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ABOUT THE JOURNAL

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Of particular significance is the journal's multinational dimension. *European Studies* functions as a platform for disseminating scholarly opinions, research analyses, reviews of recent publications, and other pertinent information from European studies disciplines to authors and readers worldwide. This global outreach fosters a diversity of perspectives and approaches.

The journal welcomes scholarly articles, reviews, notes, and information pertaining to European studies. It also prioritizes promoting the research endeavors of early-career scholars. In addition to its regular content, *European Studies* publishes distinctive sections in collaboration with foreign scientific and academic institutions, focusing on selected contemporary and demanding topics in the form of special symposia.

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ARTICLES

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Social Policy in the European Union: Genesis, Obstacles and Digital Future

David Ramiro Troitiño*
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Alla Fedorova****

Summary: The European Union is a process, not an organization, started in the 50s by a groups of visioners who thought of a long term project. The idea of the fathers of Europe, as Jean Monnet, was gradually advance in the integration proves in order to achieve such a level that would make impossible another war between National States of Europe. Economic integration has achieved great results and next steps will be social and political in order to attract the loyalty of the citizens to the integration process. Consequently, this research focusses on the necessity of integration, to some extent, the diverse national social policies in the European level, analyzing the necessities and the obstacles. Finally, the research contributes with a deep understanding of the implementation of digital solutions to solve, or avoid, problems integrating social policies within the European Union. Therefore, digitalization and its possibilities to implement a coherent, and minimum cohesive, social policy in the European level. The research introduces a new instrument, still under development, in the debate about the convenience of a Social Europe within the EU.

Keywords: Social Europe, Digital EU, social digital solutions, EU digitalization, Digital social systems.

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1. Introduction. Genesis of social policies in Europe

Under the European sphere of influence, in the Old Testament there are numerous references to poverty, charity and relief of the needy. The Jews, as a Semitic people, are subject to the requ,irements of patriarchs, kings and prophets, and solidarity is a primary obligation. Hebrew Laws prescribe the orphans charity, condemn the exploitation of widows and orphans, humanize slavery through fraternal and fair treatment, and abhor the abuse of power[1]. These were the same social approach in the Ancient Greece for the rights of the citizens, because the citizens had to serve during many years to the Polis mainly in the army, normally until they were 60. To be a citizen you had to belong to an ethnical, cultural and economic group. Just citizens could own land, a status of membership of the society. Roman law is the basis of international law of today. In Roman culture influence emanated humanistic principles, such as Seneca (man to man is sacred). This leaves out the slaves, women and children who are under authority of the paterfamilias wing, but the State provides numerous services to the citizens, with very different phases due the long centuries of roman rule. Nevertheless, within the last Roman period, Christianity changed the perception of social justice and common solidarity. As a contribution of early Christianity, are its teachings about the equality of men.[2] Christianity does not separate morality from religion. For the Hebrews, love your neighbor was limited to the „chosen people", Israel, excluding foreigners, but for new believers, love was extended to all, including foreign infidels.[3] Christianity was to influenced the development of the European Union and the concept of solidarity between its members was introduced by Christian democrats.[4]

[1] FALK, Z. W. Hebrew Law in Biblical Times: An Introduction. *Maxwell Institute Publications.* 2001, no. 41, pp. 1–144 [online]. Available at: https://scholarsarchive.byu.edu/mi/41

[2] HASKINS, Ch. I. Gender Bias in the Roman Catholic Church: Why Can't Women be Priests? *University of Maryland Law Journal of Race, Religion, Gender and Class*. 2003, vol. 3, no. 1, pp. 99–124 [online]. Available at: http://digitalcommons.law.umaryland.edu/rrgc/vol3/iss1/4

[3] AWTREY, J. D. Jews and the Sources of Religious Freedom in Early Pennsylvania. *LSU Doctoral Dissertations*: 2018, no. 4544, pp. 1–373 [online]. Available at: https://repository.lsu.edu/gradschool_dissertations/4544

[4] STJERNØ, S. The idea of solidarity in Europe. *European Journal of Social Law*. 2011, no. 3, pp. 156–167 [online]. Available at: https://soc.kuleuven.be/ceso/life-sciences-society-lab/files/stjerno-the-idea-of-solidarity-in-ejsl-2011-3-b.pdf

The medieval times shaped Europe, defining its culture, folks and borders. The evolution of communal movement was slow, from the growth of the villages and the formation of guilds and unions.[5] The strength of many guilds, allowed the implementation of various social and charitable services. So sick union members, charged a subsidy to sustain themselves and family. Nevertheless, there was a key moment in European history, the French revolution. It changed the whole perspective to social policies due the principles of liberty, equality, fraternity among the members of the society. There were many outstanding thinkers in this period, perhaps being Rousseau one of the most representative in this regard. Until Rousseau's time, the sovereign in any given society was regarded as the central authority in that society, responsible for enacting and enforcing all laws. Most often, the sovereign took the form of an authoritative monarch who possessed absolute dominion over his or her subjects. In Rousseau's work, however, sovereignty takes on a different meaning, as sovereignty is said to reside in all the people of the society as a collective.[6] The people, as a sovereign entity, express their sovereignty through their general will and must never have their sovereignty abrogated by anyone or anything outside their collective self. In this regard, sovereignty is not identified with the government but is instead opposed against it. The government's function is thus only to enforce and respect the sovereign will of the people and in no way seek to repress or dominate the general will. It clearly opened the society to social protection of all its members with outstanding improvements in the following decades. A radical change in the economic model linked with the industrial revolution, changed the social paradigm as well.[7] Previous traditional ways of solidarity could not be applied to industrial workers living in large cities, leaving unprotected a large part of the society. Therefore, the British government actuated consequently regulating the social protection of its workers, influencing the rest of the European states and the world. It expanded a social model that was implemented differently in each country of Europe according to their previous traditions. During XX century, a time of wars, depravation and unrest, the social policy became a central part of the European countries, and a pillar of the European society differentiating Europe from the rest of the world, as the USA where the solidarity is a private initiative rather than communal or public.[8]

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5 HAFERKAMP, H. and SMELSER, N. J. (eds.). *Social Change and Modernity*. Berkeley: University of California Press, 1991.

6 ROUSSEAU, J. J. (1762). The Social Contract or Principles of Political Right (Translated by G. D. H. Cole). *Fœderis æquas Dicamus leges. Vergil, Æneid XI*, 1762, pp. 1–73 [online]. Available at: https://www.files.ethz.ch/isn/125486/5017_Rousseau_The_Social_Contract.pdf

7 TROITIÑO, D. R. and KERIKMÄE, T. (eds.). *Pasado, presente y futuro de la Unión Europea.* Mc Graw Hill Interamericana S. L., 2014.

8 PONTUSSON, J. *Inequality and Prosperity: Social Europe vs Liberal America*. Ithaca, NY: Cornell University Press, 2005. https://doi.org/10.7591/9781501713385

2. Social Europe

European civilization is united in the concept of social protection, the welfare state. It is one of the notions that identify together the European states, as a contraposition to other parts of the world. The idea of the social protection of the state is commonly accepted by the whole society, and even in times of crisis, social policies are protected by the social actors of each European state.[9] The social policies can be compared to those of the United States, a country in many senses similar to Europe, but with big differences, especially in this field.[10] There are different social models in Western Europe, mainly divided into 4 main groups:[11]

- Nordic model: (Denmark, Finland, Sweden, and Holland) High social protection, plus universal social services, plus bigger expenditure in active politics of employment and strong trade unions. It makes inequality of revenues very low.
- Anglo-Saxon model: (the UK and Ireland) it combines important social protection in the last instance, especially for people of working age. It is a system based on incentives to the activity and subsidies for those really looking for a job. This system plus weak trade unions make for bigger differences in salaries, and many workers have low salaries.
- Continental model: (Austria, Belgium, France, Germany, and Luxembourg) A system based on security for the unemployed or people who find no job and a system of retirement pensions. Trade unions have fewer numbers, but are still strong, and collective negotiation is respected.
- Mediterranean model: (Spain, Greece, Italy, and Portugal) Combines social expenditure in retirement pensions, wide assistance and huge incentives to early retirement, plus huge protection to jobs with high firing costs, and trade unions with fewer numbers but strong collective negotiation, which leads to low disparities in salaries.

These social models are looking for three main objectives: reduction of poverty and inequality of revenues, protection of the labor market, and participation in the labor market. According to these objectives, we see big differences between the four main social models of Europe:

1. Inequality of revenue: The following models reduced inequality in the following proportions:

[9] ŠIŠKOVÁ, N. *Lidskoprávní mechanismy na úrovni EU a otázky související*. Praha: Wolters Kluwer ČR, 2021.

[10] ALESINA, A., GLAESER, E. and SACERDOTE, B. Why Doesn't the United States Have a European-Style Welfare State? *Brookings Papers on Economic Activity*. 2001, no. 2, pp. 1–70 [online]. Available at: https://scholar.harvard.edu/files/alesina/files/423__0332-alesina11.pdf

[11] PÕDER, K., KEREM, K. „Social Models" in a European Comparison. *Eastern European Economics*. 2011, vol. 49, no. 5, pp. 55–74, DOI: 10.2753/EEE0012-8775490503.

- Nordic reduction of 42%
- Continental reduction of 40%
- Anglo-Saxon reduction of 39%
- Mediterranean reduction of 35%

2. Reduction of poverty: People who live under 60% of the average income.
   - Nordic 11%
   - Continental 13%
   - Anglo-Saxon 19%
   - Mediterranean 20%
3. There are two ways of protecting jobs: first protecting existing jobs with high firing costs; by doing so you elude paying big unemployment subsidies. Second, generous subsidies to unemployed people paid with taxes of workers. Again, it is an issue of outsiders versus insiders and the importance of the trade unions.
   - The Mediterranean model has a high level of protection of existing jobs, less generous unemployment payments.
   - The Nordic model has more flexibility to fire workers (less cost) and bigger subsidies for the unemployed.
   - The Continental model has high protection of existing jobs and high subsidies.
   - The Anglo-Saxon system protects the existing jobs less but offers subsidies almost as high as the Nordic and Continental.
4. Participation in the labor market. Per cent of the population of working age doing any economic activity:
   - Nordic 73%
   - Anglo-Saxon 70%
   - Continental 64%
   - Mediterranean 63%

The comparison of these social models in terms of efficiency and equality also shows big differences. Efficiency is the ability to create a high and stable employment rate, and equality is linked to keeping the poverty risk rate low[12]. So, according to these two concepts, the European social models will rank as follows:

- Nordic model 1 efficiency, 1 equality
- Continental 3 efficiency, 2 equality (Exception of Austria)
- Anglo-Saxon 2 efficiency, 3 equality
- Mediterranean 4 efficiency, 4 equality

[12] LEIBFRIED, S. and PIERSON, P. (1992). Prospects for social Europe. *Politics & Society*. 1992, vol. 20, no. 3, pp. 333–366. DOI: https://doi.org/10.1177/003232929202000305.

The general rank according to the countries includes as the top states Denmark, the Netherlands, Sweden, Finland, and Austria, and the lower states are Greece, Italy, Spain, Ireland, and Portugal. The countries where the equality is higher are Sweden, Luxembourg, Finland, Denmark, the Netherlands, and France, and the countries with less equality are Greece and Ireland. On efficiency we see on the top Denmark, the Netherlands, Sweden and the UK, and on the bottom Italy and Greece.[13] Efficiency is negative for a high level of protection of jobs because with lower protection the employment rate is higher, and the other way around, with higher protection the employment rate is lower. Generosity in subsidies is not so important in terms of efficiency because it has little influence on the employment level and provides adaptability to the work force to new situations, as globalization. The risk of poverty or equality is strongly linked with the level of education. The population between 25 and 64 years with secondary or higher studies is more unlikely to live in poverty. It means that the people with less education have a bigger risk of poverty. The population with these studies in the different models is:

- Nordic 75%
- Continental 67%
- Anglo-Saxon 60%
- Mediterranean 40%

It clearly shows that the Nordic countries are less likely to increase their people living in poverty as their educational rate is higher than in the other models. It also shows the problems of the Mediterranean area, where just 40% of the population between 25 and 64 have an education that could keep them away from poverty.[14]

3. Obstacles and challenges

The analysis of the main European social models leads to different long-term possibilities accepting the following premises:

- If a model is not efficient it is not sustainable in the long term. There are no new revenues, or they are too expensive for the tax system. Sweden and Holland changed their models in the ‘70s. An older population, new technology, and globalization are other factors that make a model not sustainable in the long term.
- More equitable models can last longer in terms of democracy. If there are too many poor, the voters will choose a government that will reduce poverty.

[13] ANDERSON, K. M. *Social policy in the European Union*. London: Bloomsbury Publishing, 2015.

[14] FERRERA, M. The ‘Southern model’ of welfare in social Europe. *Journal of European social policy*. 1996, vol. 6, no. 1, pp. 17–37. DOI: https://doi.org/10.1177/095892879600600

Even if the model can last politically, in the economic sense it needs enough money to pay health care and retirement pensions. So, if a state gets relevant incomes from taxes (as for example, high employment rate), it can economically afford their social system.

The two European models with less efficiency and with a lower employment rate, the Mediterranean and the Continental, normally have higher public debt, the Mediterranean with 80% of its GDP and growing, the Continental with 71%. On the other hand, the Anglo-Saxon 36% and the Nordic 49% are more efficient. It means fewer possibilities of financing the model for the areas more needed, as the Mediterranean countries. The negative perception of globalization in terms of employment is higher in the less efficient models: Mediterranean 52%, Continental 42%, Anglo-Saxon 36%, and Nordic 37%. This leads to the question of why the voters of the less efficient states did not want a change. The answer is that most of the unemployed are outsiders, the young, women and immigrants, but now the situation is changing with a bigger risk of losing one's job. Therefore, it is a real possibility that the Mediterranean model gets closer to the Anglo-Saxon and the Continental to the Nordic.[15]

The Working Group on Aging Population (AWG) made different reports supported by ECOFIN about the aging of the European population and its consequences on public expenditure on pensions, health care, and subsidies for the unemployed. For 2004-2050 the public expenditure will grow more in the Mediterranean model. The first option to pay these expenditures could be public debt, but it means bigger taxes for the future to be paid by future generations that will not enjoy the social benefits because the GDP will not grow as much as the social expenditure. The economic crisis also makes this option unlikely, as more countries are under pressure from the markets because of their high public debt. In addition, the public debt in the countries more in need of extra funding already have high rates of debt, so their possibilities of increasing it are really reduced. A second option could be increasing indirect taxes, like a social VAT. The problem is the more modest people are the ones that consume a higher part of their rent income, so they will pay more, increasing the inequality of the social models. On the other hand, globalization makes it impossible to increase direct taxes because of the high mobility of capital. A third option is increasing the number of people of working age and get them jobs, because their contributions will increase the revenues of the state. It can be done by:

- Immigrants with jobs. They pay taxes, but this is a temporary solution because they will also retire.

[15] WALLACE, H., POLLACK, M. A., ROEDERER-RYNNING, C. and YOUNG, A. R. *Policy-making in the European Union*. Oxford: Oxford University Press, 2020.

- Increase the age of retirement, adapting it to life expectancy (longer now) as Germany and other European countries are doing, from 65 to 67 years old. It means fewer pensioners and more taxpayers.

A fourth option is decreasing the welfare state, less social security health care, or increasing the years needed to get them. As the European population is becoming older, more voters will be older, and they will reject this option. The European problem is that the work market is still national, but the goods and services markets are European. The reform of those, especially services (just 20% of services trade is European) will force the states to change their work markets. The future scenario for a common social policy will be easier as the Mediterranean system will converge with the Anglo-Saxon system, and the continental and Scandinavian systems will merge. It gives us two different social systems, easier to integrate. Also, the influence of the social systems in the economies of the member states of the European Union is an important factor for creating a common policy, because in a common market the countries with less efficient social systems will be at a disadvantage for their companies, with the consequent loss of market share. In order to compete on equal terms in a common market, a common social policy is needed.[16] Nevertheless, it seems that the countries with more efficient and equal systems are not going to be willing to change their models in a convergence with the average of the European states. It is more likely that European social policy will start its development with minimum standards, allowing more progressive legislation in the field, and hence the disparities between systems, but at the same time reducing them.

European Commission defined "Social Innovation" as: *"The development and implementation of new ideas (products, services and models) to meet social needs and create new social relationships or collaboration. It represents new responses to pressing social demands, which affect the process of social interactions. It aims to improve human well-being. Social innovation is an innovation that is social in both its ends and its means. It is an innovation that is not only good for society but also enhances individuals' capacity to act". In other definitions there is an accent on the way to proceed: social innovation "as a new combination or new configuration of social practices in certain areas of action or social contexts*" (European Commission, 2020).[17]

[16] VASILESCU, M. D., SERBAN, A. C., DIMIAN, G. C., ACELEANU, M. I. and PICATOSTE, X. Digital divide, skills and perceptions on digitalisation in the European Union–Towards a smart labour market. *PLoS ONE*. 2020, vol. 15, no. 4, pp. 1–39. DOI: https://doi.org/10.1371/journal.pone.0232032.

[17] European Commission. Social innovation: inspirational practices supporting people throughout their lives, 2020 [online]. Available at: https://ec.europa.eu/european-social-fund-plus/en/publications/social-innovation-inspirational-practices-supporting-people-throughout-their-lives

According to this definition, the European Social Policy should focus on addressing the most urgent necessities of the European society, common to all the Member States, regardless their respective social models and traditions. The current globalization inducted by borderless digital transformation of the society is increasing the necessity for common responses to issues as raising poverty rates.[18] The creation of markets beyond the national limits provides relevant benefits to those adapted to the new situation, but increase the inequality in the society as the business benefits do not contribute to the national wealth redistribution as their nature is multinational. Therefore, a supranational authority as the European Union, seems appropriate to lead a new common policy to address effectively this issue.

Migratory flows need the attention from a common frame as it is affecting the whole European Union. The free movement of people, the abolishment of internal borders and the increasing migration to Europe are stressing the social system as new necessities need to be covered in order to integrate and protect the new arrivals as, in most of the cases, lower part of the society increasing the inequality. As previously exposed, migration is a temporal solution to aging population, another common trend within Europe that is affecting the social systems of all the Member States.[19] Therefore, a more stable and long-term solution should be found to reassure the sustainability of the social systems threated by the higher costs.

The social composition of Europe is not only affected by aging population, as changing family structures is transforming the European society. New models of families and social organization required a new approach that often faces traditional barriers complicated. It is a process affecting all Europe due the current harmonization of modern societies impacted by global tendencies. Therefore, the EU can face this challenge from a new perspective because the organization works for the citizens of Europe without the restrictions of national social traditions.

The social challenges are often linked with the market, as inequality and social exclusion, inadequate supply of jobs or problems of labour market. The Internal Market is a highly integrated market ruled by European Union legislation. The problem of social integration has been already discussed in this research,

[18] AFONASOVA, M. A., PANFILOVA, E. E., GALICHKINA, M. A. and ŚLUSARCZYK, B. Digitalization in economy and innovation: The effect on social and economic processes. *Polish journal of management studies.* 2019, vol. 19, no. 2, pp. 22–32, DOI: https://doi.org/10.17512/pjms.2019.19.2.02

[19] ŠIŠKOVÁ, N. The EU concept of the rule of law and the procedures de lege lata and de lege ferenda for its protection. *International and Comparative Law Review*. 2019, vol. 19, no. 2, pp. 116–130. DOI: https://doi.org/10.2478/iclr-2019-0017

nevertheless, it is a fact that market necessities need to be address effectively in order to keep the social balance of the European Union as a whole. The Common Market has generated relevant benefits to the European economic agents increasing the economic performance and European trade. On the other hand, it generated new problems that before did not exist, as social cohesion in a territory without a common social policy. The current digital transformation of the society allows to solve some of these problems from a new approach without major collision with national traditions.[20]

The European Union, a supranational organization dealing with communal problems beyond national borders creating a new level of sovereignty beyond the national level.[21] Therefore, the problems affecting Europe cannot be solved in the national level and should be part of the framework of the Union. A clear example, is environment or digital space as it goes beyond political borders.[22] The pollution spreads from one country to the other making ineffective divergence national solutions to the problem, just a common approach will deal properly with environmental issues. As a clear example, pollution in Finish lakes is strongly link with emissions in Polish industry. A high level of protection in Finland cannot protect the finish lakes unless the origin of the emissions, Poland, implement effective measures. Therefore, the European Union is dealing with environmental policy as a part of the common frame. From the social perspective, environmental degradation has become a priority in XXI century.[23] Following the same pattern, national states cannot prevent, neither effectively address, this social risk. Just a common action linking social and environmental protection will dismiss the social impact of environmental problems.

Most of these challenges are weakening the traditional welfare policies of the European States, an important part of the European identity as the national actors lack the proper tools to fights against a combination of factors as ageing population, decrease of financial resources, maintenance of welfare standards

[20] HAMUĽÁK, O., TROITIÑO, D. R. and CHOCHIA, A. La carta de los derechos fundamentales de la union europea y los derechos sociales. *Estudios constitucionales*. 2018, vol. 16, no. 1, pp. 167–186. DOI: https://doi.org/10.4067/S0718-52002018000100167

[21] HAMUĽÁK, O. Lessons from the "Constitutional Mythology" or How to Reconcile the Concept of State Sovereignty with European Integration. *Danube: Law and Economics Review*. 2015, vol.. 6, no. 2, pp. 75–90. DOI: https://doi.org/10.1515/danb-2015-0005

[22] GÁBRIŠ, T., HAMUĽÁK, O. Pandemics in Cyberspace – Empire in Search of a Sovereign? *Baltic Journal of Law and Politics*. 2021, vol. 14, no. 1, pp. 103–123. DOI: https://doi.org/10.2478/bjlp-2021-0005 or GÁBRIŠ, T., HAMUĽÁK, O. 5G and Digital Sovereignty of the EU: The Slovak Way. *Taltech Journal of European Studies*. 2021, vol. 11, no. 2, pp. 25–47. DOI: https://doi.org/10.2478/bjes-2021-0013

[23] EVANGELISTA, R., GUERRIERI, P. and MELICIANI, V. The economic impact of digital technologies in Europe. *Economics of Innovation and new technology*. 2014, vol. 23, no. 8, pp. 802–824. DOI: https://doi.org/10.1080/10438599.2014.918438

and impact on the social groups of traditional users and the new users. In terms of digitalization, four different sources that provide protection for specific risks, market, state or other public authorities, civil society-family and personal initiatives.

Market can generate new jobs in orientated internet business, family faces new ways of interaction, new problems and new solutions. Civic society has witnessed a new communication system allowing the participation of all citizens regardless their social condition, physical location or any other previous precondition. It has fostered the civic participation to levels previously unknown. At the individual level, digitalization provides individual empowerment and inclusion, stimulates individualism and supports own identity and decreases the barrier to access and usage. These impacts on market, society and individuals need to be taking into consideration by the public authorities dealing with social problems. If the European Union is going to be deeper involved in social affairs from a digital perspective should promoted common social values, as professionalism, efficiency, service and engagement, EU taxes on digital multinationals (incoming digital services tax proposed by the European Union) and common actions addressing the growing problem of concentration of wealth.

4. Impact of digitalization in welfare policies in the EU

Digitalization offers new solutions to old and new social problems, but faces threats as "e-Governance paradox" where States are able to gather unprecedented amounts of information but prove unable to turn the information into effective policy actions.[24] In order to be effective is required an impact analysis of welfare services at systemic level. It means finding the right technological solutions as the success tool for obtaining more efficient and cost-effective digital services. In addition, it is very important to include the concept of public values as the differ from private initiative inductors for social action. The public service does not focus on economic profit but social benefits. Nevertheless, the targets should be achieved from the most effective perspective avoiding wasting money from the citizens.[25]

The European Union, a union of States with a common body of citizens represented in the European Parliament, needs to involve several agents in the digital

[24] SAVOLDELLI, A., CODAGNONE, C. and MISURACA, G. Understanding the e-government paradox: Learning from literature and practice on barriers to adoption. *Government Information Quarterly*. 2014, vol. 31, no. 1, pp. 63–71. DOI: https://doi.org/10.1016/j.giq.2014.01.008

[25] KWILINSKI, A., VYSHNEVSKYI, O. and DZWIGOL, H. Digitalization of the EU economies and people at risk of poverty or social exclusion. *Journal of Risk and Financial Management*. 2020, vol. 13, no. 7, pp. 142. DOI: https://doi.org/10.3390/jrfm13070142

social change, as experts (represented by the European Commission), Member States (present in the Council), citizens and social movements. The digitalization of the European society opens a new world for interaction between the European institutions and the civic organizations, allowing a flexible and more effective European social policy.[26] It is important the EU connects with the society and its representatives to allow a social development with a positive effect on the society. It is crucial because without the support of the citizens and their solidarity at European level, the credibility of any action would be stigmatized by those supporting national sovereignty as the last level of governance. Therefore, the digital world offers alternatives to the European Union to implement, in a fluid relation with the civic society, a credible social change improving the life of the European citizens. Most of the successful initiatives have been design in a local level, it is the duty of the European legislators to translate it to the European level effectively.

The actions of the EU in the field of common social policy should have two differentiated natures, applying specific solutions to specific problems. Issues affecting a relevant part of Europe, need clear solutions from the EU. It means, all the national social problems should be addressed by the national authorities, following the principle of subsidiarity where the most effective level of decision making to solve a problem would be in charge of the solution. Obviously, the European problems (already mentioned in this research) can be just effectively solved in the European level. On the other hand, the EU should foster a proactive approach for social developments improving the connection between the different level of decision making, including citizens.[27] Social innovators are keen to move forward in the implementation of new solutions for social problems, therefore, digitalization is mainly foster by those willing to implement innovative approaches. Nevertheless, in general, the public authorities are reluctant to implement proposals because the analysis on cost-benefits are insufficient.

The idea of a collaborative design and implementation of common reforms with several actors and levels involved, will foster social innovation in the European Union. Therefore, the European Union needs to respect subsidiarity and promote collaboration to reach an innovative approach effective in social policy.[28]

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[26] RAMIRO TROITIÑO, D., KERIKMÄE, T., HAMUĽÁK, O. (eds.). *Digital Development of the European Union*. Cham: Springer, 2023. DOI: https://doi.org/10.1007/978-3-031-27312-4_1

[27] CUERVO, M. R. V. and MENÉNDEZ, A. J. L. A multivariate framework for the analysis of the digital divide: Evidence for the European Union-15. *Information & Management*. 2006, vol. 43, no. 6, pp. 756–766. DOI: https://doi.org/10.1016/j.im.2006.05.001

[28] CRESPY, A. and MENZ, G. Commission entrepreneurship and the debasing of social Europe before and after the Eurocrisis. *JCMS: Journal of Common Market Studies*. 2015, vol. 53, no. 4, pp. 753–768. DOI: https://doi.org/10.1111/jcms.12241

The Union is facing the problem of transforming local initiatives to continental policies. Most of digital social actions start at the local level to solve specific issues. Nevertheless, even if successful, the transition to higher levels of public domain is complicated. It normally leads to the end of these initiatives within the first years of implementation.[29] The EU needs to analyze why digital solutions successfully implemented cannot be upgraded to address the problems of larger groups of citizens. If the reasons are understood, the Union will make a great step forward for the digitalization of the European social policy.

In addition, the European Union needs to enlarge the focus from single digital social services to reconfiguration of existing economic and social structures. The European Union represents a complex social ecosystem, as previously explained in this research. Therefore, different models of social frames need minimum standards allowing more progressive social policies. The digital solutions need to adapt to this scheme in order to be successfully implemented in the European level.[30]

Funding of digital social solutions is a must for the Union as the model of internet, widely dominated by high technological companies located in the United States of America, respond to market stimulus and monetary benefits.[31] The social model of USA is radically different from the models implemented in Europe, as it is based on a privatization of most of social protection initiatives. Therefore, there is not research, neither solution, from companies founded in a different social environment with different social priorities. The social benefits are difficult to monetarize in a free market economy with a predominant role of the public institutions in the welfare policies. Consequently, there is no motivation for private companies to invest and innovate in the field unless they have an external stimulus. In addition, other public authorities and civic organizations do not have the require financial resources for implementing digital solutions to their social problems.[32] They need support from higher, and economically more

[29] TROITIÑO, D. R. and KERIKMÄE, T. Europe facing the digital challenge: obstacles and solutions. *IDP. Revista de Internet, Derecho y Política*. 2021, no. 34, pp. 1–3. DOI: https://doi.org/10.7238/idp.v0i34.393310

[30] PINK, S., FERGUSON, H. and KELLY, L. (2022). Digital social work: Conceptualising a hybrid anticipatory practice. *Qualitative Social Work*. 2022, vol. 21, no. 2, pp. 413–430. DOI: https://doi.org/10.1177/14733250211003647

[31] VARDANYAN, L. and KOCHARYAN, H. Critical views on the phenomenon of EU digital sovereignty through the prism of global data governance reality: main obstacles and challenges. *European Studies: the Review of European law, Politics and Economics*. 2022, vol. 9, no. 2, pp. 110–132. DOI: https://doi.org/10.2478/eustu-2022-0016

[32] TROITIÑO, D. R. La Unión Europea y el Reino Unido. Divergencia histórica y miopismo contemporáneo. *Tempo Exterior.* 2020, vol. XX, no. 40, pp. 61–73 [online]. Available at: https://www.researchgate.net/publication/344241840_La_Union_Europea_y_el_Reino_Unido_Divergencia_historica_y_miopismo_contemporaneo

powerful, institutions. The European Union is very active in the field, supporting local, civic and private initiatives with a relevant impact on the social aspects of the society. Therefore, the EU is following the right path, but funding fatigue could curb the financial possibilities. New initiatives are required, and a more visibility for those successful digital social solutions is a must to popularize them and prevent shortcuts in future financing.

5. Conclusions

The European Union is a social experiment initiated by brave men willing to create a stable peace system in Europe. The so called, father of Europe, understood the dangers of nationalism fostering conflicts within the continent. Therefore, they designed a system with shared sovereignty promoting common management over national control. The implementation of the project was complicated and faced endless obstacles generated by the fierce resistance of nationalism against supranationalism. Consequently, they designed a complex roadmap to implement a unique social, political and economic common system in the world; step by step building a common house cornering nationalism in the cultural sphere.

In addition, the creation of a common European frame required the implementation of solidarity between its members in order to reduce or dismiss the negative effects of the integration, reduce inequalities and promote communality. Therefore, the European Comminutes established the internal concept of help between the Member States, that later on, following the progressive pattern of integration, extended to solidarity between regions and European citizens. Consequently, originally, there was no necessity for a common social policy as the solidarity was between States and was properly implemented with the European policies and several structural funds. The expansion of the solidarity targets generated the necessity of common management between EU citizens and the implementation of a common frame, the European social policy aiming to promote employment, improve living and working conditions, provide adequate social protection and combat social exclusion. These policies are generally the competence and responsibility of the EU Member States but the European Pillar of Social Rights gives new momentum to initiatives at European level. Moreover, the current social revolution foster by digitalization have changed the traditional social paradigms, necessities and priorities. It is time for the European Union to introduce improvements and advances in social terms for a common management of the social solidarity between the European citizens. The national states cannot provide social solutions to their citizens as the globalization of the digital world has generated a new really beyond political borders of States. Currently,

just world powers as USA or China have enough muscle to control the big high-tech companies operating in the world, generating works and wealth, but also inequalities and distortions in the social solidarity. The European Union could face these challenges if operating together under a common umbrella of common solidarity; common problems will be solved more effectively in common.

The European Union needs to establish common standards in digital social policies, first creating a compatible digital frame between all the Member States. The generation of data is the future for social digital initiatives, but we need to be able to use this data in the European level. Otherwise, without a real compatibility the generation of data will be useless for institutional used. The management of data as basic step that also requires a clear policy on data protection. The European Union is taking the issue very seriously because of the privacy of its citizens and the influence data collection has on digital solutions, especially in the field of Artificial Intelligence. Machine learning is based on the amount of data available. The European Union is in a privileged position because of its capacity to access data from European users, but in an open system, this data will be used by USA or China to build their alternative AI following their respective national interest. Therefore, if the EU wants to create a common digital frame, influence the welfare innovation and promote European AI solutions, needs to protect the data and promote a common frame to implement common solutions based on the necessities and capabilities of the European users.

The second logical step, will be the implementation of common minimum standards where the European Union will guarantee a minimum social protection of its citizens, but allowing additional rights coming from the Member States focus on their respective nationals. This action will help to the foundation of a common social frame, a first stage in the convergence of the different social models implemented within the European Union members. Digital possibilities can increase the convergence applying common protocols to access the information and provide the services. Therefore, it is fundamental to implement a common platform compatible all over the territory of the Union to start with a basic common approach to digital social issues.

On the field of civic engagement, the European Union is aware of their importance for the digitalization of the welfare policies. Most of the innovations come from the local level, and require the adequate support to impact the whole Union. In addition, the current digitalization allows a more active and effective civic participation in the public life of private citizens. Therefore, combining civic participation with welfare policies via digital platforms will increase the democratic support for a common European house. The concept of common sovereignty is fundamental for the implementation of a functional organization in the European level; attracting the loyalty of the European citizens by their

active participation in the European public life and by providing them European answers to their social necessities, will increase the direct support from citizens to the European Union. It is a process that requires time, but fundamental for the political development of the organization. Consequently, digital social policies and civic engagement are crucial for the development of the European Union.

Parallel, this research outlined the importance of public funding for the development of effective digital solutions for social policies. These public investments address the lack of private funds influenced by the American model of internet focus on economic benefits. It is a complete legit target, but the European society aims for s different social model. Therefore, the private companies lack the motivation to focus on social development if they cannot monetarize their achievements. In addition, the problem of ownership of a product does not apply to most of the digital solutions of welfare policies, reducing even more the incentives for private companies to invest large amounts of funds on research and innovation on digital social aspects. If Europe wishes to keep (updated) its characteristic and unique social model, a large public funding is required to promote research and innovation. The benefits will be social, with a more equal and balance society, but also economic for the public administrations with a most effective use of public social funds thanks to the possibilities offered by a digital society.

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European Parliament Elections Incentives for First-Time Voters: Evidence from the Secondary Schools

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Richard Pospíšil**

Summary: The research deals with the phenomenon of low voter turnout in European Parliament elections. The article pays attention to young first-time voters who will encounter their first European Parliament elections in June 2024. It examines their attitude to polling in the context of school activities related to public affairs implemented in the school educational activities. Based on the qualitative survey conducted on pupils aged 17-18 attending secondary schools located in ten different member countries the research tackles the question whether the public secondary education may affect the incentives of first-time voters to cast their vote in the European Parliament elections. Consequently, the research focuses on the good practices and possible stimulus given by schools that may encourage to get to vote the representatives in the European Parliament. The outcomes of the research provide suggestions to enhance the formation of voting habits of young voters and increase their interest in both national and European public affairs.

Keywords: elections, European Parliament, first-time voters, schools.

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1. Introduction

Elections are supposed to serve as a fundamental mechanism through which citizens can express their will, choose their representatives, and hold their

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government accountable[1]. The question of who is involved in political decision-making is one of the defining features that influence the future development of the country. Thus, responsible choice of a political party and participation in elections are essential for any functioning democracy. Despite this fact, not all eligible voters use their opportunity to influence the development of public affairs in their neither in their home country nor at the supranational level. The situation in which only certain groups participate in the decision-making process from which some groups exclude themselves due to their decision not to cast the vote imposes clear limits on democratic rule[2].

Since the 1980s, voter turnout has been declining in many advanced democracies; the studies have found out that the decline in turnout is particularly evident among the young people[3]. As for the situation concerning participation in elections when the European citizens may decide about their representatives in the supranational European institutions, until 2014, the turnout had steadily declined to a later uptick in 2019 which may seemingly put the pessimistic diagnosis into perspective[4]. The voter turnout statistics indicate that the overall increase in turnout is mirrored in 19 member states, with large increases since 2014 in Poland, Romania, Spain, Austria, Hungary and Germany, as well as substantial increases in countries with the lowest turnout, such as Slovakia and Czechia[5]. The survey points out the fact that "large differences remain between individual member states, ranging from 88% in Belgium[6] to 23% in Slovakia"[7]. In fact, the turnout varies strongly between countries, and also between election years within the same country which may be caused by different intersections: a significant part of the decline up to 2014 was due to the accession of new member states with rather low turnout numbers. Conversely, it is possible that in 2024 wide voter turnout may rise again for similar statistical reasons: it will be the first election without the United Kingdom, which traditionally has had a very high share of

1 BARANÍK, K., HAMUĽÁK, O. In: Supporting Role Cast: The EU Charter of Fundamental Rights. Reflection of the EU Charter in the Adjudication of Slovak Constitutional Court. *European Studies – The Review of European law, Economics and Politics*. 2021, vol. 8, p. 72, DOI: https://doi.org/10.2478/eustu-2022-0065

2 FOWLER, A. G. *Five Studies on the Causes and Consequences of Voter Turnout*. Doctoral dissertation, Harvard University, 2013 [online]. Available at: https://dash.harvard.edu/bitstream/handle/1/11156810/Fowler_gsas.harvard_0084L_10773.pdf

3 BLAIS, A., RUBENSON, D. The Source of Turnout Decline: New Values or New Contexts? *Comparative political studies*. 2012, vol. 46, no. 1, pp. 98–106.

4 EUROPEAN PARLIAMENT. *Turnout by year* [online]. Available at: https://www.europarl.europa.eu/election-results-2019/en/turnout/

5 Ibid.

6 Voting is compulsory in five countries: Belgium, Bulgaria, Luxembourg, Cyprus, and Greece.

7 EUROPEAN PARLIAMENT. *Have European elections entered a new dimension?* [online]. Available at: https://europa.eu/eurobarometer/surveys/detail/2312

non-voters in EP elections[8]. This means that even if turnout remains unchanged in all other member states, the European average will mathematically increase[9].

However, it's important to note that elections alone do not guarantee a fully functioning and healthy democracy, they are a significant part of a broader democratic framework. The point is that given the negative repercussions of the low representation, it is of utmost importance for further research to understand what are the aspects that impact young people to absent from the elections to the European Parliament. There is also agreement in the literature that if young people are not given adequate representation, their views on these important topics will likely be silenced[10]. This, in turn, might have dire consequences on young people's under-representation and support for democracy and their interest in participating in the political process[11]. Yet, existing research has so far struggled to propose the determinants that could achieve a higher polling presence among young people. Existing research lacks a deeper understanding of what might boost interest in society and politics in Europe and raise the voting rate of young people in European parliamentary elections.

In the present research, a particular point of view is going to be explored and may bring new aspects to this debate. Whereas much of the previous research focused on the individual characteristics of the voters, the present research focuses on the positive incentives that might be given to first-time voters to engage them to exercise their right to vote. The main purpose is to carry out a survey to gain data about the attitude of first-time voters to polling in the European Parliament elections in June 2024. The point is to examine which factors sway the mindset of first-time voters about their choice to poll or not. Their decision-making process is considered to be largely affected by the social environment. This fact is crucial for the present research.

Based on the qualitative survey conducted on pupils aged 17–18 attending secondary schools and vocational schools from ten different member countries the research tackles the question of whether the public secondary education may affect the incentives of first-time voters to cast their vote in the European Parliament elections. Consequently, the research focuses on the practices and possible stimulus given by schools that may encourage them to vote for representatives in

[8] EUROPEAN PARLIAMENT. *Closer to the Citizens, Closer to the Ballot* [online]. Available at: https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/closer-to-the-citizens-closer-to-the-ballot

[9] MÜLLER, M. Two years to go. What to expect from the 2024 European Parliament elections. In Policy brief. Jacque Delors Centre. 2022 [online]. Available at: https://www.delorscentre.eu/en/publications/2024-european-elections.

[10] See e.g. STOCKEMER, D., SUNDSTRÖM, A. Age representation in parliaments: Can institutions pave the way for the young? *European Political Science Review*. 2018. 10(3), p. 470–478.

[11] For more see WATTENBERG, P. M. *Is Voting for Young People?* New York: Routledge, 2015.

the European Parliament. The outcomes of the research provide a possible path to stimulate the formation of voting habits for young voters and increase their interest in public affairs. The point is to make the first-time voters cast their vote since they have not yet acquired a habit of abstaining and turning a blind eye to the elections.

Twenty schools from 10 member countries[12] are involved in the present research. From each country two schools were chosen: a grammar school and a vocational school, so the respondents represent a cross-section of the population. Only the first-time voters with the first right to vote were asked to fill in an online questionnaire. In total 579 full responses were collected. Consequently, the responses were analysed and illustrated in the charts. It complies with the reasoning line of the research to consider the limits of the research. The research is carried out only on a subset of the youth population and does not reflect the proportional representation of young people at schools. Furthermore, it is necessary to take into account the current mood of the respondents and impulsive responses especially when it comes to questions about voting, as socially desirable behaviour combined with important civic norms lead respondents. Another shortcoming of the present research is that it is not possible to observe and consider all factors that might be important to explain the non-participation in elections among young voters. Despite the above-mentioned limits the research reveals the outcomes that represent the trends and the stereotypes and gives some hints to take steps to change them.

Firstly, the legal framework of elections is explained, consequently, an overview of the voter turnout is given, followed by the findings of the study. The results are consequently explained and discussed by using inductive reasoning. Explanations of the study assess the position and the perception from a youth perspective about current European institutions.

2. The trends in European Parliament elections

In May 2024, the members of the European Parliament will be directly elected for the tenth time. The guidelines for European Parliament elections in the EU are established through European Union (EU) regulations and directives and national laws. A set of basic principles establishes certain fundamental rules that apply to all member states, such as the requirement for direct elections and the right to vote for EU citizens residing in another member state[13]. These legal instruments help to standardize and unify the common aspects of the electoral process in all EU member countries. They ensure a common framework for parliamentary

[12] Belgium, Czechia, France, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia.
[13] Treaty of Lisbon imposes the right to vote and to stand as a candidate.

elections both at the EU and the national level. While the common provisions lay down the principle of proportional representation, set certain fundamental rules and principles, such as the timing of elections and the overall composition of the European Parliament[14] and a number of incompatibilities between national and European mandates and the principle of proportional representation[15]. Statute and Funding of European Political Parties and European Political Foundations govern the status and funding of European political parties and foundations[16], which can be involved in election campaigns for the European Parliament. Many other important issues, such as the exact electoral system used or the number of constituencies, are specified by national laws[17]. One of the most important amendments to the 1976 Electoral Act adopted a set of important provisions on the possibility of different voting methods, such as electronic or postal voting[18]. This can impact the overall composition of the legislative body. Other amendments concern the protection of personal data[19]. Since the penultimate elections in 2014 and the last in 2019 much has changed concerning new challenges facing disinformation and potential manipulation of voters through online communications[20]. The recent amendments could make a significant contribution to higher interest in the elections. Chart 1 shows the turnout in the elections in 2019.

Except for Belgium, the voting turnout in the analysed countries reaches the average of EU or less, with Czechia and Slovakia being in the last positions. The figures on voter turnout for the population as a whole show only part of the problem, as abstention from voting does not affect all countries equally, nor does it affect all population groups within a society equally. Indeed, various studies reveal the statistics of voter absenteeism in EU member states in 2014, especially among the youngest group of eligible voters. In the 16-18-24 age group, abstention from voting at the EU level was over 70 percent and only slightly below 70 percent among 25-29-year-old young adults. This has changed for the 2019 European elections, but the trends demonstrating the widespread absence

[14] Article 14 Treaty on European Union (TEU); Articles 20, 22 and 223 Treaty on the Functioning of the European Union (TFEU), Article 39 of the Charter of Fundamental Rights.

[15] Council Decision 2002/772/EC.

[16] Regulation (EU) No 1141/2014.

[17] See HAMUĽÁK, O. Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic – Basic Scenarios. *European Studies – The Review of European law, Economics and Politics.* 2020, vol. 7, pp. 108–124, DOI: https://doi.org/10.2478/eustu-2022-0049

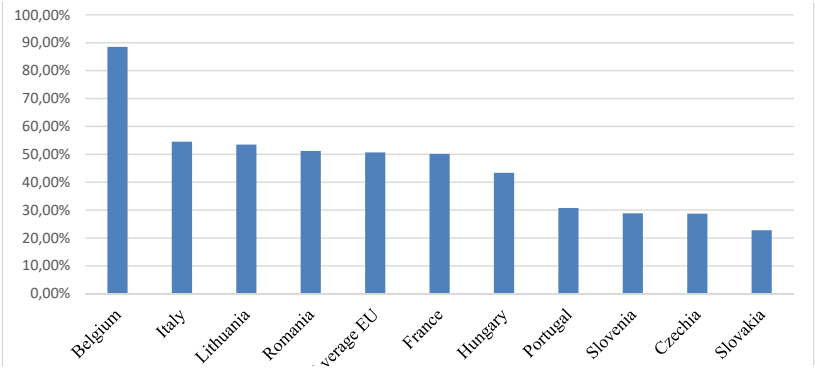
[18] Council Decision 2018/994.

[19] Cf. ANDRAŠKO, J., MESARČÍK, M., HAMUĽÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework – Basic Scenarios. *AI & SOCIETY*, 2021, 36, pp. 623–636, DOI: https://doi.org/10.1007/s00146-020-01125-5

[20] Regulation (EU) 2018/1725 on the Protection of Personal Data.

of youth from EU institutional politics are undeniable. The 2014 European Parliamentary election marked a new low in youth turnout. The result was that 72 percent of the electorate aged 18 to 24 abstained from the elections[21].

Chart 1 Turnout in the elections to the European Parliament 2019



Source: *European Parliament, own processing*

The outcomes solidify a general trend towards less political participation among young voters in the EU that raises concerns among scholars and politicians. Yet, despite increased efforts to reach young voters through specifically designed campaigns, fewer members of the youngest generation of voters cast their votes than ever before at European elections. An abundance of research focusing on voter turnout has been carried out. Important studies are confirming the fact that those who exercise the right to vote are not a random sample of registered voters[22]. One persistent finding states that voting in one election is a potent predictor for turnout in subsequent elections[23]. Some individual characteristics may correlate with voting, such as level of education, income, gender, race and ethnicity, marital status, geographic location, political ideology, trust in government and democracy, personal values, and last but not least civic engagement[24]. Some research

[21] EUROPEAN PARLIAMENT. Turnout by year [online]. Available at: https://www.europarl.europa.eu/election-results-2019/en/turnout/

[22] See e.g. GERBER, A. S., GREEN, D. P., SHACHAR, R. Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment. *American Journal of Political Science*. 2003, vol. 47, no. 3, pp. 540–550.

[23] DENNY, K., ORLA, D. Does Voting History Matter? Analysing Persistence in Turnout. *American Journal of Political Science*. 2009, vol. 53, no. 1, p. 30.

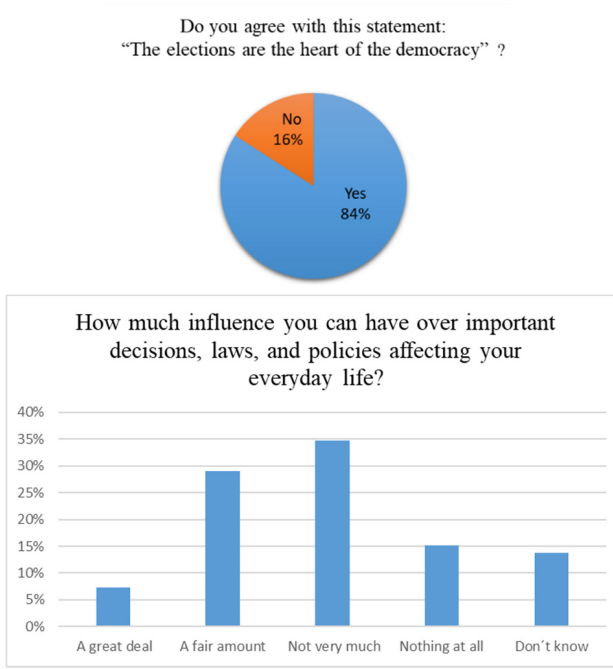
[24] ŐHRVALL, R. Growing into Voting: Election Turnout among Young People and Habit Formation. 2018 [online]. Available at :https://liu.diva-portal.org/smash/get/diva2:1238886/FULLTEXT01.pdf

outcomes point out that individuals become habituated to voting in particular types of elections. The degree of persistence appears to vary by electoral context and by the attributes of those who comply with an initial inducement to vote[25].

3. Research outcomes

The following part of the paper presents the results of the survey. The results initiate a debate that will pursue this chapter. This chapter exhibits the answers regarding the attitude of young people to the elections to the European Parliament and their opinions on the possible influence on public affairs. Charts 2 and 3 show the attitude of the respondents towards the importance of the elections and their opinion about the influence on public affairs.

Chart 2, 3 Attitude of respondents towards elections, influence on public live

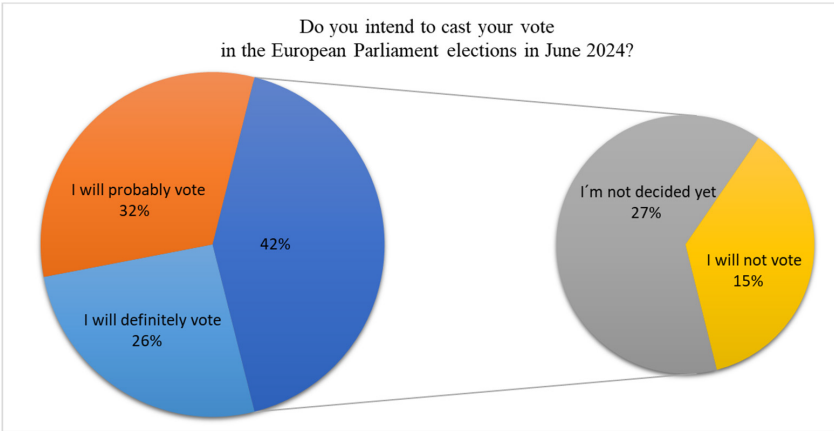


Source *Own processing*

[25] COPPOCK, A., GREEN, D. P. Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities. *American Journal of Political Science*, vol. 60, no. 4.

The first-time voters expressed a considerably high trust in the importance of the elections. Almost 85 percent consider elections to be an important tool for protecting democratic values. More than four-fifths of the respondents agree that elections are crucial for the democratic system. These opinions are in contradiction with the answers to the second question: How much influence you can have over important decisions, laws, and policies affecting your everyday life? One-third of the respondents answered, "Not very much". This means that for one-third of the respondents, their vote seems to be powerless. Those who do not believe in the power of the vote probably expressed their choice to opt out of the elections or have not decided yet. Conversely, more than half of the respondents are likely to cast including 26 percent of the respondents who are decided to cast the vote, see Chart 4.

