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COMBATING TRAFFICKING IN HUMAN BEINGS (SEXUAL EXPLOITATION) IN EU LAW: CURRENT CHALLENGES / Andrej Beleš

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This paper was prepared as part of the project APVV-16-0471 with title: "*Sexual abuse of children and entrusted persons.*"

Abstract: *Trafficking in human beings is a serious organised crime that appears in several forms. Sexual exploitation is the most common form of trafficking in human beings. The European Union combats sexual exploitation by harmonising substantive criminal law (Directives 2011/36/EU and 2011/93/EU) and certain procedural issues and by actively enforcing its policies. Nevertheless, the statistical data from the Member States concerning this crime indicate that the fight against this serious social phenomenon is not sufficiently effective. The European Commission has proposed a reform of Directive 2011/36/EU, but several aspects of this reform are insufficient and problematic.*

Key words: *Trafficking in Human Beings; Sexual Exploitation; Prostitution; Organised Crime*

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1. TRAFFICKING IN HUMAN BEINGS

Organised crime significantly disrupts the rule of law environment. This applies not only to forms of organised crime, which are parasitically connected to state authorities and which are connected to corruption, tax crimes, and crimes related to public procurement.

The essence of the rule of law is also significantly threatened by the so-called classic forms of organised crime, which replaces the market environment with goods or commodities whose trading is prohibited.

Trafficking in human beings satisfies illegally a demand in the market that could not be satisfied by legal means. It is one of the "classic" forms of organised crime that responds to market demand in a systematic and sophisticated way, with social group role sharing and illegal channels - alongside illicit trafficking in weapons, narcotics and psychotropic substances, human organs, etc. (e.g., Dianiška, Strémy and Vráblová, 2016, p. 339). This distinguishes these forms of organised crime from the so-called parasitic forms of organised crime, which focus mainly on the illegal withdrawal of funds from public budgets (tax fraud, damage to the financial interests of the European Union, corruption).

While trafficking in human beings is a profitable form of illicit business for perpetrators, it is a criminal activity that mainly involves the use of violence, the threat of violence, the threat of other serious harm, the abuse of a defenceless or otherwise vulnerable position, deception, lethality, restraint of liberty or other forms of coercion.[1] Trafficking in human beings is thus a violent crime that intensely affects the fundamental rights and freedoms of victims. In particular, the prohibition of slavery and forced labour under Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and under Article 5 of the Charter of Fundamental Rights of the European Union (the Charter). These crimes may also violate the right to liberty and security of the person (Article 5 of the Convention, Article 6 of the Charter) as well as the prohibition of torture, inhuman or degrading treatment (Article 3 of the Convention, Article 4 of the Charter).

There are several different forms of trafficking in human beings or purposes for which trafficking takes place. However, these forms do not include smuggling. Indeed, smuggling consists in the covert and unlawful cross-border transport of persons, which may involve interference with fundamental rights (in particular the right to liberty) or various forms of fraudulent conduct. In contrast, trafficking in human beings (apart from the possible covert transport of persons) is **associated with the 'use' of persons to carry out various activities, to which they are forced by various forms of violence**. Therefore, human trafficking tends towards the use of a person for forced labour and is also referred to as a modern form of the "classical", i.e. old global slave trade (Orosz, Svák et al., 2021, p. 220; Mano, 2017, pp. 40-41).

As trafficking in human beings is both a serious violent crime and the form of crime most often committed across borders, trafficking in human beings is included among the so-called European crimes for which the Council and Parliament are empowered to harmonise, through minimum rules, the definition of offences and sanctions. On this legal basis, Directive 2011/36/EU on preventing and combating trafficking in human beings was adopted (e.g., Klimek, 2011). Given the prevailing forms of trafficking in human beings, this crime should also be materially seen in the context of commercial sexual abuse of children (e.g., Jelínek et al., 2019, p. 107), which is the focus of Directive 2011/93/EU on combating sexual abuse,[2] which was adopted in the same period.

In addition to the above-mentioned substantive elements, Directive 2011/36/EU harmonises the bases for the criminal liability of legal persons in relation to trafficking in human beings, the seizure and confiscation of the proceeds of this crime, the exclusion of prosecution of the victim if he or she commits a crime in connection with being a victim of trafficking in human beings, the basic procedural attributes of the investigation and prosecution of the crime (including the right to an effective investigation, which also constitutes a procedural aspect of the State's positive obligations under the guarantees of the fundamental rights and freedoms of the State; see Čentéš and Beleš, 2022), support and assistance to victims of trafficking offences, including their protection during prosecution, special provisions in relation to the protection of child victims, and the

[1] See e.g. the criminal offense of human trafficking according to § 179 of the Slovak Criminal Code or according to § 168 of the Czech Criminal Code. These provisions (among other provisions of CC) – including the enumeration of the forms of conduct by which the offender forces the victim to do or suffer something – constitute a transposition of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, pp. 1–14).

[2] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, pp. 1–14).

prevention of trafficking in human beings. Some of the mentioned provisions of the Directive have lost their relevance in a partial sense, given the later more detailed harmonisation of some specific procedural aspects of the investigation and prosecution of criminal offences (Article 82 TFEU).[3]

In addition to the above-mentioned legal acts, the fight against trafficking in human beings is also partially related to:

- Directive 2009/52/EC on sanctions against employers who unlawfully employ third-country nationals,[4] in particular in relation to migrant third-country nationals who are victims of trafficking in human beings;
- Directive 2004/81/EC on permanent residence permits,[5] which allows Member States to issue permanent residence permits to victims of trafficking in human beings, with access to the labour market and study opportunities, so that these victims can break off contact with organised crime structures and cooperate with law enforcement authorities in the long term;
- Directive 2013/33/EU laying down standards for the reception of applicants for international protection;[6] this Directive (Articles 21 and 23) obliges Member States to take special account of the situation of applicants for international protection where they are vulnerable victims of trafficking and States are obliged to take into account the safety and security when assessing the best interests of a minor if the minor has been trafficked;
- the Europol Regulation,[7] which is important from a criminal procedural point of view, as under this legislation the investigation of trafficking in human beings falls within Europol's remit;
- certain proposals for legislation in the sphere of secondary law, which the Commission has submitted to the legislative procedure in 2022;
    - in particular, the proposal for a directive amending Directive 2011/36/EU;[8] this proposal for an amending directive makes it compulsory for Member States to criminalise the use of services provided by victims of trafficking in human beings, extends the list of forms of trafficking in human beings to be criminalised (forced

[3] This primarily concerns:
1. standards of protection, support for victims of crime and their compensation, as this area is specifically harmonised by the directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, pp. 57–73).
2. the seizure and confiscation of proceeds derived from trafficking in human beings, as the details of confiscation are harmonised by Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, pp. 39–50).

[4] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168, 30.6.2009, pp. 24–32).

[5] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261, 6.8.2004, pp. 19 – 23).

[6] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013, pp. 96–116).

[7] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, pp. 53–114).

[8] Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. COM/2022/732 final.

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marriages, illegal adoptions), extends the obligations relating to the criminalisation of legal persons, etc. (see below);

- the proposal for a Directive on combating violence against women and domestic violence,[9] which also refers to the sexual exploitation (sexual abuse) of women as a legal basis under Article 83 TFEU; the proposal for a Directive complements the measures under Directive 2011/36/EU.

2. PROSTITUTION, SEX WORK AND SEXUAL EXPLOITATION AS A FORM OF TRAFFICKING IN HUMAN BEINGS

Forms of trafficking in human beings are characterised by forced begging and forced petty property offences, exploitation for forced labour, mainly in the textile, agriculture and tourism sectors (which also include construction, tourism, catering, nursing and domestic services) and, above all, the most widespread form of trafficking in human beings is sexual exploitation, which is closely linked to the practising of prostitution. Sexual exploitation is thus an act whereby the perpetrator coerces another person to engage in prostitution (or other activities that are part of the sex industry)[10] by various violent or fraudulent means, or the perpetrator coerces the person who engages in prostitution to provide material or immaterial benefits in return for real or perceived protection or other services.

It is now necessary to conceptually distinguish between the **concepts of prostitution and sex work**. In the past, in professional and scientific publications exclusively the term prostitution was used, and this term was identical in content to today's understanding of the term sex work. For example, Osmančík, who in the 1960s studied prostitution in the contemporary criminological context of Czechoslovakia, defined (1969, p. 92) defined the term as "a socio-pathological phenomenon consisting in the mass occurrence of the lending of one's own body to another person for practices which have sexual or erotic significance for the other person, whereby the lending of one's own body is motivated exclusively or predominantly by the desire to satisfy needs other than sexual needs, but especially material needs". Similarly, the criminologist Vlček (1975) viewed prostitution as sex work, stating that it is "the providing of extramarital sexual intercourse or other forms of sexual gratification by a woman or a man for reward (any material benefit) with frequent changes of partners". A criminological definition of prostitution, which was intended to denote sex work, was also attempted (albeit with several problematic elements) by, for example, Madliak (1991, p. 363). In his view, prostitution is "committed by one who, for remuneration or for the purpose of obtaining some advantage or interest, has sex or performs an activity for the purpose of sexual gratification of a partner, without an emotional relationship and regardless of the choice

[9] Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence. COM/2022/105 final.

[10] In terms of the collection and evaluation of statistical data on sexual exploitation in the territory of EU Member States, the concept of sexual exploitation is broadly defined (see Eurostat, Statistical Working Papers, Trafficking in Human Beings, 2015 Edition, p. 29). In the context of violent or fraudulent conduct, the term is intended to include:

- all types of prostitution, in particular street prostitution, window prostitution and prostitution in brothels, hotels and private houses (so-called private flat prostitution), escort prostitution, segments related to modelling that lead to the provision of services corresponding to prostitution,
- strip clubs and bars,
- the pornography industry,
- massage services,
- other or unknown.

of the partner." The criminological identification of the terms prostitution and sex work by a multitude of other definitions with different nuances.[11]

It is clear from the above definitions that the conceptual identification of prostitution and sex work can be **stigmatising** for those who perform sex work and thus provide sex services. Indeed, if a person provides sexual services voluntarily, which may sometimes be under pressure from certain personal adverse life circumstances, the designation of such persons as prostitutes may act as a stigma. In the definitions given above, the term prostitution has an *a priori* negative connotation, since it is supposed to be a '*socio-pathological phenomenon*' in which '*one's own body is lent out*' and there is frequent changing of partners '*without an emotional relationship*', i.e. promiscuous behaviour, *'regardless of the choice of partner'*.

Therefore, it is appropriate to use the term sex work as a relevant term for the voluntary provision of sexual services for compensation in the current professional and scientific discourse. In comparison, it is appropriate to use the term prostitution in the sense of sex work only:

- in the historical context or research on historical legislation or research on the criminological aspects of sex work in the past, or
- if it is a contemporary context of sexual exploitation, i.e. prostitution – as the providing of sexual services for compensation – is carried out in the context of the use of violence, the threat of violence, fraudulent conduct or other actual or potential violent conduct by the perpetrator.

Prostitution, as a social and legal phenomenon of our times, must therefore be seen as an activity towards which the actions of perpetrators of sexual exploitation are directed, sexual exploitation being a form of trafficking in human beings. Simply put, from the current perspective, prostitution is an activity to which is directed a criminal offence (trafficking in human beings), whereas sex work is not linked with a criminal offence and is an activity of employment or self-employment.

This distinction can be supported by the harmonisation provisions of the legal acts of the European Union as well as the provisions of national law transposing these legal acts. According to Article 2 of Directive 2011/36/EU on preventing and combating trafficking in human beings, sexual exploitation means at least and above all the exploitation of other persons for prostitution. In the latter act, Article 2(d) of Directive 2011/93/EU on combating sexual exploitation defines the concept of child prostitution,[12] while Article 4 of that Directive requires Member States to criminalise the inducement, enticement or coercion of a child into child prostitution, the obtaining of benefits from such activity or other exploitation of a child in connection therewith, as well as engaging in sexual activities consisting of child prostitution. Prostitution in these acts is thus an activity that is the object of criminal offences (trafficking in human beings, sexual abuse), which Member States are obliged to criminalise and to provide for appropriate, effective and dissuasive penalties.

Of course, the professional and scientific debate on these issues is more varied and there are positions that consider all sex work to be essentially involuntary (performed in distress, under the influence of negative life situations, or under the influence of gender

[11] For example, Trávničková (1995, p. 12), similarly to Madliak, defined prostitution for the purpose of her research as "*a specific type of trade, where the aim and means of earning money consists in sexual gratification of another person, without emotional relationship and regardless of the choice of partner*".

[12] Child prostitution under this provision means „*the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether that payment, promise or consideration is made to the child or to a third party*".

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hierarchy),[13] and thus the distinction between prostitution and sex work loses its validity. Furthermore, in some countries where the practice of sex work is regulated by law (the '*reglementation model*', e.g., Germany),[14] prostitution is the legal term for sex work. For the purposes of this article, we use the **term prostitution in the context of sexual exploitation** as a serious unlawful activity.

Sexual exploitation as a form of trafficking in human beings is the most common form of trafficking in human beings, according to the Commission's First Report (2016),[15] Second Report (2018),[16] Third Report (2020)[17] and Fourth Report (2022)[18] on progress in combating trafficking in human beings[19] since 2008, when data from Member States on trafficking in human beings have been collected, and in recent years approximately 50 to 60% of the victims of trafficking offences have been victims of sexual exploitation.

According to the **First Report**, the Commission has set the following tasks and objectives in the area of combating trafficking in human beings, including sexual exploitation:

- in the field of criminal law
    - increase the number of prosecutions and convictions for the crime of trafficking in human beings,

[13] In the scientific research (among others in the context of feminist and gender criminology) two basic positions are basically profiled [summarised according to Havelková and Bellak-Hančilová (2014, pp. 12-13)]:

1. The position of sex work (as distinguished from prostitution), which is basically what we base our theoretical definition of sex work and prostitution on above. This position is established on the assumption that sex workers are free in their decision-making, i.e. they have the ability and opportunity to make and implement their decisions without (negative) external influences. From the perspective of this position, prostitution and sex work can be conceptually identified (but this is not necessarily the case). However, sex work, which is a profession, must not be stigmatised. This position advocates the decriminalisation of sex work (prostitution) and the adoption of legislation to regulate it. On the contrary, forced sex work (prostitution) must be criminalised (as sexual exploitation).
2. Position against sexual domination. This position is based on the vulnerability of those engaged in sex work/prostitution and their social disadvantage. Vulnerability and disadvantage mean that the decision to engage in or continue sex work/prostitution can never really be a truly free decision under the influence of negative circumstances (social and financial deprivation, history of family violence, addictions, etc.). These negative circumstances are aggravated by the performance of sex work / prostitution. Sex work/prostitution, according to this position, is seen as one of the consequences of gender hierarchy and sexual domination and is also one of the mechanisms to maintain them. This position seeks to eliminate sex work/prostitution by eliminating its legal regulation, prohibiting it, criminalising those who practice it, or criminalising customers.

[14] See German legal regulation *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz - ProstG)* of 2001 and *Gesetz zum Schutz von in der Prostitution tätigen Personen (Prostituiertenschutzgesetz - ProstSchG)* of 2016.

[15] Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. COM/2016/0267 final. **Hereinafter referred to as the "First Report".**

[16] Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. COM/2018/777 final. **Hereinafter referred to as the "Second Report"**

[17] Third report on the progress made in the fight against trafficking in human beings (2020) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. COM/2020/661 final, pp. 3-4. **Hereinafter referred to as the "Third Report".**

[18] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Report on the progress made in the fight against trafficking in human beings (Fourth Report). COM/2022/736 final. **Hereinafter referred to as the "Fourth Report"**

[19] The issuing of these reports is required under Articles 19 and 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings. The information is collected and provided by national coordinators (rapporteurs) or similar mechanisms in the Member States and subsequently provided to the EU Anti-Trafficking Coordinator.

    - prosecution of legal persons for this offence in order to reduce the abuse of legal business structures to cover up illegal activities,
    - the implementation of financial investigations in line with the recommendations of the Financial Action Task Force (FATF),
    - the application of other effective intelligence-based investigative tools that can provide a variety of evidence,
    - improving data collection on victims and perpetrators of trafficking in human beings;
- in the area of victim identification, victim protection and victim assistance
    - correct identification of victims and provision of assistance to victims at first contact (with the police); reducing the burden on victims (e.g., through repeated interrogations),
    - involvement of actors in the field of protection of women and children,
    - the involvement of the Schengen Information System in the cross-border exchange of information on victims of trafficking in human beings,
    - practical implementation of strong guarantees for victims that they will not be sanctioned as perpetrators;
- in the area of prevention
    - training of staff (especially 'frontline'), raising awareness of trafficking in human beings [Article 18(1) to (3) of Directive 2011/36/EU],
    - criminalisation of the use of services provided by trafficked persons [Article 18(4)], a measure recommended to Member States to reduce the demand that fuels trafficking; the First Report indicates that around half of the Member States have introduced such criminalisation; this is already being partially achieved by Directive 2011/93/EU, which obliges Member States to ensure that engaging in sexual activities with a child – in the context of prostitution – is a criminal offence;
- in the area of funding, the allocation of sufficient funds for the implementation of preventive measures, victim assistance measures, law enforcement activities, etc.

In the Second Report of 2018, the Commission declared the implementation of the "fight against the culture of impunity" and efforts to prevent trafficking in human beings. Compared to the First Report, the tasks and objectives have not changed substantially. The Commission again emphasised:

- the promotion of the criminalisation of the use of services provided by victims as an appropriate preventive tool to reduce the demand for trafficked victims, including sexual exploitation;
- the need to increase the effectiveness of prosecutions and convictions, as 'the overall level of prosecutions and convictions remains very low'; or to encourage the application of financial investigations also in relation to this crime;
- encouraging cross-border cooperation in the fight against trafficking in human beings and the creation of joint investigation teams, including with third countries (e.g., the Western Balkan countries);
- the need to support campaigns and educational programmes;

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- the need to provide support to victims, sufficient funding for this support, including granting residence in accordance with Directive 2004/81/EC.

The Commission's **Third report** (2020) also reflects these challenges and objectives and specifies some of the current challenges in combating trafficking in human beings. However, in the report, the Commission acknowledges that "*impunity for perpetrators persists in the EU and the number of prosecutions and convictions of traffickers remains low*." The Commission said that:

- specifically in the case of sexual exploitation, the gender aspect of this crime needs to be investigated and considered, focusing on the use of electronic communications in the recruitment of victims (grooming), the application of specific investigative techniques such as covert surveillance, internet surveillance, etc.;
- the link between migration and the risk of trafficking in human beings should be addressed, with particular reference to migrant women and minors;
- measures to reduce the demand for services resulting from trafficking in human beings should continue to be applied and expanded;
- the link between the internal and external dimensions of trafficking in human beings (with links to migration operations) must be addressed.

The Commission's **Fourth report** in 2022 expands on the findings in the sense of the third report and builds on the tasks and objectives set out in the previous reports. In this report, the Commission stated, inter alia:

- trafficking in human beings, including sexual exploitation (and prostitution), has been disproportionately affected by measures related to the covid-19 pandemic (restrictions on movement and travel, increased use of electronic communications); some effects of the pandemic are putting pressure on the demand for forced labour;
- restrictions on movement and travel have in many cases led to the isolation of victims with perpetrators;
- electronic communication (digital space) is increasingly used in all phases of trafficking in human beings; this allows perpetrators to acquire and dispose of more victims (conduct trafficking operations) remotely – a situation which poses a challenge for law enforcement authorities;
- the use of migration to recruit new victims has also been reinforced by the war in Ukraine since 24 February 2022;
- the findings in this and previous reports have led to a proposal to amend Directive 2011/36/EU, to increase financial support for the fight against trafficking in human beings, or are expected to lead to increased activity by the EU Anti-Trafficking Coordinator, who is promoting the Common Anti-Trafficking Plan in the context of migration and the war in Ukraine; this plan reflects the tasks and objectives set out in previous Commission reports.

3. IS THE FIGHT AGAINST SEXUAL EXPLOITATION EFFECTIVE AT THE EU LAW LEVEL?

Although the legal framework for the suppression of trafficking in human beings – in particular sexual exploitation – is relatively well developed at EU law level, as we have presented in the previous text, it is questionable whether national authorities, in cooperation with Europol, are succeeding in effectively suppressing this crime. This fact can be demonstrated by statistical data on the number of victims or potential or

convicted perpetrators of trafficking in human beings offences, with particular reference to the form of sexual exploitation.

These data are derived from the First Report to the Fourth Report from 2016 to 2022, related documents and reports from Eurostat and Europol. The data should be interpreted as indicators of trends (paradigms) and not as absolute values that can be used to accurately examine year-to-year variations or differences between Member States.[20] It should also be stressed that the numbers presented are based on records of registered victims and registered offenders, but the actual numbers are significantly higher; **the assumed latent crime rate[21] is high and may vary significantly from one Member State to another and from one year to another**. Statistically assessing the number of victims is more complicated than the number of perpetrators. The total number of victims consists of the number of so-called identified victims (i.e. victims who have been formally registered by law enforcement authorities and courts) and presumed victims (those who have not been formally registered by the relevant authorities but who meet the criteria under Directive 2011/36/EU).[22]

3.1 Statistics on the Number of Victims of Trafficking in Human Beings

The Fourth report from 2022 mainly includes registered data on the extent of sexual exploitation perpetration from 2019 and 2020, taking into account also the Covid-19 pandemic from 2020 to 2022 and social phenomena related to the war in Ukraine since 24 February 2022. In 2019 and 2020, a total of 14 311 victims of trafficking in human beings were registered in the European Union Member States, a higher number than in previous years, including 7777 in 2019 and 6534 in 2020. The proportion of women and girls was 63%, indicating that trafficking in human beings is a gender-specific crime. Around half of the victims of this crime are EU citizens.

Looking specifically at trafficking in human beings in the form of sexual exploitation (SE) over the period, the proportion of such victims was 51%, with the second highest proportion of exploitation for forced labour (28%). The form of sexual exploitation is even more gender-specific, as up to 87% of victims are female. Up to 22 % of the victims of sexual exploitation are children. The highest number of victims of sexual exploitation was recorded in the Netherlands, Romania and Germany. The above figures on victims are subject to certain changes over time, since the Directive 2011/36/EU was in the

[20] Increases or decreases in reported numbers of victims or perpetrators may be the result of legislative changes (e.g., changes in the definition of trafficking in human beings), changes in statistical methods or the application of new policies or initiatives. For example, the decrease in the number of victims in Spain between 2010 and 2012 (from 1605 to 234 and 125 respectively) is due to the legislative narrowing of the concept of victim. Similarly, the increase in the number of victims registered in the United Kingdom between 2011 and 2012 (from 331 to 1998 and 2145 respectively) is a consequence of the inclusion of 'potential victims' in the concept of victim (see Eurostat, Statistical Working Papers, Trafficking in Human Beings, 2015 Edition). The 2019 and 2020 statistical indicators (Fourth Report) no longer include UK data due to Brexit.

