that legislators should apply in the specific context of drafting tax laws. The main aim of the contributions is to answer the question from its title: Does the Czech Parliament follow tax law drafting principles? As the Czech Republic is a democratic state proclaiming in the Preamble of the Constitution[8] that the citizens are 'resolved to abide by all proven principles of a State governed by the rule of law', the hypothesis to be confirmed or disproved must be defined as follows: the Czech Parliament follows tax law drafting principles when adopting tax law.

6 | Thuronyi, 1996, p. 72.
7 | Etel, 2002, p. 47.
8 | CZ, Act. no. 1/1993 Sb.

2. Methodology and literature background

To achieve the aim of this research and test the hypothesis, the IMRaD (Introduction, Methodology, Research, Discussion) structure was chosen for the paper. First, it was necessary to identify the tax law drafting principles and create their systematics. To do this, it was necessary to critically analyse the results of previous research in this field and compare them to determine comprehensive and concise systematics of tax law drafting principles. In the second stage, it was necessary to identify particular tax law norms that do not meet the standards based on the tax law drafting principles. To provide adequate examples, it was necessary to analyse new tax acts and amendments to existing ones. It was also helpful to check whether there is any scientific literature or decisions of the Czech courts dealing with these cases and referring to tax law drafting principles. Because of the chosen structure of the contribution, the Research and Discussion sections of the paper are united. By summarising and synthesising the gained knowledge, it was possible to answer the main research question regarding whether the Czech Parliament follows tax law drafting principles and to test the stated hypothesis.

Concerning the scientific literature in a given area, numerous books, book chapters, and articles address general law drafting. Internationally, Thornton[9] is one of the most cited authors. In the Czech Republic, the book edited by Bohadlo, Harazímová, Mlsna, Vavera, and Váňa[10] should be mentioned. This publication focuses on the system of legal drafting in the Czech Republic and the various pitfalls of the process of forming legal regulations. Another practical publication following the methodological tools was prepared by Kněžínek, Mlsna, and Vedral.[11] From a more theoretical point of view, the book edited by Gerloch and Kysela[12] addresses law-making in the Czech Republic after it acceded to the European Union. Kysela[13] highlights the relationship between legislative drafting and legal political science. Šín[14] is the most general work. Škop, Malaník, Smejkalová, Štěpáníková, and Vacková[15] published a book based on known theory and empirical data from in-depth interviews. The individual parts of this book answer questions concerning the production of legal texts. The authors ask: What is the social practice of 'writing' a legislative text? Who and what influences the final form of law? Who is the author, and what is it like to be a legislator? Can writing a text affect its interpretation?

The specific issues connected with tax law drafting principles are often disregarded. However, there are outstanding publications, especially by Thuronyi, whose publication on tax design and drafting seems to be a bible for all tax legislators and who dedicated one chapter to tax law drafting principles.[16] Also, Morse and

9 | Thornton, 1996.
10 | Bohdalo et al., 2011.
11 | Kněžínek et al., 2010.
12 | Gerloch and Kysela, 2007.
13 | Kysela, 2007.
14 | Šín, 2009.
15 | Škop et al., 2019.
16 | Thuronyi, 1996, pp. 71–94.

Williams[17] should also be noted. Many excellent books have also been published in Poland, primarily Mastalski,[18] Etel,[19] Gomułowicz and Małecki,[20] Nykiel and Sęk,[21] and Brzeziński.[22] The most important expert in Slovakia is Babčák,[23] while in the Czech Republic, equivalent persons are Mrkývka[24] and Boháč.[25]

3. Research and discussion

3.1. Systematics of Tax Law Drafting Principles

Thuronyi[26] used the criteria for a well-drafted law to organise his chapter and create a system of tax law drafting principles. These criteria are understandability (brevity, transparency, avoiding legalistic language, the numbering of sections, section headings, and sentence structure), organisation (codification), effectiveness (relations between policy and drafting, anticipating application and interpretation, and drafting for a judicial audience), and integration (local drafting style, gender-neutral language, relations between tax law and other legislation, and terminology).

> Understandability refers to making the law easier to read and follow. Organization refers to both the internal organization of the law and its coordination with other tax laws. Effectiveness relates to the law's ability to enable the desired policy to be implemented. Finally, integration refers to the consistency of the law with the legal system and drafting style of the country." Thuronyi[27] is aware that these criteria are interrelated and somewhat overlapping. He demonstrates that on examples: "organization is important for understandability, and all the criteria contribute to the effectiveness of the law.[28]

Many principles defined by Thuronyi are rather technical. Moreover, Thuronyi gained experience in developed countries, whereas, in the Czech Republic, there is still no fully developed (tax) law drafting culture. For this reason, I cannot simply copy the systematics created by Thuronyi; I have to introduce such systemics myself.

17 | Morse and Williams, 2008.
18 | Mastalski, 1995; Mastalski, 2016.
19 | Etel, 2010.
20 | Gomułowicz and Małecki, 2010.
21 | Nykiel and Sęk, 2015.
22 | Brzeziński, 1986; Brzeziński, 2008.
23 | Babčák, 2008.
24 | Mrkývka, 2012.
25 | Boháč, 2023.
26 | Thuronyi, 1996, p. 72.
27 | Thuronyi, 1996, p. 72.
28 | Thuronyi, 1996, p. 72.

When drafting tax law, the legislator is limited by the boundaries of the catalogue of basic legal principles given by the country's constitution as well as by the principles generally valid for continental legal culture and the democratic rule of law. These basic principles form the first group of tax law drafting principles. The second group of principles is specific to tax law and is closely connected to the specifics of the legal method of tax law regulation. These are the self-application principles. The third group comprises tax justice principles, as there are specific conditions and rules for measuring justice in taxation. The tax law is closely related to national economics. Therefore, the fourth group of principles must cover the economic nature principles. Finally, the fifth group is connected to the quality of legislation and includes professionality principles. Similar to Thuronyi, I am aware that these criteria are interrelated and somewhat overlapping.

3.2. Basic principles

The basic principles of tax law drafting are, to a certain extent, connected to general legal drafting principles; they also include the principle of non-retroactivity and the priority of international and EU law. However, in the area of taxation, these principles play a specific and crucial role.

The most important basic principle for tax law drafting is the *nullum tributum sine lege* principle. It is a part of almost all constitutions worldwide: in Croatia,[29] Poland,[30] Romania,[31] Serbia,[32] and Slovakia.[33]

In the Czech Republic, the principle of no taxation without representation is contained in the Charter of Fundamental Rights and Basic Freedoms[34], which forms part of the constitutional system along with the Constitution. Article 11(5) of the Charter states that taxes and fees can only be imposed through acts. Interestingly, this principle is delineated in an article addressing the protection of ownership rights, and taxes then limit ownership rights. To impose any sub-statutory regulation on taxation, there must be specific authorisation in the Act. In this regard, the most significant in the Czech Republic are the generally binding ordinances issued by municipalities in the area of local taxes (i.e., recurrent property tax and local charges). Local self-governmental units have only the right to 'complete' the legal regulation following the regulation in the acts and setting the sub-structural components (additional exemptions, multiplying coefficients, specific tax rates up to the limit set in the act) according to the empowerment in the acts.

The nullum tributum sine lege principle is generally followed, and there are few cases in the history of the Czech Republic suggesting otherwise. The most common example, although rare, is the area of local charges; several municipalities have adopted local bylaws introducing charges other than those stipulated in the Local Charges Act. A very interesting decision concerning the principle of no taxation

29 | Rogić Lugarić and Klemenčić, 2022, pp. 42–43.
30 | Charkiewicz and Popławski, 2002, p. 115.
31 | Brad, 2002, p. 135.
32 | Milošević, 2022, p. 156.
33 | Štrkolec, 2022, p. 190.
34 | CZ, Act. no. 2/1993 Sb.

without representation was issued by the Constitutional Court when addressing the proposal of the Supreme Administrative Court to abolish the property transfer tax because of its alleged unconstitutionality. The Constitutional Court, i.a., summarised that it is in the public interest to collect taxes to secure public goods and services. The Court used a modified version of the principle of proportionality and examined whether there had been a violation of the prohibition of extreme disproportionality in conjunction with the criteria arising from the constitutional principle of equality. It held that the imposition of taxes was a matter for the Government and Parliament; the Court could intervene only if there was a restriction in the right to property of a choking effect or if there was a breach of the principle of equality. In this case, the court did not find grounds for cancellation of the tax.[35]

The *lex retro non agit* principle (principle of non-retroactivity) is usually defined in constitutions. In the Czech Republic, it is included in the Charter of Fundamental Rights and Basic Freedoms. Although the prohibition of retroactivity of legal norms is expressly provided for in Article 40(6) of the Charter only in the area of criminal law, it is necessary to infer from Article 1 of the Constitution that this prohibition also applies to other branches of law.[36] The prohibition of retroactivity is based on the principle that everyone must know what conduct is prohibited to be held liable for a breach of prohibition. This prohibition is also related to the function of legal norms, which impose on addressees how they should behave after their entry into force and, therefore, in principle, apply only in the future.[37]

In the area of taxation, the principle of non-retroactivity refers to the prohibition of taxation of facts that occurred in the past; that is, the obligation arising during the effectiveness of a particular regulation is governed by this regulation until its fulfilment. However, this principle may be broken if new regulations are advantageous for obligated tax subjects. A good example is the abolishment of taxes on personal motor vehicles adopted by the Czech Parliament in June 2022 with retroactive effects for the entire taxable period of 2022. Another example is the abolition of the tax on the acquisition of immovable property. The Czech Government announced its intent in the spring of 2020, and the law was approved later with effect on 26 September 2020. However, the act provided for retroactive effects of the abolition of the tax by fixing the decisive date at 31 March 2020: if the deadline for filing the tax return expires from 31 March 2020, the tax liability arising before the date of entry into force of the abolition law will cease on the date of entry into force of this law. In view of the rule that tax returns should be filed by the end of the third month following the month in which the entry was made in the cadastre, all tax obligations for which the entry was made in December 2019 or later will thus be extinguished. This procedure is referred to as super-retroactivity.[38]

Among the basic criteria, it is also necessary to include the principles of priority of international and EU law. The tax legislature must respond to developments

35 | CZ, Constitutional Court, Pl. ÚS 29/08, 21.04.2009.
36 | CZ, Constitutional Court, Pl. ÚS 21/96, 04.02.1997.
37 | CZ, Constitutional Court, III. ÚS 611/01, 13.06.2002.
38 | Radvan, 2022, pp. 46–47; Radvan and Svobodová, 2021, p. 73.

in international and European law.[39] In particular, indirect taxes (excise taxes and VAT) have been widely harmonised. In addition, double tax treaties and agreements in the area of international cooperation among tax administrations are prioritised.

3.3. Self-Application principles

The self-application principles are connected to the aforementioned specifics of the method of tax law regulation. Applying these principles should ensure that the calculation of the tax by the taxpayers and corresponding duties are easy, and not costly and time-consuming. This approach also incurs low costs for tax administrators.

Self-application principles should help taxpayers find adequate legislation for tax duties. Therefore, tax provisions should be included in separate legal acts, not hidden in one act or code consisting of several specific taxes, and without naming these taxes in the title of the act. There are several examples of bad practices in the Czech Republic. The most serious are excise taxes: while the 'traditional' Act on Excise Taxes contains five 'traditional' excise taxes (on mineral oils, spirits, wine, beer, and tobacco products) and two non-harmonised taxes (on rough tobacco and heated tobacco products), the other three new harmonised energy taxes (on gas, electricity, and solid fuels) are hidden as parts 45, 46 and 47 in the Public Budgets Stabilisation Act of 2007. It is necessary to state that initially, the Ministry of Finance contemplated that these taxes would be regulated by three separate acts, particularly given the specificity of taxation on individual commodities and the simplicity and transparency of legal regulation in general. The Financial Law Commission of the Legislative Council of the Government proposed the inclusion of energy taxes as excise duties in the existing Act on Excise Taxes. The most surprising was the government's decision, which included all three energy taxes and dozens of other laws and amendments to the Public Budgets Stabilisation Act.[40] At the local level, the most problematic are bylaws issued by municipalities on local charges: some municipalities prefer to adopt just one local generally binding ordinance on local charges, including several local fees. In such cases, taxpayers are unable to identify whether they are liable for the charge just from the title of the bylaw.

In summary, the title of the legislative instrument (act, ordinance) must be sufficiently clear and must unambiguously suggest what tax matters. A bad example in the history of Czech taxation is the tax on acquisition of immovable property. During the discussion of the draft bill in Parliament, the taxpayer was changed from the acquirer (buyer) to the seller. However, the title of the Act, the title of the tax, and the object of taxation remained unchanged. It is unsurprising that many sellers did not pay the tax without a notification from the tax office, arguing over the titles of the act and tax.

The other two principles are closely connected. It is necessary to follow uniform terminology in law. The law should be complex, and terms from other branches

39 | Gribnau and Dusarduijn, 2021, p. 167.
40 | Radvan, 2009, pp. 120–122.

of law (not only public but also private) should be used in taxation in the same manner. Tax law should not aim to create its own definitions if the term is already defined in law. Good examples might be legal personality (capacity for rights and obligations) and legal capacity (capacity to perform legal acts), which are defined in the Civil Code but are used in public law procedures, including tax procedures. It would also be inappropriate to impose an unorthodox tax or tax components. I will mention two such inappropriate tax components in Czech tax law regulations.

From 2008, the government aimed to implement a linear 15% personal income tax rate. To avoid a serious decrease in budget revenues, the government introduced a new tax base for income from dependent activities – the super-gross wage – as the brutto salary increased by social and health contributions paid by the employer at 34% (later 33.8%). The concept of super-gross wage was non-transparent, unique worldwide, and unfair. Assuming that social and health contributions are taxes sensu lato, it meant that a tax was paid on a tax. Moreover, this led to unequal income taxation of dependent and independent (self-employed) activities (more in Radvan, Neckář, 2016; Radvan, Svobodová, 2021, pp. 79-80).

Another unorthodox tax component is tax onus. Czech taxpayers can apply tax preferences for children in the form of tax reduction. However, if the tax preference is higher than the tax itself, the difference is called a 'tax bonus', which is paid back to the taxpayer. This has the characteristics of a negative tax.

Thuroniy[41] also mentions brevity as a principle of tax law drafting: 'The shorter the statute, the less effort will be required to understand it, and the lower compliance burdens will be. Elegance, brevity, and clarity of expression are therefore to be sought'. I suggest that tax duties should be formulated briefly but clearly. Sometimes, the legal text must be more detailed but must remain transparent, considering the legal and economic knowledge levels of taxpayers, tax officials, and judges.

Taxpayers and other users of tax law must have adequate time to familiarise themselves with the text of the law. Adequate *vacatio legis* is a condition for the proper (self-) application of acts. However, the practice in the Czech Republic is the opposite, especially regarding tax regulation that should be effective from the beginning of the following year. For example, amendments to many Czech tax acts effective from the beginning of the tax year 2021 were published only on 31 December 2020. The new Waste Act and related laws were adopted too late, by the end of 2020; therefore, municipalities did not have sufficient time to prepare the bylaw for waste charges collected in 2021. Only the transitional provisions in the Act allowed municipalities to use their legal authority in the abolished acts.

3.4. Tax Justice Principles

As stated by the Czech Constitutional Court,

> Distinctions leading to a violation of the principle of equality are inadmissible in two respects: they may operate both as an accessory principle, which prohibits discrimination against persons in the exercise of their fundamental rights, and as a

41 | Thuronyi, 1996, p. 73.

> non-accessory principle, which consists in the exclusion of the legislature's arbitrariness in distinguishing the rights of certain groups of subjects. In other words, in the second case, it is the principle of equality before the law.[42]

Equality is closely related to justice. Every constitution requires to follow the principle of justice, including tax justice. Tax justice is applied in two ways. Horizontal tax justice means that the same objects of taxation should be taxed equally; that is, income, property, or consumption of different persons should be taxed equally regardless of the nature of these persons, their legal status, and so on. Vertical tax justice states that an entity with higher incomes, higher valued assets, or higher consumption should pay more tax. However, there is a certain limitation: with an increasing tax base, the tax rate should not be increased highly progressively but should remain the same or be progressive proportionally. For example, in the Czech Republic, the personal income tax rate varied between 12 and 32% until 2007. Since 2008, the tax rate has been linear at 15%. However, since 2013, a solidarity tax increase of 7% was introduced. As it was, in fact, the second tax rate for higher incomes, the linear tax rate was replaced by a progressive one. Since 2021, this approach has been legal again; the solidarity tax increase was officially abolished, and the second tax rate became 23%.

To the concept of vertical tax justice, the principle of proportionality must, therefore, be maintained. The related principle of endurance states that taxes must not be of a liquidating nature. The fact that the tax should not have a choking effect is secured by corrective components. These components make it possible to respond to the disproportionate impact of taxes (exemptions, relieves, etc., or the deferral and waiver of taxes by administrative means).

It is desirable that there is no double taxation, particularly in an interstate tax system. That is, the principle of non-double taxation must be guaranteed. Even if all states are fighting international double taxation with (mostly) bilateral double tax treaties, interstate double taxation (moreover resulting from European law) is common, and the tax base for VAT also includes excise taxes. In the Czech Republic, with the concept of super-gross wage, interstate double taxation was also applied; if not health contributions, social security contributions might be considered a tax sensu lato, and being taxed by income tax represents a breach of the principle of non-double taxation.

In law generally and tax law specifically, it is necessary to follow the principle of majority protection. The legislator should protect the interests of the majority from intrusion by different lobbying interests. Respecting the aforementioned principle of endurance, corrective components must be sufficiently general to protect the interests of most taxpayers, not individual taxpayers. Not all corrective components fulfil this requirement. For example, the Czech Income Taxes Act includes some 400 corrective components (e.g., exemptions and tax reductions). This large number breaches the principles of brevity and clarity. The solution to avoid many corrective components, some of which only contribute to individuals, might be a Christmas tree strategy: the draft bill is sent to Parliament with only

42 | CZ, Constitutional Court, Pl. ÚS 29/08, 21.04.2009.

minimum corrective components (a tree), whereas the Members of Parliament are expected to add many additional corrective components (hang decorations on the tree).

3.5. Economic Nature principles

Tax law and tax law drafting are closely connected to national and international economies. In the Czech Republic, it is possible to demonstrate that tax reforms and significant amendments are linked to economic changes. The tax system changed significantly after the Velvet Revolution in 1989, when Czechoslovakia became a democratic country with a market economy. A completely new tax system needed to be established before the independence of the Czech Republic in 1993. Several substantial amendments had to be made before the Czech Republic became an EU Member State in 2004. Additional considerable changes were connected to economic crises related to the COVID-19 pandemic or Russian aggression in Ukraine.

Every state must be aware that the primary sense of taxation is the fiscal effect on public budgets, even if it is often broken, because taxes may also have reduction and stimulation functions. Drafters of tax law should respect the principles of the economy. They must consider the economic rules of the chosen economic model (the principle of an open market economy). They must consider the short- and long-term consequences of tax law regulation. They must follow the legal regulations of related sections of public financial activities. They must understand the impact of fluctuations in the value of money on the stability of tax law. Finally, they must be sensitive to continuous changes in the amount of taxes. The last two points explain why fixed tax rates and fixed corrective components (tax reductions) are not always the best solutions and why it is necessary to ensure regular amendments. The other possibility is to adopt a general inflation coefficient for tax law regulation so that tax revenue remains stable, and one-time irregular amendments will not indicate a lack of political courage to take such steps, suddenly increasing tax liability.

3.6. Professionality principles

The quality of tax law is highly influenced by the professionalism of the tax law drafters. This is why proposals for tax acts should be consulted with stakeholders (other ministries, industry unions, trade union organisations, and so forth) and discussed by professional committees with the participation also of academics. It is unfortunate that tax law is primarily addressed by professionals: draft bills are prepared by professional officials at the Ministry of Finance, discussed by other professionals within the commenting procedures, and by the Legislative Council of the Government and its committees. Professional tax advisors and attorneys, professionals working in tax administration, and tax courts apply and interpret the law. The only legal laypersons are the Government and the Parliament members, who, unfortunately, can influence the shape of the tax law the most.

An adequate explanatory report of the Act is a condition sine qua non for a complete understanding of the new legal regulation, the proper fulfilment of tax obligations by taxpayers, and proper tax administration by tax authorities. However, explanatory reports are often somewhat misleading, especially regarding the

reasons for changes in tax regulations. For example, when increasing excise taxes, the explanatory report always states that the reason for the increase is the regulative function of the tax and that the fiscal function of the excise taxes is suppressed. The lack of information and motivation for specific regulations were often omitted when adopting new tax rules as a consequence of the SARS-CoV-2 virus and the COVID-19 pandemic.

In the case of amendments made by Members of the Parliament, many breaches of tax law drafting principles are apparent. In particular, there is no explanatory report for these amendments, and sometimes even no public discussion in Parliament clarifying the motivation for submitting the proposal. The abolishment of the super-gross wage may serve as an example. The annual act amending the tax law was prepared by the Ministry of Finance and accepted by the Government for the taxable period of 2021. However, the Prime Minister, as a Member of Parliament, prepared his own amendment to this act, cancelling the super-gross wage. There was no detailed explanatory report or regulatory impact assessment, and no discussions at the level of the Ministry of Finance, relevant expert bodies in the external comment procedure, committees of the Legislative Council of the Government, or the Legislative Council of the Government itself. As the Prime Minister´s proposal meant a lower level of taxation, it was accepted and adopted. An opposition proposal to increase basic taxpayer relief was also voted through. The Czech Fiscal Council estimated that the abolition of the super gross wage would result in a shortfall in tax revenue of up to CZK 88 billion. This did not include an increase in basic taxpayer relief. With this change, a shortfall between CZK 100 and 120 billion was assumed for the taxable period of 2021[43] and even more for the following years.[44]

The solution might be for tax bills to be voted upon under so-called close rules. That is, a 'yes' or 'no' vote without the possibility of introducing amendments could be adopted. However, this never happens in practice, as it seriously breaches many constitutional rights of the Parliament and is not consistent with the democratic legal order.

The practical solution might be the aforementioned Christmas tree legislation, assuming that the decorations to be hung by the Members of Parliament are prepared in advance by the Ministry of Finance, and the Ministry of Finance also advises where on the tree (in which section and paragraph of the act) the decoration should be placed.

4. Conclusion

Summarising the knowledge gained, it is possible to state that the Czech Parliament generally follows tax law drafting principles when adopting tax law. The hypothesis stated at the beginning of this study was confirmed. However,

43 | Hlaváček and Pavel, 2020.
44 | Žurovec, 2020.

considering history, several exceptions and cases show that this statement cannot be applied to all situations. The breach of principles is not caused by a lack of principles or their lack of clarity but by their application by Parliament.

To achieve a good-quality tax law, it seems sufficient to follow the principles, especially by politicians. The legislator should know the tax law drafting principles described and critically analysed in this article.

1. Basic principles: principles given by the country's constitution and principles generally valid for continental legal culture and the democratic rule of law.
2. Self-application principles: principles specific to tax law and closely connected to the specifics of the legal method of tax law regulation.
3. Tax justice principles: specific conditions and rules for measuring justice in taxation.
4. Economic principles, as tax law has a very close relationship to national economics.
5. Professionality principles: principles connected to the quality of the legislation.

Similar to Thuronyi, I am aware that these criteria are interrelated and somewhat overlapping.