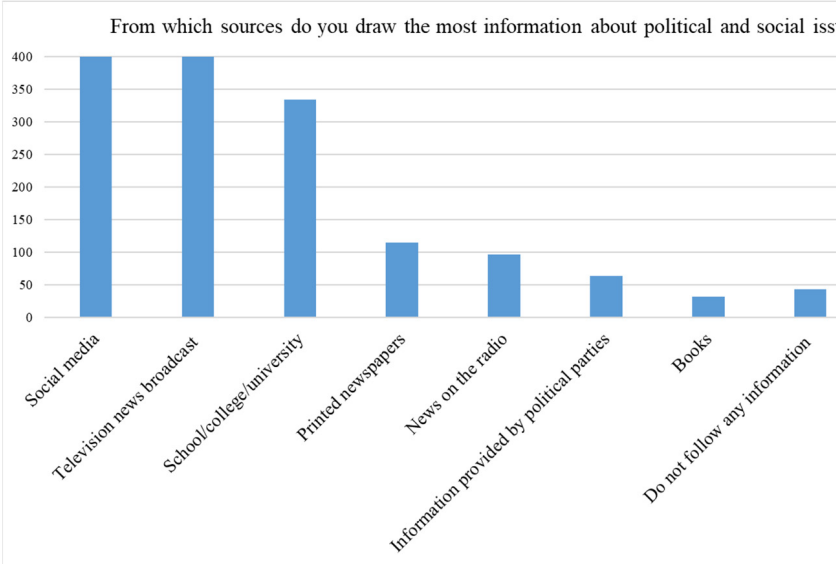
Chart 4 Intention to participate in EU elections



Source *Own processing*

These figures open up the question of what lies behind the uncertainty of young voters in the decision to participate or not in their first elections. The answers may be hidden in the sources and the way that young people get the information as well as how they proceed with information as well as the perception of the role of the European Parliament. The purpose of the next question was to find out where young people get their information from about politics and social issues. The respondents chose up to three sources they generally draw the most in order to get information about politics, economics, and social life. The answers are presented in Chart 5.

Chart 5 Sources of information



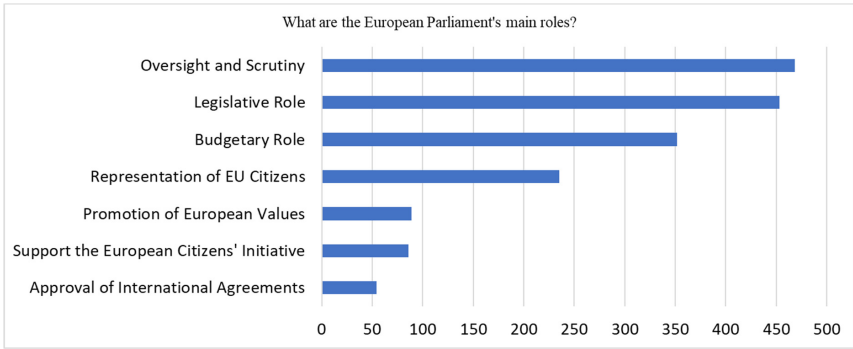
Source *Own processing*

Chart 5 shows that social media and television prevail in supplying the information. On the contrary, only a tiny fraction of the respondents draws information from traditional sources like books or news on the radio. An interesting piece of finding arises from the fact that only 63 participants responded that they gather information directly from political parties. The survey confirmed that cyberspace retains the top position. A big part of social life is connected with social media, facilitating access to both official and unofficial sources, and enabling different actors to carry out activities aimed at influencing public opinion, and social attitudes[26]. Conversely, the direct contact with political parties is insignificant.

Another question finds the answers on how young voters perceive the role of the European Parliament. Young respondents expressed themselves by choosing up to three answers.

[26] HOLT, K., SHEHATA, A., STRÖMBÄCK, J., LJUNGBERG, E. Age and the effects of news media attention and social media use on political interest and participation: Do social media function as leveller? *European Journal of Communication.* 2013, vol. 28, no. 1, pp. 19–34.

Chart 6 Perception of EU Parliament´s main roles



Source *Own processing*

Youth see the main role of the European Parliament in the legislative and budgetary tasks. The delegate positions such as the representation of EU citizens or their international representation are for them marginalised. Young people do not perceive members of the European Parliament as their representatives who may be able to express and voice their opinions and positions.

The following set of questions concerns the usage of different sources for getting the information and is focused on what is happening at schools. The respondents ranked the school in third place in the rankings of "information providers" see Chart 5. Schools have an outstanding influence, what happens in the classes may significantly influence the attitude and position of young voters. Therefore, schools are supposed to provide a diverse and wide range of activities that lead young people to civic responsibility and engagement. The following charts give an overview of the activities involved during the educational process. Respondents were asked to choose one option that describes the most how frequently the activity is addressed in schools.

The most frequent activities run at schools is training in media literacy involving mainly working with the text and information. The discussions and structured dialogues are the second most performed activity. On the contrary, the activities that deserve more profound preparation and involvement of the participants such as the mock trials or student-moderated panels are never practiced by more than half of the respondents. Visiting the institutions or meeting the politicians belong as well to rarely used activities. It can be seen that schools have difficulties in organizing time-consuming events that require longer preparation, intensive cooperation, and more profound skills of students.

Chart 7 Activities run at schools

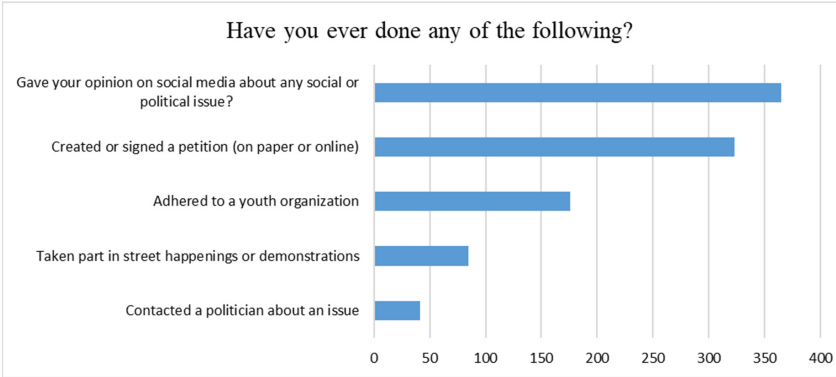
Source *Own processing*

Rather passive engagement of young people is displayed as well in Chart 8. It gives an overview of the engagement and activities that take place outside of regular school hours and that are related to public life.

Regarding personal activities, the answers reveal that young people are likely to express their opinions and they await and demand action from authorities. Moreover, social media and technology make it easier to spread opinions. Posting their opinions on social media seems to be the most acceptable way to express themselves. About two-thirds do not hesitate to manifest their point of view by signing or creating a petition. Far less frequent activity is to join an association for a common purpose or goal which stands for about one-third of

the respondents. Personal engagement seems to be convenient only for about 15 percent of the respondents.

Chart 8 Personal activities



Source *Own processing*

The outcomes of the survey open important topics for discussion on the direction in which the thinking and actions of young people are heading. A detailed analysis of the results and discussion is the content of the following part of the paper.

4. Discussion

The outcomes of the survey direct to the subsequent findings that are discussed as follows. Democracies depend on informed and engaged citizens[27]. As a necessary condition for the existence of basic democratic principles, election participation ensures a suitable mechanism for the articulation of interests and provides a form of checks and balances on decision-makers, last but not least is directly related to the responsiveness of government[28]. Consequently, democracy may hardly be sustainable unless it succeeds in continuously declining interest which leads to the lack of voter participation in the EU elections. Charts 2 and

[27] HELD, D. *Models of democracy.* Cambridge: Polity Press UK, 2006, p. 6.

[28] O'NEILL, B. Democracy, Models of Citizenship and Civic Education. In: MURRAY, Print, MILNER, H. *Civic education and youth political participation*. Sense Publishers, Rotterdam, 2009, p. 7.

3 discovered a significant effect that corresponds with the general belief among young people, for 84 percent of the respondents the elections are the heart of democracy. Furthermore, as a necessary condition for the existence of a democratic polity[29], citizen participation provides the best mechanism for the articulation of interests, affects life satisfaction, provides a form of checks and balances on decision-makers, and is directly related to the responsiveness of government.

The results of the survey (see Chart 4) show that 58 percent of respondents intend to cast their vote in the next European elections among which 26 percent expressed themselves to be already decided. The following lines deal with the undecided respondents and with the respondents who do not want to cast their vote. An important reason for not voting in the recent EU elections is a lack of trust in or dissatisfaction with politics in general and a lack of interest in politics. Another reason is the belief that a vote has no consequences or does not change anything which goes in compliance with other research[30] and with the answers (see Chart 3). Half of the respondents believe that their vote has no influence on public affairs. The reason for this predominant perception of no consequences of the voting useless' may be hidden in particular reasons that are associated. More studies indicate that in particular in recent years reporting on the EU has shown to be predominantly negative[31] with a focus on a threat to national economies[32]. During a typical election campaign, young citizens would hear or see relatively little about the EU and the parliamentary elections in the news media. Most of the news items that discuss European issues in depth concern international relations and abstract economic processes, information that is quite distant from the experiences of a young adult. If the EU is featured in the news, it is most likely in the context of national developments or general economic trends like the Euro-crisis[33].

On the other hand, a fair amount and a great deal of influence feel 29 percent, resp. 7 percent of respondents (see Chart 3). This indicates that campaign messages are seen and heard by the young Europeans and in some cases may have a bearing on their participation in the elections. Therefore, it is useful to focus on the main information sources (see Chart 5). Due to the changing and

[29] Ibidem.

[30] DEŽELAN, T. *Young people's participation in European democratic processes. How to improve and facilitate youth involvement*. 2023 [online]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/745820/IPOL_STU(2023)745820_EN.pdf

[31] GLEISSNER, M. News about the EU constitution: Journalistic challenges and media portrayal of the European union constitution. *Journalism.* 2005, 6(2), pp. 221–242.

[32] MICHIAILIDOU, A. The role of the public in shaping EU contestation: Euroscepticism and online news media. *International Political Science Review*. 2015, 36(3), p. 324.

[33] MOELLER, J., KÜHNE, R., DE VREESE, C. Mobilizing Youth in the 21st Century: How Digital Media Use Fosters Civic Duty, Information Efficacy, and Political Participation. *Journal of Broadcasting & Electronic Media*. 2018, 62(3), pp. 445–460.

fragmented media environment in the 21st century, the influence of the media on the development of political participation and civic norms has changed. Many young citizens choose to avoid political information or selectively attend to only the issues that appeal to them[34]. The research results indicate a declining use of offline sources, whereas online news media prevail. This goes in line with the predominant use of online devices in this age group, but it might also be a consequence of the higher motivation to follow the news through social networks and related use of online applications as they provide unlimited access to their own devices depending on their own choice that informs on time and allow engage in the stories that seem relevant while merely scanning all other events[35]. Consequently, the approach, way of presentation, and overall effect are crucial for the satisfaction of media-related needs and the motivation to pay attention to information and procession. Accordingly, consistent exposure to relevant news online is associated with the belief that an individual ought to partake in democratic processes, as well as more confidence in a young voter's ability to do so[36]. Both factors are key factors in participating in the elections. Still, there are 27 percent of those respondents who have not decided yet (see Chart 5). These undecided young first-time voters may be influenced by the upcoming campaign as well as by a suitable set of school activities and information efficacy. Schools have a significant influence on the development of civic duty and information efficacy and consequently on political participation. Anyhow, it is important to stress that as per some studies, the internet and social media increase the activism of those who are already active[37].

No doubt, technological innovation and the widespread use of digital technologies have had a profound impact on changing habits, including voting habits. *The widely spread use of the internet is suitable for different forms of action and interaction in a digitally networked space, it is supposed to be accessible and user-friendly for young people – the digital generation of first voters. Anyhow, t*he findings of the present research lead to the identification of the absence of an important method of communication with young voters. It is noticeable in Chart 7 that awareness-raising activities that may be organized by the schools are not sufficiently exploited. Results manifest in the young people´s indecisiveness and

[34] Ibid.

[35] HOLT, K., SHEHATA, A., STRÖMBÄCK, J., LJUNGBERG, E. Age and the effects of news media attention and social media use on political interest and participation: Do social media function as leveller? *European Journal of Communication*. 2013, 28(1), pp. 19–34.

[36] MOELLER, J., KÜHNE, R., DE VREESE, C. Mobilizing Youth in the 21st Century: How Digital Media Use Fosters Civic Duty, Information Efficacy, and Political Participation. *Journal of Broadcasting & Electronic Media*. 2018, 62(3), pp. 445–460.

[37] Ibid.

uncertainty about opinions, the sensation that things are too complicated to understand, or on the contrary, they see the world flattening in black and white. The political issues, public life, connections, dependencies, and relations are excessively intricate so that they can be understood with a single click on a mobile phone.

This aligns with the roles of the European Parliament for the young voters (see Chart 6). They do not identify their representatives in this institution to be their "ambassadors" and "spokespersons". Less than half of respondents perceive the members of the EU Parliament to represent the EU Citizens. This role is in fourth place after oversights, legislative, and budgetary roles. Young people ignore the institute called Citizens´ Initiative where the EU Parliament may decide to debate further and adopt a resolution on these ideas.

A closer look at the data (Chart 8) also shows a significant disproportion of those who are involved in active actions concerning public affairs and of those who tend to express sluggishly their opinions about some public topic. Conversely, when it comes to having an opportunity to express their opinion, they do so. These findings confirm not only that young Europeans care about politics and public affairs they also tend to develop their perspective and there is a cleavage of the will to express themselves.

Clearly, these are some of the cases for the future educational setting. Schools play an irreplaceable role in access to information about politics, and public life. School activities are supposed to influence young people by shaping their thoughts about the contemporary world. They stand for the place for intrinsic goals of disciplinary knowledge, including learning about the political conceptions, and cultures through perspective, broadening students' everyday understanding[38].

Chart 7 demonstrates the answers of the respondents on different school activities focused on data selection, increasing and developing their interest in public affairs. The activities concerning training in media literacy and access to a wide range of diverse and unfiltered information may be described to be sufficiently exploited. As for the other activities, the results of the survey suggest that the educational process is insufficiently focused on strengthening the activities leading to personal involvement in public affairs. Student-moderated panels, youth juries, mock trials, and other deliberative models of youth participation, guided tours or institutional visits, and debates with the politicians have never been undertaken for more than 50 percent of the respondents.

Therefore, it is highly important to support the proactive approach of schools in education on what European citizenship means and what are the benefits of

[38] SANDAHL, J. Studying Politics or Being Political? High School Students' Assessment of the Welfare State. *Journal of Social Science Education*. 2019, 18. pp. 153–171.

European citizenship. The following lines give some proffering future-oriented proposals that may strengthen the voting turnover. The key areas of interest are acknowledging the ongoing processes of addressing the problem of youth participation in electoral politics and recommended actions in targeting the areas of information provision, and information processing capacity. These are the creation and support of tools for youth-friendly information-sharing and feedback. It is useful for schools to continuously promote different school activities aiming at searching, expressing, defending, and exchanging opinions using various deliberative models of youth participation, such as youth juries, mock trials, and moderated panels. An important tool to bring politics closer to young people and engage them in the decision-making process is to organize debates with the politicians. The politicians themselves must take into account the importance of direct contact with young voters and make an effort to visit the schools and organize discussions and meetings while respecting the rule of rather explaining than promising. At school, instead of relying on unrelated national issues, the politicians are supposed to focus on emphasizing the role of the EU, EU integration, and cooperation in the everyday lives of EU citizens as well as on the feeling of duty towards Europe.

Another important issue is the use of digital services in public administration. As per the results of the survey, the respondents seem to be engaged and motivated to express their opinions, and the interactive interfaces and informational resources provided electronically can help them better in some cases understand candidates and issues on the ballot. The survey confirmed a high degree of information dependence and accessibility to online sources of respondents. An effective digital transformation of various aspects is likely to promote higher voter turnout among young voters. E-voting, with its accessibility and convenience, has the potential to engage and empower younger generations who are often tech-savvy and digitally connected[39]. First time voters *may be more motivated* to vote if elections are conducted electronically. E-voting is more convenient for those who are accustomed to digital convenience in their daily lives allowing them to vote quickly without travelling to a physical polling station[40]. Anyhow, in connection with these facts, it is indispensable to grasp the potential risks, put the individuals and their rights and freedoms at the heart of the legal regulation, and capture them as the primary object of protection41. Social media will remain

[39] NORRIS, P. *E-Voting as the Magic Ballot?* Harvard University: Harvard Kennedy School, University of Sydney, 2002, pp. 5–18.

[40] Ibid.

[41] ANDRAŠKO, J., MESARČÍK, M., HAMUĽÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework – Basic Scenarios. *AI & SOCIETY.* 2021, 36, p. 632.

a key tool that can build effective new relationships between political actors and young people. This will not happen without the active involvement of politicians and the positive correlation between the political use of social media and political participation and representation during school activities.

To sum up, as for the upcoming and future elections, it would be short-sighted to let young Europeans rely on sources shared through social. Instead, it needs to be assured that information about the EU is available to young citizens in a form that is understandable, unbiased, and relevant to them. This kind of information can build their self-confidence in their voting decision and can lead to active participation. Yet, having more young people who regularly participate in elections could lead to a substantial and faster shift in policy priorities, given the different perceptions of the urgency of the current, relevant, and urgent matters.

5. Conclusion

Numerous variables condition the youth voter turnout in the elections. This research aimed to assess the attitude of first-time voters to polling in European Parliament elections in June 2024 in the context of school activities as well as extracurricular activities related to public affairs. In the present research, only first-time voters were questioned in the survey. A closer look at the results of the survey shows that a great deal of information that young people take in comes from cyberspace. The number of those who are influenced by information from social media is excessively high in comparison with more reliable sources like schools, printed journals or books. At the same time, it was found that the internet and social media may increase the activism of those who are likely to express their opinion, jointly it is much easier to express their opinions via social media which is often anonymous and in a straightforward context. In contrast, the respondents are not likely to participate actively in social and political issues.

It was discussed that, even if the internet and social media offer significant potential for mobilizing youth for issue-oriented campaigns, they cannot replace the personal attitude and school involvement in different activities and social engagement to connect students to active European citizenship. The role of the school is irreplaceable when facilitating the formation of the civic responsibility of young people. EU policy measures with significant impacts on member states have steadily become more complicated in recent years and European voters today may have difficulties understanding what is at stake. This lack of involvement hinders students' understanding of the democratic process and their civic responsibilities. Among the aspects of direct school influence on students that need to be utilized are exposure and direct access to official sources. It was

described that different actors involved in public life are supposed to carry out activities aimed at influencing citizenship responsibility and ensuring more effective exposure to political information leading to learning effects and an increase in traditional forms of participation.

The research discovered that the school and extracurricular activities have been so far underutilized despite their high availability and accessibility to increase interest in elections and strengthen the civic responsibility of the youth from the perspective of European citizenship. Schools often do not engage adequately in giving the opportunities to make young people think of the role, and policies and form their judgments. Encouraging active participation in political discussions by schools and providing unbiased information can help bridge this gap, fostering informed and engaged citizens. This opens an opportunity also for politicians and other publicly active individuals to engage in fostering young people´s awareness of the importance of European institutions, especially not during an electoral campaign. Seemingly, it is essential to reach out to students personally with topics of common relevance that play a more important role than ever before.

An important conclusion arising from the research indicates young voters understand that political participation is essential for any functioning democracy. Despite this fact the European Parliament as one of the main European institutions stays distant from young people, they do not fully understand its role.

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Capital Movement Restrictions in EU Law: Retrospective and Modern Approaches, Development Trends

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Summary: This article addresses the issue of establishing the legal framework for freedom of capital movement in the EU, as well as the peculiarities of the current legal regulation of freedom of capital movement between EU Member States, as well as between them and third countries. Authors examine the issues of correlation between freedom of establishment and freedom of capital movement. The restrictions on capital movement between EU Member States and between them and third countries are characterized. The case law of Court of Justice of the European Union on key issues in this area is analysed. The main trends of capital flow restrictions at the present stage are outlined, such as those emerged amidst new realities, including the armed aggression of the Russian Federation against Ukraine, and its impact on the processes of capital flow liberalization in the EU.

Keywords: European Union, EU law, Court of Justice of the European Union, capital, investment, free movement of capital, liberalization of capital movements, restrictions on the movement of capital, armed conflicts, sanctions, the Capital Markets Union, macroprudential measures, investment agreements, investment screening

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1. Introduction

The free movement of capital, along with the free movement of persons, goods and services, is a key element of the efficient functioning of the internal market of the European Union (hereinafter referred to as the EU). Free movement of capital creates underlying conditions for effective functioning of a competitive, open, unified, single EU internal market[1], providing a number of benefits to both citizens and business entities.

At the same time, the free movement of capital it not absolute. The free movement of capital may be subject to restrictions under the internal law of a Member State in justified cases, for example, to prevent infringements of national law. Capital flow restrictions may apply both to relations between EU Member States and to relations of EU or its Member States with third countries.

Over the years, the EU has made considerable efforts to remove obstacles to capital movement in order to achieve its goal of absolutely free movement within the integration community, as well as in relations with third countries. Despite a fairly high level of integration in the area of capital movement freedom, current challenges create new obstacles, slowing down the liberalization process.

Today, the EU has one of the most open investment regimes in the world, and its Member States have relatively low amount of restrictions on foreign direct investment. However, despite the EU's desire to further liberalize the capital market, current realities, especially Russian-Ukrainian armed conflict, have a significant impact on this process, as Russia's unprovoked and brutal aggression has exacerbated the contradictions of the current world and significantly complicated the socio-economic situation at the regional and global levels.

This strengthens relevance of the chosen research topic, since the issue of the impact of the armed conflict unleashed by Russian Federation in the 21st century in the centre of Europe on the freedom of capital movement, as well as other factors which cause capital movement restrictions, have not been comprehensively studied to date.

In order to address this issue, this article aims to investigate the evolution of legal regulation of free capital movement in the EU and examples of relevant case law of Court of Justice of the European Union (hereinafter referred to as CJEU), highlight peculiarities of its modern legal regulation, provide a general characteristics and development trends of capital movement restrictions in EU law.

[1] For detailed information see: ŠIŠKOVÁ, N., HAMULÁK, O. (eds.). *Evropské právo 2. Jednotný vnitřní trh*. Prague: Wolters Kluwer, 2012, pp. 84–95.

2. Free Movement of Capital: Evolution and Peculiarities of Modern Legal Regulation

Freedom of capital movement can be viewed in the subjective sense – the subjective right to move capital freely; in the objective sense – as a set of rights and obligations enshrined in the EU law; and as a fundamental principle of the EU common market.[2]

The EU law does not contain a definition of the concepts of "capital movement" and "free movement of capital". As noted by CJEU in its judgment in Case 68/88 of *Commission of the European Communities v Hellenic Republic* of 03 December 1987, freedom of movement of capital is the original freedom to carry out a wide range of financial transactions.[3] In judgement in Case C-302/97 of *Klaus Konle v Austria* of 01 June 1999, CJEU actually equated the concepts of "capital flows" and "investment flows"[4], in this respect, as follows from the judgment, the Court distinguishes between the categories of "investment" and "capital".

According to S. Hindelang, the amount of freedom of capital movement determines the amount of foreign direct investment[5], as investments are included in capital movements under the EU law. As stated by Z. Darvas et al., capital flows can be defined as direct, portfolio and other investments, as well as financial derivatives.[6]

The freedom of capital movement was first envisaged by the Treaty establishing the European Economic Community (hereinafter referred to as the EEC Treaty) dated 25.03.1957. Article 67(1) of the Treaty stipulated that Member States shall, in the course of the transitional period and to the extent necessary

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2 STRILETS, B. Pravove rehuliuvannia investytsiinoi diialnosti v Yevropeiskomu Soiuzi [Tekst] : dys. ... kand. yuryd. nauk : 12.00.11 / In-t zakonodavstva Verkhov. Rady Ukrainy. Kyiv, 2020, p. 33–34 (in Ukrainian).

3 Commission of the European Communities v Hellenic Republic. Case 194/84. Judgment of the Court of 03 December 1987 [online]. Available at: https://eur-lex.europa.eu/legalcontent/GA/TXT/?uri= CELEX:61984CJ0194

4 Klaus Konle v Republik Österreich. European Court Reports. 1999. I-03099. Judgment of the Court of 01 June 1999 [online]. Available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61997CJ0302

5 FRAGA, L. S., HINDELANG, S. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. *European Journal of International Law.* 2010. vol. 21, issue 2, p. 497 [online]. Available at: https://academic.oup.com/ejil/article/21/2/496/374222

6 DARVAS, Z., HUTTL, P., MERLER, S., WALSH, T. Analysis of developments in EU capital flows in the global context. *Final study. Bruegel.* 2015, № 2015.2574, p. 20 [online]. Available at: https://finance.ec.europa.eu/system/files/2020-06/study-bruegel-capital-flows-03112015_en.pdf

for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested. Article 71 imposes an obligation on Member States to avoid introducing within the Community any new exchange restrictions which affect the movement of capital and current payments connected with such movement, and making existing rules more restrictive.

When establishing the European Economic Community (hereinafter referred to as the EEC), the Member States declared their readiness to liberalize capital flows to the maximum extent possible, taking into account their economic situation and balance of payments. Along with that, there was a possibility of introducing safeguard measures (with the consent and under conditions determined by the Commission of the European Communities in consultation with the Monetary Committee), in the event of movements of capital leading to disturbances in the functioning of the capital market in any Member State (Article 73(1)).[7] Thus, free movement of capital, a treaty "freedom", was introduced, which must be achieved in the manner provided for in this founding treaty by adopting an appropriate legislative programme.

The legal consequences of Article 67 of the original version of the EEC Treaty were analysed by CJEU in the course of consideration of, inter alia, the criminal proceedings against Guerrno Casati.[8] In its judgement, the European Court made the following conclusions: 1) Article 67 of the EEC Treaty differs from the provisions on the free movement of goods, persons and services in the sense that there is an obligation to liberalise the movement of capital only to the extent necessary to ensure the proper functioning of the common market. The scope of restrictions varies over time and after the end of the transition period, the requirements of the common market are taken into account to determine these restrictions, the benefits and risks of liberalisation are assessed, which, in turn, is the prerogative of the Council in accordance with the procedure regulated by Article 69 of the EEC Treaty; 2) Article 67 of the EEC Treaty must be interpreted in such a way that the restriction on the export of foreign banknotes cannot be considered cancelled after the end of the transition period regardless of the provisions of Article 69 of the EEC Treaty; 3) failure to apply the safeguard procedures provided for in Article 73 of the EEC Treaty, which constitute restrictions on the movement

[7] Treaty establishing the European Economic Community (Rome, 25 March 1957). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023/

[8] Criminal proceedings against Guerrino Casati. Judgment of the Court of 11 November 1981. Case 203/80 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0203

of capital that the state is not obliged to liberalise, does not constitute a violation of the EEC Treaty (clauses 1–3 of the judgment's Summary).

Subsequently, in 1960, the First Directive for the Implementation of Article 67 of the Treaty was adopted. In the lists "A", "B", "C" and "D" of Annex No. 1, the Directive divided capital transactions into four categories, taking into account the level of liberalisation.[9] The Second Council 63/21/EEC Directive of 18 December 1962, which supplemented and amended the First Directive[10] supplemented lists A, C and D of Annex 1. The First Directive liberalised mainly long-term capital transactions, but the Second Directive extended the liberalisation to securities transactions.

The next stage of liberalisation of capital movements in the EU was launched by the Single European Act, which was adopted on 17 February 1986[11]. Article 13 of this act supplemented the EEC Treaty with a new Article 8a, according to which the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty[12]. The liberalisation of capital movement was given the same importance as other internal market freedoms.[13]

On May 23, 1986, the Commission of the European Communities proposed to the Council a programme for the liberalization of capital movement in the Community based on the EEA. This Program outlined a three-level progressive liberalization of capital movements, which correspond to the following three categories of operations: purely capital operations ("capital operations"), such as commercial loans, direct investments or various "personal" movements of capital, which are directly related to effective implementation other basic freedoms of the common market; operations with securities on financial markets, the liberalization of which depends on the existence of a single European financial

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9 See: First Directive (EU) of the Council of 11 May 1960 for the implementation of Article 67 of the Treaty. *Official Journal of the European Communities* L 043, 12.07.1960, pp. 0921–0932 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31960L0921

10 See: Second Directive (EU) 63/21/EEC of the Council of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty. *Official Journal of the European Communities* L9 22.01.1963, pp. 62–74 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31963L0021

11 Single European Act, 29.06.1987. *Official Journal of the European Communities* L 169/1, 29.06.1987. pp. 1–28 [online]. Available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=EN

12 Ibid.

13 STRILETS, B. Svoboda rukhu kapitalu ta investytsiina diialnist u Yevropeiskomu Soiuzi. *Chasopys Kyivskoho universytetu prava.* 2015, № 1, p. 301 [online]. Available at: http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=Chkup_2015_1_72 (in Ukrainian).

market; liberalization in this area should extend to all types of operations carried out by both investors and issuers; transactions related to commercial credits and money market instruments, the liberalization of which requires the establishment of a unified financial system in the EU.[14]

Moreover, the Programme proposed a two-stage action plan for capital liberalisation. The aim of the first stage was to achieve in the EEC the actual liberalisation of capital transactions necessary for the proper functioning of the common market and the effective interaction of the capital markets of the Member States. The second stage, in turn, was the full liberalisation of all capital transactions, including all banking and financial transactions (short and long term), even if they were purely currency transactions.

To implement the above Programme, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty was adopted.[15] In accordance with Article 1 of this Directive, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. In accordance with Article 6, Member States shall take the measures obligatory to comply with this Directive no later than 1 July 1990.

After the adoption of the Single European Act[16], the process of implementing the single market programme became irreversible. At the same time, various barriers continued to exist on the market. Trade flows were closely monitored by national customs services.

The programme for completing the internal market, set out in the White Paper of the Commission of the European Communities, provided for the development and implementation of multiple directives aimed at eliminating all physical, technical and financial obstacles to the free movement of goods, persons, capital and services.[17] As a result, this eventually led to the complete accomplishment of the freedom of capital movement (but with possible restrictions).

Subsequently, on 7 February 1992, the Treaty on European Union (Maastricht Treaty) was signed, it amended the EEC Treaty, according to which, from 1 January 1994, all restrictions on the free movement of capital and payments

[14] Ibid.

[15] Directive (EU) 88/361/EEC of the Council of 24 June 1988 for the implementation of Article 67 of the Treaty [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31988L0361

[16] See: Single European Act, 29.06.1987. *Official Journal of the European Communities* L 169/1. 29.06.1987. pp. 1–28 [online]. Available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=EN

[17] YAKOVIUK, I., ANAKINA, T., TRAHNIUK, O., KOMAROVA, T. Istoriia yevropeiskoi intehratsii vid Rymskoi imperii do Yevropeiskoho Soiuzu: monohrafiia / za red. I. V. Yakoviuka. Kyiv: *Red. zhurn. «Pravo Ukrainy»*, 2012, p. 128 [online]. Available at: https://dspace.nlu.edu.ua/handle/123456789/1210 (in Ukrainian).

between Member States and between Member States and third countries were prohibited.[18] The single market was successfully introduced and started functioning on 1 January 1993.[19]

Subsequent amendments to the EU's founding treaties, including the Lisbon Treaty, did not significantly change the process of regulating the freedom of capital movement.[20] According to article 63 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU), within the framework of the provisions set out in Chapter 4 ("Capital and payments") of Title IV "Free movement of persons, services and capital", all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.[21].

The basis for determining capital flows in the EU, as defined by CJEU[22], is the Nomenclature of Capital Movements set out in Annex 1 to Directive 88/361/EEC. It differentiates capital movements based on the economic nature of the assets and liabilities to which they relate, whether expressed in national or foreign currency. According to the above Nomenclature, capital movements include: direct investments; investments in real estate; transactions with securities that are usually traded on the capital market; transactions with certificates of collective investment institutions; transactions with securities and other instruments that are mainly traded on the money market; transactions with current and deposit accounts with financial institutions; loans related to commercial transactions

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18 Treaty on European Union (Maastricht, 07 February 1992). Official Journal C 191, 29/07/1992 pp. 0001–0110 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992M/TXT

19 See: YAKOVIUK, I., ANAKINA, T., TRAHNIUK, O., KOMAROVA, T. Istoriia yevropeiskoi intehratsii vid Rymskoi imperii do Yevropeiskoho Soiuzu: monohrafiia / za red. I. V. Yakoviuka. Kyiv: *Red. zhurn. «Pravo Ukrainy»*, 2012, p. 142 [online]. Available at: https://dspace.nlu.edu.ua/handle/123456789/1210 (in Ukrainian).

20 SAMOILENKO, Y., ZAVHORODNIA, V. Vilnyi rukh kapitalu u pravovomu rehuliuvanni finansovoho rynku Yevropeiskoho Soiuzu ta perspektyvy vykorystannia yevropeiskoho dosvidu dlia Ukrainy. Pravove rehuliuvannia vidnosyn na finansovomu rynku: stan ta napriamy vdoskonalennia: monohrafia, vidp. red. V. D. Chernadchuk. *Sumy: VVP «Mriia» TOV*, 2013, p. 277 [online]. Available at: https://essuir.sumdu.edu.ua/bitstream-download/123456789/50052/8/Zavhorodnia_Samoilenko_vilnyi_rukh_kapitalu.pdf;jsessionid=09386B0619E4C93FF1AB7E61CCA428E3 (in Ukrainian).

21 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union* C 326, 26.10.2012, Vol. 55, p. 412 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

22 Capital movements [online]. Available at: https://finance.ec.europa.eu/regulation-and-supervision/capital-movements_en

or the provision of services in which a resident is a participant; financial loans and credits.[23]

The same Annex 1 to Directive 88/361/EEC states that the above Nomenclature is not an exhaustive list for the concept of capital movements and should not be interpreted as limiting the scope of application of the principle of full liberalisation of capital movements.[24] Although the free movement of capital rules now apply to movements into and out of the EU, the 1988 definitions designed to cover intra-Community movements continue to be used. This was made clear when CJEU confirmed that mortgages fall within the scope of capital movements as defined in the Directive 88/361/EEC in its judgment in Case C-222/97 *Trummer and Meyer* of 16 March 1999 and further ruled that this interpretation should continue to apply to the free movement of capital according to founding treaties. Namely, CJEU expressed the opinion that "inasmuch as Article 73b of the EC Treaty *(Maastricht consolidated version),* which prohibited restrictions on the movement of capital, substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive".[25]

Nowadays, the issue of distinguishing between freedom of establishment and freedom of capital movement is important. Freedom of establishment under the TFEU cannot be extended to situations with third countries, unlike freedom of capital movement.

CJEU seems to be ambiguous in its approach to this issue. S. Hemels, J. Rompen, S. Adfelt et al. argue that CJEU in this context has developed a rule of "definite influence" of the investor on the company's activities, if there is such influence, this situation falls under the freedom of establishment, if not – then under the freedom of capital[26], In particular, the concept of "definite influence"

[23] Directive (EU) 88/361/EEC of the Council of 24 June 1988 for the implementation of Article 67 of the Treaty [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31988L0361

[24] Ibid.

[25] Manfred Trummer and Peter Mayer. Judgment of the Court of 16 March 1999. Case C-222/97 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-222/97

[26] HEMELS, S. et al. Freedom of establishment or free movement of capital: is there an order of priority? Conflicting visions of national courts and the ECJ. *EC Tax Review*. 2010, Vol. 1, p. 21 [online]. Available at: http://ssrn.com/abstract=1959832

was applied in the judgment of CJEU in *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem* (Case C-251/98) of 13 April 2000.[27]

At the same time, the question arises as to how to determine the existence of this influence. In this regard, CJEU has developed two rules that are not fully consistent with each other: 1) the conclusion on the existence of a determining influence is made on the basis of an analysis of the provisions of the relevant national legislation, for example, in the judgment in *Winfried L. Holböck v Finanzamt Salzburg-Land* of 24 May 2007[28]; 2) the existence of "definite influence" is determined on the basis of the actual circumstances of the case, for example, in the decision in Case C-284/06 *Finanzamt Hamburg-Am Tierpark v Burda GmbH* of 26 June 2008.[29]

The position expressed by CJEU on 13 November 2012 in its judgment in Case of *Test Claimants in the FII Group Litigation* C-446/04 seems to be significantly different from the previous ones. Thus, CJEU noted that if the tax legislation in question is of a general nature (e.g., a direct general system of taxation of income and gains from shareholdings), then the freedom of movement of capital also applies to the situation when EU resident legal entities receive taxable income from controlling interests in companies resident in third countries.[30]

On the other hand, the case law of CJEU shows that if EU Member States violate both the freedom of establishment and the freedom of movement of capital, the Court may focus on the violation of the freedom of movement of capital, and legal consequences are imposed for this violation. In particular, in the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 13 February 2007 in Case C-112/05 *Commission v Germany*[31], it was noted that the European Commission

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[27] Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem. Judgment of the Court (Fifth Chamber) of 13 April 2000. Case C-251/98. European Court Reports 2000 I-02787 [online]. Available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61998CJ0251

[28] WINFRIED, L. Holböck v Finanzamt Salzburg-Land. Judgment of the Court (Fourth Chamber) of 24 May 2007. Case C-157/05. I-04051 [online]. Available at: https://eurlex.europa.eu/legal-content/ EN/TXT/?uri=CELEX%3A62005CJ0157

[29] Finanzamt Hamburg-Am Tierpark v Burda GmbH. Judgment of the Court (Fourth Chamber) of 26 June 2008. Case C-284/06. I-04571 [online]. Available at: https://eurlex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A62006CJ0284

[30] NIJKEUTER, E., MAARTEN, F. «FII 2» and the Applicable Freedoms of Movement in Third Country Situations. *EC Tax Review.* 2013, Vol 22, p. 250 [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331989

[31] Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil obligations. Article 56 EC. Legislative provisions concerning the public limited company Volkswagen. Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 13 February 2007. Case C-112/05. Commission v Germany [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CC0112&from=LT

did not make any specific claim that the Volkswagen Law was incompatible with Article 43 of the EEC Treaty, no doubt because it took into account the previous case law in which CJEU focused on the free movement of capital (paragraph 104 of the Opinion). Namely, in a number of judgments, CJEU has ruled that restrictions on the freedom of establishment are a direct consequence of obstacles to the free movement of capital, with which they are inextricably linked. It follows from the foregoing that if a violation of Article 56(1) of the EEC Treaty (prohibition of restrictions on the movement of capital) is established, then there is no need for a separate consideration of the measure in the context of freedom of establishment (paragraph 105 of the Opinion).

In view of the above, the CJEU does not have a well-established position in terms of determining the dominant freedom in a particular case.

Along with that, it can be noted that free movement of capital is given the widest scope compared to other fundamental freedoms of the EU internal market. In addition, free movement of capital is the only freedom that applies within the EU, as well as to and from third countries. From the territorial point of view, it is the broadest freedom which applies *erga omnes* (to all investors).[32] Moreover, the freedom of movement of services and establishment always involves the movement of capital.

Thus, the freedom of capital movement occupies a special place among other freedoms of the EU internal market, as it applies not only to EU Member States but also to third countries. However, although this freedom has absolute (global) character in territorial aspect, it is not absolute when it comes to a possibility of introducing restrictions regarding it.

3. General Characteristics of Capital Movement Restrictions in EU Law

Article 63 TFEU provides that, within the framework of the provisions set out in the relevant Chapter, restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Restrictions on payments between Member States and between Member States and third countries are prohibited too.

At the same time, such restrictions can still be applied as exceptional measures in the context of the EU's objectives and principles. They may not be

[32] HAMUĽÁK, O. Unveiling the overlooked freedom – the context of free movement of capital and payments in the EU law. *International and Comparative Law Review.* 2012, Vol. 12, No. 2, p. 145 [online]. Available at: https://intapi.sciendo.com/pdf/10.1515/iclr-2016-0091

imposed for economic purposes, but only if there is a real and serious threat to fundamental social relations. The restrictions on capital flows are specified by the TFEU, while some explanations and legal interpretations in this context can be found in CJEU case law. Among the provisions of the TFEU, we should distinguish between restrictions of a special nature, provided for in Chapter 4 "Capital and Payments" (Articles 64–66), and general restrictions, established in other parts of the Treaty. General restrictions are set out in Articles 345 (restrictions related to property ownership), 346 (national security and defence), 143–144 (balance of payments), 75 and 215 (financial sanctions) of the TFEU.

Restrictions of a special nature relate to restrictions for third countries, tax differentiation, prudential measures, public order or public security.

The TFEU provides for the possibility to restrict the movement of capital for the reasons set out in Article 65 of this treaty and, in the case of non-discriminatory restrictions, to protect the public interest. In particular, Article 65 TFEU provides that the free movement of capital shall be without prejudice to certain rights of the Member States. These include: a) the right to apply relevant provisions of their tax laws that distinguish between taxpayers in different circumstances as regards their residency or place of investment; b) the right to implement preventive and supervisory measures, especially in the area of taxation and prudential supervision of financial institutions. In addition, this Article reserves the right of Member States to take measures justified by reasons of public policy or public security.

In any case, restrictive measures must comply with the principle of proportionality. They must therefore be fit for purpose and shall not go beyond what is necessary to achieve that purpose, for example, violation of such principle was once mentioned by the CJEU as "…restricting in manifestly disproportionate manner…".[33] In addition, national measures must be consistent with other general EU principles, such as legal certainty ("rules of law must be clear, precise and predictable"[34]), as well as with fundamental rights stipulated in Charter of Fundamental Rights of the European Union.[35]. Furthermore, the exemptions provided for in the TFEU should not be used as a cover for arbitrary discrimination or disguised restrictions on the free movement of capital (Article 65(3) TFEU).

[33] European Commission v Hungary. Judgment of the Court (Grand Chamber) of 21 May 2019. Case C-235/17. P. 59–61 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-235/17.

[34] Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge. Judgment of the Court (First Chamber), 5 July 2012. Case C318/10. P. 58 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0318

[35] European Commission v Hungary. Judgment of the Court (Grand Chamber) of 21 May 2019. Case C-235/17. P. 59–61 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-235/17.

With regard to the application of Article 65 TFEU, CJEU in many cases has emphasised that the free movement of capital as a fundamental principle of EU law may be subject to restrictions under the internal law of a Member State only for the purpose of taking urgent measures to prevent breaches of national laws and regulations or in cases of overriding public interest. Restrictions imposed by states may also be applied as exceptional measures in the context of EU objectives and principles. It is prohibited to impose them for economic purposes, but only if there is a real and serious threat to fundamental social relations.[36]

Disputes over the application of restrictions on the free movement of capital have been repeatedly considered by CJEU. In particular, the judgments in cases Erika Waltraud Ilse Hollmann № C-443/061 of 11 October 2007 [37] and Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam № C-379/052 of 8 November 2007, are illustrative.[38]

The first case concerned different taxation rates for residents and non-residents on the sale of real estate in Portugal, and the second case concerned the refusal to exempt a non-resident who owned a share in the authorized capital of a Dutch company from dividend taxation, given that residents are exempt from such taxation. In both cases, the CJEU concluded that the taxation of income from such sources is minimally different for residents and non-residents, so the approach of the Member States to introduce unequal taxation conditions shall be considered incorrect.[39]

In 2019, the CJEU in its judgment in Case C-235/17 European Commission v Hungary found that Hungary had failed to fulfil its obligations arising from

[36] See: SAMOILENKO, Y., ZAVHORODNIA, V. Vilnyi rukh kapitalu u pravovomu rehuliuvanni finansovoho rynku Yevropeiskoho Soiuzu ta perspektyvy vykorystannia yevropeiskoho dosvidu dlia Ukrainy. Pravove rehuliuvannia vidnosyn na finansovomu rynku: stan ta napriamy vdoskonalennia: monohrafiia, vidp. red. V. D. Chernadchuk. *Sumy: VVP «Mriia» TOV*. 2013, p. 281–282 [online]. Available at: https://essuir.sumdu.edu.ua/bitstream-download/123456789/50052/8/Zavhorodnia_Samoilenko_vilnyi_rukh_kapitalu.pdf;jsessionid=09386B0619E4C93FF1AB7E61CCA428E3 (in Ukrainian).

[37] Erika Waltraud Ilse Hollmann v Fazenda Pública. Judgment of the Court (Fourth Chamber) of 11 October 2007. Case C-443/06 [online]. Available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0443:EN:PDF

[38] Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam. Judgment of the Court (First Chamber) of 8 November 2007. Case C-379/05 [online]. Available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0379:EN:NOT

[39] See: SAMOILENKO, Y., ZAVHORODNIA, V. Vilnyi rukh kapitalu u pravovomu rehuliuvanni finansovoho rynku Yevropeiskoho Soiuzu ta perspektyvy vykorystannia yevropeiskoho dosvidu dlia Ukrainy. Pravove rehuliuvannia vidnosyn na finansovomu rynku: stan ta napriamy vdoskonalennia: monohrafiia, vidp. red. V. D. Chernadchuk. *Sumy: VVP «Mriia» TOV*. 2013, p. 275–307 [online]. Available at: https://essuir.sumdu.edu.ua/bitstream-download/123456789/50052/8/Zavhorodnia_Samoilenko_vilnyi_rukh_kapitalu.pdf;jsessionid=09386B0619E4C93FF1AB7E61CCA428E3 (in Ukrainian).

the free movement of capital and right to property guaranteed by the Charter of Fundamental Rights of the European Union.[40] The Commission referred Hungary's case to CJEU because it failed to bring its national rules terminating certain usufruct rights to agricultural land into line with EU law.

At the same time, in 2019 the European Commission decided to close the respective infringement procedures related to the free movement of capital after the Member States concerned corrected the alleged violation of EU law, namely two cases against Lithuania and Slovakia related to the acquisition of agricultural land. However, the Commission extended the term during which Croatia can derogate from free movement of capital in such circumstance, but such extension was time-limited and was done in accordance with Croatia's Treaty of Accession.[41]

In 2018, CJEU issued two judgments in the cases brought by European Commission against France and Belgium for violating the principle of free movement of capital in the field of direct taxation. In the first case, the Court ruled that France had failed to fulfil its obligations under the founding treaty by refusing to take into account the tax incurred by a non-resident subsidiary in the double taxation mechanism, which allows for the offset of tax levied at each level of dividend distribution.[42]

In the second case, CJEU found that Belgium had failed to comply with its obligations by retaining the provisions according to which the rental income of Belgian taxpayers from foreign real estate is calculated on the basis of the actual rental value, and from property located in Belgium – on the basis of the cadastral value.[43]

An analysis of CJEU case law leads to the conclusion that the term "restrictions" can be interpreted by it to mean all measures that may make cross-border capital movements "less attractive" (paragraph 40 of judgment of 26 April 2012 in joined Cases C-578/10 to C-580/10 Staatssecretaris van Financiën v L.A.C. van Putten and Others).[44]

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[40] European Commission v Hungary. Judgment of the Court (Grand Chamber) of 21 May 2019. Case C-235/17 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-235/17

[41] Commission staff working document on the movement of capital and the freedom of payments. Brussels, 7 April 2021 (OR. en) 7578/21 [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-7578-2021-INIT/en/pdf

[42] European Commission v French Republic. Judgment of the Court (Fifth Chamber) of 4 October 2018. Case C-416/17 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-416/17

[43] European Commission v Kingdom of Belgium. Judgment of the Court (Sixth Chamber) of 12 April 2018. Case C-110/17 [online]. Available at: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-110/17

[44] Staatssecretaris van Financiën v L.A.C. van Putten and Others. Judgment of the Court (Third Chamber), 26 April 2012. Joined Cases C578/10 to C580/10. P. 40 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0578

It should be noted that the global financial crisis of 2007-2008 underscored the importance of overarching supervision and macroprudential actions. Capital movements can pose risks, which can be alleviated through macroprudential strategies, such as curbing unchecked credit expansion in a specific member state. It's crucial for these preventive actions to counteract potential loopholes, like heightened lending via foreign bank branches or cross-border loans, to maintain the effectiveness of measures targeting housing surpluses in a particular country.

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU). No 648/2012[45] provides for a number of instruments of macroprudential influence on the banking sector. Some instruments, such as the countercyclical capital buffer (CCyB) and the buffer for global systemically important institutions (G-SIIs), are mandatory. Others, such as the buffer for other systemically important institutions (O-SIIs), are not mandatory, although identification of O-SIIs is mandatory.

In June 2019, amendments to the Capital Requirements Regulation (2013/575/EU) and Directive (2013/36/EU) came into force as part of a broader review of the prudential and resolution framework for banks (the "Banking Package")[46].

Moving forward, let's consider general restrictions provided for in Articles 345 (restrictions on property rights), 346 (ensuring national security and defence), 143–144 (balance of payments), 75 and 215 (financial sanctions) of the TFEU.

In accordance with Article 345 TFEU, the EU founding treaties, which set out, inter alia, the rules on freedom of movement of capital, shall in no way prejudice the rules of the Member States regulating the property rights system. Thus, the exclusive competence of Member States includes privatisation policy and nationalisation of property, provided that they are carried out in a non-discriminatory manner. Art. 346 TFEU provides that Member States are not obliged to provide information the disclosure of which would prejudice their security interests, and may take the necessary measures to protect their own security interests arising from the production or trade in arms, ammunition and military material. At the same time, these measures may not have a negative impact on

[45] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU). No 648/2012 [online]. Available at: https://eur-lex.europa.eu/eli/reg/2013/575/oj

[46] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official *Official Journal of the European Union* C 326, 26.10.2012, Vol. 55, p. 412 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

the conditions of competition in the domestic market in relation to products not intended exclusively for military purposes.[47]

Among the measures to restrict capital flows, one of the key ones is anti-money laundering (AML). As noted by P. Palazov, there is an emerging competition between free capital movement and AML-related legal acts in the EU.[48] The relevant measures in this integration community were, in particular, introduced by Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. This legal act, *inter alia,* established the obligation of Member States to ensure that financial institutions, as well as persons providing services in any way related to the movement of capital (real estate agents, auditors, notaries, etc.), require the identification of their clients in the process of establishing business relationships. The identification requirements shall be applied to any transaction(s) with clients in excess of EUR 15,000, regardless of whether the transaction was carried out as a single transaction or as a series of interrelated transactions (Article 11).[49]

Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA is aimed at improving the use of financial information by providing law enforcement agencies with direct access to information about the identity of bank account holders contained in national centralized bank registers. It also provides law enforcement agencies with access to certain information from national financial intelligence units, including data on financial transactions, and improves the sharing of information between the mentioned units and their access to law enforcement information necessary

[47] Consolidated Version of the Treaty establishing the European Community. *Official Journal of the European Communities*. 1997, C340/1733. 143 p. [online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/3c32722f-0136-4d8f-a03ebfaf70d16349

[48] See: PALAZOV, Petko. Is De-Risking one of the Indications for an Emerging Competition between the Free Movement of Capital and the Anti-Money Laundering Regulations? *International Conference KNOWLEDGE-BASED ORGANIZATION Vol. XXVII*. 2021, No 2, pp. 57–64 [online]. Available at: https://sciendo.com/de/article/10.2478/kbo-2021-0048

[49] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance). OJ L 141, 05.06.2015, pp. 73–117 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849

for the performance of their tasks. These measures will speed up criminal investigations and allow authorities to fight cross-border crime more effectively (clauses 14, 15 of Article 1).[50] This Directive does not create barriers directly it is only intended for providing financial information to law enforcement bodies.