[21] The crime latency rate (i.e. the proportion of actual crime that is not registered, that does not come to light) varies considerably from one type of crime to another. The willingness to report crimes depends on the characteristics of the crime, the relationship between the offender and the victims as well as other factors (Gřivna, Scheinost and Zoubková, 2014, p. 35). The shift of a significant rate of trafficking perpetration to the online sphere (so-called cybercrime has a classically high latency rate) and the deepening of the victim's dependence on the perpetrator can significantly act to increase the latency rate of sexual exploitation.

[22] According to Eurostat, Statistical Working Papers, Trafficking in Human Beings, 2015 Edition, some Member States provide data on both identified and presumed victims (according to this report this was the case for 7 Member States), some Member States provide data only on presumed victims (3 Member States) and most Member States provide data only on identified victims (18 Member States). The data on the total number of victims includes both identified and presumed victims. The way in which the number of victims is reported has varied from period to period in the Member States, so the reminder above applies to any comparisons.

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legislative process (2010) or since the obligation for Member States to transpose the Directive expired (2013).

Table 1: Basic statistics on victims of trafficking in human beings in the European Union, with particular reference to sexual exploitation.[23]

	Assessment period	Total number of registered victims	Proportion of women and EU citizens	Share of victims in the form of SE	Share of women and children in SE
First report (2016), Eurostat THB (2015)	2010 – 2012	30 146	80 % (75 %)[24] / 65 %	69 %	95 % / 14 %
	2013 – 2014	15 846	76 % / 65 %	67 %	- / 6,5 %[25]
Second Report (2018)	2015 – 2016	20 532	68 % / 44 %	56 %	95 % / 23 %
Third Report (2020)	2017 – 2018	26 268 (EU-28), 14 145 (EU-27)[26]	58 % / 41 % (EU-28), 72 % / 49 % (EU-27),	46 % (EU-28), 60 % (EU-27)[27]	72 % (EU-27) / 14 % (EU-27)[28]
Fourth Report (2022)	2019 – 2020	14 311 (EU-27)	63 % / 53 %	51 %	87 % / 22 %

Based on the above comparison, it is clear that it is not possible to clearly identify an upward or downward trend in the absolute number of registered victims. The high

[23] Authors' work based on data published in the First Report, the Second Report, the Third Report and the Fourth Report and related documents: Commission staff working document accompanying the document Report on the progress made in the fight against trafficking in human beings (2016) ... {COM(2016) 267 final}; Commission staff working document accompanying the document Second report on the progress made in the fight against trafficking in human beings (2018) ... {COM(2018) 777 final}; Data collection on trafficking in human beings in the EU Final report – 2018 Lancaster University; Commission staff working document accompanying the document Third report on the progress made in the fight against trafficking in human beings (2020) ... {COM(2020) 661 final}; Commission staff working document Statistics and trends in trafficking in human being in the European Union in 2019-2020 ... {COM(2022) 736 final}.

[24] Here it is necessary to take into account the different data presented in the First Report and in the Eurostat report, Statistical Working Papers, Trafficking in Human Beings, 2015 Edition.

[25] The proportion of female victims of sexual exploitation was specified only by saying that it was a "significant majority". The data is summarised according to the First Report as well as the Situation Report Trafficking in human beings in the EU - Europol, 2016 (hereafter "Europol Situation Report 2016").

[26] At that time, the EU had 28 member countries, as the UK did not leave the EU until 31 January 2020. However, given the possibility and relevance of later statistical comparisons, it should be noted that the UK data fundamentally changes the overall statistics on the number of registered victims, as more than 46% of the total number of victims were registered in the UK.

[27] We refer to what we said in the previous note. It should be added here that the majority of registered victims of trafficking in the UK are victims of forced labour trafficking. Excluding the UK data, sexual exploitation clearly accounts for a clear majority of cases in terms of the number of victims. These facts are also reflected in the representation of women among victims, as there is a higher proportion of male victims in forced labour.

[28] The third report (and the related Commission staff working document ...) does not give a specific figure for the proportion of child victims of sexual exploitation, but the narrative describes it as a "significant figure". However, it is possible to calculate this proportion, as the report specifically on child trafficking (Commission staff working document ..., p. 34) states that children accounted for 22 % of all victims (EU-27) in the period in question, with 64 % of child victims attributable to a form of sexual exploitation.

number of registered victims between 2010 and 2012 and the subsequent decline may be due to changes in the definitions of victim in the individual Member States, the varying degree of cooperation between Member States in providing statistics. The rise in numbers between 2013 and 2018 may be due to the increased rate of identification of victims of trafficking in forced labour in the UK, which is clearly reflected in the absolute numbers of victims in the 2017 and 2018 reporting period, as the EU-27 (excluding UK statistics) shows almost only half the number of registered victims compared to the EU-28. This is also reflected in the proportion of sexual exploitation, which is clearly higher without considering the UK data (where victims were registered to a significant extent for the purpose of forced labour). Consequently, the high proportion of sexual exploitation is also linked to the high proportion of women in the total number of victims of trafficking.

The total number of victims across the EU-27 remains roughly the same between 2017 and 2020, while being substantially lower than in the periods under review between 2010 and 2016. This leads us to conclude that the elimination of latency (hiddenness of this crime) is not being achieved. Indeed, reducing latent crime rates (and achieving higher registration) is one of the fundamental prerequisites for successful crime suppression. Particularly in 2020, there was a slight decrease in the number of registered victims, which may be related to the covid-19 pandemic and the increased involvement of information technology in trafficking-related processes, including the recruitment of victims through electronic communication services and, consequently, the providing of victims to customers. In terms of the share of registered victims of sexual exploitation in the total number of victims, a gradual decrease can be observed (even at EU-27 level only), but this form of trafficking remains over-represented. However, this does not mean that sexual exploitation is less prevalent; on the contrary, sexual exploitation may be more likely to be committed covertly, including through electronic communication services. In terms of the countries of origin of victims, the inertia of the trend of migration of victims in an east-west direction can be observed, but due to the migration crises between 2015 and 2018, EU citizens were represented by less than half, and the electronicisation of the perpetration of crime and, from 2022 onwards, the war in Ukraine, enter into these trends. Thus, the victim data above does not suggest that the fight against this victim reduction crime has been significantly successful in the periods under review. The tasks and objectives set by the Commission in the First Report (Second and Third Reports) thus remain largely unfulfilled.

3.2 Statistics on the Number of Suspects, Prosecuted and Convicted Persons for Trafficking in Human Beings

From the four Commission reports presented, it is also possible to identify trends in relation to the number of suspects, prosecuted and convicted persons in EU Member States in relation to the crime of trafficking in human beings. In terms of the number of persons registered as suspected of having committed all forms of trafficking in human beings offences in EU Member States, this number rose to 15 214 persons between 2019 and 2020. The number of persons prosecuted in this period was 6,539 and the number of convicted persons reached 3,019. Overall, there was a clear predominance of males among suspects, accused and convicted persons: 74% (in each year: 73% and 74%). There were, however, individual exceptions: in Finland, women accounted for 53 % of the number of registered suspects, and in the Czech Republic women accounted for 53 % of the number of prosecutions and 67 % of the number of convictions. EU citizens clearly predominated among suspects, prosecuted and convicted persons (62%, 70% and 66% respectively).

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Just as sexual exploitation is the most prevalent form of all forms of trafficking in human beings in relation to victims of this crime, sexual exploitation is also the most prevalent form in 2019 and 2020 in relation to suspects, prosecuted as well as convicted persons. The proportion of persons suspected of sexual exploitation reached a rate of 65%, with the second highest proportion of persons suspected of forced labour (23%). Among those prosecuted, the proportion of those prosecuted for sexual exploitation was 70% (followed by forced labour with 19% of those prosecuted), rising to 86% and 87% in Finland and Spain, and 100% in Hungary. The proportion of persons convicted of sexual exploitation among all those convicted of trafficking in human beings was 63% on average, with the highest proportions in Latvia (82%), Spain (94%) and Finland (100%).

Table 2: Basic statistics on suspects, prosecuted and convicted persons for the crime of trafficking in human beings in the European Union, with particular reference to sexual exploitation.[29]

	Assessment period	Absolute number of registered suspects or persons who have come into contact with law enforcement	Absolute number of prosecuted persons	Absolute number of convicted persons	Percentage of persons suspected, prosecuted and convicted of sexual exploitation	Percentage of people with EU citizenship
First report (2016), Eurostat THB (2015)	2010 – 2012	12 760 / 5941[30]	8805	3855	71 %[31] / 73 %	69 %, 73 %
	2013 – 2014	6324	4079	3129	-[32]	-
Second Report (2018)	2015 – 2016	7503	5979	2927	78 % / 75 % / 72 %[33]	84 % / 87 % / -

[29] Authors' work based on data published in the First Report, the Second Report, the Third Report and the Fourth Report and other sources as for Table 1.

[30] The figures represent the total number of suspects in the EU according to the statistics on suspects by sex/age. Determining the total number of suspects at EU level for the three years is complicated because not all Member States have provided numbers of suspects by sex or nationality for all three years. See Eurostat, Statistical Working Papers, Trafficking in Human Beings, 2015 Edition.

[31] The figure is not representative due to the low number of Member States (10) that reported a statistical distribution of the number of suspects according to the form of trafficking in human beings. In addition, persons may be suspected of more than one form of trafficking in human beings.

[32] Neither the First Report nor other reports or documents (e.g., Europol Situation Report 2016) provide precise data on the share of sexual exploitation as a form of trafficking in human beings in the numbers of suspects, accused and convicted persons. However, these documents show that sexual exploitation is also the predominant form in these indicators.

[33] This figure comes from the report Data collection on trafficking in human beings in the EU Final report – 2018 Lancaster University, p. 15, 95 et seq.

Third Report (2020)	2017 – 2018	11 788 (EU-27),[34] 11 814 (EU-28)	6163 (EU-27), 6404 (EU-28)	2426 (EU-27), 2483 (EU-28)	77 % / 58 % / 54 %	68 % / 56 % / 71 %
Fourth Report (2022)	2019 – 2020	15 214	6539	3019	65 % / 70 % / 63 %	62 % / 70 % / 66 %

As the above data - taken from EU Member States' statistics - shows, there has been a gradual increase in the number of registered suspects over the periods under review. In our opinion, this - compared to the stagnation in the number of registered victims - is a sign of a positive trend in favour of eliminating the latency (hiddenness) of this type of crime in the EU. Also, in relation to the number of prosecutions, an increase can be noted between 2013 and 2020. However, no such clear trend can be identified in the number of convictions. The number of convicted persons decreased slightly between 2010 and 2018, but a slight increase was recorded between 2019 and 2020, bringing the share of convicted persons in the number of prosecuted persons to 46%. The numbers of suspects, prosecutions and convictions were not significantly affected by the exclusion of the UK from these statistics, although there was a significant reduction in the number of registered victims, as we have noted above. Nevertheless, throughout the period under review, the **numbers prosecuted and convicted remain relatively low** according to EU Member State statistics. This problem is particularly relevant to sexual exploitation, which remains the most represented form in the perpetration of this crime. The statistics also do not provide data on prosecuted and convicted legal persons. The **tasks and objectives set out by the Commission in the First Report** (and the Second and Third Reports respectively), which related in particular to the effectiveness of the use of criminal law instruments, **can not therefore be regarded as having been met**.

The prospects for improving these statistics remain unclear. In 2022, there are **additional threats** that encourage the spread of trafficking in human beings. The perpetrators of this crime have started to use the internet and social media to a much greater extent to recruit victims. The war in Ukraine and the related refugee crisis is another major factor contributing to the increase in trafficking in human beings. In addition, it should be considered that these figures only describe the state of registered crime. The actual number of crimes committed and victims of crime is much higher, as the reports themselves admit.

3.3 Statistics on the Numbers of People Suspected, Prosecuted and Convicted for Using Victim Services

At the end of the statistical data analysis, it is interesting to evaluate one more statistic. Given that Directive 2011/36/EU, as in force, leaves Member States discretion under Article 18(4) as to whether to criminalise the **use of services provided by trafficked persons**, the use of services is criminalised in some Member States. The data comes from 11 Member States and in 2019 and 2020 a total of 159 suspects, 46 prosecuted persons and 51 convicted persons were registered.

[34] As with data on numbers of victims, the Third Report (and the related Commission staff working document) distinguishes between statistics for EU Member States, including the United Kingdom, and those for Member States excluding the United Kingdom.

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Table 3: Basic statistics on suspects, prosecuted and convicted persons for the offence of using the services of a victim of trafficking in human beings in the European Union.[35]

	Assessment period	Number of EU Member States	Absolute number of registered suspects or persons who have come into contact with law enforcement	Absolute number of prosecuted persons	Absolute number of convicted persons
Second Report (2018)	2015 – 2016	–[36]	2	135	18
Third Report (2020)	2017 – 2018	11	170	162	153
Fourth Report (2022)	2019 – 2020	11	159	46	51

First of all, it should be noted that the number of Member States that have made it a criminal offence to use the services of a victim of trafficking in human beings remains low. Consequently, their indicative value is limited. In some Member States (e.g., Slovakia), a legislative change is being prepared which will criminalise the use of victim services. The statistics presented are volatile and inconsistent: there was an increase in the number of prosecutions and convictions between the First Report and the Second Report, but then a decrease in the Fourth Report. This decline may have been due to the effects of the covid-19 pandemic, as people's contacts were reduced and service provision may have taken place more covertly. The latency of this type of crime is directly proportional to the latency of trafficking.

On the basis of the above statistics with low indicative value, it is not possible to conclude to what extent the criminalisation of the use of victim services contributes to the fight against trafficking in human beings. In particular, **it is not possible to assess whether the criminalisation of the use of services has such a general prevention effect** that it reduces the demand for victim services, e.g. sexual services provided by victims.

4. POSSIBLE SOLUTIONS? REFORM OF THE DIRECTIVE 2011/36/EU

In December 2022, the Commission introduced a proposal for reform - amending Directive 2011/36/EU, building on the findings presented in the First Report to the Fourth Report from 2016 to 2022 – to prevent and suppress trafficking in human beings, as well as to protect victims more effectively.[37]

The reform of Directive 2011/36/EU includes the following changes:

a) **Extension of the definition of trafficking in human beings.**
   i. Forced marriage and illegal adoption are included among the different purposes of exploitation under Article 2(3) of the Directive. The incidence of these forms of trafficking is not high (sexual exploitation

[35] Authors' work based on data published in the First Report, the Second Report, the Third Report and the Fourth Report and other sources as for Table 1.
[36] The Second Report shows that only three Member States provided the data for 2015 and 2016.
[37] Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 19. 12. 2022, COM(2022) 732 final.

and forced labour are consistently prevalent) and has not been reflected in the statistics we have presented.

ii. Member States interpret the purposes of exploitation too narrowly, which is consequently reflected in the transpositions. Such a broadening of criminalisation cannot be objected to.

b) **Criminalisation of trafficking in human beings if the offence is committed in the online sphere.** According to the new Article 2a, the definition of trafficking in human beings is intended to include any act committed for this purpose through information and communication technologies.

i. As noted above, all stages of trafficking in human beings are now significantly committed in the online sphere – in particular through electronic communication. The above-mentioned change is aimed at ensuring, from a substantive point of view, that any such conduct is also a criminal offence.

ii. However, we consider the solution in substantive criminal law to be only part of the solution. The fact that something is formally established as a criminal offence does not mean that such conduct will not be committed and the problem is solved.

iii. Moving the committing of the crime of human trafficking to the online sphere requires advanced technical and procedural solutions. We are of the view that an effective tool can be the acquisition of knowledge about the content of electronic communications and their metadata, including the possibility of **applying automated analysis of electronic communications**. Automated analysis of electronic communications is the bulk monitoring (interception) of communications using technical tools – algorithms that are capable of detecting certain patterns of communications that indicate possible criminal behaviour. The mandatory application of automated analysis of electronic communications in certain circumstances (threats to national security) is also permitted by the case law of the Court of Justice of the EU[38] as well as (with more flexible conditions) by the European Court of Human Rights.[39]

iv. Currently, automated analysis can be applied (by electronic communications service providers) on an optional basis in the detection and investigation of sexual abuse - under the Regulation 2021/1232 on the temporary exemption from certain provisions of Directive 2002/58/EC for the purpose of combating online child sexual abuse. This specific legislation applies until the adoption of the General Regulation on respect for privacy and the protection of personal data in electronic communications. Automated analysis must be subject to strict guarantees of privacy and informational self-determination (Beleš, 2022, p. 90 et seq.). Given that perpetrators of human trafficking have begun to use the Internet and social media to a much greater extent, we believe that the scope of this regulation should be extended to human trafficking.

[38] CJEU, judgment of 6 October 2020, *La Quadrature du Net and others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, par. 2 of the operative part of the judgment.

[39] ECtHR, *Big Brother Watch and others v. United Kingdom* [GC], app. no. 58170/13, 62322/14, 24960/15, 25 May 2021, par. 361 et seq.

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v. **Automated analysis of electronic communications could be applied to identify electronic communications that take place at all stages of the trafficking process** – in the solicitation of victims (*grooming*), in the management of distance transactions, in the offering of victims to potential customers, as well as in the communication with customers. Some Member States apply 'covert surveillance, Internet surveillance' (Third Report, p. 4), but these procedural procedures would need to be at least partially unified across the EU in view of the regulation of electronic communications.

vi. On the basis of the above, **we do not consider that limiting the new Article 2a to the substantive law area alone is a sufficient solution** to the perpetration of trafficking in human beings in the online sphere.

c) **Enforcement of criminal liability of legal persons.**

i. According to the Commission reports on the implementation of Directive 2011/36/EU, legal corporate structures are often abused to conceal trafficking-related activities.

ii. Under the new wording of Article 6, certain types of sanctions imposed in criminal or non-criminal proceedings are made mandatory (not merely optional);

iii. We consider the change in the sanctioning mechanism to be correct, but **the list of sanctions could be extended to include other types of sanctions** – e.g. disclosure of a conviction, which has a negative effect on the reputation of the legal person, or forfeiture of all or part of the legal person's assets.

d) **Seizure and confiscation of property.**

i. The effective extraction of the proceeds of trafficking in human beings is a useful tool to weaken the structures of organised crime;

ii. The new wording of Article 7 clarifies the wording to establish the authority of Member States to detect, freeze, dispose of and final confiscation of assets in line with the new proposed *Directive on asset recovery and confiscation*.

e) **Establishment of reference mechanisms for the identification of victims.**

i. The statistics on the number of victims, as we have presented them, show that there remains a lack of identification of victims and that many real victims remain in the latent sphere.

ii. The establishment of referral mechanisms is a useful tool for more detailed identification of victims in all Member States.

iii. However, **we do not consider such a measure to be sufficient in terms of overall victim protection**, as in order to identify victims on a large scale, it is necessary to provide them with a safe environment with professional assistance in the first place, thereby motivating them to disengage from organised crime structures.

iv. In relation to victims of sexual exploitation, which is the most widespread form of trafficking, consideration should be given to the **establishment of a clear, strict and secure legal framework for the providing of sexual services (sex work)**, which could motivate those engaged in prostitution to step out of the grey zone and engage in legal and regulated activity outside the influence of organised crime. Legal regulation should cover a range of issues, such as health surveillance or licensing of businesses that provide such services.

v. Prostitution and sexual exploitation is a serious social problem that EU law in the context of trafficking aims to combat, but sex work is part of the internal market, as confirmed (in the context of free movement of workers, services or freedom of establishment) by the CJEU.[40] Thus, the conditions for sex work could potentially be **harmonised at EU level under Article 114 TFEU**. The purpose of this provision in the TFEU is to create a Union competence rule that allows for the effective removal of barriers in the internal market resulting from divergent national regulations. Because of its broad scope, this competence rule has been criticised (Streinz et al., 2018, p. 1441 et seq.). Sex work, which is part of the internal market, is an obvious example of such divergent regulations resulting in barriers to the internal market.

vi. Such harmonisation could only be carried out **on the basis of a detailed analysis of the impact of the regulation of sex work in some Member States on the fight against sexual exploitation.**[41] The adoption of legal regulation of sex work is supported globally by some major expert organizations (Amnesty International, World Health Organization) and legislation in some countries (e.g. New Zealand) has shown a positive impact on safety, reducing the incidence of violence or transmissible diseases (Armstrong and Abel, 2020, pp. 2, 89 et seq.).

vii. It would also be necessary for some Member States (e.g. the Czech Republic or Slovakia) to withdraw from an international agreement that prevents the adoption of legal regulation of sex work.[42]

viii. Critics of legal regulation of sex work object that in some EU Member States where prostitution is regulated, there is a proliferation of sexual exploitation of both adults and children in legal businesses (Second Report, p. 4). Harmonisation of this nature could, of course, be criticised on the grounds that it conflicts with the principles of subsidiarity and proportionality. Indeed, the regulation of sex work in European countries has not - compared to other moral policies - been subject to a clear and prevailing trend of liberalisation (Euchner, 2015, p. 33). A possible argument against the adoption of such harmonisation could also be that legislation on public morality is part of the national identity of the Member States.[43]

f) Unification of data collection and creation of statistics.

i. According to the new Article 19a, Member States are obliged to collect specified data, produce statistics and provide these to the

[40] In several judgments, the Court of Justice has identified differences in national regulation as barriers to the internal market. In each case, the performance of sex work falls within the scope of the internal market freedoms referred to above: CJEU, judgment of 20 November 2001, *Jany and Others*, C-268/99, ECLI:EU:C:2001:616, par. 49 et seq.; CJEU, judgment of 1 October 2015, *Trijber and Harmsen*, C-340/14 and C-341/14, ECLI:EU:C:2015:641, par. 67-77; CJEU, judgment of 8 May 2019, *PI*, C-230/18, ECLI:EU:C:2019:383.

[41] In the context of German regulation of sex work, see e.g. Bundeskriminalamt: Menschenhandel und Ausbeutung. Bundeslagebild 2020; Reglementierung von Prostitution: Ziele und Probleme – eine kritische betrachtung des Prostitutionsgesetzes, 2007. See also Kontos, 2014.

[42] *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*. Art. 6 of this Convention practically excludes the adoption of legal regulation of sex work in contracting States.

[43] However, this is questionable, as the concept of national identity is not fully clarified in the Court's case-law. National identity cannot be interpreted in the context of history, culture and language, but national identity is close to the constitutional identity of member states (Kiššová, 2021). Thus, the concept of protection of public morality would have to be part of the constitutional identity of member states.