An attentive reader might have noticed that the principle in dubio pro libertate and other similar principles (in dubio mitus, in dubio contra fiscum, in dubio pro tributario) as analysed by Morawski and Boháč[45] are missing in the list of principles. According to the Czech Constitutional Court, in dubio pro libertate (in dubio mitius) is one of the basic constitutional principles. The Court also stated that

> If several interpretations of a public law norm are available, it is necessary to choose the one that does not interfere at all, or as little as possible, with the fundamental right or freedom in question. … In a situation where the law allows for a double interpretation, it cannot be ignored that in the field of public law, the public authorities may only do what the law expressly allows them to do; it follows from this maxim that when imposing and enforcing taxes according to the law …, i.e., when de facto depriving a part of the acquired property, the public authorities are obliged … to respect the essence and meaning of fundamental rights and freedoms - i.e., in case of doubt, to proceed more leniently (in dubio mitius).[46]

It follows that the legislator should adopt tax legislation that is as uncontroversial as possible to avoid possible double interpretation. However, even if this ideal state of affairs is achieved, the principle of in dubio pro libertate leads to the principle that in interpreting legislation governing taxes, the property of the individual takes precedence over the right of the State to determine and pay taxes. That is, even in the absence of a conflict between two possible alternative interpretations,

45 | Morawski and Boháč, 2023.
46 | CZ, Constitutional Court, IV. ÚS 666/02, 15.12.2003.

the courts have held that the above principle must be considered and cannot be disregarded.[47]

However, the international literature on tax law[48] points to the inappropriateness of the in dubio pro libertate/in dubio contra fiscum principle. Although it used to be popular, many states abandoned this principle because of its inconsistency with the purposive approach to interpretation. Nevertheless, it appears here and there, and in some states (e.g., Belgium), it is still very important. However, if the principle of in dubio contra fiscum prevails in the courts' decisions, there is a danger: if a State loses a dispute with a taxpayer because of an unclear legal rule, it tends to correct its 'mistake' by clarifying the wording of the rule, but not its content. Thus, in the next tax year, there is no doubt about the rights and, in particular, the (tax) obligations of the tax subject. Although his behaviour is identical to that of the previous tax year, the taxpayer's taxation will be different. Therefore, it is pertinent to ask whether it is possible to speak of equality among taxable persons, both within themselves and between tax periods.

47 | Boháč and Radvan, 2015, p. 37.
48 | Thuronyi, 2003, p. 136.

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CONSTITUTIONAL COURTS AND THE COURT OF JUSTICE, CONSTITUTIONAL LAW AND EU LAW – TWO ARRANGED MARRIAGES AND THE LEGAL PROBLEMS ARISING FROM THEM

David Sehnálek[1]

ABSTRACT

This article addresses the question of relationship of constitutional courts to the Court of Justice in national case law; the hierarchy of these national courts to the Court of Justice of the European Union (EU); the hierarchy of national law (constitution) and EU law and the constitutional identity as a limit of the principle of supremacy. The innovative contribution of the present article is that it distinguishes between the effects of the principle of supremacy of EU law on national courts and on national legislators. It thus provides clear and precise guidance to national judges on how to proceed in contentious cases of conflict between national and EU law. This question is not satisfactorily answered in the case law of the Court of Justice. It is also avoided in articles and most textbooks dealing with the supremacy principle. This article also addresses the possibility of a comprehensive solution to the conflict between EU and national law in extreme, but politically extremely important and sensitive, divergences between the decisions of national constitutional courts and the Court of Justice. Contrary to conventional notions, which cognise such a divergence as a serious problem and tend to deny constitutional courts the possibility of making their own independent conclusions, the author of the present article sees this as a natural consequence of the position that these courts occupy in the legal systems of the Member States. In the last part of the article, the author presents several options that constitutional courts have and can use to deal with decisions based on EU law, ranging from full acceptance of this law to its complete rejection on the grounds that EU law does not fall within the frame of reference protected by constitutional law.

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1. Introduction

The primacy of European law is a principle that has been present thereof for 60 years. It has been formulated in the case law of the Court of Justice in a way that still raises questions today. In fact, the Court's decisions on the primacy of the European Union (EU) law always respond to a particular sub-issue. They therefore do not deal with all aspects of this principle of application in a comprehensive manner. They also often contain conclusions that the Court of Justice has not thought through and which it has modified or ignored in subsequent decisions. Meanwhile, these judgments do not deal with the national perspective and the position of the national constitutional courts. Nevertheless, inconsistent and fragmented case law is not the only issue. It is also a problem that this case law is generally treated academically in the literature, that is, without proposing specific solutions of application nor drawing implications for national authorities of various kinds.

We can use two different terms to describe the relationship between national and EU law—it is either the primacy or supremacy of EU law. Sometimes they are used interchangeably, while at other times, a distinction is made between them. In this view, primacy is a manifestation and consequence of the supremacy of EU law[2] and is understood purely as a procedural institute relating to the work of the courts. In this article, I will work with the broader concept of supremacy which refers to the structural relation between the EU's and its Member States' legal orders.[3]

This article aims to identify the implications of the supremacy principle for Member States. Not in a purely academic way, however; there have already been many such treatises. It will be important to elaborate on the implications for the legislature, authorities, and courts. The reason for this approach is that the competences of these authorities differ. However, the supremacy principle is usually described in a uniform and universal way, without the authors concerned distinguishing between the implications for national authorities.

The second aim of the article will be to answer the question of the impact of the principle of supremacy on national courts, especially constitutional courts. Can these courts rule differently from the Court of Justice and from EU law? The

2 | Avbelj, 2011, pp. 744–763.
3 | Tuominen, 2020, pp. 245–266.

starting premise is that these courts may have this possibility. I will try to prove or disprove this premise in this article.

The third objective of the present article will be to determine the hierarchy of courts in the EU vis-à-vis not only the interpretation of EU law but also the application of EU and national law. The result should be the establishment of clear procedures for resolving conflicts in the application of the law. Empirical data suggest that national (Czech) courts make mistakes in practice, as they often do not distinguish between the principle of supremacy and that of direct effect, especially in the case of directives. The result is a paradoxical situation whereby constitutional courts tend to restrict the principle of supremacy of EU law and thus apply it to a lesser extent than the case law of the Court of Justice would suggest, while the general courts, on the contrary, overuse this principle even where the case law of the Court of Justice does not require or presuppose it.

The fourth objective of this article is to propose possible systemic and legislative solutions to the problems associated with the principle of supremacy.

2. Reminder of the principle of supremacy in the case law of the Court of Justice of the EU

A member state of the EU is in a similar position in law as a sub-state of a federal state (federation). According to the Court of Justice of the EU, the law of the EU takes precedence over national law, a solution typical of federal states. A certain peculiarity of the EU is that this principle has been formulated only in the case law of the Court of Justice and therefore has no support in the 'constitution', that is, in the founding treaties of the EU. In federations, on the contrary, the constitutional enshrinement of the principle of the supremacy of federal law is customary.

The case law of the Court of Justice on the supremacy of EU law is well known and will therefore not be discussed in detail herein, but only as a starting point. I will therefore summarise the basic rules that emerge from this case law, as they are important for further analysis.

First, the principle of supremacy is enshrined directly (and tacitly) in EU law and autonomously on national law (Costa vs. E.N.E.L.).[4] Second, it is only about a priority of the application of EU law, that is, it does not imply a higher legal force of the EU over national law and is therefore not a ground for the annulment of national legislation by the national court which applies the EU regulation. Third, although it is only a priority of application, the respective state is not entitled to maintain legislation that is contrary to EU law in force, and the principle of supremacy results in absolute priority in the sense that EU law also prevails over national constitutions

4 | Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Case 6/64.

(Internationale Handelsgesselschaft)[5] and national standards of human rights protection, even if they grant a higher level of protection than EU law (Melloni).[6]

In traditional federations, the relationship between state and federal law is defined similarly to the case law of the Court of Justice for EU and national law. In the US, it is the federal constitution, which enshrines in the 'supremacy clause' a supremacy over the law of the sub-states, including their constitutions. Similarly, the German Constitution defines the relationship between federal law and the law of the land in Article 31 of the Grundgesetz. In the UK, the member nations such as Scotland are only granted the ability to regulate selected issues by their own legislation, but the UK Parliament retains the power to regulate anything, even a matter that was previously devolved.

Despite these similarities, the system created in the EU shows quite fundamental differences. First, the EU has no state power of its own, independent of its Member States. It only exercises certain powers: those conferred on it by the Member States. The extent of the conferral has been greatest in the area of the adoption of legislation. However, law enforcement and dispute resolution are mostly the task of national authorities and courts. Unlike the federations, these national courts in the EU do not face the risk of judicial review of their judgments, even when they apply EU law. Indeed, the judicial systems of the EU and its Member States are separate. Federal courts, however, typically have the power to review the judgments of state courts if such judgments have a federal dimension. This solution reinforces the power status of the federation and its supremacy. It also contributes to the internal coherence of the system and the uniform application of the law throughout the federation.

Another difference is that in the EU, Member States are the 'Masters of the Treaties'. The EU came into being by their will and by their will it endures. It was the Member States who defined the scope of the EU. In federations, these issues are dealt with in the federal constitution, whether it is written (US or Germany) or unwritten (UK). This difference is more significant than it may appear at first. Even in traditional federations, conflicts can arise, but these conflicts are essentially exclusively about the division of powers between the federation and the state. In other words, it is a matter of determining what is still in the common interest of the whole federation, and which issues already fall, in whole or in part, within the competence of a sub-state. The concept of the scope of federal and state competences can evolve in both directions over time, both in favour of the expansion of federal competence and in favour of the sub-states, as evidenced, for example, by the Roe v. Wade decision and the change of approach in the US decision regarding Dobbs v. Jackson Women's Health Organization. The question that does not arise, because it is clear, is whether federal law takes precedence over the law of the sub-states at all. Neither does the question arise as to the relationship between state and federal courts, with the latter being higher in the hierarchy.

5 | Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11–70.
6 | Judgment of the Court (Grand Chamber) of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C399/11, Paragraph 56.

I have stated that Member States are the 'Masters of the Treaties'. In this respect, they differ from traditional sub-states of federations in that they have more power to amend the 'common constitution', as it is the product of their common will. But that is where the difference ends. The interpretation of this 'common constitution' is in both cases delegated to the 'federal level'. In the EU, it is the Union itself, through the Court of Justice, which provides the binding interpretation. This is common with the federations. But the consequence is that the Member States are in the unenviable position of having to deal with the most sensitive area for them—the definition of the scope of the powers they have conferred on the EU. These powers are conferred by means of the founding treaties, which are either general or completely silent on some important issues. This gives the Court of Justice a lot of room to interpret these treaties in favour of the EU.[7] The Member States are thus in the position of a donor who has concluded a gift contract with the donee, which only defines in very general terms what is to be the subject of the gift. The specifics are then, according to that contract, not to be made by the donor, or at least by the donor together with the donee, as it is the donee himself who has the power to specify what the gift is. Accordingly, the EU does so through the Court of Justice, often to its own advantage.[8]

A brief survey of the case law of the Court of Justice shows that this court's approach to the principle of supremacy is straightforward, settled, and has been clearly established for many years. Nevertheless, it should be pointed out that this Court has in the past also given judgments which it has not followed, or which have subsequently proven to be legally unsustainable and untenable.

For example, in the Costa decision, the Court of Justice stated that 'Unlike ordinary international treaties, the European Economic Community (EEC) Treaty established its own legal order which became part of the legal systems of the Member States from the entry into force of the Treaty and which is binding on their courts'. It goes on to state, in the same vein, that

> The consequence of the incorporation into the law of each Member State of provisions derived from a Community source, and more generally of the incorporation of the text and spirit of the Treaty, is that the Member States cannot successfully invoke a later unilateral measure against a rule of law adopted by them on the basis of reciprocity, which cannot therefore be invoked against it.

However, that statement contradicts its own thesis on the autonomy of EU law expressed in the same decision. If EU law is to be genuinely autonomous, it cannot be part of the legal systems of the Member States; it is only applicable in the Member States.

7 | In the case law of the Court of Justice of the EU, this is manifested in the form of the argument 'ever closer union between the peoples of Europe', which can be seen either as an expression of the intention of the legislator, which could also be conceived more abstractly as one of the arguments within the framework of teleological interpretation (argumentum ad Unionis Europaeae). Sehnálek, 2019, p. 10.
8 | Sehnálek, 2020, pp. 125–153.

The judgment goes on to talk about the actual powers of the EEC, but the EEC, or the current EU, as an international organisation, does not have any powers on its own, but only exercises selected conferred powers (there is a difference), which belong to the Member States.

Finally, the judgment states that 'the transfer of rights and obligations corresponding to the provisions of the Treaty by the States from their national legal order to the Community legal order constitutes a definitive limitation of their sovereign rights'. In the light of Article 50 of TEU and Britain's withdrawal from the EU, we now know for certain that the limitation of Member States' rights is not definitive and final, but only voluntary and temporary.

Similarly, in another well-known decision, Simmenthal,[9] the Court of Justice states that

> Moreover, by virtue of the principle of the primacy of Community law, the provisions of the Treaty and directly applicable acts of the institutions have the effect, in their relations with the national law of the Member States, not only of rendering any provision of national law inapplicable by their mere entry into force, but, moreover, since those provisions and acts are an integral part, albeit with a higher legal force, of the legal order in force in the territory of each Member State, they prevent the valid creation of new national laws to the extent that they are incompatible with Community rules.

The Court thus contradicts the thesis of the autonomy of EU law as a system separate from national law. Notably, EU law does not have a higher legal force than national law, a matter distinct from federations, because it is not part of a single legal system within which legal force can be determined and measured against each other.

However, it is not the purpose of this article to analyse these relatively old decisions, even though they may still be considered 'law'. The purpose is to point out that, first, the concept of the principle of supremacy in case law has evolved over time. Second, this article aims to submit that it is impossible to dogmatically insist on every word or sentence that appears in the Court's judgments. Conversely, the text of those judgments must be taken with a grain of salt and with an open mind, as the result of a certain compromise reached in a private debate between the judges. The judgments are a partial and often imperfect representation of the state of play in one particular case, not a generally applicable general guide.

Finally, there is no point in criticising the Court of Justice for the way it has conceived the principle of supremacy. That principle is simply the product of recognised necessity. EU law, as supranational law, cannot function effectively without having unconditional supremacy over national law. However, there must be limits, both legal and political.

9 | Judgment of the Court of 9 March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA. Case 106/77.

3. Consequences of the supremacy of EU law for national authorities—the EU law perspective

What does the principle of supremacy mean in particular? The answer is, at first glance, uncomplicated: national authorities may not apply national law that conflicts with EU law. However, the reality is more complex and requires more careful analysis. The positions of the national bodies that make the law (the standard-setting bodies) and the bodies that merely apply the law (the courts and authorities) differ. It is precisely in this difference that one can see some sense in the distinction between the meaning of primacy and supremacy.

As far as the legislative bodies are concerned, the principle of supremacy is reflected in the fact that[10]

(a) prevents them from adopting national legislation in areas that are fully and exclusively regulated by EU law. An example is the regulation of customs duties applicable to imports of goods into the EU from a third country. The regulation of this area is complete in EU law and is contained in directly applicable legislation. Member States therefore have no scope for self-regulation.

(b) while this does not prevent these authorities from adopting their own legislation in the area regulated by EU law, it must meet the minimum standards contained in EU law. Typically, this is the case when a certain issue is regulated by a directive which contains a minimum standard for regulating a certain issue. A state may adopt its own regulation or even its own derogating solution, but it must comply with the minimum standard.

(c) does not prevent these authorities from adopting their own legislation, as EU regulation of the issue in a positive sense (this is the difference with the previous situation) is completely absent. However, EU legislation represents a limit beyond which national legislation must not go. More specifically, the EU regulation does not set the standard for the operation of the regulation in question but determines what is functionally impermissible from the viewpoint of EU law. A typical example of this situation is national levies on goods. These charges are set by Member States in national law and are not regulated by EU law. However, under EU law (see Article 30 of TFEU), such charges must not constitute a levy applied solely in connection with the passage of goods across borders (Diamantarbeiders).[11]

This was the passive side of the effect of the principle of supremacy on national legislatures. From a different, active perspective, the principle of supremacy, according to the case law of the Court of Justice (Commission of the European

10 | This part was inspired by and is based on a typology by Schutze, who analyses the problem from the US perspective and distinguishes between field, obstacle, and rule pre-emption. See Schutze, 2015, pp. 134 et seq.

11 | Judgment of the Court of 13 December 1973. Sociaal Fonds voor de Diamantarbeiders v NV Indiamex and Feitelijke Vereniging De Belder. Joined cases 37 and 38–73.

Communities v French Republic)[12] is reflected in the obligation on the legislative authorities to remove incompatibilities between national legislation and EU law. It follows for those authorities that

(a) the legislature has a duty to repeal national legislation that conflicts with EU law. This obligation arises in the case of the situation described in point (a) of the overview above. This means that the national standard is repealed in its entirety.

(b) the legislative authority has a duty to repeal or bring into line national legislation that conflicts with EU law. This obligation arises in the case of the situation described in points (b) or (c) of the summary above. This means that a national standard is repealed only to the extent that it is incompatible with an EU standard.

(c) the legislative authority has a duty to amend the scope of national legislation to remove incompatibilities with EU law. Thus, the national standard is not abolished, it is preserved, but its substantive scope is limited, for example, exclusively to national matters without an EU element.

In all of the aforementioned cases, it is irrelevant whether the EU legislation meets the Court's requirements for direct effect. In other words, the mere existence of EU legislation is sufficient in itself to affect the content of national law and the action of the national legislature by means of the principle of supremacy.

The effects of the principle of the supremacy of EU law on the institutions that do not make law but solely apply it, that is, on courts and administrative authorities, may be as follows:

(a) National courts and administrative authorities are under an obligation not to apply national legislation that conflicts with EU law without any further examination of its conflict with EU law. This obligation arises in the situation described in paragraph I(a) of the summary above.

(b) National courts and administrative authorities are obliged not to apply national rules, but only to the extent that they conflict with EU law. The prerequisite is a comparison between the standard of EU law and the standard contained in national law. If a compatible (Euro-conforming) interpretation of this national regulation with EU law is possible, they are alternatively free to apply it if the interpretation removes the incompatibilities. This obligation arises in the situation described in paragraph I(b) of the summary above.

(c) National courts and administrative authorities have a duty to test in specific cases whether a national regulation conflicts with EU law. Here too, any finding of a conflict may lead to a solution in the form of non-application of the regulation or its consistent interpretation. This obligation arises in the situation described in paragraph I(c) of the overview above.

(d) Finally, there may also be situations where national regulation is completely absent. Thus, the conflict with EU law does not lie in the fact that national law regulates certain issues differently than EU law requires. The problem is that there is no national solution. The general rule in such a case will lead to the conclusion that the competent authority may be obliged to apply the solution contained in the EU

12 | Judgment of the Court of 4 April 1974. Commission of the European Communities v French Republic. Case 167–73.

regulation, subject to other conditions. This situation typically arises in the case of directives that have not been properly and timely transposed into national law. However, if the conditions are not met, the supremacy of EU law does not apply.

(e) A specific case is a situation where the national legislation is not contrary to EU law because the latter does not provide for the relevant standard but has been adopted in contravention of EU procedural rules. In such a case, the national legislation cannot be applied by the court or authority. This was the situation in the CIA Security[13] and Unilever[14] case.

At first glance, all the solutions described above look similar to those concerning the standard-setting bodies. Yet there are significant differences. Even in a situation where, in view of the principle of supremacy, the national legislative authority is obliged to amend, repeal, or adopt a new national rule, the national court or administrative authority may be obliged to apply that national rule without applying the EU rule.

This situation can be very well demonstrated by the famous Mangold[15] case. The German legislator was not entitled to adopt the relevant solution for the employment of persons of a certain age for a fixed period of time because of a conflict with EU law. Once that national legislation had been adopted, it was under an obligation to remedy that conflict as soon as possible. Nevertheless, the national courts and authorities would not have been entitled to rule in favour of the employee concerned on the basis of EU law. That was because the recognition of the supremacy of EU law by the non-application of the national legislation would ultimately have created a situation functionally corresponding to the direct effect of the directive. However, according to the case law of the Court of Justice, which is not permissible in horizontal legal relations. If it were not possible (somewhat controversially) to apply a general principle of law in the situation in question, the matter would have to be resolved on the basis of national law. The fact that that law was contrary to the standard contained in EU law would have no effect on the national court. However, the legislature would be obliged to implement the national law. It is therefore clear that the position of the courts (and similarly the authorities) is different from that of the legislature.

It follows from the aforementioned that the priority application of EU law may be conditional on its direct effect. This is an aspect which the authorities applying the law must address, whereas it is irrelevant for the legislative bodies. If EU law is incapable of having a direct effect, it shall not be applied instead of national law (substituting direct effect), nor can it lead to the exclusion of the application of national law without the simultaneous application of EU law (excluding direct effect). This situation typically arises in the case of directives. In general, however,

13 | Judgment of the Court of 30 April 1996. CIA Security International SA v Signalson SA and Securitel SPRL. Case C-194/94.
14 | Judgment of the Court of 26 September 2000. Unilever Italia SpA v Central Food SpA. Case C-443/98.
15 | Judgment of the Court (Grand Chamber) of 22 November 2005. Werner Mangold v Rüdiger Helm. Case C-144/04.

it can occur with any legal rule enshrined, for example, in a regulation or primary law, if it is not capable of having a direct effect, for example, because it is too general and not clear, unconditional, or qualified by any reservation.[16]

The recent case law of the Court of Justice in the Pfeiffer[17] and Popławski II[18] decisions concerning directives and, more recently, in the Lin[19] decision concerning any source of EU law in general, has also clearly favoured this functional approach.[20]

It would seem that this solution is not contradictory. Yet, Czech courts tend to err in it. The first consequence is intuitive and therefore clear. In the case of the second, the courts may decide incorrectly. They may be under the misleading impression that, when they do not apply EU law (i.e., do not give it effect), they merely exclude the application of national law, complying with the requirements arising from the case law of the Court of Justice. This is not the case, as is, moreover, illustrated by the very exceptional decisions in the CIA Security and Unilever cases, in which the Court of Justice accepted this solution. However, it did so only and only in view of the specific nature of the directive in question, which did not harmonise the law of the Member States but merely laid down procedural rules for the adoption of national standards.

The second case in which, in my view, the principle of the supremacy of EU law may not be applied by the courts is where that application would involve exceeding the powers conferred by national law on the competent national court. The problem will not arise in the case of the ordinary courts and authorities, which are bound in their activities by the law, and therefore by EU law (Simmenthal). However, the position of the constitutional courts will differ. If the constitutional court is limited in its activities to deciding only on matters relating to the constitution (in the Czech Republic, including the Charter of Fundamental Rights and Freedoms), it cannot be required to uphold 'simple law', which, from the perspective of domestic law, is generally EU law. This does not, of course, preclude this Court from itself interpreting national law to conclude that it is also bound by EU law in its entirety, or only in the part relating to the protection of human rights and freedoms. I will discuss this issue later in the article.

16 | See conditions for direct effect formulated for the first time in Van Gend en Loos judgment. Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Case 26–62.
17 | Judgment of the Court of 5 October, 2004, Pfeiffer and Others. Joined cases C-397/01 to C-03/01.
18 | Judgment of the Court of 24 June 2019, Popławski II. Case C- 573/17.
19 | Judgment of the Court of 24 July 2023, Lin, Case C-107/23 PPU.
20 | This decision is remarkable for several reasons. First, it clarifies the procedure of national ordinary courts and protects them when they comply with EU law at the cost of violating national law by not respecting the decision of the Constitutional Court. Second, because it breaks the principle of lex mitior in the criminal and constitutional law of a Member State if this should be an obstacle to the effective application of EU law. On this point, see Benke, 2023, pp. 37 et seq.

4. Response by national law and national courts

The absence of a provision governing the supremacy of EU law in primary law gives national law and national courts the possibility to determine their own approach and their own rules for the application of EU law within their jurisdiction. This is a consequence of the fact that, although EU law is supposed to function federally according to the Court of Justice, the judicial systems of the EU are not federal at all.[21]

The limits of the functioning of the EU in terms of national law ought to be set at the national constitutional level. An example of such a constitution which itself sets a limit to the principle of supremacy is the Slovak Constitution, which in Article 7(2) limits the supremacy of EU acts to Slovak statutes (zákony Slovenskej republiky) only.

However, I am not aware of any explicit provision in any of the Member States that introduces at the national constitutional level a mechanism for reviewing whether the EU is acting within its conferred powers. The question has therefore been left, as in the case of EU law, to the national courts.