The European Commission has also adopted two delegated regulations on the following regulatory technical standards, drafts of which were developed by the European Supervisory Authorities:

I. Regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries, adopted on 31 January 2019 [51].
II. Regulatory technical standards on the criteria for the appointment of central contact points for electronic money issuers and payment service providers and with rules on their functions, adopted on 7 May 2018[52].

On 19 June 2019, the European Commission adopted a report on the implementation of Regulation (EU) 2015/8471 on information accompanying the transfer of funds[53], which imposes a number of obligations on payment service providers with regard to the information on payers and recipients that must accompany transfers of funds.

Particular attention is drawn to the restrictions set out in Articles 75 and 215 of the TFEU – financial sanctions. Actually, they are a kind of EU sanctions in

[50] Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1153

[51] Commission Delegated Regulation (EU) 2019/758 of 31 January 2019 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with regard to regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries (Text with EEA relevance.). *Official Journal of the European Union* 125, 14.05.2019, pp. 4–10. [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R0758

[52] Commission Delegated Regulation (EU) 2018/1108 of 7 May 2018 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with regulatory technical standards on the criteria for the appointment of central contact points for electronic money issuers and payment service providers and with rules on their functions (Text with EEA relevance.). C/2018/2716. *Official Journal of the European Union* L 203, 10.08.2018, pp. 2–6 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1108

[53] Report from the Commission to the European Parliament and the Counsil on the application of Chapter IV of Regulation (EU) 2015/847 on information accompanying transfers of funds. COM/2019/282 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:282:FIN

general, which are one of the EU's tools to promote the objectives of the Common Foreign and Security Policy. These goals encompass the protection of the EU's core values and security interests, bolstering democracy, upholding the rule of law, protecting human rights and international law principles, maintaining peace, averting conflicts, and fortifying global security.[54] Pursuant to Art. 75 of TFEU, administrative measures may be imposed on the movement of capital and payments, including the freezing of accounts, financial assets or economic profits owned or held by individuals, legal entities, groups or non-state entities (in order to prevent and combat terrorism and related activities).[55] According to Article 215 TFEU, if a decision taken in accordance with Chapter 2 of Title V of the Treaty on European Union provides for the termination or restriction, in part or in whole, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. The Council shall inform the European Parliament thereof. In addition, the Council may adopt restrictive measures against individuals or legal entities and groups or non-governmental entities.

As can be seen from these articles, sanctions can be applied to entities both inside and outside the EU. However, as a rule, such restrictions are applied to entities from other countries, for example, individuals associated with al-Qaeda [56].

Thus, restrictions on the freedom of movement of capital can be defined as measures that may make cross-border capital flows less attractive, they can be applied, *inter alia,* either to protect Member States and / or the EU against economic harm, as well as to safe-guard the EU's values, its fundamental interests, intra-EU and international security etc. (when it comes to sanctions). Capital movement restrictions are established by the EU founding treaties and are also interpreted/ explained in CJEU case law. It should be noted that capital controls apply not only to member states, but also to third countries that are not members of the EU.

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[54] European Union sanctions [online]. Available at: https://www.eeas.europa.eu/eeas/european-union-sanctions_en#10710

[55] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union* C 326, 26.10.2012, Vol. 55, p. 412 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

[56] European Parliament v Council of the European Union. Judgment of the Court (Grand Chamber), 19 July 2012. Case C130/10 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0130

4. Peculiarities of Restrictions on Free Movement of Capital in the EU's and Its Member States' Relations with Third Countries

The provision of Article 63 TFEU on the free movement of capital between EU Member States and third countries has a different meaning compared to the freedom of capital movement within the EU. As noted by Czech scientist O. Hamuľák, the TFEU highlights that, under the law of the European Union (following the enactment of the Maastricht Treaty), there was a complete liberalization of capital movement among Member States as well as between them and third countries. However, this doesn't imply that the extent of this freedom is identical internally and externally. The TFEU differentiates these aspects by permitting a more expansive set of exceptions to restriction prohibitions in the external dimension compared to the internal one.[57] In particular, in its judgment in Skatteverket v A. of 18 December 2007 (Case C-101/05), CJEU emphasized that it "takes place in a different legal context" than that existing within the EU. Thus, additional restrictions may be acceptable in case of non-EU countries.[58]

Pursuant to Article 64(1) TFEU, the provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. With regard to restrictions that existed in the national legislation of Bulgaria, Estonia and Hungary, the relevant date is 31 December 1999.[59]

Brexit consequences can be analysed in the context of restrictions on the free movement of capital with third countries. As noted above, Article 63 of the TFEU guarantees unrestricted access to the market in the context of capital movement not only to EU Member States, but also to third countries. After Brexit, these

[57] HAMUĽÁK, O. Unveiling the overlooked freedom – the context of free movement of capital and payments in the EU law. *International and Comparative Law Review.* 2012, Vol. 12, No. 2, p. 145 [online]. Available at: https://intapi.sciendo.com/pdf/10.1515/iclr-2016-0091

[58] Skatteverket v A. Judgment of the Court (Grand Chamber) of 18 December 2007. Case C-101/05 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0101

[59] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union* C 326, 26.10.2012, Vol. 55, p. 412 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex-%3A12012E%2FTXT

provisions became applicable to the United Kingdom. However, considering the findings by Prof. Dr. Alexander Schall[60], it appears to us that overlapping between freedom of establishment and freedom of capital movement may create cardinally different consequences depending on which freedom will be considered as dominated one, because freedom of establishment does not apply to situations with third countries unlike its competing freedom.

Although Article 65 TFEU and the additional restriction-related provisions in Articles 64, 66 and 75 potentially limit the extent to which third countries participate in the internal market, we agree with the position[61] that they are unlikely to affect the UK, considering close economic relationships between it and EU Member States. Thus, the UK should continue to benefit from the free movement of capital after Brexit. In terms of capital movement, this country still has access to the EU single market.

According to Article 64(3) TFEU, the Council of the EU, acting in accordance with a special legislative procedure, may unanimously and after consultations with the European Parliament adopt measures that are a step back in EU legislation in matters of liberalization of the movement of capital to or from third countries. In addition, in accordance with Article 66 TFEU, if, under exceptional circumstances, the movement of capital to or from third countries causes or may cause serious complications in the functioning of the economic and monetary union, the Council of the EU, on a proposal of the European Commission and after consultations with the European Central Bank, may take protective measures regarding third countries for a period not exceeding 6 months, if such measures are absolutely necessary.[62]

According to Article 29 TFEU, the Council of the EU adopts decisions that determine the approach of the EU to a separate issue of a geographical or thematic nature, and according to Article 215 TFEU, the Council may adopt restrictive measures against individuals or legal entities and groups or non-governmental organizations.

In 2019, three new sanction regimes were introduced. Pursuant to Council (EU) Regulation 2019/796, the Council may freeze the funds and economic

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[60] SCHALL, A. Free capital movement vs. freedom of establishment in light of Brexit. Thesis paper [online] Available at: https://www.law.ox.ac.uk/sites/default/files/migrated/free_capital_movement_vs._freedom_of_establishment_in_light_of_brexit_0.pdf

[61] See: MUKWIRI, J. Brexit and implications for the free movement of capital. *Legal issues of economic integration.* 2019. № 46 (1). pp. 7–28 [online]. Available at: https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/liei0046&div=6&id=&page=.?

[62] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union* C 326, 26.10.2012, Vol. 55, p. 412 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex-%3A12012E%2FTXT

resources of individuals or legal entities, organizations and bodies responsible for cyber-attacks, as well as those who support them. Two new geographic sanction regimes apply to Nicaragua[63] and Turkey's unauthorized drilling in the Eastern Mediterranean.[64] Currently, no persons, organizations or bodies have been included in the list of these regimes.

Practice shows that most current EU sanction regimes have been extended for the next six-month periods, including regimes introduced in connection with Russia's actions aimed at destabilizing the situation in Ukraine, and North Korea's nuclear proliferation activities.

The most notable of the existing EU sanction regimes were those related to Russia's actions in Ukraine.[65]

In particular, Council (EU) Regulation No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine provided for the freezing of all funds and economic resources of natural or legal persons involved in the violation of territorial integrity of Ukraine.[66]

Subsequently, on July 31, 2014, the Council of the EU adopted Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine[67], that is, a violation of sovereignty and territorial integrity. It was prohibited to carry out transactions, provide financing or investment services or operate with new bonds or shares or similar financial instruments with a maturity / repayment of more than 90 days, issued by stateowned Russian financial institutions (Sberbank, VTB Bank, Gazprombank

[63] Council Decision (CFSP) 2019/1720 of 14 October 2019 concerning restrictive measures in view of the situation in Nicaragua. OJ L 262, 15.10.2019, p. 58–63 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019D1720

[64] Council Decision (CFSP) 2019/1894 of 11 November 2019 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean. OJ L 291, 12.11.2019, p. 47–53 [online]. Available at: https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A32019D1894

[65] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. *Official Journal of the European Union* L 78, 17.03.2014, p. 16–21 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014D0145

[66] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. *Official Journal of the European Union* L 78, 17.03.2014, p. 6–15 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0269

[67] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. *Official Journal of the European Union* L 229, 31.07.2014, p. 13–17 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014 D0512

and other entities specified in the Appendix to Decision), with the exception of Russia's institutions having international status established by intergovernmental agreements with the aggressor country as one of the shareholders.

The EU's restrictive financial measures are aimed at cutting off strategic stateowned Russian companies from the EU funding sources, thus imposing indirect financial costs on the Russian state in order to induce it to change its behaviour. In March 2015, the European Council linked the lifting of EU sanctions to the complete implementation of the Minsk agreements[68] (but eventually this did not happen).

In connection with the full-scale invasion of Ukraine by the Russian Federation, in 2022-2023 the EU approved a number of packages of tough sanctions against the aggressor country, which are primarily aimed at the Russian economy. Among the main restrictive measures, the following should be highlighted: exclusion of leading Russian banks from the SWIFT system; prohibition of investing in projects co-financed by the Russian direct investment fund; prohibition of exporting certain oil refining technologies; the ban on the import of Russian coal; a complete ban on the import of all Russian crude oil and oil products delivered by sea; restrictions in the transport industry (ban on exporting equipment and providing services in this field, closure of airspace for all aircraft owned, registered or controlled by Russia, including oligarchs' private aircraft; sanctions in the trade sector; exclusion of Russia from public contracts and financial/non-financial support etc.[69]

A far-reaching EU sanctions regime in terms of the complexity of financial and capital restrictions is that of imposed against North Korea in connection with its nuclear proliferation activities.[70]

The regime prohibits the transfer or clearing of funds to and from North Korea, as well as from North Korea, as well as any transactions with banks located in North Korea, or the opening of branches and subsidiaries of North Korean banks in the EU and EU banks in North Korea. It also requires Member States to strengthen the monitoring of their financial institutions' activities related to North Korean banks, as well as detailed reporting by EU banks on such activities.

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[68] EU restrictive measures in response to the crisis in Ukraine [online]. Available at: https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#timeline-measures-adopted-in-2022-2023

[69] Sanctions adopted following Russia's military aggression against Ukraine [online]. Available at: https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_uk

[70] Council Decision (CFSP) 2016/849 of 27 May 2016 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Decision 2013/183/CFSP. *Official Journal of the European Union* L 141, 28.05.2016, pp. 79–124 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0849

In addition, the EU has implemented actions against Iran aimed at curbing its nuclear proliferation activities. Specifically, these include financial constraints such as freezing the assets of the Central Bank of Iran and prominent Iranian commercial banks, as well as establishing mechanisms for notifying and approving transfers exceeding certain limits to Iranian financial institutions. General and individual restrictive measures were also imposed in response to the use of Iranian drones in Russian aggression.[71]

Restrictions on the free movement of capital in the EU's relations with third countries have their own specifics, as they take place in a different legal context than that existing within the EU. The deepening level of global integration in the area of free movement of capital, on the one hand, and the current situation related to the armed conflict in Ukraine, as well as other factors, determine specific trends in the development of capital restrictions.

5. Capital Movement Restrictions in the EU: Development Trends

Despite a fairly high level of integration in the area of capital flows and significant liberalization, integration processes in the EU are further deepening, simultaneously facing difficulties.

Thus, in order to improve capital mobility and access to finance for EU member states, the European Commission initiated the creation of the Capital Market Union (hereinafter referred to as the CMU) in 2014, which remains a very important priority for the EU. It is necessary to complement the Banking Union, as well as to strengthen Economic and Monetary union and the international role of the euro.[72]

The CMU is also an important project strongly linked to the internal market functioning. One of its main objectives is to remove the remaining cross-border barriers to investment in EU capital markets in order to create a true single capital market. This should allow savers and companies to access investment opportunities and financing on the same terms anywhere in the EU, regardless of their location or the state of development of local capital markets.[73]

[71] Iran: EU restrictive measures [online]. Avaliable at: https://www.consilium.europa.eu/en/policies/sanctions/iran/

[72] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. "Capital Markets Union: progress on building a single market for capital for a strong Economic and Monetary Union", 15 March 2019, Brussels, COM(2019) 136 final [online]. Available at: https://ec.europa.eu/finance/docs/policy/190315-cmu-communication_en.pdf

[73] Ibid.

All the legislative measures announced in the 2015 Capital Markets Union Action Plan and the 2017 Mid-Term Review of the Capital Markets Union Action Plan have been implemented by European Commission, including legislative proposals that contribute to the removal of barriers to cross-border investment. European Commission provided an overview of the progress made in its Communication COM(2019) 136 final of 15.03.2019 entitled "Capital Markets Union: progress on building a single market for capital for a strong Economic and Monetary Union".[74]

Since September 2015, the European Commission, the European Parliament and the Council have agreed on a series of legislative acts that lay the groundwork for the creation of the CMU. Together, they aim to: 1) to facilitate access to pan-European products and labels through a revised Venture Capital Regulation (EUVeCa), reduce red tape for companies seeking a public listing (prospectus review) and help create a common European market for personal pension products; 2) to increase market transparency and integrity through new rules for simple, transparent and standardised securitisation (STS); 3) introduce a more proportionate prudential regime for investment firms and a harmonised framework for covered bonds; and 4) remove cross-border barriers to capital market integration by harmonising key pre-insolvency procedures and strengthening the role of European supervisors in supervisory convergence.[75] It should be noted that shift towards the CMU raised new problems, as noted by D. Piroska and R.A. Epstein, "tensions between supranational empowerment and national control prevented deeper integration"[76], and this especially concerns EU Member States from Eastern Europe.

While it's currently difficult to evaluate the impact of the enacted legislative proposals since most have not been in effect for long, further efforts are undoubtedly required to establish a fully-fledged CMU. Long-term trends, such as technological advancements, the implications of Brexit, and the shift towards a climate-neutral economy, will influence the future of capital markets in the EU. More effort will also be needed in areas where progress has been slower, such as access to financing and the development of appropriate ecosystems for small and midsize enterprises; addressing cross-border challenges like differing national bankruptcy laws and streamlining income taxation methods.

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74 Ibid.

75 Ibid.

76 PIROSKA, D., EPSTEIN, R. Stalled by design: New paradoxes in the European Union's single financial market. *Journal of European integration*. 2023, Vol. 45, № 1, p. 197 [online]. Available at: https://www.tandfonline.com/doi/full/10.1080/07036337.2022.2154344

In May 2019, the OECD Council approved a revision of the OECD Code on Capital Liberalisation.[77] This Code commits the countries that have joined it to gradually liberalise cross-border capital flows.[78]

The main objective of the review was to strengthen the Code by ensuring that it remains relevant in an environment that has changed significantly in recent decades. European Commission has been actively involved in the reviewing process and has introduced additional coordination between Member States to ensure consistency of their positions, in particular on issues covered by the EU's common legal framework.

The revised Code ensures that Member States may take measures necessary to preserve financial stability ("macroprudential measures") while maintaining liberalisation standards. The Code clarifies that commonly used macroprudential measures are not considered restrictions (Basel III-type cross-currency liquidity ratios such as the liquidity coverage ratio and the net stable funding ratio). It also provides flexibility for untested measures, recognising that the macroprudential toolkit is evolving.

An important step towards liberalising capital flows in the EU is the settlement of investment disputes in free trade agreements or individual investment treaties.[79]

Investment protection provisions typically cover a number of standards for the treatment accorded to investors of one party and their investments in the territory of the other party. These include non-discrimination, fair and equitable treatment, as well as market accesses. However, some of these provisions have raised concerns in the past as to how they may interfere with states' right to regulate this matter in the context of public policy objectives. In this regard, the European Commission has adopted a reform-based approach that provides for modern and innovative provisions to strike a balance between the rights of investors and the right of states to regulate in order to achieve legitimate public policy objectives. The Commission applies this approach in its negotiations on investment protection provisions.[80]

Negotiations on an investment agreement with China intensified in 2019. Several rounds of negotiations took place in 2019, focusing on liberalisation commitments and market access. Negotiations regarding Comprehensive Agreement

[77] OECD. OECD Code of Liberalisation of Capital Movements. 2019 [online]. Available at: https://www.oecd.org/g20/summits/osaka/OECD-Codes-of-capital-movements.pdf

[78] The IMF's Institutional View on Capital Flows in Practice. Group of twenty [online]. Available at: https://www.imf.org/external/np/g20/pdf/2018/073018.pdf

[79] Commission staff working document on the movement of capital and the freedom of payments. Brussels, 7 April 2021 (OR. en) 7578/21, p. 52 [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-7578-2021-INIT/en/pdf

[80] Ibid.

on Investment were concluded in principle in December 2020[81], further progress has stalled due to some economic/political reasons and, as it seems to be, due to other risks, including suggested China's tacit support for Russia.

The EU and Japan's Economic Partnership Agreement entered into force on 1 February 2019.[82] Discussions are ongoing on investment protection and dispute settlement under a possible future additional agreement concerning these matters.

There are also some other EU free trade agreements, including with Singapore and Vietnam, as well there are multiple negotiations performed by the EU with many countries and regional trade blocs such as Southern Common Market (Mercosur) all over the world.

Typically, investment protection deals made at the EU level with different non-EU countries supersede the bilateral investment treaties established by Member States with those countries. Yet, according to Regulation (EU) No 1219/2012[83], which sets transitional rules for bilateral investment treaties between Member States and non-EU countries, the Commission can permit Member States to negotiate or finalize new bilateral investment treaties, provided there are no active (or finished) EU-level talks with that country, and the treaty aligns with EU law and its investment policy.

Despite the liberalisation of capital flows, certain barriers remain and, at the same time, there is an opposite trend towards their strengthening. An important tendedncy in the field of capital controls in the EU is the introduction and the use of investment screening mechanisms, as in some cases foreign investors may seek to acquire strategic assets that give them access to, for example, critical technologies, infrastructure or confidential information, which poses certain security or public order risks.[84] In response to such concerns, and considering that key trade partners of the EU, as well as few Member States already introduced the aforementioned measures, there was adopted Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.[85] As noted

[81] Ibid.

[82] EU-Japan Economic Partnership Agreement [online]. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/japan/eu-japan-agreement_en

[83] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. *Official Journal of the European Union* L 351, 20.12.2012, pp. 40–46 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R1219

[84] Commission staff working document on the movement of capital and the freedom of payments. Brussels, 7 April 2021 (OR. en) 7578/21, p. 55 [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-7578-2021-INIT/en/pdf

[85] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. *Official*

by Dutch scientists W. Zwartkruis and B. de Jong, the primary objectives of this Regulation are to streamline the evaluation of foreign direct investments linked to crucial strategic technologies and to establish coordination of the screening mechanism between Member States and the European Commission.[86] We believe that this screening actually means new restrictions of the capital movement, despite the fact that according to the EU's official information, "the EU mechanism does not restrict the EU's openness to FDI: of the more than 420 cases screened in 2022, less than 3% led to the Commission issuing an opinion."[87] However, it seems that with time and with increasing number of screened cases, diverse controversies may appear with regard of the application peculiarities of this Regulation.

Capital control measures are designed to deter chaotic capital outflows that may lead to financial and economic downturns. On the other hand, investment screening mechanisms allow state bodies to check and, when deemed highly appropriate, halt investments due to security concerns or public order considerations.

As of 2021, according to Member States, 17 of them (including Denmark, Germany, France, Finland, France, Italy, Latvia, Lithuania, and Hungary) have established screening mechanisms. Some these mechanisms apply to both intra- and outra-EU investments, while others apply only to third country investors. Some mechanisms specify the sectors in which investments are subject to review, while others are not limited to specific sectors or list sectors for illustrative purposes only.[88]

Screening mechanisms may use various thresholds (e.g., acquisition of 25% of the share capital/voting or control rights in a company) to determine the investments subject to review, which typically exclude portfolio investments. They may be launched by voluntary or mandatory notifications, and under certain conditions, a public body may initiate a check-up on its own initiative.[89]

The newly introduced EU's system for screening foreign investments is crafted to assist every Member State and the Commission in pinpointing and addressing potential threats that specific foreign investments could pose to security

Journal of the European Union L 79I, 21.03.2019, pp. 1–14 [online]. Available at: https://eur-lex.europa.eu/eli/reg/2019/452/oj

[86] See: ZWARTKRUIS, W., DE JONG, B. The EU regulation on screening of foreign direct investment: a game changer? *European Business Law Review*. 2020, Issue 31, pp. 447–474.

[87] EU foreign investment screening and export controls help underpin European security. Press release. 19 October 2023, Brussels [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5125

[88] Commission staff working document on the movement of capital and the freedom of payments. Brussels, 7 April 2021 (OR. en) 7578/21, p. 56 [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-7578-2021-INIT/en/pdf

[89] Ibid.

and public order. This takes place whether or not a Member State already has its own screening mechanism. This system isn't intended to substitute or replicate the existing screening frameworks in EU Member States. Instead, it establishes a collaborative framework, within which Member States and the Commission can share information about foreign direct investments that might impact security or public order. Additionally, it provides a platform for voicing concerns through Commission's opinions about such investments, when necessary. These opinions are not imperative, because it's up to Member State whether to apply a screening mechanism or not.[90]

In addition, despite the EU's desire to further liberalise the capital market, current realities, including Russian-Ukrainian armed conflict, have a significant impact on this process, as Russian Federation's aggression has exacerbated the contradictions of the current world, in international community, and significantly complicated the socio-economic situation at the regional and global levels. A number of new challenges, risks and threats have emerged that have caused turbulent processes in the political, economic and security environments, namely: the termination of energy sources supplies from Russian Federation, the blockade of Ukraine's exports of agricultural products by it. The above circumstances had a negative impact on the liberalisation of capital flows, primarily between the EU member states and third countries, including Ukraine. The Russian-Ukrainian armed conflict has objectively reduced the interest and willingness of European investors to develop contacts with a state which fights against aggressor, which contains risks and dangers for prospective investments and business.

At the same time, the fact that Ukraine has been granted the status of an EU candidate, the unprecedented sanctions imposed by the EU against Russia, and a number of EU initiatives to liberalise trade relations with Ukraine (lifting trade restrictions for Ukrainian producers) demonstrate the EU's solidarity with Ukraine and support, including in ensuring the freedom of capital flows from Ukraine.

6. Conclusions

The provisions regarding free movement of capital were first envisaged in the EEC Treaty of 1957. In our opinion, they were not strictly imperative in nature: Member States were to strive to avoid introducing any new restrictions on capital

[90] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. *Official Journal of the European Union* L 79I, 21.03.2019, pp. 1–14 [online]. Available at: https://eur-lex.europa.eu/eli/reg/2019/452/oj

movements and related payments within the EEC. This freedom proclaimed by the EEC Treaty was implemented gradually. A number of directives played a significant role in its development. The case law of CJEU also considerably influenced the evolution of free capital movement.

A new impetus to the liberalization of the movement of capital in the EEC was given by the EEA of 1986, according to which the liberalization of the freedom of the movement of capital was given the same importance as other freedoms of the internal market. In the context of understanding the concept of "capital movement" in accordance with EU law, investments are one of its components. From the analysis of legal acts and CJEU case law, it follows that investments were given a key importance in the process of liberalization of the movement of capital within the framework of the EU, namely, first of all, the free movement of direct investments was ensured. Hence other types of capital movements tended to be subject of more restrictions. Prohibition of capital restrictions both in the internal and external dimensions was introduced be the Maastricht Treaty.

Currently the freedom of movement of capital occupies a special place among other EU internal market freedoms, as it applies not only to EU member states but also to third countries, including a former member – the UK. In addition, freedom of capital movement is essential for the regulation of investment activity in the EU.

Current realities determine specific trends in the development of the capital market in the EU, as well as restrictions on the freedom of capital movement. The key trends include: the creation of the CMU and eliminating of appeared barriers towards its achievement, which remains a very important priority for the EU to complement the Banking Union, as well as to strengthen the economic and monetary union and the international role of the euro; the tendency to settle investment disputes in free trade agreements or individual investment agreements; the use of foreign investment screening mechanisms, etc.

In the current environment of slowing economic growth, global trade tensions, and, most importantly, the armed conflict in Ukraine, there is an urgent need for closer integration of capital markets in the EU, as Russian aggression has exacerbated the contradictions of the current world and significantly complicated the socio-economic situation at the regional and global levels. This aggression also caused new restrictions concerning Russian Federation and countries which provide military support to it, such as Iran.

Overcoming the consequences of the crisis caused by the armed conflict in Ukraine, as well as implementing the EU's priorities for the coming years, including becoming the first climate-neutral economy, will require significant investment. Using public finance would not be sufficient, so attracting private investment and mobilising cross-border investment is crucial. The remaining restrictions to the free

movement of capital must of course be eliminated or eased when deemed appropriate/safe, because there seem to be exist confronting trends: dialectic combination of further liberalization and introducing new measures with a varying degree of restrictive potential, for example, foreign direct investment screening. Current realities indicate correctives in trend of liberalisation of capital movement in the EU towards new possible restrictions, mostly in its relations with third countries.

In addition, as bilateral investment agreements between EU Member States and third countries should be progressively replaced by the EU trade/investment agreements, it is essential that investors continue to feel confident that their investments will be effectively protected, and relevant measures in this regard should be improved. Hence the EU and its Member States should be careful when it comes to new restrictions, which will definitely be possible considering existing confrontation in the modern world triggered by Russia's unprovoked aggression in Ukraine and, unfortunately, support (explicit and implicit) of such illegal actions from the side of some countries.

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EU Funding – a Lesson (not) To Be Taught from Slovakia

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Summary: The EU Funds are measure provided by the Union, whose purpose is to, in effective, fair and sustainable manner, intervene in businesses in long-lasting and sustainable way which don't introduce undue advantage and distort the competition on relevant market. The article provides an analysis on particular problematic aspects of EU structural at the EU level and on national level, as defined by the case-law of the Court of Justice of the EU. A case study is provided on example of Slovakia, whose performance in last two programming periods (2006–2013 and 2014–2020) was compared with those of its neighbours from V4 – Czechia, Hungary, and Poland.

Keywords: Competing Jurisdiction, the CJEU, Arbitration, International Economic Agreements, Israel.

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1. Introduction

The idea of removing the disparities between well developed and less or least developed regions has been present in *acquis communautaire* from the very early moments of the European integration. To reach this objective, a supporting mechanism of structural funds was progressively built. The main task of these funds was (and still is) to promote economic, social, and territorial cohesion between regions within Communities and later Union. At the beginning, funds were financed through the contributions of the Member States, which

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were defined by rates laid down in regulations implementing particular funds. It was therefore necessary to establish the powers and responsibilities relating to the management of the funds. As the European Court of Justice in *Belgium and Luxembourg v Mertens and Other*[1] explained: *"The power of obtaining its own resources and of financing by means of these its own expenditure is one of the oldest prerogatives of a sovereign state. The act of renouncing this power in favour of the Community, albeit within certain limits, amounts to a real and important transfer of sovereign powers."* Community by adopting an implementing regulation on supporting fond got power to decide on what will be supported and how. Member States remained responsible for implementation of the support on the basis of programs approved by the Commission and, in the case of wrong payments, for recollecting the money back. At fulfilling this task, Member States acted on behalf of the Communities. This principle is still valid. However, over decades, fragmented regulation was successively substituted by more centralised one, based on common codex for all funds and specific implementing regulations for every particular fund. A mechanism of structural funds become more transparent, more comprehensible, and more simply to access. More than 60 years of existence of the structural funds should be the proof, that they really are an accessible and effective tool of cohesion.

Is it really true when it comes to the performance of the particular Member States? One might have some doubts, if we look at the overview on ESIF implementation in just ending programming period provided by the Commission (Figure 1).

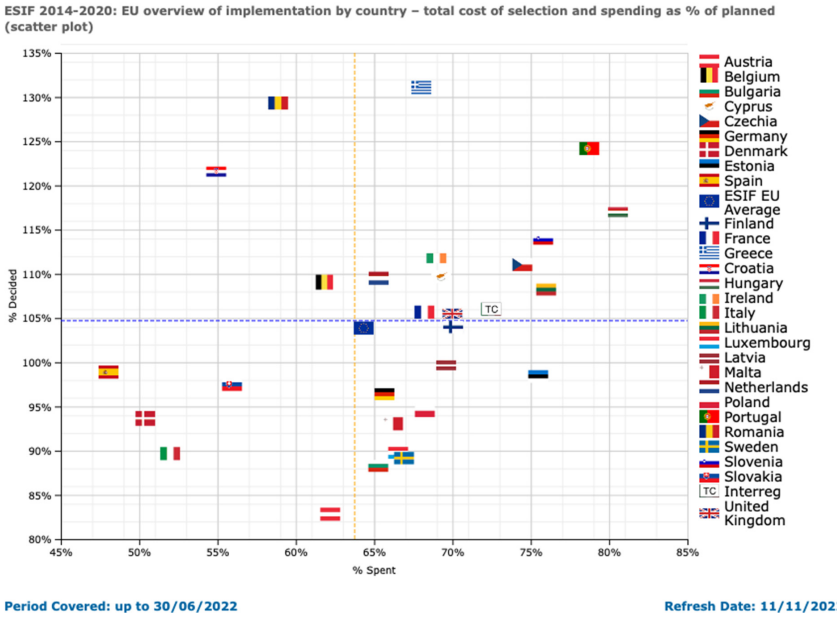
We can see that the effectivity of the Member States in spending of EU Funds varies from far below (47%) average (64%) to very good (80%), whilst any of the Member States was able to provide 100% spending of decided financial assistance.

Surprisingly, new Member States (i.e., those who entered the EU in 2004 and later) performed much better than the old ones, as they took up to eight places in the top 10. Last three places were taken by Spain (47%), Denmark (50%), and Italy (51%). However, their GDPs per capita exceeds that of EU's, which might be the one of the reasons of little need of cohesion through the structural funds. Slovakia's performance of spending met the 55% of decided amount, which is also far from the EU Average (64%). Why did Slovakia not succeed in this process?

To find out an answer, an analysis and the comparison of the performances of Slovakia, Czechia, Hungary, and Poland in implementing of structural funds

[1] Judgement of 4 April 1974, Belgian State and Grand-Duché de Luxembours v Mertens and Others, Joined cases 178, 179 and 180/73, EU:C:1974:36, page 392.

was realised. The selection of the countries was made with regard to the fact, that all V4 countries entered the EU together in 2004 and they had a similar starting position – they were countries with the transitional economies and their GDPs per capita were lower than the GDP's average of that-time EU, as well as they are neighbouring countries located in the same region of Central Europe.



Source: *https://cohesiondata.ec.europa.eu/overview/14-20*

Period chosen for examination counts second (2007–2013) and third (2014–2020) structural fund programming period after Slovakia's accession to the EU. First programming period (2000–2006) was not taken into the consideration, as examined countries – Slovakia, Czechia, Hungary, and Poland did not participate in programs for whole programming period.

Methods used during the preparation of this article comprise the doctrinal analysis, comparison, deduction, and synthesis.

Article starts with the general chapter, which deals with the brief introduction of structural funds. Second chapter deals then with specific research relating to above mentioned selected countries. Third chapter is a specific case study of Slovakia's most problematic issues. Conclusion then provides final recommendations of the author.

2. From Rome to Lisbon

This part does not have the ambition to bring an exhaustive enumeration and analysis of all legislation applicable to the Structural Fund, but rather give a brief insight to this area. Therefore, author limits herself just to provision of basic legal context relevant for the research realised in next chapter.

Looking back at the Rome *Treaty Establishing the European Economic Community* of 1957 (hereinafter only TEEC), already its Preamble refers to the wish of founders to pursue the improvement of the living and working conditions of their citizens as well as decrease of the disparities between well developed and less developed territories of the Member States. To achieve these goals, Treaty in Article 123 established the European Social Fund (hereinafter only ESF), whose main task was to promote within the Community employment facilities and the geographical and occupational mobility of workers.

It also introduced the legal basis (Art. 40(4) TEEC) for the future creation of a fund for financing projects in agricultural area. This presumption materialized in1962 upon the Council´s *Regulation No 25*,[2] which established the European Agricultural Guidance and Guarantee Fund (hereinafter only EAGGF). Its main task was to finance refunds on exports to third countries, intervention aimed at stabilizing markets, and common measures adopted in order to attain the objectives such as the increase of agricultural productivity, establishment of fair standard of living for the agricultural population, stabilisation of markets; guarancy of regular supplies; and establishment of reasonable prices in supplies to consumers.

About a decade later, upon the flexibility clause set in Article 235 TEEC[3] Council by its *Regulation No 724/75* established the European Regional Development Fund (hereinafter only ERDF), whose intervention in conjunction with national aids, should permit the correction of the main regional imbalances in the Community and particularly those resulting from the preponderance of agriculture and from industrial change and structural underemployment [as explained in Preamble].

However, the real breakthrough relating to the operation of European Structural Funds came with the *Single European Act* (1986). It added a new Title V – Economic and Social Cohesion (articles 130a-130e) to the Part Three of the TEEC where it formally integrated already existing funds to the body of

[2] Council Regulation (EEC) No 25 of 4 April 1962 on the financing of the common agricultural policy, OJ 30, 20. 4. 1962, p. 991–993.

[3] "*If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions."*

the Treaty and named them `structural funds´.[4] Provisions on existing structural funds were from 1 January 1989 reformed by the newly adopted structural funds Common Provisions Regulation I[5] (No 2052/88)**,** which clarified the main tasks of the Structural Funds[6] as well as identified priority objectives[7] of the Community's action in its attempt to achieve harmonious development and even out disparities between its Member States. Beside principles of their functioning, it also laid down 5-years programming period and stipulated that programs financed by the Structural Funds must comply with the competition rules as well as with rules on public procurement and environmental protection (Art. 7). Programs were planned on local, regional, or state level. Specific procedures for providing funds, conditions of eligibility, assessment, financial management and monitoring were to be set in specific implementing decisions adopted by the Council. Regulation No 2052/88 was re-examined by the Council at the end of 1993 and amended by Regulation No 2081/93, which covered the next 5-years programming period. Whereas the Structural Fung Regulation I was rather brief then exhaustive, coordination between existing Structural Funds relating to funding frameworks, multiannual budget forecasts, financial management, monitoring, and control were specified in its implementing Regulation No 4253/88.[8]

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4 Only Guidance Section of the European Agricultural Guidance and Guarantee Fund falls to this definition.

5 Council Regulation (EEC) No 2052/1988 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 185, 15.07.1988, p. 9–20.

6 The Preamble of the implementing Regulation No 2052/88 explains that ERDF is the main instrument for achieving the objective of ensuring the development and structural adjustment of regions whose development is lagging behind; whereas it plays a central role in the conversion of regions, frontier regions and parts of regions (including employment areas and urban communities) seriously affected by industrial decline; essential tasks of the ESF are combating long-term unemployment and the occupational integration of young people; whereas it helps to support economic and social cohesion; whereas it is also an instrument of decisive importance in the promotion of consistent employment policies in the Member States and in the Community; and the Guidance Section of the EAGGF is, within the context of support for economic and social cohesion, the main instrument for financing the adjustment of agricultural structures and the development of rural areas with a view to reform of the common agricultural policy.

7 *"(1) promoting the development and structural adjustment of the regions whose development is lagging behind, (2) converting the regions, frontier regions or parts of regions (including employment areas and urban communities) seriously affected by industrial decline, (3) combating long-term unemployment, (4) facilitating the occupational integration of young people, and (5) with a view to reform the common agricultural policy speeding up the adjustment of agricultural structures, and promoting the development of rural area"* (Art. 1).

8 Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different

This funding regime applied for two programming periods – from 1989 to 1993 and from 1994 to 1999. During this time, system was decentralised, and regulation fragmented. European Court of Justice in its decision-making practice dealt mostly with the responsibility of the Member States for the sound financial management (*"Member States receiving Community financial assistance are required to provide all the guarantees necessary to verify the exact compliance between the expenditure actually incurred in the context of co-financed projects and the application for Community financial assistance relating hereto*[9]*, the exercise of any discretion, by the Member State in question, to decide whether or not it would be expedient to demand repayment of European Union funds unduly or irregularly granted would be inconsistent with the duty imposed on its authorities by the first subparagraph of Article 23(1) of Regulation No 4253/88 to recover any amounts unduly or irregularly paid*[10]*)*, with the reduction of the payments (*"The argument that the transfers did not compromise the general objective of the programmes or of the Community assistance, it must be pointed out that, showing that a project was implemented is not sufficient to justify the payment of financial assistance. The system of subsidies provided for under Community rules is based, in particular, on the performance by the beneficiary of a series of obligations to which payment of the intended financial assistance is made subject. If the beneficiary does not perform all its obligations, such as those concerning compliance with the legal and financial framework, Article 24 of the regulation 4253/88 permits the Commission to reconsider the extent of its obligations under the decision granting assistance. It is also clear that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation without there being thereby any infringement of the principle of proportionality"*[11]*)*, corrections (*"Although the Commission has margin of appreciation as to the policy of fixing the rate of correction, it is not allowed to change its policy in the course of a judicial review in order to fill a gap or to a remedy an error in the exercise of that margin in one of its decisions"*[12]), and irregularities (*"Only the possibility that an irregularity may be penalised not by reduction of the aid by an amount corresponding to that irregularity but by complete cancellation of the aid can produce the deterrent effect required to*

Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 374, 31.12.1988, p. 1–14.

9 Judgment of 13 July 2011, Greece v Commission, T-81/09, EU:T:2011:366, para. 96.

10 Judgement of 21.12.2011, Chambre de commerce a d'industrie de l'Indre, C-465/10, EU:C:2011:867, para. 34.

11 Judgement of 9 September 2008, Germany v Commission, T-349/06, EU:T:2008:318, para. 77.

12 Judgment of 13 July 2011, Greece v Commission, T-81/09, EU:T:2011:366, para. 142.

ensure the proper management of the resources of the EAGGF."[13]) as well as with interpretation of particular terms or conditions. However, in those times the case law was relatively modest, and its number increased substantially in later time of the functioning of the Union.

Maastricht *Treaty Establishing the European Community* (1992) in Title XIV (Arts. 130a-130e) of the Part Three followed up on the wording of EEC Treaty as amended by the Single European Act. However, it introduced a new – Cohesion Fund for financing projects in the field of environment and trans-European networks in the area of transport infrastructure (Art. 139d). Also, the procedure of adopting the implementation decisions by the Council had slightly changed (initiative from the Commission, co-decisive role of the EP, consultations of Economic and Social Committee and Committee of Regions). *Amsterdam Treaty* (1997) except re-numbering the relevant provisions on Economic and Social Cohesion (now Arts. 158-162) did not amend these provisions substantially. Nor did the ***Treaty of Nice*** (2002).

However, new implementing structural funds *Common Provisions Regulation II*[14] (No 1260/1999) which repealed the Structural Funds Regulation I substantially reformed the management of structural funds. It redefined and narrowed priority objectives just to three: (1) promoting the development and structural adjustment of regions whose development is lagging behind, (2) supporting the economic and social conversion of areas facing structural difficulties, and (3) adapting and modernising policies and systems of education, training and employment. It also establishes a new structural fund – Financial Instrument for Fisheries Guidance (hereinafter only FIFG). By its content, it is a modern codex for programming, operating, and managing grants provided by the Union. It counted with prolonged 7-years program period (2000–2006) for supporting operational programs contained in single programming documents prepared individually by each Member States and approved by the Commission reflecting to the defined objectives and priorities, as well as eligible geographical areas. It also provides a common vocabulary for Structural Funds instruments (*such are measure, final beneficiaries, managing authority, paying authority*, etc.) which brought a higher transparency to EU funding. Following the previous regulation, it also requires the compatibility with EU policies and rules on competition, public procurement, and environmental protection, but it also add a new requirement on the elimination of inequalities and the promotion of gender equality. The basic principle for the use of Structural Funds is the effectiveness, towards

[13] Judgement of 24 January 2002, Conserve Italia/Commission, C-500/99 P, EU:C:2002:45, para. 101.

[14] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ L 161, 26.06.1999, p. 1–42.

which managing authorities must adjust both – substantial and financial management. For check-ups, it stipulated various forms of monitoring including on-spots control and divide the responsibility for financial control between the Commission and Member States. Irregularities were to be sanctioned by financial corrections. Finally, it obliged Member States to ensure a publicity for their development plans and implementations supported by EU Structural Funds. This regulation brought a substantial simplification to the funding scheme which it made more accessible to the final beneficiaries. For the purpose of improvement of the performance of the funding support, as well as for better allocation of the financial assistance, an accurate statistics were crucial. For many years European regional statistics have been collected, compiled and disseminated on the basis of a common regional classification. Regulation No 1059/2003[15] formally established "Nomenclature of territorial units for statistics" (hereinafter only NUTS). As explained in the Preamble (12) of this regulation, the NUTS classification is restricted to the economic territory of the Member States and does not provide complete coverage of the territory to which the Treaty applies. It counted with 3 levels classified according to the population thresholds.[16] NUTS classification is then used for defining the eligible territories for EU's financial assistance.

Structural funds *Common Provisions Regulation III*[17] (No 1083/2006) reacted on the challenges brought by the enlarged EU and disparities that occurred at both regional and national level. It excluded agricultural[18] and fisheries[19] funds from the scheme of structural funds and redefined ERDF, ESF and Cohesion Fond as Cohesion Policy Funds, whose main objective for the period 2007-2013 was to seek

[15] Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), OJ L 154, 21.06.2003, p. 1–41.

[16] Pursuant to the Art. 3 (2) of the Regulation 1059/2003 in order to establish the relevant NUTS level in which a given class of administrative units in a Member State is to be classified, the average size of this class of administrative units in the Member State shall lie within the following population thresholds: NUTS 1 from 3 mil. to 7 mil., NUTS 2 from 800 000 to 3 mil., NUTS 3 from 150 000 to 800 000. If the population of a whole Member State is below the minimum threshold for a given NUTS level, the whole Member State shall be one NUTS territorial unit for this level.

[17] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, Official Journal of European Commitie, L 210, 31. 7. 2006, p. 25–78.

[18] Former EAGGF was by the Art. 92 of the Regulation No 1698/2005 integrated to the scheme of European Agricultural Fund for Rural Development (EAFRD).

[19] Former FIFG was through the Regulation No 1198/2006 replaced by the European Fisheries Fund and later through the Regulation No 50/2014 by the European Maritime and Fisheries Fund (EMFF).

the convergence of the Member States and the regions, regional competitiveness and employment and European territorial cooperation. It worked on the similar principles as the Structural Funds Regulation II (7-years period, programming, management and control system, *etc*.). However, it introduced the obligation of Member States and Commission not only to ensure equality based on gender, but also to take steps to prevent *"any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them"* (Art. 16) as well as *preserve the sustainable development and protection and improving of the environment* (Art. 17). Other changes reflected mostly to the necessity to accurate the responsibilities of the Member States in the process of implementation of project support and enforcing the corrections of irregularities.

Finally, the *Treaty on the Functioning of the European Union in* Articles 174–178 formally extends (in secondary law already existing) commitment to promote (except economic and social) also territorial cohesion. After completion of programming period 2006–2013, a new *Common Provisions Regulation IV*[20] (No 1303/2013) was adopted. This regulation presents *lex generalis* for the newly defined European Structural and Investment Funds (hereinafter only ESIF) comprised of EFRD, ESF, Cohesion Fund, EAFRD, and EMFF and regulated the programming period 2014–2020. Again, it is a complex codex, which laid down the provisions necessary to ensure the effectiveness of the ESI Funds and their coordination with one another and with other Union instruments. Fund-specific Regulations were replaced by new ones, which were defined in Article 1.[21] Beside traditional cohesion objectives, this regulation defined tasks of ESIF also as providing support to deliver the Union the strategy for smart, sustainable and inclusive growth. It put emphasis on simplifying the process and improving the management and control systems. Towards optimalisation of the usage of funds, it introduced ex ante conditionalities to ensure institutional, legislative and administrative capacities for effective and efficient use of ESIF, mandatory performance reserve, which could be flexibly used to unpredicted priority objectives within approved programs and performance-based funding models, which should direct funding support to pre-defined outputs or results.

[20] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, Official Journal of European Commitie, L 347, 20.12.2013, p. 320–469.

[21] ERDF Regulation No 1301/2013, ESF Regulation No 1304/2013, CF Regulation No 1300/2013, ETC Regulation No 1299/2013, EAFRD Regulation No 1305/2013, EMFF Regulation No 508/2014.

New programming period 2021–2027 falls under rules laid down by *Common Provision Regulation V* (No 2021/1060)[22]. It substantially reforms the framework of Union's funding policy by extending their objectives, requiring to consider the EU values,[23] introducing the new funds and laying down more elaborated financial and other rules of their operating the funds. Moreover, Union has robustly strengthened control mechanism by adopting the Regulation (No 2020/2092) on a general regime of conditionality for the protection of the Union budget, and by launching the operations by the European Public Prosecutor Office. However, Common Provision Regulation V and new programming period are not subjects of analysis in this article, as the new period is just at the beginning and there are not available any data relating to the performance of the Member States within this period.

To sum up this part, Union's funding introduced a gradual institutionalism and robust capacity building. Union gradually centralised fragmented legislation to the Common Provision Regulation, whose content robustly grew since its first version in 1999. Common Provision Regulation lays down principles and rules on implementation, management, monitoring and control of operations receiving financial assistance applicable to all funds, which creates a more homogenous framework for their operation. Despite the fact, that every fund preserves own specific regulation, content of such regulation is limited just to issues not covered by the Common Provision Regulation. Moreover, even CJEU contributes to that homogeneity by uniform interpretation of terms included in both – general or specific regulations while remaining, that in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part.[24]

Funds are implemented under a system of shared management between Commission and Member States respecting the principles of subsidiarity and proportionality. Member States takes on primary responsibility for the efficient use of Union's funds, which, without prejudice to powers vested in the Commission, contributes to proper implementation of the general budget of the European Union.[25]

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[22] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.06.2021, p. 159–706.

[23] See more to this regard in FISICARO, M. Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values. *European Papers*. 2022, Vol. 7, No 2, pp. 697–719, DOI: https://doi.org/10.15166/2499-8249/594

[24] Judgement of 26 May 2016, Județul Neamț, Joined cases C-260/14 and C-261/14, EU:C:201 6:360, para. 35

[25] Judgment of 3 September 2014, Baltlanta, C-410/13, EU:C:2014:2134, para. 44.

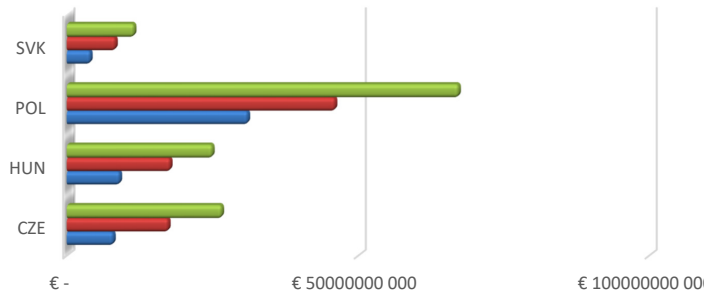
That means, that Member States are, in particular, responsible for the management and control of operational programmes and for the detection of irregularities.[26]

Next part will analyse, how V4 countries manage to deal with such responsibilities and whether Union's funds helped them to catch up more developed Member States.

3. V4's success story(?)

At the time of their accession, GDP per capita of Czechia (11 749,9 USD), Hungary (10 303,7 USD), Poland (6 681,4 USD) and Slovakia (10 691,40 USD) were far below of the Union's average (26 308,7 USD).[27] A cohesion policy and their instruments in the form of structural funds belonged therefore amongst important tools how to catch up more developed Member States. In this regard, Union allocated for them in period 2007-2013 more than 130 billion EUR. However, states were able to spend barely 40% of this amount (see Figure 2).

Figure 2: Financial implementation of structural funds in 2007-2013 programming period in V4 countries



	CZE	HUN	POL	SVK
PLANNED	€ 26539650 285	€ 24921148 600	€ 67185549 244	€ 11498331 484
DECIDED	€ 17372742 885	€ 17696004 966	€ 45980497 543	€ 8296343 874
SPENT	€ 7943505 457	€ 9049346 888	€ 31017228 230	€ 3991342 175

Data retrieved from: *https://ec.europa.eu/regional_policy/sources/how/policy/doc/strategic_report/2013/01_csr_swd_sec129_stats.xls*

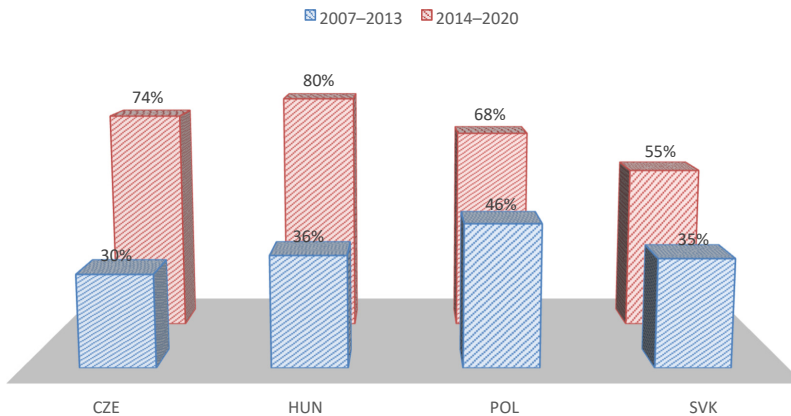
[26] Judgement of 1 October 2020, Elme Messer Metalurgs, C-743/18, EU:C:2020:767, para. 49.