Commission annually; given the inconsistency and incompleteness of the statistics we have presented in the previous text, this change should be viewed positively.

g) Criminalising the use of the services of trafficked persons.
   i. The optional discretion of Member States to criminalise the use of the services of trafficked persons is transformed under the new Article 18a into a mandatory obligation to criminalise such conduct, i.e. to criminalise customers who (intentionally) use the services of trafficked persons.
   ii. The criminalisation of the use of services is intended to serve as a preventive measure - criminalisation has the effect of general prevention, and thus is intended to reduce the demand for the services of trafficked persons. This measure has the same ideological basis as a more general measure - the criminalisation of any demand for sexual services, which began to be applied in the late 1990s in Sweden on the grounds that prostitution (sex work) is inherently harmful and (in general) is a form of violence against women (see more in Havelková and Bellak-Hančilová, 2014, pp. 44-63).
   iii. The problem with this measure is that **the statistics we have analysed above do not show the effectiveness of the preventive effect** of such a measure, the comparisons of data according to the Second Report, Third Report and Fourth Report are **inconsistent and it cannot be concluded** from them that in Member States where such a measure has already been introduced, it is a measure that has been widely applied with a significant effect on reducing the number of victims of trafficking in human beings. Moreover, the success rate of the application of such a measure seems to be decreasing with the shift of service providing to the online environment (Fourth Report); a more detailed analysis of the application in the Member States where such a measure has already been introduced would be necessary to decide that such a measure is necessary to be mandatorily introduced at a EU law level.
   iv. For example, Section 232a (6) of the German Criminal Code StGB (as part of the offence of forced prostitution – *Zwangsprostitution*) punishes the intentional[44] or negligent[45] use of the services of a victim of sexual exploitation, but with the possibility of extinction of criminality if the perpetrator voluntarily reports such conduct to the police authorities. However, this legislation is part of a broader legal context - the regulation of sex work in Germany - under two separate laws, and a breach of this legal framework may constitute the offence of forced prostitution (Sec. 232a) or trafficking in human beings (Sec. 232) or exploitation of prostitutes (Sec. 180a of the German Criminal Code StGB; see Fischer, 2018, p. 1259 et seq.).

Under Slovak criminal law, a new provision of the Criminal Code criminalising the use of the services of a victim of trafficking in human beings – with intentional culpability

[44] Punishable by three months to five years.
[45] Punishable by up to three years.

and with a number of qualifying facts[46] – is in the draft phase before the adoption and entry into force of the reform of Directive 2011/36/EU; the qualification of the offence may interfere with the offence of trafficking in human beings (the perpetrator obtains a greater/substantial benefit for himself or another) as well as with the offence of sexual abuse [the perpetrator commits an offence against a child – in which case the offence is already child prostitution under Art. 202 par. 1 (b) of the Slovak Criminal Code].

5. CONCLUSION

Although the institutions of the European Union have set themselves important tasks and objectives in the fight against trafficking in human beings, in particular in the areas of more effective enforcement of criminal law, increasing the number of prosecutions and convictions, better identification of victims of this crime and expanding victim assistance, these tasks and objectives have only been achieved to a limited extent through the harmonisation of criminal law with Directive 2011/36/EU. The statistics presented show the continued high latency of this crime in the European Union and the stagnation in the number of prosecutions and convictions. This applies in particular to sexual exploitation, which has long been the most common form of trafficking in human beings. In addition, new threats to trafficking in human beings are emerging, such as the shift of crime to the online space and increased migration, to which the current Directive 2011/36/EU fails to respond adequately.

In December 2022, the Commission presented a reform of Directive 2011/36/EU, which in principle brings positive changes. However, these changes are – in the light of the statistics presented - insufficient or insufficiently justified in a number of respects. In view of the widespread perpetration of trafficking in human beings through information and communication technologies, changes in the substantive sphere alone are not sufficient, but effective procedural instruments need to be adopted. A suitable procedural

[46] The offence of using the services of a victim of trafficking in human beings under Section 179a of the Criminal Code should have the following wording (according to the working materials of the Ministry of Justice of the Slovak Republic, December 2022):

1) Whoever, knowing that he or she is a person who is a victim of trafficking in human beings, uses the services of a person who is a victim of trafficking in human beings resulting from the exploitation of such a person referred to in Section 179, shall be punished by imprisonment for one to five years.
2) The offender shall be punished by imprisonment for a term of three years to eight years if he or she commits an act referred to in paragraph (1)
    a) and obtains a greater benefit for himself or for another,
    b) and by such act places another in danger of serious bodily harm or death,
    c) as a public official,
    d) on a protected person other than a child,
    e) for a special motive, or
    f) in a more serious manner.
3) An offender shall be punished by imprisonment for a term of between four and ten years if he commits an act referred to in subsection (1)
    a) and obtains by it a substantial benefit for himself or for another, or
    b) and causes serious bodily injury or death or another particularly serious consequence.
4) An offender shall be punished by imprisonment for a term of between seven and twelve years if he commits an act referred to in paragraph (1)
    a) and obtains by it a benefit of a large amount for himself or for another
    b) on a child; or
    c) as a member of a dangerous group.
5) An offender shall be punished by imprisonment for a term of ten years to fifteen years if he commits an act referred to in paragraph (1)
    a) and obtains by it a benefit for himself or for another of an extremely large amount, or
    b) and causes serious bodily injury to more than one person or the death of several persons.

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tool may be the automated analysis of electronic communications, which could be primarily applied by extending the material scope of Regulation 2021/1232. In terms of extending protection to victims of sexual exploitation, it would be appropriate to consider the creation of a clear, strict and secure legal framework for the provision of sexual services in the context of the harmonisation of the internal market under Article 114 TFEU. However, such a solution has both factual and legal obstacles. With regard to the Commission's proposed measure to criminalise the use of services provided by trafficked persons, it should be noted that it cannot be concluded from the available statistics that extending criminalisation is an appropriate and sufficient instrument to reduce the demand for such services.

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AN OVERVIEW OF THE DOCTRINE OF ULTRA VIRES REVIEW FROM THE PERSPECTIVE OF THE GERMAN FEDERAL CONSTITUTIONAL COURT AND THE POLISH CONSTITUTIONAL COURT / Sára Kiššová

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Abstract: *European Union law is based on a number of principles of application, such as the principle of primacy or the principle of conferral. Over the years of this project's existence, we have witnessed Member States being excessively cautious on the subject of the primacy of European Union law. Among these Member States is Germany, which has for years shown its vigilance towards the proceedings and acts of the European Union, whether through the well-known Solange judgement or the recent judgment in the PSPP case. The Federal Constitutional Court has thus created a controlling competence vis-à-vis the bodies and institutions of the European Union by which it seeks to ensure that its standard of constitutional protection is maintained. The present article focuses on the development of the ultra vires review competence and it analyses the manner in which it has been exercised. It also focuses on the use of the ultra vires review by Poland in the K 3/21 case, which has resonated with both the professional and non-professional public. The article also aims to compare the judgment in the PSPP case and the judgment in K 3/21 and to assess whether the ultra vires review was properly activated by the Polish Constitutional Court.*

Key words: *Ultra Vires; Review; PSPP; K 3/21; Germany; Poland; Primacy of EU Law*

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1. INTRODUCTION: THE SUPERMACY OF THE EU LAW

The Treaty establishing the European Community (EEC Treaty) did not contain provisions on the effects and characteristics of Community law. The question of the primacy of Community law over national law arose relatively soon after the adoption of the Treaties of Rome and has been addressed by the Court of Justice of the European Union (CJEU) in two major cases. The CJEU first outlined its view of the issue in the *Van Gend en Loos* case, where the Court held that the Community represented the creation of a new legal order of international law in favour of which states had limited their sovereign rights.[1] However, the Van Gen en Loos proceedings were more concerned with the

[1] CJEU, judgement of 14 August 1962, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

question of direct effect, and it was not until *Costa v. ENEL* that the CJEU commented on the question of the principle of the primacy of Community law, in which the principle of the primacy of Community law over national law was *de facto* created.[2] Here, the CJEU relied on three main arguments: first, the primacy of EU law derives from the agreement concluded by the Member States when they joined the European Union (EU); second, it derives from the fact that the objectives of the founding treaties would not have been realisable without the primacy of EU law and, therefore, the founding treaties themselves would have had no value; the third argument is based on equality, which would not have been respected if national law were unilaterally given primacy over EU law, which would have led to discrimination in the application of EU law between the Member States (Craig and de Búrca, 2020, p. 841). This doctrine has been developed and shaped by further case law into the current form of the principle of the primacy of EU law,[3] which can be simply defined as follows: If a national law norm comes into conflict with EU law, the national norm must be set aside and EU law must be applied.

The doctrine of the primacy of EU law thus constitutes an obligation of uniform application of EU law by the Member States, which entails the need for a uniform interpretation of EU law, which, among other things, includes the assessment of the validity of individual EU acts. The rule here is that national courts interpret and apply EU law and the CJEU is the primary interpreting authority of the founding treaties, which means that when the validity of an EU act is at issue, the exclusive jurisdiction lies with the CJEU. It, therefore, follows that national courts do not have jurisdiction to rule on the validity of Union acts,[4] and this requires the existence of certain safeguards and restraints which limit the European Union's action and thus ensure that the principle of primacy of EU law is maintained only within a defined range of scope.

Hence, first of all, there is the fundamental principle of EU law, which is about the distribution of powers between the EU and the Member States. The principle of conferral (Article 5(1,2) TEU) limits the Union to act only on matters which have been delegated to it exclusively or partially by the Member States. The remaining competences are left in the hands of the Member States. It can therefore be concluded that the principle of the primacy of EU law applies only to the range of competences that the Member States have delegated to the Union, and that action outside those delegated competences shall be invalid. However, it should be added here, as already mentioned above, that the invalidity of such act is to be decided exclusively by the EU itself, more precisely by the CJEU (Article 267(1) TFEU).

Secondly, there is the concept of national identity contained in Article 4(2) TEU, which obliges the Union to respect the national identity of the Member States as inherent in their fundamental political and constitutional structures. The concept thus protects the defined national identity of a Member State in case it comes into conflict with EU law or EU action. However, this concept is perceived by the authors as vague, unclear and surrounded by worrying practice of some Member States (see Kiššová, 2022). The assessment of whether the national identity of a Member State has been interfered with and whether EU law or action is thus invalid is again a matter for the EU, as Article 4(2) TEU is silent on the specific process for challenging this concept.

[2] CJEU, judgement of 21 January 1964, *Costa v. ENEL*, C-6/67, ECLI:EU:C:1964:66.
[3] See: CJEU, judgement of 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114; CJEU, judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49.
[4] See: CJEU, judgement of 22 October 1987, *Foto-Frost v. Hauptzollamt Lübeck-Os*t, C-314/85, ECLI:EU:C:1987:452.

It can be seen from the above-mentioned that the principle of the primacy of EU law has set certain limits that control the Union's powers. However, we will point to the issue of jurisdiction in the case of deciding whether the Union has exceeded its powers and whether the resulting act of the Union is thus invalid or contrary to the national identity of a Member State. The EU has, as already mentioned, retained jurisdiction over this matter, and so it is for the CJEU to rule on the invalidity of EU acts and on the excess of competence. In this respect, the CJEU applies the so-called *Kompetenz-Kompetenz* doctrine, which means that although the EU's powers are limited by their nature, it is for the CJEU alone to determine whether a particular case falls within the scope of EU law (Lindeboom, 2018, p. 334). In other words, Member States must respect EU norms even if they appear to be invalid, and also the very interference with their national identity is conditional on the Union's confirmation of the interference.

However, the *Kompetenz-Kompetenz* doctrine also has its opponents, such is Germany, which has been presenting its opposition to the absolute primacy of EU law since 1974, or the current issue of respect for the rule of law by Poland, which undermined the primacy principle to its advantage in various ways. One of the ways in which these Member States express their opposition to the absoluteness of the principle of the primacy of EU law and the *Kompetenz-Kompetenz* doctrine is the so-called *ultra vires* review. *Ultra vires* review became the doctrine by which Germany began to exercise its control competence over the Union. This doctrine later inspired other Member States' constitutional courts, which opted to activate such a procedure as an *ultima ratio* remedy in the event of a violation of the principle of conferral by the Union's institutions.[5] The Czech Constitutional Court even overturned a decision of the CJEU in a preliminary ruling in the Slovak pensions case on the grounds that it was unlawful[6] and the Danish Supreme Court refused to defer to the outcome of the preliminary ruling procedure on the grounds that principles of EU law created by a judge cannot take precedence over national law.[7] It is evident that some national constitutional courts boldly use *ultra vires* review for relevant reasons. However, what happens if a similar procedure is activated by a Member State which cannot justify it on any legitimate grounds and, in principle, undermines the primacy of Union law and European Union law to no meaningful extent? Is this a threat to the European Union and its functioning, or is such a Member State essentially behaving in a self-destructive manner?

The aim of this article is to focus on the creation and use of *ultra vires* review by the Federal Constitutional Court, i.e. to analyse its use to date through selected national case law. Due to the use of a similar review procedure by other Member States, in the third part of the article we will analyse the judgment in Case *K 3/21*, where the Polish Constitutional Court declared as *ultra vires* some parts of EU primary law. Finally, the article will proceed to a comparison in the approach of the Federal Constitutional Court and the Polish Constitutional Court in assessing *ultra vires* against the European Union.

[5] See: Polish Constitutional Tribunal judgement of 11 May 2005, K 18/04 Accession Treaty; Czech Constitutional Court decision of 26 November 2008, Pl. ÚS 19/08, Treaty of Lisbon I; Spanish Constitutional Court declaration of 12 December 2004, 1/2004.

[6] Czech Constitutional Court decision of 31 January 2012, Pl. ÚS 5/12, Slovak pensions.

[7] Danish Supreme Court judgement of 6 December 2015, Case 15/2014, Dansk Industri acting on behalf of Ajos v. The estate left by A, Ajos.

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2. CREATING ULTRA VIRES REVIEW: THE GERMAN FEDERAL CONSTITUTIONAL COURT

Of the twenty-seven jurisdictions within the EU, we can identify one jurisdiction that has been cautious and openly critical about the principle of the primacy of EU law and the application of the *Kompetenz-Kompetenz* by the CJEU. As mentioned above, it is Germany that has been speaking out against the principle of the primacy of EU law for years, or has been in dialogue with the CJEU about the EU's overreach. The Federal Constitutional Court (FFC) has dealt with the question of *ultra vires* of certain EU acts on several occasions, and three types of review mechanisms have emerged from these proceedings. The first kind of review mechanism stems from the *Solange I* ruling, called the Solange reservation, where the FCC proceeded to review human rights standards. The second mechanism of review is closely tied to the Solange reservation, called *ultra vires* review, which the Federal Constitutional Court first mentions and applies in Maastricht and later develops in Honeywell. A third control mechanism is also mentioned in the Maastricht judgment and more clearly developed by the Federal Constitutional Court in the Lisbon judgment, the so-called constitutional identity review. In the following sections, we will focus on the *ultra vires* review mechanism by analysing the most important judgments of the Federal Constitutional Court.

2.1 Solange I and Solange II

For the first time, the Federal Constitutional Court of Germany (FCC) expressed its position on the question of the primacy of EU law *in Solange I* (1974)[8] and *Solange II* (1986). In the *Solange I* decision, the FFC found that human rights were insufficiently protected by EU law as opposed to the protection afforded by fundamental rights stemming from the German Constitution (Basic Law). The FCC argued that since fundamental human rights are part of the Basic Law, the delegation of competence to the EU cannot result in a weakening of these rights.[9] Therefore, the FFC submits that in the event of a conflict between Community law and a part of national constitutional law or, more specifically, the fundamental rights guarantees in the Basic Law, the fundamental rights guarantee in the Basic Law prevails, unless the relevant Community authorities have eliminated the conflict of norms in accordance with the mechanism of the Treaty.[10]

In the context of this judgement, two facts could be seen. First, the Federal Constitutional Court here directly confronted and challenged the absoluteness of the principle of the primacy of EU law and thus created an exception to the Court's case law. Secondly, the Federal Constitutional Court has created and granted itself competence or jurisdiction to review EU law and declare it invalid in relation to national constitutional law and the protection of human rights. We note here that it is not appropriate to confuse the Solange reservation with *ultra vires* review because of their use by the Federal Constitutional Court in different subject matter jurisdictions. While the Federal Constitutional Court in this proceeding reserved review of the human rights standard in the Act of Union, in later proceedings it extends its jurisdiction to all acts of the Union.

In the *Solange II* decision, the Federal Constitutional Court merely noted the improvement of the protection of fundamental human rights by EU law and added that it

[8] BVerfG, Judgement of the Federal Constitutional Court of 29 May 1974 - case 2 BvL 52/71, BVerfGE 37, 271, 278-285, [*Solange*].
[9] *Ibid*., §280.
[10] *Ibid*., §281.

will not exercise jurisdiction to review EU legislation as long as the level of rights is sufficiently guaranteed by the EU.

2.2 Maastricht

The activation and *de facto* creation of the *ultra vires* review has occurred in connection with its accession to the Maastricht Treaty, that is to say, in connection with German's accession to the newly formed European Union. On 2 December 1992, the Bundestag passed the law approving the Maastricht Treaty at its last reading, which was subsequently approved unanimously by the Bundesrat on 18 December 1992, with effect from 31 December 1992.

Subsequently, two constitutional complaints were lodged with the German Constitutional Court concerning the approval of the ratification of the Maastricht Treaty and the law amending the Basic Law. The complaints were lodged by four Members of the European Parliament, members of the political party Die Grünen and a former high-ranking official of the European Commission, Manfred Brunner. What is interesting in these proceedings is that almost all of the applicants' claims were dismissed as inadmissible for lack of standing, since the applicants failed to convince the Federal Constitutional Court that one of their fundamental rights or one of their rights under Articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law had been violated, with the exception of one of the claims made by the applicant Brunner (Wieland, 1994, p. 260). The Federal Constitutional Court found that the impugned law may violate the complainant's right under Article 38(1) of the Basic Law, according to which the Bundestag, as Parliament, retains as many rights and powers as the principle of democracy requires.

However, despite the rejection of most of the applicants' arguments, there are many interesting arguments in the reasoning of the FCC's judgment in the admissibility section dealing with the *ultra vires* review and the competences of the European Union. The Federal Constitutional Court reiterated its jurisdiction to maintain an effective level of protection of the fundamental rights of German citizens as declared in *Solange I and II*,[11] i.e. to review situations in which the challenged EU law has been applied by a German institution. However, the Federal Constitutional Court modified the scope of that jurisdiction by extending it to any situation in which the application of EU law has infringed EU fundamental rights.[12] Thus, all acts of the Union come under the scrutiny of the Federal Constitutional Court by the Maastricht decision, and the challenge to the authority of the EU by the Federal German Court can be argued. Boom even hinted at the possibility that this expansion of jurisdiction might lead the FCC to use jurisdiction not only when protection falls below German constitutional standards, but to challenge individual decisions of the CJEU in general (Boom, 1995, p. 181).

2.3 Honeywell/ Mangold

Seventeen years passed after the Maastricht decision before another *ultra vires* review by the German Constitutional Court. This time it was in the area of labour law and fixed-term employment, which was the subject of litigation before the Federal Labour Court. In the original proceedings, the applicant had challenged the ineffectiveness of the fixed-term employment contract against the applicant in the present proceedings before the FCC, arguing that it was not possible to apply the exception under which it was possible to derogate from the principle that objective reasons were required for the

[11] BVerfG, Judgement of the Second Senate of 12 December 1993 - 2 BvR 2134/920, BverfGE 89, 155.
[12] *Ibid*., pp.174-175.

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creation of a fixed-term employment relationship if the employee had already reached the age of 52 at the time of the creation of the employment relationship.[13,14] However, the Federal Labour Court held that this derogation could not be applied because, in its words, it was bound by the case-law of the CJEU in the Mangold case.[15] On the basis of the *Mangold* judgment, the Federal Labour Court refused to apply the aforementioned Section 14(3)(4) of the Act on part-time work and fixed-term employment contracts, as it was incompatible with the anti-discrimination Directive 2000/78/EC and the general principle of non-discrimination on grounds of age. In particular, the applicant alleged an infringement of his freedom of contract and his right to a lawful judge. For the purposes of this section, however, we will focus only on his allegations in respect of the breach of freedom of contract, as there are allegations that the EU proceedings were *ultra vires*. The remaining claims and the parts of the judgment dealing with them will be omitted from this section

As regards the claim that there has been a breach of freedom of contract, the applicant considers that the Federal Labour Court used the judgment of the CJEU in Mangold as the material basis for its decision, by which the CJEU exceeded its competence in a number of respects.[16] The Applicant adds that the Federal Labour Court infringed the principle of the protection of legitimate expectations by its action. However, the Second Chamber of the Federal Constitutional Court found that this constitutional complaint was unfounded and held that the *Mangold* judgment had not been used by the Federal Labour Court as an *ultra vires* act.

We will mention an important statement of the Federal Constitutional Court, which was also made in the *Lisbon* judgment (the so-called identity review judgment),[17] which goes that *ultra vires* review can only be carried out by the Federal Constitutional Court against EU bodies and institutions in a way that is open to European law.[18,19] The FCC added that its duty to deal with reasoned complaints against EU bodies and institutions through *ultra vires* review should be coordinated with the role conferred on the Court of Justice by the Treaties to interpret and apply the Treaties and thereby safeguard the unity and coherence of Union law.[20] Thus, while the Federal Constitutional Court fully respects the primacy of EU law, it reserves to itself powers of review over it and declares that it will exercise them only in a manner reserved by law and open towards the EU law.[21]

Moreover, this judgment provides some guidance on how and when the Federal Constitutional Court can declare an act of the Union to be *ultra vires*. First and foremost, the FCC notes that for an *ultra vires* review, there must first be an opportunity for the

[13] § 14(3) sentence 4 of the Law on Part-Time Working and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz - TzBfG).
[14] BVerfG, Order of the Second Senate of 6 July 2010-2 BvR 2661/06, paras. 1-116. Available at: http://www.bverfg.de/e/rs20100706_2bvr266106en.html (accessed on 29.12.2022); hereinafter referred to as the "Honeywell".
[15] CJEU, judgment of 22 November 2005 (Grand Chamber), *Werner Mangold v. Rüdiger Helm*, Case C-144/04, ECLI:EU:C:2005:709.
[16] As a final argument, he submitted that the Federal Labour Court should have referred to the CJEU the question whether the principles of the protection of legitimate expectations under Community or national law require that the Mangold judgment be subject to a time limit.
[17] BVerfG, Judgment of the Second Senate of 30 June 2009-2 BvE 2/08, paras. 1-421, Lisbon judgement. Available at: http://www.bverfg.de/e/es20090630_2bve000208en.html (accessed on 29.12.2022).
[18] *Honeywell*, §58.
[19] In the *Lisbon judgment*, the Federal Constitutional Court referred several times to "openness to European law" as a fundamental principle that must be respected, the so-called Europarechtsfreundlichkeit.
[20] *Honeywell*, §56.
[21] *Honeywell*, §59.