The reserved or rather conditional attitude of the German,[22] Italian,[23] and other constitutional courts towards the principle of supremacy is well known.[24] It is therefore astonishing that the whole system, which was created solely thru the judgments of the Court of Justice, has lasted for almost 50 years without giving rise to an open judicial conflict. If these first 50 years can be described as a time of purely verbal conflict,[25] the situation has undergone a dramatic transformation in the last decade. Peaceful coexistence limited to mutual verbal demarcation has been replaced by a state of open and acknowledged judicial conflict. The first case in which the supremacy of EU law and the role of the Court of Justice in its interpretation was challenged was the Czech Constitutional Court's decision in Holubec (Czechoslovak pensions),[26] followed by the Danish Supreme Court's decision in Ajos,[27] the German Constitutional Court's decision in PSPP,[28] and the Polish Constitutional Court's decision in supremacy and the rule of law.[29]

21 | Some authors proposed a more federal-like solution with EU courts established in all Member States, but such a reform does not see very likely in a near future. See Zemánek, 2003, pp. 9 et seq.
22 | I am referring to the well known case of the German Constitutional Court *Solange I, Solange II, Maastricht-Urteil, Lissabon-Urteil and Honeywell*.
23 | See, for example, Bonelli, 2018, pp. 357–373.
24 | See, for example, Vikarská and Dřínovská, 2022, pp. 1176 et seq. For an analysis of lesser know Spanish judgments related to the supremacy see García, 2017, or Duchek, 2023, p. 199.
25 | The German Constitutional Court has long been described as 'the dog that barks but does not bite'.
26 | Judgment of the Czech Constitutional Court, of 31 January 2012. in Holubec (Slovak pensions) case. Pl. ÚS 5/12.
27 | Judgment of the Danish Supreme court of 6. 12. 2016 15/2014 6 Available at: http://www.supremecourt.dk (Accessed: 20 January 2024).
28 | Judgment of the German Federal Constitutional Court, of 5 May 2020. joined cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.
29 | For other examples of revolts see Bobek, Bříza and Hubková, 2022, pp. 110–112, or Bončková and Týč, 2022, pp. 1219–1222.

The jurisprudence of national constitutional courts from the period of calm, when the conflict was only verbal, suggested that a real conflict would arise either in the event of a constitutionally impermissible interference with the protection of human rights and freedoms by EU law or in a situation where the EU institutions acted *ultra vires*.

The judgments of the constitutional courts from the decade of turmoil and open conflict have partly confirmed these assumptions. Surprisingly, however, the source of the problems was not the protection of human rights and freedoms, but the question of the scope of the powers conferred and the different view of the facts. In addition to that, constitutional identity also became a problem.

A specific situation arose in the case of the Czech and Polish decisions. Neither of them represents a typical *ultra vires* situation. Rather, they concern different legal qualifications of the same problem. In the Czech case, the situation was one which, according to the Court of Justice, was subject to coordination within the EU social security system, whereas, according to the Czech Constitutional Court, it was a purely domestic matter relating to the break-up of the formerly common state with Slovakia.[30] In the case of Poland, there is a fundamental difference in how that state perceives the organisation of justice, which is a purely national matter, and the definition of the rule of law, where the Court indeed has jurisdiction. Just as the awarding of pensions in the Czech case may be a matter of national law and the break-up of the federation,[31] as well as EU law and coordination therewith, the independence of the judiciary may be part of an autonomous national procedural sphere or an EU concept of the rule of law.

This distinguishes the two cases from the Danish and German decisions. Those cases did not involve a different qualification of the situation. In Ajos, it was not the application or even the existence of a general principle of law that was at issue. It was only the question whether it could have direct effect in a situation where Denmark's accession treaty made no provision to that effect. Similarly, the qualification in the German PSPP case was not in dispute; the question at issue was essentially one of the degree of justification required.

I, therefore, conclude that a conflict between national and EU law can arise for the following reasons:

I. Material

1. EU law will interfere with the standard of protection of human rights and freedoms to an extent that will appear unsustainable from the perspective of a national constitutional court.

2. The EU authorities will intervene in the sphere of important national values: an intervention in constitutional identity.

30 | For details see Hamuľák, 2014, p. 128, or Křepelka, 2012, pp. 278–294, Stehlík, Sehnálek and Hamuľák, 2020, pp. 151–168.

31 | There is a third explanation that has nothing to do with EU law. The reason why the Constitutional Court ruled as it did was not because of opposition to EU law and the Court of Justice, but because of a long-standing dispute with the Supreme Administrative Court. The Court of Justice happened to be on the wrong side, but the main opponent of the Czech Constitutional Court was the Supreme Administrative Court. This conclusion is supported also by the Czech scientific literature. See for example Kosař and Vyhnánek, 2018, p. 866.

II. Formal

1. EU bodies will act ultra vires, and this category includes interference with what the Czech Constitutional Court calls the material core of the Constitution

2. The same situation will be qualified (treated) differently by national and EU courts. Thus, the dispute will not be about the existence of EU jurisdiction, as in the previous case, but about the legal qualification of the facts of the case.

The difference lies in the fact that for the first group, we do not reject the application of EU law a priori, but only ex post for insufficiency and inconsistency of its standard with the national standard. In the second case, we refuse to apply EU law without further consideration because we consider the situation in question to be a matter governed exclusively by national law.

The question entails how to resolve potential conflicts. A rational place to start would be to define the relationship between EU and national law in legal philosophical terms. The problem is that this approach will not work. In fact, legal philosophy has so far failed to provide a systemic understanding of EU law. It is the starting point for a view of how the relationship between EU law and national law should work. Why does the legal philosophy approach fail? It is because there is no one central authority that can both ask and answer this question. Thus, we get a very different answer depending on whether the supranational Court of Justice (federalist approach) or the national constitutional courts (constitutionalist approach) deal with the relationship between EU law and national law.[32]

A clear answer could have been given by the Member States in primary law (they have the power, as they are 'Masters of the Treaties'). They tried to do so in the Constitution for Europe, but this attempt failed.

The current solution in the declaration concerning primacy[33] is legally non-binding and therefore insufficient. Moreover, it refers to the opinion of an internal body of the EU (the legal service of the Council of the EU) and is only a declaration of the conference, not of the Member States. A federalist solution to the problem of supremacy directly in the 'constitution' has therefore not been adopted.

32 | However, the question of the legal-philosophical approach to law is worthy of attention, so I refer to the literature dealing with this issue. The absence of a one-size-fits-all solution follows from this literature Scheu, 2002; Brown, 2014; Pavlík, 2004; Weiler and Haltern, 1996, pp. 411–448; Schilling, 1996, pp. 389–390; Moorhead, 2012, pp. 126–143.

33 | Declaration No 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

5. Solutions from the perspective of national constitutional courts

So far, I have worked mainly with the Court of Justice's perspective. However, it is also possible to approach the problem from the other side, that is, from the perspective of national law as formulated by national constitutional courts.

They have gradually and very carefully formulated their own doctrinal approach to EU law and its relationship to national law. The 'solange' approach of the German Constitutional Court and the *'contro limiti'* doctrine of the Italian Constitutional Court are well known. As these are well described and researched issues in the literature, they will not be further discussed herein.[34]

Common to both approaches is the belief that in national law in general (constitutional law in particular) there is a set of certain rules and values that are inalienable. Accession to the EU could therefore only and exclusively take place within the limits of these values. Consequently, the supremacy of EU law and its autonomous character cannot lead to the elimination of those rules or values.

In this view, the EU was created derivatively, on the basis of national (constitutional) law and therefore within its limits. The law of the EU was thus able to emerge as an autonomous and independent law. But it did so within certain limits, in the spirit of the maxim '*Nemo plus iuris in alium transferre potest quam ipse habet*'. If certain values are inalienable, then logically there could be no transfer of the exercise of powers in these areas to the EU. National law simply cannot and does not allow this.

At this point, I would like to point out one thing that is often forgotten. When one examines the position of national constitutional courts on the supremacy of EU law, these courts are treated as one large group. However, this is not the correct approach. I believe that there is a subtle difference between the constitutional courts of the founding Member States, such as the German constitutional court or the Italian constitutional court. They were confronted with a fait accompli and could not influence the Court's decision or the conditions of membership of the EU. The situation of the new Member States and their constitutional courts is different. They were joining the European Union under conditions that had already been clarified and where the concept of the principle of supremacy was well known from the Court Justice's jurisprudence. This approach was therefore accepted by new Member States in its entirety on entry into the EU.[35]

34 | Specifically for Czech constitutional response to the supremacy principle, see, for example, Bobek, Bříza and Hubková, 2022, pp. 115–174; Malenovský, 2006, p. 774; Tichý and Dumbrovský, 2013, p. 191.

35 | Accession to the EU was by international treaty, so one could support the thesis here by estoppel, a principle of public international law.

6. Supremacy and national constitutional law: Two mutually incompatible concepts?

At first glance, it may seem that the two solutions are incompatible and therefore cannot exist side by side. Their very existence is seemingly legally wrong. Logically, therefore, one of these solutions must be rejected as incorrect. However, I do not share this distinct approach. Indeed, I believe both approaches are compatible.

First, the European Court of Justice draws on EU law in formulating and interpreting the principle of supremacy. It is therefore not concerned with national limits. It cannot even deal with them, as it is not competent to interpret and apply national law.

Second, national constitutional courts interpret their own constitutions. This is their main task, and it is up to the Member States themselves to ensure consistency within their own legal system and between the different branches of government. Indeed, the executive and legislature seem to have no problem with the supremacy of EU law within the limits formulated by the Court of Justice. If they did, this would probably be reflected in some form in the text of the founding treaties, or in the protocols or declarations annexed to them. This has not happened so far (with the exception of the somewhat problematic declaration mentioned above). Only the constitutional courts have therefore defined themselves in relation to supremacy.

From this perspective, the work of the constitutional courts must be viewed as follows: first, they do not review and reassess the case law of the Court in the area of the principle of supremacy, but second, they interpret their own constitution to ascertain the conditions and limits of a State's membership of an international organisation. This is what they can and should do under national constitutions.

One cannot argue that constitutional courts should submit to EU law and its principle of supremacy without a corresponding change in the national constitution. It would be a denial of their independent and impartial role in interpreting constitutional law. Nevertheless, they can come to that decision on their own as they have that power. Does this mean that these courts should unnecessarily emphasise differences and create unnecessary conflicts with EU law and the Court of Justice? Certainly not; they too are bound by the principle of loyalty.[36]

36 | In Czech jurisprudence such a cooperative approach can be demonstrate by a decision of the Constitutional Court in the case of the European Arrest Warrant. Despite the clear wording of the Charter of Fundamental rights and Freedoms this court came to a conclusion compatible with EU law. It did so through creative and extensive interpretation of national standard. See Judgment of the Constitutional Court of 3 May 2006 Evropský zatýkací rozkaz (eurozatykač) Pl.ÚS 66/04 and Sehnálek, 2021, p. 217.

7. How to address the supremacy of EU law from the perspective of national law and national courts

First, it is necessary to stress the difference between the ordinary and constitutional courts. According to the Simmenthal decision, the ordinary courts have the status of courts of the EU and are therefore obliged to apply EU law as their own law in preference to national law. I therefore consider that in their case, the supremacy of EU law will be fully apparent. Although these courts may also be called upon to protect rights and freedoms regulated by the Constitution (diffuse enforcement of the Constitution), in view of the supremacy of EU law, they must also give priority to EU law in these cases.

The situation is different in the case of the constitutional courts. These courts (at least the Czech Constitutional Court) do not enforce law in general, that is, simple law (and thus also the EU law). They have very narrowly defined tasks relating to constitutional justice and therefore stand outside the hierarchy of the general courts in a given country.

Their task derives from national law, and EU law interferes only to a limited extent with the procedural autonomy of Member States. From this perspective, it is therefore permissible under EU law for these courts to perform one specific function, that of exercising constitutional justice. From that viewpoint, they do not have to perform, and do not perform, the function of a general court enforcing EU law. That is the task of the ordinary courts. The consequences of the Simmenthal decision therefore concern them only to a limited extent.

This statement does not mean, of course, that the constitutional courts do not have to follow EU law at all. Such a conclusion would be incorrect. By their loyalty to the law of the EU, they are bound both by national law (respect for external obligations)[37] and EU law.[38] The analogy with public international law is obvious.

This specific position enables national constitutional courts to rule on national constitutions and national arrangements for fundamental human rights and freedoms in full compliance with EU law. The constitution is a source of national law, so it is natural that, in interpreting it, these courts may reach a solution that is contrary to what EU law envisages. If that happens, it is not a denial of the supremacy of EU law.

Moreover, rejecting the conclusions of the Court of Justice of the EU is not a denial of the supremacy of EU law, and such a conclusion would be a shortcut and an incorrect one at that. The constitutional court may fully respect the interpretation of EU law, but it may qualify the facts differently. The consequence of this

37 | It is enshrined in the Czech Constitution, for example, in Article 1(2) as follows: ‘The Czech Republic respects its obligations under international law.’ A certain shortcoming of the Czech Constitution is that, even after almost two decades of membership of the EU, it does not respond to membership of this organization. However, the obligation contained in the quoted provision is interpreted as encompassing not only international law but also EU law.

38 | Article 4(3) of the EU Treaty.

different legal qualification is that it subsequently applies national law. The general confusion that often arises here is, in my view, due to the Anglo-Saxon view of the matter, which identifies a judicial decision with the law, and in this view the Court's decision is intended to be a precedent—a source of law. That is not the case.[39] Although the constitutional court cannot interpret EU law differently from the Court of Justice in this way, nothing prevents it from classifying the facts as a problem of national constitutional law and then interpreting and applying it.[40]

The emergence of such situations is, of course, a complication. However, it can be solved in one of the following ways:

1. Legislatively so that: a) the respective state amends its constitution to comply with EU law; b) all Member States together amend primary law to reflect the limits of national law.

2. Judicially so that: a) the Court of Justice will change the interpretation of EU law to reflect the requirements of national law, particularly in situations affecting the national identity of a Member State; b) the constitutional court adapts the interpretation of constitutional law to the requirements of EU law.

3. Politically so that: a) the country leaves the EU.

4. Institutionally: a) setting up a new body to deal with conflict situations; b) by limiting the binding effect of decisions in preliminary rulings on matters relating to EU competence, national identity and the protection of human rights and freedoms, or of all decisions in these proceedings in general[41]; c) or by reallocating powers between EU institutions.

The overview above reveals that conflicts are natural and also solvable. They may even provide a useful impetus for the further development of either EU or national constitutional law. However, the difficulty of resolution varies considerably. A legislative solution under 1(a) may run up against the immutability of certain elements of the national constitution. The solution under point 1(b) presupposes a consensus of all Member States, which may be difficult to achieve.

A judicial solution is more feasible, where the institution of the preliminary question can help. Practical examples show that 'judicial dialogue' between the highest courts may (or not) work.[42]

39 | For explanation, see, for example, Sehnálek, 2020, pp. 125 et seq.
40 | See the Ajos case, in which the Danish Supreme Court concluded that Danish law did not allow the direct effect of the general principles on accession to the EU and therefore the principles could not have that effect in Denmark. Judgment of the Danish Supreme court of 6. 12. 2016 15/2014 6 Available at: http://www.supremecourt.dk (Accessed: 20 January 2024).
41 | It is noteworthy that the systematic placement of the power to rule on preliminary questions is at the very end of the list of its powers. This, according to Professor Malenovský, Judge Emeritus of the Court of Justice, may suggest that the original concept of the preliminary ruling procedure, and thus the role of the Court of Justice in interpreting EU law, appears to have been merely supplementary. As is evident and not only from this article, the preliminary ruling has on the contrary become a major instrument of integration, having led, among other things, to the formulation of the principle of supremacy. See Malenovský, 2007, p. 1068.
42 | An example of a functional dialogue is the 'Taricco saga', see Sehnálek, 2019, pp. 48 et seq.; Vikarská, 2017; Sehnálek and Stehlík, 2019, pp. 181–199.

The third solution is the ultimate one. However, if such an extreme situation arises, such as a conflict of EU law with the material core of the rule of law or with its national identity, and at the same time a change in the legal framework of the EU or national constitutional law is impossible, leaving the EU is the only possible solution to such a situation.

The fourth solution assumes that a new political (i.e., not judicial) body would be established. This body could operate with equal representation of the EU and Member States (presumably at the level of the constitutional courts), and would review contentious issues. I do not consider this solution appropriate, as it would create duplication with the Court of Justice and would not guarantee that it would fulfil its function. The functionality of such a body would depend heavily on the personalities nominated from the Member States to that body. The views of these individuals may differ from those of the top institutions, even if they are members. There is therefore no guarantee that this Court would not be a Court of Justice 2.0.[43]

Limiting the binding nature of the preliminary ruling is a functional solution, but it does not address the core of the problem. So who will decide if it is not the Court of Justice and how will the uniform application of EU law be ensured and not threatened? This solution does not answer that question.

A realignment of powers between authorities might make sense. It would mean strengthening the intergovernmental element in the institutional structure of the EU. I can imagine that key issues relating to powers and national identity would be decided definitively not by the Court of Justice but unanimously by the European Council. I can also imagine that this new EU setting will be followed by a national regulation, which, for example, will create a new procedural tool in the constitutional court, obliging the Prime Minister (or President) of a Member State to seek a binding opinion from the constitutional court on a given matter before deciding in the European Council. The downside of this solution would be a significant slowdown in the process of European integration. However, I believe that we are now at a stage where we can afford to slow down a bit.

The wrong, but often very effective, solution is to do nothing, literally. In the Czech Republic, an example of this solution is the application of the institute of state liability for damages caused by breach of EU law (Francovich liability). State liability for damages, which has been established by the case law of the Court of Justice, appears in the judgments as a sophisticated and functional institute and useful tool of the protection of one's rights. In practice, however, the applicability of this institute has long been problematic, if not outright impossible. Therefore, this institute is essentially meaningless in the Czech Republic. I consider this solution to be the worst possible, as it is not legal.

Paradoxically, this article may suggest a deficiency on the part of EU law because this law does not explicitly formulate the principle of supremacy in founding treaties. As I have noted herein in another context, several national constitutions also exhibit a similar serious deficiency. The Czech Constitution, for example, for almost two decades of EU membership, provides only for EU entry.

43 | Sehnálek, 2019, pp. 32 and 33.

It omits the conditions of not only membership but also withdrawal from the EU. However, these issues could/should be addressed at the national constitutional level (together with other issues related to EU membership, particularly in legal and institutional spheres).

I stated above that constitutional courts do not have to be bound by EU law. But the situation is more complicated. Indeed, national law (or the case law of the relevant constitutional court) may 'draw' EU law into the national legal framework. There are several ways in which this can happen. In the case of the Czech Constitutional Court, the following possibilities are offered:

1. EU law will take precedence over all national law, including the entire constitution, given the need to respect external obligations. By analogy, this solution would also have to apply to all international law. This is not how the Czech Constitution is interpreted.

2. EU law as a whole will become part of Czech constitutional law, but within the limits of the material core of the Czech Constitution. This solution was not chosen either. It would have meant that the Czech Constitutional Court became a general court within the reach of EU law.

3. Only EU standards for the protection of human rights and freedoms will become part of Czech constitutional law. This has already happened in the case of international human rights treaties.[44]

4. EU law as a whole (or in its human rights part) becomes part of the frame of reference against which the constitutional court judges cases, without being a systemic part of the Czech legal system (which is the case in the previous two options). The constitutional court has already ruled in this way, but there does not seem to be a consensus among the individual chambers that this is the correct solution.[45]

5. The constitutional court will not apply EU law at all, as it is outside the scope of its review.[46]

Of the above, I consider the last to be correct. All the other solutions are problematic because they lead to the direct subordination of the constitutional court to the Court of Justice in matters of interpretation of EU law or make the constitutional court a general court. [47] Compliance with EU law can be ensured at the level of the general courts, while the review of validity and interpretation is carried out by the EU courts. The inclusion of the constitutional court is redundant in this respect.

The argument against this approach, which I have already encountered informally on several occasions, is 'And who will help the specific parties, in a situation where they can no longer avail themselves of the ordinary remedies, if not the

44 | Judgment of the Constitutional Court of 25 June 2002 'Konkurzní nález' Pl.ÚS 36/01.
45 | This approach was applied for example in judgment of the Czech Constitutional Court of 5 November 2019 case No. II. US 2778/19.
46 | The question of the relation between the Czech Constitution and the Charter is extensively covered by Hamuľák in the Czech literature. See, for example, Hamuľák, 2011, pp. 288–308; Hamuľák, 2010. Hamuľák has addressed this issue also in Hungarian law context see Hamuľák, Sulyok and Kiss, 2019, pp. 130–150.
47 | Kühn, 2005, pp. 57–62.

constitutional court?' I do not consider this 'messianic argument' to be correct, for purely formal reasons. In such cases, the constitutional court conceives of its powers extensively or even directly exceeds them.[48]

Regardless of the solution chosen, there is no need for a constitutional court because the general courts should preferentially rule according to EU law. But this is a somewhat complicated conclusion in the Czech Republic. Indeed, in its '*konkurzní nález'* decision,[49] the Czech Constitutional Court limited the ability of general courts to rule in situations where they find a conflict with a human rights treaty. If EU law is to be treated in the same way as public international law (and the Czech Constitution does not distinguish between the two), this means that the general courts are obliged under Article 95(2) of the Constitution to refer to the constitutional court for a decision those cases where there is a conflict between EU human rights law and domestic law. However, this approach is inconsistent with EU law and is therefore inapplicable in the light of the Simmenthal decision in relation to EU law. The priority application can be decided by these general courts themselves, and they do not need the constitutional court to do so.[50]

8. Principle of supremacy and national identity

Up to now, we have worked with cases involving parallel and mutually independent work between the Court of Justice and national (constitutional) courts. Nevertheless, national courts and the Court of Justice, as well as European law and constitutional law, do meet in one case. It concerns the definition of the content of the concept of national (constitutional) identity.[51] It is national identity on the basis of which national specificities can be considered, and thus, the full supremacy of EU law cannot be asserted.

National identity is a term and institute of EU law. The content of this term and its meaning is determined both by EU law through the Court of Justice and

48 | The question of whether the constitutional court should be the one to review the general courts in cases where EU law should have been or has been applied is also raised by Vikarská and Dřínovská in their article, and they stated that the German court chose this option (the case concerned constitutional identity) and this court questioned the supremacy of EU secondary law, see Vikarská and Dřínovská, 2022, pp. 1176 et seq., the Czech Constitutional Court also (consumer protection). However, unlike the German one, it applied the EU directive through an essentially newly created general principle of consumer protection. For details see Sehnálek, 2021, p. 268.

49 | Judgment of the Constitutional Court of 25 June 2002 "konkurzní nález" Pl.ÚS 36/01.

50 | The change of approach was recently confirmed by the Constitutional Court in its decision Pl.ÚS 3/20 of 6 October 2021.

51 | This is not the only such legal term. Another where this situation arises is e.g. public order or public morality from Article 36 of TFEU.

by national law, particularly through the constitutional courts and the way they define the constitutional identity.[52]

The EU term 'national identity' is therefore not absolutely independent (autonomous) from national law as are other terms of EU law. The latter, by means of it, permeates EU law and directly influences its meaning. The material focus of national constitutions and respect for certain rights undoubtedly belong to the content of this term. How national law and national courts treat these institutions is therefore binding on the Court of Justice.

The problem is that while the specific content of the concept of national identity is derived from national law for each respective Member State, the limits of this concept are set by EU law through the Court of Justice,[53] and it has a monopoly on the correct interpretation of EU law within the reach of EU law. This is undoubtedly an interesting demonstration of the interdependence between the Court of Justice and national laws and courts.

Another problem is that constitutional identity is often a very general concept without a specific definition. Therefore, the Court of Justice is not significantly constrained by national law and can select only those aspects of such a broad concept that suit its purposes. This is the case, for example, in Czech law. The Czech Constitution does not define the concept of constitutional identity. Neither does the case law of the constitutional court provide a coherent answer. In addition to that, the Czech literature is rather limited to description of the case law of the Court of Justice on national identity. In fact, I have so far found only one Czech academic article that contains a relevant attempt to define the Czech concept of constitutional identity in a way that could provide a starting point for the definition of the relationship with EU law and the Court of Justice. In this article, Kosař and Vyhnánek[54] define three concepts of constitutional identity. They distinguish between, first, the narrow concept, which can be equated with the Czech eternity clause ('*Ewigkeitsklausel*'),[55] and, second, the broad concept, which is based on the material core of the constitution and therefore also contains an inherent value base. Finally, third, both authors distinguish the popular, that is, non-legal, conception of constitutional identity, which also includes the perception of the people and their elected representatives of what constitutes the core of the Czech constitutionalism. The third conception of constitutional identity also includes elements that are not traditional parts of constitutions, such as restitution or lustration laws, the so-called Beneš decrees,[56] the principle of the welfare state, and some social

52 | Terms 'national identity' and 'constitutional identity' are not identical. Whereas the first represents and institute of the EU law, the later is an institute of national law. They, therefore, may have a different meaning.
53 | These limits are mapped by Zbíral, 2014, pp. 112–133 and Bončková and Týč, 2022, pp. 1209–1215.
54 | Kosař and Vyhnánek, 2018, p. 855.
55 | According to the Article l9 Section 2 of the Czech Constitution 'Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible'.
56 | Post WW2 Czech legislation under which some German and Hungarian citizens were expelled from Czechoslovakia and their property confiscated.

problems associated with the division of the Czechoslovak federation.[57] In this situation, unfortunately, the Czech law and the Czech concept of constitutional identity have nothing significant to contribute to the debate on national identity and its content in the EU law.