[27] Data retrieved from https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2021&locations=EU-SK-HU-CZ-PL&start=2004&view=chart

As regards the GDP, all V4 countries in 2007 showed better indicators of GDP per capita (Czechia: 18 466,5 USD, Hungary: 13 945 USD, Poland: 11 254,5 USD, Slovakia: 16 106,1 USD) compared to their 2004 ones. Surprisingly, improvement of economy indicators was not the case of all countries (2013 GDP per capita Czechia: 20 133,2 USD, Hungary: 13 720 USD, Poland: 13 696,5 USD, Slovakia: 18 208,4 USD) at the end of program period, as Hungary's 2013 GDP was lower than that of 2007. Union's average GDP in 2013 (34 578,1 USD) remained an unreachable goal.

However, V4 countries strongly rely on ESIF, as they represented 2,4%–4,1% of the V4 countries´ GDP in 2013. This reliance was therefore a strong motivator for introducing best practices, which can improve the administration of the Member State as a whole.[28] This factor, complemented by gained funding experience and simplification of processes obtained in reforming legislation mentioned above helped to substantially improve rather questionable performance of the countries from 2007–2013 programming period (Figure 3).

Figure 3: Dynamics in ESIF spending o V4 countries in 2007–2013 and 2014–2020 programming period

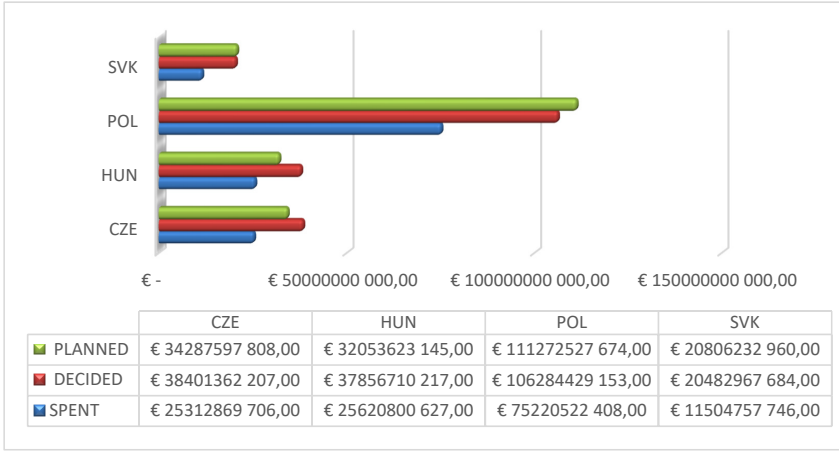


Source: *processed by author. Data retrieved from https://cohesiondata.ec.europa.eu/overview/14-20 and https://ec.europa.eu/regional_policy/sources/how/policy/doc/strategic_report/2013/01_csr_swd_sec129_stats.xls*

[28] European Commission. *Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds*, p. 18, DOI. 10.2776/753195.

In total numbers, V4 countries spent 137 658 950 487 EUR out of planned 198 419 981 587 EUR (Figure 4) which presents 69,9%.

Figure 4: Financial implementation of structural funds in 2014–2020 programming period in V4 countries



	CZE	HUN	POL	SVK
PLANNED	€ 34287597 808,00	€ 32053623 145,00	€ 111272527 674,00	€ 20806232 960,00
DECIDED	€ 38401362 207,00	€ 37856710 217,00	€ 106284429 153,00	€ 20482967 684,00
SPENT	€ 25312869 706,00	€ 25620800 627,00	€ 75220522 408,00	€ 11504757 746,00

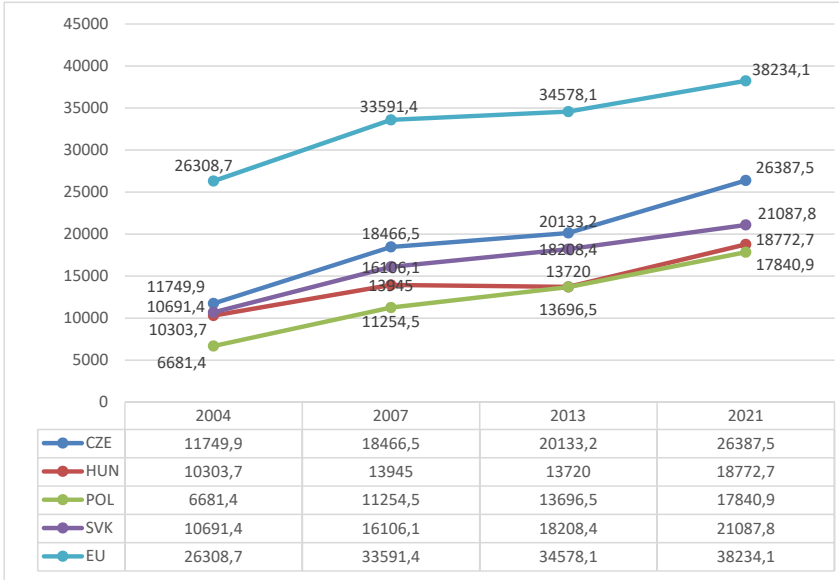
Data retrieved from *https://cohesiondata.ec.europa.eu/overview/14-20*

Improvement in funding spendings (Figure 4) positively affected also the growth of the GDP per capita as ca be illustrated in Figure 5.

Convert these results to percentage, Czechia moves from 2004's 45% of Union's average to 69% in 2021, Hungary from 39% to 49%, Poland from 25% to 47% and Slovakia from 2004's 41% to 2021's 55% of Union's average. By analysis of all this data, some partial conclusions could be made:

1. Removal of economic, social and territorial disparities between developed and less developed Member States are not easy to be achieved. After almost 20 years of membership in the EU, only Czechia managed to meet Union's average GDP per capita, however only that from 16 years ago. All other three countries are still far from reaching even the bottom of the assessed Union's levels.
2. ESIF in 2014–2020 programming period become more accessible to Member States and they improved their implementation.
3. Countries still have reserves in their capacities to spend Union's financial assistance.
4. Performance of Slovakia is worst from all V4 countries as regards the improvement in funding spending in programming period 2014–2020.

Figure 5: Dynamics in GDP per capita growth in V4 countries in 2004, 2007, 2013 and 2021 in comparison with the EU (in USD)



	2004	2007	2013	2021
CZE	11749,9	18466,5	20133,2	26387,5
HUN	10303,7	13945	13720	18772,7
POL	6681,4	11254,5	13696,5	17840,9
SVK	10691,4	16106,1	18208,4	21087,8
EU	26308,7	33591,4	34578,1	38234,1

Data retrieved from: *https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2021&locations=EU-SK-HU-CZ-PL&start=2007&view=chart*

Why it is so? As the Commission pointed out in one of its 2016 reports[29] major source of deficiencies in ESIF implementation could be seen in public procurement as breaches in public procurement remain one of the main sources of irregularities in project co-finances by the EU Funds. Whereas ESIF are implemented in the environment of the Internal Market and compliance with public procurement is at the same time essential for the sound functioning of the Internal Market, Member States always have to ensure that all Union´s spending complies with public procurement rules.[30] To this regard, all Member States face challenges in consistently complying with EU and national rules and regulations, preventing conflicts of interest and other risk factor for fraud and corruption, and properly integrating EU policy goals into their tender documents. Irregularities in public

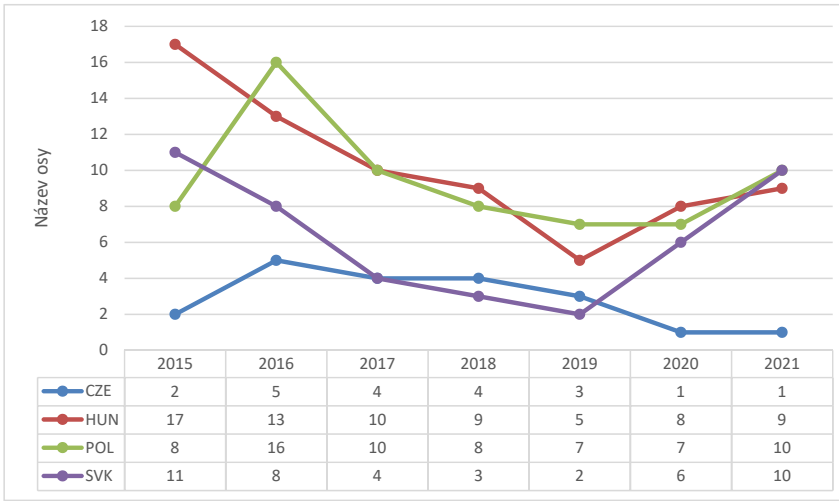
[29] Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds, DOI: 10.2776/753195, p. 17.

[30] EUROPEAN COURT OF AUDITORS. *Performance-based Financing in Cohesion Policy: worthy ambitions, but obstacles remained in 2014–2020 period*, DOI: 10.2865/963687, p. 58.

procurement can be the result of a lack of administrative capacity on the part of contracting authorities and oversight bodies, inadequate systems and tools in place, and ineffective governance structures. Especially these weaknesses were subject of ex ante conditionalities introduced by Common Provision Regulation IV. Member States were obliged to adopt relevant measures providing the accurate application of EU rules, transparent procedures, training in ESIF and improvement of administrative capacities, before start reimbursing financial support from ESIF or at least to prove a relevant Action Plan to this regard. The European Court of Auditors in its report[31] pointed out, that only one-stop control of fulfilment ex ante conditionalities by Member States proved to be insufficient, as Member States indeed had troubles with their compliance in later time of programming period.

Even OLAF confirmed, that issues with which it deals the most, relates to Structural Funds sector. During 2015–2021[32] OLAF concluded 850 investigations into the use of ESIF out of which 169 (20%) relates the V4 countries (Figure 6). Figure 7 then presents the percentage rate of found irregularities.

Figure 6: Overview of the OLAF´s concluded investigations into the use of ESIF in 2015–2021



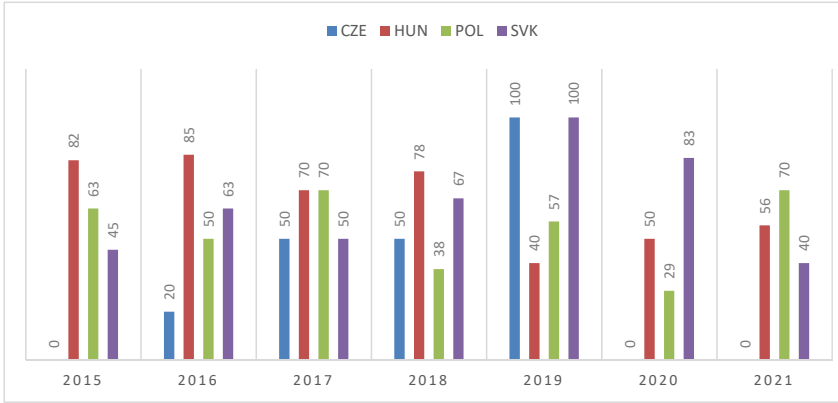
	2015	2016	2017	2018	2019	2020	2021
CZE	2	5	4	4	3	1	1
HUN	17	13	10	9	5	8	9
POL	8	16	10	8	7	7	10
SVK	11	8	4	3	2	6	10

Source: *data retrieved from OLAF`s annual reports 2015–2021*

[31] EUROPEAN COURT OF AUDITORS. *Performance-based Financing in Cohesion Policy: worthy ambitions, but obstacles remained in 2014–2020 period*, DOI: 10.2865/963687, p.

[32] OLAF´s Annual report from 2014 was prepared in a way, that does not able to retrieve data relevant for this graph.

Figure 7: Irregularities rates in % found by OLAF in its 2015–2021 investigations (closed cases)



Source: *data retrieved from OLAF`s annual reports 2015–2021*

Except Czechia, all other three V4 countries still presents high rates of present irregularities. As pointed out by the OLAF, they often have character of corruption in public procurement procedures or cross-border procurement fraud.[33]

In case study of Slovakia, author tries to find why is it so.

4. Case study of Slovakia – public procurement

From the statistics presented above, one can say that Slovakia´s performance in ESIF spending is rather poor than satisfying. As Commission, European Court of Auditors and OLAF suggested, weak performance of Member States might be caused by deficiencies in public procurement, an analysis will focus on this aspect. Public procurement belongs to those EU policies, which are highly harmonised. In 2014, a brand-new package of directives[34] were adopted (hereinafter only PP

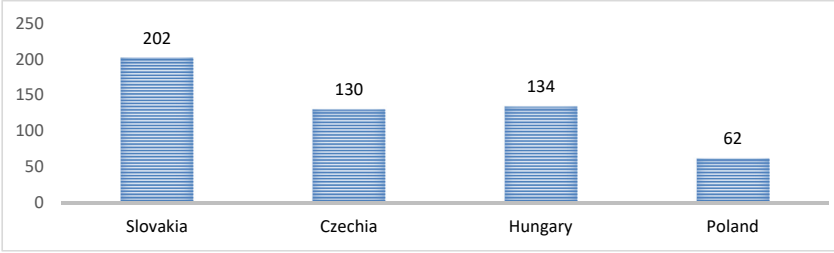
[33] See to that regard for example The OLAF Report 2015, p. 10, The OLAF Report 2016, p. 15, or The OLAF Report 2021, p. 14.

[34] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.03.2014, p. 65–242, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L94, 28.03.2014, p. 243–374, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.03.2014, p. 1–64.

directives) with the aim to promote competition within the Internal Market as much as possible. This included digitalisation and simplification of processes, usage of Common Procurement Vocabulary and other measures ensuring the greater transparency and integrity of tenders. Member States were obliged to transpose these directives into their national legal orders by 18 April 2016 (provisions on mandatory usage of electronic means by 18 October 2018). Slovakia transposed all directives in time (by Act No 343/2015 Coll. on Public Procurement).

So did other countries of V4. Question therefore may arise, how it is possible, that even if we have very similar procurement environment, performance of the procuring authorities so much differs. It is apparent especially when comparing the average length of procuring processes (Figure 8).

Figure 8: Average decision-making speed in public procurement (in days) – time between the deadline for receiving offers and the date the contract is awarded



Source: *https://single-market-scoreboard.ec.europa.eu/policy_areas/public-procurement_en*

Such performance points out to insufficient capacities of procuring authorities. As Slovak Vice-premier Remišová remined towards public procurement: *"Slovakia lost more than 691 million EUR due to fraud and errors in public procurement in the 2007–2013 EU funding period alone. In this current programming period* [2013–2020]*, corrections amount to 250 million EUR."*[35] With aim to verify, whether this assumption is true, author analysed annual reports 2015–2021[36] of the Slovak National Office for Olaf (Národný úrad pre OLAF), which is a part of the Government Office of the Slovak Republic, responsible for protection of financial interests of the Union in Slovakia and reporting irregularities to OLAF.

[35] REMIŠOVÁ, V. https://www.mirri.gov.sk/aktuality/cko/vicepremierka-remisova-s-nku-a-uvo-sme-podpisali-prelomovu-dohodu-o-spolupraci-pri-kontrole-novych-eurofondov/

[36] Available at: https://www.olaf.vlada.gov.sk/vyrocne-spravy-olaf/

Findings of the National Office for OLAF confirmed, that public procurement indeed presents a substantial part, if not a majority, of all irregularities detected in ESIF implementation. The most recurrent deficiencies for which financial correction were imposed were conflict of interest, overpricing, awarding contracts to (uncompetitive) pre-selected tenderers, insufficient first-instance control by procuring authorities (they failed to define fair and accurate conditions of tender), breaches of public procurement principles of non-discrimination (requiring the submission of a specific document in accordance with the legislation of the Slovak Republic without the possibility of submitting its equivalent), equality (failure to send an explanation of the tender documents to all tenderers), transparency (failure to send an explanation of the tender documents to all tenderers, setting different conditions in the contract notice and the tender documents), proportionality (too overcoming requirement for economic, or technical capacities of the tenderers, failure to take the opportunity to ask the tenderer or tenderer to clarify or supplement the documents submitted; and the exclusion of tenderers on the basis of formal deficiencies), dividing of tenders with the purpose to avoid regular processes, delays in informing with the results of administrative controls, the conclusion of an amendment to the works contract without a call for tenders and corruption (the typical scenario, as described in Reports from 2015 and 2016, often included situations when so called "consultant" provided eligible beneficiary "full service" meaning that it prepared application for grant, organised public procurement for the overpriced services or supplies financed from ESIF with the "right" winner to be selected. After chosen tenderer receives project money, consultant through the invoices for fictive services, transfer project money (for nothing) to its disposal and share them with the people responsible for approving the beneficiary´s application).[37]

However, it is clear, that Slovakia understands errors which occur in system and fight them. To this regard, Slovakia has adopted various measures, which include professionalisation in public procurement, establishment of responsibility for sound procurement, strengthening the independent position of the Public Procurement Office, exclusion of particular civil servants from possibility to gain a public contract.

5. Conclusions

Research provided in this article showed, that ESIF indeed are valuable tool for less developed countries in their path to catch up with the more developed

[37] Similar irregularites were described also by the OECD in *Tackling Fraud and Corruption Risks in the Slovak Republic*, p. 14, https://doi.org/10.1787/6b8da11a-en

Member States. However, it also showed, that system is not easy to comprehend, as the best performance of spending is at the level of 80% (Hungary). Moreover, almost 30% of the Member States are not even able to reach the Union´s average (64%) rate of spending.

Annual reports or evaluation reports of the Commission, Court of Auditors, OLAF or national authorities proved, that problem could be found in the obligation of Member States to comply with the applicable Union law. That, amongst other, require to purchase goods, services and construction works financed from EU funds though the public procurement procedures.

Despite having harmonising directives on public procurement, Member States still show differences in the performance in this area. Slovakia´s case study showed, that many of irregularities, whose consequence were at least delays in processes of procurement or worst, financial corrections in ESIF spending, were caused by improperly prepared or realised tenders. This may be done intentionally by purpose (with the aim to gain unfair advantage) or by negligence due to the maladministration of the contracting authorities.

It is clear, that the Union is trying gradually improving the system of financial management and control. However, this must be supplemented by effective sanctioning system. To this regard, new instruments (EPPO, Rule of Law Conditionality Regulation) seem to be promising. Also, Slovakia did well by adopted mandatory professionalisation in public procurement. As system is ready, we need to wait and see in programming period 2020-2027, whether good system will not occur errors due to personal factor.

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The Importance of the EU Law and the Law of the Member States in the Field of Out-Of-Court Dispute Resolution

Lukáš Ryšavý*

Summary: The out-of-court dispute resolution is an area of law that is coming into focus from EU law, through international treaties to national laws. In recent decades, this dynamic field of law has begun to establish itself as an important alternative to judicial dispute resolution. This is reflected in the adoption of various legal norms, with the Singapore Convention being one of the most recent significant additions to the sources of law. Out-of-court dispute resolution encompasses a wide variety of dispute resolution methods, with arbitration and mediation being the most important, as these are the only two methods of out-of-court dispute resolution that are regulated by a number of generally binding legal regulations (as well as many others). The multitude and diversity of legal regulation of arbitration and mediation, their interrelationships and mutual influence are the subject of this article..

Keywords: arbitration, mediation, UNCITRAL, ICSID, UNCITRAL Model law, New York Convention, Singapore Convention, Mediation Directive, Arbitration Rules, Mediation Rules, ADR, ODR.

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1. Introduction

In recent decades, the need for a fast, efficient dispute resolution method that suits the needs and interests of the parties has become a fundamental driving force for the development of out-of-court dispute resolution, i.e. for the resolution of disputes outside the traditional state court system. However, the search for new alternatives and methods of resolving disputes is not a new concept.

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Especially when the state judiciary is unable to fulfill its role properly and in a timely manner, and particularly concerning interests of the parties,[1] out-of-court ways to enforce the right are sought all the more diligently. Efforts to find a more efficient, effective and easier way outside the system of state courts are generally understood as a fundamental criterion for the historical emergence and development of the system of out-of-court dispute resolution.[2]

The current growing sensitivity to justice, or rather to subjectively perceived justice,[3] has naturally resulted in an increase in various types of disputes which, if not resolved through other means, will ultimately end up in state court. Disputes and the need for their resolution and decisions have become a very common part of our lives, as evidenced by the (still) significant number of disputes adjudicated before the state courts.[4] However, out-of-court dispute resolution could be one of the options to prevent the high burden on the courts.[5]

The term out-of-court dispute resolution is deliberately chosen here as a general term, for which the term Alternative Dispute Resolution (ADR) is commonly used in the legal environment. However, the definition of ADR is not uniform and the inclusion or exclusion of individual dispute resolution methods within or outside ADR is viewed differently.[6] In this regard, the term out-of-court dispute resolution, as opposed to the dispute resolution before state courts, is a superior, more general and entirely appropriate term. In fact, the problematic incorporation

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1 MUSTILL, M. J. Arbitration: History and Background. *Journal of International Arbitration*. 1989, Volume 6, Issue 2, p. 55.

2 Ibid, p. 43.

3 HENKE, W. *Recht und Staat: Grundlagen der Jurisprudenz*. Tübingen: Mohr Siebeck, 1988, p. 218.

4 On the other hand, in some countries it appears that trust in the judiciary is not very high, and the desire to bring disputes to the state court is continuously and significantly decreasing. One example is, perhaps surprisingly, Germany; cf. SCHMIDT, F, H., LAPP, T., MAY, A. *Mediation in der Praxis des Anwalts.* 2nd edition. München: C. H. Beck, 2022, p. 13.

5 People with their own experience have in Germany significantly less confidence in the German judiciary; see Institut für Demoskopie Allensbach: *Roland Rechtsreport 2021*, p. 20; available at: https://www.roland-rechtsschutz.de/media/roland-rechtsschutz/pdf-rr/042-presse-presse mitteilungen/roland-rechtsreport/roland_rechtsreport_2021.pdf (accessed on 30 November 2023).

6 On the relationship between arbitration and ADR, cf. e.g. BLACKABY, N., PARTASIDES, C. et al. *Redfern and Hunter on international arbitration*. 5th edition. New York: Oxford University Press, 2009, p. 44 et seq.; BERGER, K. P. *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration.* 3rd edition. The Hague: Kluwer Law International, 2015, p. 44 et seq.; SCHÜTZE, R. A., THÜMMEL, R. C. *Schiedsgericht und Schiedsverfahren.* 7th edition. München: C. H. Beck, 2021, p. 6 ff.; MENKEL-MEADOW, C. *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*. In: WRIGHT, J. D. (ed.). *International Encyclopedia of the Social & Behavioral Sciences.* 2nd edition. Amsterdam: Elsevier, 2015, pp. 70–74.

into the ADR system primarily concerns arbitration proceedings, which are also discussed in the context of the chosen topic in this article.[7]

Arbitration, together with mediation, are indeed the most significant and well-known methods of out-of-court dispute resolution, and in the case of mediation it is also increasingly used.[8] The reason may also be the fact that these are the only out-of-court dispute resolution methods that are regulated by a number of generally binding – but also generally non-binding – legal regulations and norms. In particular, mediation has been at the center of interest of various legislators in recent years.[9] The diversity and complexity of the legal regulation of out-of-court dispute resolution, or the two most significant methods – arbitration and mediation – which are sometimes not easily penetrable,[10] are the subject of this article.

2. Arbitration and mediation as central methods of out-of-court dispute resolution

„Arbitration is now the principal method of resolving international disputes involving states, individuals, and corporations“,[11] „Arbitration is power“,[12] „[Es] gibt heute kaum noch Vertragsbeziehungen in der Wirtschaft, die nicht eine Schiedsvereinbarung enthalten…“[13] There are numerous similar examples highlighting the importance and significance of arbitration, its impact and leading role in resolving disputes in commercial relations.[14]

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7 Arbitration, as an equivalent option for the protection of rights and interests to proceedings before state courts, is in this respect considered one, and according to some also the only one of the so-called alternative dispute resolution methods. At the same time, however, arbitration can also be defined as a method of out-of-court dispute resolution that stands outside the scope of alternative dispute resolution. See also footnote 6.

8 SCHMIDT/LAPP/MAY: *Mediation…,* p. 14; LACHMANN, J. P. *Handbuch für die Schiedsgerichtspraxis*. 3rd edition. Köln: Verlag Dr. Otto Schmidt, 2008, p. 12 et seq.; RISSE, J. *Wirtschaftsmediation*. 2nd edition. München: C. H. Beck, 2022, p. 1 et seq.; ELSTERMANN, P. *Internationale handelsrechtliche Mediation. Streitbeilegungsalternative mit schleichender Entwicklung zum Schiedsverfahren 2.0?* Baden-Baden: Nomos, 2023, p. 24 et seq.

9 See e.g. SCHMIDT/LAPP/MAY: *Mediation in der Praxis…,* p. 11.

10 BRÖDERMANN, E., ROSENGARTEN, J. *Internationales Privat- und Zivilverfahrensrecht*. 8th edition. München: Vahlen, 2019, p. 214.

11 BLACKABY/PARTASIDES: *Redfern and Hunter on international arbitration…,* p. 1.

12 Title of article by KRONSTEIN, H. Arbitration is power. *New York University Law Review*. 1963, Vol. 38, Issue 4, pp. 661–700.

13 LIONNET, K. Rechtspolitische Bedeutung der Schiedsgerichtsbarkeit. In: BERGER, K. P. et al. (eds.). *Festschrift für Otto Sandrock zum 70. Geburtstag*. Heidelberg: Verlag Recht und Wirtschaft, 2000, p. 603.

14 For all of them, for example BORN, G. B. *International Commercial Arbitration.* 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2014, p. 1: *„International arbitration warrants*

Arbitration is the most commonly considered method of dispute resolution in international commercial relations, and it is assumed that an arbitration agreement is currently included in the vast majority of all contracts concluded in international trade. In these disputes arbitration has almost completely replaced the state courts proceedings.[15] However, this does not mean that all disputes for which the parties have concluded an arbitration agreement must ultimately end up before an arbitrator. Moreover, statistics (if they are available at all within the arbitration) show that, compared to the number of disputes settled in state courts, arbitration is quantitatively an almost insignificant method of dispute resolution.[16] However, what makes arbitration so significant and important is the average value of a dispute, which ranges in the tens of millions of euros or dollars.[17]

Mediation as one of the basic methods of out-of-court dispute resolution, in which, unlike arbitration, it is not primarily an authoritative decision of a third party – the arbitrator – but a consensual resolution of the dispute through a third party – the mediator –, has come into wider awareness later. In the last twenty years, however, it has become fundamentally established in the legal systems and in the awareness of the professional and lay public.[18] In conjunction with other forms of out-of-court dispute resolution, it has achieved a similar popularity in some jurisdictions as in the case of the arbitration. For example, in the USA, considered the cradle of current out-of-court dispute resolution, up to 90% of disputes are settled out of court and the traditional civil procedure has become a real exception.[19] Awareness of mediation is also huge in the general

attention, if for nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs." Similarly BÖCKSTIEGEL, K. H., KRÖLL, S., NACIMIENTO, P. (eds.). *Arbitration in Germany: The Model Law in Practice*. 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2015, p. 5: *„Today, arbitration is widely used in most areas of business and commerce."*

15 SCHROEDER, H. P. *Die lex mercatoria arbitralis: Strukturelle Transnationalität und transnationale Rechtsstrukturen im Recht der internationalen Schiedsgerichtsbarkeit.* München: Sellier European Law Publisher, 2007*,* p. 23; BERGER, K. P. *Internationale Wirtschaftsschiedsgerichtsbarkeit. Verfahrens- und materiellrechtliche Grundprobleme im Spiegel moderner Schiedsgesetze und Schiedspraxis.* Berlin, New York: Walter de Gruyter, 1992, p. 8, footnote 61.

16 Cf. e.g. RYŠAVÝ, L. *Nezávislost a nestrannost rozhodce*. Praha: C. H. Beck, 2018, p. 22 et seq.

17 See WAGNER, G. *Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit.* München: C. H. Beck, 2017, p. 117. On this issue, see also LACHMANN: *Handbuch für die Schiedsgerichtspraxis…,* p. 30 et seq.

18 One of the first areas where mediation was used was family mediation; see DUVE, Ch., EIDENMÜLLER, H., HACKE, A., FRIES, M. *Mediation in der Wirtschaft*. Köln: Verlag Dr. Otto Schmidt KG, 2019, p. 86. Currently, another important area of mediation is commercial disputes.

19 See DANIELS, J. Sonstiges Streitschlichtung in den USA: Das Recht verlässt die Richterbank. *Anwaltsblatt*. 2011/6, p. 453; DUVE/EIDENMÜLLER/HACKE/FRIES: *Mediation in der Wirtschaft…,* p. 75.

population; in Germany, for example, out-of-court dispute resolution is widely regarded as a useful tool for resolving disputes.[20] The EU is also responding to this popularity of out-of-court dispute resolution, and the support and development of alternative dispute resolution methods is also one of the objectives of judicial cooperation in civil matters in accordance with Article 81(2)(g) TFEU (see below).

As a result of globalization, particularly business relations are becoming much more international, which brings with it a number of specific challenges. The different cultural, linguistic and, above all, legal origins of the contracting parties, with often different levels of expected subjective behavior, have led to the search for and the creation of new ways of resolving disputes that would be able to adapt to these conditions and differences in an efficient and flexible manner. Arbitration and mediation are the out-of-court dispute resolution methods that best meet these requirements.[21] However, of all the possible ways of settling disputes out of court, arbitration was until recently practically the only truly equivalent alternative to court proceedings.[22] In the future, mediation could be added to it, especially in view of the Convention on International Settlement Agreements resulting from Mediation (see below).

Arbitration and mediation are modern legal institutes, both in the national and – above all – in the international context, that require thorough consideration. Only if we correctly understand their meaning, their advantages and disadvantages, as well as their differences from proceedings before state courts, can we fully and fearlessly use their potential.

3. EU law and out-of-court dispute resolution

The issue of out-of-court dispute resolution has its current anchorage in the EU by way of primary law in Article 81(1)(g) TFEU, which allows for the adoption of measures, i.e. secondary acts, to develop alternative methods of dispute

[20] See Institut für Demoskopie Allensbach: *Roland Rechtsreport 2021*, p. 20 et seq.

[21] Without an arbitration agreement, for example, claims in international trade relations with countries such as the USA, China, etc. would be practically unenforceable; see e.g. BRÖDERMANN/ROSENGARTEN: *Internationales Privat- und Zivilverfahrensrecht…,* p. 211.

[22] See *Deutscher Bundestag*, Gesetzentwurf: Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahrens-Neuregelungsgesetz – SchiedsVfG), Drucksache 13/5274, p. 46; available at: http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf (accessed on 30 November 2023). Explanatory report to Czech Act No. 19/2012 Coll., which amends Act No. 216/1994 Coll., on arbitration and enforcement of arbitration awards and other related laws, point 1.2. LIONNET, K., LIONNET, A. *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*. 3rd edition. Stuttgart: Richard Boorberg Verlag, 2005, p. 59.

settlement in the framework of judicial cooperation in civil matters.[23] Out-of-court dispute resolution is thus among the areas that are at the forefront of the EU's interest. However, the EU legislator's approach to the different methods of out-of-court dispute resolution varies.

As will be shown, EU law is the only source of law where arbitration is not comprehensively regulated by a separate legal regulation. However, the European Union does not regulate arbitration in a targeted and pragmatic way, as existing regulation at other levels, typically in international treaties, is sufficient.[24]

Since the Brussels Convention,[25] arbitration has been one of the areas expressly excluded from the scope of the relevant legal norms. Thus, it was also excluded from the Brussels I Regulation[26] and is one of the areas expressly excluded from the current Brussels Ibis Regulation,[27] as the central secondary act governing civil and commercial matters.[28] Although there has been extensive discussion about retaining or modifying this exclusion, and the proposal for the reform of the Brussels I Regulation included a point on „Improvement of the interface between the regulation and arbitration",[29] and the Commission's proposed Article 29 addressed certain problematic issues related to the relationship between judicial proceedings and arbitration, these proposals have failed to gain traction. Thus, Article 1(2)(d) of the Brussels Ibis Regulation remained with the statement that the Regulation does not apply to arbitration. Although this decision by the EU legislator seeks to clarify recital 12 of the Regulation,[30] problematic

[23] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016ME/TXT (accessed on 30 November 2023).

[24] Similarly, e.g. HÜßTEGE, R., MANSEL, H. P. *BGB. Rom-Verordnungen zum Internationalen Privatrecht.* Band 6. 3rd edition. Baden-Baden: Nomos, 2019, p. 54. In detail about the position of arbitration under EU law, for example EICHSTÄDT, J. O. *Der schiedsrechtliche Acquis communautaire: Gleichzeitig ein Beitrag zur Frage von Maßnahmen der Europäischen Union zur Förderung der Schiedsgerichtsbarkeit.* Jena: Jenaer Wissenschaftliche Verlagsgesellschaft, 2013, p. 68, 99.

[25] Article 1(2)(d) of the Brussels Convention, OJ L 299, 31.12.1972, p. 32–42.

[26] Article 1(2)(d) of the Brussels I Regulation, OJ L 351, 20.12.2012, p. 1–32.

[27] *Official Journal of European Commitie*, L 351, 20.12.2012, p. 1–32.

[28] Cf. e.g. BAUMANN, A. *Schiedsgerichtsbarkeit und EuGVVO: Löst die Novelle die problematischen Abgrenzungsfragen?* In: *Rechtsdurchsetzung: Rechtsverwirklichung durch materielles Recht und Verfahrensrecht: Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag*, Köln: Carl Heymanns Verlag, 2016, p. 467 et seq.

[29] See COM(2010) 748 final, p. 9, point 3.1.4.

[30] This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. | A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void,

aspects remain, and the debate continues.[31] For example, the incompatibility of the jurisdiction system with arbitration (arbitral tribunals)[32] and „general satisfaction with the operation of the 1958 New York Convention which should not be undermined by any Union action on the matter"[33] are often cited as reasons for excluding arbitration from the Brussels Ibis Regulation. The provisions of the New York Convention remain unaffected in accordance with Article 73(1) of the Brussels Ibis Regulation. However, by deciding not to intervene directly in the issue of arbitration, the EU states have enabled the continued application of the New York Convention, which is applicable throughout the EU, and through its Article VII(1) other relevant legal instruments (see below).

On the other hand, a distinction must be made on this issue as to whether it is an arbitration as such, i.e. a separate area of law to which the exclusion from the Regulation applies, or a proceeding in which it is not an arbitration as such and an exception from the scope of the regulation does not apply.[34] Similarly in the case of determining the applicable law under EU conflict of laws rules; arbitration agreements and choice of court agreements are also exempted from the Rome

inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. | On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation. | This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

31 See e.g. DICKLER, J. F. Schiedsgerichtsbarkeit und Reform der EuGVVO. Standort Europa zwischen Stagnation und Fortschritt. Tübingen: Mohr Siebeck, 2015; GEIMER, R. Die Reichweite der Bereichsausnahme zu Gunsten der Schiedsgerichtsbarkeit in Art. 1 Abs. 2 lit. d EuGVVO n. F. In: Rechtsdurchsetzung: Rechtsverwirklichung durch materielles Recht und Verfahrensrecht: Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag. Köln: Carl Heymanns Verlag, 2016, p. 501 et seq.

32 See JUNKER, A. *Internationales Zivilprozessrecht.* 6th edition. München: C. H. Beck, 2023, p. 53.

33 COM(2010) 748 final, p. 5.

34 Cf. e.g. Judgment of the CJEU of 17 November 1998, C-391/95; recital 12(3) of the Brussels Ibis Regulation.

I Regulation,[35] which determines the law applicable to contractual obligations. However, it can be inferred from the wording of this provision that other contracts within the framework of arbitration are covered by this regulation.[36]

In the context of out-of-court dispute resolution, the EU actively focuses its legal acts primarily on mediation or consumer protection within the out-of-court dispute resolution (in this case, both mediation and arbitration).[37] In 2002, the EU adopted the Green Paper on alternative dispute resolution in civil and commercial law.[38] Based on this, the Proposal for a directive on certain aspects of mediation in civil and commercial matters was created in 2004.[39] In the same year, the European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission, setting out a set of principles to which individual mediators can voluntarily decide to commit. After lengthy negotiations, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the Mediation Directive)[40] was finally adopted in 2008.

Thus, a common standard has been established among the Member States for certain areas of mediation within the EU; however, the importance of national law of individual Member States remains absolutely essential in the field of mediation, especially because the Directive regulates mediation only in cross-border relations.[41] Nonetheless, the Mediation Directive is, in generally considered a significant step, as it has provided a major impetus for the legal regulation of mediation in some EU Member States.[42] However, Member States have not limited their national mediation laws to mediation in cross-border relationships, but have extended it to purely domestic relationships. In doing so, however, they have contributed, in line with the Directive, to increasing the attractiveness of out-of-court procedures and to the broader use of mediation for the settlement of disputes in civil and commercial matters aiming to simplify and improve access

[35] See Article 1(2)(e) of the Rome I Regulation, *Official Journal of European Commitie*, L 177, 04.07.2008, p. 6–16.

[36] For example, on the contract between the arbitrator and the parties to the dispute, the so-called *receptum arbitrii*; cf. WIECZOREK, B., SCHÜTZE, R. A. *Zivilprozessordnung und Nebengesetze. Elfter Band. §§ 916–1066*. 4th edition. Berlin/Boston: Walter de Gruyter, 2014, p. 447.

[37] Cf. e.g. Article 2(4) of the Directive 2013/11/EU. For more details see EICHSTÄDT: *Der schiedsrechtliche Acquis communautaire…,* p. 56 et seq.

[38] COM(2002) 196 final.

[39] COM(2004) 718 final.

[40] *Official Journal of European Commitie*, L 136, 24.5.2008, p. 3–8.

[41] Article 1(2) of the Mediation Directive.

[42] States were required to transform the Directive by 21 May 2011.

to justice.[43] The approach of each EU Member State to the implementation of the Mediation Directive varied legislatively only in terms of whether member state had already regulated mediation in national law or not. Member States that had to create completely new legislation include, for example, Germany[44] or the Czech Republic[45]; countries that already had mediation regulated include, for example, Slovakia[46] or Austria[47].

With regard to the increasing number of contracts concluded between consumers and traders, the EU has adopted Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)[48] and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)[49]. The aim of the adoption of both instruments is to ensure that consumers also have access to out-of-court methods of resolving domestic or cross-border disputes arising in connection with sales or service contracts concluded in an online or offline environment.[50]

43 See recital 5 et seq. of the Mediation Directive.

44 Mediationsgesetz vom 21. Juli 2012 (BGBl. I S. 1577), das durch Artikel 135 der Verordnung vom 31. August 2015 (BGBl. I S. 1474) geändert worden ist.

45 Czech Act No. 202/2012 Coll., on Mediation.

46 Slovak Act No. 420/2004 Coll., on Mediation.

47 Bundesgesetz über Mediation in Zivilrechtssachen, BGBl. I Nr. 29/2003.

48 OJ L 165, 18.06.2013, p. 63–79. The Directive responds to some extent to the unsatisfactory situation prevailing even after the adoption of the Commission Recommendations 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

49 OJ L 165, 18.06.2013, p. 1–12. In accordance with this Regulation [Article 2(1)], an online platform has been created: https://ec.europa.eu/consumers/odr.

50 See recital 4 et seq. of the Directive on consumer ADR; recital 4 ff of the Regulation on consumer ODR. Cf. also Report on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes of 25 September 2019; COM(2019) 425 final.

4. International treaties in the field of arbitration and mediation

The issue of out-of-court dispute resolution is also addressed in a numerous international treaties, some of which are absolutely crucial for the respective area. Particularly important international treaties can substantially contribute to the popularity of out-of-court dispute resolution (see below). International treaties also significantly influence the legislation of the EU and individual member states.

4.1. New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[51] is one of the most important multilateral international treaties in general and, given its global reach and impact, one of the most important sources of arbitration ever – if not the most important. Although the substantive scope of the New York Convention is primarily focused on the issue of recognition and enforcement of foreign arbitral awards, the importance and impact of this exceptional and unique legal document is much greater, and affects (albeit indirectly) issues beyond the recognition and enforcement of arbitral awards. The New York Convention, to which 172 states have acceded,[52] can be described without exaggeration as one of the most successful international treaties with a global scope, thanks to which arbitration enjoys such great popularity in the international context.

The New York Convention was adopted at the United Nations Conference on International Commercial Arbitration, held from 20 May to 10 June 1958 in New York. In addition to the intergovernmental[53] and non-governmental organizations

[51] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, entered into force on 7 June 1959.

[52] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en (accessed on 30 November 2023).

[53] E.g. Hague Conference on Private International Law (HCCH), see UNITED NATIONS, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, VOL. 330/1959, p. 6; available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20330/v330.pdf (accessed on 30 November 2023). The EU has also become a member of the HCCH. The HCCH has currently 91 Members: 90 States (including all current EU member states) and 1 Regional Economic Integration Organisation, i.e. EU. See https://www.hcch.net/en/instruments/conventions/status-table/?cid=29 (accessed on 30 November 2023). The European Community became a Member of the Hague Conference on 3 April 2007; see also Council decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law (2006/719/EC). With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaces and succeeds the European Community as from that date.

and governments represented by observers, 45 governments were represented, including representatives of twelve current EU Member States: Austria, Belgium, Bulgaria, the former Czechoslovakia – i.e. the current successor states Czech Republic and Slovakia –, Finland, France, Germany, Italy, the Netherlands, Poland and Sweden.[54] Currently, all EU Member States are contracting states, with Malta being the last Member State to accede to the New York Convention in 2000.[55]

In accordance with Article I(3) of the New York Convention states had the option to make a reservation to apply the New York Convention only between contracting states or only to commercial disputes. In view of the fact that within the EU the New York Convention applies in all Member States, the territorial reservation – made for example by Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic and Greece – plays no role. In this context, limiting the application of the New York Convention to commercial matters may have more practical significance. Such a reservation has been made within the EU by Croatia, Cyprus, Denmark, Greece, Hungary, Poland and Romania.[56]

With regard to the investigated issue of sources of law in out-of-court dispute resolution, or the importance of EU law and EU Member State law in this area, it is necessary to emphasize in particular the so-called "more-favourable-right".[57,58] Based on the principle regulated in Article VII(1) of the New York Convention,[59] the application of other bilateral or multilateral international treaties, or national law, is allowed if it is more favourable for the given situation.[60] As mentioned above, this does not necessarily concern only the question of the recognition and enforcement of a foreign arbitral award, since that provision, like the entire New York Convention, also applies to other areas, such as the objection of the lack of jurisdiction of the state courts, the form or validity of the arbitration agreement,

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[54] See UNITED NATIONS, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, VOL. 330/1959, p. 4; available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20330/v330.pdf (accessed on 30 November 2023).

[55] See footnote 52.

[56] Ibid.

[57] It is also possible to encounter the term „most-favourable-right-provision"; see BINDER, Peter. *International Commercial Arbitration and Mediation in Uncitral Model Law Jurisdictions.* 4th edition. Alphen aan den Rijn: Kluwer Law International, 2019, p. 104, 627.

[58] See decision of the Czech Supreme Court (Nejvyšší soud) of 16 August 2017, Ref. No. 20 Cdo 5882/2016.

[59] Article VII(1) of the New York Convention: The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

[60] More favourable, of course, in relation to the party seeking the recognition of the award, and not to the party wishing to oppose the award, as the aim is to simplify the movement of arbitration awards.

etc.[61] In the case of recognition and enforcement of a foreign arbitral award, since this is the primary concern of the New York Convention, even an arbitral award which does not comply with the conditions of the New York Convention will be recognized, if he meets the more lenient conditions laid down in another legal instrument, such as another international treaty or national law (Article VII(1) of the New York Convention).

However, only one legal instrument, i.e. either an international treaty or a law, can be applied and it is not possible to combine the provisions of several of them. Thus, either the New York Convention or another international treaty or national regulation is applied.[62] However, even taking into account the most-favourable-right, it is not possible to apply those treaties whose application is expressly excluded by the international treaty. An example of such a provision is Article VII(2) of the New York Convention, under which the 1923 Geneva Protocol on Judgment Clauses and the 1927 Geneva Convention on the Enforceability of Foreign Arbitral Awards ceased to apply between the Parties to the New York Convention.[63] Therefore, even if these treaties were more favourable to the party seeking recognition of the arbitral award in a particular case, they cannot be applied between the Parties to the New York Convention.

4.2. European Convention on International Commercial Arbitration

In order to facilitate trade, or to resolve disputes in trade relations between the political East and West, parallel to the negotiations on the New York Convention, negotiations on the European Convention on International Commercial Arbitration (the European Convention) were conducted, which was finally after lengthy

[61] See e.g. decision of the German Federal Court of Justice (Bundesgerichtshof) of 21 September 2005, Ref. No. III ZB 18/05; Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 8 June 2010, Ref. No. XI ZR 349/08; Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 25 January 2011, Ref. No. XI ZR 350/08.

[62] Similarly ADOLPHSEN, J. In: KRÜGER, W., RAUSCHER, T. (eds.). *Münchener Kommentar zur Zivilprozessordnung*. Band 3. Sections 1025–1109. München: C. H. Beck, 2013, p. 565.

[63] These are one the first international treaties regulating certain aspects of arbitration on a wider territorial scale, which, however, would not stand up to much today in view of the developments that arbitration has undergone in the meantime. Nevertheless, there are still countries where their application comes into consideration. However, these are only a few states, such as Anguilla or the Bahamas, which play an absolutely insignificant role in the arbitration. See e.g. SCHÜTZE/THÜMMEL: *Schiedsgericht und Schiedsverfahren…,* p. 12.

negotiations signed in Geneva on 21 April 1961.[64] The change in the political climate did not affect the validity and applicability of this Convention in any way, and in accordance with Article I(1)(a) the European Convention applies when the parties had their habitual place of residence or their seat in different Contracting States when the arbitration agreement was concluded.

Compared to the New York Convention, however, the European Convention has much less practical (and unifying) impact not only within the European Union. Not all Member States are parties, although most of them have ratified the Convention. At present, the European Convention has 31 contracting parties, of which 17 are EU Member States: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, Slovenia and Spain.[65]

The European Convention allows, in accordance with its Article X(7), the application of the New York Convention and, in conjunction with Article VII(1) of the New York Convention, the application of the most-favourable-right must also be allowed within the framework of the European Convention.[66]

In the context of the European Convention, it is also necessary to mention the (Paris) Agreement relating to Application of the European Convention on International Commercial Arbitration of 17 December 1962, which, in accordance with Article 2(1) of this Agreement, is open for signature only by the member States of the Council of Europe. The purpose of this Agreement is to simplify certain problematic aspects arising from the (political/bipolar) European Convention and takes precedence over the European Convention on certain issues (Article 1 of this Agreement). The contracting parties are 8 countries (Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg and one non-member but candidate EU state – Moldova).[67]

4.3. Singapore Convention

The difficulty of enforcing agreements reached in mediation was considered one of the important reasons hindering the wider use of mediation.[68] UNCITRAL

[64] The Convention was prepared and opened for signature on 21 April 1961 by the Special Meeting held at the European Office of the United Nations in Geneva from 10 to 21 April 1961.

[65] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en (accessed on 30 November 2023).

[66] Decision of the German Provincial Court of Appeal in Munich (OLG München) of 23 November 2009, Ref. No. 34 Sch 13/09.

[67] See https://www.coe.int/en/web/conventions/full-list//?module=signatures-by-treaty&treatynum=042 (accessed on 30 November 2023).

[68] Proposal by the Government of the United States of America: future work for Working Group II, A/CN.9/822, p. 2; available at: https://undocs.org/en/A/CN.9/822 (accessed on 30 November

sought to address this unsatisfactory situation by creating an instrument that would uniformly regulate the enforcement of agreements reached in mediation. On 20 December 2018, The United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention)[69] was adopted, which aims to achieve a similar success in the field of mediation as New York Convention achieved regarding the recognition and enforcement of arbitral awards.[70] The Singapore Convention was adopted by the General Assembly on 20 December 2018 in New York and provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements. It ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified procedure.

The name „Singapore Convention" derives from the fact that UNCITRAL accepted Singapore's offer to hold the signing ceremony in Singapore and also from the fact that one of the working groups that drafted the Convention was successfully led by a delegate from Singapore.[71] The Convention entered into force pursuant to Article 14(1) on 12 September 2020, consists of a Preamble and 16 Articles, and currently has 13 Parties, with no EU Member State being a Party. No EU Member State is even a signatory of this Convention (the Convention currently has 56 signatories); the UK, for example, is a signatory, as is the USA, China, but neither have ratified yet.[72] Even the EU has not yet acceded to the Singapore Convention, and voices are being heard within the EU as to whether the EU has the competence to accede to the convention or whether individual Member States have it.[73]

Whether the Singapore Convention will be a successful international treaty in the field of mediation cannot be answered yet and it is necessary to await future developments, particularly with regard to the number of contracting parties.

2023).

69 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf

70 See e.g. RISSE: *Wirtschaftsmediation…,* p. 602.

71 For more details see ELSTERMANN: *Internationale handelsrechtliche Mediation*…, p. 259 et seq.

72 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (accessed on 30 November 2023).

73 See https://www.lto.de/recht/hintergruende/h/singapur-konvention-mediationsvergleich-international-vollstreckbar-voraussetzungen-kein-eu-beitritt/ (accessed on 30 November 2023).