CJEU to express its legal opinion with respect to the challenged act/action by way of a preliminary ruling. The possibility of initiating an *ultra vires* review by the Federal Constitutional Court can only be then considered if it is clear that the acts of the EU organs and institutions have been carried out outside the delegated powers. An act outside the delegated powers can only be found to have been carried out in a manner that explicitly violates the principle of delegated powers and the violation of the powers is sufficiently qualified.[22]

2.4 OMT/ Gauweiler

Another case before the Federal Constitutional Court dealt with the question of whether Germany can participate in one of the mechanisms designed to contain the European financial crisis. In particular, the OMT (Outright Monetary Transactions) mechanism, under which sovereign bonds of selected Member States can be purchased up to an unlimited amount under certain conditions, such as participation in a reform programme agreed by the European Financial Stability Facility or the European Stability Mechanism (for more on the subject of the dispute see: Mayer, 2014). The question that arose in this case concerned the consent of the Federal Constitutional Court to Germany's participation in this mechanism, which was granted in a similar case in 2012 in connection with Germany's participation in the European Stability Mechanism. Indeed, agreeing to participate meant that the German Parliament would retain extensive control over the mechanism's activities (Dingfelder Stone, 2016, p. 147). It thus became disputed that the parliamentary checks necessary for German participation in the *OMT* were absent. Several citizens and some members of the Bundestag lodged constitutional complaints against the OMT decision. The complainants argued that the programme exceeded the ECB's legal mandate and violated the prohibition on monetary financing of Member States under the Treaty on the Functioning of the European Union (TFEU). There were also claims that these violations of the TFEU contravened the constitutional principle of democracy and undermined the national constitutional identity. We analyse the approach of the Federal Constitutional Court to *ultra vires* review in this case through three documents: the first is the order initiating the preliminary ruling by the Federal Constitutional Court,[23] the second is the judgment of the preliminary ruling before the CJEU[24] and the third is the judgment of the Federal Constitutional Court on the merits of the case.[25]

With regard to the initiation of the preliminary ruling procedure before the CJEU, it can be stated that this case is the first time that the procedures that the FCC itself defined as mandatory in activating *ultra vires* review in the *Honeywell* judgment have been applied. Thus, in addition to (1) the general requirement to conduct *ultra vires* review in accordance with the principle of openness towards EU law, (2) the EU act in question must manifestly exceed the EU's competences, which constitutes a structural change in the balance of powers between the EU level and the level of the Member States, and (3) the CJEU must be able to review the EU act in question. The Federal Constitutional Court

[22] See more: §60 et seq.

[23] BVerfG, Order of the Second Senate of 14 January 2014-2 BvR 2728/13, paras. 1-24. Available at: http://www.bverfg.de/e/rs20140114_2bvr272813en.html (accessed on 29.12.2022); hereinafter referred to as the "OMT Resolution".

[24] CJEU, judgement of 16 June 2015 (Grand Chamber), *Gauweiler and Others v. Deutscher Bundestag*, C-62/14, EU:C:2015:400.

[25] BVerfG, Judgment of the Second Senate of 21 June 2016-2 BvR 2728/13, paras. 1-220. Available at: http://www.bverfg.de/e/rs20160621_2bvr272813en.html (accessed on 29.12.2022); hereinafter referred to as the "*OMT Judgment*".

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thus respected the procedure in this case and initiated preliminary proceedings for the first time ever (see reference 23).

The Federal Constitutional Court supplemented the preliminary question order with a comprehensive text and reasoning as to why it sees the *OMT* decision as being outside the ECB's mandate and going beyond the realm of monetary policy.[26] In doing so, the Federal Constitutional Court was essentially indicating answers to the preliminary questions it had asked. The Federal Constitutional Court has also commented on the possibility of an interpretation in accordance with EU law, suggesting that concerns about the validity of the *OMT* decision could be resolved by an interpretation in accordance with EU law. In the view of the Federal Constitutional Court, the *OMT*'s decision *"might not be open to challenge if it could... interpreted or limited its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism and would only be supportive in relation to economic policies in the Union"*.[27] However, according to the Federal Constitutional Court, this requires the exclusion of the possibility of debt reduction, in order not to buy up to an unlimited amount of government bonds of selected Member States and to avoid, as far as possible, interference in market pricing.[28]

The outcome of the preliminary ruling procedure before the CJEU can be seen in the judgment in *Gauweiler and Others v German Parliament*. The content of the judgment and the CJEU's legal opinion on the subject matter of the case have been discussed elsewhere (Craig and Markakis, 2016; Hinarejos, 2015; Baroncelli, 2016) while more interesting is the reaction of the Federal Constitutional Court to the *Gauweiler* judgment, in which the CJEU disagreed with the assessment of the Federal Constitutional Court and evaluated the *OMT* decision as being fully within the Union's competences.

The reaction can be found in a judgment of 21 June 2016, where a surprising reversal against the *OMT* programme was made by the Federal Constitutional Court. In fact, the Federal Constitutional Court pointed out that the CJEU, in its preliminary ruling, had imposed further restrictive requirements on the *OMT* scheme, which thus prevented its unrestricted extension and could therefore now be considered to be compatible with EU law. The Federal Constitutional Court thus finds that the form in which the *OMT* decision was presented by the European Central Bank was perceived as *ultra vires*, but the additional addition of parameters or the required restrictive interpretation by the CJEU changed the situation.[29] However, Pliakos and Anagnostaras argue that a closer analysis of the judgment in question suggests that the Federal Constitutional Court deliberately misinterpreted the content of the preliminary ruling in order to conceal the fact that the Court of Justice had in fact rejected its request to impose additional restrictions on the bond purchase programme. They attribute this attitude of the Federal Constitutional Court to an attempt to avoid declaring the *OMT* programme *ultra vires* (2017, pp. 216 and 226).

In conclusion, however, the position of the Federal Constitutional Court in activating the *ultra vires* review was in line with the principle of openness to the EU legal order and respectful of the role and competences of the CJEU.

2.5 PSPP/Weiss

The Federal Constitutional Court first resorted to declaring an act of an EU institution *ultra vires* in its judgment of 5 May 2020, sparking a wave of controversy in the

[26] *OMT Resolution*, §§55-100.
[27] *Ibid*., §100.
[28] *Ibid*.
[29] *OMT Judgment*, §190-197.

EU, both in the academy and in the media. Wendel even characterises the *PSPP* judgment as creating *"a debate on different aspects at different levels, conducted in different languages - both linguistically and professionally - and involving actors from different fields, actors who not infrequently talk to each other, whether they are lawyers, scientists, economists, journalists or politicians"* (2020, p. 979).

The subject of the constitutional complaints concerned the 2015 Public Sector Purchase Programme (*PSPP*) and the related subsequent decision of the European Central Bank and the actions of the Bundestag and the Federal Government. The *PSPP* is a programme under which Eurosystem central banks may purchase eligible marketable debt securities under specific conditions on the secondary market and from eligible counterparties, as determined by ECB decisions. The reason for initiating the preliminary ruling procedure was that the Federal Constitutional Court was not sure whether the *PSPP* constituted a monetary policy measure at all. The Federal Constitutional Court had doubts as to the compatibility of the *PSPP* with the principle of proportionality and thus asked the CJEU to carry out a proportionality test, the results of which would determine the validity of the *PSPP*.

At the end of 2018, the CJEU ruled in Weiss that the measure complies with the principle of proportionality and is also within the ECB's competence in the area of eligible marketable debt securities, thus confirming the validity of the decision and the programme it sets out.[30] The CJEU carried out an analysis of the *PSPP*'s compliance with the proportionality principle in §79 et seq. In principle, the CJEU found that the ESCB had no other effective instrument at its disposal to reduce the inflation rate and, given the predictable effects of the *PSPP* and the fact that the ESCB's objective did not appear to be achieved by any other type of monetary policy measure that would imply more limited ESCB action, it must be concluded that the *PSPP*, in its basic principle, does not appear to go beyond what is necessary to achieve that objective. As regards the implementation of the *PSPP*, the Court finds that the way in which the programme is set up helps to ensure that its effects are limited to what is necessary to achieve the objective in question and that the programme, by virtue of its application only for the period necessary to achieve the objective pursued, is of a temporary nature.[31]

The reaction of the Federal Constitutional Court to the CJEU's judgment came on 5 May 2020 and, as mentioned above, with this judgment the Federal Constitutional Court declared for the first time an act of an EU institution being *ultra vires*. First of all, the Federal Constitutional Court finds a violation of fundamental law by the Federal Parliament and the Federal Government due to the failure to take appropriate measures against the Governing Council of the ECB, which neither assessed nor demonstrated that the measure taken was in accordance with EU law.[32] Secondly, the Federal Constitutional Court has dealt with the Court of Justice's examination of compliance with the principle of proportionality and has in principle proceeded to the next step in the *ultra vires* review by declaring that the Decision of the Governing Council of the ECB of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 must be qualified as *ultra vires* acts.[33]

In this part of the section, we will take a closer look at the analysis of the arguments and statements of the Federal Constitutional Court in the part of the judgment where it discusses the necessity of declaring the above-mentioned decisions as *ultra*

[30] CJEU, judgement of 11 December 2018, *Weiss and others v. Bundestag*, C-493/17, ECLI:EU:C:2018:1000.
[31] *Ibid*., §§79-84 and §116.
[32] BVerfG, Judgment of the Second Senate of 5 May 2020-2 BvR 859/15, paras. 1-237. Available at: http://www.bverfg.de/e/rs20200505_2bvr085915en.html (accessed on 29.12.2022); [PSPP], §§ 97-105.
[33] *Ibid*., §117.

vires. In doing so, we will focus again on the manner of communication of the Federal Constitutional Court. Although most of the Constitutional Court's reasoning is centred around the principle of proportionality, it is noticeable that the emphasis is in fact on the principle of conferral and the dispute over the correct methodological approach that should guide its application (Anagnostaras, 2021, p. 813).

In essence, the Federal Constitutional Court submits that the procedure followed by the CJEU in its review does not take into account the actual effects of the *PSPP* for the purposes of assessing the appropriateness of the measure, and also that the abandonment of an overall assessment and evaluation in this respect does not meet the requirements for a comprehensible examination of whether the ESCB and the ECB have complied with the limits of their competence in the field of monetary policy.[34] The FCC also adds that the way in which the CJEU applies the principle of proportionality in the present case renders that principle irrelevant for the purposes of distinguishing between monetary and economic policy in relation to the *PSPP*[35] and that, in doing so, the CJEU completely ignores the impact of the *PSPP* on economic policy.[36] And since the CJEU did not take into account the effects of the *PSPP* on economic policy, its exercise of proportionality review cannot fulfil its objective, as there is an absence of a key element, namely the balancing of competing interests. For these reasons, the Federal Constitutional Court declares the CJEU's proportionality review to be irrelevant and also states that the consequence of such an omission is that the EU does not effectively review whether the ECB exceeds its powers.[37] In the light of these facts, the Federal Constitutional Court finds that a review of the principle of proportionality such as that carried out by the CJEU in the present case clearly exceeds the judicial mandate conferred on the CJEU by Article 19(1) TEU, resulting in a structurally significant change in the order of competence to the detriment of the Member States.

In this respect, therefore, according to the Federal Constitutional Court, the *Weiss* judgment constitutes an *ultra vires* act,[38] with the consequence that the constitutional authorities must use the means at their disposal to take active steps to ensure that the European integration programme is respected and that its limits are observed. This is because this *ultra vires* act does not share the principle of the primacy of EU law.[39] The Federal Constitutional Court points to a solution through (1) the delegation of sovereign powers for the purpose of rectifying the lack of EU competence, and if this is not possible or there is no will, the constitutional authorities are obliged to (2) resort to legal or political means within the authorities' powers in order to repeal acts that do not fall under the EU integration programme.[40] On this basis, the Federal Constitutional Court finds that the Federal Government and the Federal Parliament must, as part of their responsibility for European integration, take steps to ensure that the ECB carries out an assessment of the adequacy of the *PSPP*. On the basis of the assessment carried out, the Federal Constitutional Court thus prohibited the Federal Parliament from participating in the implementation and enforcement of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 and the Decision of

[34] *Ibid*., §123.
[35] Ibid., §12; i.e., the distinction between the exclusive competence in the field of monetary policy conferred on the EU (Article 3(1)(c) TFEU) and the limited competence conferred on the EU to coordinate general economic policies, with Member States retaining competence in the field of economic policy in general (Article 4(1) TEU; Article 4(2) TFEU). 5 ODS. 1 TFEU).
[36] *Ibid*., §133.
[37] *Ibid*., §135 and §141.
[38] *Ibid*., §154.
[39] *Ibid*., §234.
[40] *Ibid*., §231.

12. September 2019, and to carry out further bond purchases, and to contribute to a further increase in the monthly volume of purchases, unless the Governing Council of the ECB adopts a new decision demonstrating in a clear and reasoned manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme.[41]

3. THE ULTRA VIRES REVIEW BY THE POLISH CONSTITUIONAL COURT

In the previous chapter, we focused on the origins and application of *ultra vires* review by the Federal Constitutional Court, which has applied the doctrine several times in the thirty years of the European Union's existence. However, it was not only the Federal Constitutional Court that reserved itself against an action or act of an institution or body of the EU during these three decades. As already mentioned in the text of this article, *ultra vires* review has been carried out by several Member States such as Italy, the Czech Republic, France or Denmark. Another Member State that proceeded to carry out *ultra vires* review was also Poland, in the context of the national proceedings before the Constitutional Court in case K 3/21. It can be stated that the K 3/21 procedure is one of the results of the heated conflict between Poland and the EU, which strongly criticises Poland for violating the rule of law (Máčaj, 2021), and it can also be seen as a reaction to the CJEU's judgment in case C-824/18.[42] The subject of the constitutional complaint concerned the issue of the appointment of judges of the Polish Supreme Court addressed in the above-mentioned CJEU judgment and was initiated by the Polish Prime Minister Mateusz Morawiecki. In the petition, he asked the Polish Constitutional Court to interpret Articles 1, 2 and 19 TEU, more specifically to examine whether the Treaty on European Union authorises the EU institutions to derogate from the application of the Polish Constitution or to apply provisions which have ceased to apply, following a decision of the Constitutional Court, on the grounds of their conflict with the Polish Constitution, and whether the European Court of Justice is entitled to examine the impartiality of national judges.

The Polish Constitutional Court developed its arguments and reasoning on almost 900 paragraphs of the judgment, including several dissents, focusing primarily on the jurisdiction of the CJEU and the principle of the primacy of EU law. The Polish Constitutional Court recalls that the Republic of Poland did not agree with the unconditional operation of the principle of the primacy of EU law in the Polish legal system, and certainly not with the unrestricted creation of legal rules by the CJEU which have primacy of application over the Polish Constitution. It further adds that Poland does not regard the obligation to be bound by the provisions of the founding Treaties and by acts adopted by the institutions of the Communities and the European Central Bank as a general agreement to be bound by such law-making by the EU bodies and institutions which goes beyond the competences conferred on the EU.[43] The Polish Constitutional Court points to the limits of the CJEU's powers, noting the distinction between interpreting the law and making law, whereas the latter constitutes an overreach of the CJEU's powers.[44] Subsequently, the PCC refers to the Federal Constitutional Court and its creation of *ultra vires* review and states its alignment with the position of the Federal Constitutional Court. The PCC therefore concludes on the first point of the proposal by

[41] *Ibid*., §235.
[42] CJEU, judgement of 2 March 2021 (Grand Chamber), *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, C-824/18, ECLI:EU:C:2021:153.
[43] Polish Constitutional Tribunal judgement of 7 October 2021, K 3/21, §228.
[44] *Ibid*., §§231-236.

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stating that the norms created through the interpretation of the Treaties by the CJEU cannot override the Constitution and that Article 1 TEU is compatible with constitutional norms only provided that the Polish Constitution retains its supremacy over all other norms. It adds that '...if the CJEU, by interpreting the treaties, shapes a "stage of ever closer cooperation" in which the norms of EU law created by the interpretation of the treaties outside the scope of the CJEU's delegated powers override the constitution, resulting in a loss of state and nation sovereignty, then to that extent the "ever closer union between the peoples of Europe" will be incompatible with constitutional standards of control".[45] Concluding on the second point of the proposal, which dealt with the EU's competences in the field of judicial power, the Polish Constitutional Court held that such a power interfering with the judicial system of a Member State, whereby rules are created which allow or authorise the disregard of the Constitution and national legislation, to rule on the basis of provisions which are not valid, is considered to be *ultra vires* conduct. This is because "...the Republic of Poland has not delegated to the EU the competence to set standards in the field of the judicial system" and the only one who is competent to assess the incompatibility of national legislation with the principles is the Constitutional Court.[46] The Polish Constitutional Court has thus ruled that three articles of the European Union's founding treaties, which have been the subject of interpretation, are incompatible with the Polish constitution. Article 1 TEU, which provides for the existence of the European Union and the transfer of powers from the Member States, is incompatible with Articles 2 and 8 of the Polish Constitution on the ground that it creates a new stage of integration whereby the powers of the CJEU exceed those conferred on the EU, causing a loss of sovereignty of the Polish State. Article 2 TEU, which provides for the existence of the European Union and the delegation of powers from the Member States, and Article 19(1) TEU, which states that the CJEU's mission is to ensure compliance with EU law throughout the Union, are incompatible on the grounds that they create a new competence for the CJEU and allow the lower national courts and the Polish Supreme Court not to apply the Constitution, to overrule the decisions of the Constitutional Court and to review the legality of the procedure for appointing judges, which, according to the CJEU, does not fall within the EU's competence.[47]

3.1. Copycatting the FCC gone wrong?

In the text below, we focus on the major differences we perceive in the activation of *ultra vires* review by the Federal Constitutional Court and the activation of *ultra vires* review by the Polish Constitutional Court in the case K 3/21. We make the comparison of these judgments on the grounds that both judgments declare a certain act of the EU to be *ultra vires*.

First, we will focus on the subject matter of each judgment. The judgment in the *PSPP* case deals with the ECB's decisions and the assessment of the *PSPP*'s compliance with the principle of proportionality. Judgment K 3/21 deals with the provisions of primary EU law, i.e. Articles 1, 2 and 19(1) TEU and their compatibility with the Polish Constitution. From the point of view of the nature of the legal provisions dealt with in the proceedings, there is a significant difference, because while the Federal Constitutional Court subjected an act of EU secondary law to *ultra vires* review in the *PSPP* judgment, the Polish Constitutional Court in the present proceedings declares *ultra vires* the provisions of one of the founding treaties, i.e., primary law. The fact that these are fundamental provisions of primary law brings the K 3/21 judgment the label "controversial". The controversy of

[45] *Ibid*., §§258-263.
[46] *Ibid*., §380.
[47] *Ibid*., §§384-393.

this judgment is underlined by the Polish Constitutional Court's attitude towards the principle of the primacy of EU law, which clearly indicates a rejection of the primacy of EU law over the Polish Constitution. We do not detect such a rejection in the text of the *PSPP* judgment of the Federal Constitutional Court, nor in any of the judgments analysed above. Moreover, the Polish Constitutional Court makes the primacy of the Constitution over EU law absolute and does not limit it to certain parts of the Constitution, such as elements of national identity, as the Federal Constitutional Court does.

Second, we will point out on what grounds *ultra vires* review occurs in individual cases. In the case of the *PSPP*, these were individual constitutional complaints, brought by individuals outside the political sphere. Individual constitutional complaints were also at issue in earlier *ultra vires* review cases such as Honeywell and *OMT*. On the other hand, in the case of constitutional proposal K 3/21, the petitioner is a politically engaged person, namely the Polish Prime Minister Mateusz Morawiecki, and the *ultra vires* review was carried out against such EU acts with which several Polish actions were incompatible. The incompatibility of the Polish acts at issue with EU law was found by the CJEU in Case C-824/18 and K 3/21 was a response to the breaches found therein.

In particular, the Honeywell judgment brought with it a procedure which the Federal Constitutional Court has defined as obligatory for a proper *ultra vires* review, which must respect the principle of openness towards EU law and respect the competences of the CJEU.[48] To reiterate, the Federal Constitutional Court notes the need to initiate a preliminary ruling procedure and thus give the CJEU the opportunity to express its views, thereby respecting its role in the interpretation of EU law. This was ultimately respected in the *PSPP* case and the CJEU was given the opportunity to express its opinion on the question of whether the scheme was in line with the proportionality principle. However, such a step is absent in the case K 3/21, where we observe that the *ultra vires* finding is made without the opportunity for the CJEU to be heard and in response to the CJEU's judgment in another case. For this reason, the Polish Constitutional Court did not proceed in the same way as the Federal Constitutional Court.

Last, we look at the approach of the two constitutional courts to the legal problem in the respective cases. In the case of the approach of the Federal Constitutional Court, one can see in its statements an overall effort to harmonise and align the problematic EU act, while in the text of the judgement it tasks the ECB with the possibility of reconsidering the contradictory programme. On the other hand, such an approach is absent in the case of the Polish Constitutional Court, and the whole judgment can be seen as rather offensive towards the EU project and its basic provisions. In its arguments against the primacy of primary law, Poland seems to have forgotten that it became a member of the EU voluntarily and, upon accession, accepted the principles of application that had been set by CJEU case law years before.

4. CONCLUSION

The article aimed to analyse the development of *ultra vires* review and its application by selected Member States. From the analysis carried out, we know that the creator of *ultra vires* review was the Federal Constitutional Court, which showed its vigilance against the powers and acts of the European Union long before the establishment of the EU project in 1992. In the 30 years since the signing of the Maastricht Treaty, we can note the progressive integration of the EU but, at the same time, the increasing scepticism of the Member States towards it. As a precaution against

[48] *Honeywell*, §60 et seq.

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unwarranted EU interference in areas that do not fall within its competence, we have identified three 'brakes' on integration that have so far been applied by the Member States, with the *ultra vires* review doctrine becoming the subject of scrutiny. We thus examined *ultra vires* review through the case law of the Federal Constitutional Court and analysed its approach to EU law while conducting the review.

It can be concluded that, of the case law analysed herein, the Federal Constitutional Court appears to use *ultra vires* review with respect towards EU law and the primacy of EU law. The reasoning provided within the text of the judgments does not show a deliberate attempt to undermine the EU legal order, but rather an attempt to control EU actions and EU acts. In contrast, Poland was selected as the second Member State for the comparison of the use of *ultra vires* review, as it has been known in recent years for its rejection of certain EU principles and procedures. The aim of the analysis of the judgment K 3/21 was to look at the text of the reasoning of the Polish Constitutional Court and to examine how the court expresses itself towards EU law and the principle of the primacy of EU law.

From the analysis carried out by us, we have to conclude that there is a significant difference between the dialogue conducted by the Federal Constitutional Court towards the CJEU and this rather monologue of the Polish Constitutional Court. The most striking differences have been presented in the text above and one may question whether Poland has even tried to follow the set procedure as defined by the Federal Constitutional Court and whether it is correct to speak of the activation of *ultra vires* review. Such action by Poland rather hurts the doctrine and puts it in a position where it is being disputed as threatening the principle of the primacy of EU law.

However, it must be stated at this point that *ultra vires* review is an excellent tool for scrutinising EU actions, however, there is a need to carry out such scrutiny within a framework of respect for the EU legal order, to which each Member State has adhered with full knowledge of its obligations.