The possible divergence between the Court of Justice and the national courts in terms of national identity does not constitute a specific problem requiring a particular approach. Everything we have said above in general terms applies to its solution. The way how the limits are set, however, has the consequence that national identity is only a conditional protection of vital Member States' interests. It is conditional because it is a matter of EU law, and therefore, the Court of Justice has the final say on the interpretation of this term.

9. Conclusion

The first objective of this article was to identify the implications of the primacy principle for Member States. The primacy principle affects different national authorities differently. There are differences between the authorities that apply the law (courts and authorities) and those that make the law. The former may be limited in their priority application of EU law by the direct effect principle. The latter are not subject to any such limitation.

The second aim of the article was to answer the question about whether national (constitutional) courts could rule differently from the Court of Justice and from EU law. The answer depends on whether these courts rule according to national or EU law. In interpreting national law, the courts are in principle limited only by the principle of loyalty (and indirect effect). Otherwise, they determine their own interpretation of it. They may therefore reach a different solution than the Court of Justice on the basis of their interpretation of national law. In the case of EU law, national courts are bound by the interpretation of EU law as formulated by the Court of Justice. However, this does not mean that they are subordinate to the Court of Justice. It is merely a limitation on the possibility of interpreting EU law in terms of methods of interpretation.

Although national courts are bound by the jurisprudence of the Court of Justice, it should not be taken literally and as a source of law. Decisions are delivered in a certain context, which is subject to change. The reasoning of judgments may contain abbreviations or errors. Finally, the jurisprudence of the Court of Justice is evolving and may change. When in doubt, rather than mechanically adopting the original decision, it is better to refer to the case for a preliminary ruling and ask again. Judicial dialogue can lead to a sensible new solution.

The third objective of the article was to determine the hierarchy of courts in the EU in the interpretation of EU law and the application of EU and national law. The crux of the problem is that there is no hierarchy between the national and the EU courts, except for the interpretation of EU law. The Court of Justice has no

57 | Ibid., p. 869.

power to interpret national law nor can it review its validity. This fact is particularly important from the perspective of the constitutional courts. The Court of Justice has no power to examine and determine the limits of membership of the EU under national constitutions. That is the exclusive competence of the national constitutional courts. From this perspective, we can view these courts as equals.

The fourth objective of this article is to propose possible systemic and legislative solutions to the problems associated with the principle supremacy. A logical solution would be to enshrine the supremacy principle in the text of the founding treaties, while simultaneously regulating the conditions of membership of the EU in national constitutions. A solution could also be to modify the powers of the various institutions of the EU, strengthening the powers of the European Council in matters of competence. In such a case, I would consider it sensible to supplement the national regulation with a new procedural institute that would have to be initiated on a compulsory basis before the European Council could take its own decisions. The deciding authority would be the national constitutional court.

Finally, I feel it necessary to stress that the current strange silence of EU and national law on the principle of supremacy was the only possible way to ensure the existence of a supranational form of integration. Indeed, as enshrining supremacy in writing in the founding treaties would be politically unacceptable at the time of the European Community's creation, it was therefore pragmatic to remain silent on supremacy to create the conditions for the principle to be formulated through the courts. However, it is now time to move on from this approach and to legislate explicitly on the issue of the relationship between EU and national law, one way or the other.

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LIMITATIONS ON THE FREEDOM OF MOVEMENT OF FOREIGNERS AND ASYLUM SEEKERS IN CROATIAN LAW AND PRACTICE

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ABSTRACT

In reality, numerous measures can be issued that limit the freedom of movement of foreigners, including third country nationals and asylum seekers. Detaining foreigners and asylum seekers is a form of deprivation of freedom of movement and can be compared to incarceration as they can be either arrested and detained for a short period of time or detained at the Centre for foreigners. The second form of detention is more important as it can last for a relatively long period. There are numerous reasons for which a foreigner can be detained at the Centre; moreover, the detainment can be prolonged repeatedly. This is why a scrutinous control of decisions to detain a foreigner must be established and every decision of detention must be controlled by an administrative court ex officio. This represents a quasi-administrative dispute instigated ex officio to ensure the conformity of such decisions with the law. This study analyzes the legal regulation of detention of foreigners. as well as the practice of the courts to show whether the Ministry of Interior acts in accordance with the law.

KEYWORDS

detention
foreigners
Centre for foreigners
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1. Introduction

The detention of foreigners and asylum seekers is regulated by two acts: the Foreigners Act[2] and the International and Temporary Protection Act[3] (there are several bylaws that regulate this issue). The restrictions on freedom of movement prescribed by the Foreigners Act (Arts. 211–222) are two-fold. First, foreigners can be arrested and detained for a maximum of 48 hours (possible prolongation for an additional 24 hours) for specific reasons (three in total). Second, it is possible to restrict the freedom of movement of foreigners by placing them at the centre for foreigners[4]; if the same purpose cannot be achieved by milder measures when the expected goal is the forcible removal and return of foreigners, it is their country of nationality or origin. The situations in which foreigners can be arrested are not controversial. Therefore, they will be briefly analysed. However, detention at the centre for foreigners is another issue. First, detention can last for a rather long time, and there are numerous reasons for this decision. Second, legal protection against decisions on detention by the Ministry of Interior is rather peculiar and unique in the Croatian legal system. The restriction of the movement of foreigners prescribed by the International and Temporary Protection Act is mentioned in Art. 54 which enables the Ministry of Interior to restrict the movement of asylum seekers for various reasons. Restriction of the movement of asylum seekers can be achieved by using several measures, including prohibition of movement outside shelters for asylum seekers or detention at centres for foreigners. Usually, the goal is to determine one's identity or ensure one's participation in an administrative procedure (to hinder escape possibilities). However, it is worth noting that legal protection against decisions allowing for the detention of asylum seekers differs from that as prescribed by the Foreigners' Act. There is no mandatory control over every decision as control is implemented only if the detained person files a lawsuit against such a decision in front of a competent administrative court. Therefore, this study aims to analyse the legal regulations of the detention of foreigners and asylum seekers. However, an analysis of the legal regulation would not suffice, as the question of the adequacy of the legal regulation would still remain unanswered. Therefore, we also analyse the practice of the administrative courts with regard to both acts to show what controls decisions on detention. The study seeks whether the courts show that the actions of the Ministry of Interior conform with the law and to what extent. Earlier researchers examined[5] whether legal protection against decisions on the detention of foreigners, which was introduced in 2013, would force the Ministry of Interior to adopt procedures, to protect individual rights at a higher level. Research from 2020[6] showed that this is probably not the

2 | OG nos. 133/20, 114/22, 151/22.
3 | OG nos. 70/15, 127/17, 33/23.
4 | Admission centre for foreigners (Ježevo), Transit admission centre for foreigners Trilj and Transit admission centre for foreigners Tovarnik.
5 | Lalić Novak, 2013, p. 151.
6 | Staničić and Horvat, 2020, p. 12.

case. Therefore, it would be interesting to see whether the situation changed as Croatia faced a sharp increase in illegal migration from 2020 onwards. It is important to mention that there is a strong link between the detention of foreigners and asylum seekers, and the need for successful border control and protection which is also analysed (in short) in this study.

2. Relationship between border protection and control and the detention of foreigners and asylum seekers

Border control is considered an exclusive prerogative of every state, as states have the exclusive right to prescribe who, when, and in what manner they are entitled to cross borders. However, international human rights standards limit this right. In other words, states have the right to decide who, and under what conditions, is one entitled to enter or stay in their territory, but are restricted to this right by their obligation to consider the protection of human rights.[7] International law dictates that states allow a migrant to enter or stay in their territory when they meet the conditions for international protection or when their entry is necessary for family reunification.[8] Larger numbers of migrants and asylum seekers indicate a greater need to restrict the movement of illegal migrants and/or asylum seekers. In other words, border control means an effective control on border crossings and protection of the state border (the outer border of the European Union). This means that all activities are implemented at the border in accordance with the needs of the Schengen Code in response to an attempted crossing or the act of crossing the border.[9] All member states are obliged to implement integrated border management. By adopting Regulation (EU) 2016/1624 of the European Parliament and the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and the Council and repealing Regulation (EC) no. 863/2007 of the European Parliament and the Council, Council Regulation (EC) no. 2007/2004 and Council Decision 2005/267/EC[10], the default elements of the new European concept of integrated border management were made on the basis that all member states are obliged to adopt their national strategies of integrated border management. On 13 November 2019 the new Regulation (EU) no. 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard was adopted, along with Regulation (EU) no. 1052/2013 and Regulation (EU) no. 2016/1624.[11] In Art. 3 of the new Regulation, four elements of integrated border management were incorporated (fundamental

7 | Staničić, 2022, p. 109.
8 | Lalić Novak, 2020, p. 6.
9 | Staničić, 2022, p. 117.
10 | Official Journal of the European Union, L 251/1 from 16.9.2016.
11 | Official Journal of the European Union, L 295, from 14.11.2019.

rights; education and training; research and innovation; and cooperation with relevant institutions and bodies, offices, and agencies of the Union). It is well known that there are different rules on entry into the Schengen Area depending on the status of the person attempting to cross the border (whether they have the right to free movement in accordance with the European Union law). Border control is implemented at border crossings to enable persons, their means of transportation and items in their possession to enter (or exit) the territory of member states. Border protection is the control of the borderline between border crossings to prevent people from evading border control and is the responsibility of the border police.[12] Therefore, state borders are protected mainly to prevent unauthorised border crossings, suppress cross-border crimes and take measures against persons who have illegally crossed the border. Border control, as well as the supervision and protection of state borders, is therefore an important instrument against illegal migration, criminality related to people smuggling and related crimes, and border crossings. In recent years, the Republic of Croatia has experienced an unprecedented increase in illegal border crossings. The period until 2017 was characterised by moderate illegal border crossings that did not exceed 5000 annually. However, in 2019, a sharp increase accounting to 20278 illegal crossings were detected, which was more than 147 % over that of the previous year. In 2020, the situation worsened as 29904 illegal border crossings were noted. In 2021, the problem was relatively mitigated as 17404 illegal crossings were noted[13]. However, by 2022, more than 50000 illegal crossings were noted. [14] Furthermore, the Republic of Croatia became a full member of the Schengen area on 1 January 2023; however, under its Treaty of Ascension to the European Union (EU) in 2013 the Schengen rules were implemented. This means that the Croatian border police have exercised the Schengen Code for many years. Considering this, it is obvious that the increase in illegal migration also implies an increase in migrants who are to be returned to their country of origin or nationality. This also indicates an increase in the number of asylum seekers in the Republic of Croatia who apply for asylum. Their numbers have increased remarkably during the last few years, from approximately 1900 in 2019 and 2020, to 3039 in 2021, and lastly 12832 in 2022.[15]

12 | Staničić, 2015, p. 130.
13 | Staničić, 2022, p. 111.
14 | Official statistic of the Ministry of Interior [Online]. Available at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234 (Accessed: 23 September 2023).
15 | Official statistic of the Ministry of Interior [Online]. Available at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234 (Accessed: 23 September 2023).

3. Restriction on the movement of foreigners according to the Foreigners Act

3.1. Arrest of a foreigner

As one of the measures for achieving restriction on movement (with the aim of returning foreigners to their country of origin, or to prevent escape), it is possible to arrest and detain foreigners. This is possible according to the Foreigners' Act and is prescribed by Art. 211. It is permissible to arrest and detain a third country national for at least 48 hours if there is a need to determine their identity (because of lack of documents or suspicion of a forgery), the circumstances of illegal border crossing or stay, the need to execute forcible return and the risk of escape of the third country national. The prescribed deadline for detainment can be prolonged for an additional 24 hours, but only if it is reasonable to assume that the circumstances regarding their arrest can be determined within that additional time and their detention at the centre for foreigners is not feasible because of the distance from the centre. The deadline starts at the time of the arrest. If the deadline expires, the third country national will be released immediately, even if the circumstances that necessitated the arrest have not yet been determined. Of course, if these circumstances were to be determined prior to the expiration of the deadline, the third country national would be released, despite the deadline having not expired.

It is obligatory to inform[16] the third country national about the reasons behind the arrest, following the possibility of determining a legal representative[17] and

16 | According to the Regulation on treatment of third state nationals (*Pravilnik o postupanju prema državljanima trećih zemalja*), OG no. 136/2021, the notice on the arrest contains (Art. 20):
1. name and surname of the third country national;
2. parent's names;
3. date, place, and state of birth;
4. gender;
5. nationality;
6. address, place, and state of residence;
7. type, number, date, place of issue, and validity period of the document for border crossing or other identity document;
8. place and date of arrest and name of the police department, that is, the police station whose police officers arrested the third country national;
9. reason for arrest (legal Art. and name of misdemeanour or criminal offense);
10. current location of the arrested person;
11. communication sent by a third country national;
12. information that the minor was found accompanied by a representative, as well as the name, surname, and nationality of the accompanying person;
13. information that the minor was found unaccompanied and the name, surname, and citizenship of the representative.

17 | In this case, they are entitled to one free phone call and the procedure is suspended until such a representative arrives (on the basis that this does not endanger the possibility to end the procedure within the set deadline). See Art. 54 of the Regulation on treatment of third state nationals.

informing their family members or someone else that they have been arrested, and, informing the embassy or a consular office of the state of their nationality.

If a third country national is a minor without an escort, the competent body for social welfare must be informed, as they are obliged to appoint a special guardian for all minors without escort, to safeguard their rights. Additionally, the embassy or consular office of the state of minors' nationality will be informed of their arrest.

It is obligatory to keep the arrested third country national in a lit and aerated room; it must be adequately heated, furnished with basic furniture (table, chairs, bed with linen) and have a lavatory. If the accommodation is single, the room must be at least 7 m square, and if it is a group, it must be at least 5 m square per person.[18]

3.2. Detention of a foreigner at the Centre for foreigners

Detention of a third country national at the centre is possible only if the same purpose of forcible return and repatriation cannot be ensured by lighter measures. The law stipulates that available lighter measures can include depositing travelling documents and tickets, depositing financial funds, banning leaving a certain address and reporting to the police station at a given time (Art. 213, para. 1). If this can be achieved by implementing lighter measures, then detention cannot be ordered. Instead, a decision to implement one or more lighter measures was issued by the Ministry and delivered to third country nationals. In most cases, there is no possibility of an appeal against such a decision; however, an administrative dispute is an available remedy. If the purpose cannot be achieved by lighter measures, then detention in the centre will be ordered by the Ministry.[19] In this instance, detention must be determined for the shortest possible time and is required to execute forcible return and repatriation. It must be highlighted that the Ministry has discretionary powers in determine whether the purpose can be achieved through lighter measures or detention is really needed.

There are situations in which a third country national is detected during an illegal stay for various reasons[20]. In this case, they are obliged to leave the country immediately (Art. 183). If there is reason to believe that such a third

18 | Regulation on treatment of third state nationals, Art. 46/2.

19 | The rules of stay are regulated by the Regulation on the stay in the reception centre for foreigners and the method of calculating the costs of forced removal, OG no. 145/2021. It is translated into English and French and can be translated into other languages (Art. 3).

20 | (1) A third country national shall be deemed to be staying illegally if:
1. he is not on short-term stay;
2. he does not have a valid temporary stay, long-term residence or permanent stay permit;
3. he is not entitled to legally stay in line with the legislation governing international protection;
4. he is not the third country national referred to in Art. 58, para. 4; Art. 62, para. 2; Art. 129, para. 2; and Art. 156, para. 1 of this Act;
5. he moves outside an area to which his movement has been restricted pursuant to a bilateral international treaty; 6. he is not covered by the mobility programme referred to in Art. 73, para. 5 or Art. 74, paras. 3 and 12 of this Act.

country national is going to evade their obligation to leave the country (and the European Economic Area), they can be detained at the centre for up to six months. There are two sets of cases based on the existence of such risks. The first set leaves discretional power with the Ministry, that is, the Ministry is entitled, but not obliged, to issue a detention decision: they lack an identity card or travelling document, have no registered stay, have declared that they will not execute or disrupt the execution of measures for their return, they do not execute or have not executed the return decision, they do not fulfil or have not fulfilled the obligation to go to another member state, they entered the EEA illegally, that is, the Republic of Croatia; their previous behaviour indicates that they could avoid fulfilling the obligation to leave the EEA or the Republic of Croatia (Art. 214, para. 2).

The other set of cases prompts the Ministry to obligatorily issue a detention decision because their existence is considered a risk of avoiding the obligation to leave the EEA, that is, the Republic of Croatia. Those cases include they refused to provide personal or other information and documents or provided false information, they used or forged someone else's document, they rejected or destroyed the identity document, they refused to give fingerprints, they prevented by force or fraud the payment for the purpose of forcible removal to the country to which he is being forcibly removed, they did not comply with the lighter measures issued by the Ministry (instead of detention), they entered the EEA or the Republic of Croatia before the ban on entry and residence expired and they resided in another EEA member state from which they illegally entered the Republic of Croatia directly or by transit through a third country (illegal secondary movement) (Art. 214, para. 3).

The prescribed time for detention was up to six months. However, this time can be extended to 12 months if a third country national refuses to disclose personal or other data and documents needed for forcible return or has given false data, in some other manner prevented or delayed forcible return, or the Ministry justifiably expects the delivery of travel and other documents needed for forcible return that were requested from the competent bodies of another country.

If there are reasons for detention, whether those that dictate detention in all cases or those for which the Ministry finds that, because of their existence, it is appropriate to detain a third country national, a decision is issued by the Ministry through a competent police station or police department in the form of an administrative act. The decision on the extension of detention was brought about directly by the Ministry.

Another decision can be made during detention when stricter police supervision is ordered. It encompasses the restriction of the movement of a third country's nationals at the centre. This decision is specific as it is prescribed that it can be brought about without enabling the party (third country national) to be heard.[21]

21 | Staničić and Horvat, 2020, p. 11.

Strict police supervision may be ordered for a maximum period of seven days.[22] This measure could be issued multiple times (Art. 219, para. 7).

Therefore, during the detention process, there are three types of decisions: detention, the extension of detention and decisions on stricter police supervision.

3.2.1. Legal protection against decisions on detention

As decisions on detention are administrative acts, they are brought under the General Administrative Procedure Act (GAPA)[23]. This Act prescribes legal protection against administrative acts (decisions, *rješenja*) in Art. 12[24], according to which an appeal is the usual legal remedy against decisions that parties find unlawful or irregular[25]. However, it can be prescribed differently according to the law. As the Foreigners Act prescribes that detention decisions are brought about by the

22 | Strict police supervision may be ordered if a third country national:
1. leaves the centre without authorisation or if there are justified reasons to suspect that they will try to leave the centre;
2. physically assaults other third country nationals, authorised officers, or other employees;
3. tries to inflict self-injury;
4. behaves inappropriately, grossly insults and degrades other third country nationals, authorised officers or other employees on any grounds;
5. prepares or makes items for assault, self-injury, or escape from the centre;
6. engages in the preparation of narcotic substances and precursors at the centre;
7. deliberately damages clothing or other items and objects they received to use at the centre;
8. deliberately damages technical and other equipment at the centre;
9. deliberately interferes with the operation of technical equipment (audio-visual and lighting) which is installed at the premises for the purpose of providing physical and technical protection;
10. persistently refuses to obey the orders of police officers and does not comply with the valid legislation;
11. otherwise seriously breaches the provisions of the house rules of the centre (Art. 219, para. 2).

23 | OG nos. 47/2009, and 110/2021. It is important to note that the GAPA is a general procedural act and that its application is mandatory in all administrative matters. This is prescribed by Art. 3/1 of the GAPA, according to which: 'This Act shall apply in deciding all administrative matters. Only individual questions of administrative procedure may be regulated otherwise by law, where it is necessary for deciding in particular administrative areas and where this is not contrary to the fundamental provisions and the purpose of this Act'.
From these two separate principles emerges the following: first, it is clear that deviations from the GAPA are permitted only in special cases and that even then the principles and fundamental provisions of the GAPA apply; second, only particular questions can be regulated otherwise by law, which results in the conclusion that the administrative procedure as a whole cannot be regulated by the provisions of any other act. Therefore, the importance of the GAPA in the Croatian legal order is paramount. Britvić Vetma and Staničić, 2021, p. 17.

24 | (1) A party has the right to an objection against a first-instance decision, as well as when an administrative body has not adjudicated an administrative matter within a specific term, unless provided otherwise by law.
(2) An administrative dispute can be initiated against a second-instance decision or against a first-instance decision against which an appeal is not allowed.

25 | Irregular decision is usually linked with the use of discretionary powers.

Ministry (although through first-instance bodies– competent police stations or police departments) which is a body above which there is no second-instance body and appeal is not permitted.[26] Therefore, according to Art. 12, para. 2 of the GAPA, the only available legal remedy, is administrative dispute. The Foreigners Act does prescribe that administrative dispute is available (Art. 216, para. 3), but also enacts a very peculiar mean of control of legality of the aforementioned decisions through a 'quasi' administrative dispute.[27]

Judicial protection against an individual decision of a public law body is ensured in all other cases in the form of an administrative dispute before the competent administrative court in accordance with the Administrative Disputes Act (ADA)[28], according to which administrative court proceedings are initiated by a lawsuit. The only exception to this is when an assessment of the legality of a general act is required. The provision that an administrative dispute is initiated by a lawsuit is an expression of the principle of disposition–the court does not initiate an administrative dispute *ex officio*. Therefore, the administrative court does not act *ex officio* but in accordance with the expressed will of the party, that is, the plaintiff.[29]

26 | It should be noted that the fact that the Ministry of interior decides on the limitation of freedom of movement, and not a court was challenged in front of the Constitutional Court of the Republic of Croatia in 2012. However, the Court decided on the matter in 2020 rejecting the claim that such regulation is unconstitutional. The Court cited the practice of the ECJ with regard to the requirements of the Directive 2008/115 on issuing a written act with real and legal reasons for detention (judgement Bashir Mohamad Ali Mahdi, C-146/14 from 5 June 2014. The Constitutional Court also reiterated that there is ample judicial control of detention decisions which makes the regulation in accordance with the Constitution. See decision U-I-5695/2014 from 24 June 2020.

27 | Accordingly, one could question how to formulate an instruction on the legal remedy as an integral part of each decision (Art. 98 of the GAPA). Namely, it is stipulated that the instruction on legal remedy informs the party whether he can file an appeal against the decision or initiate an administrative dispute, to which body, within what time frame and in what way. There is no doubt that a third country national is a party to an administrative proceeding that resulted in the adoption of a decision on detention/extension of detention/stricter police supervision. An appeal is not allowed against all the aforementioned decisions; therefore, the instruction on legal remedy should state that a lawsuit is allowed to the competent administrative court. However, according to the Foreigners Act, the party—a third country national—does not have the right to file a lawsuit against the aforementioned decisions, but is only informed that the Ministry will submit the case file to the administrative court, which will evaluate the legality of the decision. Therefore, basically, the party does not have any legal remedy against the aforementioned decisions. However, can a remedy instruction be like that? Or should it be stated in the instruction on legal remedy that no appeal or lawsuit can be filed against the decision, but that the Ministry will initiate the initiation of an 'administrative dispute' against the decision ex officio? The instruction on the legal remedy is an instruction for the party, therefore the decision from the Foreigners Act is problematic from the aspect of the GAPA and the mandatory content of the decision. Staničić and Horvat, 2020, p. 12.

28 | OG nos. 20/2010, 143/2012, 152/2014, and 94/2016 – decision of the Constitutional Court of the Republic of Croatia, 29/2017.

29 | Staničić, Britvić Vetma and Horvat, 2017, p. 87.