4.4. ICSID

Recently, the International Centre for Settlement of Investment Disputes (ICSID), which focuses on the highly specific area of investment disputes, has also played an important role in out-of-court dispute resolution. These disputes, however, have a certain public law character and thus differ to some extent from classical (private) out-of-court dispute resolution. Of particular importance in this respect is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which was negotiated in Washington on 18 March 1965.[74] This Convention is again one of the very successful international treaties with worldwide scope. As of today, it counts 165 Member States (158 Contracting States and 7 Signatory States). Within the EU, all Member States are Contracting States with the sole exception of Poland.[75] For the purposes of this Convention then, in accordance with its Article 6(1)(c), the ICSID Arbitration Rules have been adopted.[76]

In addition to arbitration, ICSID has recently focused on mediation and has adopted mediation rules for the field of investments. The ICSID Mediation Rules adopted by the Administrative Council of the Centre came into effect on 1 July 2022.[77] In contrast to arbitration proceedings under the ICSID Convention, parties to an ICSID mediation proceeding are not required to be a Contracting State or nationals of another Contracting State. In terms of the conceptual definition of mediation, it is important to point out that there is a strict distinction between mediation and conciliation[78] in the ICSID system of out-of-court dispute resolution, although these terms are commonly confused or are equivalent.[79]

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74 Available at: https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (accessed on 30 November 2023).

75 See https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf (accessed on 30 November 2023).

76 Available at: https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (accessed on 30 November 2023).

77 Available at: https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf (accessed on 30 November 2023).

78 Available at: https://icsid.worldbank.org/sites/default/files/Conciliation_Rules.pdf (accessed on 30 November 2023).

79 See https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation (accessed on 30 November 2023); United Nations: UNCITRAL Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021), Vienna, 2023, p. 3, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2223585e.pdf (accessed on 30 November 2023). LACHMANN: *Handbuch für die Schiedsgerichtspraxis*…, p. 13.

4.5. Other international treaties on out-of-court dispute resolution

In addition to the above-mentioned international documents, there are a number of other, more or less important, or regional international treaties that regulate the issue of out-of-court dispute resolution – traditionally for the area of arbitration – only as one of many procedural issues – typically agreements on legal assistance –, or for a specific area within the unified substantive international treaties.

International treaties on legal assistance impact arbitration exclusively in terms of the recognition and enforcement of foreign arbitral awards.[80] In this respect, it is crucial to compare and contrast the relationship between these traditionally bilateral treaties and the multilateral international treaties that apply to this issue – also with regard to the most-favourable-right under Article VII(1) of the New York Convention (see above).

However, significant unified substantive international treaties, which primarily aim at substantive regulation of a defined area, also very often contain regulation of certain aspects of arbitration. Such provisions can be found, for example, in international treaties governing the field of transport and carriage: Article 33 of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which applies in 58 States and to which all EU Member States are parties;[81] Article 28–32 of the Convention concerning International Carriage by Rail (COTIF), which currently has 50 contracting States, some of which have suspended membership;[82] Article 34 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) of 1999, to which 139 countries of the world participate, including all EU Member States;[83] Article 32 of the Convention for the Unification of

[80] On the issue of international treaties on legal assistance and arbitration, cf. e.g. RYŠAVÝ, L. Arbitration From the Perspective of Bilateral Agreements on Legal Assistance. In: *Czech (& Central European) Yearbook of Arbitration*. 2020/1, pp. 181–208.

[81] See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XI-B-11&chapter=11&clang=_en (accessed on 30 November 2023).

[82] See https://otif.org/fileadmin/images/pictures/Table1P_DE.pdf (accessed on 30 November 2023). The EU also acceded to COTIF on 1 July 2011; see Council Decision of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, OJ L 51, 23.02.2013, p. 1–7.

[83] See https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (accessed on 30 November 2023).

Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (the Warsaw Convention),[84] which has 152 contracting states.[85]

In view of the multitude of international treaties in each Member State, it is always necessary to examine which treaty is to be applied. In the absence of an explicit regulation of the relationship, the procedure is based on generally applicable legal principles such as *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, or according to the Vienna Convention on the Law of Treaties,[86] or to the already mentioned principle of most-favourable-right. In relation to national regulation, it should be stressed that international treaties become part of national law and traditionally take precedence (in application) over laws.[87]

5. National rules on out-of-court dispute resolution

If the relevant legal regulation is not contained in an international instrument (EU law or international treaties) – and this is usually the case even if it is a comprehensive regulation such as the New York Convention[88] – the national regulation of arbitration (or mediation) applies. All EU countries now have their own regulations for both arbitration and mediation (see examples above).[89] The national regulation of out-of-court dispute resolution is often not very extensive, as it only regulates the most basic institutes in order not to unnecessarily restrict the development of mediation or to prevent arbitration from becoming another formalized type of civil procedure, which it should not be.[90]

However, even in the existence of international sources, national laws are important sources of law. This is true for national out-of-court dispute resolution; however, they are also justified in cross-border relations where international

[84] This convention was replaced by the Montreal Convention in those states that acceded to the Montreal Convention [Article 55(1)(a) of the Montreal Convention].

[85] See https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (accessed on 30 November 2023). In a specific case, however, it depends on whether the given state has also acceded to any of the additional protocols [Article 55(1) of the Montreal Convention].

[86] Similarly SCHLOSSER, P. *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. 2nd edition. Tübingen: Mohr Siebeck, 1989, p. 106.

[87] See e.g. Article 10 of the Constitution of the Czech Republic (Czech Act No. 1/1993 Coll.), Article 7 of the Constitution of the Slovak Republic (Slovak Act No. 460/1992 Coll.), not unequivocally, but in practice with the same result Article 59(2) of the German Basic Law (Grundgesetz) of 23 May 1949.

[88] For example, under the grounds for refusal to recognize and enforce a foreign arbitral award in Article V(2)(a), explicit reference is made to domestic arbitrability.

[89] On the worldwide regulation of arbitration see SCHLOSSER: *Das Recht der internationalen privaten Schiedsgerichtsbarkeit…,* Rn. 143 et seq.

[90] Cf. SCHMIDT/LAPP/MAY: *Mediation in der Praxis…,* p. 16.

legislation does not address specific institutes and issues, or where it needs to be supplemented, to take certain national specificities into account, or to implement the objectives of a directive.[91] The extent to which individual national regulations coincide or differ will significantly depend on whether these states, and to what extent, drew inspiration from significant model instruments, i.e., soft law (see below).[92]

From the perspective of the national legislator, the instruments developed by the United Nations Commission on International Trade Law play a crucial role in the out-of-court settlement of disputes. For arbitration, this is the UNCITRAL Model Law on International Commercial Arbitration from 1985.[93] Member States that have not been influenced or inspired by this Model Law in their arbitration regulation include France and Sweden.[94] The regulation of arbitration in important arbitration centers such as Paris or Stockholm may thus differ significantly in certain aspects from that in many other countries.[95] Within the United Nations Commission on International Trade Law, there is a list of States whose legislation was based on or influenced by the Model Law; currently there are 88 States in a total of 121 jurisdictions.[96] According to that list, the EU countries whose national laws are not influenced to a greater extent by the Model Law include: in addition to France and Sweden, the Czech Republic, Finland, Italy, Latvia, Luxembourg, the Netherlands, Portugal and Romania.

In the area of mediation, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) is less accepted by individual states. The reason for its lower acceptance is, on the one hand, that it is a relatively new instrument, and on top of that, EU Member States had the obligation to transform the mediation directive, so that their national regulation did not require any interventions. Nevertheless, legislation based on or influenced by this Model Law has been enacted in 33 states in a total of 46 jurisdictions;[97] among the EU Member States, the following

[91] Similarly SCHROEDER: *Die lex mercatoria arbitralis…*, p. 36; ELSTERMANN: *Internationale handelsrechtliche Mediation*…, p. 36 et seq., 212.

[92] See on the issue of differences in legal regulation in the field of mediation ȘUȘTAC, Z., WALKER, J., IGNAT, C., CIUCĂ, A. E., LUNGU, S. *Best practice guide on the use of mediation in cross-border cases*, Bucharest, 2013, p. 129.

[93] Cf. e.g. SCHÜTZE/THÜMMEL: *Schiedsgericht und Schiedsverfahren…,* p. 10.

[94] The same is true of the UK, for example.

[95] For example, on the question of whether a single arbitrator or a three-member arbitral tribunal should *ex lege* decide in the absence of an agreement between the parties.

[96] See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed on 30 November 2023).

[97] Cf. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status (accessed on 30 November 2023).

countries have been inspired by the regulation of mediation in their national laws: Belgium, Croatia, France, Hungary, Luxembourg and Slovenia.

6. Soft law and out-of-court dispute resolution

In addition to EU regulations, international treaties and national laws – or simultaneously with them – other instruments, which in the international context are referred to as so-called soft law, play an unmistakable and very important role in out-of-court dispute resolution.

In order to overcome the differences between the individual national legal regulations, but also to overcome the differences between the individual legal systems (Europe, USA, China), various international, professional and interest organizations and chambers have been for decades creating a system of rules, regulations, model laws, etc. In addition to those already mentioned, for example, the International Chamber of Commerce – ICC, the International Bar Association – IBA, the American Bar Association – AAA, the Inter-Pacific Bar Association – IPBA, the International Council for Commercial Arbitration – ICCA, the Chartered Institute of Arbitrators – CIArb, the United Nations Economic Commission for Europe – UNECE, the World Intellectual Property Organization – WIPO, the International Centre for Dispute Resolution – ICDR, the Singapore International Mediation Centre – SIMC, the International Mediation Institute – IMI and others.[98]

The standards created by these bodies are not generally binding, respectively are not in themselves binding without further consideration. Their binding nature does not result from the nature of the given norms, as they are not legal norms in the legislative sense – hence the term soft law – but from the agreement of the parties or from the decision of the national legislator, who adopts the rules and model laws into its own laws (see the UNCITRAL Model Laws referred to above). In addition, if these rules become part of national law and are binding like any other national law, the further objective of convergence and unification of legal orders is fulfilled.

Despite their general non-binding nature, these norms play a significant role in terms of their meaning and prevalence, and the parties may contractually agree on their application, or they may play a role by the passing of laws or in the decision-making practice of the competent authorities.[99] Examples of such

[98] See e.g. RYŠAVÝ: *Nezávislost a nestrannost rozhodce…,* p. 20.

[99] See decision of the Austrian Supreme Court (Oberster Gerichtshof) of 5 August 2014, Ref. No. 18 ONc 1/14p, point 4.1.

soft law include the IBA Guidelines on Conflicts of Interest in International Arbitration[100] or The Code of Ethics for Arbitrators in Commercial Disputes issued by the American Arbitration Association[101] and the American Bar Association.[102] These and similar regulations are generally very detailed, well ordered and with many concrete examples that may arise in practice.[103] On the other hand, it is necessary to realize that such rules are often the result of certain professional groups taking into account their interests above all, and not always the interests of arbitration as such, and should therefore be approached in this way.[104] This does not, of course, diminish their contribution, importance and general acceptance.[105]

As mentioned above, one of the most important and globally widespread examples of soft law is the UNCITRAL Model Law on International Commercial Arbitration. In addition to this, UNCITRAL has adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. The Model Law on Mediation was initially adopted in 2002. It was known as the "Model Law on International Commercial Conciliation", and it covered the conciliation procedure. The Model Law has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation". And like the other soft law instruments, it was adopted to assist States in reforming and modernizing their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.[106]

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[100] *International Bar Association.* IBA Guidelines on Conflicts of Interest in International Arbitration of 23 October 2014; available at: https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (accessed on 30 November 2023).

[101] *American Arbitration Association*. The Code of Ethics for Arbitrators in Commercial Disputes, available at: https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf (accessed on 30 November 2023).

[102] See https://www.americanbar.org/groups/dispute_resolution/resources/ethics/code-of-ethics-for-arbitrators-commercial-disputes (accessed on 30 November 2023).

[103] Other examples of similar regulations give WIECZOREK/SCHÜTZE: *Zivilprozessordnung und Nebengesetze…,* p. 451.

[104] For more details e.g. LACHMANN: *Handbuch für die Schiedsgerichtspraxis…,* p. 257.

[105] PFEIFFER, T. Schiedsrichterbefangenheit und anwaltliche Versicherungsmandate. In: GEIMER, R., SCHÜTZE, R. A. (eds.). *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag*. München: Sellier European Law Publisher, 2012, p. 750; decision of the German Provincial Court of Appeal in Frankfurt am Main (OLG Frankfurt am Main) of 10 January 2008 Ref. No. 26 Sch 21/07.

[106] Cf. https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (accessed on 30 November 2023).

In addition to these Model Laws, UNCITRAL has adopted the UNCITRAL Mediation Rules[107] and UNCITRAL Arbitration Rules,[108] as well as, for example, rules on online dispute resolution.[109] In the case of such rules, it is often a comprehensive set of rules covering all relevant aspects of mediation or arbitration proceedings (commencement and termination of proceedings, appointment and role of arbitrators or mediators, conduct of mediation or arbitration proceedings, etc.), the application of which can be agreed by the parties and thus avoid complications in the event that a particular issue in the context of out-of-court proceedings is not contractually settled between the parties.

7. Conclusion

In conclusion, it can be stated that, from the perspective of arbitration as well as from the perspective of mediation, the importance of EU law is fundamental, albeit in a very different way in the two central methods of out-of-court dispute resolution. In the regulation of arbitration, the EU ultimately decided not to directly intervene through its legislation, even though this may not have been its initial intention. However, in doing so, it has enabled the continued applicability of the highly successful unification instrument that is the New York Convention. The fact that all the existing EU Member States are parties to the New York Convention may have played a role in this, and any modification by means of a secondary act would only duplicate the existing legal situation or make the EU an island that would differentiate itself from the rest of the world. However, such a situation would not be desirable in view of the highly international or global nature of arbitration and would break down the degree of uniformity that has been achieved.

From the perspective of mediation, the importance of the EU is crucial in that the adoption of the Mediation Directive and the resulting obligation for Member States to implement it in their legal systems has been the basic (or

[107] Mediation Rules of the United Nations Commission on International Trade Law of 9 December 2001, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf (accessed on 30 November 2023). The Rules are the result of a revision of the 1980 UNCITRAL Conciliation Rules.

[108] Arbitration Rules of the United Nations Commission on International Trade Law originally dated 15 December 1976 (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (accessed on 30 November 2023).

[109] UNCITRAL Technical Notes on Online Dispute Resolution, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf (accessed on 30 November 2023).

the last) impetus for some Member States to regulate mediation by law. In this context, Member States have taken the opportunity offered and did not limit the mediation regulated by the directive in cross-border relations only to relations with an international element, but also extended it to purely domestic relations. This contributed to its wide application and to enlightenment among the lay and professional public.

EU law as well as the law of individual member states are also fundamentally determined by international treaties – the EU itself has become a contracting party to many of them, and within their scope they take precedence over national laws and sometimes even over EU regulations. From the perspective of arbitration, it is the already mentioned New York Convention, as an example of a successful international agreement behind the worldwide popularity of arbitration. In the case of mediation, it is especially the Singapore Convention, which, however, will have to earn its place in the spotlight.

However, the importance of national law is also quite crucial for the field of out-of-court dispute resolution, because while international and EU sources establish the basic principles and framework of the given out-of-court dispute resolution methods, national law regulates specific institutes, rules and procedures for their use. In sports terminology, it could be said that EU law and international treaties define the territory on which the game is to be played, whereas national law lays down the specific and core rules of the game.

From the perspective of the national legislator and the parties to the out-of-court dispute resolution, the importance of so-called soft law cannot be overlooked. It provides states with a lot of high quality instruments and models law worthy of emulation and parties with comprehensive rules that take into account all relevant circumstances that parties should/must otherwise have to consider. The most famous model laws and rules come from UNCITRAL.

Considering the importance of out-of-court dispute resolution in the international and national context, with regard to the rich variety of different sources in terms of types and origin, it is necessary to stress the importance of a uniform, respectively not contradictory approach in the application, interpretation of concepts or in the decision-making activity of state courts in the field of arbitration and mediation – especially when it is not EU law.[110]

[110] On the interconnectedness of case law in different countries, cf. decision of the Austrian Supreme Court (Oberster Gerichtshof) of 5 August 2014, Ref. No. 18 ONc 1/14p, point 5.1.

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Title to Territory in Europe in the Context of the Russian-Ukrainian Armed Conflict: Methods, Illegal Claims and Legal Assessments

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Summary: Illegal decisions and actions do not give rise to legal consequences. An annexed territory cannot receive the status of a part of an aggressor state. The question of a territorial dispute does not arise in this case. It is correct to talk about a unilateral unreasonable claim. Territory, as an integral part of the concept of state, as a criterion of statehood, has acquired special significance in the modern conditions. It is not only a natural resource (land, water, subsoil) and a space for the placement of technologies and hazardous waste. It may be considered as a line of protection. States may lay claim to one or another part of the territory of a neighboring state. The methods of territorial acquisitions of the past do not comply with the norms of modern international law.

Keywords: title to territory, territorial integrity, continuity of states, statehood, annexation of Crimea by the Russian Federation, International Court of Justice on territorial disputes, methods of territorial acquisition.

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1. Introduction

On February 24, 2022, Russia carried out a full-scale invasion of Ukraine, hoping to quickly seize its territory and establish its power. This was not for the first time when Russia ignored the title to territory and principles of international law. In 2008 Russian troops invaded in Georgia, latter, in 2014, they appeared in Crimea, istalled pro-Russian government and illegally annexed this part of sovereign Ukraine.

In 2018, American researcher Mark Voyger warned that if Russia continued its lawfare activities unchecked, it "will be emboldened to continue applying those methods to justify its expansionist and interventionist policies in all areas that it regards as legitimate spheres of interest".[1] However, international policy makers and state leaders ignored this warning.

Now, after a year and a half since the outbreak of the most brutal full-scale war on the territory of a European state since the end of the Second World War, the question of the title to territory has acquired a special meaning. How can this issue be resolved in international legal documents? What is the very picture of state continuity practice? What did the methods of acquiring territory look like in the past? Are the past practices commensurate with the current content of international law?

The essence of our hypothesis is that in the situation with the annexation of Crimea by Russia there is no territorial dispute, but a one-sided unfounded claim is obvious.

While exploring the problem and building our logical line, we relied on the works of O. L. Ayoola, G. H. G. A. Antselevich, Yu. G. Barsegov, L. Boisson de Chazournes, A. Cassesse, J. Crawford, S. Cybichowski, T. Guseinov, J. Dugard, T. D. Grant, B. M. Klimenko, P. P. Kremnev, K. Mamadu, U. Mamedov, L. Mälksoo, K. Marek, F. S. Mirzayev, Nogovitsyna Yu. O., N. V. Ostrouhov, A. Peters, R. F. Salimov, M. N. Show, E. V. Spektorsky, O. V. Tarasov, L. D. Tymchenko, A. Verdross, M. Voyger, O. V. Zadorozhniy, N. V. Zaharova and others.

[1] VOYGER, M. 'Russian Lawfare–Russia's Weaponisation Of International And Domestic Law: Implications For Th Region And Policy Recommendations'. *Journal of Baltic Security.* 2018, 4(2), pp. 35–42. DOI: 10.2478/jobs-2018-0011.

They devoted their works to the study of state, its continuity, territory and international territorial issues.

The methodology for writing this article is based on the search for a rational international legal solution to the problem of acquiring the title to territory through the study of the norms of international law, looking into the historical background of the issue and analysing the claims of Russia as an aggressor state.

2. Territory and its Strategical Importance: Doctrine, International Legal Documents and Practice

Analyzing the nature of the requests of aggressor states, and primarily Russia, we may say with confidence that in modern conditions a state is, first of all, a territory. There are several explanations for that. Any state is a natural resource (land, water, subsoil), a space for the placement of technologies and hazardous waste. Finally, and this is very important, state territory may be considered as a line of protection. As noted László Bernát Veszprémy, "In spite of all technological innovations, geographical boundaries are still the best method of defending oneself… Russia will never cede the control of the lands she considers vital for the country's future; she will never abandon the areas from where the country can be easily attacked".[2]

This situation is neither new nor accidental. The medieval statehood arose due to the fact that peoples were moving. One nation was taking over another. It seized territory, land (terra). Hence the origin of the names of European states – Holland, Deutschland, England, Switzerland. "The resettled groups and tribes were already losing contact with their native land, – we read from E.V. Spektorsky. ... The conquered population had no independent meaning: it was assigned to a clump, attached to the land ... the territory was the center of the state".[3]

The concept of territory was central to the political doctrine of the Ukrainian thinker of the early 20th century V.K. Lipinsky, who believed that the awareness of its own territory and the desire to have its own state is the determining factor of the Ukrainian national movement of his time. If nationalism and socialism were, in his opinion, the ideology of the community, the feeling of people of the same class, of the same faith, even if they live in another territory, then only the territorial ideology can become the defining element in building statehood.[4]

[2] VESZPREMI, L. B. The American Conservative. 2022, Aug. 1, 12:03 AM [online]. Available at: https://www.theamericanconservative.com/the-inexorable-crowbar-of-geography

[3] SPEKTORSKY, E. V. *Gosudarstvo*. Petrograd: Publishing house "OGNI", 1918, p. 6–7.

[4] See: BABURIN, S. N. *Territoriya gosudarstva (pravovye problemy)*: dis. … d-ra yurid. nauk. Moskva, 1998 [online]. Available at: http://www.dissercat.com/content/territoriya-gosudarstva-teoretiko-pravovye-problemy

Contemporary trends of the international law reveal that the state is free to exercise its territorial superiority to the extent that the rights and lawful interests of other states are not affected. And for a very simple reason: since the international community consists of independent states, the sovereignty of one of them is necessarily limited by the sovereignty of the other.[5]

According to S.N. Baburin, the territory is a sign of the state under the condition that there is a unified society within its borders (an association of the population and state power). The condition and the sign of self-governance of the society is the preservation of the territorial integrity of the state.[6] N.V. Ostrouhov notes that the observance of the principles of equal rights and self-determination of peoples, together with the principle of the territorial integrity of states, is one of the urgent problems of modern international law.[7] However, the right to self-determination is not a "right to secession".[8]

O.L. Ayoola stresses that in accordance with the purposes and principles of the UN Charter and other norms of international law, the territorial integrity of states should be based on self-determination of peoples. At the same time, the exercise of its right to self-determination by the people can not be regarded as a dismemberment of the state, a partial or complete violation of its territorial integrity.[9] Nevertheless, international law also provides such forms of external self-determination as the unification, accession or separation of states. This is how the North and South Yemen merged into the Republic of Yemen (1990), the unification of the GDR and the FRG (1990), the disintegration of the USSR (1991), the separation of Czechoslovakia (1993), the separation of Eritrea from Ethiopia (1993),[10] as well as the centrifugal tendencies continue in the territory of the former Yugoslavia.

As it is known, in the doctrine of international law and in the practice of states the thesis has long strengthened that in the event of the disintegration of one state and the emergence on its territory of new ones, the latter, by virtue of

[5] KOKOROKO, D. Souveraineté étatique et principe de légitimité démocratique. *Revue quebecoise de droit international*, vol. 16.1, 2003, s. 39.

[6] BABURIN, S. N. *Territoriya gosudarstva (pravovye problemy)*: avtoref. dis. … d-ra yurid. nauk. Moskva, 1998 [online]. Available at: http://law.edu.ru/book/book.asp?bookID=82590

[7] OSTROUHOV, N. V. *Territorialnaya tselostnost' gosudarstv v sovremennom mezhdunarodnom prave i eyo obespechenie v Rossiyskoy Fedratsii i na postsovetskom prostranstve.* Moskva: Yurlitinform, 2009, p. 128.

[8] See: SHULGA, A. M., NOVIKOVA, L. V., SIDOROV, V. I. (et al.). *Teoria derzhavy i prava:* navch. posibn. Kharkiv: HNU im. V.N. Karazina, 2014, p. 44.

[9] AYOOLA, O. L. *Mezhdunarodno-pravovye problemy territorialnyh sporov v Afrike*: avtoref. … dis. kand. yurid. nauk. Moskva, 1993, p. 7.

[10] See: GUSEINOV, T., MAMEDOV, U. Okkupatsiya territoriy Azerbaidzhanskoy Respubliki: Ritorika o samoopredelenii i voprosy mezhdunarodnoy otvetstvennosti, *Mezhdunarodnoe pravo i problemy integratsii*. 2014, vol. 1(37), p. 275.

the *fait accompli*, inherit this territory within the borders established by treaty order and extend to it its state sovereignty.[11] In matters of disposition of its territory, the state is limited to the interests of the people, who the only is entitled to make a final decision. Any ethnos living in the state territory has the right to cultural-national self-determination (development), limited only by the common interests of the people of the corresponding state. No national (ethnic) self-determination can cross out such a common interest as unconditional preservation of the inviolability and integrity of the state's territory.[12]

The ideas of the right of peoples to self-determination and the principle of territorial integrity of states are fixed in authoritative sources of international law, contained in the declarations of the UN General Assembly, documents of international organizations; they are often appealed during ethnic conflicts. The emergence of the doctrine of national self-determination dates back to the era of the Enlightenment and is associated with the names of such thinkers as J. Locke, G. Grotius, E. de Vattel, J.-J. Rousseau, who theoretically substantiated the sovereignty of the people through the theory of "natural law". The first French Constitution, adopted on September 3, 1791, declared: firstly, freedom and equality in rights from birth; secondly, that the purpose of each state is to ensure the natural and inalienable human rights; thirdly, that the source of sovereignty rests, in essence, in the nation, which laid the foundation for the idea of self-determination of peoples, proceeding from the natural human right given to it from birth. The French bourgeois revolution of 1789–1794 for the first time in the world proclaimed the refusal to conquer foreign territories, the restriction of the rights of monarchs in possession of state territory, and the inviolability of national borders. In May 1790, a draft declaration was submitted to the National Assembly, which later became a decree, and it indicated that the invasion of one state from another threatens the freedom and security of all ... Thus, based on the principles of popular sovereignty, territorial supremacy, non-interference in the internal affairs of other states, the subject of ownership of the territory was called the people.[13] The influence of the people and its right to self-determination and statehood was discussed in detail in the context of Germany's legal status after

[11] See: ANTSELEVICH, G. A. Nekotorye aspekty razvitiya nauki i praktiki mezhdunarodnogo morskogo prava v suverennoy Ukraine, in: MELNYK, A. YA., MELNYK, S. A., KOROTKIY, T. R. (eds.). *Mezhdunarodnoe pravo kak osnova sovremennogo miroporiadka*: kollektivnaya monographia. Liber Amicorum k 75-letiyu prof. V. N. Denisova. Kyiv-Odessa: Feniks, 2012, p. 507.

[12] See: BABURIN, S. N. Supra note 4, p. 10.

[13] See: YAVKIN, N. V. *Problema obespecheniya edinstva i territorialnoy tselostnosti gosudarstva v usloviyah bor'by narodov za samoopredelenie*: dis. … kand. polit. nauk. Nizhniy Novgorod, 2004, p. 22–23.

its defeat in World War II. In particular, the question was considered whether the existence of the German State had ceased or was continuing.[14]

According to the provisions of Art. 1 of the Inter-American Convention on the Rights and Duties of States adopted in Montevideo in 1933, the state as a subject of international law should have the following characteristics: a) permanent population; b) a certain territory; c) the government; d) the ability to enter into relations with other states.[15]

In the case of revising the list of criteria of statehood, T. Grant proposed to subject to reflection such categories as: independence, a claim to statehood, people's process, external and internal legitimacy of formation (taking into account such criteria as democracy and minority policy), organic ties (common historical, cultural, religious or ethnic ties), membership in the UN, recognition.[16] J. Crawford lists "prohibition of aggression and acquisition of territory by force", "right to self-determination", "prohibition of racial discrimination" as additional criteria of statehood.[17] J. Schwarzenberger names "ability to stand by itself", which would mean, according to T. Grant, political and military independence in the legal understanding of statehood.[18]

According to L. Mälksoo, the concept of statehood in international law reflects the definition of the state used in the Montevideo Convention.[19]

Ensuring territorial integrity and unity is the main function of any state. During the first consultations of the period of the Second World War between F.D. Roosevelt and W. Churchill regarding the Atlantic Charter elaborated in August 1941, both states solemnly promised not to seize the territories and not to seek such acquisitions, while simultaneously condemning the territorial changes "incompatible with the free expression of the will of the peoples concerned". However, already on March 7, 1942, W. Churchill wrote to F.D. Roosevelt: "In

[14] See: MALKSOO, L. Sovetskaya anneksiya i gosudarstvennyi kontinuitet: mezhdunarodno-pravovoy status Estonii, Latvii i Litvy v 1940–1991 gg. i posle 1991 g. *Issledovanie konflikta mezhdu normativnost'yu i siloy v mezhdunarodnom prave.* Tartu: Tartu Ulikooli Kirjastus, 2005, p. 62–63.

[15] See: ALEKSANDROVA, E. S. Eshcho raz k voprosu legitimnosti prava na setsesiyu: demokraticheskoe pravo na samoopredelenie vs detsentralizatsiya gosudarstva? In: BIRYUKOV, P. N. (ed.). Mezdunarodno-pravovye chteniya. Voronezh: VGU, 2014, vol. 12, p. 20.

[16] GRANT, T. D. Defining Statehood: The Montevideo Convention and its Discontens. *Columbia Journal of Transnational Law*. 1999, 37 (2): 403–457, p. 450.

[17] CRAWFORD, J. The Creation of States in International Law. *Oxford*: Clarendon Press, 1979, p. 47, 118, 105–106, 227.

[18] In: GRANT, T. D. Defining Statehood: The Montevideo Convention and its Discontens. *Columbia Journal of Transnational Law*. 1999, 37 (2): 403–457, p. 438.

[19] MALKSOO, L. Op. cit., p. 40; see also: TCHERNICHENKO, S. V. State as a Personality, Subject of International Law and Bearer of Sovereignty, *Russian YBIL*. 1993–1994, St.-Petersburg: "Russia-Neva", 1995, p. 15.

the face of increasing difficulties in the war, I come to the conclusion that the principles of the Atlantic Charter should not be interpreted in terms of changing the borders of Russia that existed at the time of Germany's entry into its territory".[20] The problem of territorial integrity was considered in a number of international legal documents, including the materials of the Helsinki Conference on Security and Cooperation in Europe (1975). The Declaration of Principles includes a special section entitled "Territorial Integrity of States". Shortly after the collapse of the USSR in 1994, the Declaration on respect for the sovereignty, territorial integrity and inviolability of the borders of the CIS member states was signed,[21] the parties of which confirmed that while building their relations as friendly, the states will refrain from military, political, economic or any other form of pressure, including blockade, as well as support and use of separatism against territorial integrity and inviolability, as well as political independence of any of the participating states in the Commonwealth. It was established that the seizure of territory with the use of force can not be recognized, and military occupation of the territory of states can not be used for international recognition or imposing a change in its legal status.

According to W. Bernam, the problem is that the more states recognize the existence of general principles of law, the more common and blurred becomes their content. For example, everyone agrees that the principle of *pacta sunt servanda* (treaties must be respected) exists in one form or another in all legal systems. However, when disputes arise regarding the content and significance of this principle, states are no longer unanimous.[22]

3. Illegal claims of Russia

With the start of a full-scale Russian military invasion of Ukraine in 2022, the issues of annexation and occupation, as well as state continuity, acquired special poignancy. Since the thesis on the right of the Russian Federation to the territory of Ukraine on the basis of continuity had no prospects, one of the motives for annexing its territory was the refusal to recognize the existence of a state that owns a title, i.e. Ukraine. It should be stressed that the Legal Department Office

[20] See: SALIMOV, R. F. *Problemy implementatsii printsipa territorialnoy tselostnosti i nerushimosti granits gosudarstv na sovremennom etape*: avtoref. … dis. kand. yurid. nauk. Baku, 2010, p. 11.

[21] Deklaratsiya pro dotrymannia suverenitetu, territorialnoy tsilisnosti ta nedotorkannosti kordoniv derzhav-uchasnyts' SND 1994. Official site of the Suoreme Rada of Ukraine [online]. Available at: http://zakon2.rada.gov.ua/laws/show/997_480

[22] BERNAM, W. *Pravovaya sistema SShA.* 3-y vyp. Moskva: Novaya yustitsiya, 2006, p. 1047.

of the Council of Federation of the Federal Assembly of the Russian Federation on the appeal of the State Duma deputy A.N. Saveliev on the legal expertise of "Information on the succession of the Russian Federation, the principle of continuity and repatriation in connection with the request of the deputy of the State Duma of the Federal Assembly of the Russian Federation A.N. Saveliev" No. SAN-588-6 of May 25, 2006 reported that the fact that the territory of one state once in the past (before the adoption of the UN Charter) belonged to another state, in no case can serve as the basis for making claims about its return at the present time. This statement (approach) contradicts such fundamental principles as territorial integrity and inviolability of state borders, which stipulate *inter alia* that changes in the territories of states and their borders can occur only in accordance with international law (conclusion of an international treaty, association, separation, accession of states, etc.). Otherwise, the political map of the world would constantly be changing and thus extremely unstable. On this basis, Russia, as the legal successor to the Russian Empire, might claim, for example, the inclusion in its territory of Poland and Finland, which were part of the empire in the past. Of course, such a demand can not be recognized as legitimate from the perspective of the norms and principles of contemporary international law.[23] Since international law tends to preserve the stability of international relations, it is quite natural that there is a clear presumption in the practice of states in favor of the continuity of existing states.[24] Specialists in public international law wrote about the principle of the maximum possible continuity of states.[25] Perhaps this is why the practice has gone along the path of its recognition.

The Russian Federation's claims that Ukraine is not a sovereign state and has never existed (or alternatively) that Ukraine is only 32 years old (counting from the collapse of the USSR and the adoption of the Declaration of Independence), and it did not take place as a state, etc. Such theories are justified by the Russian scholars in the following way: acceptance by almost all republics (except the RSFSR) of acts of state independence conflicted with constitutional legislation on the procedure for secession from the USSR, the results of a referendum on the preservation of the USSR of March 17, 1991, and thus could not have legal consequences.[26]

[23] See: NIGMATULLINA, Z. B. Spravka Deputatu Gosudarstvennoy Dumy Federal'nogo Sobrania Rossiyskoy Federatsii A.N. Savelyevu iz SF po probleme kontinuiteta. Moskva, 2007 [online]. Available at: http://www.savelev.ru/journal/case/attachment/?caseid=49&id=17

[24] See: MAREK, K. *Identity and Continuity of States in International Law*. 2e ed. Geneve: Librairie Droz, 1968, p. 548; CRAWFORD, J. The Creation of States in International Law. *Cambridge Law Journal*. 1979, vol. 9, p. 417; CZAPLINSKI, W. La continuite, l'identite et la succession d'etats – evaluation de cas recents, 26 *Revue Belge de Droit International.* 1993, p. 375.

[25] See: DAHM, G. *Volkerrecht*. Band I. Stuttgart: Kohlhammer, 1958, s. 85.

[26] KREMNEV, P. P. *Mezhdunarodno-pravovye problemy, sviazannye s raspadom SSSR*: avtoref. dis. … d-ra yurid. nauk. Moskva, 2010, p. 12.

E. Aman emphasizes that the changes that took place in Eastern Europe in the late 80s – early 90s of the 20th century led to the emergence of a number of successor states, most of which were formed as a result of the collapse of the USSR. In the studies devoted to the disintegration of the Soviet Union, one question was first examined: Are all the newly formed states new states. In fact, the emerging states (Russia and the Baltic States) took different positions on this issue. Most of the countries that emerged on the territory of the USSR have not clearly expressed their position on this issue. The Baltic States represented themselves as successors of states that existed before 1940.[27] At the same time, Russia also speaks about the incessancy (continuity) of the state existence of the Russian Empire, the Russian Republic, the RSFSR, the USSR and the Russian Federation.[28] It is true on the official level. From the scientific perspective, there is an opinion that the concept "the Russian Federation is a state-continuer of the USSR" does not stem from the doctrine of the continuity, but is a new category of the event of succession of states, the result of recognition by international organizations[29] and talking about the continuity of the Russian Federation does not matter.[30] As pointed out by O.V. Zadorozhniy, the concept of "the RF is a successor state" and "the general successor" of the USSR contradicts the conventional and customary norms of international law.[31] If one analyzes the issue of the property of the former USSR, in respect of some objects, the Russian Federation acts as a legal successor, concerning others – as a continuator.[32] F. R. Gasimov expresses the same opinion about international treaties.[33] In the opinion of O.V.

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27 AMAN, E. Vzgliad evropeyskih yuristov na raspad SSSR, *Pravovedenie*. 1999, vol. 2, p. 220–230 [online]. Available at: http://law.edu.ru/article/article.asp?articleID=149079

28 Poyasnitelnaya zapiska «K proektu Federalnogo zakona 'O vnesenii izmeneniy i dopolneniy v Zakon Rossiyskoy Federatsii "O vnesenii izmeneniy v Federalnyi zakon 'O grazdanstve Rossiyskoy Federatsii' "» ot 23.06.2014 No. 157-FZ [online]. Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=32537

29 KREMNEV, P. P. *Obrazovanie i prekrashchenie sushchestvovaniya SSSR kak sub'ekta mezhdunarodnogo prava*: avtoref. dis. … kand. yurid. nauk. Moskva, 2000, p. 10; see also: VEL'YAMINOV, G. Vossoedinenie Kryma s Rossiey: pravovoy status, *Gosudarstvo i pravo.* 2014, vol. 9, p. 17.

30 KREMNEV, P. P. O novyh poniatiyah i kategoriyah pravopreemstva gosudarstv: teoretiko-prakticheskie voprosy, *Zhurn. mezhdunar. prava i mezhdunar. otnosheniy.* 2010, vol. 1, p. 25; see also: KREMNEV, P. P. *Raspad SSSR: mezhdunarodno-pavovye problemy.* Moskva: Zertsalo-M, 2005, p. 173–242.

31 ZADOROZHNIY, O. V. *Mizhnarodne pravo u vidnosynah Ukrainy i Rosiys'koy Federatsii*: avtoref. dys. … d-ra yuryd. nauk. Kyiv, 2015, p. 18.

32 GAVLO, Yu. N. Raspad SSSR i mezhdunarodno-pavovoy status Rossiyskoy Federatsii, Izv. Altaysk. un-ta. *Yurisprudentsiya*. 2000, vol. 2 [online]. Available at: http://cyberleninka.ru/article/n/raspad-sssr-i-mezhdunarodno-pravovoy-status-rossiyskoy-federatsii

33 GASYMOV, F. R. *Priznanie gosudarstv i pravitelstv: sovremennaya mezhdunarodno-pravovaya teoria i praktika*: avtoref. dis. … kand. yurid. nauk. Kazan', 2005. 21 p. [online]. Available at: http://law.edu.ru/book/book.asp?bookID=1191693

Tarasov, the termination of the existence of the USSR can definitely be qualified as the disintegration of the state.[34]

After the collapse of the USSR, the former union republics outlined their borders, being guided, in fact, by the principle of *uti possidetis juris*. In modern international legal relations, the principle of *uti possidetis* was for the first time applied in the process of decolonization of Latin America. Thus, during the adoption of declarations of independence by Latin American states at the beginning of the 19th century, taking into account the continuation of armed conflicts with the mother countries, it was decided to preserve the territorial *status quo* in the region, until a more convenient moment for resolving the issues of delimitation lines.[35] The principle of *uti possidetis* is universal and is used to establish the state border along the line of administrative delimitation, i. e., where the frontier did not exist before.[36] The idea of the universality of the principle of *uti possidetis* and its application in situations of disintegration of modern states has often been abused.[37] Nevertheless, many experts in the field of international law support this concept.[38] We want to emphasize that the revision of the recognized borders contradicts the referred norm, which today is equivalent to the principle of territorial integrity and inviolability of borders.[39]

As L. Boisson de Chazournes notes, this is a rather delicate situation, especially because of the problems of the succession of states.[40] That is why, we suggest to study the issue of the continuity of states more carefully.

Continuity is a political theory about the incessancy of the state and, in the legal sense, the continuity of its obligations. This is a difference from the concept

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[34] TARASOV, O. V. *Sub'ekt mizhnarodnogo prava: problemy suchasnoy teorii.* Harkiv: Pravo, 2014, p. 265.

[35] LALOND, S. *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*. Montreal & Kingston-London-Ithaca: McGill Queen's University Press, 2002, p. 28.

[36] NOGOVITSYNA, Yu. O. *Pravonastupnytsvo Ukrainy: mizhnarodno-pravovi aspekty*: avtoref. dys. … kand. yuryd. nauk. Kyiv, 2005, p. 10.

[37] GEVORGIAN, L. Vopros unasledovaniya administrativnyh granits SSSR v mezhdunarodnom prave [online]. Available at: http://publications.ysu.am/wp-content/uploads/2014/02/410.pdf

[38] SHAW, M. N. The Heritage of States: The Principle of Uti Possidetis Juris Today. *British Year Book of International Law*, 1996, vol. 67, p. 97; KRUGER, H. *The Nagorno-Karabakh Conflict: A Legal Analysis*. Berlin-Heidelberg: Springer, 2010, p. 42–44; PETERS, A. The Principle of "Uti Possidetis Juris": How Relevant is it for Issues of Secession? In: WALTER, C., UNGERN-STERNBERG, A., ABUSHOV, K. (eds.). *Self-Determination and Secession in International Law*. Oxford: University Press, 2014, p. 95–137.

[39] See also: MIRZAYEV, F. S. *Uti Possidetis v self-determination: The lessons of the post-soviet practice.* Thesis submitted for the degree of Doctor of Philosophy. Leicester: University of Leicester, School of Law, 2014, 318 p.

[40] BOISSON, Ch. L. Les ordonnances en mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide. *Annuaire français de droit international*. XXXIX, Editions du CNRS, Paris, 1993, p. 517.

of "succession", when one state assumes certain international rights and obligations of another – existing or ceased to exist. The problem of continuity arises in the case of cardinal changes in the state – a revolution and a change in the state regime, the disintegration or unification of a state.[41] S. Cybichowski spoke about such an understanding of law and the state, where the people were given an advantage over the state.[42] According to A. Verdross, the identity of the legal personality of a state depends not on the identity of its constitution, but rather on the continuity of its population.[43]

In this understanding he was not alone.[44] However, there is an opinion that the "people's continuity" must be confirmed by the active actions of the population against annexation.[45] Such a situation takes place, since, in the opinion of R.L. Bobrov, the essence of the international personality of a state is the people.[46] The continuity of the people is permanent, irrespective of not only the existence of the state and its actions in the event of annexations, but even if it is necessary to leave temporarily (willingly or unwillingly) the territory of its residence. But the continuity of a state directly depends on the continuity of the people. Here we absolutely agree with the above opinion of A. Verdross, but with one addition: If the given people is not torn from the place of their historical residence. Thus, the identity of the legal personality of a state, regardless of its name and various circumstances that occurred during its entire existence (occupation, annexation, etc.) follows from the continuity of the people on the territory of its historical residence.

Lauri Mälksoo, a Professor at the University of Tartu, Estonia, devoted his work to the study of the problem of the continuity in relation to the Baltic States, and he drew attention to the fact that Estonia, Latvia and Lithuania were wiped out by the political map of the world in 1940, but in 1991 they "awakened".[47] According to L. Mälksoo, for a number of researchers who recognize the identity of the legal personality of the modern Baltic countries, the starting point is

41 PYHTIN, S. *Sobytiya 1917 g. i problema nepreryvnosti rossiyskoy gosudarstvennosti*. Moskva, 2009 [online]. Available at: http://legitimist.ru/sight/politics/2010/arxivnyie-novosti/sobyitiya-1917-g.-i-problema-nepr.html

42 CYBICHOWSKI, S. *Das volkerrechtliche Okkupationsrecht*. XVIII Z. fur VR, 1934, s. 318–319.

43 VERDROSS, A., SIMMA, B. *Universelles Volkerrecht. Theorie und Praxis*. Berlin: Ducker & Humblot, 1984, s. 231.

44 VEROSTA, S. Die *Internationale Stellung Österreichs: Eine Sammlung von Erklärungen und Verträgen aus den Jahren 1938 bis 1947*. Wien: Manz, 1947, s. 9.

45 SCHEUNER, U. Die Funktionsnachfolge und das Problem der staatsrechlichen Kontinuitat. In: MAUNZ, T. (Hg.). *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung (Festschrift fur F. Nawiasky)*. Munchen: Isar Verlag, 1956, s. 21.

46 BOBROV, R. L. *Osnovnye problemy teorii mezhdunarodnogo prava*. Moskva: Mezdunarodnye otnosheniya, 1968, p. 64.

47 MALKSOO, L. Op. cit., p. 17.

obviously the unity of the notions 'the identity of the legal personality' and 'the continuity'.[48]

In 1919 the Charter of the League of Nations prohibited the seizure of the territory of another state and its annexation, which, unfortunately, did not yet mean the final proclamation of the principle of territorial integrity of states, since the adoption of the Charter of the League of Nations occurred while the recognition of territorial changes in Europe and was often accompanied by mutual disconsent of the subjects.[49] The attitude of states towards illegal acts and the consequences of illegal acts is clearly stated in the Resolution adopted on March 11, 1932, by the Extraordinary Assembly of the League of Nations. The document stated that members of the League of Nations were obliged not to recognize any situation, treaty or agreement that could be created by means contrary to the Statute of the League of Nations or the Treaty of Paris.[50]

V. Shetzel argued about the illegality of annexations, saying, nevertheless, the possibility of acquiring the appropriate title in a case of recognition by the community, and the refusal of such recognition testified to the illegality of annexation, confirming that the conqueror could not acquire the title to the conquered territory.[51] However, today, the authors are also unanimous on the issues of legitimating the new state. In 1987, John Dugard wrote that jurists agreed that an act committed in violation of a fundamental rule that affects a community rather than a state ... was void and therefore should not be recognized.[52] N.V. Zaharova claims that an aggressor state has no rights as the successor, its actions aimed at appropriating the rights to the seized territory, as well as any rights of the state to which this territory belongs, are legally null and void.[53] And the identical is possition of the European Court of Human Rights in its decision in the case of "OAO Neftyanaya kompaniya Yukos *v.* Russia" on July 31, 2014. It confirmed the principle *ex injuria jus non oritur*.[54]

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48 Ibid., p. 101.

49 See: ZADOROZHNIY, O. V. *Porushennia agresyvnoyu viynoyu Rosiys'koy Federatsii proty Ukrainy osnovnyh pryntsypiv mizhnarodnogo prava.* Kyiv: K.I.S., 2015, p. 129.

50 Off. J., Special Suppl., No 101, p. 8, Documents, 1932, p. 284.

51 See: MALKSOO, L. Op. cit., p. 43.

52 DUGARD, J. *Recognition and the United Nations.* Cambridge, England: Grotius Publications, 1987, p. 132–133. John Dugard's work builds on the argument of Professor J. Crawford, who argued that states have a common law duty not to recognize an act committed in violation of the norm. jus cogens. For details: CRAWFORD, J. *The Creation of States in International Law.* Oxford: Clarendon Press, 1979, p. 123.

53 ZAHAROVA, N. V. *Pravopreemstvo gosudarstv*. Moskva: Mezdunarodnye otnosheniya, 1973, p. 9–10.

54 Official site of the ECHR [online]. Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145730#{"itemid":["001-145730"]}.

4. Methods of Acquiring Territory in the Past

In the last century, the principle of self-determination of peoples played the most significant role as the legal basis for territorial changes. The implementation of this principle led to major territorial changes, which resulted in the emergence of many new states on the political map of the world in Europe, Asia, Africa, and Latin America. M.E. Cherkes draws attention to the fact that gradually, on the place of primary domestication, a derivative acquisition has come, when the territory of one state passes to another on agreemental or extra-agreemental grounds.[55] The principle of self-determination of peoples has long been the subject of study by international lawyers. A. Cassese studied it thoughroughly, and he elaborated a comprehensive concept of its development as a legal principle in accordance with the UN Charter and its interaction with other principles and norms of international law.[56]

The existing classification of methods for acquiring territory is based on Roman law and does not fully correspond to the modern realities. Most cases can not be attributed to the corresponding classification. As a rule, there are five main models of territory acquisition: occupation of *terra nullius*, acquisition of territory on the basis of antiquity of possession or according to historical circumstances (prescription), cession, increase in territory (accretion).

The term of legitimization of property acquired through force (annexation) and the recognition of rights as legally significant are very important issues within the international system that is now resolved at the international judicial level.

Occupation is a way of acquiring territory by the state through joining, under certain conditions, territories that do not belong to anybody (*terra nullius*). The occupation can only be carried out by states and must be aimed at proclaiming sovereignty over these territories. In international law, it is customary to distinguish between fictitious and effective occupation.[57]

One of the main problems of modern international law is associated with the influence of time on the definition of a certain amount of rights and obligations. This can cause a number of difficulties, if, for example, legal in the XI century territorial status ceased to be so in the XIX century. The general rule governing such cases is the following: they must be considered in accordance with the conditions and norms which existed at the time of the acquisition of the disputed territories. Thus, according to the results of the Arbitration Court's consideration

[55] CHERKES, M. Yu. *Mizhnarodne pravo: pidruchnyk*. 5-te vyd. Kyiv: Znannya, 2006, p. 172.

[56] See: CASSESE, A. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge, New York: Cambridge University Press, 1995. 365 p.

[57] See: TYMCHENKO, L. D. *Mezhdunarodnoe pravo: uchebnik*. Kharkov: Konsum; Un-t vnutr. del, 1999, p. 298–299.

of the case of Palmas (1928), it can be concluded that the territorial claims that have passed to Spain from the United States on the basis of continuity are subject to assessment, taking into account the principles of international law in effect at the time of the discovery of this island. The case also reveals that although the emergence of certain rights is based on the norms of international law of the relevant period, their continued existence depends on the evolution of law. In practice, this condition operates in the context of the relevant rules governing the acquisition of territory, covering recognition and acquiescence. As B.M. Klimenko notes, tacit acknowledgment usually means the absence of a corresponding protest in cases where there are grounds for this. For example, the absence of a protest regarding the spread of the legislation of the other party to the disputed territory can be regarded as recognition of the effect of this legislation in the given territory with the corresponding consequences,[58] i.e., in fact, the waiver of its right to it. G. Dahm disagrees with this approach, arguing that the act of refusal should be clearly expressed and can not be presumpted ... the fact that the state does not resort to the right it has, does not mean giving it up.[59] I.C. McGibbon argues that not always the absence of protest means a tacit recognition, for example, in the case when the parties agreed to leave the question open.[60]

Real, continuous and peaceful implementation of the state's activity in a certain territory is a reliable and natural criterion for determining the existence of its sovereignty over it. However, despite its effectiveness, the implementation of such control may not be equivalent to the possession of a certain territory. The necessary actions for the acquisition of sovereignty in each specific case depend on such conditions as the type of territory, the seriousness of the arguments of the opposing party, as well as the specific features of international relations. There are a number of categories corresponding to situations caused by the need to determine historical and geographical territorial rights. Some of them, being exclusively political or moral principles, may not have purely legal significance. Others in the long term entail certain legal consequences. For example, the legitimacy and necessity of applying the principle of territorial integrity of states, along with the rules prohibiting interference in the internal jurisdiction of states, is not being questioned by anyone today. Thus, Art. 2(4) of the UN Charter prohibits the use of force or the threat of use of force against the territorial integrity

[58] KLIMENKO, B. M. *Mirnoe reshenie mezhdunarodnyh sporov*. Moskva: Mezdunarodnye otnosheniya, 1982, p. 158.