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PROTECTION OF RULE OF LAW WHILE PROTECTING RULE OF LAW: WHO GUARDS THE GUARDIAN? / Ondrej Blažo

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Abstract: *The paper focuses on judicial review of political or quasi-political/quasi-legal decisions or other acts of the institutions of the EU involved in following procedures designed to protect the value of rule of law: a) mechanism for protection of values under Art. 7 of the Treaty on European Union and b) measures adopted within the conditionality for the protection of the EU budget (Regulation 2020/2029). At a first sight, the difference between the judicial review of measures aimed to protect rule of law in the Member States under Art. 7 TEU and under Regulation 2020/2029 can appear straightforward: a limited procedural review of measures adopted under Art 7 TEU due to specific powers stipulated in Art. 269 TFEU and full judicial review of measures adopted under Regulation 2020/2029. However, notwithstanding different structure, uncertainties stemming from the wording of the Treaties, the Treaties provide comprehensive framework of judicial control of analysed types of measures aimed to avoid backsliding rule of law in the Member States.*

Key words: *Rule of Law; Judicial Review; Article 7 TEU; Conditionality Regulation; EU Budget; European Union*

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1. INTRODUCTION

Mechanisms for the safeguarding rule of law as a value of the European Union (EU) were not developed merely within the term of von der Leyen's European Commission (Mokrá et al., 2019, p. 182), however, strengthening of the enforcement of this value within the EU is one of the main strategic goals of von der Leyen's agenda (Leyen, 2019, pp. 14–15). The rule of law as a spiritual and moral heritage (Mader, 2019, p. 136) was incorporated into Art. 2 Treaty of European Union (TEU) as a value of the EU, Preamble of the Charter of Fundamental Rights of the EU (CFREU) as well as Art. 21(1) TEU in the regards of external relations. The values of the EU, including the rule of law, exceeded the framework of mere political declaration or moral purpose of the EU existence and were effectively turned into judicially applicable provision (Spieker, 2021). The legal framework is based on the optimistic prism towards the integration and provisions of Art. 7 and Art 50 TEU were introduced as a safeguard *ultima ratio*. Due to this optimistic optics, the TEU does not contain any provisions on expulsions of a Member State from the EU (Circolo, 2022) and backsliding of the level of alignment to the values of the EU, or more precisely deviating from them via systematic measures undermining democracy and rule of law

(Anders and Priebus, 2021; Daminova, 2019; Gatta, 2019; Komanovics, 2022, p. 131; Martín Arribas, 2022).

Measures established by the EU law, aimed to ensure outlawing any deviation from the value of rule of law, can be split between judicial and non-judicial. While the judicial measures involve the Court of Justice of the EU (CJEU) directly, the latter are enforced by other EU institutions, i.e. the European Commission, the European Council, the Council of the EU, and the European Parliament. All these bodies are manifestly political bodies (although their political interests can be different or contradictory) and in order to ensure enforcement of rule of law principles in line with rule-of-law safeguards, judicial control thereof is required. The judicial control is essential for ensuring reliability and trustworthiness of the procedures linked to the protection of the rule of law (in this context, compare Spieker, 2021, p. 240). This paper will not focus on judicial review of the state of rule of law, i.e. via infringement procedure and preliminary rulings (e.g., Bonelli, 2021) and will not question the independence of the CJEU (discussions in this context, see Kochenov and Butler, 2022) leaving them out of the scope of the paper. The paper will rather focus on judicial review of political or quasi-political/quasi-legal decisions or other acts of the institutions of the EU involved in following procedures designed to protect the value of rule of law:

a) mechanism for protection of values under Art. 7 TEU;
b) measures adopted within the conditionality for the protection of the EU budget.[1]

The paper will not analyse these instruments in detail beyond framework necessary for the assessment of the extent of judicial supervision. Moreover, it will not deal with "negotiated" mechanisms of rule of law surveillance, in particular conditionality mechanisms in association agreements and accession process or GSP+ and also not on measures adopted within the Common Foreign and Security Policy (CFSP) aimed to protect rule of law in the third countries.[2] Hence, the aim of the paper is the assessment of safeguards provided in the case of unilateral measures adopted by the EU's institutions in order to maintain and protect rule of law, i.e. whether the rule of law is protected in these mechanisms.

2. MECHANISM FOR PROTECTION OF VALUES UNDER ART. 7 TEU

The legal regulation mechanism for protection of the values of the EU based on Art. 7 TEU is scattered among other provisions: Art. 269 TFEU limiting powers of the CJEU and Art. 354 TFEU providing the details of voting procedures required by Art. 7 TEU.

The powers of the CJEU to review acts adopted under Art 7 TEU are limited as regards:

a) person who can request the review ("…solely at the request of the Member State concerned by a determination of the European Council or of the Council…")
b) the procedural point of view ("Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request)"
c) scope of the review ("…in respect solely of the procedural stipulations contained in …[Art. 7]").

[1] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I , 22.12.2020, pp. 1–10). ELI: http://data.europa.eu/eli/reg/2020/2092/oj

[2] See CJEU, judgment of 22 June 2021, *Venezuela/Council*, C-872/19 P, ECLI:EU:C:2021:507.

Since Art. 269 TFEU contains no reference to Art. 263 TFEU, the first question is, whether Art. 269 TEU is a *lex specialis* to Art. 263 TEU (in comparison, Art. 274 TFEU refers to Art. 263 TFEU in the case of review of restrictive measures). This question is not solved by the Rules of Procedure of the Court of Justice as well since procedures under Art. 269 TFEU are mentioned in Title VIII as "Particular Forms of Procedure" (Art. 206 of the Rules) and thus are not included in Title IV "Direct Actions". However, there is a question of the added value of the relation of Art. 269 TFEU to Art. 263 TFEU as *lex specialis*. Provisions of Art. 269 TFEU provide specific requesting party, limitation period and the scope of review and hence there are no remaining provisions of Art. 263 TFEU that could be applicable within the review under Art. 269 TFEU. On the other hand, the wording of the competence of the CJEU apparently carves out the review of acts adopted under Art. 7 form general rules of review under Art. 263 TFEU: "The Court of Justice shall have jurisdiction (…) solely at the request of the Member State (…) and in respect solely of the procedural stipulations (…)". If we turn the sentence into negative wording, we will get: "the CJEU shall have no jurisdiction to review acts adopted under Art. 7 TEU by the Council or European Council by requests of other persons that the Member State concerned and in respect to other grounds than the procedural stipulation." AG Bobek in *C-650/18 Hungary/Parliament* also distinguishes between acts and decisions of the Council in general and acts referred as "determinations"[3] and thus, the decision of the Council under Art. 7(3) TEU falls out of the limited scope of review under Art. 269 TFEU and can be reviewed under Art. 263 TFEU.[4]

It must be noted that Art. 263 TFEU is not the only avenue for review of legality of acts of the EU institutions. They can be reviewed within Art. 267 TFEU as well as within any procedure within the competence of the CJEU due to provision of Art. 277 TFEU. As discussed above, Art. 269 TFEU limits (or, more precisely, deprives) the competence of the CJEU review "determinations" not only *vis-à-vis* possible review under Art. 263 TFEU but in regards Art. 267 TFEU and 277 TFEU as well. Hence, the court of the Member States cannot raise a preliminary question regarding validity of act adopted under Art. 7 TEU by the Council or by the Commission containing "determination" and validity of such an act cannot be raised within any other proceeding within the competence of the CJEU by other party than the Member State concerned and after lapsing one-month limitation period.

Art. 269 TFEU limits the competence of the CJEU when reviewing legality of the acts of the European Council and the Council, this provision, however, remained silent on possible actions for failure to act under Art. 265 TFEU. The Council is obliged to regularly monitor the development in the Member State concerned [Art. 7(1)(2) and Art. 7(4) TEU] and can be thus requested to revoke, lift, or adjust adopted measures.

Analysing the limits of the scope of the review under Art. 269 TFEU, we can find possible similarity with the restricted competence of the CJEU to review acts adopted within the CFSP (Art. 275 ZFEU). Apart from review of the actions by individuals raised under Art. 263(4) TFEU, the CJEU holds competence to "…monitor compliance with Article 40 of the Treaty on European Union". Based on Art. 40 TEU, the CJEU has a competence to monitor:

a) division of powers between the EU and the Member States and extent thereof,
b) division of powers between the institutions of the EU and extent thereof,
c) fulfilment of procedural rules stipulated by the TEU or TFEU.

Within the review of the acts adopted within the CFSP, the CJEU is therefore empowered to monitor proper application of any institutional, organizational, or

[3] Opinion of AG Bobek of 3 December 2020, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2020:985, par. 43-78.
[4] *Ibid.*, par. 99.

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procedural rule based on the Treaties. This scope of the review strikingly differs Art. 275 TFEU from Art. 269 TFEU, which allows monitoring solely "procedural stipulations" provided by Art. 7 TEU. Indeed, procedural stipulations under Art. 354 TFEU shall be monitored as well since they are directly referred by Art. 7(4) TEU. Such a wording explicitly excludes any further considerations and even other institutional failures or misuse of law if they are not directly included in Art. 7 TEU. Absurdly, the CJEU cannot even monitor validity and legality of composition of the institutions adopting the measure or proper formal content of an act (Art. 296 TFEU)[5] or due signature (Art. 297 TFEU).

Apart from the decisions of the Council and the European Council containing determination of "a clear risk of a serious breach by a Member State of the values referred to in Article 2" [Art. 7(1) TEU] and "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2" [Art. 7(1) TEU], Art. 7 contains other preparatory and final acts of the institution of the EU:

a) proposal of the European Commission or proposal of the European Parliament under Art. 7(1) TEU;
b) proposal of the European Commission under Art. 7(1) TEU;
c) consent of the European Parliament under Art. 7(1) and Art. 7(2) TEU;
d) recommendations of the Council under Art. 7(1) TEU;
e) decision of the Council on suspension of certain rights of the Member State under Art. 7(3) TEU.

All above-mentioned acts fall outside the scope of Art. 269 TFEU, and their reviewability can be assessed under Art. 263 TFEU. Since recommendations cannot be reviewed under Art. 263 TFEU and decision on suspension of rights is evidently final decision addressed to a Member State influencing rights thereof, i.e. undoubtedly fall into the scope of Art. 263 TFEU, only the possibility of review of "preparatory" acts are remaining in question. It is stemming from the settled case law that intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment.[6] However, if a "preparatory" act constitutes separate legal effects to the third parties that cannot be remedied by the action against the "final" act, the "preparatory" act can be subject to action for annulment under Art. 263 TFEU.

Such considerations were confirmed by the CJEU in *C-650/18 Hungary/Parliament,*[7] the only case judicially testing application of Art. 7 TEU. The legal effects of the resolution of the European Parliament (and thus accordingly that of the European Commission) under Art. 7(1) TEU were confirmed due to wording of Protocol (No. 24) on asylum for nationals of Member States of the European Union that allow consider admissible applications of nationals of the Member States against which the procedure under Art. 7(1) TEU was launched.[8] Apparently, such an effect of Protocol (No. 24) seems to be accidental and authors of the Treaties probably did not intend to add another layer of judicial review of acts adopted under Art. 7 TEU. Moreover, resolution of the European Parliament or the proposal of the European Commission could be subject to more thorough review under the full application of Art. 263 TFEU comparing to review of "determinations" of the European Council or the Council. This approach is far from being systematic in a situation when launching the procedure under Art. 7(1) TEU by the

[5] "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."
[6] E.g., CJEU, judgment of 15 March 2017, *Stichting Woonlinie and Others v Commission*, C-414/15 P, ECLI:EU:C:2017:215, par. 44.
[7] CJEU, judgment of 3 June 2021, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2021:426, par. 29-61.
[8] Sole Article, subpar. b).

Member States is not subject to a judicial review by the CJEU. In *C-650/18 Hungary/Parliament*, the CJEU tried to save this accidental effect of Protocol (No. 24) on review of acts under Art. 7(1) TEU by restricting its powers by Art. 269 TFEU, even if it was reviewing an act outside of the scope of that provision and basing its competence on Art. 263 TFEU only: "(…) the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU to review the legality of acts of the EU institutions cannot be interpreted in such a way as to deprive of practical effect the limitation on that general jurisdiction provided for in Article 269 TFEU."[9] Therefore, the CJEU is ready to accept its power to review "preparatory" acts adopted by the European Commission or by the European Parliament under Art. 263 TFEU, but only if brought by a Member State concerned and based on the arguments on procedural matters. This solution resembles the solution of a riddle in Brothers Grimm's "Die kluge Bauerntochter".[10] Indeed, the CJEU desired to protect possible competence of the Council to make determinations under Art. 7(1) TEU, however refusing to review an act of the institution by a broad interpretation of restriction of competence relating to the other type of review resembles more *denegatio iustitiae* that self-restraining approach of the CJEU to political, economic or social considerations of the institutions. It is true that if the CJEU reviews existence of a clear risk of a serious breach of values within the review of the European Parliament's or the European Commission's proposal, it can block path for adoption of "determination" by the Council, if the proposal is annulled. On the other hand, the CJEU can step out of the role of a pure guardian of legality when correcting mistakes or failures of the legislator unfavourably to the parties to the proceeding. In this point in *C-650/18 Hungary/Parliament* the CJEU did not follow the Opinion of the AG Bobek, who had assessed all the pleas of Hungary, including grounds for the resolution of the European Parliament.[11]

To conclude, in order to save the Council's full competence to make determinations under Art. 7(1), the CJEU could have refer to its self-restraint to review political decisions of the institutions rather than referring directly to Art. 269 TFEU.

In comparison, the CJEU seems to have full-scale jurisdiction to review all aspects of the decision of the Council under Art. 7(3) TEU within the ambit of Art. 263 TFEU. However, within this review, legality of previous determination of the European Council adopted under Art 7(2) TEU cannot be challenged due to Art. 169 TFEU. A possible review can be split into two parts:

a) existence of a serious and persistent breach of values;

b) extent and proportionality of restriction of rights of a Member State in concern.

At a first sight, the first limb appears to be unreviewable, since the Council shall rely on pure existence on determination given by the European Council under Art. 7(2)

[9] CJEU, judgment of 3 June 2021, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2021:426, par. 51.

[10] The peasant's daughter was required by the king to come to him neither naked nor clothed, neither walking nor riding, neither on the road nor off it.

[11] Opinion of AG Bobek of 3 December 2020, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2020:985, par. 147: "Article 7(1) TEU does not limit the reasons on the basis of which a reasoned proposal may be adopted. Nor could it seriously be argued that there is some other provision of EU law, including the duty of sincere cooperation, which somehow limits the pool of sources on which a reasoned proposal under Article 7(1) TEU would be permitted to rely. Since that proposal must be reasoned, the Parliament must rely on objective elements suggesting the existence of such a risk. Previous findings of infringement may undoubtedly constitute such elements, thereby helping to make a case against the Member State concerned under Article 7 TEU to the extent that such infringements amount to a disregard of EU values. Thus, in relying on infringement proceedings, whether they be closed or pending, the contested resolution has not breached any of the principles relied upon by the applicant within its fourth plea."

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TFEU and thus the CJEU may focus merely to monitor existence of such a determination. However, if the Council may revoke or change its previous measures in response to changes in the situation which led to their being imposed, the Council shall check the existence of situation which led to the determination provided by the European Council in the moment of adoption of the decision under Art. 7(3) TEU. Otherwise, it can lead to a situation where one day, the Council adopts a decision and the following day, it revokes it due to change of situation. The Council may rely on the determination made by the European Council that certain facts lead to the conclusion that there is a serious and persistent breach of values, but it cannot rely on the existence of those facts, in particular when there is certain time delay between the European Council's determination and the Council's decision. Simply, due to limits of the Art. 269 TFEU, the CJEU cannot review legality of the European Commission's determination of existence of a serious and persistent breach of values, however, it may (shall) review whether such a determination was still applicable in the moment of adoption of the decision of the Council under Art. 7(3) TEU due to state of matters in that moment.

The second limb of possible review is not restricted by Art. 269 TFEU and thus the review procedure will not differ from review of other individual acts (i.e., proportionality of measures, due process of law, duty to provide substantiated reasons, etc.)

3. MEASURES ADOPTED WITHIN THE CONDITIONALITY FOR THE PROTECTION OF THE EU BUDGET

From the point of view of the legal basis and political arguments, Regulation 2020/2092 was, on the one hand, described as an effective measures to protect rule of law in the Member States as an abstract value, on the other hand, as a purely budgetary measure simply expanding previous measures protecting taxpayers' money (Blauberger and van Hüllen, 2021; Łacny, 2021; Pech, 2022). This dichotomy lead to disputes whether political aims (protection of values) of Regulation 2020/2092 does not circumvent mechanisms under Art. 7 TEU. This mixture of political goals and purely budgetary goals aimed to uphold the legal basis for the regulation – Art. 322 TFEU – is visible in the preamble of Regulation 2020/2092: e.g., Recitals 1, 3, 4, 5, 6 and 11 refer to protection and maintaining values of the EU *in abstracto*, and e.g. Recitals 2, 7 and 13 et seq. refer to the necessity of effectively functioning enforcement system of law in the Member States in order to manage EU funds.

Argument on circumventing Art 7 TEU and Art. 296 TFEU was rejected by the CJEU in C-156/21 *Hungary/Parliament and Council*[12] and C-157/21 *Poland/Parliament and Council*[13] (for more details Hoxhaj, 2022). Due to inapplicability of Art. 269 TFEU, in both cases the CJEU confirmed full competence to review implementing decisions under Art. 6(10) or Art. 6(11) of Regulation 2020/2029 within the ambit of Art. 263 TFEU. Along with the general principles and requirements for adoption of acts of the institutions, provisions of Art. 6 of Regulation 2020/2029 provide a procedural steps to be observed within the procedure. Summing up, the review of legality of an implementing decision of the Council under Art. 6 of regulation 2020/2029 can be subject to review under Art. 263 TFEU and challenged by all alternative applicants, as well as within preliminary reference under Art. 267 TFEU or review under Art. 277 TFEU. Moreover, in the case of possible lifting measures under Art. 7 of Regulation 2020/2029, the decision on lifting measures can be challenged as well. Regarding both alternatives (adoption measures and lifting

[12] CJEU, judgment of 16 February 2022, *Hungary/Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.
[13] CJEU, judgment of 16 February 2022, *Poland/Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

measures), the Commission and the Council may be forced to act by the action under Art 265TFEU. The CJEU has a competence to review not only procedural requirements, but also proportionality of measures as well as existence of conditions of measures.

When assessing the existence of rule of law violation and proportionality of measures adopted in order to protect EU budget against negative consequences of backsliding of rule of law in a Member State, it can be expected that the CJEU will follow its established practice of deference to discretionary powers of other institutions when perusing their duties: "(...) the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue..."[14] Therefore, the CJEU cannot be expected to perform profound investigation and would monitor manifest excesses when assessing rule of law violations in a Member States, their links to performance of the EU budget and proportionality of measures, while accepting choices made by the European Commission and by the Council within their institutional discretion.

4. CONCLUSIONS

At a first sight, the difference between the judicial review of measures aimed to protect rule of law in the Member States under Art. 7 TEU and under Regulation 2020/2029 can appear straightforward: a limited procedural review of measures adopted under Art 7 TEU due to specific powers stipulated in Art. 269 TFEU and full judicial review of measures adopted under Regulation 2020/2029. However, the construction of powers of the CJEU *vis-à-vis* Art. 7 TEU has several intentional and unintentional gaps. First, as a collateral consequence of the wording of Protocol (24) the CJEU has competence to review a proposals for adoption of measures under Art. 7(1) TEU. The CJEU tried to tackle this non-systemic and almost accidental competence by expanding limits of Art. 269 TFEU to application Art. 263 TFEU in case *C-650/18 Hungary/Parliament.* Unfortunately, this approach, even logical and aiming to preserve competence and possible discretion of the Council under Art. 7(1) TEU, restricts the competence of the CJEU without any support in the wording of the Treaties. Judicial-deference approach to political deliberation appears to be more suitable and supported by the settled case law. Although the CJEU cannot review deliberations made by the European Council in its "determination" under Art. 7(2) TEU it can still review proportionality of the Council's measures based on that "determination" as well as whether the "deliberation" can be still a valid basis for the Council's decision under Art. 7(3) TEU. Nevertheless, the limited scope of review of proposals under Art. 7(1) TEU and "deliberations" under Art. 7(1) and 7(2) TEU does not diminish competence of full review of decisions under Art. 7(3) TEU. On the other hand, in can be expected, that in both cases, review decisions under Art. 7(3) TEU and implementing decisions based on Regulation 2020/2029, the CJEU may apply judicial deference in respect of discretionary powers of the European Commission and the Council. Thus, notwithstanding different structure, uncertainties stemming from the wording of the Treaties, the Treaties provide comprehensive framework of judicial control of analysed types of measures aimed to avoid backsliding rule of law in the Member States.

[14] CJEU, judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, ECLI:EU:C:2006:10, par. 80 and case law cited therein.

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IMPACT OF EUROPEAN UNION TARIFF PREFERENCES ON INTERNATIONAL HUMAN RIGHTS TREATIES / Adam Máčaj

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Abstract: *Tariff preferences of the EU seek to, inter alia, incentivize third countries through more beneficial scheme of preferences to act in accordance with international human rights standards and other values prioritized by the EU. The aim of this contribution is to assess whether this motivation has real impact on third countries as regards their approach to core international human rights treaties and provide answer to the question whether improved tariff preferences influenced conduct of those countries, as regards accession to the said treaties and expansion of their territorial applicability. Through this assessment, the research seeks to analyse impact the positive conditionality had on acceptance and ratification of human rights treaties by countries that have not showed previous inclination to ratifications without the prospect of obtaining tariff preferences by the EU. The central method is to consider the international human rights treaty ratification years of all states benefitting from the EU regime of tariff preferences. By comparing the time of ratifying the required human rights treaties, and the year in which the respective states became beneficiaries of tariff preferences, the study confirms that, safe for several specific cases, the states receiving tariff preferences had little to no new obligations in terms of ratifying human rights conventions they were previously not bound by.*

Key words: *EU; GSP; Tariff Preferences; Human Rights Treaties; Human Rights Treaty Ratification*

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1. INTRODUCTION

The European Union (hereinafter "EU") is an actor whose capabilities and influence stretch far beyond internal market within its Member States (hereinafter "MSs" or singular form "MS"). It has been so long before current crisis threatening values of the EU threatened to undermine pillars of mutual trust, and long before the EU territory bridged the East-West divide. Albeit belated in comparison to traditional goal of internal market and economic integration, the EU has, over decades, firmly positioned itself as a value-oriented international organization. Moving beyond the economic lens, values, over time explicitly recognized in Art. 2 of the Treaty on the European Union (hereinafter "TEU"), have provided one of the unifying narratives for EU action. The values found their role to play in a multitude of areas, spanning rule of law, protection of human rights, or judicial independence, at the EU level, but their influences also manifested before judicial bodies of the MSs (Blanke and Mangiameli, 2013; di Gregorio, 2019; Schorkopf, 2020). This role

has, over the years, manifested itself in a variety of settings as well, including not only relationship between the EU and its MSs, including in areas where the EU does not have competence of its own (Kováčiková and Blažo, 2019, p. 222), but also throughout the process of its enlargement, as part of its accession criteria,[1] and its external relations as well (Mokrá, 2020; Schroeder, 2021; Smilov, 2006), for example in the area of trade agreements through human rights clauses with trade partners of the EU (Bartels, 2014; Mckenzie and Meissner, 2017).