However, the Foreigners Act prescribes (parallelly, or instead of[30]) that immediately after delivering the decision to the third country national, the Ministry is obliged to submit to the competent administrative court the case files on detention at the centre, on extension of detention, or on stricter police supervision (this decision is referred to the court by the centre). On the basis of the submitted file, the competent administrative court examined the legality of this decision. Therefore, without the filing of a lawsuit, that is, without the activity of the plaintiff, the judicial supervision of the legality of the individual decision by which the public law body decided on the party's obligation is activated, that is, it is undoubtedly a 'dispute' whose subject is the one referred to in Art. 3, para. 1, point 1 ADA. The question is whether it is even possible to talk about an administrative dispute, as, basically, in this form of judicial control over the work of the administration, there is no plaintiff, defendant, or interested person, as Šikić believes.[31] Other authors state that this is a 'quasi-administrative dispute', that is, a drastic deviation from the usual regulation of administrative disputes according to the ADA.[32]

Furthermore, in contrast to the ADA, which does not prescribe deadlines in which the administrative court must make a decision in an administrative dispute, the Foreigners Act prescribes extremely short deadlines in which the administrative court must make a decision to repeal or confirm the contested decision within five days from the date of delivery of the case file to the court (Art. 216, para. 4). The deadline is even shorter for the evaluation of the legality of the decision on stricter police supervision, where the court must make a decision on the same day it receives the decision, or if the decision in question is brought on a court's non-working day, the first working day from the day it receives the decision from the centre. Additionally, when the court decides, in accordance with Art. 216, para. 5, or para. 8 of the same Art. of the Foreigners Act, whether a third country national who has been detained for a period longer than three months should be released from the centre after three months, the deadline is ten days from the date of delivery of the case files. The ratio of such short deadlines is clear as these are proceedings in which the personal freedom of an individual is limited to free movement[33]. However, as Šikić states, the ability of the administrative court to decide on cases so quickly is questionable.[34]

30 | One could assume that both legal remedies are available – the right of the third country national to file a lawsuit in front of the competent administrative court, and the obligation of the Ministry and the centre to submit the decision (and file) to the competent administrative court for review of legality. However, because all decisions are due for review according to the law, what would be the point in allowing the third county national to dispute a decision that will already be processed by the court *ex officio*? Therefore, the available legal remedy is substituted by a quasi administrative dispute instigated by the court upon delivery of the decisions with regard to detention. Accordingly, there are examples in which a lawsuit by the third country national was lodged in front of the competent administrative court (Usl-3563/18-7 from 21 January 2021).

31 | Šikić, 2019, p. 57.

32 | Staničić, Britvić Vetma and Horvat, 2017, p. 87.

33 | Staničić and Horvat, 2020, p. 11.

34 | Šikić, 2019, p. 57.

As an additional point of interest, it should be pointed out that, in an administrative dispute, if the illegality of an individual decision contested by a lawsuit is established, it should be annulled. However, according to the Foreigners Act, if the administrative court finds illegality(s) in a decision on detention, extension of detention or stricter police supervision, it can only repeal such decisions (Art. 216, paras. 4 and 5, Art. 219, para. 5). The practical as well as theoretical difference between the annulment and repeal of an administrative act!).[35]

Furthermore, there is the question of whether there is the right to appeal the decision of the administrative court regarding the legality of decisions brought about by the detention of a third country national. Namely, third country national is not a party in this 'administrative dispute', and only the party can file an appeal according to ADA; therefore they cannot file an appeal against the judgement confirming the decision of the Ministry. However, the Ministry is relatively a party in this 'administrative dispute'; therefore, in theory, it could file an appeal against the judgment repealing the decision. However, this would mean that only a public law body can file an appeal when it is dissatisfied with a court decision, and not the third country national on whose rights the decision refers to, which would be a direct violation of Art. 14, para. 2 of the Constitution of the Republic of Croatia[36], which reads: 'All are equal before the law'. In other words, there would be no equality of arms and the appeal would be the legal remedy for only one party in the 'administrative dispute'. Therefore, one should accept Šikić's point of view that in this form of judicial control over the work of the administration, there are no parties in the sense of ADA.[37] Consequently, no one can dispute the administrative court's decision to revoke or confirm the decision.[38] However, the newer case law of the Administrative court shows that the judgments contain the legal remedy notice which states that an appeal to the High Administrative Court is permitted.[39]

Therefore, there are the following differences in this form of judicial control over the work of the administration, which is why we cannot discuss an administrative dispute in the sense that it is regulated by the ADA: 1) it is initiated *ex officio*, without a lawsuit, that is, the addressee of the act cannot challenge the act independently. However, the body that adopted the act only initiates the procedure for assessing its legality; 2) there are no parties (plaintiff, defendant, and interested person); 3) as a rule, there is no hearing (except in the case of minors), contrary to the ADA's express provision; 4) a number of ADA rules do not apply (on the submission of a claim to an answer, the principle of a party's statement, the principle of helping an ignorant party, the party's right to representation, and so on); 5) it should be impossible to challenge the court decision.

35 | Staničić and Horvat, 2020, p. 12.
36 | OG, nos. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010– consolidated text, 5/2014.
37 | Šikić, 2019, p. 57.
38 | Staničić and Horvat, 2020, p. 12.
39 | See, e.g., Usl-2680/2022-2 from 16 September 2022, Us I-37/2023-2 from 10 January 2023, Us I-114/2023-2 from 30 January 2023. This practice is not valid, as stated, there are no parties in this form of judicial control, and only parties can challenge a court's decision through appeal.

3.2.1.1. Role of discretionary power in detention cases

Another point that must be mentioned is the role of discretionary power in administrative procedures regarding detention. Discretionary powers are especially broad in the Administrative Law of the Interior; this is true in almost all detention cases. When discretionary powers are used, the court's ability to review decisions that contain discretionary powers is limited. The ADA prescribes that an administrative dispute cannot be conducted on the regularity of an individual decision made by applying discretionary powers, but can be conducted on the legality of such a decision, the limits of authority, and the purpose for which the authority was given (Art. 4, para. 2).

4. Restriction of movement of asylum seekers according to the International and Temporary Protection Act

4.1. On limiting freedom of movement of asylum seekers in general

International agreements, regional documents, and national regulations guarantee the right to asylum. According to the 1951 Convention on the Status of Refugees, all states are, in principle, obliged to give the right of choice of place of residence and freedom of movement within their territory to legally residing persons (Art. 26, para. 2). In general, the limitation of freedom of movement for asylum seekers should be avoided; however, this can be prescribed in certain cases[40]. However, it should be prescribed by law and justified, considering that the duration of such a measure should be as short as possible.[41] The asylum seeker must be informed of the decision and reasons for limiting his freedom of movement in the language he understands, and this limitation must not represent an obstacle for applying for asylum.[42] Prior to deciding on the limitation of movement, other measures must be considered, such as reporting to a competent body or similar measures.[43] If a limitation on freedom of movement is issued, it must meet (cumulatively) the criteria of necessity, proportionality, and justifiability.[44] The European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly mention the right to asylum; however, the ECtHR has established a series of standards for the protection of asylum seekers through its case law.[45] It should be mentioned that the ECtHR highlighted the fact that limiting the freedom of movement of asylum seekers is a measure implemented not on persons who committed a felony but on foreigners who are often in fear of their

40 | Lalić Novak, 2013, p. 142; UNHCR, 1986, para. b.
41 | Lalić Novak, 2013, p. 142.
42 | Lalić Novak, 2013, p. 142.
43 | Lalić Novak, 2013, p. 143.
44 | Lalić Novak, Gojević-Zrnić and Radečić, 2015, p. 87.
45 | Lalić Novak, 2014, p. 940.

life, fled the country of their origin.[46] Therefore, asylum seekers are a vulnerable group that must always be considered when discussing such measures.

4.2. Decisions on limiting the right of free movement of asylum seekers

It is prescribed that asylum seekers have the right to move freely in the Republic of Croatia. This right is set in motion after the person who seeks asylum states their intention to seek asylum, usually while undertaking border control at the border crossing.[47] However, this right can be limited if a competent authority deems it necessary. There are multiple reasons[48]for which this decision can be made by the ministry, police department, or police station. Therefore, although asylum seekers have, in principle, the right to free movement, this right can be limited in several ways. The following measures were used to limit the right to free movement: prohibiting movement outside the shelter; prohibiting movement outside a certain area; personally entering the shelter at a certain time; depositing travel documents and tickets at the shelter; detention at a centre for foreigners.

It is worth noting that detention at the centre for foreigners is deemed the strictest measure that can be implemented only if all other measures cannot ensure the fulfilment of the purpose of limiting the right to free movement in accordance with the proportionality principle.[49] Therefore, in total, five types of decisions can be made to ensure the asylum seekers' participation in the procedure and that they do not abuse the right to asylum, as it has to be considered that

46 | Amuur vs. France, request no. 19776/92 from 25 June 1996, para. 41.

47 | This can be done, if the seeker is already in Croatia, at the police department, police station or at the centre for foreigners, and also, but in extraordinary circumstances, at the shelter for asylum seekers.

48 | 1. to determine the facts and circumstances on which the request for international protection is based, which cannot be determined without restrictions on movement, especially if it is assessed that there is a risk of flight (the risk of flight is assessed based on all the facts and circumstances of the specific case, especially with regard to previous attempts to leave the Republic of Croatia voluntarily, refusal to submit to verification and identification, concealment or provision of false information about identity and/or citizenship, violation of the House Rules of the shelter, results of the Eurodac system and opposition to the transfer).
2. to establish and verify identity or nationality.
3. for the protection of national security or public order of the Republic of Croatia.
4. to prevent the spread of infectious diseases in accordance with national regulations on necessary epidemiological measures.
5. to prevent endangering the lives of persons and property.
6. multiple consecutive attempts to leave the Republic of Croatia during the international protection procedure.
7. the implementation of the forced removal procedure, if on the basis of objective circumstances, considering that the applicant already had the opportunity to start the procedure for granting international protection, it is reasonably assumed that by applying for international protection he wants to delay or hinder the execution of the decision on expulsion and/or return made in accordance provisions of the Foreigners Act.

49 | This applies especially to members of vulnerable groups who can be detained in the centre only if, by individual assessment, is determined that such accommodation is fit to his personal circumstances and needs, especially health condition. Unaccompanied minors, if this measure is deemed, by individual assessment, necessary, must be detained apart from adults and in the shortest possible time.

almost 80% of asylum applicants left the country during the procedure[50]: decision prohibiting their movement outside the shelter, decision prohibiting their movement outside a certain area, decision ordering them to check themselves at the shelter at a certain time (every Tuesday at two), decision ordering them to deposit documents and tickets at the shelter (to make further travelling impossible) and the decision on detention at the centre for foreigners. All these decisions are administrative acts that must be explained and contain instructions on legal remedies.

These decisions can be made for a period during which the right to free movement persists for up to three months in total. However, an issued measure can be prolonged for an additional up to three months 'for justified reasons'. It is important to note that when the ministry, police department or police station issues a decision limiting the right to free movement, such a decision must contain (at the disposition) the measure of choice and duration of the measure. Both must be aligned to limit the free movement of asylum seekers.

4.3. Legal protection against decisions on the limitation of the freedom of movement

All decisions that limit the freedom of movement of asylum seekers are subject to legal control. However, as mentioned above, there is discretionary power in all of these decisions. This fact prevents the court from examining the regularity of the decision in the scope of its discretionary part, as it is competent only for examining the legality of such a decision, the limits of authority and the purpose for which the authority was given. As in decisions regarding the detention of a third country's nationals, there is no appeal against decisions limiting the right to free movement of asylum seekers. The only legal remedy was an administrative dispute before a competent court.

It is prescribed that the asylum seeker should be entitled to administrative disputes against all decisions, limiting their right to free movement. The deadline for such a lawsuit is rather short – only eight days after delivery. The competent court then asks the issuing authority for the case file to be sent to the court within eight days after the request of the court is received. Consequently, the court must deliver a judgement within 15 days after the oral hearing. It is worth noting that such deadlines differ significantly from the ones usually prescribed in administrative dispute by the ADA (the deadline for filing a lawsuit is 30 days from delivery, there is no deadline in which a judgement is to be delivered). This is justified because limiting freedom of movement requires quick redress if unlawfulness occurs.

If the court finds the decision unlawful, it will annul it, and the asylum seeker must be released immediately (Art. 54, para. 14). The law is not very complete on this issue, as it only prescribes that the Ministry is to 'release the asylum seeker' if the court finds that a decision on limiting the freedom of movement is illegal. However, as explained above, there are multiple decisions on limiting freedom of movement which do not always include detention. For example, decisions

50 | Lalić Novak and Giljević, 2022, p. 118.

prohibiting movement outside a certain area, ordering one to check themselves at the shelter at a certain time or ordering them to deposit documents and tickets at the shelter. Therefore, if such decisions are found illegal, then the asylum seeker is free to move outside a precisely set area, is not obliged to check themselves at the shelter, and is entitled to the return of documents deposited at the shelter.

There is a relatively peculiar obligation of the competent administrative court to examine, *ex officio*, or at the request of the asylum seeker, the decision to limit freedom of movement at reasonable intervals. This applies especially when the limiting freedom of movement exceeds one month in duration. However, the International and Temporary Protection Act lacks regulation in the sense of Art. 216, para. 4 of the Foreigners Act, which prescribes the obligation of the Ministry to send files to the competent Court. Therefore, the question on how the court will fulfil its duty if no one is obliged to send the file and decide on detention arises. The only solution is to apply the aforementioned regulations from the Foreigners Act and allow them to apply to all detentions of third country nationals.

5. Court's practice on detention of foreigners and asylum seekers

This Sec. analyses the practice of the administrative courts since 2012 regarding the detention of foreigners, based on the information obtained from the courts via the right to access information, as they control all detention decisions. Regarding the detention of asylum seekers, court practices available to the public were analysed, and data was requested from the courts.

The previous research done by Staničić and Horvat in 2020 showed that competent administrative courts made the following decisions during the period from 1 January 2012 to 1 January 2020.

a) Administrative Court in Zagreb

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1154	995	121	86.22%

b) Administrative Court in Split

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
487	447	36	91.77%

c) Administrative court in Osijek

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
317	300	10	94.64%

d) Administrative Court in Rijeka

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1	1	0	100%

From this data, it is clear that there were, in total, 1959 detention decisions, from which 1743, or 88.97% were verified. Only 167 or 8.52% detention decisions were revoked.[51] Furthermore, Staničić and Horvat point out that none of the first-instance administrative courts have received a case in which a decision would be made on stricter police supervision in accordance with Art. 138, para. 5 of the Foreigners Act, which means that this measure is not used at all, because the Ministry is obliged to refer such solutions to the court for evaluation of legality. Additionally, there were only cases before the Administrative Court in Zagreb under Art. 135, para. 5 of the Foreigners Act–an extension of accommodation after three months–and in 12 cases, it was decided that the citizen of a third country would not be dismissed from the centre.[52]

After collecting data for the period from 1 January 2020 to 25 June 2023 via the Access to Information Act,[53] we observed the following:

a) Administrative court in Zagreb

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1615	1331	256	84.15%

b) Administrative court in Osijek

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1879	1652	224	88.08%

51 | In some cases, the suspension of the dispute was recorded–7 before the Administrative Court in Osijek, 1 before the Administrative Court in Split, that is, the proposal of the Ministry for judicial review of the legality of the decision was rejected–3 such cases before the Administrative Court in Split, and in some cases the decision was partially cancelled–66 such cases before the Administrative Court in Zagreb. See in Staničić and Horvat, 2020, p. 12.
52 | Staničić and Horvat, 2020, p. 12.
53 | OG nos. 25/2013, 85/2015, and 69/2022.

c) Administrative Court in Rijeka[54]

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
0	0	0	0%

d) Administrative court in Split

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1662	1645	7	98.97%

There were, in total, 5156 detention decisions in the specified period (1 January 2020 to 25 June 2023), out of which 487 or 9.45% were revoked. Therefore, 90.55 % of the detention decisions were verified as legal by the competent courts. Again, only five (four in front of the Administrative court in Zagreb and one in front of the Administrative court in Osijek) cases of accommodation extension appeared after three months, and all were verified as legal. It is also interesting to note that there have been no decisions regarding stricter police supervision from 2012 to date, which clearly shows that the institute was not in use. The data show that the vast majority of decisions on detention brought by the competent bodies (the Ministry, police departments, and police stations) are legal, as there have been 7115 detention decisions, out of which only 533 or 7.49% were revoked by the courts. It should also be noted that there are instances in which courts uphold the detention decision but shorten the detention period, saying that the decided decision is not in accordance with the principle of proportionality.[55]

By checking the available case law of the administrative courts on detention[56], it is clear that the courts usually rule within the set deadline[57] of five days; however, there are cases in which this was not adhered.[58] However, such delays are minimal, and one must highlight the fact that the courts bring such judgements in a very short time, notwithstanding the fact that it is, e.g., the holiday season (judgments from 29 December, 2 January etc.) which shows that the courts really try to meet the set (very short) deadline.

In conclusion, courts always check whether the conditions for ordering detention have been met, whether the same purpose could have been achieved by lighter

54 | Is not a competent court as there is no detention centre under its jurisdiction.
55 | See the series of judgements of the Administrative court in Osijek early 2023 in which the detention is upheld, but the duration shortened from the set maximum six months to maximum two months. See, Us I – 1534/2023-2 from 2 January 2023, Us I 67/2023-2 from 12 January 2023, and Us I 181/2023-2 from 8 February 2023.
56 | Through the dana base of the Supreme Court – *Supranova*, available at: https://sudskapraksa.csp.vsrh.hr/home (Accessed: 23 September 2023).
57 | See, Usl-2680/2022-2 from 16 September 2022, 5 Us I-35/2023-2 from 10 January 2023, and 1 Us I-153/2023-2 from 2 February 2023.
58 | See, Usl-2753/22-2 from 27 September 2022 (one day delay).

measures (which is uncommon), and whether the duration of the detention was set in accordance with the principle of proportionality.[59]

6. Conclusion

The system regulating the limitations of the freedom of movement of foreigners and asylum seekers in Croatian law is aligned with the acquis communautaire, and set up in a way that guarantees the rights and freedoms of the people to whom it is applied. The analysis showed that more than 90% of decisions on detention are validated by the administrative courts. However, the impact of discretionary powers, which limit the scrutiny of administrative courts must always be considered. It is worth noting that the Croatian system regulating the limitations of freedom of movement of foreigners and asylum seekers also adheres to the requests set by the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.[60]

Furthermore, the wording of the Foreigners' Act regarding legal protection against detention decisions is poor and open to interpretation. For example, as was stated above, what is the nature of court protection in form of *ex officio* scrutiny, do parties in reality exist in such a court procedure, and consequently, should there be a right to appeal against first instance judgements? By scrutinising the norms, one should determine that this is a highly unusual 'administrative dispute' without parties. This would mean that there is no right to appeal, but court practices show that administrative courts find this differently. Therefore, there is need for amendments to the Foreigners Act to clearly prescribe whether third country nationals and the Ministry are parties to such court procedures, and whether an appeal is allowed.

A special issue is the right to launch a 'real' administrative dispute against detention decisions (parallel with the procedure *ex officio*). This option should not exist as it is obsolete because of the obligation of the authorities to send every decision to the competent court for validation. However, the existence of this 'real' administrative dispute can, in theory, be justified as a manner in which the rights of the parties are protected, as they have the opportunity to challenge every decision limiting the right to movement by themselves. However, there are a small number of such cases which is to be expected because of the *ex officio* control and the fact that to instigate judicial proceedings, a person must, first, be aware of the possibility, and second, be in a position to do so.

One should also rethink the deadlines set by courts to deliver their judgements. Five days is an extremely short time to put a decision on detention under real scrutiny, and this could be why few such decisions were revoked. If courts have more time, they would find more illegalities in the procedure before making

59 | See, Us I-42/2023-2, Us I-47/2023-2, and Us I-37/2023-2, all from 10 January 2023.
60 | UNHCR, 2012.

a detention decision. These cases have limitations in terms of freedom and must be resolved swiftly. However, a time limit of 10 days would be more suitable.

The International and Temporary Protection Act should be amended to include the obligation of the Ministry to return deposited travelling documents and tickets in Art. 54 para. 14, and the fact that the asylum seeker is free to move outside a precisely set area or is not obliged to check themselves at the shelter if the decision on limitation of freedom of movement is found illegal. The Act only prescribes that the asylum seeker should be released if the detention decision is illegal; however, there are other forms of limiting freedom of movement available to the authorities.

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INTEGRATION RESPONSIBILITY: THE RELATIONSHIP OF NATIONAL CONSTITUTIONAL COURTS TO THE COURT OF JUSTICE OF THE EUROPEAN UNION. HIERARCHY OR COLLEGIALITY?

Norbert Tribl[1]

ABSTRACT

As long as the peoples of Europe are unable to create a homogeneous, united society, the principle of 'unity in diversity' will be a natural limit to the development of the 'ever closer union' clause, and this is not a mere philosophical or theoretical argument; it is rather a fact-based inadequacy that must be reflected in the European legal order and the concrete competences and their limits, especially in the relationship between the Court of Justice of the European Union and the European national constitutional and higher courts. The undefined nature of the relationship between European Union (EU) law and national constitutions (resulting from the supranational nature of integration) forced European national constitutional courts to assume a role that could also be seen as a functional change in terms of the entirety of the European constitutional judiciary. The role of these bodies seems to be complemented by a kind of 'integrational' function; the European national constitutional courts must no longer only defend their national constitutions but must do so while considering the proper advancement of the integration process. They must act in a manner that upholds the Court of Justice of the European Union's (CJEU) right to an authentic interpretation of the Treaties; however, taking into account that the CJEU, as an institution of the EU, is not entitled to make decisions ultra vires against the framework set by the Treaties.

KEYWORDS

ever closer union
unity in diversity
constitutional courts
Future of Europe
ultra vires

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1. Introduction

Perhaps one of the biggest challenges faced in recent years is the future of Europe and European integration.[2] Since its inception, European integration has been built on compromise, in want of a better solution, and has been in a constant search for a way forward: How do we define European unity? What are the goals of European unity? It is a process that determines and shapes the constitutional arrangements of the Member States involved in it. Conversely, the constitutional development of the Member States must also shape the development of the European integration process and, in this context, the European legal order, which is now symbiotically united with the constitutional and legal systems of the Member States.

The European Union has no sovereignty of its own. Its existence, power, and nature depend on the will of the Member States. Consequently, the EU cannot oppose the will of the Member States. German constitutional doctrine refers to this direction, which is in accordance with the will of the Member States and can be read in the Treaties, as the '*Integrationsprogramm*'.[3] This common program is practically the soul of European integration. The prevailing view in the EU approach is that EU law and integration must be defended by the EU institutions, particularly the Court of Justice of the European Union (CJEU).[4] This is beyond dispute, but it is important to note that it does not imply absolutism. On the contrary, the idea of integration, the *Integrationsprogramm*, must be defended from two sides: on the one hand, from the side of the Union, so that the Member States cannot infringe the provisions of the Treaties, and on the other hand, from the side of the Member States, so that the Union itself cannot go beyond the scope of the Treaties.[5]

The other side of the coin is the responsibility of the constitutional institutions to comply with the provisions of the Treaties and to act in the spirit of the Treaties at all times, which is called in German constitutional law '*Integrationswerantwortung*'.[6] The national constitutional courts, like the Hungarian or German constitutional courts, are the supreme guardians of the national constitutions and are responsible for ensuring that the process of European integration remains within the framework of the Treaties and does not undermine the integrity of the constitutional order of the Member States, which the Treaties are designed to protect.