[59] DAHM, G. (et al.) *Völkerrecht Band I/3*. Berlin: De Gruyter Recht, 2002, s. 771.

[60] MACGIBBON, I. C. *The Scope of Acquiescence in International Law*. British Year Book of International Law, 1954, vol. 31, p. 143.

and political independence of states.[61] With the assertion in international law of the principle of self-determination of peoples, all the largest and most significant territorial changes occur or should occur on its basis. In this sense, according to Yu.G. Barsegov, self-determination should be considered the main principle of territorial division.[62] At the present, humanity faces many unresolved problems. One of these problems is various kinds of territorial disputes, which often result in violent armed conflicts.[63] The roots of some territorial disputes go back to the distant past, in the historical period of the division of the world, when territories were acquired for various reasons: primary discovery, occupation, acquisitive prescription, conquests.

Roman private law under the occupation understood the appropriation and possession of things with the intention of retaining them. It justified the right of ownership of the invader and extended it to all ownerless things according to the principle expressed in the laws of the XII tables – *res nullius cedit primo occupanti* – an abandoned thing follows the first seized.[64]

It was later considered that the discovery of a land, the installation of a flag or other emblem of the state whose representative had made the discovery, as well as the announcement of the entry of that state into possession, were sufficient to enable this land to be recognized as the territory of the state that claimed it. The lack of a developed communication system led to the fact that one and the same land was discovered and joined several times by different states. Subsequently, the annexation of the "no-man's" territory required the establishment of administrative power and actual control over this territory. As a rule, the administration was small, and attempts at actual control were very vague. Such uncertainty created the basis for territorial disputes.

Under the acquisition of prescription was understood the acquisition of sovereignty over the territory by the actual and unbreakable possession of this territory for a long time. This doctrine contained a lot of contradictions. The actual and unbreakable possession was differently understood. Certain terms of such ownership also did not exist. A distinctive feature of acquisitive prescription was that it represented the entry into possession of a territory previously considered

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61 See: BUROMENSKIY, M. V. (ed.). *Mizhnarodne pravo v dokumentah*. Kharkiv: Vyd-vo Nats. un-tu vnutr. sprav, 2003, p. 174.

62 BARSEGOV, Yu. G. *Territoriya v mezhdunarodnom prave. Yuridicheskaya priroda territorialnogo verhovenstva i pravovye osnovaniya rasporiazheniya territoriey*. Moskva: Gosyurizdat, 1958, p. 101.

63 MAVADU, K. *Razreshenie mezhdunarodnyh sporov v sovremennom mezhdunarodnom prave: na primere territorialnogo spora mezhdu Respublikoy Mali i Respublikoy Burkina-Faso*: avtoref. … dis. kand. yurid. nauk. Moskva, 2010, p. 3.

64 PERETERSKIY, I. S. *Rimskoe chastnoe pravo: uchebnik*. Moskva: Zertsalo-M, 2012, p. 209.

to belong to another state or which had an obscure identity. All this also created conditions for the emergence of territorial disputes.

Since ancient times it has been recognized that a land territory that does not belong to any state (*terra nullius*) with adjacent coastal waters can be acquired by a sustained, prolonged occupation that satisfies the following requirements: the invader must be a sovereign state, the territory must initially be a no man's land or once again become a no man's land, the occupier must confirm there the actual dominance (the principle of effectiveness) and exercise this dominance constantly, i.e. with the intention of sustainably governing the territory. Upon the completion of the occupation, the occupier acquires territorial sovereignty over the occupied territory. This sovereignty is preserved even if the territory is temporarily abandoned (with the exception of the dereliction).[65] Today, this method of acquiring territory has lost its former significance, but some norms continue to play a role in resolving disputes over previous acquisitions, as well as for judgments about the right over parts of the seabed and subsoil outside of territorial waters and polar territories.

Different rules have already been worked out on the question of the occupation: it is indisputable that the amount of the necessary exercise of domination depends on the population density and on other circumstances (for example, as it was stated in the arbitration of Max Huber in the case of Palmas on April 4, 1928, the occupying state can exercise its domination indirectly – through the native representative).[66] But always effective exercise of domination is necessary on the occupied territory, as well as "the intention and desire to act as a sovereign ... and all manifestations or the exercise of this authority" – as emphasized by the Permanent Court of International Justice in the judgment of Eastern Greenland case of 5 April 1933.[67]

Only on uninhabited islands is enough symbolic claim to possession, for example, raising the flag. As the King of Spain pointed out in the arbitral award of 9 February 1931 on the dispute between France and Mexico about the island of Clipperton: On November 17, 1858, the island of Clipperton was annexed by France, and then on December 13, 1897, was captured by Mexico, which declared it to be its property on the fact that it was near its territorial waters and was actively used by Mexican fishermen and seamen. Also, Mexico positioned itself as the legal successor of Spain in the region. Mexico sent a military garrison to the island, installed a lighthouse and organized phosphate mining with Britain, after which a territorial conflict broke out between France and Mexico. In 1930, France appealed to the Permanent Court of International Justice in the Hague

[65] The abandonment of the territory without the intention to return; renunciation of sovereignty over the territory.

[66] See: VERDROSS, A. *Mezhdunarodnoe pravo*. Moskva: Izd. inostr. lit., 1959, p. 256.

[67] Ibid.

with a demand to return officially the island. In 1931 the World Court ordered to resolve the conflict to the King of Italy Victor Emmanuel III, who on January 28, 1931, decided it in the interests of France.[68]

But in no case, the mere discovery accompanied by the declaration of annexation of any territory (without subsequent occupation) does not entail the acquisition of territorial sovereignty. The state-discoverer has only the pre-emptive right to occupation, which must be carried out within a reasonable time. From the theory of occupation follows the theory of adjacent territories, asserting that the occupier simultaneously acquires those territories (and islands), which consist in a natural relationship with the occupied one. This theory was rejected by the arbitration award in the case of Palmas in the matter of islands outside territorial waters, as an unreasonable claim.[69]

In a decision on the land and maritime border between Cameroon and Nigeria (Cameroon *v.* Nigeria) of 10 October 2002, the ICJ, referring to its case-law, indicated that it had repeatedly made decisions regarding the legal relationship between the *"*effectivitйs*"* and legal title.[70] Referring to the decision on the border dispute (Burkina Faso *v.* Republic of Mali), the Court noted:

> *"If the action is not in accordance with the law, when the territory in question is in fact not governed by the state that possesses the title, it should be preferred to the owner of the legal title.*
>
> *Thus, each of the mentioned methods of acquiring territory in the past concealed the grounds of territorial disputes. In addition, it often happened that the same territory was acquired by different states for different reasons. One state believed, for example, that it acquired this territory on the basis of occupation, and another believed that it acquired this territory on the basis of acquisitive prescription".*[71]

The theory of historical fixing of title is very controversial and can not replace the ways of acquiring the title established in international law, which take into account many important factual and legal aspects. This conclusion should be understood in such a way that the seizure of territory, even legally contrary to international law, in effect at the time the dispute was resolved, had to meet the requirements imposed on such actions by the relevant epoch. Therefore, when resolving territorial disputes, it becomes necessary to give a legal assessment of the facts that took place in the distant past. From the most ancient origins of the

[68] Ibid.

[69] See: VERDROSS, A. Op. cit., p. 257.

[70] See: CARON, D. D. (ed.). International Decisions [online]. Available at: http://www.iilj.org/wp-content/uploads/2016/08/Case-Note-on-Land-and-Maritime-Boundary-Between-Cameroon-and-Nigeria-ICJ-2002.pdf

[71] See: KLIMENKO, B. M. Op. cit., p. 28.

dispute, which are taken into account, until the resolution of the dispute on the merits are often centuries pass. In connection with the need to assess the past, a reference should be made to the provisions of the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 1970 which prohibits a change in the ownership of territory by the threat or use of force, but at the same time stipulates that this should not be interpreted as depriving the validity of agreements concluded before the adoption of the UN Charter.[72]

Old international law did not prohibit either aggressive wars or the forcible seizure of territories. The concept of understanding war including aggressive one was developed, because there was a struggle between nations, hence all wars must be considered legitimate.[73] However, it was believed that in itself the fact of armed seizure and military occupation of a foreign territory does not mean its legal accession. For the latter, a declaration of the winner of the annexation of the conquered territory was required. In the absence of such an act, the territory remained part of the defeated state. However, these rules were not always strictly observed, and numerous wars for division and redistribution of territories often led to a complicated and confusing situation.

Like the primary occupation, the acquisition of territory on the basis of long-standing possession as a prerequisite also has a long and effective occupation of the territory. But this type of acquisition differs from the primary occupation in the following: it refers to a territory that was at the time of occupation still the territory of another state, or if there was a dispute between two states regarding the title for this territory.

Such occupations do not justify the immediate acquisition of the territory, since the fact of effective domination can be the basis for the emergence of the relevant rights only if and only to the extent that international law links these legal consequences to it. Possession of a foreign or disputed territory without a corresponding treaty is legal and law-forming in the case that there is an unbreakable, uninterrupted and uncontested exercise of domination, as it was noted in the Mexican arbitration award in the El Chamizal case on June 15, 1911.[74] Under this circumstance, the British Declaration on the annexation of the Boer Republic and the Italian Declaration on the annexation of Tripolitania and Abyssinia published by annexing states before the end of hostilities were recognized

[72] Deklaratsiya o printsipah mezhdunarodnogo prava, ksayushchihsya druzhestvennyh otnosheniy i sotrudnichestva mezhdu gosudarstvami v sootvetstvii s Ustavom OON 1970 g [online]. Available at: http://www.un.org/ru/documents/decl_conv/declarations/intlaw_principles.shtml

[73] GOROHOVSKAYA, E. V. Agressiya kak mezhdunarodnoe prestuplenie: genezis razvitiya poniatiya, *Almanah mezhdunarodnogo prava*. 2009, vol. 1, p. 45.

[74] See: VERDROSS, A. Op. cit., p. 258.

as void in the context of international law. The same principle was established by the sentence of the International Military Tribunal in Nuremberg on October 1, 1946. In particular, before the Tribunal it was stated that the annexation of Austria was justified by a strong desire for an alliance between Austria and Germany that was expressed in many quarters. It was also alleged that these peoples had many similarities that made such a union desirable, and that as a result, the goal was achieved without bloodshed. The Tribunal came to the conclusion that these statements, even if they are correct, are in fact not significant because the facts definitely prove that the methods used to achieve this goal were aggressive. The decisive factor was the military power of Germany, which was ready to take effect if it met any resistance. Moreover, none of these considerations, as Gossbach's report on the meeting of November 5, 1937, shows, was the motive for Hitler's actions. On the contrary, this document emphasizes, first and foremost, the advantage that Germany acquires militarily as a result of the annexation of Austria.[75] So, after the occupation of Austria by the German army on March 12 and the annexation of Austria on March 13, Jodl wrote in his diary: "After Austria's annexation, Hitler declares that there is no need to rush to resolve the Czech question, since Austria must first be digested. However, preparations for the "Green Plan" (i.e. the plan against Czechoslovakia) must be carried out vigorously; they must be re-prepared taking into account the changed strategic positions resulting from the annexation of Austria".[76]

5. Conclusion

There have been significant political and socio-economic transformations throughout the world at the end of XX century. Undoubtedly, one of the most significant events of this period was the disintegration of the USSR, as a result of which the balance of forces in the international arena underwent serious changes. The challenge by several states of the principles of inviolability of borders and territorial integrity, which for a long time are the basis of stability in Europe and throughout the world, adds a particularly dangerous character to this process. At the beginning of the 21st century the need to rethink some concepts, that previously seemed unshakable, stands before the science of international law with all sharpness, which requires avoidance of stereotypes, freedom from ideological

[75] Nyurnbergskiy protsess. Sbornik materialov. V 2-h t. T. 2: Prigovor mezhdunarodnogo voennogo tribunal. Moskva: Yurid. lit., 1954, p. 966.

[76] Ibid., p. 967.

cliches and independent research of theoretical and practical problems of international law, especially territorial issues.[77]

As we can see, the situation with the annexation of Crimea by the Russian Federation is similar to that condemned by the Nuremberg Tribunal. And exactly this conclusion must follow regarding the legitimacy of such annexation. In this issue there is no territorial dispute, but there is a one-sided unreasonable claim.[78] The difference between territorial disputes and unilateral claims is also made by the American scientist A. Burghardt, while noting that the latter do not have sufficient legal grounds.[79] With such a conclusion everybody should agree on the basis of the norms of modern international law.

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[77] See: SALIMOV, R. F. Op. cit., p. 4–5.

[78] See: MALKSOO, L. *Russian Approaches to International Law*. Oxford: Oxford University Press, 2015, p. 180–183.

[79] BURRGHARDT, A. F. The Bases of Territorial Claims. *Geographical Review*. 1973, No. 2, p. 228.

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The Legal Framework of Whistleblowers' Protection in Ukraine and in the Czech Republic

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Summary: The Directive (EU) no. 2019/1937 of the European Parliament and of the Council of October 23rd 2019 on the Protection of Persons Who Report Breaches of Union Law (further 'the Directive') was published on November 26th 2019 and went into effect in December of 2019. Considering its importance, the presented article deals with the issue of legal regulation of whistleblowers' protection in both Ukraine and the Czech Republic. The existing Ukrainian legislation is not lacking certain deficiencies. First of all, there is the need to introduce a broad definition of the term "whistleblower" so that whistleblowers of violations of human rights, environmental standards, food safety and household items, public interests, etc. were also subject to protection. As for the Czech Republic, from an analysis of the Act on the Protection of Whistleblowers, it is clear that this Act is obviously a failed result of the Directive's transposition.

Keywords: the Directive, a whistleblower, a reporting person, a competent person, Law of Ukraine "On the Prevention of Corruption", Law "On Amendments to the Law of Ukraine "On the Prevention of Corruption", Act no. 171/2023 Coll., on the Protection of Whistleblowers.

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1. Introduction

As mentioned above, the Directive[1] was published and went into effect in 2019. Considering its importance, the membership of the Czech Republic in the European Union and Ukraine's aspirations for this membership, the presented article, created as the output of the project no. 23-PKVV-UM-6 called CODE (COoperation and DEvelopment) supported within the grant program of the Ministry of Foreign Affairs of the Czech Republic, deals particularly with the issue of legal regulation of whistleblowers' protection in both Ukraine and the Czech Republic. Before doing so, however, it is necessary to present the essential facts concerning the Directive and the essential reasons for its adoption.

The reasons for adopting the Directive, arising from its Explanatory memorandum, were as follows. For many years, the Eurobarometer survey data suggested that more than 60 % of people in the EU and companies based in the EU considered corruption to be widespread in their countries.[2] [3] The State of the Union Addresses also put the fight against corruption high on the European's Commission's agenda highlighting the need to tackle it both at the EU and at the national level. The European Parliament[4] also repeatedly called for more

[1] For more details on the Directive, see for instance TEICHMANN, F. M. J., WITTMANN, C. Whistleblowing: procedural and dogmatic problems in the implementation of directive (EU) 2019/1937. *Journal of Financial Crime*, 30(5), 2022, pp. 553–566; GERDEMANN, S., COLNERIC, N. The EU Whistleblower Directive and its Transposition: Part 1. *European Labour Law Journal*, 12(2), 2020, pp. 193–210; MENDIETA, M., V. An analysis of Directive (EU) 2019/1937 from public<c ethics and the challenges of implementation. Revista *Espanola de la Transparencia*, (12), 2021, pp. 15–24; VAN WAEYENBERGE, A., DAVIES, Z. The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System. *European Journal of Risk Regulation*, 12(1), 2021, pp. 236–244; MASIERO, A. F. The regulation of whistleblowing in the light of directive 2019/1937/EU between corruption prevention and whistleblower protection. *Archivio Penale*, 72(2), 2020 [online]. Available at: https://archiviopenale.it/la-disciplina-delwhistleblowing-alla-luce-della-direttiva-2019-1937-ue-traprevenzione-dei-fenomeni-corruttivi-e-tutela-deldenunciante/articoli/24906; LEWIS, D. The EU Directive on the Protection of Whistleblowers: A Missed Opportunity to Establish International Best Practices? *E-Journal of International and Comparative Labour Studies*, 9(1), 2020, pp. 1–25.

[2] The European Commission. *Citizens and businesses have spoken – corruption remains a serious problem in EU countries* [online]. Available at: https://home-affairs.ec.europa.eu/news/citizens-and-businesses-have-spoken-corruption-remains-serious-problem-eu-countries-2022-07-13_en

[3] For more details on the Eurobarometer, see for instance NISSEN, S. The Eurobarometer and the process of European integration. Methodological foundations and weaknesses of the largest European survey. *Quality & Quantity*, 48(2), Dordrecht: Springer Science + Business Media, 2014.

[4] See for instance the European Parliament. *Resolution of October 25th 2016, Fight against corruption and follow-up of the CRIM resolution* https://www.europarl.europa.eu/doceo/document/TA-8-2016-0403_EN.html

EU action to combat corruption.[5] The Council made similar calls, in particular in the context of cooperation to fight organized and serious international crime.[6] Thus, the EU legal framework on combating corruption existing before the adoption of the Directive needed to be updated to take into account the evolution of corruption threats and the legal obligations on the Union and Member States under international law, as well as the evolution of national criminal legal frameworks. It has to be also mentioned that the EU is a party to the United Nations Convention against Corruption[7] (further 'the UNCAC'), which is the most comprehensive international legal instrument in this field, combining a wide range of measures to prevent and fight corruption. For the above reasons, therefore the Directive was supposed to update the EU legislative framework, including by incorporating international standards binding on the EU, such as those in the UNCAC. The aim was to ensure that all forms of corruption would be criminalized in all Member States, and that offences would incur effective, proportionate and dissuasive penalties. In addition, the Directive includes relevant measures to prevent corruption in accordance with international standards and facilitate cross-border cooperation, as required by the UNCAC.[8] [9]

The legal bases for the Directive are Art. 83(1), 83(2) and 82(1)(d) of the Treaty on the Functioning of the European Union (further 'the TFEU'). Art. 83(1) of the TFEU identifies corruption as one of the crimes with a particular cross-border dimension. It enables the European Parliament and the Council to establish the necessary minimum rules on the definition of corruption by means of directives adopted in accordance with the ordinary legislative procedure. There is no single definition of corruption as corruption exists in different forms involving different participants. Indeed, corruption is an endemic phenomenon that

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5 For more details on the State of the Union Addresses, see for instance MOLNÁR, A., JAKUSNÉ HARNOS, E. The Postmodernity of the European Union: A Discourse Analysis of State of the Union Addresses. *The International Spectator*, 58, 2023, pp. 58–74.

6 The General Secretariat of the Council. *Council conclusions of March 9th 2023 setting the EU's priorities for the fight against serious and organized crime for EMPACT 2022–2025* [online]. Available at: https://data.consilium.europa.eu/doc/document/ST-7101-2023-INIT/en/pdf

7 The United Nations. *United Nations 2003, United Nations Convention Against Corruption, Treaty Series 2349 (October): 41* [online]. Available at: https://www.unodc.org/unodc/en/corruption/uncac.html

8 *Explanatory memorandum to the Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23rd 2019 on the Protection of Persons Who Report Breaches of Union Law* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52023PC0234

9 For more details on the United Nations Convention against Corruption, see for instance LARSON, E. N. The United Nations Convention against Corruption. In: ACHATHALER, L., HOFMANN, D., PÁZMÁNDY, M. (eds.). *Korruptionsbekämpfung als globale Herausforderung.* Wiesbaden: VS Verlag für Sozialwissenschaften, 2011, pp. 11–18.

takes multiple shapes and forms across all facets of society, for example bribery, embezzlement, trading in influence, trading of information, abuse of functions and illicit enrichment. During the negotiations of UNCAC, United Nations States Parties carefully considered whether to develop a legal definition of corruption. It was concluded that any attempt at a comprehensive definition would inevitably fail to address some forms of corruption. As a consequence, the international community reached consensus on certain manifestations of corruption while leaving each State free to go beyond the minimum standards set forth in UNCAC.[10] [11] Art. 83(2) of the TFEU is the legal basis on which Directive (EU) no. 2017/1371, which is amended by the Directive, was adopted. It sets out the EU's competence to establish minimum rules with regard to the definition of criminal offences and sanctions in EU policy areas which have been subject to harmonization measures, if this is essential to ensure the effective implementation of such policy areas. And Art. 82(1)(d) of the TFEU provides the legal basis for measures to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions, such as the adoption of common rules concerning jurisdiction in criminal matters.[12]

The Directive is based on the principle of proportionality, as set out in Art. 5(4) of the Treaty on European Union (further 'the TEU'), which means that the Directive is limited to what is necessary and proportionate to efficiently prevent and combat corruption and to implement international obligations and standards, in particular as regards the criminalization of corruption, in line with the UNCAC. The Directive defines the scope of the corruption offences with a view to covering all relevant conduct while limiting it to what is necessary and proportionate. The Directive is supposed to strengthen existing international obligations where necessary, in order to improve cross-border cooperation and to prevent criminals from exploiting the differences between national legislations to their advantage. Furthermore, it is necessary to add that, in accordance with Art. 83 and 82(1) of the TFEU, the establishment of minimum rules concerning the definition of criminal offences and sanctions in the area of serious crime with a cross-border dimension, including corruption can only be achieved by means

[10] MEENAKSHI, F., JANČOVÁ, L. *Cost of Non-Europe Report Stepping up the EU's efforts to tackle corruption*. Brussels: European Parliamentary Research Service, 2023, p. 15.

[11] The United Nations Office on Drugs and Crime (UNODC). *Safeguarding against Corruption in Major Public Events Facilitator's Guide*. New York: UNODC, p. 30 [online]. Available at: https://www.unodc.org/documents/corruption/Publications/Major_Public_Events_Training_Materials/Facilitators_Guide_Safeguarding_against_Corruption_in_MPE.pdf

[12] *Explanatory memorandum to the Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23rd 2019 on the Protection of Persons Who Report Breaches of Union Law* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52023PC0234

of a Directive of the European Parliament and the Council adopted in accordance with the ordinary legislative procedure.[13]

In accordance with the principle of proportionality, the Directive also introduces minimum rules on the level of sanctions, having regard to the nature of the offence. Moreover, administrative sanctions imposed are to be taken into account when sentencing the person for a criminal offence set out in the Directive. The Directive also highlights that, to ensure the effective and transparent investigation and prosecution of corruption offences, Member States should establish procedures for the suspension or temporary reassignment of a public official accused of an offence as referred to in the Directive. In such cases they should bear in mind the principle of the presumption of innocence and the need to respect right to an effective remedy. The use of investigative tools, which the Directive seeks to ensure, has to respect fundamental rights, such as the right to an effective remedy and to a fair trial and the presumption of innocence and the right of defense. The use of such tools, in accordance with national law, should be targeted and take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data. Moreover, when applying the Directive, Member States must respect their obligations under Union law with regard to procedural rights of suspects or accused persons in criminal proceedings.[14]

The implementation of the Directive is monitored by the Commission on the basis of the information provided by the Member States on the measures taken to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive. The Commission shall, two years after the deadline for implementation of the Directive, i.e. two years after December 17th 2021, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures to comply with the Directive. Four years following the deadline for implementation of the Directive, the Commission shall submit a report to the European Parliament and to the Council, assessing the added value of the Directive with regard to combating corruption, including the impact on fundamental rights and freedoms. On the basis of this evaluation, the Commission shall, if necessary, decide on appropriate follow-up actions.[15]

[13] Ibid.
[14] Ibid.
[15] Ibid.

2. The basics of legal regulation in Ukraine

Currently the only provisions on whistleblowing existing in Ukrainian law can be found in the anticorruption legislation. Unfortunately, the legislative provisions in Ukraine do not provide for the protection of whistleblowers of other crimes: e.g. flagrant violations of human rights, ecological standards, safety of food and household items, public interests, etc. The issue of the legal framework of whistleblowing has not been actively researched in Ukraine. In their article, Tatarenko, H. V., Mezeria, O. A. and Tatarenko, I. V. rightly point out that the majority of the research was conducted before the latest amendments to Ukrainian law regarding corruption whistleblowers were introduced, which significantly expanded and changed the regulation of whistleblower activities. As a result of these changes, whistleblower rights have been protected, rewards for whistleblowers have been established, possible channels for reporting corruption have been regulated, the procedure for examining these reports, including those submitted anonymously, has been altered, and other changes have been made as well. Consequently, these aspects require new legal analysis and research. According to Zagyney, Z. whistleblowing provisions in Ukrainian corruption legislation were introduced to comply with Universal and European standards. The academic research which covers the legislation in force was developed by the group of experts of the Anti-Corruption Research and Education Centre (ACREC). Their Scientific and practical commentary on the legislation of Ukraine on the protection of whistleblowers is based on the explanations provided by the National Agency for the Prevention of Corruption (NAPC).[16] [17] [18]

The need for legislative regulation of the institute for the protection of whistleblowers who report corruption was first reflected at the international level in Art. 22 of the Criminal Law[19] and Art. 9 of the Civil Convention of the Council of Europe on Corruption[20]. Art. 33 of the United Nations Convention Against Corruption provides that each participating state shall examine the possibility

[16] TATARENKO, H. V., MEZERIA, O. A., TATARENKO, I. V. Reform of the Institute of the Whistleblowers of Corruption in Ukraine: Long-Term Changes or Simulation of Progress. *Current Problems of Law: theory and practice*. 2020, vol. 1 (39), pp. 127–142 (in Ukrainian).

[17] ZAGYNEy, Z. Whistleblowers Corruption: Quid Prodest. *Scientific journal of the National Academy of the Prosecutor's Office of Ukraine*. 2016, vol. 2, pp. 125–136 (in Ukrainian).

[18] *Scientific and practical commentary on the legislation of Ukraine on the protection of whistleblowers*. NESTERENKO, O. ed. – Kyiv: TOV Red ZET, 2021. 140 p. [online]. Available at: https://acrec.org.ua/wp-content/uploads/2021/11/comments.pdf (in Ukrainian).

[19] *Criminal Law Convention on Corruption* (ETC No. 173) adopted 27.01.1999 [online]. Available at: https://rm.coe.int/168007f3f5

[20] *Civil Law Convention on Corruption* (ETC No. 174) adopted 04.11.1999 [online]. Available at: https://rm.coe.int/168007f3f6

of incorporating in its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention[21]. The Criminal and Civil Conventions of the Council of Europe on Corruption, as well as the United Nations Convention against Corruption, have been ratified by Ukraine and are part of the national legislation of Ukraine. And in 2019 the European Parliament and the Council of the European Union adopted the Directive[22]. The Directive is not part of the national legislation of Ukraine, however, due to its aspirations of candidacy for membership in the European Union, Ukraine must be guided by the provisions of this EU act.

3. The state of legal regulation in Ukraine

Provisions covering whistleblowing are incorporated into the Law of Ukraine "On the Prevention of Corruption"[23] (further 'the Law') adopted in 2014 (the amendments regarding whistleblowing were incorporated by the special Law "On Amendments to the Law of Ukraine "On the Prevention of Corruption"[24] in 2019 and 2021[25]). According to these amendments special Chapter VIII "Protection of Whistleblowers" was added to the text of the Law (Art. 53-53[9]). According to Art. 1(1)(20) of the Law whistleblower is a natural person who, believing that the information is reliable, reported possible facts of corruption or corruption-related offenses, other violations of the abovementioned Law, committed by another person, if such information had become known to him/her in connection with his/her work, professional, economic, social, scientific activity, the completion of service or training, or his/her participation in procedures provided for by the legislation

[21] The United Nations. *United Nations 2003, United Nations Convention Against Corruption, Treaty Series 2349 (October): 41* [online]. Available at: https://www.unodc.org/unodc/en/corruption/uncac.html

[22] *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937

[23] Law of Ukraine "*On the Prevention of Corruption*" dated 14. 10. 2014 [online]. Available at: https://zakon.rada.gov.ua/laws/show/1700-18#Text (in Ukrainian).

[24] Law of Ukraine "*On Amendments to the Law of Ukraine "On the Prevention of Corruption" regarding Corruption Whistleblowers*" dated 17. 10. 2019 [online]. Available at: https://zakon.rada.gov.ua/laws/show/198-20#Text (in Ukrainian).

[25] Law of Ukraine "*On Amendments to the Law of Ukraine "On the Prevention of Corruption" regarding* regulation of some issues of whistleblower protection" dated 01.06.2021 [online]. Available at: https://zakon.rada.gov.ua/laws/show/1502-20#Text (in Ukrainian).

which are mandatory for starting such activity, completion of service or training. Due to the Art. 3(1)(16[2]) of the Criminal Procedure Code of Ukraine, a whistleblower shall mean an individual who, in the presence of the belief that the information is reliable, has filed a report or notification of a corruption criminal offence to the pre-trial investigation body[26]. Finally, Art. 272(3) of the Code of Ukraine on Administrative Offences indicates that a whistleblower is a witness in cases of administrative offenses related to corruption. The whistleblower has the right to keep information about him/her confidential while giving explanations on the case. Tatarenko, H. V., Mezeria, O. A. and Tatarenko, I. V. note that it is rather difficult to find a logical and noble reason why the legislator introduced such a difference in the procedural status of whistleblowers in cases of criminal offenses of corruption and administrative offenses related to corruption[27].

In accordance with the requirements of Art. 1(1)(20) and Art. 53[2](2)(2) of the Law, a person is examined a whistleblower under the following conditions: the notification must be made by a natural person (citizen of Ukraine, foreigner, stateless person) who is convinced that the information is reliable; and the information provided in the notification must contain factual data confirming the possible commission of a corruption or corruption-related offense by another individual, other violations of the Law which can be verified; and the information reported by the individual became known to him/her in connection with his/her labor, professional, economic, social, scientific activity, his/her service or training or his/her participation in the procedures prescribed by law which are mandatory for starting such activity, service or training. Thus, in the absence of at least one of the above conditions, an individual cannot be examined as a whistleblower.

The provisions of the Chapter VIII "Protection of Whistleblowers" the Law of Ukraine "On the Prevention of Corruption" stipulate that the whistleblower's rights are established from the moment of reporting of information about possible facts of corruption or corruption-related offenses (Art. 53[3]). The whistleblower is entitled to certain number of rights: to be informed about their rights and obligations, stipulated by the Law; to submit evidence to support his/her claim; to receive confirmation of its acceptance and registration from the authorized body to which he/she submitted the notification; to provide explanations, testimony or refuse to give them; to free legal assistance in connection with the protection of whistleblower rights; to confidentiality; to report possible

[26] *Criminal Procedure Code of Ukraine* adopted in 13.04.2012, amended 15.06.2021 [online]. Available at: https://dickinsonlaw.psu.edu/sites/default/files/large-files/Ukraine-Crim-Pro-Law-amndmnts-through-2018.pdf

[27] TATARENKO, H. V., MEZERIA, O. A., TATARENKO, I. V. Reform of the Institute of the Whistleblowers of Corruption in Ukraine: Long-Term Changes or Simulation of Progress. *Current Problems of Law: theory and practice*. 2020, vol. 1 (39), pp. 127–142 (in Ukrainian).

facts of corruption or corruption-related offenses without indicating personal information (anonymously); in the event of a threat to life and health, to ensure the safety of him/herself and close relatives, property and housing or to refuse such measures; to reimbursement of expenses in connection with the protection of the rights of whistleblowers, expenses for a lawyer in connection with the protection of the rights of a person as a whistleblower, costs of court fees; to remuneration in the cases specified by law; to receive psychological support; to exemption from legal liability in cases defined by law; to receive information about the status and results of the review, to inspection and/or investigation based on the fact that he/she reported the information.

As provided by the Law the rights and guarantees of whistleblowers protection extend to individuals who are close to the whistleblower. Pursuant to the Art. 1 (1 (4)) close persons are family members of the individual specified in Art. 3 (1) of the Law, as well as husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brothers and cousins, sisters and cousins, wife's brother and sister (husband), nephew, niece, uncle, aunt, grandfather, grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, son-in-law, daughter-in-law, father-in-law, mother-in-law, father-in-law, mother-in-law, father and mother of the wife (husband) of the son (daughter), adopter or adoptee, guardian or custodian, person who is under the guardianship or guardianship of the specified individual (Art. 1 (1 (4)) of the Law).

Moreover, family members, in accordance Art. 1 (1 (17–18)) of the Law, are: a) a person who is married to the individual specified in the Art. 3 (1) of this Law, and the children of the specified subject until they reach the age of majority (in Ukraine it is in general 18 years) – regardless of cohabitation with the individual; and b) any individuals residing together, connected by common life, who have mutual rights and obligations with the entity specified in the Art. 3 (1) of this Law (except for persons whose mutual rights and obligations are not of a family nature), including persons who live together but are not married.

Regarding protection of the whistleblower in the field of employment the specific provisions of the Art. 53 (4) of the Law are in force. The whistleblower and his/her close relatives cannot be refused employment, they cannot be fired or forced to resign, brought to disciplinary action or subjected to other negative influence measures by the manager or employer (transfer, certification, change of working conditions, refusal to appointment to a higher position, salary reduction, etc.) or the threat of such influence measures in connection with the notification of possible facts of corruption or corruption-related offenses. It is important to underline that negative measures also include formally legitimate decisions and actions of the manager or employer which are selective in nature, in particular,

and are not applied to other employees in similar situations and/or have not been applied to the employee in similar situations before. Whistleblowers suspended from work due to no fault of their own are remunerated for the period of suspension at their average salary.

The whistleblower and his/her close relatives cannot be denied the conclusion or extension of a contract, employment contract (agreement), provision of administrative and other services in connection with the reporting of possible facts of corruption or corruption-related offenses. Neither whistleblowers nor their close relatives may be obstructed in pursuing their professional, economic, public, scientific, or other activities, nor may they be discriminated against in connection with the notification of possible facts of corruption or corruption-related offenses, nor may they be subject to any discriminatory measures. The Law guarantees whistleblowers' and their families' rights to be restored under Art. 534 (1–3).

The whistleblower, his/her relatives, dismissed from work in connection with the notification of potential facts of corruption or corruption-related offenses are immediately reinstated in their previous job (position), and the average salary for the period of forced absenteeism will be paid to them, but not for more than a year. If the application for reinstatement of the whistleblower or his/her close person at work (position) is examined for more than one year through no fault of theirs, they are paid the average salary for the entire period of forced absenteeism.

When a whistleblower is transferred to another permanent lower-paying job (position) after submitting a notification of possible facts of corruption, corruption-related offenses he/she may be immediately reinstated at the previous position. In addition, they receive the difference in earnings, but only for one year at a time. If the reinstatement request takes more than one year, the whistleblower or his/her close person at work receives the average salary for the entire period of forced absenteeism. If there are grounds for reinstatement of an employee who was dismissed due to his or close person's notification of possible facts of corruption or corruption-related offenses, the employee can be compensated for his or her reinstatement in the amount of six months' average earnings or two years' average earnings if renewal is not possible.

Information about the whistleblower, his relatives or other data that can identify the whistleblower, his relatives cannot be disclosed to third parties not involved in reviewing, verifying and/or investigating the facts reported by him, as well as to persons whose actions or inactions relate to the facts reported by him, except in cases established by law. In the event that the law allows for the disclosure of information about the whistleblower or information that can identify the whistleblower without the consent of the whistleblower, the whistleblower must be informed of it by handing him a notification of the adoption of the relevant decision with a receipt no later than 18 working days before the

date of disclosure. When disclosing whistleblower information, the notification must indicate to whom it will be disclosed and the reasons for doing so. In the event that the whistleblower's information is illegally disclosed, the individual responsible will be held accountable. The whistleblower has the right to receive information about the status and results of the review, inspection and/or investigation in connection with the report made by him about possible facts of corruption or corruption-related offenses. Whistleblowers who report corruption crimes are eligible for rewards if the crime or damage to the state exceeds five thousand times the subsistence minimum for able-bodied persons at the time of the crime (in October 2023 this subsistence minimum is UAH 2 589,00 or EUR 67,00).

In the event of a criminal conviction for corruption, the reward is equal to 10 percent of the victim's monetary loss or to the state's damages caused by the crime. At the time of the crime, the reward amount could not exceed three thousand minimum wages. Reward amounts are equally divided among whistleblowers who reveal different information about the same corruption crime, including supplementary information. On October 2nd 2023, first time in history, the High Anti-Corruption Court panel of judges determined to pay the reward to the whistleblower, which will amount to 13 UAH 299 950,00 (approximately EUR 345 000,00). Yevhen Shevchenko, a whistleblower who has been working for the National Anti-Corruption Bureau of Ukraine (NABU) since 2016, reported attempts to bribe anti-corruption bodies heads for 6 million USD. An amount of 5 million USD was to be paid to Nazar Kholodnytskyi, the head of the Specialized Anti-Corruption Prosecutor's Office (SAP). In the investigation, it was discovered that individuals accused in the case were trying to "buy" the ex-minister's release from suspicion in the embezzlement case of the Real Bank stabilization loan. A further 1 million USD was allegedly intended for intermediaries.[28] [29]

The whistleblower bears no legal responsibility for reporting possible facts of corruption or corruption-related offenses, dissemination of the information specified in the report, despite the possible violation of his/her official, civil, labor or other obligations by such a report obligations or obligations. Reporting of possible facts of corruption or corruption-related offences cannot be examined as a violation of the confidentiality conditions stipulated by a civil, labor or other agreement (contract). When whistleblowers report possible corruption or corruption-related offenses, they are not liable for the property or moral damage they suffer, except when they report knowingly false information.

[28] *Corruption whistleblower to get UAH 13.3m reward first time in Ukraine* [online]. Available at: https://en.lb.ua/news/2023/10/02/22858_corruption_whistleblower_get_uah.html

[29] NYRERÖD, T., SPAGNOLO, G. A fresh look at whistleblower rewards. *Journal of Governance and Regulation*, 10(4 Special issue), 2021, pp. 248–260.

There are a number of channels available to whistleblowers who wish to report corruption. In accordance with Art. 53²(1) of the Law, whistleblowers are free to choose internal, regular or external reporting channels. Internal channels of reporting are methods of protected and anonymous reporting of information submitted by the whistleblower to the head or authorized unit (official) of the body or legal entity in which the whistleblower works, serves or studies or on the order of which he performs the work (Art. 1(1)(21) of the Law). External channels of reporting are ways of reporting information by a whistleblower through natural or legal persons, including through mass media, journalists, public associations, trade unions, etc. (Art. 1(1)(22) of the Law). Regular channels of reporting are ways of protected and anonymous reporting of information by the whistleblower to the NAPC, other authorities, whose competence is the examination and decision-making on issues, regarding which relevant information is disclosed. Regular channels must be created by specially authorized entities in the field of anti-corruption, pre-trial investigation bodies, bodies responsible for monitoring compliance with laws in relevant areas, other state bodies, institutions, organizations (Art. 1(1)(23) of Law). According to Art. 53¹(2) of the Law, submission of reports (including anonymous ones) through internal channels about possible facts of corruption or corruption-related offenses, other violations of this Law is carried out through the 24-hour Portal and special telephone lines.

The Unified Whistleblower Reporting Portal (further 'the Portal')[30] is an information and communication system that has a comprehensive information protection system with confirmed compliance in accordance with the Law of Ukraine "On the Protection of Information in Information and Communication Systems"[31] which provides data exchange with the whistleblower via the Internet, collection, storage, use, protection, accounting, search, summarization of whistleblower reports, as well as other information, including about the status of whistleblowers, the status and results of examination of whistleblower reports. A procedure for managing the Portal is established by the Agency that holds and administers it.[32] As of September 6th 2023, the Portal is permanently operational.[33]

[30] Unified Whistleblower Reporting Portal. Available at: https://whistleblowers.nazk.gov.ua/

[31] Law of Ukraine *"On Protection of Information in Information and Communication System"* dated 5. 7. 1994 [online]. Available at: https://zakon.rada.gov.ua/laws/card/80/94-%D0%B2%D1%80 (in Ukrainian).

[32] Order of the National Agency on Prevention of Corruption № 1/23 dated 03.01.2023 *"On Approval of the Procedure for Maintaining the Unified Whistleblower Reporting Portal"* [online]. Available at: https://zakon.rada.gov.ua/laws/show/z0022-23#Text (in Ukrainian).

[33] Order of the National Agency on Prevention of Corruption № 190/23 dated 31.08.2023 «*On the Launching of the Unified Whistleblower Reporting Portal*» [online]. Available at: https://nazk.gov.ua/uk/documents/nakaz-vid-31-08-2023-190-23-pro-pochatok-roboty-yedynogo-portalu-povidomlen-vykryvachiv/ (in Ukrainian).

As part of its operation, the Portal processes personal data, which is provided by the whistleblower, as well as personal data of users who have access to the Portal, and these data are used in order to protect whistleblowers, verify whistleblower notifications, and perform administrative duties. Specified data are processed in accordance with the law and do not require consent from the subjects. Providing whistleblowers with information on the status and results of their whistleblower reports, as well as providing information on the status and results of their whistleblower reports, the single whistleblower reporting portal ensures confidentiality and anonymity for whistleblowers. The Portal is one of the tools for implementing anti-corruption policy, and its creation is part of the State Anti-Corruption Program for 2023 – 2025.[34] The NACP therefore aims to create conditions under which whistleblowers can report corruption-related facts safely.

Access to the Portal is open for individuals who have reported corruption (in terms of making reports and receiving information about the status and results of their review) and authorized users – the Chairman and employees of the Agency in accordance with their competence defined by the Law, managers and authorized persons of the relevant subjects in terms of whistleblower reports, examination of which is assigned to their powers in accordance with the Law, other authorized persons in terms of information on the status of whistleblowers in the event of a whistleblower's appeal for free legal or psychological assistance specified by the Law. As the Portal and dedicated phone line are the only internal messaging channels that organizations need to maintain, the Portal is a cost saver for organizations. At the first stage, within 30 working days, specially authorized entities in the field of anti-corruption (NAPC, NABU, Office of the Prosecutor General, National Police) and the State Bureau of Investigation were supposed to be connected to the Portal. Within 180 days, 92 thousand Ukrainian organizations are expected to be connected to the Portal. The Portal received more than 360 reports of the crime of corruption in its first month of operation.[35]

As outlined in Art. $53^2(3)$ of the Law, whistleblowers who inform an authorized person of possible facts of corruption or corruption-related offenses, whether they notify such information through external or internal channels of notification, must give preliminary examination to such information within 10 working days after entering it into the Unified Portal. If an organization is not yet

[34] Regulation of the Cabinet of Minister of Ukraine № 220 dated 04.03.2023 *"On Approval of the State Anti-Corruption Program for 2023–2025"* [online]. Available at: https://zakon.rada.gov.ua/laws/show/220-2023-%D0%BF#Text (in Ukrainian).

[35] *During the First Month of Operation, the NAPC received 360 Reports from whistleblowers about corruption – Renkas* [online]. Available at: http://www.nrcu.gov.ua/news.html?newsID=102410 (in Ukrainian).

connected to the Portal, it must examine reports received through any reporting channels within the time limits specified in Art. 53^2 of the Law, from the date when the organization receives such notification. If, during the preliminary examination of the notification, it is established that it does not meet the requirements of the Law, its further examination is carried out in accordance with the procedure established for the examination of citizens' appeals, and the person who made the notification is informed about it. Within 40 working days from the moment the National Agency grants the head of the organization access to the Portal, all notifications received by the organization from the time of the Portal's launch until the moment of their actual connection to the Portal must be entered into the Portal. Art. 53^2(2) of the Law specifies the requirements for reports (including anonymous ones) and the procedure for their examination. The report must be reviewed if it contains factual information indicating the possible commission of corruption or corruption-related activities.

In accordance with Art. 131(8)(6) of the Law, one of the primary responsibilities of authorized units (authorized officials) is to investigate complaints of violations of the Law, including at subordinate organizations, institutions, and enterprises, as well as to inform the head of the appropriate body of specially authorized entities in the field of anti-corruption about the facts about the violation of legislation. Consequently, it is the authorized division (authorized person) of the relevant body that is tasked with reviewing reports received through internal channels and evaluating their factual content. Additionally, the individual responsible for the implementation of the anti-corruption program is usually entrusted with the examination of reports in legal entities specified in Art. 62(2) of the Law.

During the preliminary examination of the report, authorized units (authorized official) in accordance with Art. 53^9(2) of the Law have the right to: request documents from other structural divisions of the organization, including those containing information with limited access (except for state secrets), and make copies of them; summon and interview persons whose actions or inactions are related to the facts reported by the whistleblower, including the head, deputy heads of the organization; submit the proposal to the head of the organization to bring guilty persons to disciplinary liability for violation the Law; to implement other powers defined by law, aimed at comprehensive examination of whistleblowers' reports and protection of their rights and freedoms. Preliminary examination of reports reports submitted through external or internal communication channels takes place within ten working days from the date of entering the information into the Portal.

If during the preliminary examination of the notification it is established that it does not meet the requirements of the Law (that is, it does not contain factual data that can be verified), its further examination is carried out in the

order determined for the examination of citizens' appeals, and the person who made the notification is informed about it (Art. 53^2(3)(2) of the Law). In this case, the executor of the report should determine the appropriate structural unit. If, during the preliminary examination of the report, it is established that it does not belong to the competence of the organization to which it was received, its examination is terminated. It is necessary to inform the person who made the notification about this, and to clarify which body or legal entity is competent to review or investigate the facts stated in the notification (Par. 3, Part 3, Art. 532 of the Law). If signs of a corruption offense or an offense related to corruption are revealed during the preliminary examination, the materials are transferred to the corresponding specially authorized entity in the field of anti-corruption or the State Bureau of Investigation (Art. 53^2(3)(7) of the Law).

At the same time, in accordance with Art. 53(6) of the Law, officials and employees of organizations in the event of discovering a corruption or corruption-related offense or receiving a notification of the commission of such an offense by the employees of the relevant organization are obliged to take measures within their powers to stop such an offense and immediately, within 24 hours, to notify in writing about its commission by a specially authorized subject in the field of anti-corruption (taking into account the provisions of Art. 216 of the Criminal Procedure Code of Ukraine and Art. 255 of the Criminal Procedure Code). In this case, "employees of the relevant organization" should be understood as employees of the organization itself, as well as sub-departmental organizations of employees of enterprises, institutions, and organizations. Thus, the notification of the specially authorized entity in the field of anti-corruption can be carried out both upon receipt of a notification and when violations are detected during the preliminary review of such a notification (based on the results of an inspection or investigation of the facts stated in the notification). In case of non-confirmation of the facts stated in the report, the head or employee of the authorized unit (authorized official) responsible for the preliminary examination may prepare expert opinion (information sheet, report or official memo) on behalf of the head of the body that the information stated in the report was not confirmed.

If during the preliminary examination of the report it is established that it does not meet the requirements of the Law (that is, it does not contain factual data that can be verified), its further examination is carried out in the order determined for the examination of citizens' appeals, and the person who made the notification is notified about it (Art. 53^2(3)(2) of the Law). It is up to the executor of the report to determine what structure is appropriate in this case. If, during the preliminary examination of the report, it is established that it does not belong to the competence of the organization to which it was received, its examination is terminated. It is necessary to inform the person who made the notification

about this, and to clarify which body or legal entity is competent to review or investigate the facts stated in the notification (Art. $53^2(3)(3)$ of the Law). If signs of a corruption offense or an offense related to corruption are revealed during the preliminary examination, the materials are transferred to the corresponding specially authorized entity in the field of anti-corruption activities or the State Bureau of Investigation (Art. $53^2(3)(7)$ of the Law).

At the same time, in accordance with Art. 53(6) of the Law, officials and employees of organizations in the event of discovering the corruption or corruption-related offense or receiving a notification of the commission of such an offense by the employees of the relevant organization are obliged to take measures within their powers to stop such an offense and immediately, within 24 hours, to notify in writing about its commission by a specially authorized subject in the field of anti-corruption (taking into account the provisions of Art. 216 of the Criminal Procedure Code of Ukraine and Art. 255 of the Code of Ukraine on Administrative Offences).

Ukrainian judicial system delivered several crucial judgements regarding protection of whistleblowers. In April 2023, the Civil Cassation Court within the Supreme Court of Ukraine delivered its judgment in the case when in 2021 the applicant had appealed against dismissal.[36] In March 2021, the citizen filed a lawsuit in court to declare illegal and to cancel his dismissal, he demanded to be reinstated in his position and be paid the appropriate salary for the period of forced absenteeism. Among other things, he indicated that he had worked as a director on prevention and countering corruption, an adviser to the President of the NNEGC "Energoatom". He stated that dismissal had been implemented without the consent of the NACP. He also repeatedly informed the head of the enterprise that he had been a corruption whistleblower. In addition, disciplinary sanctions were applied only to him, although according to the results of the official investigation, they were proposed to be imposed on other persons as well. The Civil Cassation Court satisfied the cassation appeals of the NAPC and the applicant's representative, annulled the decision of the appeals court and upheld the decision of the court of first instance, making the following legal conclusions.

The Civil Cassation Court ruled that the Law of Ukraine "On Prevention of Corruption" guarantees the independence of the authorized official from influence or interference in his work, which is implemented through the mechanism of obtaining consent from the NAPC for his dismissal, if it occurs at the initiative of the head of the organisation. In this case, the granting of the consent of the

[36] For more details, see for instance the Order of the Civil Cassation Court within the Supreme Court of Ukraine dated 19.04.2023 in the case № 761/8294/21 [online]. Available at: https://verdictum.ligazakon.net/document/110395768?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl01 (in Ukrainian).

NAPC is aimed at preventing the dismissal of the officials due to their reporting on the facts of corruption and corruption-related offenses. Dismissal of an authorized person without obtaining consent or contrary to the reasoned refusal of NAPC to grant consent to the dismissal of such a person is the violation of Art. 64(5)(2) of the Law.