It is the area of EU and the impact of its values on external relations that is the research presented in this paper devoted towards. Even within the specific issue of trade relations of the EU with third countries, a variety of trade-associated measures and human rights considerations exist. For the sake of comprehensiveness, this research does not aim to consider value and human-rights-oriented measures in external relations or trade relations of the EU in their broad scope. Rather, the article places its focus at one particular area where the EU devoted its *economic* influence towards *value* influence worldwide, even in the absence of trade agreements and negotiations with individual partners, namely the scheme of tariff preferences.

The reason why tariff preferences specifically became an instrument of EU values stems from the conditional benefits for third countries that they receive only in case they follow specific course of conduct desired by the EU to promote its values throughout the world, in particular developing parts thereof. Accordingly, the paper focuses on the assessment of the impact these tariff preferences brought to the development of this value promotion. It aims to achieve this goal through analysing the particular area of ratifications of international human rights treaties.

The question to be explored is whether the developing countries receiving the tariff preferences were motivated, by the desire to improve their position in the Generalized Scheme of Preferences (hereinafter "GSP"), to ratify some of the international human rights treaties they were not state parties to before. The hypothesis to be verified is that the ratifications to international human rights treaties by countries receiving the increased benefits of the special GSP regime (hereinafter "GSP+") were not motivated by the prospect of improved tariff preferences. Should this prove to be the finding, this paper will then explore other reasons why GSP+ is, or at least in the future could be, beneficial to the promotion of EU values outside its borders.

With a view to achieving these goals, a comprehensive overview is provided, considering what the tariff preferences in the EU comprise, what positive and negative modalities of conditionality mean, and what they require of the beneficiary states. The text subsequently provides short analysis of (in)effectiveness of negative conditionality as applied by the EU in the scheme of tariff preferences thus far, before turning to analysing whether the positive conditionality of the tariff preferences is any different. For this purpose, the relevant data are synthesized about all international human right conventions mandatory under the GSP+ with the years in which the GSP+ beneficiaries (current, as well as former) have ratified them. The data are then compared to the years in which the GSP+ beneficiaries have joined the scheme, in order to ascertain, whether the convention ratifications by states may have been influenced by the prospects of fulfilling conditions required to join the GSP+, or whether available information suggest that the incentives to ratify previously unratified conventions were negligible, or whether other factors incentivized the beneficiaries.

[1] Art. 49 TEU.

2. TARIFF PREFERENCES IN THE WORLD OF VALUES OF THE EUROPEAN UNION

In its external relations, much like *vis-à-vis* its own MSs, the EU has by now entered a domain in which it is determined to bring its values to life and oversee their observance. The values of the EU are presented as one of the core interests it aims to safeguard throughout its policies and actions with third countries.[2] Interestingly, the values enumerated in Arts. 3 and 21, largely replicated from Art. 2 TEU itself,[3] are not referred to in Art. 21(1) as values, but as "principles which have inspired its own creation, development and enlargement". In terms of legal significance however, it is argued this discrepancy is of no substance, as it merely recognizes that in international sphere, the EU does not adopt values of its own, but is merely guided by the very same values that originally formed its own constitutional order and jurisprudence of the Court of Justice of the European Union (hereinafter "CJEU"). While notable differences in the scope of Art. 21 TEU exist,[4] the wording maintains "deliberate congruence" of values in their internal and external direction, with the "intent to harmonise the catalogues of fundamental values and principles" in both settings (Oeter, 2013, pp. 842–843).

It has to be pointed out that the tariff preferences are just one of many measures where the EU in fact implements its values. In fact, it is bound to implement them throughout all of its external action, and even in policies that merely have an external aspect.[5] Like in many other areas, the political objectives of the EU in this context may not necessarily be aligned with its economic interests on the other hand, and the resulting tensions may prove difficult to resolve to the benefit of all (Blažo, Kováčiková, and Mokrá, 2019, p. 262).

Taking into account the breadth of contemporary international relations and the resulting extent of EU external action, it would not be feasible within the limits of this paper to fully explore all interests (especially when they are often conflicting ones), which the EU projects into its conduct within the wider world. Even within the EU, the shared values of Art. 2 TEU have occasionally resulted in conflicting approaches, like in certain approaches to human rights protection (cf. Bobek, 2017). It is therefore natural when the same values, shared in their broad sense with many third countries, have necessarily same issues of different approaches between the EU and its partners (Leino and Petrov, 2009).

Rather than discussing these competing interests, this research is fully aimed at exploring one specific measure, tariff preferences, and the question whether it succeeded in one objective the EU followed, namely human rights protection. The GSP was created under the common commercial policy of the EU, which has to respect general rules of Art. 21 TEU on external action by virtue of the Treaty on the Functioning of the European Union (hereinafter "TFEU").[6] Accordingly, respect for human rights is one of the objectives the EU must consider when considering support of developing countries through the GSP. The EU was itself the first to adopt the scheme of tariff preferences in 1971, pursuant to recommendations of the United Nations Conference on Trade and Development (hereinafter "UNCTD") (European Commission, 2015). In developing the GSP, two primary

[2] Arts. 3(5) and 21(2) TEU.
[3] Cf. the references to human rights, democracy, the rule of law, human dignity, equality and solidarity, all present in Art. 2 TEU.
[4] In comparison to Art. 2, Arts. 3(5) and 21(1) are expanded by e.g. peace, security, and international law with principles of the Charter of the United Nations.
[5] Art. 21(3) TEU.
[6] Art. 205, 207 TFEU.

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manifestations of desire to secure human rights protection in developing countries are present, first of them being the possibility for beneficiary countries to lose tariff preferences (the so-called negative form of conditionality) and hamper their access to the internal market of the EU, as a response to violations of various obligations related to values of the EU.[7]

Considering the widespread challenges human rights face all over the globe, it is notable that in the entire history of GSP in the EU, only four countries altogether have actually lost tariff preferences, and only single one, Cambodia, is currently deprived of the preferences.[8] The risk in withdrawing preferential treatment as a measure of EU value promotion resembles the one in its internal discourse – can and should the EU start negatively impact countries it deems failing in fulfilling the same standards MSs themselves are implementing inconsistently, or outright deny their position as a shared value (Lysina, 2020 regarding internal discourse on the rule of law as a shared value; Sjursen, 2017, pp. 450–451 regarding international views on the EU and implications for its reputation).

Much like in the field of other sanctions, it is therefore apparent that in withdrawing the benefits of tariff preferences, the EU prefers the approach tackling only the most egregious breaches of fundamental rights and United Nations (hereinafter "UN") core human rights treaties.

Unlike withdrawal, which is in principle usable as an element of negative conditionality to deprive of tariff preference beneficiaries from any category of preferential treatment, there are also positive measures that specifically promote respect for EU values among third countries already benefiting from the GSP. The GSP+ regime seeks to influence countries already enjoying the fruits of tariff preferences the other way around, by promising even better preferential treatment, should the beneficiaries tilt their policies to align with the goals desired by the EU. It is therefore necessary to examine this measure, a form of so-called positive conditionality (de Schutter, 2015), and its impact on promoting values in the GSP regimes, to ascertain whether this incentive had more profound impact on cases than four isolated instances of tariff preference withdrawals.

Instead of monitoring implementation of human rights (and other) obligations and dealing with the potentially contentious withdrawal of preferences, the initial method of operation for the GSP+ works the other way around. It instead sets as a precondition the bare minimum of ratification of specific conventions by the prospective beneficiaries of improved preferential treatment. That way, even without the subsequent monitoring or

[7] In the current iteration of the GSP regulation, Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1, the relevant provision of Art. 19 clearly manifests its interest to protect values of the EU in considering the possibility of losing tariff preferences due to conduct stipulated in Art. 19(1), relevant part of which stipulates "serious and systematic violation of principles [of core UN human rights treaties or International Labour Organization conventions]" as a ground for withdrawing the tariff preferences.

[8] Other three countries deprived of tariff preferences in the past include Myanmar, Belarus, and Sri Lanka. Cf. Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, OJ L 405/35; Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, OJ L 45/1; Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, OJ L 181/13; Commission Delegated Regulation (EU) 2020/550 of 12 February 2020 amending Annexes II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia, OJ L 127/1.

the threat of losing preferences, at least the minimalistic goal of convincing developing countries to assume obligations stemming from human rights conventions under international law would be achieved.[9]

In its current regime, the positive conditionality in the tariff preference regimes is the "special incentive arrangement for sustainable development and good governance",[10] in short the current iteration of the GSP+. Historically, the positive conditionality was directed towards improvements in a variety of areas, from International Labour Organization (hereinafter "ILO") conventions, environmental protection, through fight against international and transnational organized crime, to protection of human rights (Słok–Wódkowska, 2013).[11]

Much like the general regime of the GSP, or the Everything-but-Arms (hereinafter "EBA") regime, more favourable, but not linked to any obligations in the sphere of EU values, even the GSP+ regime is naturally subject to the possibility of withdrawal.[12] Subsequently, such possibility is also subject to the same criticism outlined above, regarding lack of transparency and reluctance to resort to withdrawal of preferences granted in the first place. Above all, it must be recalled that so far, even out of four withdrawals of tariff preferences, Sri Lanka is the single country that lost the benefits of GSP+.[13] Therefore, even though this possibility of monitoring (and sanctioning) countries that do not properly implement obligations required by the EU exists, it has been used sparingly so far. The real consequences accordingly remain similarly rare, much like the application of negative conditionality in respect of the general GSP scheme, as described above.

3. THE GSP+ AND RATIFICATION OF UNITED NATIONS INTERNATIONAL HUMAN RIGHTS TREATIES – INTRODUCING EU VALUES OUTSIDE THE EU?

The focal point of this paper therefore does not focus on the effectiveness or pitfalls of securing compliance with the obligations taken by the states that choose to

[9] It obviously cannot be said that monitoring would not play a role subsequently, and the EU would remain content with token ratifications without any real implementation. On the contrary, countries that seek the additional benefits of GSP+ undertake to respect and cooperate with the monitoring by the European Commission. Cf. Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1, Art. 13.

[10] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1, Art. 9.

[11] For historical regimes of positive conditionality, see also Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries; Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001; Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 - Statements on a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004; Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences; Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007.

[12] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1, Art. 19 *et seq*.

[13] Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, OJ L 45/1.

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enter the GSP+. Rather, the aim is to assess what impact the GSP+ had on countries that gained the benefits and their ratification of the required UN conventions in the area of human rights.

The current Regulation (EU) No 978/2012 (hereinafter "GSP Regulation") lists conventions whose ratification is mandatory to join the GSP+ in Annex VIII. Art. 9 of the GSP Regulation now requires ratification of all the conventions listed, without any reservations prohibited by those conventions, or incompatible with their object and purpose.

The relevant conventions in Annex VIII required fall into two groups, although these list four categories together, namely core human rights[14] and labour rights[15] (Part A), along with environment[16] and "governance principles" conventions[17] (Part B) – although these deal with combating crime only, not including broader governance issues.

The human rights treaties of UN, ratification of which is required and whose ratifications are accordingly the scope of this paper, are:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948) (hereinafter "Genocide Convention");
- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (hereinafter "UN CERD");
- International Covenant on Civil and Political Rights (1966) (hereinafter "ICCPR");
- International Covenant on Economic Social and Cultural Rights (1966) (hereinafter "ICESCR");
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) (hereinafter "UN CEDAW");
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (hereinafter "UN CAT");
- Convention on the Rights of the Child (1989) (hereinafter "UN CRC").

For the sake of comprehensive assessment in the area of international human rights conventions, the ratification assessment of International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) (hereinafter "Apartheid Convention") is included as well, which was required by the third countries up until the adoption of the most recent GSP regulation in 2012, when this convention was dropped from the requirements.

[14] See below.

[15] Convention concerning Forced or Compulsory Labour, No 29 (1930); Convention concerning Freedom of Association and Protection of the Right to Organise, No 87 (1948); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No 98 (1949); Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value, No 100 (1951); Convention concerning the Abolition of Forced Labour, No 105 (1957); Convention concerning Discrimination in Respect of Employment and Occupation, No 111 (1958); Convention concerning Minimum Age for Admission to Employment, No 138 (1973); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No 182 (1999).

[16] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973); Montreal Protocol on Substances that Deplete the Ozone Layer (1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); Convention on Biological Diversity (1992); The United Nations Framework Convention on Climate Change (1992); Cartagena Protocol on Biosafety (2000); Stockholm Convention on persistent Organic Pollutants (2001); Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998).

[17] United Nations Single Convention on Narcotic Drugs (1961); United Nations Convention on Psychotropic Substances (1971); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); United Nations Convention against Corruption (2004).

The assessment works with the analysis of ratification year of the relevant conventions by the 8 current GSP+ beneficiaries,[18] as well as by 15 more countries that have benefitted from the GSP+ tariff preferences in the past.[19] It is worth noting that the greater tariff preferences apparently do not attract broad attention among third countries, in spite of the fact that the GSP as such has been considerably expanded over time. Most countries that do not benefit from the GSP+ are either not eligible (due to their development, or failure to fulfil the vulnerability criteria), or do not need the preferences negligible in comparison to the EBA regime on the other hand. The allegation this paper will consider is then whether indeed, even the countries benefiting from the GSP+ were not motivated to ratify conventions they had not, but rather were mostly rewarded for the state of their prior convention ratifications in the sphere of human rights (cf. de Schutter, 2015; Hamuľák and Gunasekara, 2019; Słok–Wódkowska, 2013).

Taking into account the 8 conventions and 23 countries assessed overall, the GSP+ regime would require 184 convention ratifications altogether. Due to dropping the requirement of ratifying Apartheid Convention in 2012, ratifications of this convention by Pakistan, Philippines, Kyrgyz Republic, and Uzbekistan are not to be taken into account, as these countries have entered the GSP+ after 2012. Out of the remaining 180 mandatory ratifications, there is overwhelming prevalence of conventions that have been ratified generally decades before the ratification was required by the GSP+ regime. Out of all the conventions, only UN CAT (1 ratification),[20] Genocide Convention (2 ratifications)[21] and Apartheid Convention (5 ratifications)[22] were ratified by states in the year prior to their inclusion in the GSP+. In addition, Mongolia ratified the UN CAT in 2002, three years prior to joining the GSP+ in 2005, when ratification of the UN CAT became mandatory. The reasons for this ratification are therefore inconclusive and it cannot be ascertained, whether these were similarly influenced by the prospects of receiving GSP+ preferences.

The single country that ratified multiple required conventions prior to its inclusion into the GSP+ was Pakistan, which ratified the ICCPR in 2010, the ICESCR in 2008, and UN CAT in 2010. Even though Pakistan was included in the GSP+ only in 2014, years after ratifications, its ratifications were attributed to the government's plans to secure the benefits of the GSP+ (Rafique, Kiani, and Karmel, 2016, p. 13).

Overall, the impact of the GSP+ requirements on the ratification status of core international human rights treaties can nevertheless be considered minimal. The case of Pakistan is an outlier, the only country with three ratifications preceding inclusion into the GSP+. All other countries needed to ratify at most one of the required conventions prior to inclusion, and have been state parties to all other human rights conventions, and even these ratifications were required by merely 7 other countries beyond Pakistan, out of 23 beneficiaries overall. Nearly two thirds of the beneficiaries (15 countries) have therefore satisfied all the ratification requirements at least a decade, if not decades, before receiving the tariff preferences.

Apart from Pakistan, all the ratifications were also made with respect either of the Genocide Convention, or the Apartheid Convention. The GSP+ had no real influence on ratification numbers of any other UN human rights treaty and failed to persuade countries to become state parties.

[18] Bolivia, Cabo Verde, Kyrgyz Republic, Mongolia, Pakistan, Philippines, Sri Lanka, and Uzbekistan.
[19] Armenia, Azerbaijan, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Moldova, Nicaragua, Panama, Paraguay, Peru, and Venezuela.
[20] By Nicaragua in 2005.
[21] By Bolivia in 2005 and Cabo Verde in 2011.
[22] By Georgia, Guatemala, Honduras, Moldova, and Paraguay in 2005.

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4. CONCLUSION – WHAT PRACTICAL IMPACTS HAS THE GSP+ BROUGHT?

Considering the abovementioned possibilities of the EBA regime and difficult access to the GSP+ as regards trade vulnerability,[23] it is perhaps little surprise that third countries were not particularly eager to join the regime. Expectedly, very little progress has been in addition made in terms of increasing the ratification numbers of human rights treaties, which has only rarely resulted from the prospective benefits of the GSP+ for third countries.

These rare occurrences of GSP+-induced ratifications were exclusively concerning a single country in terms of broader ratification efforts of multiple required conventions. In terms of the remaining GSP+-induced ratifications, those were essentially cases of several prospective participants ratifying single convention that they have not ratified long prior. None of these countries was persuaded towards ratification of any convention creating broader list of obligations or establishing broad catalogue of human rights. All of these ratifications concerned either the Genocide Convention, or the Apartheid Convention, as instruments establishing prohibited acts and crimes under international law. It has been argued that GSP+ benefits did not serve as an incentive for prospective participants to proactively ratify conventions and assume new obligations, and rather were provided improved tariff preferences to countries that mostly satisfied the required goals anyway (Słok–Wódkowska, 2013). The limited scope of new ratifications of only the two abovementioned conventions supports this finding, especially considering the fact that neither of these two conventions establish a monitoring body, meaning new ratifications did not come with the burden of regular periodic monitoring of expert bodies, merely review by the European Commission itself.[24]

The overall results of the GSP+ in the field of human rights convention ratifications are therefore minimal. Yet that does not mean that the regime as such can be dismissed as irrelevant. The impacts of the GSP+ offer areas with possibility of further analysis. First of all, there are other three categories of conventions listed in Annex VIII to the GSP regulation (labour rights, environmental protection, and good governance/transnational crimes), ratification of which is mandatory. It is necessary to assess the impact GSP+ had on ratification status of these treaties as well, creating often more specific obligations in comparison to core human rights treaties.

Secondly, on top of the ratifications, it is imperative to assess also the actual impact participation in the GSP+ and subsequent monitoring accompanied by the Commission reviews had on performance and fulfilment of the ratified conventions. It can well be the situation that country ratified all the required convention years (even decades) before the GSP+ even became a thing (or at least before the countries started considering joining the GSP+) for entirely different reasons. Yet the question is how much were the countries actually successful in implementation of the conventions, before the prospect of EU rewarding them for proper implementation, and depriving them of the rewards in cases of lackluster approach. There is a criticism of GSP+ having little effect not only on the ratification, but also little improvement in implementing the conventions,

[23] Annex VII to the GSP Regulation defines trade vulnerability through a set of two cumulative criteria, using firstly the criterion where country's seven largest sections of GSP+-eligible imports comprise more than 75% of its overall imports into the EU over three consecutive years, where at the same time, the GSP+-eligible imports from the vulnerable country must represent less than 7,4 % of overall GSP+-eligible imports imported from all the general GSP beneficiary states (also over three consecutive years). This second criterion, often barring countries from the GSP+ benefits, is proposed to be removed in the newest version of the GSP Regulation by the Commission (see below).

[24] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1, Art. 13.

particularly as regards the ILO conventions (de Schutter, 2015, pp. 18–19). Analysis of performance in human rights (and other) international standards in the GSP+ participant countries before and after they joined the scheme (and, in some cases, performance of countries that no longer benefit from the regime), can bring useful insight into broader impact of the GSP+.[25]

Finally, the assessment in the future will need to include changes made with the reformed GSP regulation, to enter into force in 2024, and impacts new regulation will have on the countries included in the GSP+. The proposal was adopted by the Commission in September 2021[26] and added e.g. UN Convention on the Rights of Persons with Disabilities (hereinafter "UN CRPD") among the conventions that must be ratified by the GSP+ beneficiaries. While the UN CRPD has again already been ratified by all the current GSP+ beneficiaries and is broadly recognized over the world, the European Parliament (hereinafter "EP") has provided additional input into the legislative process aimed at convention ratifications as well, demanding inclusion of other conventions, including the Rome Statute of the International Criminal Court (hereinafter "Rome Statute") into the GSP+ requirements.[27] Should the EP proposals make their way into the regulation, it could provide an interesting insight into the real strength of GSP+ and its impact on conduct of third countries, as 5 out of 8 current GSP+ beneficiaries are not state parties to the Rome Statute.[28] At the same time, expanding the conventions to be ratified could further shape the position of the EU as a value-oriented global player as well, one that requires not only token ratifications of conventions that are universally recognized nevertheless. On the other hand, the EU could send a clear signal that it is actually seeking to broaden the applicability of international law and normative system on new actors, before granting them the economic benefits. However, whether such signal will be the priority of other institutions, remains to be seen.

[25] Literature has already suggested similar methods for assessment of the GSP+ performance, e.g. the GSP+ Compliance Index (cf. Marx and Lebzelter, 2020).

[26] European Commission, Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM(2021) 579 final, 22.9.2021.

[27] European Parliament Committee on International Trade, Report on the proposal for a regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council (COM(2021)0579 – C9-0364/2021– 2021/0297(COD)), 17.5.2022.

[28] Kyrgyzstan, Pakistan, Uzbekistan, and Sri Lanka never ratified the Rome Statute, while Philippines withdrew its ratification.

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ANNEXES

Annex A – Ratifications of treaties by current and former GSP+ members[29]

	GSP+ membership since	UN ICCPR (1966)	UN ICESCR (1966)	UN CERD (1965)	UN CEDAW (1979)
GSP+ countries (12/2022)		**Ratification year**	**Ratification year**	**Ratification year**	**Ratification year**
Bolivia	2005	1982	1982	1970	1990
Cabo Verde	2012	1993	1993	1979	1980
Kyrgyz Republic	2016	1994	1994	1997	1997
Mongolia	2005	1974	1974	1969	1981
Pakistan	2014	**2010**	**2008**	1966	1996
Philippines	2014	1986	1974	1967	1981
Sri Lanka	2005-2010, 2017	1980	1980	1982	1981
Uzbekistan	2021	1995	1995	1995	1995
GSP+ former countries					
Armenia	2009	1993	1993	1993	1993
Azerbaijan	2009	1992	1992	1996	1995
Colombia	2005	1969	1969	1981	1982
Costa Rica	2005	1968	1968	1967	1986
Ecuador	2005	1969	1969	1966	1969
El Salvador	2005	1979	1979	1979	1981
Georgia	2005	1994	1994	1999	1994
Guatemala	2005	1992	1988	1983	1982
Honduras	2005	1997	1981	2002	1983
Moldova	2005	1993	1993	1993	1994
Nicaragua	2005	1980	1980	1978	1981
Panama	2005	1977	1977	1967	1981
Paraguay	2009	1992	1992	2003	1987
Peru	2005	1978	1978	1971	1982
Venezuela	2005	1978	1978	1967	1983

	GSP+ membership since	UN CAT (1984)	UN CRC (1989)	Genocide Convention (1948)	Apartheid Convention (1973)
GSP+ countries (12/2022)		**Ratification year**	**Ratification year**	**Ratification year**	**Ratification year**
Bolivia	2005	1999	1990	**2005**	1983
Cabo Verde	2012	1992	1992	**2011**	1979
Kyrgyz Republic	2016	1997	1994	1997	1997
Mongolia	2005	**2002**	1990	1967	1975
Pakistan	2014	**2010**	1990	1957	1986
Philippines	2014	1986	1990	1950	1978
Sri Lanka	2005-2010, 2017	1994	1991	1950	1982
Uzbekistan	2021	1995	1994	1999	N/A

[29] The ratifications of conventions by states directly influenced by the GSP+ requirements, as identified in the paper, are outlined in bold for the sake of clarity.