The EU and the European legal order are not something that the EU institutions must protect from the Member States. Rather, it is a *sui generis* legal order, born of the will of the Member States, capable of acting on the basis of their

2 | In 2021 a Conference on the Future of Europe was launched by the European Parliament, the Council and the European Commission. Cf.: https://futureu.europa.eu/en/pages/about (Accessed: 28 September 2023).
3 | Cf.: Degenhart, 2022.
4 | Cf.: Article 19(1) of TEU.
5 | Martucci, 2021, pp. 17–24.
6 | See the so-called '*Integrationsverantwortungsgesetz* – IntVG' in Germany: Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union.

sovereignty, which must be protected from both sides, the Member States, and the integration process. The European Community law must be implemented jointly by the European courts and the national constitutional courts within the limits and powers laid down in the Treaties. However, it must also be stressed that the authentic treaty interpretation powers of the CJEU should not imply interpretative hegemony or result in an expansive interpretation of powers that would lead to the CJEU taking over the role of national constitutional courts or placing itself above them in matters that fall within the competence of national constitutional courts.[7]

The CJEU generally has the final word on the interpretation of Founding Treaties, but national constitutional courts cannot be deprived of the right to review national mandates, allowing the exercise of shared competences, or individual EU acts adopted based on such mandates, for their conformity with national core constitutional requirements. It is in this examination, among other things, that the responsibility of the national constitutional courts for integration is embodied. They are responsible for the integration process, as is the CJEU. The responsibility for integration is twofold: On the one hand, constitutional courts are responsible for ensuring that the institutions of the Union, including the CJEU itself, do not go beyond the scope of the Treaties, and on the other hand, the integration institutions guarantee that the Member States remain within the scope of the Treaties.

This also means, therefore, that the constitutional courts and higher courts of the Member States have a duty, by virtue of their function, to safeguard the values, institutions, and legal principles that constitute the uniqueness of the constitutional arrangements of the Member States–in essence, the constitutional identity of the Member States.

In the EU, 28 sui generis legal systems must be reconciled: the legal systems of the 27 Member States and the legal system of the EU. We must do all this within the principle of unity in diversity, which is not so much a principle as a value. The very basis of European integration is that the Member States retain their sovereignty and the uniqueness that this implies, and it is with this in mind that they participate in the whole.

In practice, constitutional identity is equivalent to the principle of unity in diversity. This is not based on an arbitrary decision; it is the result of the kind of cooperation that has been and is best suited to the social and legal structures and constitutional cultures of the Member States that have achieved integration. It is clear from the founding Treaties of the EU that the Member States wish to protect this diversity institutionally. One only needs to consider Article 4(2) TEU. This is true even if today there is an attempt to push this diversity into the background and to replace the principle of *'unity in diversity'* with an *'ever closer union'* clause.

7 | The relationship between national constitutional courts and the CJEU, and the role of national constitutional courts in the European integration process, has been a major topic in Europe in recent years. Nothing illustrates this better than the numerous conferences organised by the actors involved. For example the 'EUnited in diversity: between common constitutional traditions and national identities' International Conference in Riga, Latvia, 2–3 September 2021, organised by the CJEU.

However, it must be stressed that the direction of the European integration process cannot be abstracted from the peoples who make up Europe or from their social arrangements. Thus, as long as the peoples of Europe are unable to create a homogeneous, united society, the principle of *'unity in diversity'* will be a natural limit to the development of the *'ever closer union'* clause. This is not a mere philosophical or theoretical argument; rather, it is a fact-based inadequacy which must be reflected in the European legal order and, as I will explain later, in the concrete competences and their limits.[8]

European constitutional courts began at an early stage to identify the constitutional values and institutions that form the immanent core of the constitutional order of their Member States, which can be read in the constitutions of the Member States. Among other things, this is how the concept of constitutional identity was born, at least as far as the practices of European constitutional courts are concerned. Among the constitutional courts or supreme courts of the Member States, the German constitutional court has so far been the most active in interpreting what constitutional identity means, how it relates to *ultra vires* EU acts, and in which cases the identity test and the ultra vires test should be applied.[9] Hungary's approach to the concept of constitutional identity is special, and perhaps it is not an exaggeration to say that it is also somewhat pioneering. Only the Fundamental Law of Hungary contains a requirement to protect constitutional identity, which is thus binding on the Constitutional Court.[10]

2. The relationship of national constitutional courts to the Court of Justice of the European Union

One of the most important issues in the constitutional debate on Europe's future is the relationship between the CJEU and national constitutional courts[11], as the former is the authentic interpreter of EU law, while the latter is an authentic *erga omnes* interpreter of national constitutions.[12] However, the issue of the relationship between these organs is a consequence of the relationship between EU law and national constitutions being only seemingly regulated[13] based on a fragile state of balance below the surface. The principle of the primacy of EU law over the constitutions of the Member States is not an *expressis verbis* clause laid down in the Treaties; the CJEU developed it in the *van Gend en Loos* and then the *Costa v. E.N.E.L.* decisions as general principles of EU law in the 1970s. However, the CJEU did not (even then) receive unreserved support from the Member States. From the

8 | Piris, 2022, pp. 969–980.
9 | Calliess, 2020, pp. 153–182.
10 | The official translation of the Fundamental Law of Hungary is available: https://njt.hu/jogszabaly/en/2011-4301-02-00 (Accessed: 28 September 2023). See: Art. Q, para. 4.
11 | Várnay, 2019, pp. 63–91.
12 | Vincze and Chronowski, 2018, pp. 493–515.
13 | Belov, 2017, pp. 72–97.

1970s onwards, the German Federal Constitutional Court (GFCC) declared in the Solange decisions that it reserved the right not to apply EU law against the German constitution if certain conditions were met.[14] However, the findings of the principle of the Federal Constitutional Court have never become a reality. Since the creation of the *reservation for the protection of fundamental rights* and the *ultra vires test*, the Federal Constitutional Court has never taken a position that would have applied the wording of Solange decisions to a concrete case or issue.[15]

However, over the decades, internal tensions have intensified as the EU has become a community of value. The potential conflict between EU law and national constitutions has seemingly become a political debate, becoming an increasingly used synonym for Euroscepticism. Meanwhile, the absolute primacy of EU law over national constitutions has become a doctrine. However, the risk of destabilisation is coded into a system based on an implicit integration of the absolute, no-exception primacy of EU law.[16]

However, in the midst of increasingly heated political debates, one of the most important legal problems of European integration remains, and we pay a serious price manifested in constitutional law due to the lack of political consensus. Certain parts of the relationship between the EU and the Member States must be determined by the national constitutional courts and the CJEU. Thus, a force field is created where originally neutral constitutional interpreters start to actively shape the integration process, supplementing the original functions of the continental (Kelsenian, centralised) system of constitutional justice. Owing to the unstable situation created by the Treaties, Member States' constitutional interpreters have been given a de facto new obligation: 'to make heads or tails' of the relationship between the EU legal order and the Member States' constitutional systems, of which they are the gatekeepers. If we approach this issue dogmatically, we could even say that in the continental, centralised model of constitutional justice, the functions of constitutional courts are complemented by a kind of 'integrational function'.[17] The relationship between national constitutional courts and the CJEU, and the primacy of EU law over the constitutions of the Member States, has been and still is sought to be maintained by the European Constitutional Dialogue, while the claim to define these relations simultaneously supports the need to protect constitutional identity.[18] Perhaps the real question, however, is whether EU law takes precedence over national constitutions.

In the scientific discourse of recent years, we have repeatedly encountered glimpses of a moment of *'open bread-breaking'*, when, due to the vagueness of the relationship between the two, these courts and these sources of law collided. On 5 May 2020 the German Federal Constitutional Court's decision[19] on the PSPP scheme seemed to have taken a step; however, the consequences were controversial. This

14 | Cf.: BVerfGE 37, 271 – Solange I., BVerfGE 73, 339 –Solange II.
15 | Vincze and Chronowski, 2018, pp. 197–218.
16 | Kelemen et al., 2020.
17 | The phenomenon is somewhat similar to the form of responsibility for *'Integrationsverantwortung'* described later, which was developed by German constitutional law.
18 | Cf.: Orbán, 2018.
19 | 2 BvR 859/15, paras. 1–237.

study had a limited purpose in examining GFCC decisions. However, its aim is to present the similarities that can be explored between the previous practices of the Hungarian Constitutional Court (HCC) and the GFCC's PSPP decision. In addition, these decisions outline a possible perspective for the problematic relationship between European judicial forums, which are not adequately regulated by the Treaties and where the CJEU seems to be seeking hegemony.

2.1. The Weiss II. (PSPP) Decision

This approach has a long tradition in German constitutional doctrine and was partly used by the GFCC in its controversial Weiss II, or PSPP, decision of 5 May 2020.[20] In this decision, the GFCC 'prohibited' the Federal President from signing a law that would have enacted the EU Council Decision on own resources into German law, paving the way for an economic rescue package to deal with the effects of COVID. In the PSPP decision, the GFCC, in the spirit of responsibility to integrate, essentially obliged the German public authorities, German government, and Bundestag to demand that the European Central Bank (ECB) carry out a comprehensive proportionality test when making its decisions and continuously monitor that it does not exceed its powers.

On 9 June 2021 the European Commission announced that it had started infringement proceedings against Germany[21] in response to the ruling by the GFCC on 5 May 2020 regarding the ECB Public Sector Purchase Programme (PSPP). According to the Commission, the judgment of the GFCC regarding ECB bond purchases violated the primacy and autonomy of EU law.[22] In December 2021, the procedure was closed. The European Commission said that it had received assurance from Berlin that the supremacy of EU law would be respected. According to the Commission's announcement

> The Commission considers it appropriate to close the infringement, for three reasons. First, in its reply to the letter of formal notice, Germany has provided very strong commitments. In particular, Germany has formally declared that it affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law. Second, Germany explicitly recognises the authority of the Court of Justice of the European Union, whose decisions are final and binding. It also considers that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the Court of Justice. Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal to avoid, in the future, a repetition of an 'ultra vires' finding, and take an active role in that regard.[23]

20 | Decision 2 BvR 859/15 of the German Federal Constitutional Court on 5 May 2020.
21 | INFR(2021)2114.
22 | Fabbrini, 2021.
23 | Cf.: Infringements package (December 2021) of the European Commission.

The case, therefore, appears to have been decided in favour of the CJEU, but it should be noted that the infringement proceedings involved two political bodies: the European Commission and the German government. However, what is special about the GFCC decisions?

In the Decision 2 BvR 859/15 (PSPP decision), the GFCC made a number of findings defining European integration and the EU legal order, which, however, can only be classified as 'anti-integration' provisions at a very sloppy and superficial first reading. The genesis of the GFCC's decision is not rotted in an anti-integration sentiment, but in the legal doctrine of *Integrationsverantwortung*[24] developed in German constitutional law, which literally refers to a form of 'integrational responsibility' of the German constitutional organs – in the current case the Federal Government, the Bundestag and the GFCC –, in other words their constitutional responsibility for the integration process (*Integrationsprogramm*[25]).

The responsibility of the German constitutional organs for the integration process is based on Article 23 (1) of the Fundamental Law of Germany–the integration clause of the Fundamental Law. According to the settled case law of the GFCC and the PSPP decision, the German constitutional organs, within their responsibility for the integration process, are obliged to take appropriate steps to implement and protect it.[26] However, the GFCC emphasised that the *Integrationsverantwortung* is not a unilateral instrument that obliges the constitutional organs of Germany to accept the decisions of EU institutions without restrictions. On the contrary, it can be interpreted as the implementation of the *Integrationsprogramm*, that is, the idea of integration enshrined in the Treaty on the Functioning of the European Union (TFEU), and as such, its masters are the Member States.[27] Consequently, it is the responsibility of the German constitutional organs to comply with and enforce the acts of the EU institutions insofar as they are in line with the idea of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of these EU institutions run counter to the '*idea of integration*', the responsibility of the German constitutional organs for the process of European integration requires them to take action against *ultra vires acts*, but at least to seek to mitigate their harmful effects.[28]

According to the GFCC, which also argued in the preliminary ruling procedure, the ECB's bond purchase program goes beyond the ECB's and the ESCB's powers, given that, in addition to its monetary policy implications for the Eurozone, it has economic policy consequences and long-term implications[29] that fall exclusively within the non-delegated powers of the Member States.[30] In its PSPP decision of 5 May 2020 the Federal Constitutional Court found, in its decision of 11 December 2018 in Preliminary ruling procedure C-493/17, that the CJEU stated that the ECB's decisions and the PSPP program complied with the requirements of EU law, in

24 | Tischendorf, 2016, pp. 7–9.
25 | Degenhart, 2019.
26 | 2 BvR 859/15, 116.
27 | 2 BvR 859/15, 53, 89, 105–109.
28 | 2 BvR 859/15, 89, 105–106, 107, 109, 116, 231.
29 | 2 BvR 859/15, 133, 136, 139, 159, 161–162.
30 | 2 BvR 859/15, 109, 120, 127, 136.

particular proportionality without examining the merits of the ECB's decisions in question or the long-term economic policy implications of the PSPP program.[31] According to the GFCC, the CJEU's review did not cover the real economic and long-term effects of the PSPP, and thus did not examine the merits of whether the ECB exceeded its monetary powers under primary law.[32]

According to the GFCC, the CJEU did not properly apply the proportionality test,[33] so proportionality, as laid down in the second sentence of Article 5 (1) and (4) TEU could not fulfil its function of protecting Member States' powers and preventing *ultra vires acts*, thus emptying the principle of delegation of power enshrined in the second sentence of Articles 5 (1) and 5 (4) TEU.[34] According to the decision, the fact that the CJEU did not properly assess the economic policy implications of the PSPP (or marginalised it or quasi-subordinated it to the monetary objectives of the Eurozone[35]) is an arbitrary interpretation of EU law[36] that allows the ECB to go beyond the powers conferred on it by the Treaties (monetary policy) and ultimately excludes its activities entirely from the possibility of judicial review.[37] This leads to a precedent-setting practice which would allow the EU institutions, in this case the ECB, to establish or extend their own powers (*Kompetenz-Kompetenz*[38]), which is contrary to integration efforts and the provisions of the Treaties.[39] Therefore, the GFCC does not consider itself as bound by the interpretation of the law contained in the CJEU's decision.[40] According to the Court, since the CJEU's decision was due to an insufficient examination of the principle of proportionality, and in view of the above consequences, it does not ensure proper judicial review of the ECB's decisions[41] and thus extends the powers of the EU institutions.

German constitutional organs, such as the Federal Government, the Bundesbank and the GFCC, have a constitutional obligation to protect the principle of democracy, which is protected by Articles 20 and 79 of the Fundamental Law of Germany (*Grundgesetz*). The second is the eternity clause, which is the main source of Germany's constitutional identity.[42] In the decision, the Federal Constitutional Court explains that the German people, due to their sovereignty, have the right to democratic self-determination, the principle of democracy, which is a fundamental constitutional factor that cannot be endangered by the integration process.[43] The system of division of competences is intended to ensure the preservation of the principle of democracy and sovereignty of the people, and thus democratic legitimacy, during the integration process. For the decisions of the EU institutions to have the requisite democratic

31 | 2 BvR 859/15, 2, 6, 81, 116, 119-120, 161–162.
32 | 2 BvR 859/15, 116–120, 133.
33 | 2 BvR 859/15, 116, 126–128.
34 | 2 BvR 859/15, 6b, 6c, 116, 119, 123–126.
35 | 2 BvR 859/15, 120-122, 161–163.
36 | 2 BvR 859/15, 112–113.
37 | 2 BvR 859/15, 156.
38 | 2 BvR 859/15, 102, 156.
39 | 2 BvR 859/15, 102, 105–106, 116.
40 | 2 BvR 859/15, 154, 163, 178.
41 | 2 BvR 859/15, 156, 111–113, 116–119.
42 | 2 BvR 859/15, 115, 230.
43 | 2 BvR 859/15, 100–101.

legitimacy, they must be traceable to the provisions of the Treaties and to the idea of the integration that creates them. The stability of the division of competences is intended to be ensured by the requirement of proportionality, and any failure to comply with it risks destabilising the division of competences within the EU.[44] According to the decision, the idea of integration does not infringe on the principles of popular sovereignty or democracy as long as the decisions of the EU institutions and bodies are not ultra vires; that is, they remain within the scope of the powers derived from the Treaties, which are intended to be ensured by one of the main principles of the EU, the delegation of powers, and the requirements (and guarantees) imposed on it.[45]

The decision states that if the CJEU's interpretation of the law does not respect the powers set out in Article 19 (1) TEU and goes beyond them[46], it violates the minimum requirement of democratic legitimacy of EU acts, and thus the decision in light of the above is not applicable in relation to Germany.[47] Therefore, the GFCC does not consider the judgment of the CJEU in the preliminary ruling procedure to be binding, given that its consequences are contrary to the basic idea of integration[48] and lead to a misuse of powers.

2.2. Decisions of the Hungarian Constitutional Court

2.2.1. Decision 143/2010. (VII. 14.) CC and Decision 22/2016. (XII. 5.) CC

Decision 143/2010. (VII. 14.) of the HCC was the first such ruling in Hungary that examined the constitutionality of Act CLXVIII of 2007 on the promulgation of the Treaty of Lisbon. The decision failed to address the protection of national sovereignty as part of EU integration; this issue was raised only in one of the concurring opinions.[49] In 2010, the HCC did not mark a constitutional direction regarding the relationship between the Hungarian legal system and European integration. However, according to their Decision 22/2016. (XII. 5.), the HCC took to consider the interpretation of Article 4 (2) TEU in light of the 'integration clause' of the FL (primarily Article E) and to answer the questions it left open in the Lisbon decision. Simultaneously, the HCC thwarted the concept of constitutional identity from becoming the centre of Hungarian constitutional theory.

The HCC argued, using a very strange and untranslatable terminology, that the 'self-identity' of Hungary is to be understood under the concept of constitutional identity, and the scope of this identity can only be considered on a case-by-case

44 | 2 BvR 859/15, 101, 158.
45 | 2 BvR 859/15, 142, 158.
46 | 2 BvR 859/15, 154–156.
47 | 2 BvR 859/15, 2, 154, 157–158.
48 | 2 BvR 859/15, 113, 116.
49 | László Trócsányi emphasised in his concurring opinion that when Member States have transferred some of their powers to EU organs, did not give away their statehood, sovereignty and the essence of their independence. The Member States retained the right of disposal to the fundamental principles of their constitution that are indispensable for maintaining statehood and constitutional identity. The state, by joining the integration, maintains state sovereignty without a separate declaration, as it is the basis of the constitutions of the Member States (and the Community legal order). Cf. László Trócsányi's concurring opinion.

basis, based on the *'whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the historical constitution – as required by Article R) (3)*[50] *of the Fundamental Law.'*[51] Simultaneously, the HCC regards constitutional identity as a bridge between Member States and European integration when it states that the protection of constitutional identity should be granted in the framework of informal cooperation with the CJEU– namely, constitutional dialogue – based on the principles of equality and collegiality.[52]

With reference to the German Solange decisions[53], the HCC declared that it must act with regard to the possible application of European law to protect fundamental rights. However, the HCC also noted, as a last resort, that *'it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights.'*[54] With regard to *ultra vires acts,* the HCC emphasised the fact that the 'Integration clause' of the FL allows for the application of the EU legal acts in Hungary but also means the limitation of any joint exercise of competences.[55] In accordance with the above, based on Article E) (2) FL and Article 4 (2) TEU, as a constraint on the joint exercise of powers within European integration, the HCC established the 'sovereignty control' and 'identity control' tests based on an influence from the GFCC's past cases (elaborated for the protection of Hungarian constitutional identity).[56] In this context, the HCC essentially declared and strengthened consensus on constitutional identity in Hungarian academic literature, stating that the HCC is the supreme guardian of the protection of constitutional self-identity.[57] However, following this declaration of principle, the HCC noted that *'the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.'*[58]

Although the HCC has laid out the results of a broad-ranging comparative overview of different constitutional jurisdictions in Europe to justify its decision, its position was most significantly influenced by the judgments of the GFCC. The HCC was criticised for having too many references to the practice of European constitutional (and supreme) courts (in the name of the constitutional dialogue), and despite the declarations of theoretical significance in the decision, the relationship between Hungarian national law and the legal order of the EU was not exactly determined.[59] As far as European judicial dialogue is concerned (not as a

50 | According to Article R (3) of the Fundamental Law: '*The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution*'.
51 | Decision 22/2016. (XII. 5.) CC [64].
52 | Decision 22/2016. (XII. 5.) CC [63].
53 | For more detail see: Solange I. and II.
54 | Decision 22/2016. (XII. 5.) CC [49].
55 | Decision 22/2016. (XII. 5.) CC [53].
56 | Decision 22/2016. (XII. 5.) CC [54].
57 | Decision 22/2016. (XII. 5.) CC [55].
58 | Decision 22/2016. (XII. 5.) CC [56].
59 | Chronowski and Vincze, 2018, p. 96.

criticism but rather as an opportunity for constitutional courts), the applicability of the preliminary reference procedure has been mentioned by scholars as a future possibility on the issue which was set aside by the jurisprudence of the HCC.[60] (It should be noted that HCC is not precluded from initiating referrals to the CJEU, as the authentic interpreter of the EU law, on this issue[61] with reference to the identity test. The HCC made an abstract interpretation of Article E of the FL and did not decide on the concrete conflict between EU law and national law in the decision.)

2.2.2. Decision 2/2019. (III. 5.) CC

Unlike the 'Identity decision', in Decision 2/2019. (III. 5.), the HCC approached the relationship between the European legal order and the national constitution not through constitutional identity, but specifically through the integration clause of the FL. It was concluded that the HCC's authentic (*erga omnes*) interpretation of the FL should be respected by all other organs (national and European).[62] The case was relevant to the awarding of refugee status, and the HCC held that the Hungarian State is not constitutionally obliged to award such status to all applicants. Based on the petition submitted by the Government, the HCC had to answer three questions for which it had to interpret Articles R) (1), E), 24 (1), and XIV (4) of the FL.[63]

Based on the petition, the particular constitutional problem addressed in the case was the relationship between the FL and the legal order of the EU, more specifically, the HCC's monopoly over interpreting the FL. The background of the case was the formal notice sent by the European Commission regarding compliance with the EU law of Act VI of 2018 on amending certain acts relating to measures to combat illegal immigration and the Seventh Amendment[64] of the FL. According to the Commission's interpretation, the amended Article XIV of the FL on asylum violated certain Articles of Directive 2011/95/EU of the European Parliament and of the Council on 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. According to the petitioner, in the context of this interpretation of the FL, a particular constitutional issue has been raised regarding the relationship between the interpretation of the FL by an organ of the EU and the authentic interpretation provided by the HCC.[65]

The HCC pointed out that according to Article R) (1) of the FL, the FL shall be the foundation of Hungary's legal system, and Article E) thereof contains the constitutional basis upon which Hungary participates, as a Member State, in the EU, which also serves as a constant basis for the enforcement of the Union's law as internal

60 | Chronowski and Vincze, 2018, p. 122.
61 | Chronowski and Vincze, 2018, p. 109.
62 | The English version of the decision is available in the following link: https://web.archive.org/web/20220119154617/https://hunconcourt.hu/uploads/sites/3/2019/03/2_2019_en_final.pdf (Accessed: 28 September 2023).
63 | Cf.: 2/2019. (III. 5.) CC [7].
64 | The Seventh Amendment of the FL was adopted on 20 June 2018.
65 | Cf.: 2/2019. (III. 5.) CC [2].

law, as well as for direct applicability.[66] In its decision, the HCC recalled that Article E) (1) of the FL specifies participation in the development of European unity as an aim of the State. The HCC noted regarding the so-called ‘Lisbon decision’[67] (cf. above), that this participation is not self-serving as it should serve the purpose of expanding human rights, prosperity and security.[68] The HCC indicated that Hungary participates in the EU as a Member State in the interest of developing European unity, for the purpose of expanding the freedom, prosperity and security of European nations.[69] (The rules contained in Article E) and the interpretation of the HCC therefore are consistent with the terminology of ‘*Integrationsprogramm*’ used in German constitutional law, as presented above.[70])

This decision of the HCC highlighted that EU law as internal law does not fit into the hierarchy of the domestic sources of law specified by the FL under Article T): it is a set of laws to be applied mandatorily on the basis of the constitutional order incorporated in the FL, and the HCC has no competence to annul EU law.[71] (The HCC may only apply such legal consequences under Article 24 of the FL to the legal regulations listed in Article T) (2), while EU law provides for generally binding rules of conduct based on Article E) (3).)[72] According to the HCC, therefore, the Court’s lack of competence to annul EU law results from the fact that Union law is not part of the system of the sources of law according to Article T) and there is a separate constitutional provision that makes Union law, as a mandatorily applicable law, part of the legal system.[73]

The HCC pointed out that the transfer of competences based on Article E) (2) of the FL is based on the Founding Treaties as international treaties signed by the Member States, the ratification of which requires a majority required for the adoption of a constitution under Article E) (4).[74] In the opinion of the HCC, the requirement of a majority for the adoption of a constitution specified in Article E) (4) results in the obligation of a cooperative interpretation of the law, and the Union law shall enjoy primacy of application in contrast to the internal law created by the domestic legislator. The HCC cited the jurisprudence of the GFCC, stating that *‘the uniform enforcement of the European law in the Member States is of central importance concerning the success of the European Union’*[75] and the legal community of the *28 members* could not survive without the uniform enforcement and effect of European law in the Member States.[76]

66 | 2/2019. (III. 5.) CC [14].
67 | 143/2010. (VII. 14.) CC.
68 | 2/2019. (III. 5.) CC [15].
69 | 2/2019. (III. 5.) CC [15].
70 | 2 BvR 859/15, 116.
71 | 2/2019. (III. 5.) CC [20].
72 | Hamuľák, Sulyok and Kiss, 2019, pp. 130–150, 133–137.
73 | 2/2019. (III. 5.) CC [20].
74 | 2/2019. (III. 5.) CC [21].
75 | Cf.: BVerfGE 73, 339, 368.
76 | Cf.: BVerfGE – 2 Bvr 2735/14, 37.