Regarding the status of the whistleblower the Civil Cassation Court held that the whistleblower's rights arise from the moment of reporting information about possible facts of corruption or corruption-related offenses. Therefore, an individual acquires the status of a whistleblower from the moment of reporting information about a violation of the requirements of the law by another person. According to Art. 53^4(1) of the Law, in particular, the whistleblower may not be dismissed from work, may not be subjected to other negative influence measures by the manager or employer in connection with the report. Negative measures also include formally legitimate decisions and actions of a manager or employer of a selective nature which do not apply to other employees in similar situations. At the same time, Art. 53^4 of the said Law, guarantees are applied not only on the fact that a person is a whistleblower but on the condition that there is a connection between negative measures or the threat of their application and the whistleblower's report. The Court stated: "Having established that the applicant acquired the status of a whistleblower from the moment of reporting of a corruption violation, the court of first instance came to the correct conclusion that he was dismissed in violation of the requirements of Art. 53^4(1)(4) of the Law, since the defendant applied to the applicant who has the status of a whistleblower negative measures, which, although they have signs of formal legality, are selective, since they were not applied to other employees in similar situations but were applied exclusively to the plaintiff without consent NAPC". The position of the Civil Cassation Court is the exact example of real enforcement of the whistleblower's rights by the judicial in Ukraine. This case-law is not vast in general but the first attempts to produce common approach for all courts of lower instances.

4. The basics of legal regulation in the Czech Republic

As for legal regulation in the Czech Republic, the Directive has been transposed into Czech law by a brand new Act no. 171/2023 Coll., on the Protection of Whistleblowers (further 'the Act'). This transposition has a significant impact because until August 1st 2023 there was no specific legal instrument in the Czech

legal system to protect whistleblowers. As for the purpose of its adoption, it is clear from its explanatory report that the Act was not only adopted to transpose the Directive but also in response to the Czech Republic's international obligations and recommendations, arising from the Council of Europe Criminal Law Convention on Corruption, the Council of Europe Civil Law Convention on Corruption, the International Covenant on Civil and Political Rights, the United Nations Convention against Corruption and other activities of the Organization for Economic Co-operation and Development and the Council of Europe.[37] The path to adoption of the Act was not entirely easy. The original version of the bill was sent for comments on April 29th 2022. The version for the Czech government's consideration was sent to it on September 26th 2022. Two amendments were then made to the bill at the level of its consideration by the government, on November 16th and 30th 2022.

In the context of the introductory content of this article, it is unfortunately necessary to state that the Directive was transposed into the legal system of the Czech Republic too late and for this late transposition of the Directive, infringement procedure no. 2022/0043 is being held against the Czech Republic. The infringement procedure, under Art, 258 of the Treaty on the Functioning of the European Union, was initiated by the European Commission on January 27th 2022. This infringement procedure may result in the imposition of a financial penalty, and given the nature of the Directive, the European Commission will be able to use the option under Art. 260(3) of the TFEU to request the imposition of a significant financial penalty, as the case has been referred to the Court of Justice of the European Union on February 15th 2023.[38]

5. The state of legal regulation in the Czech Republic

At this place it should be noted that during the law-making process many objections, concerning the transposition of the Directive into the Czech legal order, were raised against the content of the Act draft. These comments were of organizational nature, related to the fundamental legal institutes regulated by the Act and related to the internal reporting system. Due to the fixed extent of this article, its content deals only with the analysis of deficiencies of fundamental legal institutes regulated by the Act. Specifically, the shortcomings and uncertainties

[37] *Explanatory report to the Act no. 171/2023 Coll., on the Protection of Whistleblowers* [online]. Available at: https://www.psp.cz/sqw/text/orig2.sqw?idd=221054 (in Czech).

[38] Ibid.

concerning the system for submitting reports, the definition of the reporting person, the competent person's powers and the possibilities of the competent person's actions in verifying the validity of the report are to be analyzed.

Regarding the system for submitting reports, legal regulation under § 7 of the Act gives a reporting person the option to choose how he or she will submit a report, whether he or she will use the internal reporting system, submit a report to the Ministry of Justice, publish a report or submit a report to the authority responsible for investigation of unlawful conduct. However, the Act does not limit the jurisdiction of the competent person who investigates reports submitted through the internal reporting system. Therefore, a situation may arise where a reporting person, who is an employee of the obligated entity and has come across possible unlawful conduct at another obligated entity in the course of his or her work, uses employer's internal reporting system to address a report. Nevertheless, the Act imposes an obligation on the competent person to investigate this report. However, investigating the report of unlawful conduct committed by another obligated entity opens up the possibility of potential misuse of the situation and the acquisition of information within the business competition, especially when, apart from the obligation of confidentiality, the Act does not regulate the relationship between the competent person and the obligated entity in any other way.[39]

Under § 9(2) of the Act, an obligated entity shall ensure that a reporting person is able to submit a report through the internal reporting system in writing, orally or in person. This applies to the person who does not perform any work or other similar activity for the obligated entity only if the obligated entity has not excluded the receipt of reports from that person. It means restricting access to the internal reporting system to persons who do not perform any work or other similar activities for the obligated entity but who have become aware of the breach of law in the connection with the performance of their work or other similar activities (e.g. work or other similar activities for another employer). In such a case, they may submit a report through their own employer's internal reporting system. The competent person must then investigate the breach of law by the obligated entity which did not authorize this competent person to carry out the actions. However, it should not be relevant for the scope of the internal reporting system for which entity the work or other similar activity is performed, but which entity is suspected of the breach of law. Thus, suspected breaches of

[39] Objections to the draft of the Act on the Protection of Whistleblowers made during law-making process [online]. Available at: https://www.odok.cz/portal/veklep/material/KORNCDXFM97V/ALBSCJMJJA9B and Joint objections of three anti-corruption NGOs to the draft of the Act on the Protection of Whistleblowers and Amendment Act [online]. Available at: https://www.transparency.cz/wp-content/uploads/2020/08/P%C5%99ipom%C3%ADnky-k-z%C3%A1konu-o-ochran%C4%9B-oznamovatel%C5%AF.pdf (in Czech).

law arising within an obligated entity should be dealt by its internal reporting system. Moreover, this restriction is in clear conflict with Art. 2(1) of the Directive, i.e. with its material scope.[40]

As for the definition of the reporting person, it should be noted that § 2 of the Act regulates the definition of the report, but does not regulate the definition of the reporting person. Therefore, it is not clear from the Act whether the whistleblower can only be a person who submits a report under the Act or whether he or she submits it in other ways. This has a major impact on against whom retaliation may not be taken. Because it is not clear who the whistleblower is, it is also not clear who is protected from retaliation. It follows from Art. 4(1)(c) of the Directive that the Act should also apply to so-called non-executive members. However, it is not clear from the text of the Directive how this requirement should be fulfilled and who all can be considered as a so-called non-executive member. It seems to include various advisers, persons in an unofficial position, etc. Nor does the Act explicitly deal with this issue. Further, it should be noted that the Act also grants protection against retaliation to any person who makes a report by way of publication or to a public authority competent under any other law or regulation of the European Union. However, the regime of protection against retaliation does not apply to reports made to superior employees, although it is common practice for employees to be instructed to inform their superiors of suspicious facts. Moreover, it should be also noted that the Act lacks a determination as to when a whistleblower must have reasonable grounds to believe that the information reported is true.[41]

On the other hand, § 2(3)(j) of the Act, for its purposes, states that, work or other similar activity includes the exercise of rights and obligations arising from a contract, the subject matter of which is the provision of supplies, services, construction work or other similar performance. This solution goes far beyond Art. 4(1)(d) of the Directive that applies only to persons working under the supervision and direction of contractors, subcontractors and suppliers. It means that only a person carrying out activities under supervision and instructions can be considered a whistleblower. This includes activities that can be considered as dependent work or activities where the contractor is bound by clear instructions from the obligated entity or its contractors or subcontractors. Thus, the Directive does not require that anyone who supplies goods or services to the obligated entity or its supplier can be considered a whistleblower. It should also be noted that the Act lacks a legal regulation reflecting Art. 4(2) of the Directive, i.e. an employment relationship that has ended in the meantime.[42]

[40] Ibid.
[41] Ibid.
[42] Ibid.

Regarding powers of the competent person, legal regulation under § 11 and § 12 of the Act imposes on the competent person the responsibility to assess the validity of reports submitted through the internal reporting system. However, the Act does not provide any means for them to arrive at a specific objective conclusion. It means that the competent person does not have the right to access necessary documents or to interview specific individuals etc. In practice, the competent person is solely reliant on the description of the situation described by the reporting person. Based on this description, it is generally not possible to reach an objective conclusion regarding the breach of law. Consequently, the competent person has no tools to evaluate the validity of the report, which could paradoxically lead to a violation of § 24(1) and § 25(1) of the Act, i.e. committing the administrative offence of failing to investigate the report. The Act also does not establish any specific rules for determining the competent person. In principle, it is not excluded that employers appoint themselves as competent persons. However, in such cases, if reports concern the activities of the employers or members of the statutory bodies, it would not be appropriate for competent persons to assess these reports. The primary task of the competent person is to assess the validity of the report. Given the fact that the competent person has to make a legal qualification of the situation and determine whether a criminal offence or a violation of a legal regulation, or even a directly applicable EU regulation in a specific area, has occurred, the qualification requirements set out in the Act for the competent person appear insufficient. Finally, it is necessary to mention that the Ministry of Justice is given a period of 3 months to assess the validity of the report. Given the fact that the Act establishes a deadline of 30 days for the competent person to assess the validity of the report, within the internal reporting system (with the possibility of extending it by an additional 30 days, and this extension can be repeated twice), and considering that work principles of competent persons and an authorized employees of the Ministry of Justice are the same, the differential setting of a deadline is definitely disproportionate. The Act, however, does not specify the moment when relevant deadlines begin.[43]

It also follows from the above, that the Act does not accurately transpose 11(3) of the Directive, because its § 12(3) states that the competent person must consider the validity of the report and inform the reporting person in writing of the consideration results within 30 days of report receipt, which is certainly a different legal construction. Moreover the Act does not expressly regulate the institute of transmission of the report in terms of Art. 11(6) and Art. 16(3) of the Directive. A further problem is that the Directive does not explicitly solve the

[43] Ibid.

situations where reporting persons make only informal enquiries which are then evaluated by competent persons as reports. In these cases, reporting persons then have no chance to influence whether or not the competent persons will transmit reports to the competent authorities. Even if the identity of whistleblowers is not mentioned in transmitted reports, their identity may in fact be revealed during the investigation of the matter by competent authorities. It should also be added that, within the meaning of Art. 20(2) of the Directive, financial assistance and support measures are not regulated by the Act.[44]

Under § 12(6) of the Act, the legal regulation stipulates that if the report is not evaluated as justified, the competent person shall promptly inform the whistleblower in writing that, based on the facts presented in the report and the known circumstances, it has not been identified any suspicion of unlawful conduct or it has been found that the report is based on false information. Whistleblowers shall also be informed of their right to submit reports to public authorities. However, the Act does not specify how the obliged person should act when the report contains facts that indicate an administrative offence or a criminal offence, under what circumstances the obliged person is bound to report such facts to the relevant public authority and whether it can disclose the identity of the whistleblower. Answers to these questions can be partially inferred from the methodology issued by the Ministry on December 15th 2021, on the direct applicability of the Directive. However, the Act does not explicitly provide clear guidance on this matter.[45]

As regards the protection of the reporting person, the Act, particularly with regard to the legal regulation under its § 3, does not fully transpose Art. 21(2)(3)(7) of the Directive, which provide for other important means of whistleblower protection. In its current state, without proper transposition of these Directive provisions, the Act substantially increases the risk of a whistleblower being sanctioned for obtaining or disclosing the information necessary to make a report, which limits the whistleblower's protection. On the other hand, it is necessary to say that the Act, with regard to the legal regulation under its § 3, sufficiently transposes Art. 3(3) of the Directive stating that the Directive shall not affect the application of Union or national law relating to any of the following issues: (a) the protection of classified information; (b) the protection of legal and medical professional privilege; (c) the secrecy of judicial deliberations; and (d) rules on criminal procedure. Although, the fact that the Act does not in any way solve the breach of the obligation of confidentiality through the

[44] Ibid.
[45] Ibid.

constituent elements of the administrative offences defined within its framework is very problematic.[46]

6. Conclusions

The existing Ukrainian legislation is not lacking certain deficiencies. First of all, as it was abovementioned there is the need to introduce a broad definition of the term "whistleblower" so that whistleblowers of violations of human rights, environmental standards, food safety and household items, public interests, etc. were also subject to protection. There have been no developments regarding the physical safety of whistleblowers outside of criminal proceedings. In particular, no appropriate changes were adopted that would ensure the protection of such people and their family members and meet international standards. In the future, legislative immunity should also be extended to those persons who assisted the whistleblower in making the report, etc. It will also be necessary to examine the possibility of obtaining the right to medical assistance. It should be noted that the provision of psychological assistance already provided for in the Law remains declarative due to the lack of appropriate procedures. And whistleblowers who report information containing state secrets need a higher level of protection as well. Additionally, whistleblower cases should only be examined by judges who are trained in this area (with the appropriate certification).

As for the Czech Republic, from an analysis of the basic legal institutes regulated by the Act no. 171/2023 Coll., on the Protection of Whistleblowers (further 'the Act'), it is clear that the Act is clearly a failed result of the Directive's transposition. In fact, the Act does not transpose many provisions of the Directive in a sufficient manner and in one case goes beyond the Directive. The Act thus clearly does not provide adequate support for its addressees, who will have to rely directly on the Directive. Despite this strong criticism, it is clear that the shortcomings of the legal regulation of the fundamental institutes of the Act could be eliminated by means of amendments, albeit significant ones. At this point, however, it should be pointed out that the Act fails in one absolutely fundamental aspect. The reason is Art. 11(2)(a) of the Directive binding Member States to ensure that the competent authorities establish independent and autonomous external reporting channels for receiving and handling information on breaches of law. The Directive thus seems to be heading towards the establishment of a new independent authority. But, under § 16 of the Act, the status of the external reporting channel is given to one of the departments of the Ministry of Justice.

[46] Ibid.

And logically, the Ministry of Justice cannot be the real external channel for all its employees and its subordinate organizations. Such a configuration of the legal regulation under the Act, which is in contradiction with the Directive in itself, in fact represents a significant risk of undermining the effective functioning of the Directive in the Czech Republic to a large extent.[47]

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[47] *Joint objections of three anti-corruption NGOs to the draft of the Act on the Protection of Whistleblowers and Amendment Act* [online]. Available at: https://www.transparency.cz/wp-content/uploads/2020/08/P%C5%99ipom%C3%ADnky-k-z%C3%A1konu-o-ochran%C4%9B-oznamovatel%C5%AF.pdf (in Czech).

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Problems of Reimbursement of Expenses for the Defence Lawyer's Representation in the Case of a Judgment of Acquittal

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Summary: In this article, the authors analyse problems of reimbursement of expenses for the defence lawyer's representation in the case of a judgement of acquittal. The identification of problems is based on the analysis of EU law, ECtHR jurisprudence and the legal regulation of some European countries. During the research, it was identified that the establishment of the aforementioned right is not mandatory according to the EU law and is left to the discretion of the Member States. It was also found that realization of this right of the acquitted person often balances on the edge of the conflict between individual's and public interest. Although the right of the acquitted person to reimbursement of the expenses for the defence lawyer's representation is provided in all States analysed in the Article, the application of this right is quite different. In some of the analysed States, the aforementioned right is guaranteed not only to the acquitted person but also to the one in respect of who the criminal proceedings are terminated or he is partially acquitted. Taking into account the identified lack of the legal regulation in Lithuania and adopting good practices of other European countries, proposals are presented in the Article on how the legal regulation of Lithuania could be improved. According to the authors, the realization of these proposals would allow to achieve an optimal balance between the individual and public interests.

Keywords: Criminal procedure, tort liability, human rights, defence expenses, balance of interests

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1. Introduction

In any society there is a natural tension between the individual‘s and the public interests. The term „public interest“ is used in many different contexts to describe and justify a wide variety of policies and activities. While agreement is unlikely on a single definition of public interest, inherent in the concept of public interest activity is the notion of action benefiting a larger group than the individual or group responsible for the activity.[1] There is a conflict between what individuals want and what serves their interests and what is needed for the welfare, safety and security of the entire group. Government needs to moderate that conflict. Depending on the type of view that is operative concerning the nature of the social arrangement and the nature of government, the conflict will be resolved in favour of one or the other sets of interests.[2]

Public services are shaping based on public interest. Executing justice, discipline and security is a service to society through crime prosecution, trail and executing the verdicts by criminal justice system. Like other public services, it looks for providing public interest.[3] So, a legitimate reason for societies to establish criminal justice systems and prosecution services is to serve public interest and the common good.[4] Criminal procedure is a way to execute criminal justice through public interest. Since criminal procedure is set to provide public interest like many other laws, it also supports individual rights. But at the same time it is necessary to emphasize that criminal procedure is one of the most obvious arenas of public interest where individual rights and freedoms clash. On this basis, criminal procedure aims at achieving a balance point between public interest and individual interest.[5]

Both national and EU legal acts guarantee a wide range of procedural rights to a criminally responsible person. Such procedural rights as the right to defence, the right to interpretation and translation, the right to remove officials from offices, to file appeals, etc., are a matter-of-course in the practical criminal procedural activity and have been extensively discussed in the legal doctrine.

1 PERCIVAL, R. V., MILLER, G. P. The Role of Attorney Fee Shifting in Public Interest Litigation. *Law and Contemporary Problems.* 1984, 47.1, pp. 234.

2 PECORINO, P. A. *An Introduction to Philosophy* [online]. Available at: https://www.qcc.cuny.edu/socialsciences/ppecorino/intro_text/Chapter%2010%20Political%20Philosophy/Group_vs_Individual_Interest.htm

3 ES-HAGHI, S. J., SHEIDAEIAN, M. Public interest in criminal procedure and its challenges: an attitude toward Iranian criminal law. *J. Pol. & L.*, 2016, 9, pp. 2.

4 TULU, Diriba Adugna. Withdrawal of Criminal Charges for the Sake of Public Interest in Ethiopia: Exploring Legal Gaps and Way Forward. *Humanities and Social Sciences*. 2021; 9(4), pp. 81.

5 ES-HAGHI, Seyyed Jafar, SHEIDAEIAN, Mahdi. *Supra note* 4, pp. 1.

However, in addition to the above-mentioned rights, there are other procedural rights, which, although widely recognized[6], are not given enough attention in legal doctrine. One of such rights – the right of the acquitted person to claim from the State reimbursement of the expenses for the defence lawyer's representation in criminal procedure. It should be noted that the practical application of this right in different countries is very different. In order to highlight these differences, the authors chose quite different legal systems for comparison – during the research, the acquitted person's right to receive compensation for defence expenses was compared in Lithuania, Poland, Germany, Sweden and United Kingdom. In this comparative analysis, Lithuania was chosen as the reference country, since this right in legal acts of this country was established at the latest, and its practical application and especially the scope of its application still raises a number of problems and issues that are sought to be answered in this research study.

The need for a scientific research of this procedural right of the acquitted person is determined not only by lack of researches but also by the fact that upon realisation thereof the said conflict between individual's and public interest becomes especially distinct. On the one hand, by guaranteeing to a person not only the right to defence but also providing him the possibility to receive from the State reimbursement of the costs for the defence lawyer's representation, the level of protection of human rights becomes significantly higher. On the other hand, too excessive application of such a right may become a disproportionate financial burden for the State, and in some cases, even have a negative influence on the criminal process[7]. The whole society is interested in both – rational use of the State budget funds and efficient criminal procedure, therefore, upon realising the said right, it is inevitably manoeuvred between public interest and individual interest.[8] Such right was established in the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – CCP) only on 1 May 2022. Therefore, in the absence of the formed consistent case-law and developed scientific doctrine to this day, the said issue of balancing interests is particularly relevant in Lithuania.

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[6] For example, compensation for the acquitted accused is available in Norway, Sweden, Denmark, Austria, Germany, the Netherlands, Iceland, Italy and Latvia etc. (MICHELS, J. D. Compensating acquitted defendants for detention before international criminal courts. *Journal of International Criminal Justice.* 2010, 8.2, pp. 413).

[7] For example, J. D. Michels states, that „critics claim that a compensation scheme for acquitted accused may discourage the prosecutor from bringing cases, where he is unsure of conviction. This would place a check on a socially useful activity. This claim speculates that the potential future cost of compensating an accused would deter a prosecutor from bringing a case if he is uncertain of conviction". (See more: MICHELS, Johan David. *Supra note* 7, pp. 419).

[8] See more: ŠALČIUS, Marijus. Baudžiamojo proceso veiksmų (sprendimų) teisėtumo vertinimas baudžiamajame ir civiliniame procesuose [Evaluation of the lawfulness of criminal proceedings (decisions) in criminal and civil proceedings]. *Teisės apžvalga*. 2020, 2(22), pp. 22.

Thus, the purpose of this article is to establish measures enabling to achieve the optimum balance between the interests of a natural person realising his right to receive from the State reimbursement of the costs for the defence counsel and interests of the society as a whole. In order to achieve this purpose, the Lithuanian practice will be analysed through the prism of criteria formed by the European Court of Human Rights (hereinafter – the ECtHR), and will be compared with that of other EU countries. Systematic analysis, synthesis, critique and other scientific research methods will be used in this research.

2. Legal regulation of the right to reimbursement of the defence lawyer's fees in EU law

The right to a defence is a fundamental value in any State governed by the rule of law.[9] This right is a nominated element of the right to the fair trial in criminal proceedings.[10] In other words, the rights of the defence are a concretion of the fair trial principle established in Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the ECHR) and they must be understood as a consequence of the presumption of innocence declared in Art. 6(2), which is in turn also a corollary of the fair trial principle. Consequently the interpretation of the Art. 6(3) rights of the accused must always be in conformity with the general fair trial principle.[11]

The right to defence in criminal proceedings is a comprehensive right that includes its main elements such as: the right to self-defence (defence in person), the right to defence through choosing legal assistance, the right to assigned legal assistance.[12] The analysis of EU legal acts performed during this research[13] allows

[9] GHEORGHIU, Elena et al. Respect for the right of defence in accordance with the case law of the European Court of Human Rights. *Studii Juridice şi Administrative*. 2022, 26.1, pp. 119.

[10] GACSI, Anett Erzsebet et al. Right to the (effective) defence in the (new) Hungarian Code of Criminal Proceedings. *Curentul Juridic*. 2018, 73.2, pp. 57.

[11] RAMOS, Vânia Costa. The Rights of the Defence According to the ECtHR: An Illustration in the Light of ATV Luxembourg and the Right to Legal Assistance. *New Journal of European Criminal Law.* 2016, 7.4, pp. 397.

[12] GUTNYK, Vitalli. The right to defence in criminal proceedings: international law aspects. *Teisė*. 2022, 14, pp. 102.

[13] During the research, the following EU legislation was analyzed: European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950); European Union, Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01; Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1; Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon

stating that all three the above mentioned elements of the right to defence are rather properly regulated in the European legal regulations. Such fundamental issues as the duty of the State institutions to ensure participation of a defence counsel upon performing certain actions of the criminal procedure (e.g. upon resolving issues of arrest or surrender on foot of the European Arrest Warrant), a possibility of a suspect to consult with his defence counsel without outsiders, additional defence guarantees for the minors, the State guaranteed free of charge legal aid when a person cannot afford a defence lawyer, and other, are usually established in the Directives of the European Parliament and the Council the regulations whereof had to be transferred to the national laws, following the terms established by the Member State of the EU. Thus, the performed analysis of the EU legal acts allows to accept the opinion met in the legal doctrine that the international legal norm on the right to defence in criminal proceedings is customary, general and inherent, in the sense that in a democratic society every person has the right to defence in a criminal proceeding.[14]

It is also necessary to note that neither of the analysed legal acts envisages the object of this research, i.e. the right of the acquitted person to get reimbursement of the costs for the defence lawyer from the State. In this regard, it is worth mentioning the Art. 52 (3) of the Charter of Fundamental Rights of the EU (hereinafter – the Charter), named "the first catalogue of human rights at the level of supranational entities"[15], in the legal doctrine, where it is provided that in so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention.[16] Historically, the second sentence of Art. 52(3) CFREU was considered a tool to upgrade the ECHR level of guarantees.[17] States have a relatively wide discretion in the choice of instruments to

deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1; Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

14 GUTNYK, Vitalli. *Supra note* 13, pp. 102–103.

15 ŠIŠKOVÁ, Naděžda et al. New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter). *European Studies-the Review of European Law, Economics and Politics*. 2014, 1.1, pp. 12.

16 European Union, Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01.

17 DAMINOVA, Nasiya et al. The Charter of Fundamental Rights of the European Union as a factor affecting the 'European consensus' notion (the example of 'due process' rights). *European Studies-the Review of European Law, Economics and Politics*. 2017, 4.1, pp. 32.

apply the Charter in their practice.[18] Thus, the EU Member States (including Lithuania), which have consolidated the reimbursement of the costs for the defender's services in their legislation, exercised the said discretion consolidated in the Charter to establish the higher level protection of human rights in the national Criminal Procedure than provided in the EU law. In summary, it can be stated that it is important to the EU law that the right to defence, *per se*, would be guaranteed in the Member States, however specific measures of its realisation are reserved for the regulation of the national legislation.

3. Compensation for legal representation in the case-law of the ECtHR

As mentioned before, the international legal norm on the right to defence in criminal proceedings is customary, general and inherent. On the other hand, filling it with content largely depends on the practice of international judicial bodies, regional and national characteristics.[19]

Really, a great deal of attention is paid in the case-law of the ECtHR to the right of defence, as a fundamental right of anyone who has been charged with criminal offence. Meanwhile, the case-law of the ECtHR, which analyses such derivative elements of the right to defence as the right to receive from the State reimbursement of the costs for the defender's legal representation is of rather lesser extent. In the authors' opinion, it is partially because the EU law does not comprise such facultative elements of the right to defence and the legal regulation thereof is reserved to the competence of the national legislations. However, it cannot be stated that the case-law of the ECtHR spares no attention at all to the said elements of the right to defence.

Issues relating to reimbursement of the costs for the defender's services are usually analysed in the case-law of the ECtHR in the context of the principle of the right to the judicial defence. For the first time the right of access to a court as guaranteed by Art. 6 (1) of the ECHR was established in the case *Golder v. the United Kingdom*[20]. In this and subsequent cases[21] the ECtHR said that Art. 6 (1) of the ECHR secures to everyone the right to have a claim relating to his

[18] HAMUĽÁK, Ondrej et al. The variations of judicial enforcement of EU charter of fundamental rights *vis-á-vis* union institutions and bodies. *European Studies-the Review of European Law, Economics and Politics*. 2018, 5.1, pp. 102.

[19] GUTNYK, Vitalli. *Supra note* 13, pp. 103.

[20] Golder v. the United Kingdom, Application no. 4451/70, European Court of Human Rights, 1975.

[21] Lupeni Greek Catholic Parish and Others v. Romania, Application no. 76943/11, European Court of Human Rights, 2016.

civil rights and obligations brought before a court. In the opinion of the ECtHR, the mere possibility of initiating legal proceedings and appealing decisions does not in itself meet all the requirements of Art. 6 (1) of the ECHR.[22] The ECHR is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[23] The purpose of the applying to the court is not simply to participate in the process, but to achieve the desired result. ECtHR practice takes the position that going to court to defend your rights is pointless if you end up in a worse position than before the litigation.[24] This is the situation of a person who, although he won a legal dispute against the State (e.g. in the case of acquittal), but the State did not cover his defence costs. In the context of such disputes the ECtHR has also referred to a more general principle that the risk of any mistake made by the State authority must be borne by the State itself and that errors must not be remedied at the expense of the individuals concerned.[25] *Ex post facto* refusal to reimburse the applicant's own costs in disputes against the State originating from the acts in the exercise of its public authority may as well constitute a restriction of access to court and/or interference with the right of property.[26] In cases concerning such disputes, in which the applicants had been successful but had nevertheless been left to bear their own costs, the Court found a violation of either Art. 1 of Protocol No. 1[27] or Art. 6 (1) of the ECHR[28], it being understood that in such cases finding a violation of both Articles is also possible.[29]

In this context, it is worth to revert also to another aspect of the topic of this research, i.e. public interest in order the budgetary expenses for reimbursement of the defence costs would not be excessively high. The question whether the right of access to a court can be limited in order to harmonise interests of the acquitted person and the public interest, is directly linked to that. Even though the international case-law emphasizes the priority of the fundamental human rights over financial interests[30], however the opinions diverge about this matter in the

[22] Černius and Rinkevičius v. Lithuania, Application no. 73579/17 and 14620/18, European Court of Human Rights, 2020.

[23] Zubac v. Croatia, Application no. 40160/12, European Court of Human Rights, 2018.

[24] Černius and Rinkevičius v. Lithuania, Application no. 73579/17 and 14620/18, European Court of Human Rights, 2020.

[25] Beinarovič and Others v. Lithuania, Application no. 70520/10, 21920/10 and 41876/11, European Court of Human Rights, 2018.

[26] Dragan Kovačević v. Croatia, Application no. 49281/15, European Court of Human Rights, 2022.

[27] Musa Tarhan v. Turkey, Application no. 12055/17, European Court of Human Rights, 2019.

[28] Klauz v. Croatia, Application no. 28963/10, European Court of Human Rights, 2013.

[29] Zustović v. Croatia, Application no. 27903/15, European Court of Human Rights, 2021.

[30] GRUODYTĖ, Edita, MILČIUVIENĖ, Saulė, PALIONIENĖ, Neringa. The Principle of Direct Effect in Criminal Law: Theory and Practice. *European Studies-the Review of European Law, Economics and Politics*. 2020, 7, pp. 75.

legal doctrine. In the point of view of some scientists, „<...> the person's right of access to a court is absolute, and this constitutional right may not be artificially restricted nor implementation of such right be artificially encumbered".[31] Other authors state that „[…] one of the values of civilised society, i.e. the right to access to a court seeking for judicial defence, is not absolute in the laws".[32] It is recognised in the Doctrine that the need to limit exercise of individual rights may be considered as inevitable taking into consideration that every individual exists in a social space, therefore unlimited exercise of the available rights may determine violation of the rights of others or may pose a threat to society.[33] „In the democratic society, conflicts between the individual's and the public interests are resolved by harmonising different interests seeking not to transgress their balance, and one of the ways to harmonize interests should be limitation of realisation of human rights and freedoms".[34]

The ECtHR also takes the position that access to a court is not absolute and may be limited.[35] As this is a right which the ECHR sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.[36] In this respect, the States enjoy a certain margin of appreciation. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[37] Furthermore, a limitation will not be compatible with Art. 6(1) of the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[38] As to the legitimate aim, the ECtHR takes the position, that public interest-related financial considerations could sometimes play a part in the State's policy

[31] ABRAMAVIČIUS, Armanas. Teisė į teisminę gynybą Lietuvos Respublikos Konstitucinio Teismo Jurisprudencijoje [The right to judicial defense in the Jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Jurisprudencija*. 2009, 3 (117), pp. 35.

[32] VĖLYVIS, Stasys, ABROMAVIČIENĖ, Gitana. Kai kurios teisės kreiptis į teismą bendrosios sąlygos [General conditions for certain rights of appeal]. *Jurisprudencija*. 2006, 2 (80), pp. 131.

[33] LEONAITĖ, Erika. Proporcingumo principas Europos žmogaus teisių teismo jurisprudencijoje (Daktaro disertacija) [Principle of Proportionality in the Case Law of the European Court of Human Rights (Doctoral dissertation)]. *Vilniaus universitetas*. 2013, pp. 7.

[34] BILEVIČIŪTĖ, Eglė et al. *Lietuvos Konstitucinė Teisė* [Lithuanian Constitutional Law]. Registrų Centras, 2017, pp. 285.

[35] Černius and Rinkevičius v. Lithuania, Application no. 73579/17 and 14620/18, European Court of Human Rights, 2020.

[36] Golder v. the United Kingdom, Application no. 4451/70, European Court of Human Rights, 1975.

[37] Černius and Rinkevičius v. Lithuania, Application no. 73579/17 and 14620/18, European Court of Human Rights, 2020.

[38] Mihajlović v. Croatia, Application no. 21752/02, European Court of Human Rights, 2005.

to decrease State expenses[39]. The ECtHR thus does not disregard the possibility, as such, to limit reimbursement of litigation fees in court proceedings as being legitimate in the public interest.[40]

In summary, it can be stated that following the case law formulated by ECtHR, the State must ensure reimbursement of the costs for defence, otherwise the right for a fair trial consolidated in the Art. 6 of the ECHR would be violated. On the other hand, seeking for harmonisation of the individual's and public interests, the ECHR admits that the analysed right is not absolute and in certain cases may be limited. One way or another, the case-law of the ECHR does not speak about how to ensure such reimbursement of costs – by establishing imperative appropriate legal standards in the Law of Criminal Procedure or by invoking other legal institutes. This matter remains the discretion of the Member States and is resolved rather differently, as we will able to see farther.

4. The right of the acquitted defendant to reimbursement for costs expended in their defence in Lithuania

Rather significant changes happened recently in Lithuania in the sphere of reimbursement of costs for the defender's legal representation. The duty of the State to compensate the expenses incurred by the acquitted person for payment of the services of the defence lawyer was consolidated in the CPC only on 1 May 2022, i.e. the Art. 106 of the CPC was appended by the Par. 3, which provides that "in case a person is acquitted, when rendering a judgement or a ruling, a court shall take a decision regarding the compensation of the necessary and reasonable expenses of the person for payment of the services of the lawyer or assistant lawyer who participated in the proceedings as a defence counsel of this person, in view of the circumstances of the case, from the State funds in accordance with the procedure laid down by the laws". It can therefore be considered that such amendment of the Law of Criminal Procedure having created an imperative duty for the State to reimburse the said expenses would still not have been consolidated in laws if the decision of the Constitutional Court of the Republic of Lithuania would not be adopted in 2021 (hereinafter – the Constitutional Court)[41], which will be

[39] Stella and Others v. Italy, Application no. 49169/09, 54908/09, 55156/09 et al., European Court of Human Rights, 2014.

[40] Černius and Rinkevičius v. Lithuania, Application no. 73579/17 and 14620/18, European Court of Human Rights, 2020.

[41] Ruling of the Constitutional Court of the Republic of Lithuania of 13 March 2021.

analysed more broadly further. Till amendment of the said law, the legal system of Lithuania in the analysed sphere had to come a long way of formation, which can be conditionally divided into 3 separate stages.

The first stage lasted from 1996, when the decision was passed in the first case to compensate for damages inflicted by wrongful acts of the pre-trial investigation officers, prosecutors or court[42] in the course of criminal proceedings, to 19 March 2021, when the said decision of the Constitutional Court was adopted. During this period, the courts of Lithuania have formed a consistent case-law providing that when expenses incurred by the acquitted person in criminal proceedings are not reimbursed following the procedure established in the legal standards of the Criminal Procedure and a person files a civil claim against the State having violated the positive duties upon realising the Art. 6(1) of the Convention, such expenses may be an integrate part of property damages. Thus, Lithuanian Courts have consistently followed the case-law of the ECHR stating that in case of acquittal, a person cannot suffer property losses therefore the expenses incurred for assistance of the defence lawyer, should be reimbursed.[43] However, compensation for these expenses is awarded only when the court establishes wrongful acts of the law enforcement institutions being not the only albeit sufficient reason for such costs.[44] Thus, these expenses in a civil case for compensation for damages may be awarded inasmuch as they are related to the appropriate wrongful acts of the State and can be recognised as damages.[45] Civil liability of the State for the property damage of such character may arise not only in those cases when there are a relevance wrongful acts and damages sought but also having established the remoteness.[46] Thus, not questioning the duty of the State to compensate expenses for defence in case of acquittal, Lithuanian courts in this stage linked it with the tort liability of the State, i.e. award thereof was possible only having established all 3 essential conditions of the State's tort liability: wrongful acts of the pre-trial officer, prosecutor or court.[47] In those cases

[42] See more: ŠALČIUS, Marijus. Neteisėtais baudžiamojo proceso veiksmais padarytos žalos atlyginimo problematika: mokslo daktaro disertacija [Problems of compensation of damages inflicted by unlawful actions in the course of the criminal proceedings: doctoral dissertation]. *Vytautas Magnus University*. 2021, pp. 20–20, 116–135.

[43] Order of the Supreme Court of Lithuania of 12 February 2010 in case No. 3K-3-75/2010.

[44] Order of the Supreme Court of Lithuania of 2 December 2011 in case No. 3K-7-375/2011; Order of the Supreme Court of Lithuania of 13November 2015 in case No. 3K-3-572-969/2015.

[45] Order of the Supreme Court of Lithuania of 18 December 2015 in case No. E3K-3-670-378/2015.

[46] Order of the Supreme Court of Lithuania of 1 July 2020 in case No. 3K-3-205-313/2020.

[47] See more: ŠALČIUS, Marijus, BILIUS, Mindaugas. Baudžiamojo proceso pažeidimu padarytos žalos atlyginimo teisinis reguliavimas ir vertinimo teismų praktikoje problematika [Legal Regulation of Compensation for Damage Caused by Violation of the Criminal Process and the Problem of Assessment in Court Practice]. *Teisės apžvalga*. 2016, 2(14).

where not all acts in criminal proceedings requested by the acquitted person to recognise wrongful used to be recognised wrongful then only a part of expenses related to wrongful acts used to be awarded as a compensation for damages. The amount of the compensation was determined taking into account the scope, value and complexity of the lawyer's services as well as other circumstances.[48]

On 19 March 2021, having examined the case following an individual constitutional complaint, the Constitutional Court of the Republic of Lithuania recognised that Art. 106 of the Code of Criminal Procedure, insofar as, under this article, a person in respect of whom an acquitting court judgement has been adopted is not reimbursed for the necessary and reasonable lawyer's fees, had been in conflict with of Art. 30(1) and of Art. 31(6) of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law. In this ruling, the Constitutional Court relied on the interpretations of the ECtHR presented in the already mentioned judgement *Černius and Rinkevičius v. Lithuania*. Despite the stated unconstitutionality, the legal standard providing the necessity to compensate the acquitted person the expenses incurred for the services of the defence counsel entered into force in CPC only on 1 May 2022. During this period, the case-law of the national courts of Lithuania when dealing with the matter of reimbursement of the expenses for the defender's services, was quite inconsistent. Some of the court decisions were founded on the case-law having formed before the decision of the Constitutional Court, i.e. by linking award of the costs with the conditions of tort liability of the State. In other words, expenses for the defence lawyer's services were used to award only in the event that wrongfulness of acts of the pre-trial officers, prosecutor or court was established. The requirement of the wrongfulness of acts in the criminal procedure was not raised in the rest of the court decisions and awarding of expenses was founded on clarification of the Constitutional Court concerning unconstitutionality of the Art. 106 of the CPC.

Amendment of the Art. 106 of the CPC, which entered into force on 1 May 2022, brought legal consistency in the analysed area. After passing the decision of acquittal, the person no longer needs to initiate a civil case against the State claiming compensation for the costs incurred to pay for the defence lawyer's representation. For this, it is sufficient to submit a request in the same criminal case for such costs to be reimbursed from the State budget.

Despite the positive aspects of the analysed amendments of the CPC, it should be noted that their scope was limited to the elimination of the directly indicated deficiencies of legal regulation specified in the decision of the Constitutional Court, i.e. the obligation of the State to reimburse the expenses for the

[48] Order of the Supreme Court of Lithuania of 27 April 2017 in case No. e3K-3-214-695/2017.

defender's services was established only in case of the judgement of acquittal. However, the amendments of the CPC have not provided reimbursement of expenses in cases where the court rules on termination of the criminal proceedings on the ground that there is a circumstance eliminating criminal responsibility (e.g. self-protection, necessity or other) or if there is an effective decision passed by a competent body in respect of a person regarding essentially the same legally significant facts (i. e. when a case is terminated in order to avoid violation of the principle of *non bis in idem*). Reimbursement of the expenses for the defence lawyer's services is also not provided in cases when the pre-trial investigation is terminated by the prosecutor's resolution. Such legal regulation raises doubts as to its conformity with the principle of equality, which is considered in legal doctrine as one of the principles limiting the freedom of discretion of the Member States when choosing legal measures to regulate certain areas.[49] For example, persons who are acquitted by a court verdict and persons in respect of who pre-trial investigation is terminated by the prosecutor's resolution having established that no criminal act has been committed are basically in the same legal situation. All of them are considered as not having committed any criminal act in terms of the criminal justice, however in the first case, the State is obliged to reimburse such person expenses for his defender's services, whereas in the second case it is not.

Another aspect that raises doubts about the suitability of the new Lithuanian legal regulation is the compensation of the defence costs in case of partial acquittal. In the opinion of the Supreme Court of Lithuania, when a person has been acquitted for one of the criminal acts indicted and convicted for others, he is not entitled to compensation for the defence costs.[50] The court reasoned this by the fact that there are only two types of court verdicts in Lithuania: acquittal and conviction. When a person is acquitted for one of the criminal acts indicted and convicted for others, a conviction verdict is passed. Meanwhile, Art. 106(3) of the CPC stipulates that costs are reimbursed only in case of an acquittal. However, it is doubtful whether this is correct, since some of the prosecutors' accusations were not confirmed.

On the other hand, the current version of the CCP provides reimbursement of costs for the services of a defence lawyer in case of each acquittal. The only circumstances by which the reimbursement of expenses can be reduced is the reasonableness and necessity of such expenses. There are also recommendations approved by the Minister of Justice regarding the maximum attorney fees for legal representation, but they are only indicative and not binding on

[49] HAMUĽÁK, Ondrej et al. Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic–Basic Scenarios. *European Studies the Review of European Law, Economics and Politics*. 2020, 7.1, pp. 110.

[50] Ruling of the Supreme Court of Lithuania of 23 May 2023 in case No. 2K-165-489/2023.

the courts.[51] However, the Lithuanian CCP does not provide that when making a decision on reimbursement of the analysed costs, a court can assess the acquitted person's behaviour in the criminal process or other similar circumstances. In Lithuania, 313 persons were acquitted in 2022[52]. Thus, if they all would realize the right to reimbursement for defence costs guaranteed by the CCP, it may become a rather heavy financial burden for the State. In this case, having once again faced the conflict between the interests of a private person and the public, it is appropriate to look at the models of exercising the analysed right applied in other States.

5. Overview of the legal regulation of the right to reimbursement of the defence expenses in the European Countries

5.1. Poland

Expenses for the defence lawyer's representation are one of the elements comprising costs of the criminal litigation in Poland. Art. 616(1) of the Polish Code of Criminal Procedure (thereinafter – Polish CCP) states that the litigation costs include: court costs and justifiable expenses of the parties, including the costs of retaining one defence counsel or attorney for the particular case. It seems that there should be no ambiguity and when the accused person is acquitted, he should be entitled to claim for reimbursement of the expenses incurred for the purposes of his defence. As well Art. 632(2) of the Polish CCP states that in cases when the accused person has been acquitted or the proceedings have been discontinued, the costs of the court proceedings in cases of public indictment must be covered by the State Treasury.

On the other hand, it should be noted that the Regulation effective until 23 May 2007, stated that in cases of the acquittal of the defendant or termination of the proceedings, the costs of the trial in public indictment cases should be covered by the State Treasury, except for the attorneys' who has been acting as a defender or attorney of choice remuneration. Full or partial reimbursement of the defence lawyer's remuneration was then possible only in the so-called "justified cases". However, the judgment of the Polish Constitutional Tribunal

[51] Ruling of the Supreme Court of Lithuania of 17 April 2023 in case No. 2K-92-976/2023.

[52] Report on the activities of the Prosecutor's Office of the Republic of Lithuania in 2022 [online]. Available at: https://www.prokuraturos.lt/data/public/uploads/2023/03/2022-m.-ataskaita-2023-03-01-nr.-17.9.-1974.pdf

of 26 July 2006, SK 21/04 found the Art. 632 (2) of the Polish CCP incompatible with the Art. 2, Art. 32 Sec. 1 and Art. 42 Sec. 2 of the Constitution, to such extent that it limited the possibility of granting a person, acquitted in a public indictment case, reimbursement of costs for the defence attorney's fees only in "justified cases". Specifically, the Constitutional Tribunal stated that "in a state governed by the rule of law, the principle should be to charge the party that failed to defend its position with the costs of the proceedings. In regard to the acquittal in public indictment proceedings, this means that the costs should be borne by the prosecutor – a public authority, and in fact – by the State Treasury. Considering that the accused person is a vulnerable party in the proceedings and the choice of a defence lawyer contributes to equalization of the trial chances, it must be recognized that a person who has been acquitted should receive a full refund of the litigation costs, including the costs incurred for defence. Such regulation implements the constitutional right to defence and favours to the principle of equality of arms, the additional advantage whereof is that the state minimizes the negative consequences resulting from the wrongful accusation and conduction of criminal proceedings against a person."[53] Irrespective of whether the defender is chosen by the accused person or a person acting on his/her behalf, the expenses for the defence lawyer's representation are considered to be the expenses of that party.

The issue of procedural costs, especially in criminal proceedings, is not one of the most frequently discussed issues in the Polish legal doctrine.[54] It seems there is a belief in the simplicity of this issue.

On the other hand, there are several issues that can cause certain problems. The first one worth of attention is the issue of reimbursement of the defence costs to the accused in the event of his acquittal. If the accused person is acquitted of all the charges presented in the indictment, then, pursuant to Art. 632(2) of the Polish CCP, the accused shall not be reimbursed for the costs of the appointed defender only if he has directed against himself the suspicion of committing a prohibited act. The problem arises when the accusation consists of two or more charges (criminal acts) and the accused person is partially acquitted (or a part of the case is discontinued) but at the same time he is partially convicted. According to Art. 630 of the Polish CCP, in cases brought by public prosecution, if the accused has not been convicted of each of the offences imputed to him, the costs involved in the charge in the part to which the acquittal extends, shall be charged to the State Treasury.

[53] Judgment of the Polish Constitutional Tribunal of 26 July 2006, SK 21/04.

[54] See more: PAPRZYCKI, Lech Krzysztof et al. *Kodeks postępowania karnego*. Komentarz Lex, 2013, pp. 1532; ŚWIECKI, Dariusz et al. *Kodeks postępowania karnego. Komentarz*. Warszawa, 2013, pp. 1481.

However, in this respect, two completely different positions could be found as to whether in the provision also applies to the reimbursement of the defence costs this case. The first position expressed by the Court of Appeal in Wrocław, states as follows: "According to Art. 626 § 1 of the CCP, in the decision concluding the proceedings the court shall always indicate to whom, in which proportions and to what extent the court costs shall be charged. The basis for charging the State Treasury with the costs of the trial in case of acquittal of the defendant or discontinuation of the proceedings in cases of public prosecution is the Art. 632 § 2 of the Polish CCP. If the accused has been acquitted or the proceedings have been discontinued in cases brought by public prosecution, the costs of the court proceedings shall be charged to the State Treasury including a fee of one defence counsel as provided by the Art. 630 of CCP".[55]

The Court of Appeal in Katowice expressed a different position: "In a situation where there was a conviction for at least one of the acts, and a person has been acquitted or proceedings were discontinued in case of the others, the court of first instance was right to state that this does not justify an award of costs to the convicted person he has paid as a remuneration for the defence lawyer's services in the preparatory proceedings and the proceedings before the court of first instance. The defence attorney undertook actions with regard to all the alleged crimes, including those for which the accused was convicted throughout the proceedings, and it is currently impossible to assess how much work the defence required in terms of individual charges."[56]

The said problem was resolved by the resolution of the Supreme Court on 28 January 2016: "Expenses related to the prosecution referred to in the Art. 630 of CCP are also the expenses incurred by the accused in regard with the appointment of one defence counsel in the case. In case of a partial acquittal of the defendant or partial discontinuation of the proceedings against him/her, he/she may therefore claim for reimbursement of these costs from the State Treasury in the part to which the acquittal extends."[57]

It should be mentioned that only justifiable expenses are considered as procedural costs. As it is stated in the Art. 616 (1) of the Polish CCP, only the costs of retaining one defence counsel or attorney for the case are considered as justifiable. In this aspect, the Regulation of the Minister of Justice of 28 September 2002 on Fees for Advocates' Services should be mentioned.[58] Pursuant to § 2 sec. 1 and 2 of the above cited Regulation, the basis for awarding the costs for legal

[55] Ruling of the Wroclaw Court of Appeal of 16 December 2011 in case No. II AKz 523/11.

[56] Ruling of Katowice Court of Appeal of 14 September 2011 in case No. II AKz 613/11.

[57] Ruling of the Supreme Court of Poland of 28 January 2016 in case No. I KZP 16/15.

[58] Regulation of the Minister of Justice of the Republic of Poland of 28 September 2002 [online]. Avaible at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20021631348

representation are the minimum amount of remuneration specified in chapters 3 – 5. This fee may not be higher than six minimum amounts of remuneration. In preparatory proceedings during the pre-trial investigation stage, the minimum amount of remuneration is PLN 180 (approximately EUR 40), and during the ordinary proceedings before the court of first instance – PLN 420 PLN (approximately EUR 95). In cases where the trial lasts more than 1 day, the minimum amount of remuneration is increased by 20% for each subsequent day.

Thus, the provisions of the Polish CCP provide grounds for awarding reimbursement of reasonable expenses of a person acquitted or against who proceedings have been discontinued. It is obvious that they cannot be interpreted in isolation from the provisions of the Regulation on fees for advocates' services. Since there is no doubt that the provisions on maximum costs apply when bills are submitted, there are no grounds for abandoning the application of the provisions on quantifying these costs depending on the attorney's workload, the nature of the case and the attorney's contribution to its clarification and resolution. Defendants are free to choose a defence lawyer but they must be aware that the possible reimbursement of the defence costs will not depend on the defence lawyer's reputation and the actual amount of remuneration received by him, but only on the factors specified in the Regulation, which are the same for everyone.

5.2. Germany

Legal costs and necessary expenses in the case of acquittal in Germany are regulated and codified in German Code of Criminal Procedure (*Strafprozeßordnung* – StPO). This code regulates instances when the legal costs and necessary expenses could be awarded to the acquitted defendants as well as situations where such reimbursements cannot be made.

As a general rule, if indicted accused is acquitted, the legal costs are paid by the State. Book 7, div. 2, Sec. 467 (1) of German Code of Criminal Procedure states that: *"If the indicted accused is acquitted, if the opening of the main proceedings against the indicted accused is refused or if the proceedings against the indicted accused are terminated, Treasury expenditure and the indicted accused's necessary expenses are borne by the Treasury."*[59] However, from the formulation of this particular section, it can be seen that legal costs and necessary expenses can be reimbursed not only in the case of acquittal, but in the cases if the opening of the main proceedings against the defendant are refused or if the charges against the charged defendant are dismissed. This is the main distinction

[59] German Code of Criminal Procedure [online]. Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p3087

from the Lithuanian regulation regarding the same issue, whereas in Lithuania, legal costs can be reimbursed only in case of acquittal.