GSP+ former countries					
Armenia	2009	1993	1993	1993	1993
Azerbaijan	2009	1996	1992	1996	1996
Colombia	2005	1987	1991	1959	1988
Costa Rica	2005	1993	1990	1950	1986
Ecuador	2005	1988	1990	1949	1975
El Salvador	2005	1996	1990	1950	1979
Georgia	2005	1994	1994	1993	**2005**
Guatemala	2005	1990	1990	1950	**2005**
Honduras	2005	1996	1990	1952	**2005**
Moldova	2005	1995	1993	1993	**2005**
Nicaragua	2005	2005	1990	1952	1980
Panama	2005	1987	1990	1957	1977
Paraguay	2009	1990	1990	2001	**2005**
Peru	2005	1988	1990	1960	1978
Venezuela	2005	1991	1990	1960	1983

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EUROPEAN UNION'S VALUE-BASED APPROACH TO SUSTAINABILITY OF ACCESSION PROCESS (IN WESTERN BALKAN)/ Lucia Mokrá

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Abstract: *The Union cornerstones are respect for the rule of law and the fundamental rights on which it is founded - as stipulated in Article 2 of the Treaty on European Union. EU law is supreme to national law and has direct effect, as evidence of the significance of mutual trust among its member states and their respective legal systems. The EU promotes a broad and substantive understanding of the rule of law whereby this concept is viewed as intertwined with and mutually reinforcing of the principles of democracy and respect for human rights, all of which underpin political stability and sustained economic and social development. The EU Charter of Fundamental Rights is binding on European institutions' internal and external policies when implementing EU law: it includes a legal obligation to ensure that all EU actions promote and respect human rights and fundamental freedoms, including external policies. Mirroring its internal policies, the EU seeks to prevent violations of human rights and related rule of law throughout the world. This paper analyses the EU's approach to supporting rule of law reforms and human rights protection in candidate countries base on analysis of particular agreements. It first situates European fundamental values to demonstrate how values are embedded in the association agreement and then focus on the assessment of the goals which aimed to be achieved. The paper also examines EU tools applicable in concrete cases. We argue that the EU has consistently putting the rule of law and human rights at the centre of its action and contribute to more effective protection of these values in candidate countries.*

Key words: *Fundamental Rights; Rule of Law; Democracy; External Actions; Candidate Countries; Association Agreement*

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1. INTRODUCTION

The European Commission's Communication on Further strengthening the Rule of Law within the Union – State of play and possible next steps „acknowledged the importance of strengthening the rule of law for the future of democracy in Europe and

the need to reinforce action at all stages – promotion, prevention and response".[1] The summary assessment of EU Member States refer to the promising practices but do not forget on some isolated cases in which some countries point to interference with their sovereignty.[2] The underlined importance of the rule of law in the European Union allows the Commission also to transfer rule of law implementation experiences into its policies, including the European Neighbourhood Policy and Enlargement. Rule of law together with the human rights became crucial not only in assessment of the fulfilment of Copenhagen criteria in Enlargement Policy, but are also used as the indicator for the progress of reform priorities in candidate countries. „When supporting rule of law reform and constitution building in other regions, the EU aims to ensure the same level of respect for fundamental values and democratic culture as in its own member states" (Ioannides, 2014, p. 4). This paper analyses the EU's approach to supporting rule of law reforms and human rights protection in candidate countries base on analysis of particular agreements. The assessment is based on the 2020 Commission Communication "Enhancing the accession process – A credible EU perspective for the Western Balkans" and the annual Progress reports in associate countries of Western Balkan. The qualitative content analysis of the applicable EU legislation and policy framework with the annual report will address the centralisation of the rule of law and human rights as EU fundamental values in accession process of Western Balkan candidate countries.

2. FUNDAMENTAL VALUES OF THE EUROPEAN UNION AND ASSOCIATION AGREEMENTS

Respect for human rights and dignity, together with the principles of freedom, democracy, equality, and the rule of law, are values common to all European Union (EU) countries (Article 2 TEU). They also guide the EU's action both inside and outside its borders. Democracy in this sense should be understood as "the framework within which conditions are established for the effective protection of fundamental rights and the rule of law" (de Baere, 2012). Without an effective "direct" remedy, the values of the EU, including the rule of law, are taken into account while being applied in respective rules or dealing with possible violation of rules, duties and rights stipulated by the Treaties" (Kováčiková and Blažo, 2019, p. 222).

Article 49 of the Treaty on European Union now clarifies the general conditions for accession to the European Union: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union" Article 2(1) of the Treaty on European Union states that "[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". The external aspect of the rule of law as regulated in Article 21 of the Treaty on European Union is focused on a mission, that "the EU should not be seen only as an exporter of the values, but most importantly as an organisation which consolidates and supports the rule of law" (Konstadinides, 2017, p. 77). In relation to the enlargement process, the European Commission had presented the non-exhaustive list

[1] European Commission (2019). Communication from the Commission to the European Parliament, the European Council and the Council, Further Strengthening the Rule of Law within the Union State of Play and Possible Next Steps. COM/2019/163 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163 (accessed on 29.12.2022).

[2] European Commission (2019). Strengthening the Rule of Law in the Union - Stakeholder contributions. Available at: https://commission.europa.eu/system/files/2019-07/ruleoflaw_summary_150719_v3.pdf (accessed on 29.12.2022).

of the principles enshrined in the notion of the rule of law, which should be evaluated under these criteria:

- "legality
- legal certainty
- prohibition of arbitrariness of the executive,
- independent and impartial courts,
- effective judicial review including respect for
- fundamental rights.
- equality before the law."[3]

Based on the treaty requirements and the Commission assessment tool, there had been introduced chapters 23 and 24 as the fundamental part of any association agreement related to the rule of law and the human rights application. Chapter 23 "judiciary and fundamental rights" together with the chapter 24 "justice, freedom and security" cover "key rule of law issues, in particular reform of the judiciary and the fight against organised crime and corruption. The creation of chapter 23 and the use of opening and closing benchmarks in the accession negotiations have proved to be a powerful tool to push reforms within the enlargement process and throughout the whole pre-accession period" (Nozar, 2012, p. 2).

The elements compiled under chapter 23 and 24 are linked to the political Copenhagen criteria and have to be fulfilled before the overall negotiations begin. The Commission has been regularly confirming the importance of the rule of law and human rights protection in Enlargement policy documents and strategies. The 2009 Enlargement Strategy stressed the rule of law as one of the key challenges within the enlargement process: "[T]aking into account experience from the fifth enlargement, the rule of law is a key priority which needs to be addressed at an early stage of the accession process. With EU assistance some progress has been made in putting into place effective legislation and structures to fight corruption and organised crime, but rigorous implementation and enforcement of laws are necessary to achieve tangible results" (European Commission (2009). EU Enlargement Strategy, in: Nozar, 2012, p. 2). The implementation needs to assess the state of rule of law and human rights as the first point in the accession process was supported even more in the 2011 Enlargement strategy, when "extending the timeframe of negotiations on the two chapters and would strengthen the use of benchmarks trough the introduction of interim benchmarks. It would be applied to all candidate countries starting accession negotiations" (European Commission (2011). EU Enlargement Strategy, in: Nozar, 2012, p. 3). The same approach had been confirmed in the later adopted Enlargement strategies and particularly for the Western Balkan in the strategic document "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans".[4] Two years after, the European Commission adopted the 2020 Communication "Enhancing the accession process – A credible EU perspective for the Western Balkans",[5] with ambition to better define the conditions for

[3] European Commission (2014). Communication from the Commission to the European Parliament and the Council. COM/2014/0158 final. A New EU Framework to Strengthen the Rule of Law. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN (accessed on 29.12.2022).

[4] European Commission (2018). A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans. COM(2018) 65 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-01/communication-credible-enlargement-perspective-western-balkans_en.pdf (accessed on 29.12.2022).

[5] European Commission (2020). Communication "Enhancing the accession process – A Credible EU Perspective for the Western Balkans" COM(2020) 57 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-02/enlargement-methodology_en.pdf (accessed on 29.12.2022).

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enlargement and the connection to demanding reforms. As stated in the Communication, the more candidates advance in their reforms, the more they will advance in the process. Equally, the Commission proposes more decisive measures, proportionally sanctioning any serious or prolonged stagnation or backsliding in reform implementation and meeting the requirements of accession process.

As the enlargement process is initially connected with the fulfilment of reforms required in chapters 23 and 24, the following analysis refers to the initial assessment of the rule of law and human rights in candidate countries of Western Balkan.

3. RULE OF LAW AND HUMAN RIGHTS IN WESTERN BALKAN – WHAT PROGRESS CANDIDATE COUNTRIES STIPULATES?

Many of the current enlargement countries, namely those situated in the Western Balkan region, are still undergoing a political transition period. Although there is pending association agreement with Turkey and the EU had granted the candidate status also to Ukraine and Moldova in 2022,[6] the presented analysis focuses on the assessment of the annual progress of the Western Balkan countries, which had been involved in the annual Commission's Progress report, i.e. Montenegro, Serbia, Albania, North Macedonia, Bosnia and Herzegovina, Kosovo.

For **Montenegro**, according to the Commission's assessment,[7] limited progress has been made in the area of the judiciary, with stagnating implementation of key judicial reforms and a limited track record on accountability. The corruption remains prevalent in many areas and still an issue of concern. On fundamental rights, Montenegro continued meeting obligations from international human rights instruments and legislation; however, challenges remain in ensuring the effective implementation of national legislation on human rights. There was limited progress in the area of freedom of expression. "The priority for further overall progress in negotiations remains the fulfilment of the rule of law interim benchmarks set under chapters 23 and 24. To reach this milestone, the authorities need to demonstrate in practice their commitment to Montenegro's EU reform agenda. Montenegro needs to further intensify its efforts to address the outstanding issues, including in the critical areas of freedom of expression and media freedom and fight against corruption and organised crime, without reversing earlier achievements in the judicial reform".[8]

For **Serbia**, according to the Commission's assessment, an overall balance is currently ensured between progress under the rule of law chapters and normalisation of relations with Kosovo, on the one hand, and progress in the accession negotiations across chapters, on the other. Serbia needs to continue and to accelerate and deepen reforms on the independence of the judiciary, the fight against corruption, media freedom, the domestic handling of war crimes and the fight against organised crime. In particular, the Serbian authorities should finalise the constitutional reform process in the area of the

[6] European Parliament (2022). European Parliament resolution of 23 June 2022 on the Candidate Status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0249_EN.html (accessed on 29.12.2022).

[7] European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Montenegro 2021 Report. SWD(2021) 293 final/2. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Montenegro%202021%20report.PDF (accessed on 29.12.2022).

[8] European Commission (2021). Enlargement Package: European Commission Assesses and Sets Out Reform Priorities for the Western Balkans and Turkey. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/2021-enlargement-package-european-commission-assesses-and-sets-out-reform-priorities-western-balkans-2021-10-19_en (accessed on 29.12.2022).

judiciary which has been started in 2021 as the current legal framework does not provide sufficient guarantees against potential political influence over the judiciary. Serbia's progress on the rule of law and the normalisation of relations with Kosovo is essential and will determine the overall pace of the accession negotiations. In area of fundamental rights, the existing legislative and institutional framework compliant to international standards and treaties should be consistently and efficiently implemented. The vacant position of human rights bodies as well as the lack of transparency and consistency in applied procedural guarantees raised the EU awareness in this area constantly.[9]

Albania and North Macedonia continue to fulfil the conditions to open accession negotiations and both countries advanced steadily on the EU reform path. **Albania** made good progress in continued implementation of the comprehensive justice reform. The legislative framework has been further strengthened to ensure a more efficient delivery of justice. In the area of fundamental rights, progress was assessed in most areas, however the need for transparent and inclusive approach related to the right to property was underlined. An additional by-law was adopted on minority education, but remaining by-laws are still pending adoption. The population census law was adopted. The legal framework on anti-discrimination further improved and progress is visible in other aspects of fundamental rights, for instance on the enforcement of the rights of persons with disabilities and on gender equality.[10] The **North Macedonia** assessment[11] underlines moderate progress in area of judiciary, mainly addressing police impunity and strengthening judicial independence. Corruption is prevalent in many areas and remains an issue of concern. The country continues to meet its general obligations on fundamental rights, but there are challenges in implementing the existing legislation, such as the new Parliament re-adoption of the Law on the Prevention and Protection against Discrimination after constitutional review; the limited progress in relation to granting freedom of expression in compliance with professional standards of journalism. Important progress was achieved with the adoption of the Law on Prevention and Protection from Violence against Women and Domestic Violence.

Based on the Commission assessment[12] of **Bosnia and Herzegovina** (BiH), the strategic goal of EU integration has not been turned into concrete action. BiH needs to address the 14 key priorities, including electoral and constitutional reforms, and will have to deliver on a critical mass of reforms before the Commission could recommend granting candidate status to the country. Significant reforms are needed as requested in chapter 23 to ensure that all citizens are able to effectively exercise their political rights and thus bring the country's constitutional and legislative framework in line with the case-law of the ECtHR. Segregated education needs to end in order to ensure non-discriminatory, inclusive and quality education for all. Gender-based violence, ill-

[9] European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Serbia 2021 Report. SWD(2021) 288 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Serbia-Report-2021.pdf (accessed on 29.12.2022).

[10] European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Albania 2021 Report. SWD(2021) 289 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Albania-Report-2021.pdf (accessed on 29.12.2022).

[11] European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. North Macedonia 2021 Report. SWD(2021) 294 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/North-Macedonia-Report-2021.pdf (accessed on 29.12.2022).

[12] European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Bosnia and Herzegovina 2021 Report. SWD(2021) 291 final/2. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Bosnia%20and%20Herzegovina%202021%20report.PDF (accessed on 29.12.2022).

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treatment of detainees and the protection of minorities, including the Roma, are also issues of concern. The country needs to develop a comprehensive strategic framework on human rights and on the protection of minorities, including on transitional justice. In relation to chapter 24, very limited progress was made. The legislation is not harmonised across the country and institutional cooperation and coordination are weak. Against all previous efforts and missions, BiH is in the early stage of preparation of the fight against organised crime. Criminal organisations operating in the country take advantage of legal and administrative loopholes. The police are vulnerable to political interference. Financial investigations and asset seizures are largely ineffective. There was an improvement in the mechanisms for collecting, sharing, and analysing statistics on migration in the Information System for Migration, however Violent collective expulsion (pushbacks) of migrants and asylum seekers back into Bosnia and Herzegovina continued to be reported in 2020 and 2021.

In **Kosovo**, the early parliamentary elections in February 2021 resulted into new government with parliamentary majority. Full and effective implementation of the reform action plan over the coming period will be essential as stressed in the Commission's assessment[13], because the country is still at an early state of preparation for applying the EU acquis and the European standards in the area of the judiciary and fundamental rights. Limited progress had been made, including in functioning of the judiciary and the investigation and prosecution of some organised crime and high-level corruption cases. The capacity of the judiciary and prosecution, including for handling cases in a timely manner, remains weak. The positive highlight is the adoption of the Rule of Law Strategy and Action Plan, which outlines the main challenges in the rule of law system. As regards fundamental rights, the government needs to ensure oversight of the implementation of legislation, streamlining of strategies and better coordination of policies. The need to address minority protection law and strengthening the institutional dialogue should contribute to advancing the human rights in the country.

4. CONCLUSION

The rule of law is the fundamental value of the European Union and together with human rights are essential for the proper functioning of a state and for the fulfilment of the political criteria in the accession process. EU accession requires from the point of the rule of law, the implementation of complex reforms in order to take on the obligations of membership. As the Commission assessed in its annual Progress report, "the current accession candidates need, as a matter of priority, to deliver genuine and sustainable results on key issues: the rule of law, justice reform, fight against corruption and organised crime, security, fundamental rights, functioning of democratic institutions and public administration reform, as well as on economic development and competitiveness".[14]

[13] European Commission (2021). Communication on EU Enlargement Policy. COMMISSION STAFF WORKING DOCUMENT. Kosovo 2021 Report. SWD(2021) 292 final/2. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF (accessed on 29.12.2022).
[14] European Commission (2021). Enlargement package: European Commission Assesses and Sets out Reform Priorities for the Western Balkans and Turkey. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/2021-enlargement-package-european-commission-assesses-and-sets-out-reform-priorities-western-balkans-2021-10-19_en (accessed on 29.12.2022).

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EFFECTIVE JUDICIAL PROTECTION AND THE REGULATION IMPLEMENTING ENHANCED COOPERATION ON THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE / Valéria Ružičková

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This paper is an output of the project APVV-18-0421 *„The European Public Prosecutor´s Office in Connections of the Constitutional Order of the Slovak Republic as Strengthening of the European Integration through Law"*.

Abstract: ***Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office contains several ambiguous provisions which spark the interest of European Union law scholars. One of them is the Recital 30 of said regulation, according to which where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, Member States should not be obliged to provide for review by national courts. The article therefore examines the notion of effective judicial protection within the European Union, its expression in the EPPO Regulation, some of the pressing issues relating (although not only) to the wording of the Recital 30 of the Preamble of the EPPO Regulation with regard to the principle of effective judicial protection and contemplates on possible reaction from the Court of Justice of the European Union.***

Key words: ***European Public Prosecutor's Office; Effective Judicial Protection; Judicial Review***

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1. INTRODUCTION

From once an economic union of states, the European Union has emerged as a community of people united in various fields of operation and its impact on quotidian life of individuals has risen significantly. One of its freshest ambition coming to life is the project of the European Public Prosecutor's Office (hereinafter referred to as "the EPPO"), which became operational in June 2021, already initiated several proceedings, and issued convictions.

The idea of the EPPO's creation has its roots in the meeting of the Presidents of the European Criminal Law Associations at Urbino University in Italy in 1995, where the idea of a European legal area for the protection of the financial interests of the European Communities was launched. A group of experts led by Prof. Delmas-Marty was tasked with elaborating guiding principles in relation to the criminal law protection of the Union's financial interests within the framework of a single European legal area. A report called Corpus Juris was delivered by these experts in 1997, including provisions on the EPPO's establishment. Corpus Juris distinguished between criminal law and criminal procedure

and focused on the pre-trial procedure, leaving the later stages of criminal proceedings to the national judiciary. European public prosecutor was intended to be present during the trial stage in order to ensure continuity of the proceedings and equality of treatment among those being tried, in spite of the differences between national systems (De Angelis, 2019).

In 2000, the Corpus Juris 2000 was presented as a follow-up to the 1997 proposal, analysing the feasibility of the Corpus Juris in relation to the legislations of the Member States. Later, in 2001, European Commission published its Green Paper[1] on criminal-law protection of the financial interests of the Community, and the establishment of a European Prosecutor, seeking practical solutions in implementing the EPPO project. Stating that the Corpus Juris proposed a high level of harmonisation of the substantive criminal law, European Commission pointed out that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community's financial interests. The debate was thus restricted to the minimum requirement for the European Public Prosecutor to be able to operate effectively (De Angelis, 2019).

After providing the legal basis for the EPPO's creation in the Lisbon Treaty,[2] the European Commission presented its proposal for a regulation establishing the EPPO in 2013.[3] However, there was a lack of willingness of all EU Member States to participate in this project, leaving it to the intentions of the so called enhanced cooperation.[4] This was established by the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office[5] (hereinafter referred to as „the EPPO Regulation") which – although still innovative and ambitious – was a compromise and quite distinct from the Commission's proposal (De Angelis, 2019). According to the EPPO Regulation, the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union, which are provided for in the so called PIF Directive[6] and determined by the EPPO Regulation. In that respect, it shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.[7]

The EPPO operates on the centralised and decentralised level: central level consists of the European Chief Prosecutor and 22 – one for each participating EU Member State – European Prosecutors, while the decentralised level consists of European Delegated Prosecutors. These act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment.[8] Despite the fact that they may also exercise functions as national prosecutors,[9] when investigating and

[1] Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM_2001_817.
[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1–271.
[3] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534.
[4] See Article 20 of the Treaty on European Union.
[5] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, pp. 1–71.
[6] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29–41.
[7] Article 4 of the EPPO Regulation.
[8] Articles 8 and 13 of the EPPO Regulation.
[9] Article 13 of the EPPO Regulation.

prosecuting offences within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO and should operate with complete independence from their national authorities.[10]

In general, procedural acts of the EPPO that are intended to produce legal effects *vis-à-vis* third parties as well as failures to adopt such acts shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.[11] Nevertheless, Recital 30 of the EPPO Regulation states that where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 of the Treaty on the European Union and Article 47 of the Charter of Fundamental Rights of the European Union. Such – might be called inconspicuous – provision may seem as a decent solution to coexistence of various legal orders and different forms of prosecutors' acts scrutiny across EU Member States, nevertheless, it may raise several questions and issues related to the effective judicial protection across the European Union.

Following parts of this article therefore examine the notion of effective judicial protection within the European Union, its expression in the EPPO Regulation, some of the pressing issues relating (although not only) to the above-mentioned wording of the Recital 30 of the Preamble of the EPPO Regulation with regard to the principle of effective judicial protection and contemplates on possible reaction from the Court of Justice of the European Union (hereinafter referred to as "the CJEU").

2. EFFECTIVE JUDICIAL PROTECTION AND ITS EXPRESSION IN THE EPPO REGULATION

At the same time as the legal basis for the creation of the EPPO in the primary law was provided for, the second subparagraph of Article 19(1) TEU was introduced, too. It states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." This provision mentions effective legal protection, nevertheless, it is argued that its purpose was to underline already existing general principle of EU law – principle of effective judicial protection – stemming from the constitutional traditions common to EU Member States (Rydén, 2020, pp. 22-24) and mentioned in the case-law of the Court of Justice of the European Union.[12] General principle of effective judicial protection was – according to the CJEU – reaffirmed by the Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter").[13, 14]

[10] Recital 32 of the Preamble of the EPPO Regulation.
[11] Article 42 of the EPPO Regulation.
[12] See, for example, CJEU, judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206 and CJEU, judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236.
[13] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405. According to the Article 47 of the Charter, „[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."
[14] CJEU, judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163, para. 37.

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Although the Charter refers to an "effective remedy", the Explanations to the Charter[15] state that "in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law […]. According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. […] Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law." Therefore, despite the wording of the above-mentioned provisions, their purpose and meaning refers to a "judicial protection" or a "judicial review". The CJEU also mentions these terms interchangeably, not quoting the exact wording of the TEU but using the term "effective judicial protection" instead.[16] It is necessary to point out that the principle of effective judicial protection is not static but has been applied and developed by the Court in a flexible fashion, adapting it to various situations in which individuals are attempting to enforce rights derived from EU law (Rydén, 2020, p. 26).

As for the rights of individuals stemming from EU law, national courts are bound by the Charter when they are implementing EU law. Generally, there must be a provision of secondary EU law applicable in a specific case, nevertheless, as was stated by the CJEU in *UNECTEF v. Heylens*,[17] the general principle of effective judicial protection – reaffirmed by the Article 47 of the Charter – was applicable regardless of whether a specific right was codified in secondary EU law.[18] Even without this rule in mind, the Charter and the principles codified therein should be applicable to proceedings within the EPPO's competence, since they are initiated and carried out according to and on the basis on the EPPO Regulation.