The HCC stated, in accordance with the *'principle of maintained sovereignty'*[77], that EU membership shall mean the joint exercise of competences in an international community rather than a surrender of sovereignty.[78] Moreover, in the decision, the HCC explained that FL allows the joint exercise of competences through the constitutional self-restraint of Hungary's sovereignty. As a consequence, the limitations set by the FL shall also be respected in the case of the jointly exercised competences, in particular the protection of fundamental rights, which is 'the primary obligation of the State' under Article I (1) of the FL as well as the inalienable elements of sovereignty in accordance with the last sentence of Article E) (2).[79] The reasoning of the HCC is essentially in line with the PSPP decision on 5 May 2020 in which the GFCC stated that the German people, by virtue of their sovereignty, have the right to democratic self-determination to enforce the principle of democracy, which is a fundamental constitutional factor that cannot be jeopardised by the integration process (cf. above).

HCC, similar to the PSPP decision, stated in Decision 2/2019. (III. 5.) that in view of the CJEU, the Union law is defined as an independent and autonomous legal order.[80] However, the HCC continues – the EU is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation, concluding international treaties in its own name, and the core basis of this community is the international treaties concluded by the Member States.[81]

At this point, Decision 2/2019. (III. 5.) CC can again be parallel to the PSPP decision. One of the basic arguments of the PSPP decision is the concept of *Integrationsverantwortung* developed in German constitutional law, which can be interpreted as the special constitutional responsibility of the German constitutional institutions for the integration process. The responsibility of the constitutional organs for the integration process is based on Article 23 (1) of the GG–that is, their integration clause. According to the settled case law of the GFCC, German constitutional institutions are obliged to take appropriate steps to implement and protect the integration process (i.e. integration).[82] However, the GFCC emphasised that the *Integrationsverantwortung* is not a unilateral instrument which obliges constitutional institutions to adopt the decisions of the EU institutions in an unlimited manner. By contrast, it can be interpreted as an implementation of the idea of integration enshrined in the TFEU, and as such, its masters are the Member States[83]. Consequently, it is the responsibility of the German constitutional institutions to comply with and enforce the provisions of the EU organs insofar as they are in line with the spirit of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of the EU institutions run counter to the 'idea of integration', the responsibility of the German constitutional institutions for EU integration

77 | 22/2016. (XII. 5.) CC [60].
78 | 2/2019. (III. 5.) CC [23].
79 | Cf.: 22/2016. (XII. 5.) CC [97].
80 | 2/2019. (III. 5.) CC [24].
81 | 22/2016. (XII. 5.) CC [32].
82 | 2 BvR 859/15, 116.
83 | 2 BvR 859/15, 53, 89, 105–109.

requires them to take action against *ultra vires* acts, but at least to seek to mitigate their harmful effects.[84]

According to the HCC, the laws and the FL should be interpreted in a manner that complies with the EU law. The view of the HCC was based on the presumption that both the Union law and the national legal system based on the FL aimed to carry out the objectives specified in Article E) (1) of the FL. [85] In essence, the starting point of the HCC again corresponds to what was written in the subsequent PSPP decision, in which it is stated that the failure to respect Article 19 (1) TEU violates the minimum requirement of democratic legitimacy for EU acts[86] and constitutional identity.[87] Consequently, if the CJEU is required to respect the constitutional identity of the Member States that arise from the constitution, it must necessarily interpret the constitution of the Member States. Conversely, when the GFCC found that the CJEU had decided *ultra vires*, it interpreted the TEU. Based on the reasoning above, in its answer to the petitioner's second question, the HCC stated that according to Article 24 (1) of the FL, the HCC is the authentic interpreter of the FL, and its interpretation shall not be derogated by any interpretation provided by other organs and shall be respected by everyone. It was also stated that, despite the above, in the course of interpreting the FL, the HCC shall consider the obligations binding on Hungary based on its membership in the EU and under international treaties.[88]

2.2.3. Decision 32/2021 (XII. 20.) CC

Finally, Decision 32/2021 (XII. 20.) CC should be mentioned[89], in which the HCC examined the impact of migration. The Hungarian Minister of Justice submitted a petition to the HCC seeking an interpretation of Articles E (2) and XIV (4) of the Hungarian Fundamental Law (HFL) because the implementation of the judgment of the CJEU delivered on 17 December 2020 in Case C-808/18 raises a constitutional problem that requires an interpretation of the Fundamental Law. The HCC, interpreting the Europe Clause of the Fundamental Law, stated that where the exercise of joint competences with the EU is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU until the institutions of the EU take the measures necessary to ensure the effective enforcement of the joint exercise of competences.

The HCC also stated that where the incomplete effectiveness of the joint exercise of competences leads to consequences that raise the issue of violation of the right to identity of persons living in the territory of Hungary, the Hungarian State shall be obliged to ensure the protection of this right within the framework of its obligation of institutional protection. Finally, the HCC stated

84 | 2 BvR 859/15, 89, 105–106, 107, 109, 116, 231.
85 | 2/2019. (III. 5.) CC [36].
86 | 2 BvR 859/15, 2, 154, 157–158.
87 | 2 BvR 859/15, 1, 33–42.
88 | 2/2019. (III. 5.) CC [37].
89 | For an analysis of the decision, see also: Blutman, 2022.

that protecting Hungary's inalienable right to determine its territorial unity, population, form of government, and state structure shall be part of its constitutional identity.

However, in its decision, the HCC could not assess whether the incomplete effectiveness of the joint exercise of competences was released in the specific case. The HCC could not take a position on whether the petitioner's argument that, as a consequence of the CJEU judgment, the foreign population may become a part of Hungary's population is correct. According to the HCC, this is a matter to be judged by the body applying the law, and not by the HCC. Simultaneously, the court emphasised that the abstract interpretation of the HFL cannot be aimed at reviewing the judgment of the CJEU, nor does the HCC's procedure in the present case, due to its nature, including the examination of the primacy of EU law.

In view of the above, a detailed analysis of the decision is not included in the scope of the present study.[90]

3. Summary

Both the PSPP decision of the GFCC and the relevant practice of the HCC are trending; one thing needs to be stated: both bodies made their decisions in the context of their assumed constitutional responsibility for European integration, in light of the founding treaties and the process of integration.

While each of these decisions is individually significant, there is another emerging trend that seems positive: one can point to the existence of a form of responsibility of the Member States' constitutional courts for the European integration process. The undefined nature of the relationship between EU law and national constitutions (resulting from the supranational nature of the integration) forced European national constitutional courts to assume a role that could also be seen as a functional change in terms of the entirety of the European constitutional judiciary. The role of European constitutional justice seems to be complemented by a kind of 'integrational' function: the European national constitutional courts must no longer only defend their national constitutions but must do so while considering the proper advancement of the integration process. They must do so in a way that respects the right of the CJEU to an authentic interpretation of the Treaties, taking into account that the CJEU, as an institution of the EU, is not entitled to make decisions *ultra vires* against the framework set by the treaties. Just as we distinguish between substantive law and constitutional law rules in national law, we can distinguish between the 'ordinary provisions' of the European legal order and the fundamental provisions arising from supranationalism by analogy. The primacy of EU law is beyond dispute and is safeguarded by the CJEU. However, the

90 | The official translation of the decision is available at: https://web.archive.org/web/20230609182914/https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2021/12/32_2021_ab_eng.pdf (Accessed: 28 September 2023).

CJEU and the EU institutions are not federal bodies above the Member States but are much more like the Member States themselves, subordinated to the consensual frames of the Founding Treaties in the integration process. European national constitutional courts can collectively build a bridge to establish a balance between national legal systems and supranational structures of the EU. Thus, the European system of constitutional justice seems to play a key role in the constitutional matrix of responsibility for the integration process.

However, the decision of the GFCC has raised serious concerns across Europe and the German state (or more precisely, the German government!) guaranteed the EU that the GFCC would not follow this path.[91] In addition, the aforementioned highlights a trend in the practice of the European Constitutional Courts that is not necessarily in line with the evolving practice of the CJEU. Just to give one example: In Joined Cases of C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 the CJEU has made a decision which partly provided for the admissibility of decisions of national constitutional courts. According to this decision,

> Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.

The decision states as well that

> the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

The CJEU's approach places the national constitutional courts in a hierarchical system in which the ordinary courts of the Member States (including the higher courts of the Member States), the national constitutional courts, and the CJEU are organised in a single hierarchical order, with the CJEU at the top. By contrast, the national constitutional courts, based on national constitutions and Founding Treaties, seek to establish a system of relations between European courts which respects the sovereignty of the Member States and is based on the competences of the EU and the Member States. This is in accordance with the requirement of

91 | Riedl, 2021.

legal certainty (and therefore the rule of law), whose approach has the keywords of dialogue and collegiality while building the European constitutional space by maintaining a delicate balance between the ever closer union clause and the narrative of unity in diversity.

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EFFECTIVENESS OF TAX DISPUTE RESOLUTION MECHANISMS – THE IMPACT OF THE EUROPEAN LEGAL FRAMEWORK ON NATIONAL JURISDICTION

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ABSTRACT

The search for a more effective resolution of cross-border tax disputes provokes the general question of the effectiveness of tax dispute resolution mechanisms. In recent years or even decades, a cross-border tax dispute settlement within the European Union (EU) internal market has engendered several issues and perspectives. With an overview of the Croatian tax dispute environment, there is a short analysis of alternative dispute resolution mechanisms with a basic description and a short practical evaluation. The tax dispute environment in Croatia shows that a vast majority of tax disputes therein originate from audits. This paper provides an outline of the principal issues arising from the Europeanisation of tax disputes and probably national tax procedural rules. The landscape for tax dispute resolution is changing dramatically at the EU level. Pre-litigation tax instruments and settlements have become extremely important and developed. Tax dispute judicial settlements still have a lot of relevance and are seen as a possible object of such efforts to move towards the creation of European fundamental principles and rights for taxpayers in that area. This paper aims to analyse the effectiveness of alternative dispute resolution mechanisms in the context of tax disputes in Croatia. By examining the tax dispute environment and evaluating various mechanisms, we can gain insights into the challenges and potential solutions for resolving these disputes.

KEYWORDS

tax dispute
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1. Introduction

The last few decades have revealed that attention has shifted away from the negative taxation phenomenon. This is to say that the focus is not on the issue of tax evasion and abuse of different national tax laws of the Member States and intensive activities at the European and international levels that combat such harmful practices. Fiscal jurisdiction and tax sovereignty remained in the exclusive competence of the Member States, but notwithstanding this fact, such sovereignty was, and still is, nevertheless limited, at least by the fundamental freedoms of the European Union (EU). In addition, the EU has repeatedly tried to introduce some form of common European tax, and this attempt has lasted to this day.[2]

Noticing the differentiation between direct and indirect taxes, it can be easily determined that the development of the latter was the first on the harmonisation agenda. On the one hand, the harmonisation of value added tax has been done fairly well and comprehensively. On the other hand, the harmonisation of direct taxes was delayed due to questions about EU competence. However, the active role of the Court of Justice of the EU (CJEU) has resolved this dilemma by interpreting that it has jurisdiction to interpret direct taxes. Positive and negative integration are traditionally seen as vehicles of Europeanisation in the field of taxation.[3] Positive integration refers to the harmonisation of rules at the EU level through tax measures based on proposals for EU action, as well as by measures resulting from the EU harmonisation policy.[4] Such integration encourages the elimination of tax obstacles for the functioning of the internal market. This integration is 'from above' and ever more influences the objectives of national tax policies.[5] However, the negative integration of tax legislation is mostly used for the case law of the CJEU (hereinafter: CJEU or Court)[6] on the incompatibility of national tax measures with EU fundamental freedoms and European rules.[7] It is important to note that this integration has changed the national tax rules concerning direct taxes the most. Mention should be made for the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[8], in whose legal tradition the Court of Justice develops basic EU principles for the functioning of the internal market, such as principles for the protection of the fundamental

2 | Examples are 1992 CO2/Energy Tax proposal, see more: Klok, 2005; Hentze, 2019; Lips, 2020, pp. 975–990.
3 | Augenstein, 2012, pp. 99–112.
4 | Helminem, 2018. Lang et. al., 2010.
5 | Blauberger, 2008.
6 | Preliminary ruling proceedings – recommendations to national courts [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14552 (Accessed: 24 September 2023). The Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/jcms/j_6/en/ (Accessed: 24 September 2023).
7 | Wattel, Marres and Vermeulen, 2018, p. 4.
8 | European Convention for the Protection of Human Rights and Fundamental Freedoms [Online]. Available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention_ENG.pdf (Accessed: 24 September 2023).

freedoms of the EU. The CJEU must also consider the constitutional acts of the EU Member States when deciding on such integration, as well as the principles contained in the ECHR, such as the principle of *lex certa*, the principle of mutual and equal hearing of parties, the principle of the right to defence and 'equality of arms in competition (fine) cases', the principles of respect for family life in cases of freedom of movement.[9] To create a 'single' internal market out of 'diverse' national markets, a common market, the EU Treaties pursue a dual strategy: negative and positive integration.[10]

This paper shows the way positive and negative integration in the field of tax dispute settlement procedures and mechanisms have taken place and are reflected in the national tax legislation of Member States. This is reflected in some amendments to Croatian national tax legislation, especially procedural legislation.

In recent decades, an increasing number of people have been talking about the difficulties and problems that arise during the implementation of the tax procedure. Such difficulties and problems most often appear in the form of a lengthy procedure, as well as increased costs of conducting the procedure and the impossibility of collecting claims from the competent tax authorities. After trying to identify the causes of such difficulties and problems, the search for possible solutions was started, which would constitute a quality answer to the existing open questions. The simplest way to initiate such complex research would be to analyse models for improving the efficiency and increasing the economy of the procedures of other branches of law, especially those belonging to private law. In this case, an analysis of civil law dispute resolution mechanisms was undertaken and, in particular, an analysis of alternative mechanisms used by traders in the domain of commercial law.

The possibility of administrative and judicial supervision of tax authorities' decisions is generally guaranteed. However, this administrative and judicial inquiry should not be reduced to a mere evaluation of the legality of the decisions made but should also focus on the verification and adherence to constitutional and conventional rights. Equally, the provision concerning the right to a fair trial (Art. 6, para. 1) from the ECHR is applicable and should be observed in administrative and judicial proceedings. From Croatian legal practice, it is to be mentioned that the right to a fair trial within a reasonable time is frequently violated.

The opportunity to prevent the occurrence of tax disputes is often considered in discussions on the mechanisms that would resolve tax disputes. Abandoning the old or traditional paradigm of the relationship between taxpayers and tax authorities, a considerable place is left for the development of other principles such as reciprocity, fair play, and protection of taxpayers' rights.[11] Such a change in the activities of the tax authorities follows logically after the prediction of new tax instruments which seek to enable the revitalisation of a whole new legal concept, which implies increased bona fide cooperation between tax authorities and taxpayers and includes the active role of taxpayers in that cooperation. In

9 | Flattery, 2010, pp. 53–81.
10 | Pistone, 2020.
11 | Žunić, 2017, pp. 78–91; Gadžo, 2017, pp. 177–189.

a moment where disputes between tax authorities and taxpayers have already arisen, it is necessary to focus on all the mechanisms that have the aim and purpose of speeding up the finding of solutions, reducing costs, and increasing efficiency. Therefore, at this stage, for the aforementioned reasons, they try to detect and use all those mechanisms that would often bypass long, expensive administrative and court proceedings. In this context, the so-called alternative mechanisms or ways of resolving disputes (alternative dispute resolution—ADR) are becoming current. This way of resolving disputed tax issues emphasises the will of both parties to solve their dispute in this alternative way.[12] Therefore, it is generally a matter of voluntary consensus between both parties—the taxpayer and the tax authority. Notably, ADR can also be defined as 'a kind of umbrella term for all out-of-court forms of dispute resolution in which an independent person helps the parties to the dispute to resolve controversial issues'. There are several mechanisms that are systematised, such as international and national law, judicial and non-judicial, voluntary and mandatory, and so on.[13] Those in national law are differentiated into those in a narrower sense as traditional forms or mechanisms: early neutral evaluation, mediation, and conciliation, and those in a broader sense that include 'special tax-legal institutes'.[14] This emphasises that alternative concepts of resolving tax disputes are in the framework of a new tax law, implemented from the common law countries and tradition.[15] It should also be noted that this idea was developed based on the model of civil law instruments and mechanisms, which by their nature are extrajudicial but give the parties in a dispute the opportunity to find a mutually acceptable solution. Given the civil law basis of this concept, terms such as 'civilising tax procedure' can be found in the literature.[16]

The present paper will emphasise two phases in finding solutions for avoiding disputed tax situations. Thus, the causes are still considered, and the phase of avoiding the occurrence of disputes will be studied using the Croatian and comparative positive legal framework. Special review will be given regarding two important tools: advance rulings and the granting of a special status to taxpayers. Thereafter, alternative ways of resolving tax disputes will be analysed, and along with the analysis of civil law and tax law models, special emphasis will be placed on tax arbitration and the arbitrability of tax disputes. Finally, the influences of European legislation on the creation of national tax rules for resolving tax disputes in an alternative way will be presented.

12 | Žunić, 2016, pp. 279–295.
13 | Knudsen, 2011, pp. 350–358.
14 | Rogić, Lugarić and Yasin, 2016, p. 28.
15 | Rogić, Lugarić and Čičin-Šain, 2014, p. 349.
16 | Lederman, 1996, pp. 183–245.

2. Influence of positive and negative integration on national tax law and on tax dispute resolution mechanisms

With the introduction of common customs rules, it can be said that the era of enhanced positive integration when it comes to indirect taxation was initiated. Limited positive integration occurs in the direct taxation field, more precisely, when it comes to corporate taxation with Parent Subsidiary Directive (hereinafter: PSD),[17] Mergers Directive (hereinafter: MD),[18] Interest and Royalties Directive (hereinafter: IRD),[19] Arbitration Convention,[20] but pending positive integration of direct taxation includes DAC amendments, cross-border administrative cooperation, and anti-abuse legislation with anti-tax avoidance legislation. Positive integration has continued in the recent period with the adoption of the Anti-Tax Avoidance Directive (hereinafter: ATAD),[21] which directly affects the functioning of the internal market. Notably, ATAD confirms the European commitment to implementing policies that could prevent the fragmentation of the internal market and preserve fair competition.[22] Therefore, ATAD laid down rules for combating tax avoidance practices. ATAD introduced four Specific Anti-Tax Avoidance Rules (SAARs) and one General Anti-Tax Avoidance Rule (GAAR).[23] Thus, the EU expanded the range of possible responses to tax evasion phenomena in relation to the BEPS Action Plan.[24] With regard to direct taxation, this Directive aims to fill legal gaps that arise or, rather, are abused in business that transcends the borders of a Member State, thus seeking to preserve the integrity of the internal market by preventing the abuse of rights and benefits granted by the provisions of European law.

Negative integration is another important factor that affects the conversion of EU tax law into domestic tax law. This is mostly the case law of the CJEU on the incompatibility of national tax measures with EU fundamental freedoms.[25] The

17 | Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, *Official Journal L 225, 20/08/1990, pp. 6–9*.
18 | Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, pp. 34–46.
19 | Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, 26.6.2003, pp. 49–54.
20 | Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC.
21 | Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, pp. 1–14.
22 | Soom, 2020, pp. 273–285.
23 | Gadžo and Klemenčić, 2014, pp. 277–302.
24 | OECD, 2013.
25 | Pistone, 2018b.

CJEU's activities were primarily focused on determining its jurisdiction and the EU's jurisdiction in tax matters. The CJEU 'assesses' European law regularly in the preliminary proceedings in relation to the disputed issue in a specific case. Depending on the circumstances of the case, the CJEU's given opinion may differ from one case to another. However, to resolve any disputed tax issue, it can be concluded from the case law that the Court adheres consistently to the mechanisms and methods for resolving them, as well as that these mechanisms and methods originally belong to international tax law.[26] In the Damseaux[27] and Block cases,[28] for example, the CJEU takes the position that it leaves the prevention of double taxation, although this is the biggest obstacle to freedom of movement to the Member States.[29] Furthermore, in the CIBA case,[30] the Court explicitly accepted the principle of worldwide taxation of the country of residence. In the SGI case,[31] the Court concluded that the source principle should be applied, according to which the source state has the right to tax only the income derived from its territory, meaning defining the limits of fiscal jurisdiction. In the Hilten-van der Heijden case, the Court accepts nationality taxation regardless of source or residence,[32] while in the Lidl Belgium case,[33] it agrees to take territoriality of taxation, meaning that the taxpayer's home country also applies the source principle to its residents. Although the CJEU has explicitly accepted the fact in Damseaux and Block[34] that the parallel exercise of tax jurisdiction by two states can lead to double taxation, which is in no way compatible with freedom of movement, the Court is quite reluctant to accept the fact that the exercise of tax jurisdiction by two states may result in a double non-deduction of fees or losses.

Evidently, there are limitations to the CJEU's jurisdiction and instruments in resolving tax issues. Even though the Court appears to be making efforts to eliminate double taxation for taxpayers operating across borders within the EU, the CJEU appears to be slower to realise that it has no legal instruments and jurisdiction for such efforts, just as it neither does nor does not have the instruments and competencies to consider all these taxpayer benefits and losses, such as the personal and family circumstances of individuals, and to have the said benefits and losses paid taken into account somewhere in the internal market for tax purposes.

2.1. A gradual integration process on the tax procedural law and tax dispute issues

In addition to the above-mentioned, we should look at the ECHR's influence in resolving controversial tax issues. The ECHR, as an international document dating back to the middle of the last century, lays down its principles that have become

26 | Pistone, 2009, pp. 1–23.
27 | Case C 128/08.
28 | Case C 67/08.
29 | Cerioni, 2009, pp. 542–556.
30 | Case C 96/08. See more, Wattel, 2017, pp. 319–349.
31 | Case C 311/08, See, Jonsson, 2011.
32 | van den Broek and Wildeboer, 2007.
33 | Leclercq and Trédaniel, 2009.
34 | Cerioni, 2009, pp. 542–556.

part of the legal tradition through the principle of general acceptance of the document and the case law of the European Court of Human Rights (hereinafter: ECtHR).[35] Consequently, it should be emphasised that such a legal tradition of the EU Member States also appears as a basis for the interpretation of European law.

However, the formal recognition of human rights enshrined by the ECHR was by EU Member States at the Nice Summit in 2000, proclaiming the EU Charter of Fundamental Rights (hereinafter: Charter).[36] The 2009 Lisbon Treaty equates the Charter of Fundamental Rights of the European Union with the Treaty on the Functioning of the European Union Art. 6 (1) (hereinafter: TFEU)[37] with the founding treaties, making it explicitly part of EU primary law.[38] Therefore, the CJEU, in resolving preliminary issues at the request of the national courts of the EU Member States or interpreting EU law, is obliged to ensure the protection of the fundamental principles of human rights contained in the ECHR.