However, in order to avoid unnecessary expenses from the Treasury for reimbursement of legal fees of the acquitted person, further protection provisions are implemented. Costs incurred through the defendant's own fault are excluded.[60] For instance, Sec. 467 (2) states that: *"The costs of the proceedings caused by the indicted accused's culpable default are charged to him or her. To that extent, the expenses which the indicted accused has caused are not charged to the Treasury."*[61] Additionally, Section 467 (3) implies further restrictions regarding the reimbursement of legal costs as it states that: *"The indicted accused's necessary expenses are not charged to the Treasury if the indicted accused caused the preferment of public charges by making a report in which he or she pretended to have committed the offence with which he or she was charged. The court may dispense with charging the indicted accused's necessary expenses to the Treasury if (1) he or she caused the preferment of public charges by falsely incriminating himself or herself with regard to material points or in contradiction to his or her later statement or by concealing material exonerating circumstances despite having made a statement in response to the accusation or (2) he or she is not sentenced for an offence only on account of a procedural impediment."* Additional obstacles for reimbursing the acquitted person are laid down in Sec. 467 (4) and (5). Sec. 467 (4) provides that *"If the court terminates the proceedings pursuant to a provision which permits this at the court's discretion, it may dispense with charging the indicted accused's necessary expenses to the Treasury."* Sec. 467 (5) additionally states that: *"The indicted accused's necessary expenses are not charged to the Treasury if the proceedings are terminated with final effect after previous provisional termination (section 153a)."*

Lawyers' fees are assessed in Germany either in line with the Lawyers' Remuneration Act (*Rechtsanwaltsvergütungsgesetz*) or in accordance with fee agreements. However, the Federal Lawyers Code's (*Bundesrechtsanwaltsordnung*) (BRAO)[62] Sec. 49 (b) and the Lawyers' Remuneration Act's[63] Sec. 3 (a) to 4 (b) must be followed. The agreed upon costs cannot be less than those prescribed by law, especially if the attorney defends the client in court. Compensation that is

[60] DEKEL, Omer. Should the Acquitted Recover Damages? The Right of an Acquitted Defendant to Receive Compensation for the Injury He Has Suffered. *Criminal Law Bulletin.* 2011, 47, pp. 8.

[61] German Code of Criminal Procedure [online]. Available at: https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p3087

[62] Federal Code for Lawyers [online]. Available at: https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.html#:~:text=(1)%20A%20lawyer%20is%20the,only%20by%20a%20federal%20law

[63] Act on the Remuneration of Lawyers [online]. Available at: https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html

greater than prescribed by the law may be agreed upon at any moment.[64] When representation in a matter is completed, attorneys are paid for their legal services provided to the client, unless otherwise agreed between the parties. However, lawyers are also legally entitled to an advance payment, if agreed.[65]

All things considered, the issue of reimbursement to the acquitted person is codified and mainly solved by Sec. 467 of German Code of Criminal Procedure. It is worth mentioning, that unlike in Lithuania, in Germany the *costs* incurred in *legal proceedings* can be reimbursed even if the procedure against accused is terminated or refused. However, this does not mean that all necessary legal expenses of the acquitted person are automatically paid by the Treasury. Acquitted person must meet certain requirements which are laid down in the German Code of Criminal Procedure in order to avoid unnecessary spending of public funds.

5.3. Sweden

In Sweden the rules and principles regarding the reimbursement of legal fees in case of the defendant's acquittal are prescribed in the Swedish Code of Judicial Procedure (Rättegångsbalken). It is specified in this Code that if the defendant is acquitted, he/she is entitled to compensation for all incurred expenses for defence counsel. It is specifically stated in the Chap. 31, Sec. 2 of Swedish Code of Judicial Procedure that: *"If the defendant is acquitted in a case instituted by the prosecutor or if a prosecution instituted by the prosecutor is dismissed, the court may award the defendant compensation out of public funds for his costs for defense counsel, including consultation fees pursuant to the Legal Aid Act 1996:1619, for obtaining evidence during the preliminary investigation or the proceedings provided that the costs were reasonably necessary to protect his rights."*[66] It is worth mentioning that in Sweden, unlike in Lithuania, an acquitted defendant is also entitled to additional compensation, namely: *"The defendant may also receive compensation for the costs he incurred by attending court. Such compensation shall be paid in accordance with rules issued by the Government."*[67] The compensation depends on a number of terms and circumstances, including

[64] European e-Justice Portal [online]. Available at: https://e-justice.europa.eu/37/EN/costs?GERMANY&member=1

[65] Ibid.

[66] Swedish Code of Judicial Procedure [online]. Available at: https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf

[67] ROOS, Daniel. Compensation for costs and legal fees after acquittal or conviction [online]. Available at: https://ecba.org/content/index.php?option=com_content&view=article&id=672:copenhagen-2014&catid=40&Itemid=17

but not limited to means, rationality test and necessity of the legal counsel, as well as other factors.

It is worth mentioning that there is another way to recover legal expenses for the acquitted defendant. Another main document, which regulates the costs incurred in legal proceedings in Sweden, is the Act on State Compensation for Legal Costs. The procedure for requesting and getting reimbursement for legal costs is further described in above mentioned Act. This law specifies the requirements and processes for requesting reimbursement in detail, along with the forms and deadlines. It's crucial to remember that legal costs incurred by the acquitted person are not reimbursed by default. The acquitted defendant must submit a request for compensation for its legal costs, and the court will decide based on the facts of the case as well as the complexity of the matter, the length of the proceedings, and whether legal representation is required. All of this will be taken into account by the court before making a decision whether to award the legal costs or not.

The reimbursement of expenses for acquitted criminal defendants (costs incurred during the court proceedings) is governed mainly by Swedish Code of Judicial Procedure. It is clear that an acquitted defendant may be entitles to reimbursement of all costs expended in the court proceedings plus additional compensation for costs incurred by attendance at court. However, in order to avoid unnecessary burden to the public funds, the court, before reimbursing the acquitted defendant for the incurred legal costs, will take into account whether the reimbursement of such costs is just and reasonable.

5.4. United Kingdom

Although the United Kingdom is not a country of the EU, but for it, recognizing the fundamental standards of human rights protection and belonging to a different legal system than the previously analysed countries, the procedure of reimbursement for defence costs that exists in it is also undoubtedly relevant.

As in most countries where the Rule of Law is in force, the acquitted defendant in the United Kingdom can also recover legal costs incurred during the criminal proceedings. The Criminal Cases Unit is responsible for assessing a range of claims paid out of Central Funds and it applies to England and Wales. When a defendant is acquitted of all charges, he/she can recover legal costs. This procedure is known as *Defendant's Cost Order* (DCO). It is worth mentioning that current law stipulates limits of refundable legal costs. DCO will only cover expenses directly related to the case, such as the cost of hiring a solicitor or barrister in order to help the defendant to prepare for trial and represent him/her in court. However, it will not cover other costs not related to legal assistance in

court proceedings, such as lost earnings. Criminal Procedure Rules 2020 and Criminal Practice Directions 2023, govern the *criminal* court *procedure* in *magistrates*' *courts*, the Crown Court, the Court of Appeal, and the High Court in situations involving extradition appeal cases.[68] Sec. 45.4 (8) states: *"An order for the payment of costs out of central funds can be made – a) for a defendant – (i) on acquittal, (ii) where a prosecution does not proceed, (iii) where the Crown Court allows any part of a defendant's appeal from a magistrates' court, (iv) where the Court of Appeal allows any part of a defendant's appeal from the Crown Court, (v) where the Court of Appeal decides a prosecutor's appeal under Part 37 (Appeal to the Court of Appeal against ruling at preparatory hearing) or Part 38 (Appeal to the Court of Appeal against ruling adverse to prosecution), (vi) where the Court of Appeal decides a reference by the Attorney General under Part 41 (Reference to the Court of Appeal of point of law or unduly lenient sentence), (vii) where the Court of Appeal decides an appeal by someone other than the defendant about a serious crime prevention order, or (viii) where the defendant is discharged under Part 1 or 2 of the Extradition Act 2003;"*[69] This means that there is an exhaustive list of ways to reimburse costs of legal representation for a defendant, which is codified in Criminal Procedure Rules.

Criminal Costs Practice Direction states that in Magistrate's court, where a defendant has been acquitted on some counts but convicted on others, the court may make an order that only part of the costs be paid.[70] A court should award compensation to a defendant who has been either fully or partially acquitted, for costs incurred for the purpose of conducting his defence in the proceedings in which he was acquitted. The court may deviate from this rule if there is good reason for doing so. As an example of circumstances that justify the denial of a right to compensation, the Practice Direction points to a situation in which the defendant's behaviour misled the prosecution and caused it to believe that the indictment against him had a more solid foundation than it actually did. In cases when the right to compensation is denied, the judge must explain to those present in the courtroom that the refusal to grant compensation to the defendant is not meant to suggest that the defendant is guilty. The judge must also indicate the exact reason for the denial of compensation[71]. Art. 2.1.1 of Par. 2 of the Criminal

[68] Legislation.gov.uk [online]. Available at: https://www.legislation.gov.uk/uksi/2020/759/contents/made

[69] Legislation.gov.uk [online]. Available at: https://www.legislation.gov.uk/uksi/2020/759/rule/45.4/made

[70] Criminal Costs Practice Direction [online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924050/crim-practice-directions-X-costs-2015.pdf

[71] DEKEL, Omer. "Should the Acquitted Recover Damages? The Right of an Acquitted Defendant to Receive Compensation for the Injury He Has Suffered." *Criminal Law Bulletin*. 2011, 47, p. 7.

Costs Practice Direction additionally states that: *"The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified. Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, either the amount allowed must be specified in the order or the court may describe to the appropriate authority the reduction required."*[72]

Art. 2.2.1. of Criminal Costs Practice Direction governs the procedure of awarding costs occurred in the Crown Court. When a defendant is acquitted of all criminal offences, the court usually makes a defendant's cost order in his favour. Additionally, when a court decides whether to award defendant's costs or not, it takes into consideration whether there are any circumstances when doing so would not be practical. For instance, it is stated in the same section that: *"A defendant's costs order should normally be made whether or not an order for costs between the parties is made, unless there are positive reasons for not doing so, for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was. The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified. Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, either the lesser amount must be specified in the order, or the court must describe to the appropriate authority the reduction required."*[73]

However, the Costs in Criminal Cases (General) Regulations 1986 (Amendment) has defined a limitation on how much can be recovered. In the regulations it is stated that: *"the appropriate authority shall calculate amounts payable out of central funds in respect of legal costs to the individual in accordance with the rates or scales or other provision made by the Lord Chancellor pursuant to paragraph (7), whether or not that results in the fixing of an amount that the appropriate authority considers reasonably sufficient or necessary to compensate*

[72] Criminal Costs Practice Direction [online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924050/crim-practice-directions-X-costs-2015.pdf

[73] Criminal Costs Practice Direction [online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924050/crim-practice-directions-X-costs-2015.pdf

the individual."[74] This means that it is quite difficult to recover all legal costs which defendant paid privately in order to defend himself/herself against the prosecution.

Therefore, it can be seen that in England and Wales the procedure of awarding legal costs to a successful defendant is governed and codified by specific Acts of Parliament. Unlike in Lithuania, the specific rules and procedures under which an *acquitted defendant* may be entitled to *recover* his *legal costs* are governed by several statutes. In addition, unlike in Lithuania, there are certain specific circumstances in the UK when the defence costs are not reimbursed even in case of the judgement of acquittal. In the UK, as in the majority of the analysed countries, the maximum amount of compensation for defence costs is also set.

In summary, it can be said that in all the analysed States, the right of the acquitted person to compensation for the defence costs is unquestionable. Unlike in Lithuania, in the analysed States, reimbursement of costs is guaranteed not only in the case of a complete acquittal, but also when the criminal proceedings are terminated or a person is partially acquitted.

This undoubtedly increases the protection of human rights. Meanwhile, the interests of the state in all the analysed States are protected by providing certain limits on the defence costs that are awarded. It was also established during the research that in all analysed countries, except for Lithuania, there are certain exceptions when the defence costs are not reimbursed. In legal doctrine such exceptions are usually divided into two categories. The first exception relates to damages that the defendant could have prevented without impacting his defence. The second exception relates to special circumstances which a court could find, justifying a denial or reduction in compensation.[75]

6. Conclusion

The State's obligation to compensate the acquitted person for the expenses incurred for the services of the defence counsel often balances on the edge of the conflict between individual's and public interest. The analysis has revealed that EU law does not establish the obligation of the States to ensure the right of the acquitted person to reimbursement of the expenses for the defence counsel, suffered in criminal proceedings. The decision whether to establish such a right or not is left to the discretion of the States. Meanwhile, according to the ECHR,

[74] The Costs in Criminal Cases (General) (Amendment) Regulations 2012 [online]. Available at: https://www.legislation.gov.uk/uksi/2012/1804/regulation/6/made?view=plain

[75] DEKEL, Omer. Should the Acquitted Recover Damages? The Right of an Acquitted Defendant to Receive Compensation for the Injury He Has Suffered. *Criminal Law Bulletin*. 2011, 47, pp. 6–7.

States have an obligation to apply such right in national law, otherwise the right for a fair trial consolidated in the Art. 6 of the ECHR would be violated. On the other hand, seeking for harmonisation of the individual's and public interests, the ECHR admits that the analysed right is not absolute and in certain cases may be limited (e. g., in order to limit the unreasonable burden on the state budget or to ensure the efficiency of the criminal process).

The analysis of legal acts and court practice led to the conclusion that the practice of Lithuanian courts and the amendments to the CCP, which entered into force in 2022, guarantee even a higher level of human rights protection than is required by the EU law. In the past, in order to receive compensation for the expenses of a defence counsel, a person had to initiate a civil case against the State. The current legal regulation allows this to be made as simple as possible – by submitting a request for reimbursement of expenses in a criminal case. Nevertheless, the current legal regulation of Lithuania still raises doubts not only about ensuring the principle of equality, but also about insufficient protection of the state budget. On the one hand, in Lithuania, the aforementioned right is not guaranteed to a person who has been partially acquitted or in whose favour criminal proceedings have been terminated. On the other hand, there is no guarantee that the realization of the aforementioned right will not place a disproportionate burden on the state budget.

Taking into account variety of good practices of the analysed European countries, the legal regulation of Lithuania should be supplemented by providing for a possibility of receiving compensation for defence costs in cases of partial acquittal and termination of the criminal proceedings. On the other hand, in order not to place an excessive financial burden on the state budget and to ensure an effective criminal process, safeguard measures existing in other European countries should also be provided (e.g., the duty to assess the person's behaviour in criminal proceedings and other objective circumstances). It is believed that such improvement of legal regulation will undoubtedly contribute to the more effective reconciliation of the interests of a private individual and the public.

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Cross-border Transit of Energy Resources and Significant Matters of its Legal Regulation

Turan Jafarli*

Summary: The article emphasises that states' competitiveness is dependent on energy resources and that these resources have become a key component of national economic security. Consequently, this opens up new avenues for international legal cooperation in energy relations. Transporting enough oil and natural gas across the globe to meet the daily demand is an epic undertaking, that is increasing drastically. Even with the global implementation of Green Energy Policies, oil and gas companies continue to explore and acquire additional oil reservoirs. This evidence indicates that the use of carbohydrates as a source of energy will continue to be widespread and essential. The conflict has historically been a defining characteristic of transit issues between states, as mentioned in the article. In the modern era, the acquisition and transportation of energy resources frequently sparked violent conflicts and cold wars. Typically, such conflicts "emerge" in countries richer in energy resources or with a crucial role in bringing these resources to the global market. Today, the regions with the most active armed conflicts are or were at the heart of the world's energy resources.

Keywords: energy resources, energy transportation, energy security, international legal cooperation, transit issues, transnational cooperation, modern oil and gas issues.

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1. Introduction

Energy security cooperation between states has become one of the most important issues in modern international relations. The issue of regulating cross-border energy transit laws as a crucial component of an energy security strategy is one of the determining factors for the states. Moreover, interstate cooperation on energy resources plays a crucial role in determining states' vital interests, given that energy resources are unequally distributed among countries and, more importantly, that the states' socioeconomic development is largely dependent on these resources.

With the establishment of the first international conventions on transit freedom in the 1920s, the international community began to address energy transition issues. The 1921 Barcelona Convention and Statute on Freedom of Transit and related normative instruments brought transit freedom to the attention of international law[1]. Following that, the community put in a lot of effort to develop areas of cooperation, which continued with the signing of agreements and the ratification of various doctrines on energy transit. On December 19, 2014, the United Nations General Assembly also passed a resolution on the Role of Transport and Transit Corridors in Ensuring International Cooperation for Sustainable Development. The resolution establishes an international framework for partnerships in the areas of environmentally responsible transportation, corridors for transit, and environmental protection. Additionally, on November 23, 2016, in Ashgabat, Turkmenistan, the first global World Conference on Sustainable Transport was launched with the purpose of coordinating and further developing inter-state cooperation in the field of cross-border energy transit.

The emergence of international legal regulation of energy cooperation coincided with the events of the oil shocks of the 1970s. The main crisis was caused by two specific events occurring in the Middle East: the Yom-Kippur War of 1973 and the Iranian Revolution of 1979, which resulted in disruptions of oil supplies from the region that led to difficulties for the countries that relied on energy exports from the region[2]. Overseen crises have pushed the states to facilitate the search for solutions to the safe transit of energy from energy-producing regions to energy-consuming regions. On the other hand, as the global economic system deepens the interdependence of states in the energy sector, the need for international legal regulation of cross-border Energy transit is growing. The article seeks relevant answers to the following questions:

[1] FAZIL, J. Freedom of Transit under International Law: Reflections on 100 Years of the Barcelona Convention. *Indian Journal of Law and Legal Research*. 2022, (4:4), pp.1–19.

[2] NERSESIAN, R. *Energy for the 21st Century: A Comprehensive Guide to Conventional and Alternative Sources.* 2010, pp. 147.

- How have the oil shocks and related energy supply disruptions affected the establishment of international legal frameworks and rules for cross-border energy transit?
- How did the Baku-Tbilisi-Ceyhan pipeline become the benchmark for the legal regulation of the cross-border transit of energy resources and maintain its relevance and legal force despite regional conflicts?
- In what ways does the Energy Charter Treaty classify and characterise the many kinds of energy sources?
- How has the historical evolution of the legal regulation of energy resource transit shaped the current international frameworks governing cross-border energy transit?

In order to accomplish the goals of the article, it has been divided into seven chapters. Initially, the reader is provided with a concise explanation of how energy resources were an essential political instrument in the international political arena in order to achieve superiority. In light of The Energy Charter Treaty, the third part defines energy resources and introduces related problems. The next part gives a brief historical overview of the historical legal framework governing the transport of energy resources. In the last section (chapter 6), it is explained how the Energy Charter Treaty might be used as a model for the design of future international cross-border transit agreements. The article applies various research methodologies, including a literature review to address theoretical questions, as well as descriptive and comparative analyses to analyse energy transit issues.

2. Energy resources as political tools

Oil and natural gas commodities are primary energy products, as they have the largest share of energy consumption. Therefore, the international transboundary and domestic intra-country transit of oil and natural gas resources are among the most important issues. Moreover, the production and transit of these products through pipelines via open seas and land are subject to international and domestic legal regulations. While legal regulation covers many areas, it must also primarily stimulate economic development and respond to consumers' energy needs. This aspect has been the main priority of the energy strategies of the states, and their energy policies have been formulated accordingly. The legal regulation of the use of energy resources is also determined by the form and size of the energy produced[3].

[3] BRADBROOK, A. Energy law as an Academic Discipline. *Journal of Energy & Natural Resources law.* 1996, vol. 14, pp. 194.

The management of discovered energy resources and their transit to world markets has led to many problems in International Relations. For instance, the energy-exporting countries, which own international transit-communication systems, use their advantage as a political pressure mechanism. These pressure mechanisms are also used to prevent the realisation of alternative export routes. However, it has been emphasised that maintaining energy superpowers by having control over energy transport corridors is unacceptable in international practice and theory. Consequently, legal guarantees for energy transit should be established as a standard in addition to the availability of alternative exports for energy resources.

Azerbaijan concluded "the Contract of Century", an oil contract with the major transnational oil corporations, in 1994. This has provided legal guarantees for Azerbaijan's economic and political sovereignty[4]. The event had a twofold impact: firstly, alternative energy transit routes were developed that bypassed the territory of Russia. Secondly, Azerbaijan has actively joined these processes in order to establish an international legal security mechanism for cross-border energy transit. Thus, the state sovereignty and economic independence of Azerbaijan have gained true ground.

One of the most important necessities of the regulatory law on cross-border transit of energy resources as a domain of strategic cross-border cooperation is the formulation of a procedure for the peaceful settlement of interstate disputes related to energy transit. Peaceful settlement of international disputes related to cross-border energy Transit is one of the priority issues for states. The historical record of interstate transit disputes shows that there is a serious need to develop international legal regulations. In this regard, the safe and free transit of energy has become an exception to the territorial sovereignty of states for the purpose of international economic cooperation[5]. Above all, the concept and legal definition of the regulatory law on the transit of energy resources must be clarified. Customary rules of energy trade, especially in international trade, include tax issues, as well as the collection of direct and indirect taxes based on their classification. This classification is also related to tariff regulation and technical-administrative processes. It is important to determine what type of energy is transported to the territory of third countries during the energy transit. Therefore, defining the concept of energy resources is as important as defining an energy security policy[6].

[4] AGASI, K. The contract of the century and its long-term implications on the development of Azerbaijan. *Studia Orientalnie.* 2014, nr 1 (5), ISSN 2299-1999, pp. 138–139.

[5] SADIGOV, A. *International economic law*. BSU Publishing House, 2008, pp. 258.

[6] KROES, N. *More competition and greater energy security in the Single European Market for electricity and gas*. Berlin, 30.03.2007, pp. 11.

3. A fundamental understanding of natural resources in International law

The role of energy in modern human life is paramount. Therefore, specific legislation, international agreements, and technical and health standards have been accepted in the fields of its use, production, and transportation. In this regard, the energy sector has been undergoing rapid development. The specificity of energy as a subject of legal regulation has also brought up interstate cooperation by covering complex international problems related to natural resources as a whole[7].

Energy manifests itself through the utilization of energy resources. The energy has to be processed and get its final form before it enters into utilization. In general, energy resources are considered useful kind of natural resources which serves the benefit of the economy. Another feature of energy is its transition from one form to another, which requires consideration of relevant legal features in the regulation of energy relations[8]. Sometimes energy resources are equated with natural resources, though they are in a different category of energy. The use of energy resources forms a certain area of activity – the energy sector. Energy is a means and a system for the transformation of natural resources into final consumer commodities that determine the quality of life of society. Subsequently, energy resources possess qualities different from natural resources. Natural resources are the sum of the physical existence of any natural elements of the environment that meet human needs. Moreover, they are also limited by location, natural-geographical, legal and other characteristics. Resources start with one form and extend into another form through chemical processes. Natural resources also produce a) primary and b) reproduced energy resources.

Primary energy resources are divided into renewable and exhaustible sources (non-renewable). Renewable energy includes solar, geothermal and gravitational energy, wind, waves, high tides, ocean currents, biomass, hydropower, etc. Hydropower is the most important type of renewable energy. The use of renewable energy attracts more investment due to concerns over environmental protection. The regulatory measurements in financial, economic, technical, and legal aspects of state strategies towards energy sectors are gaining momentum when examining domestic legislation of the states. However, even though developed countries are more likely To be successful in implementing decarbonization policies with the help of modern technologies and supplying the end users with their energy

[7] KATİNKA, B. *Green, safe, Chear. Where next for RU energy policy?* Centre for European Reform, 2011, pp. 14.

[8] BARKER, T. How Relevant are Today's Energy Efficiency Technologies to Deployed Military Bases? *Energy Security: Operational Highlights*. 2013, No 2, pp. 13.

needs via renewable energy means, developing countries still have economic, technological, political, and in particular, legal obstacles to transforming their fossil-based energy use to renewable energies. Thus, further development and improvement are necessary for their legal structures to ensure such states get impressive results.

Exhaustible sources are coal, peat, oil, natural gas, nuclear fuel, and so on. Primary exhaustible sources include the fuel forms that are generated from energy resources. Fuel forms include solid (enriched grey coal, coke), liquid (diesel fuel), and gas (natural gas, liquefied gas) reserves. Renewable and exhaustible sources generate reproducible energy commodities. Reproduced energy commodities obtained from both renewable and exhaustible energy sources are electricity, thermal energy (steam, hot water) and others.

The first provision of the Energy Charter Treaty systematically defines energy substances and products[9]. The term Energy Substances and Products also clarifies what constitutes the concept of Economic Activity in the Energy Sector. This economic activity includes the exploration, production, processing, production, and storage of energy substances and products and their transportation, transmission, trading, and sale, as well as a supply of energy to consumers.

Nuclear energy, coal, natural gas, oil and oil products, and electricity are identified as the types of energy in Annex I: Energy Materials and Products to the Energy Charter Treaty[10]. All types of energy resources are also categorized into subgroups. For instance, uranium, heavy water, radioactive isotopes and other products are listed as subgroups of nuclear energy. Oil and gas products are grouped into one category due to their quality of utilisation. Although the Energy Charter Treaty has provided grounds for the adoption of a spate act for the regulation of nuclear energy issues, it has not been possible to conclude it successfully. This implies that the Energy Charter Treaty still regulates oil and natural gas as the primary energy sources.

The Energy Charter Treaty envisages underground energy resources. The treaty states that these reserves are accepted as natural resources. Article 18, paragraph 3 specifies that each state has the right to determine a geographical area within its territory for the purpose of exploration and production of these energy resources. The general concepts of the Treaty are to identify "energy resources" as "natural resources". However, such use of concepts related to energy resources cannot be considered completely successful due to the fact that "natural resources" encompasses a much broader understanding[11].

[9] The Energy Charter Treaty, Article 1, point 4, 1994.

[10] Annex EM I: Energy Materials and Products to the Energy Charter Treaty, 1994.

[11] BAMBERGER, S. Overview of the Energy Charter Treaties / Energy Charter Treaty. *A Path to Investment and Trade for East and West*. 2002, pp. 56.

4. The regulatory and legislative framework of energy resources in the Republic of Azerbaijan

A characteristic feature of the energy legislation of the Republic of Azerbaijan is that it refers to the Agreement on the European Energy Charter (1994) in terms of the terminological regulation of energy resources. The classification of energy resources as put forward in the Energy Charter Treaty Annex has gone through approximation into domestic legislation by the signatory states. For example, the Law of the Republic of Azerbaijan on Energy of 1998 adopted the relevant Annex which is in line with the Annex of the Energy Charter Treaty. The Republic of Azerbaijan also adopted the nomenclature of energy products and other goods upon the ratification of the Energy Charter Agreement in 1997[12].

Article 2 of the Law on the Use of Energy Resources[13] defines oil, oil products, gas, electricity, water, nuclear energy, renewable and other energy carriers used in accordance with the current level or development of energy technology. In this regard, domestic legislation has adopted international law as a source of law. Article 3 of the Law states that the legislation of the Azerbaijan Republic on the use of energy resources consists of this Law and other normative legal acts of the Azerbaijan Republic, adopted in accordance with this Law, as well as international agreements. Article 1 of the Law also identifies the transportation or transmission of energy materials and products by means of rail, land roads, and waterways, as well as the means of transportation. Pipelines and power transmission lines are recognised as an inalienable part of the energy infrastructure. Nonetheless, it also excludes the facilities used to transmit communication signals.

International transportation of energy resources through pipelines is one of the most strategically important issues for states. However, most developing countries regulate this issue under civil law. The scope of the norms on the international transportation of energy resources based on energy contracts is also specified in the Civil Code[14] of the Republic of Azerbaijan.

[12] Decision of the Cabinet of Ministers on the rates of customs duties for export-import operations in the Republic of Azerbaijan.

[13] Law of the Republic of Azerbaijan on efficient use of energy resources and energy efficiency.

[14] Civil Code of the Republic of Azerbaijan.

5. Historical background of the legal regulation of the transit of energy resources

The right to free transit gained prominence at a time when national states created barriers to international trade during the 16th–17th centuries. During this period, powerful states began to have a significant impact on international trade relations. More optimal routes for international trade, such as sea routes without passing through national-territorial jurisdictions, have been developed. The principle of freedom of the high seas has finally emerged with the United Nations Convention on the Law of the Sea, which was signed in 1982[15]. The convention establishes a global regime of public order in the world's oceans and seas, establishing rules for all uses of the oceans and their resources.

The need for international legal regulation of cross-border energy transit depends on a number of factors. These are a disproportionate distribution of energy resources geographically, physical properties of energy resources, transportation costs, the urge to diversify supply sources, the level of self-sufficiency, etc.[16] These factors significantly affect the options for transit, and their international legal interpretation.

Other sources of regulations for cross-border transit are the Convention on Transit Trade of Landlocked States[17], which was adopted in 1965 in New York, and the international agreement regulating the transit of energy resources was adopted in 1994 – the Energy Charter Treaty[18]. Article 7 of the Energy Charter Treaty also deals with the legal regulation of transits. The Treaty, as an international agreement, is the solution to the transit problems related to energy resources and also refers to the Convention on Transit Trade of Landlocked States. Article 5 of the Convention on Transit Trade of Landlocked States is related to the right use of transit and it strengthens norms set up in the Energy Charter Treaty. Before moving on to the analysis of cross-border transit in international treaty norms, it is necessary to comment on their legal nature.

The acceptance of transborder transit as a customary law or standard of an international treaty that operates in harmony with the sovereignty of states provides

[15] United Nations Convention on the Law of the Sea [online]. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[16] LANTERPASCHT, H. *The function of law in the International Community, (Reprinted)*. Oxford: Oxford University Press, 2012, pp. 44.

[17] U.N. Convention on Transit Trade of Land-locked Countries. TD/transit/9, 09 July 1965 [online]. Available at: https://www.cambridge.org/core/journals/international-legal-materials/article/abs/un-convention-on-transit-trade-of-landlocked-countries/72135C2432594993FAC63EE3AF370084.

[18] The Energy Charter Treaty, 1994 [online]. Available at: https://www.energychartertreaty.org/treaty/energy-charter-treaty

a solution to many problems. Although there are differing opinions among international lawyers on the legal nature of cross-border transit, the prevailing position supports it as customary law. H. Hrotsia, H. Lauterpact, I. Brownlie, D. Colombosa and others regard the free use of transit as a general norm of international law. As early as the 17th century, Hugo Grotius noted that there was a general rule of law regarding transit through the territory of another state for the sake of the unity of nations[19]. H. Lanterpascht has also held the same position and noted that the right to free use of transit exists regardless of any agreement, and the transit state must agree to any cross-border transit action in all cases.[20]

According to international law, the countries and regions through which international pipelines and power lines pass determine their legal status. In this case, it is important to determine the international legal definition of transit. When transit is connected to the territory of two states, it manifests an international nature. As there is no interest by third countries in cross-border transit, it is regulated in a simpler way in the international legal sense. The most important normative document and development of international legal regulation of cross-border transit of energy resources is the adoption of the Energy Charter Treaty. The treaty came at a difficult geopolitical time. It was adopted as a continuation of the policy formulated by the European Energy Charter. The Energy Charter Treaty was adopted in 1994 and enacted in 1998. It consists of a preamble, 50 articles, 14 annexes, and the Protocol on Energy Efficiency and Relevant Environmental Issues. Additionally, a draft Declaration on Electricity, the Peaceful Uses of Atomic Energy and the Safety of Nuclear Facilities and the Principles of Regulating Cooperation in regard to Nuclear Energy and the Protocol on Multilateral Transit Rules, as well as other numerous appendices were developed.

The Energy Charter Treaty covers the issues related to trade, investment and their protection, dispute resolution, access to energy resources, use, rules of capital and investment, liberalisation of energy trade. The treaty has put forward several specific procedural provisions that are exemplary and important for many international agreements in the energy sector. An international transit clause of the Treaty has been adopted to regulate the cross-border transit of energy resources. The main advantage of this clause over the other provision of international agreements on energy transit is that it aims at the elimination of monopolies in transit, the procedure for resolving disputes specifically. The Treaty also focuses on reconciling the interests of energy-producing, transit and (in most cases developed) energy importing countries in determining the cross-border transit regime.

[19] BAMBERGER, S. Overview of the Energy Charter Treaties / Energy Charter Treaty. *A Path to Investment and Trade for East and West*. 2002, pp. 57.

[20] LANTERPASCHT, H. *The function of law in the International Community (Reprinted)*. Oxford: Oxford University Press, 2012, pp. 44.

6. Energy Charter Treaty as the base model for international agreements

The treaty's cross-border transit regime is used as a model and mechanism of international legal regulation of oil, gas, and infrastructure. The transitional rules set out in the treaty are applied in both bilateral and multilateral intergovernmental agreements. The preamble of the Agreement among Azerbaijan, Georgia and Turkey (1999) on the transportation of crude oil through the territory of Azerbaijan, Georgia and Turkey via the Baku-Tbilisi-Ceyhan main export pipeline has adopted the model from the Energy Charter Treaty in international energy relations. It notes that the security, investment and other elements of oil and gas transportation systems among the states as well as other issues such as transit risks will be resolved in accordance with international economic law and the principles stated in the Energy Charter Treaty. The most important feature of the Treaty in the international legal regulation of cross-border transit is the identification of new directions and forms of cooperation for the future solution of the issues. In order to regulate international cross-border transit, a new draft agreement (protocol) was developed within the framework of the Conference on the Energy Charter as an institutional body of international obligations on cross-border transit stemmed from the Energy Charter Treaty. The Protocol was initiated by the Energy Charter Secretariat, the G-8 States, the European Union and the Energy Council. Azerbaijan has actively participated in the proceedings of the working group on cross-border transit issues, which is established to conduct effectively the work of the Conference. Azerbaijan also constantly seeks closer cooperation with this group. Moreover, Azerbaijan has paid close attention to this project for its successful implementation of cross-border projects in order to ensure the unimpeded transit of its resources to world markets. The participation in the draft transit protocol allowed Azerbaijan to ensure the commercial and legal aspects of the transportation of oil and natural gas to the European single energy market through the BTC main oil export pipeline and Baku-Tbilisi-Erzurum (BTE) gas pipeline projects. It is not doubted that the Secretariat of the Conference on the Energy Charter has adopted the Intergovernmental Agreement on the Baku-Tbilisi-Ceyhan (BTC) as the main export oil pipeline, to which the Republic of Azerbaijan is a party, as an example of such international agreements. A new draft contract was developed as an appendix to the Energy Charter Treaty. The Multilateral Transit Protocol consists of 34 articles and various explanations.

The international agreements on the export of hydrocarbon resources of Azerbaijan to the world market constitute a special category of international agreements on the cross-border transit of oil and gas. Since the beginning of

its independence, Azerbaijan has begun to achieve its political and economic sovereignty over energy policy. This forced Azerbaijan to cooperate with neighbouring countries in this direction in order to provide access to international markets and resolve the transit issue. Azerbaijan does not have direct access to the world's oceans. Therefore, it, as a landlocked country, it has always preferred the most efficient and politically viable routes to bring its natural resources to the world market. The culmination of these policies was the OSCE Summit in Istanbul On November 18, 1999, an Agreement was signed on the transportation of crude oil through the territories of Azerbaijan, Georgia, and Turkey via the Baku-Tbilisi-Ceyhan main export pipeline, that construction began in September 2002 and was completed in 2004[21].

The contract on BTC does not seem to have such a broad structure at first glance. It consists of 10 articles and various supplementary documents. In addition, the importance of the agreements between the governments of the countries with transit territories and the participants of the Main Export Pipeline should be emphasised. The Preamble of the Intergovernmental Agreement emphasises the interstate nature of the project and guarantees that the right to use the territory of participating countries for transit purposes, which are enshrined in the Energy Charter Agreement, will be ensured. This agreement was crucial in bringing the oil products to the world market, an obligation Azerbaijan has taken on under the Contract of the Century signed on September 20, 1994.

There are also exceptions to domestic legislation in relation to international agreements. The place of international agreements in the system of normative legal acts included in the national legal system is reflected in Article 151[22] of the Constitution of the Republic of Azerbaijan, which was adopted on November 12, 1994, with a public referendum. This article states that international agreements prevail in the event of a conflict between normative legal acts included in the domestic legislative system of Azerbaijan and interstate agreements to which Azerbaijan is a party, with the exception of acts adopted by referendum. Article 151 of the Constitution also reveals that interstate international agreements have legal force over all other normative acts, including laws, decrees, and normative acts of the central executive bodies of Azerbaijan, except for the Constitution and other acts adopted by referendum. The goal of this article is to resolve any potential inconsistencies between Azerbaijan's normative legislative acts and the rules established by international agreements.

[21] FOMENKO, O. *Energy Diplomacy of Our Time*. 2003, pp. 46.

[22] Constitution of the Republic of Azerbaijan, Article 151 [online]. Available at: https://president.az/en/pages/view/azerbaijan/constitution.

7. Conclusion

The general principles of international law must also be taken into account in the international legal regulation of cross-border energy transportation. Cross-border transit operations should be carried out in accordance with the principles of "sovereignty of states over natural resources" and "sovereign equality of states". One of the main sources of international law is Articles 1 and 4 of the UN Charter. They state that all the member states of the UN possess sovereign equality, and they shall refrain from forces threatening the political independence or territorial integrity of any other state in a manner that is inconsistent with the purposes of the United Nations.

State sovereignty is such an important principle in regard to the cross-border transit of energy resources that no contract is concluded without expressing this principle. A special article was dedicated to state sovereignty, taking the sensitivity of states in the energy sector into account in the Energy Charter Treaty. The Final Act of the Conference on the Energy Charter states that the Contracting Parties recognise the sovereignty of the States and their sovereign rights in respect of energy resources and reaffirm their sovereignty and the exercise of sovereign rights in accordance with international law. All States reserve the right to determine the exploration and exploitation of energy resources in their territories, as well as the method and speed of exploitation, taxes and other financial payments, the safety of exploration and the protection of the environment, and identification of the geographical area for energy exploration with direct participation or through state enterprises (Article 18) [23]. This article also applies to the cross-border transit of energy resources. Even when transit is considered a norm, its formation requires the sovereign will of states, and there is a need to express this principle in a contractual manner.

State sovereignty is the basis for other principles in the cross-border transit of energy resources. For instance, the transit country has the authority to take measures to restrict transit in the event of a threat to energy systems. This situation has already formed the general rule of international law. States can exercise their sovereign rights, such as nationalising transit infrastructure, in order to protect domestic energy markets. As is known, the principle of international and state control over the movement of capital implies the right of each state to regulate and control foreign investment within its national jurisdiction in accordance with its domestic legislation and the norms of international law[24].

[23] Part IV: Miscellaneous Provisionsand, the Energy Charter Treaty, 1994.

[24] MAMMADOV, R. F. *Caspian Sea oil transportation routes on the basis of international law, International importance of the Baku-Tbilisi-Ceyhan oil pipeline*. Baku, 2002, pp. 220–221.

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REVIEWS & NOTES

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Event note: Jean Monnet Scientific Conference: *European Union's Response on the Challenges of Modern Society*

Olomouc, 26th – 27th April 2023

By
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On 26 and 27th April 2023 Jean Monnet Network: European Union and the Challenges of Modern Society organized an international conference that took place at the Faculty of Law, Palacký University in Olomouc, Czech Republic. It was an event presenting cutting-edge research dedicated to the most salient issues related to digitalization, robotization, cyber security and effective resilience against hybrid threats in the light of European law, which was conducted within the Jean Monnet Network framework: unique cooperation between Palacký University in Olomouc (Czech Republic), Taras Shevchenko National University of Kyiv (Ukraine), Comenius University in Bratislava (Slovakia), Tallinn University of Technology (Estonia) and Heidelberg University (Germany). The event was hosted by the Jean Monnet Centre of Excellence in EU Law at the Faculty of Law, Palacký University Olomouc, and conducted in cooperation with the Czech Association of European Studies. The Conference was a key closing event of the international research project led by Prof. Naděžda Šišková, head of Jean Monnet Network.

The agenda of the event was highlighted by the progressive development of AI and ongoing Russian aggression against Ukraine, which added urgency to the presented topics that were of interest to a large audience: about 100 experts from academic institutions or state administrations of various countries, international organizations, diplomats, practitioners, NGOs and of course students. The importance of the event was reflected also in the welcome address by Dr. **Ivan Bartoš**, Deputy Prime Minister for Digitalization and Minister of Regional Development of the Czech Republic, Dr. **Zdenka Papoušková** – the Vice-Rector of Palacký University in Olomouc and Prof. **Václav Stehlík** – the Dean of the Faculty of Law, Palacký University in Olomouc. The conference was opened by the speech of Prof. **Naděžda Šišková**, Head of Jean Monnet Centre of Excellence in EU

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Law and President of the Czech Association for European Studies, who chaired the first panel. In her opening remarks she discussed the main legal challenges connected to Artificial Intelligence.

Dr. **Petr Kolář**, Former Ambassador of the Czech Republic to Russia and former Ambassador of the Czech Republic to the USA provided excellent retrospective analysis before responding to the question: Was the Russian War against Ukraine Inevitable? Could We Avoid It? What Is the Lesson Learned? His contribution provided various views, including a critical assessment of the Western perspective, including the response of the EU. His conclusions were developed by the professor **Volodymyr Vasylenko** from Kyiv Mohyla University who served also as the former Ambassador of Ukraine to Great Britain and was a former member of the International Criminal Court for former Yugoslavia. Prof. Vasylenko dedicated his contribution to the Russian Hybrid War Against Ukraine and the Model of its International Responsibility for Crime of Aggression. He stressed the fact, that hybrid warfare is not covered by international law and that Russia has been conducting hybrid warfare against Ukraine since 1920. He provided details about for types of hybrid warfare against Ukraine, notably linguist-cultural war, propaganda war, history war, and confessional religious war before suggesting steps to renew peace in Eastern Europe. Prof. **Peter-Christian Müller-Graff**, Head of the Chair for Economic and European Law, Faculty of Law Heidelberg University, President of the German Association of European Community Studies talked about "Legal Implications of the Current Question of the European Union´s Strategic Sovereignty". His brilliant analysis revealed the foundations and determinants for the EU strategic sovereignty in the EU primary law as relevant for individual strategic areas including energy, trade, or defense. Dr. **Ondřej Filipec** from Palacký University in Olomouc concluded this panel with a retrospective analysis of the EU-NATO cooperation in hybrid threat prevention and cybersecurity, which was strongly inspired by the new institutionalism.

The second panel of the conference, entitled "Digital Technologies and Human Rights. Case-law in the Field of Fundamental Rights in the Light of Modern Technologies. Charter of Fundamental Rights of the EU and the New Rights", was opened by Dr. **Emil Ruffer**, Director of the International Law Department, Ministry of Foreign Affairs of the Czech Republic, who dedicated his presentation to case studies of the Council of Europe and its contribution to the AI Convention. The presentation entitled **"**From CAHAI to CAI and Beyond – The Process of Negotiation the Convention on Artificial Intelligence in the Council of Europe's Intergovernmental Committee 2019-2023 provided a unique expert insight into the topic including the political background of the inter-governmental working committees of experts. The panel was followed by Dr. **Ondrej**

Hamuľak, Department of International and European Law, Vice-Dean, Faculty of Law Palacký University who prepared a contribution with **Lusine Vardanyan** and **Hovsep Kocharyan** about the right to internet access. In the contribution, they presented the pros and cons of establishing a new fundamental right, including possible consequences, leaving the question open: internet access is not only a simple platform but at the same time, it is not an independent human right itself. Dr. **Soňa Matochová**, Head of the Analytic Department, Czech Data Protection Office talked about the "Current Issues of Artificial Intelligence and Human Rights." In her analysis, she focused on obstacles in creating a perfect regulation in the EU while providing very deep and practical insight into the issue. The panel was concluded by two Ph.D. candidates from the Faculty of Law Palacký University. **Hovsep Kocharyan,** spoke about the Key Challenges of the Application of the Right to be Forgotten in Post-GDPR EU Law and **Martin Mach** dedicated his contribution to the Judgement of the European Court of Justice in case C-460/20 in the Context of Photographs on social media.

A special panel was dedicated to the Issues of Robotization and its Challenges: AI Liability, Prevention of Risks, AI, and Human Rights. Prof. **Marie Patakyová**, from the Department of European Law, Faculty of Law Comenius University in Bratislava, spoke about the algorithmic collusion and provided some proposals *de lege ferenda*. She stressed the issue that sometimes algorithms are used to adapt the price for the consumer without its knowledge which can be revealed by analysing the code. The solution may come in the form of international agreements or the existence of some authority proactively searching for such types of algorithms. Prof. **Jozef Andraško**, the Vice-Dean, and Director of the Institute of Digital Technologies and Intellectual Property, from the Faculty of Law, Comenius University in Bratislava, spoke about "Automated Vehicles and Incident Notification". Connecting practical issues with legal regulation, prof. Andraško discovered several flaws in the existing system and very important questions to be answered, including those of liability over fully automated vehicles. Dr. **Agnes Kasper** from the Department of Law, Tallinn University of Technology, entitled her presentation "Bug off! – The implications of cybersecurity duty of care." She focused on bugs and vulnerabilities in digital products and their implications for security in the increasingly complex products. She discussed the "duty of care" approach and the responsibility of authorities, which will probably require deeper integration and synchronization of policies among ENISA, European Commission, or EDA.

Dr. **Maria Claudia Solarte Vasquez**, Senior lecturer, Department of Law, Tallinn University of Technology spoke about Transaction Design and Human Centred Automation while providing a very comprehensive overview of the trends, including technology development and socio-economic development

which are bringing new questions regarding converging tracks in AI technology governance, which shall be based on human-centric approach. The final speaker of the day was **Bohdan Pshenichnyi** from the Institute of International Relations, Taras Shevchenko National University of Kyiv, who talked about the "Legal Principles of Use of Artificial Intelligence in Public Sphere". His presentation was dedicated to the overview of principles, including the principle of transparency and protection. He spoke about setting up minimum standards for ensuring security of the AI-related use.

The second day was opened by the panel focusing on Competition Law in the Digital Economy. **Nikola Ledvinková** from the Cartels and Payment Services Department of the Office for the Protection of Competition spoke about the practice of the Czech Competition Authority in dealing with digital technology. First, she introduced tools for investigation including Dawn raid, NUIX, and program UFED, and continued with tools for detection, including projects called Computational Antitrust or Datacros II, which are aimed to reveal Bid rigging – an anti-competitive agreement between potential bidders to manipulate the bidding process. She provided insight into several interesting cases including Seznam.cz, Borgis, CETIN and Nej.cz. Dr. **Ondřej Dostal**, Head of Competition Compliance Unit, Legal Services Department, CEZ Group, spoke about the Digital Economy in Corporate Antitrust Practice. His contribution focused on antitrust corporate practices depending on the type of the business and enriched the audience with thoughts on cartelization via algorithms, market (non)transparency, or vertical restraints such as priority placement or abuse of (quasi) dominance by gatekeepers.

Also prof. **Michal Petr**, Head of the Department of International and European Law, Palacký University, provided an interesting contribution entitled "Parallel Competences in Digital Markets: Competition Law, Sector Regulation and *Ne bis In Idem*". His excellent analysis resulted in comparing the Digital Markets Act application with the potential parallel application of the competition law in the ne bis in idem context. The scope and intervention were summarized in a very effective table, showing competition, sector, and DMA effects in the scope and intervention, including ex-ante obligations under sectoral and DMA regulation. The last speaker of the section was Prof. **Kseniia Smyrnova**, Vice-Rector, Taras Shevchenko National University of Kyiv. She spoke about the EU–Ukraine association due to the candidate status with a special focus on the steps forward integration to the digital market. She provided valuable insight into the process, including evaluation from the side of the European Commission and the attitude of Ukraine and its authorities, including the Supreme Court of Ukraine. She stressed, that the Supreme Court of Ukraine ruled out last year in gas and energy law, that decisions of the EU Court of Justice may be directly applicable in such

cases, which are built up under the EU law which makes Ukraine an interesting example of Europeanization.

The panel on Cyber Security, Cyber Crimes and the Legal Instruments for Effective Resilience was opened by Dr. **Pavel Telička** from Crossroads Consulting who served as former Commissioner and former Vice-president of the European Parliament, who talked about the Cybersecurity Challenges in the Background of Russian Aggression. During his opening remark, he stressed the multidimensional nature of the cybersecurity challenges is affecting business, intelligence, and many other areas with practical examples. His contribution was supplemented by the prof. **Lyudmila Falalejeva**, and Dr. **Bohdan Strilets** from the Koretsky Institute of State and Law of the National Academy of Science of Ukraine. They talked about the legal Regulation of Cyber Security in Markets in Crypto-Assets and new challenges for the EU. Both authors started with an analysis of the current situation of markets in crypto assets and an overview of existing legal tools, their effectiveness, and gaps. **Eva Klusová**, from the Might of Flight, spoke about the dangers of contemporary pro-Russian propaganda, which is being tailored to specific target groups. She presented vulnerabilities of several groups' lone seniors, inexperienced youth, spiritual stay-at-home or fixed mindsetters/know-it-all.

The last speaker of the section was Prof. **Anna Hurova**, Research Fellow at the Littoral, Environmental, and Society Department of the Scientific Research National Centre in Paris, who focused on Cyber Security as a Challenge for the Future of Space Activity. She mentioned the software as a necessary part of the satellite services and provided an overview of cyberattacks targeted at the satellites including economic and technological implications of satellite protection. on the economic and technological aspects of satellite protection.

The last section was dedicated to Consumer Protection in the online World. Prof. **Blanka Vítová**, Vice-Dean, Faculty of Law, Palacky University, spoke about the Selected Aspects and Challenges in Consumer Protection in the Digital Era. Her summarizing contribution was an excellent analysis of key challenges (e. g. transparency and security, safety of products, the role of intermediaries, information asymmetry, unclear conditions, and personalization of sale) and opportunities (e.g. technology, flaws detection, education, collaboration). Dr. **Rita Simon**, a researcher at the Institute of the State and Law of the Czech Academy of Sciences, was speaking about the Key Challenges of the Implementation of Directive 2019/770 On Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services. She spoke about the challenges of legislative procedure as the Czech legislator was unable to comply with the implementation and provided an overview of the main changes brought by the DCS Directives, including defining the essence of digital content and digital

services. Dr. **Ivan Ivančík** from the Faculty of Law, Comenius University in Bratislava, presented the contribution entitled: "*Vigilantibus iura scripta sunt*. Consumers and Data Protection in on-line World." He started with a focus on data processing as covered by the GDPR and the necessity of processing in the public interest and legitimate interest.

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