The enormous influence of the ECHR in resolving tax issues is discussed in the tax community and academia, providing more context and examples of the case law of the ECtHR. In that context, it may be relevant to the CJEU with regard to the interpretation of ECHR principles.[39] Recent ECtHR cases raised the issue of the possible spread of established legal principles to legal instruments provided as an answer by the EU to the BEPS Action Plan. [40] Considering the Sopropé case, the CJEU discussed whether a Portuguese company had been given sufficient time by the Portuguese Customs Administration to be heard on a certain fact during the tax procedure as an administrative proceeding. This case concerned the principle of right to defence[41] and the implementation of the *audi alteram partem* principle as obligatory for the tax administration. This principle is confirmed as a part of the general frameworks of EU law that protect the right to defence under the provisions of the Charter.[42] One more case that is important and interesting in this context is the famous Ferrazzini case[43] concerning the right to an effective remedy and the right to a fair trial. In this case, the ECtHR ruled on the application of Art. 6 of the ECHR on the requirement of a fair hearing, laid down in Art. 47 of the Charter. This case is important because it abolishes the absolute ban on the application of Art. 6 of the ECHR in tax disputes, both in those relating to fundamental freedoms and in those relating to EU secondary law. More significantly, the CJEU

35 | Kofler, Maduro and Pistone, 2011.
36 | Charter of Fundamental Rights of the European Union (2012) *OJ C 326, pp. 391–407.*
37 | Consolidated version of the Treaty on the Functioning of the European Union, (2012) OJ C 326, pp. 47–390.
38 | Para. 2 of the same article stipulates that the EU will be present regarding the accession of new member states; that is, that upon accession of new member states to the EU it will request the signing and ratification of the ECHR if it has not already done so. Para. 3 of that article clearly stipulates that the principles of the ECHR constitute a de facto tradition of the EU Member States and that they are therefore general principles of EU law.
39 | Pistone, 2018a, pp. 91–94.
40 | Attard, 2020, pp. 137–140.
41 | Case C-349/07, Soprope, EU:C:2008:746.
42 | Art. 47 of the Charter.
43 | EctHR, more to see in Baker, 2001, pp. 205–211; Endresen, 2017, p. 508.

has thus become competent in deciding on the fairness of national tax proceedings in which taxpayers rely on the rule of European law.[44]

A new European rule on tax dispute resolution mechanisms has been in effect since 2019 as a result of BEPS and EU policy. Notably, BEPS is mostly about a stronger fight against aggressive tax planning and international tax avoidance with stronger international tax coordination, bringing more complexity to international taxation. But, these all engender more disputes, making cross-border tax dispute settlement more important than ever with BEPS 14. Although settling tax disputes at the international level is a qualitatively better option than doing that in every single jurisdiction, there are many dilemmas: settling tax disputes or preventing them, how much can we rely on the mutual agreement procedure (MAP) and should we rely on settling tax disputes through tax or no-tax dispute settlement instruments?[45] They are laid down in the Directive on Tax Dispute Resolution Mechanisms (hereinafter: TDRD),[46] which brings significant improvements to resolving tax disputes. These rules ensure that taxpayers will resolve disputes related to the interpretation and application of tax provisions more promptly and effectively. There is, in this Directive, an explicit acknowledgement of taxpayer rights, such as the right to a fair trial or the right to conduct business.[47] The new rules cover issues related to double taxation, which occurs when two or more countries claim the right to tax the same income or profit. This can happen, for example, due to a mismatch in national rules or different interpretations of the transfer pricing rules in a bilateral tax treaty.[48] TDRD enhances legal certainty when it comes to seeking a solution in cross-border tax disputes, especially as a wide range of cases is covered, and Member States have to comply with clear deadlines to agree on a binding solution for taxpayers' timely decisions. Accordingly, TDRD prescribes the MAP as an administrative procedure between the competent authorities of Member States involved in a tax dispute.[49] In the MAP, the competent authorities try to resolve the dispute. The time limit of the Directive for MAP is two years, or three years if this is extended on a justified request by a competent authority. In case the dispute is not resolved with a MAP between competent authorities, then the taxpayer can request to set up an advisory commission comprising the competent authorities of the Member States in dispute and three independent persons.[50] The competent authorities in the aforementioned Advisory Commission have to agree on rules of functioning

44 | Pistone, 2018a, p. 93.
45 | Pistone, 30 April 2021, Rijeka Tax Law Day Conference.
46 | Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, *OJ L 265, 14.10.2017.*
47 | Perrou, 2019, p. 715.
48 | It is worth mentioning that there are currently around 900 double taxation disputes in the EU and they are estimated to be worth €10.5 billion; see more Wiséen, 2019.
49 | Nobrega and Silva, 2009, pp. 529–544.
50 | These persons are drawn from a purpose-compiled list to which they get nominated by Member States in accordance with the Directive.

that provide details on the procedure.[51] In case the rules of functioning are not notified to the taxpayer or are notified incompletely, the members shall use the standard.[52] Once set up, this advisory body has to deliver its opinion within six months. After the advisory commission delivers its opinion, the opinion is notified to the competent authorities. Accordingly, the competent authorities of the Member States concerned make a final decision. If they do not manage to agree on a final decision and on time, the opinion becomes binding on the competent authorities. Details of the decisions will be published online.[53]

The EU Tax Dispute Settlement Directive goes beyond mere implementation of BEPS 14 in the EU as EU secondary law brings CJEU jurisdiction. There is protection of the rights of the affected persons under EU law from MAP throughout tax arbitration and an idea of prevention before settlement through mediation. Notably, it has a visible impact on non-EU law cross-border tax dispute settlement instruments, as it is the EU Arbitration Convention with tax treaty dispute settlement procedures. [54] Still, there are open issues about the involvement of taxpayers in cross-border tax dispute settlement: Is there a sufficient degree of transparency in mutual agreement procedures? Additionally, we can present the issue of discretionary powers within the framework of the mutual agreement procedures and comply with the rule of law. All these issues and questions underline the principles of equivalence and effectiveness in tax dispute resolution mechanisms.

2.1.1. Gradual Europeanisation of tax disputes preventing and resolution rules

Since 2015, it has been possible to determine a sort of a slow moving from the traditional paradigm of tax law attitude towards the so-called cooperative compliance model.[55] Croatian tax law has recently introduced some new instruments, including advance rulings, advance pricing agreements, procedure of granting special status to taxpayers, and so on.[56] Although many criticisms still remain on the practice of the application of such instruments, there is a place to say that this is a way of Europeanisation of Croatian tax law, mostly a procedural part of tax law and, more precisely, the Europeanisation of tax disputes preventing and resolution rules.[57]

The criticism is more pronounced when we come to the mechanisms of the resolution of tax disputes relative to the prevention mechanisms. A multistage scheme of dispute settlement might be seen as more effective and successive in stage 0 than the stage where the dispute has already arisen. It is reasonable to try to gain some benefits from TDRD implementation at the national level of

51 | Commission Implementing Regulation (EU) 2019/652 of 24 April 2019 laying down standard Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission and a standard form for the communication of information concerning publicity of the final decision in accordance with Council Directive (EU) 2017/1852.

52 | TDRD, Rules of Functioning are prescribed in Annex I, Part I.

53 | Pit, 2019, pp. 745–759.

54 | Pistone, 2021.

55 | Terra and Wattel, 2012.

56 | Čičin-Šain, 2016, pp. 847–866.

57 | Gadžo, 2020, pp. 373–406.

the tax dispute resolution system, considering specific objectives defined in the Directive's preamble: broadening the scope of application of the Arbitration Convention to all disputes concerning the application and interpretation of tax treaties between Member States, ensuring legal certainty for taxpayers, ensuring effectiveness, efficiency and ensuring transparency. Subsequently, TDRD *ratione materiae* applies to disputes related to the application of the tax treaties between EU Member States, and it is interesting to mention according to TDRD provisions that, the standards of dispute resolution mechanisms are mandatory nature of dispute settlement mechanisms, time limits for dispute settlement, and obligation to achieve resolution. As stated above, Croatian tax law has recently developed a legal framework of alternative dispute resolution with instruments that prevent disputes. Such instruments in the dispute avoidance level as advance rulings are still not sufficiently recognised in practice. There is a need for stronger dialogue and cooperation in the tax administrative procedure stage especially. In the Croatian academic literature[58] and in practice, as previously mentioned, problems have been identified in the second instance of administrative tax dispute resolution that raises questions about changing the institutional framework and strengthening ADR mechanisms for tax disputes in Croatia. There are numerous advantages of the 'neutral early evaluation'[59] mechanism and preventing dispute mechanisms in this stage of taxation. It is vital to underline the mentioned European standard for tax dispute resolution regarding time limits, as in national tax disputes, it is also of huge importance and influence on taxpayer's fundamental rights. That is to conclude that the adoption of international and European standards for tax dispute resolution at the national level may lead to changes in the national taxation system and bring benefits for the taxpayers and tax administration, making national tax dispute mechanisms more efficient.

Previously mentioned MAPs are still opening the issue of the relations between MAPs and tax arbitration, with the need for assessing the effectiveness of MAPs, specifically in the light of taxpayers' rights: the question of the right of access to MAP documents, the right of being heard, and right of defence. There is also a vital issue of the right to fair administrative and judicial tax procedures, as there is an important perspective on tax arbitration as an administrative, and not a quasi-judicial, form of arbitration.[60] Several countries are against it, not only

58 | This paper rather builds on previous discussions, including Kovacevic, 2021, pp. 203–214.

59 | Thuronyi, 2013; Schön, 2015, pp. 271–293.

60 | Pistone, 2020. Especially important in a light of the tax arbitration system that was introduced in Portugal with the aim of improving speed and flexibility in the resolution of disputes between taxpayers and the tax authority. Tax arbitration has been implemented in Portugal since 2011, following several years of discussion among scholars and legislative bodies about its accordance with the Portuguese constitution. As it is recognised (Rogério M. Fernandes Ferreira of RFF & Associados) the most conservative legal voices considered the implementation of this mechanism with some initial concern and scepticism, arguing that the resolution of disputes between taxpayers and the tax authorities was not compatible with the institution of arbitration as a private dispute resolution mechanism. Notwithstanding, those arguments were rebutted and the possibility to commit tax disputes to arbitration was introduced. See, more: Fernandes Ferreira, 2020.

because of factual disputes but also because they conclude that it is not the solution to all problems, especially based on the non-final surrender of jurisdiction under tax arbitration. There is a proposal for a two-tier procedure with the involvement of taxpayers that can solve some issues of motivation.[61]

3. Prevention of tax disputes as an instrument of effectiveness

When finding new solutions for resolving disputes, the focus should be on defining the cause of tax disputes. The reasons for which tax disputes may arise are diverse, and they concern disputes over the determination of key elements of taxation, that is, facts legally relevant for determining and allocating taxes. The goal of the new instruments intended for use in the dispute prevention phase is actually the determination of these essential elements and the classification of transactions *pro futuro*, while those mechanisms in the phase wherein the dispute has already occurred are aimed at determining all these elements as quickly as possible so that the dispute can be promptly resolved. In the context of the causes of disputes, it is necessary to look at some of the phenomena that are directly or indirectly related to the appearance and incidence of disputes. Tax disputes can be caused by taxpayers and tax authorities. Enhanced administrative cooperation and exchange of information, at the EU level and legislation, mostly as an automatic exchange of information, a major area of focus today, brings to the tax authorities the possibility to duly utilise the vast exchange of information network. This puts pressure on taxpayers and tax courts, as tax authorities tend to accept any information received from a foreign tax authority as truthful. Although most information is exchanged automatically and in bulk, with little to no human interference, it will inevitably augment the risk of errors and inaccuracies that may turn into a big risk for taxpayers and new sources of disputes.[62]

Preventing the occurrence of tax disputes constitutes the first or zero phase, which effectively seeks to increase the effectiveness of taxation and suppress resistance to paying taxes and tax evasion. The new mechanisms that should be effective at this stage should be aimed at forming better cooperation and strengthening mutual trust between tax authorities and taxpayers. One of these mechanisms is realised through the instrument of advance rulings. Within the

61 | Baker and Pistone, 2016, pp. 335–345. See, Pistone, 2021. More: Council of Europe Committee of Ministers Rec (2001)9 on Alternatives to Litigation between Adm. Authorities and Private Parties; Dragos and Neamtu, 2014; Interview (4.4.) & Reports, available at: http://www.fu.gov.si/o_financni_upravi/ (Accessed: 25 September 2023). Fronda, 2014; van Hout, 2018, pp. 43–97; Jerovšek et al., 2008; Klun and Slabe-Erker, 2009, pp. 529–548; Kovač, 2012, pp. 395–416.
62 | Ramos and Matos, 2022, pp. 229–240.

framework of these, with advance rulings as binding tax opinions,[63] it can be said that transfer pricing agreements have also been developed, which are based on the positive identification of the arm's length principle.[64]

In Croatian practice, the so-called granting of special status to taxpayers or horizontal monitoring becomes important. Furthermore, there are instruments in Croatian practice to prevent the occurrence of tax disputes in the form of a final discussion in tax audit procedure with the possibility of achieving tax settlement and the mandatory engagement of an independent expert, lawyer, or legal adviser in the tax audit procedure.

4. Alternative methods of resolving tax disputes

From the definition of alternative dispute resolution, it is important to analyse the way in which they have developed[65] and to differentiate among them some basic types. The roots of alternative dispute resolution methods are found in private or civil law. Notably, ADR is often an umbrella term for all out-of-court

63 | As a special administrative act, a tax act passed by a tax authority and which is binding for the tax authority in the application of tax regulations to transactions, business and other tax-relevant facts of the taxpayer.

64 | Advance pricing agreement (APA) could be defined as an 'agreement between a group of companies or related companies as a taxpayer and a tax authority, on the criteria by which transfer pricing rules will be applied, especially to transactions within a group of companies as a taxpayer'.

65 | The first attempt to affirm and promote alternative ways of resolving disputes can be found in the form of mediation present in the first days of civilisation. In this context, historians often cite examples of mediation in commercial disputes among the Phoenicians and Babylonians, and such a practice developed in ancient Greece, where in disputes that were not marital or family, there was a so-called proxenatas (institute of mediators). When the ancient Romans are mentioned, it is important to note that they also knew about a certain institution of mediation and that notes on the peaceful resolution of disputes can be found in Justinian's Digests from 530–533. Later, that is, whether there was first a court and then extrajudicial mechanisms, as well as whether there was first conciliation and only then arbitration. Although these questions cannot be answered with certainty, especially the question of whether conciliation is historically older than arbitration, it must be concluded that it is still more likely that judicial ones developed from a certain type of out-of-court dispute resolution. However, it can also be linked to some peculiarities that adorned such procedures at that time. For example, the mediator could only be a person who was considered a holy person, a person who deserves special respect; it was about individuals who, due to their characteristics and/or position in society, had the a priori trust of the members of society, including the person in dispute. In addition, the concept of the so-called Schiedsgerichtstheorie, the theory according to which arbitration is the primary form of civil process, has been subjected to the following criticisms: 1. Schiedsgerichtstheorie is rationalistic speculation without any real basis in historical events, and 2. Romans and others resolved their disputes by invoking supernatural forces and/or deities in proceedings guided by priests or prophets. Finally, the so-called Leiden peacemakers who appeared in the 16th century and who were presented by Voltaire as Bureaux de Paix and Juges de Paix in France and the Netherlands, and because of their actions, they were considered the forerunners of the peaceful settlement of disputes. See, Chretien, 1951, p. 509.

procedures used to resolve disputes, separate from the judicial system, and a voluntary procedure that requires the consent of both parties. Owing to the nature of alternative methods of dispute resolution, it is often pointed out that they have or are of a private law character, and this is because they have developed from private law, and they are not a binding method of dispute resolution. In the public law area, the use of alternative ways of resolving disputes might be highlighted as a problem, considering the issue of arbitrability of such disputes. It is noteworthy that ADR often implies the existence of a third neutral person, although this does not have to be the case, for example, in the case of negotiations. All of these are common features of ADR methods; however, all listed general characteristics may differ depending on the ADR form and national or international regulations. The most common forms of ADR are arbitration, mediation, conciliation, negotiation, private judging, neutral expert, or fact-finding by experts, mini-trial, and ombudsman.

Arbitration is the most frequently mentioned mechanism of ADR, as voluntary with the ruling that is binding and with a limited possibility of revision. The third-party arbitrator chosen from the parties in dispute makes the decision, usually an expert with specialisation in the area to be decided. The formality of the procedure is reduced, as the parties can agree on procedural rules and material law, with each party having the possibility of presenting evidence for the claims made. The legal ruling sometimes contains an explanation (depending on which arbitration is in question), and in private law relations, there is no possibility of requesting a judicial review.

Mediation is voluntary, although in some countries, it is binding for certain types of disputes. When an agreement is reached in a mediation, it is enforceable like a contract, and the mediator is chosen by the parties in dispute. It is informal and unstructured, and there is a non-binding presentation of evidence, claims, and interests, while the result of successful mediation is a mutually binding agreement and is possible in private law. Conciliation is voluntary/mandatory (depending on the legal issue and state regulation), and the parties are helped to reach a settlement without imposing a binding solution. The third party is called the conciliator, and impartiality, equality, and fairness must be respected, as there is confidentiality in the procedure, which is characterised by informality, flexibility, and elasticity. Furthermore, there is an interest orientation and an integral view of the relationship as characteristics, non-commitment in the sense of consensual dispute resolution, and the greatest advantage of conciliation is the speed of dispute resolution and low costs.

Negotiation is voluntary, and if an agreement is reached, it is enforceable like a contract; there is no third party; it is informal and unstructured; the presentation of evidence, claims, and interests is non-binding; the result of successful negotiations is a mutually binding agreement; and it is possible in private law relationships.

Private litigation, impartial determination of the facts by experts, mini-trials, and abbreviated court proceedings are alternative ways of resolving disputes immanent in the American or Anglo-Saxon legal system.[66]

Finally, the parties can decide on an ombudsman voluntarily; it is not binding, the third party is institutionally determined, there is a lot of informality, there is an investigative nature of the procedure, the decision is made in the form of a report, and it is most often possible in private law relationships.

It is necessary to consider which of these models are suitable and usable for modernising the resolution of disputes in the field of tax law. It seems that arbitration may be the most useful in reducing costs, increasing efficiency, and speeding up the procedure for resolving tax disputes. Mediation as an alternative way of resolving disputes would be applicable, but in Croatia, Art. 3 of the Conciliation Act of 2011 defines conciliation as 'any procedure, regardless of whether it is carried out in a court, a conciliation institution or outside of them, in which the parties seek to resolve the dispute by agreement with the help of one or more conciliators which help the parties reach a settlement, without the power to impose a binding solution on them'. However, when it comes to this regulation, according to Art. 1, it is stated that it 'regulates conciliation in civil, commercial, labour, and other disputes about rights that the parties can freely dispose of'. In other words, it primarily entails resolving private law disputes, while the mentioned regulation would not be applicable to tax disputes. Put differently, there are obstacles regarding arbitrability as we look at the expression 'and other disputes about rights that the parties can freely dispose of'. Comparative experiences speak in favour of conciliation in tax disputes. Moreover, it can be seen that the tax ombudsman is a potential form of alternative resolution of tax disputes. Studying comparative solutions, one can

66 | Private litigation is voluntary, and the binding decision is subject to appeal. The third party that makes the decision is chosen by the parties (must be a judge or lawyer by profession), the procedure is determined by law (more flexible in terms of time, place and procedures), there is a possibility to present evidence and claims, the principled decision is sometimes supported in the process of finding facts and conclusions based on the law, and occurs in private law relationships without the possibility of demanding judicial execution of the decision (enforcement). Impartial fact-finding by experts is voluntary/obligatory (depending on the legal issue and state regulation), the decision is non-binding, there is a third neutral party with specialisation in the subject of expertise, and it can be chosen by the parties to the dispute, it is carried out informally, there is a research nature of the procedure, the decision is made in the form of a report or 'testimony', and it also occurs in private legal relations until a court proceeding has been opened. Furthermore, the mini-trial is voluntary; if an agreement is reached, it is enforceable like a contract. The third party is a neutral advisor, sometimes with specialisation in the subject of expertise, and is less formal than a classic trial. The rules can be set by the parties in dispute, and there is the possibility of an abbreviated presentation of evidence and claims; the result should represent a mutually acceptable agreement, which most often occurs in private law relationships. Finally, the abbreviated court procedure is voluntary/mandatory (depending on the legal issue and state regulation); if an agreement is reached, it is enforceable like a contract, the panel/jury is chosen by the court, the procedure is predetermined (however, there is less formality than a classic trial), there is a possibility of abbreviated presentation of evidence and claims, the decision (verdict) is advisory in order to facilitate reaching an agreement, and the procedure is public. Weil, Lentz and Hoffman, 2012.

come across mediation and early neutral valuation as alternative ways of resolving tax disputes.

5. Concluding remarks

The impact of the European legal framework on national Croatian jurisdiction might be followed throughout the reviewed Europeanisation of tax disputes and search for solutions in the form of ADR in connection to tax disputes. The introduction of the new rules regarding tax dispute resolution serves to improve the efficacy and efficiency of the dispute resolution processes as a step forward for the legal certainty of taxpayers operating in an uncertain post-BEPS tax environment. The new European rules provide taxpayers with a legal course of action at each stage of the process and, therefore, the confidence that their dispute will be resolved. This rule provides better guidance through the process of dispute resolution and helps parties to better understand it. In combination with the increased scope of tax disputes covered, implementing standards into national tax dispute regulations means that the dispute resolution process should become much more accessible and efficient for taxpayers. Although we currently have a negative integration of tax procedural and dispute regulation issues, in terms of a kind of prohibition on inefficient tax procedures and disputes, TDRD has raised questions about whether we need positive integration in this segment of taxation. In anticipation of such a step, standards and solutions in the new mechanisms for resolving European disputes should be taken over into national tax systems. The timeliness and quality of tax dispute resolution by tax authorities have a direct impact on the rule of law enforcement. There is a significant impact on not only the rights of taxpayers but also the efficiency of tax authorities, as well as an overall evaluation of the tax business environment. These are some of the important factors in measuring the mechanism of tax dispute resolution efficiency. Following defined criteria, we can mark indicators and help taxpayers and tax authorities develop important dispute resolution mechanisms in the light of positive European and international experiences.

Conclusions can be made on the potential Europeanisation of tax disputes and the search for effective ADR methods in tax disputes. European tax law is a component of a broader set of regulations and plays a role in shaping international tax regulations. International tax law has a significant impact on the interpretations and functions of the CJEU through its regulations, systems, approaches, and tools. Therefore, a reciprocal connection exists between the evolution of tax regulations and procedural regulations, which encompasses regulations pertaining to tax disputes. This link entails a nearly symmetrical connection and a significant impact on the formulation of national tax legislation. At the European level, there is a strong emphasis on the significance of positive integration as the preferred approach for ensuring legal clarity. While it is beneficial to promote the creation of tax regulations through positive integration, it is important to acknowledge the highly theoretical nature of certain provisions in positive integration instruments.

There is also concern that extensive regulation may undermine the primary advantage of the internal market. The reintroduction of excessive regulation could once again engender uncertainty for both the taxpayers and the tax administration. Simply put, achieving a harmonious equilibrium in positive tax integration is essential. This emphasises the need for negative integration as a crucial element in addressing any unanswered topic without regulation. The CJEU guarantees the uniformity of the internal market and the coherence of European tax law. The ECtHR plays an indirectly significant role in tax matters as well.

The implementation of the new regulations pertaining to tax dispute resolution aims to enhance the effectiveness and efficiency of the dispute resolution procedures, thereby advancing the legal assurance for taxpayers operating in an ambiguous post-BEPS tax landscape. The new European regulations offer taxpayers a clear and legally binding procedure at every step of the process, ensuring that their issue will be effectively addressed. This rule enhances the clarity and effectiveness of the dispute resolution process, facilitating a better understanding for all parties involved. By incorporating standards into national tax dispute legislation, the resolution process for taxpayers is expected to become more accessible and efficient, especially due to the expanded coverage of tax disputes. Despite the existing lack of effective coordination between tax procedural and dispute regulatory matters, there is a growing concern regarding the necessity of implementing proactive measures to address inefficient tax procedures and conflicts in the field of taxes. Prior to implementing this measure, it is advisable to incorporate the standards and solutions from the new procedures for resolving European disputes into national tax systems. The promptness and excellence of tax dispute settlement by tax authorities directly influence the implementation of the rule of law. The impact of taxpayer's rights, the efficiency of tax authorities, and the overall evaluation of the tax business climate are all highly significant factors. Several crucial aspects contribute to the measurement of tax dispute settlement efficiency. By adhering to specific criteria, we may identify signs and assist taxpayers and tax authorities in establishing effective dispute resolution systems, drawing from successful European and worldwide practices.

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