The EPPO Regulation itself does not mention effective judicial protection as such. It merely states in its Article 42 – as already mentioned – that procedural acts of the EPPO that are intended to produce legal effects *vis-à-vis* third parties as well as failures to adopt such acts shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law, however, according to the Recital 30 of the Preamble of the EPPO Regulation, where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, Member States should not be obliged to provide for review by national courts. In those cases, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. Nevertheless, said Recital explicitly wraps such situation with the obligation to respect the Article 19 TEU and Article 47 of the Charter.[19]

Bearing in mind the scope and meaning of these articles as described above, they refer to the effective judicial protection, which may seem at odds with not providing for a judicial review of said "certain acts". However, it must be pointed out that Recital 30 might

[15] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02). According to the Article 52(7) of the Charter, „[t]he explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

[16] In case C-619/18 European Commission v. Republic of Poland, the Court stated that „[i]n that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields." See CJEU, judgment of 24 June 2019, *European Commission v Republic of Poland*, C-619/18, ECLI:EU:C:2019:531, para. 48.

[17] CJEU, judgment of 15 October 1987, *Heylens*, C-222/86, ECLI:EU:C:1987:442.

[18] *Ibid*., para. 14.

[19] These would nonetheless be applicable regardless of their explicit mentioning.

be read also from the point of view other than being contradicting with general principle of EU law. One of its possible meanings is that Articles 19 TEU and 47 of the Charter are to be interpreted more broadly, that is, that they offer effective legal protection rather that narrower judicial protection. This might include also the above-mentioned review by supervising prosecutors. This interpretation is, however, in our opinion very hardly acceptable, since the focus on the judicial protection either by the CJEU or the scholars while interpreting Article 19 TEU and Article 47 of the Charter is significant.

Another possible interpretation of Recital 30 is that it concerns only judicial (non)review during the investigation phase – taking into account the wording of this Recital[20] – and it does not exclude the obligation of participating Member States to respect the general principle of effective judicial protection outside the range of investigation measures or via specific procedures such as constitutional complaint of an individual. The Recital 30 certainly does not apply on all procedural measures taken by the EPPO and intending to produce legal effects *vis-à-vis* third parties, since this term differs from "the investigation measures". The terminology used in Article 42(1) of the EPPO Regulation was the final outcome of discussions in the Council Working Group and the term "procedural acts" was preferred over the term "investigation measures" or "acts of investigation" as paragraph 1 is supposed to apply not only to "investigative measures" as referred in Articles 30 and 31 of the EPPO Regulation (Herrnfeld et al., 2020, p. 409). Therefore, the interpretation that group of certain acts is excluded from the obligation to provide for a judicial review of EPPO's procedural acts is possible taking into account that Recital 30 refers to the stage of investigation and the term "procedural acts" used in the EPPO Regulation is broader than the term "investigation measures".

However, there is also another suggestion, that is, that the Recital 30 reflects a compromise between different views that had been expressed in relation to the question whether it is necessary for Member States to provide for a review by national courts also in situation where in domestic cases the national law provides for internal review mechanisms within the public prosecution system. As a said compromise, the Recital 30 does provide that such mechanism for an internal review may apply, nevertheless, it confirms that Member States are indeed obliged to provide for effective judicial review under Article 42(1) of the EPPO Regulation where so required in the light of Article 19 TEU and Article 47 of the Charter. National law thus can provide that the prior exhaustion of such internal review mechanism constitutes a precondition, but it cannot fully replace the possibility to eventually seek judicial review of procedural acts of the EPPO (Herrnfeld et al., 2020, pp. 422 – 423). Nonetheless, Recital 30 would deserve further clarification by the CJEU.

[20] Whole wording of the Recital 30 is as follows: „The investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber. Where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')."

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3. WHY DOES IT MATTER? SEVERAL IMPLICATIONS OF POSSIBLE ISSUES

Several concerns are present in the debate regarding the judicial review of EPPO's procedural acts – firstly, these concerns are related to the limited jurisdiction of the CJEU with regard to the EPPO's acts. They do not necessarily focus on the issue whether there is judicial review as such in the participating Member States, they mainly address the fact that even if there is such review, it might not be as sufficient as it would be in the case of the CJEU (Mitsilegas, 2021).[21] In this regard, we may encounter even proposals for a court or a tribunal as an European Union body which would decide solely the matters of the EPPO.

In this regard, we should not, in our opinion, forget – although it would be almost impossible taking into account that this argument is overly emphasized in the literature – the hybrid nature of the EPPO and the fact that it relies to a large extent on the national legal orders. Therefore, it would be appropriate to firstly adopt a set of harmonised rules in relation to the prosecutorial activities or, at least, to the EPPO's functioning and leave to the Member States how they adapt their legal orders and processes related to the national prosecution once there are different rules relating to the EPPO's activities. In that case, there would be no doubt as to whether the central EU court or tribunal knows the applicable law to a necessary extent. In this state of affairs, it is hardly imaginable that the EU judicial body could sufficiently assess matters processed according to the national law.

Secondly, some concerns focus on the possible absence of judicial review of certain EPPO's acts in some of the participating Member States. The above-mentioned Recital 30 of the EPPO Regulation overshadows the otherwise clear obligation of Member States to ensure effective judicial protection via providing for a judicial review of EPPO's procedural acts which are intended to produce legal effects *vis-à-vis* third parties. In our earlier work, we also doubted that the EPPO Regulation itself requires participating Member States to do so (Ružičková, 2021). Although there is a convincing argumentation that participating Member States are obliged to provide such judicial review (Herrnfeld et al., 2020, pp. 418 – 420), the sometimes uncertain wording of the EPPO Regulation might cause a confusion among all relevant actors.

This might be seen also in relation to another concern, that is, that a careful reading of Article 42(3) of the EPPO Regulation leads to different interpretations regarding the competent judicial authority to review a decision to dismiss a case.[22] On the one hand, it can be argued that the provision in question excludes a review of the decision not to prosecute before the domestic courts as it focuses this control on the CJEU, provided that the decision to dismiss a case is challenged by referring to Union law. On the other hand, awkward stylization of the above provisions may lead to the conclusion that the decision to dismiss a case can be challenged before the national authorities by referring to the provisions of domestic law on judicial review to dismiss a case if the appellant does not call for breaches of Union law. These interpretations might therefore undermine legal certainty (Novokmet, 2020, p. 145).

Furthermore, the argument relating to the non-equal treatment might be put forward. Some of the individuals whose rights would be infringed in the proceedings conducted by the very same EU body would be subject to a different treatment depending

[21] Mitsilegas (2021) points out that by establishing very limited jurisdiction of the CJEU in reviewing EPPO's acts, the EPPO Regulation presents a significant rule of law deficit in terms of judicial protection.

[22] Article 42(3) of the EPPO Regulation states: „By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall be subject to review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU."

on which national legislation would be applicable. These concerns go hand in hand with the concerns relating to the reviewing of the EPPO's decisions on forum and the consequences for the individuals concerned (Zivic et al., 2022).

4. SEVERAL SCENARIOS OF THE POSSIBLE CJEU'S CASE LAW

The above-mentioned issues lead us to conclusion that further clarification will be needed, as regards judicial review of EPPO's acts. In an ideal scenario, national courts would refer preliminary question to the CJEU, seeking such clarification. Should the CJEU be provided with an opportunity to answer a question whether it is – in the light of interpretation of the EPPO Regulation and related provisions of EU primary law – an obligation rather than a possibility of EU Member States who wish to participate in EPPO's functioning to establish a judicial review of specific EPPO's acts, several scenarios come to one's mind as regard possible CJEU's answer.

Firstly, the CJEU might decide that the obligation to provide for a judicial review within the EPPO's functioning applies – taking into account the intention of EU legislators reflected in the Recital 30 of the EPPO Regulation – only outside the scope of investigation measures. Within their scope, an internal review within the prosecutorial office would suffice. However, if a Member State provides for a judicial review of investigation measures, the EPPO Regulation and EU law in general would not prevent it from doing so. Although being a possible CJEU's answer, we do not consider it to be a probable one. It is true that wording of Recital 30 is rather ambiguous and, one might say, explicitly excludes the obligation of participating EU Member States to provide for judicial review of investigation measures where there is only the possibility of internal review of such acts. Nevertheless, the general principle of effective judicial protection should prevail and apply on these situations as well.

Secondly, the CJEU could interpret the rule in Recital 30 of the EPPO Regulation in an extensive way and decide that where the national law provides for an internal review of prosecution acts and does not provide for judicial review of such acts, a Member State is not obliged to amend its legislation taking into account the circumstances in which the EPPO was established. We do consider this scenario neither probable, nor appropriate and desirable, nevertheless, intentions of EPPO Regulation's authors striving to respect national legal orders to a great extent cannot be overlooked.

Thirdly, the CJEU may come to a conclusion that even though "general" courts of participating EU Member States do not have opportunities for judicial review laid down in national law, it is sufficient for compliance with principle of effective judicial protection to provide for "special" procedures such as constitutional complaint. This would allow to avoid fundamental rights being infringed, yet still without the need to change national legislations dramatically in order to fulfil requirements stemming from EU law. Such answer would reflect a compromise between ensuring judicial protection of an individual and respecting national legal orders. Although we consider this scenario to be the most probable, we have already expressed elsewhere our doubts regarding the extent of effectiveness of such judicial protection. In the Member States with legislation such as, for example, the Slovak Republic, this solution would respect the principle of equivalence, it would, nevertheless, might be questionable whether it would respect the principle of effectiveness (Ružičková, 2021, p. 680).[23]

[23] Situations in which there is no applicable set of harmonised EU procedural rules, are governed by the so-called principle of procedural autonomy of EU Member States that means, in general, that the procedures

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And finally, it might be decided by the CJEU that notwithstanding the rule in the Recital 30 of the EPPO Regulation, participating Member States are obliged to provide for effective judicial protection by general courts, not only by specialized procedures via constitutional complaints. Such conclusion would not exclude the possibility of internal review of prosecution acts, it would merely require additional review provided by national courts. This scenario would, in our opinion, be the most suitable as regards ensuring effective judicial protection and would erase above-mentioned concerns related to the fact that in one Member State, an individual could rely on judicial protection via "standard" procedures before national courts while in another – even if there was an obligation to provide for a judicial review of prosecution acts and thus it would not be possible to review such acts only via internal review and not any other – he/she could only have recourse to the constitutional courts. Nevertheless, this would represent a large interference in national legal orders and require some of the participating Member States to amend their legislation to a large extent which is hardly imaginable and, at this stage of integration, desirable for Member States.

5. CONCLUSION

As already outlined above, the principle of effective judicial protection should be respected also with regard to the EPPO proceedings. As results from the CJEU's case law, although the Article 19 TEU refers to the effective legal protection and Article 47 of the Charter to an effective remedy, these provisions intend to ensure effective *judicial* protection. In this context, the interpretation of the Recital 30 of the EPPO Regulation which would exclude judicial review of national courts should be avoided completely.

From presented possible scenarios of the CJEU's future case law, we consider the last one to be the most appropriate, i.e. that Member States are obliged to provide for effective judicial protection by general courts, not only by specialized procedures via constitutional complaints. However, as already stated, taking into account the special character of the EPPO and its legal framework, more sensitive and probable one is the interpretation according to which the Member States are obliged to provide for a judicial review even when respective national legal order provides for an internal review of prosecution acts, nevertheless, if such legislation provides only for a review via constitutional court, such review would be in accordance with the requirement of effective judicial protection. From the point of criminal law view, European Union may now seem to be „divided in diversity"[24] and any intentions to further unite national legal systems might prove unfortunate.

It remains to be seen what the reaction of the CJEU would be, it could, however, be said with certainty that the wording of the EPPO Regulation offers a room for discussions and contradictory views. It would be therefore appropriate to clarify the meaning of its particular provisions or, ideally, amend them in a way which would not cause as many doubts and concerns as it does now.

which shall be used for ensuring the rights stemming from the EU law are those laid down in the national legal order. The procedural autonomy of EU Member States is, however, limited by the principles of equivalence and effectiveness. The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce. See, for example, CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117.

[24] As opposed to the motto of the European Union "United in diversity".

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CURRENT PROCESS OF OPTIMISATION OF THE LEGAL SYSTEM OF THE CZECH REPUBLIC, INCLUDING THE IMPLEMENTATION OF THE PRESENT EU STRATEGY IN THE FIGHT AGAINST TERRORISM AND RADICALISM / Vladimír Souček, Jozef Sabol

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Abstract: *The programme statement of the new government of the Czech Republic (CR) from the beginning of 2022 about the current security situation in the country and the European Union (EU) foresees the implementation of a significant optimisation of legal regulations in dealing with crises and emergency events. In addition to the experience of the fight against the Covid-19 pandemic, the worsening effects of weather, and the current negative indicators in the economy, the government decided to focus its legislative efforts on combating terrorism in line with the policy of both the EU and NATO. The paper provides an overview of relevant EU documents and discusses some specific problems encountered by the Member States, including the CR. In these regards, due attention is also paid to the consistent implementation of the EU Directives into national legislation. The paper also discusses some of the Department of Crisis Management activities as part of scientific research at the Police Academy of the CR in Prague (PACR), which is partially related to the optimisation of the legislative process in the security field.*

Key words: *Legal System; Czech Republic; Implementation; European Union Strategy; Terrorism; Radicalisation*

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1. INTRODUCTION

During the creation of the foundations of security legislation and in the subsequent implementation of relevant legal regulations, practical experience from dealing with specific emergencies and other crises shows that these regulations must be modified. There is a need for changes to respond to a variety of the current conditions of security risk management. Crisis management does not have sufficient legal support and the necessary tools for dealing with some new threats.

The terrorist danger, especially cyber threats, increasing radicalisation and the potential use of CBRNE substances should be considered, and appropriate countermeasures adopted. Therefore, it is necessary to respond to current developments and implement an adequate approach at the international and national levels. In addition,

the present legal tools proved insufficient in the case of other fundamental threats that often turned into crises, such as the Covid-19 pandemic, migration waves, drought and other natural disasters. Due to inadequate legal support, the declared emergency measures were challenged in court, the state of crisis had to be declared, or specific laws with temporary validity had to be swiftly introduced (e.g., the Czech Pandemic Act).

That is why the Ministry of the Interior of the Czech Republic (MI CR) is currently analysing the situation and the need to optimise legal regulations governing all relevant security areas in the country. These activities are consistent with the program statement of the Czech Government from the beginning of 2022.

2. CURRENT STATE OF OPTIMISATION OF THE LEGAL AND SECURITY SYSTEM OF THE CZECH REPUBLIC

The process of ongoing requests for changes in the legal security system is part of the program declaration of the current Czech Government, where it is mentioned: "By the end of 2023, we will prepare a revision of the legislation for crisis management and critical infrastructure and, if necessary, also amend the Competence Act. We will set up effective crisis management consisting of the revision of type plans for managing crisis events, the analysis of current security threats, preparation for crises (pandemics, floods, droughts, blackouts, industrial accidents, cyber-attacks, soft targets etc.), and a clear strengthening of the functions and activities of crisis units or bodies, especially the Central Crisis Staff."[1]

The MI CR is currently conducting a survey of the opinions of representatives of the public administration and relevant components of the security system of the CR on the need for changes in current legal regulations, such as the Crisis Act and other security legislation, and is collecting individual suggestions and proposals from security and crisis management experts. This follows from the optimisation process of the CR security system, which was initiated by the updated version of the Security Strategy of the CR from 2015,[2] the Threat Analysis for the CR from 2015,[3] and the National Security Audit from 2016.[4]

As a starting point for government material, the national security audit addresses, among other things, the progress of the fight against terrorism and the further linking of international cooperation in this area. The following steps have been outlined:

a) Provision and updating of basic anti-terrorist documents

The key document that regulates the strategic framework of the fight against terrorism in the CR is the **Strategy of the CR for the fight against terrorism from 2013** (further on in this chapter only "Strategy"). The Strategy covers five core areas – cooperation between interested parties in the fight against terrorism, protection of the population and other potential targets, security research and communication with the public, prevention of radicalisation and recruitment into terrorist groups, and the

[1] Programové prohlášení vlády z ledna 2022 (Program Declaration of the Czech Government). Available at: https://duckduckgo.com/?t=ffab&q=2022%2Fprogramove-prohlaseni-vlady-Petra-Fialy.pdf&ia=web (accessed on 11.09.2022).
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necessary insight into the legislative anchoring of the issue of the fight against terrorism. The validity of this document is not limited in time, and any update should therefore arise from the current need. From the point of view of the Audit working group, the content of the Strategy is still valid in its entirety, and there is no need to change it at this time.

To implement the Strategy, the Czech Government adopted a new **Action Plan for the fight against terrorism from 2016 to 2018** on August 31, 2016. This Action Plan consists of three separate documents. These are the **"Legislative Proposals in the Field of Internal Security"** and the **"Anti-Terrorism Package"**, which contain concrete steps to reduce the risk of a terrorist attack and its negative consequences. The third document is the "Proposal of measures to increase security at international airports in the CR", which contains some measures in the field of civil aviation security.

b) Status in the legislative area

The CR does not have a special "anti-terrorist law"; the issue of criminal responsibility for terrorism is nevertheless fully covered in the **Criminal Code** (40/2009 Coll.). In particular, they relate to terrorism here: §311 (Terrorist attack), §312 (Terror), §272 (General threat), §290 (Taking control of an air transport vehicle, civilian vessel and fixed platform), §292 (Introduction of air transport means abroad), §314 (Sabotage), §140 (Murder), §174 (Hostage taking), §175 (Extortion), §279 (Unauthorised armament), §280 (Development, production and possession of prohibited weapons), §281 (Unauthorised production and possession of radioactive substances and highly dangerous substances), §282 (Unauthorised production and possession of nuclear material and special fissile material) and §357 (Dissemination of alarm messages), or in some cases also (verbal) criminal acts disrupting the coexistence of people § 352 to 356 (e.g., Dangerous threats etc.).

Currently (2015), an amendment to the **Criminal Code** is in the legislative process, which further regulates financing terrorism, supporting and promoting terrorism or threatening a terrorist crime. According to the proposal, it should be about amendments to § 311, § 129 (where the term "Terrorist group" is newly defined), § 312, § 361. The amendment is also related to the revision of Act No. 141/1961 Coll. on criminal court proceedings (Criminal Procedure). This amendment clarifies some facts and prevents some interpretation issues and will thus enable more effective criminal punishment of crimes related to terrorism. The Audit Working Group fully supports adopting this amendment to the Criminal Code in its proposed wording.

Some partial deficiencies in the existing legislation that may have an impact on the fight against terrorism (e.g., the retention of data from telecommunications traffic, the use of intelligence information in evidentiary proceedings, or the expansion of controls on the cross-border transfer of cash) are addressed in more detail in the already mentioned material "Legislative proposals in the area internal security". See also the Recommendations section.

Recommendations – the government already adopted a series of proposed measures in 2016 in two documents:

a) Anti-terror package[5]

- Storage of data from telecommunications traffic;

[5] The material is subject to the level of secrecy according to Act No. 412/2005 Coll. on the protection of classified information and on security capability as amended, therefore it is not possible to include proposed measures in the text of the Audit.

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- Act on the Office for Foreign Relations and information (foreign intelligence service);
- Intelligence as evidence;
- Cancellation of the stay of a foreigner who is in the territory of the CR;
- Classified information in administrative proceedings;
- Proceedings for granting international protection at the internal border;
- Events with a more significant number of people (mass events) and police powers;
- General evaluation of the current legislation in the area of the punishment of terrorism and related security threats;
- Expanding controls on the cross-border transfer of cash.

b) Legislative proposals in the field of internal security

- Paying attention to the issue of radicalisation and recruitment. It is necessary for the relevant authorities to pay attention to the signs of radicalisation of individuals or small groups (not only) in the Muslim community environment. This radicalisation can manifest itself in different ways, e.g., through social networks or other activities in the cyber domain. It is essential for the state to intervene when persons who may have a broader influence on a given community (e.g., imams) abuse their position to spread extremist interpretations of Islam incompatible with the principles of a democratic society or directly call for violence.
- In this regard, monitoring the financing and support of similar activities from abroad is also appropriate.
- Attention must also be paid to radicalisation in prisons – experience from Western Europe shows that the criminal environment is an important radicalisation factor.
- Strengthen measures in relation to an active attacker - in particular, continue to practice riot police in AMOK-type actions, creating a register of offences, etc.
- Pay attention to the issue of protecting soft targets from terrorist attacks. Attacks on soft targets can be prevented (or their consequences mitigated) by strengthening their security (but it is necessary to balance the aspect of security with the aspect of cost and effectiveness), but also by training the personnel of these places, etc. The general problem with the security of soft targets is that they are owned mainly by private subjects, and the cooperation of the state with the private sector and the participation of the soft targets themselves in their security is, therefore, key in this regard. The Ministry of Internal Affairs of the Czech Republic (MIA CR) was tasked by the government with preparing a proposal to create a nationwide system of support for the security of selected soft targets. This activity builds on long-term experience from cooperation, for example, with owners of Jewish buildings.
- In connection with the issue of foreign fighters, it is also necessary to pay attention to the issues of the formation of paramilitary groups on Czech territory and foreign influence.
- Strengthening the protection of critical infrastructure, both physical and cyber.
- Support for the long-term development of communication infrastructure and technologies of public administration and eGovernment for use in ensuring internal order and security, state security and solving crisis situations.

- Adoption of the amendment to the Criminal Code prepared by the Ministry of Justice of the Czech Republic (MJ CR), which also regulates some provisions concerning terrorism.
- Propose an amendment to the legislation that would, in urgent cases, enable the intelligence services and law enforcement authorities, on the basis of specific information, to deploy actions that are generally subject to the approval of another state authority (typically a court) immediately, while the request for authorisation would be submitted within an additional period (e.g., 48 hours). Usually, these would be cases where it is possible to prevent the commission or repetition of a terrorist attack and subsequently clarify and minimise the harmful consequences of terrorism.
- To propose an amendment to the legislation that would allow to ascertain or verify information about terrorist crimes, immediate access to information about the owners and managers of bank and similar accounts, about the balance on the interest account, and which would allow access to a statement of financial transactions on the relevant account.
- The legislation amendment with the aim, among other things, to enable the prosecution of service in non-state foreign forces is currently being resolved in the MJ working group. This area should certainly be included among the problems this Audit chapter recommends addressing.

3. PROGRESS OF THE IMPLEMENTATION AND UPDATE OF THE LEGISLATION IN THE FIELD OF THE FIGHT AGAINST TERRORISM AND RADICALISM

The European Union pays special attention to the issue of combating terrorism, as well as radicalism and violent extremism, which is reflected in a number of their directives, documents and measures aimed at tackling these negative tendencies with the aim of strengthening the security situation in the region. To effectively combat this danger, the EU strategy focuses on four main pillars: prevention, protection, prosecution and response. The CR is trying to consistently transpose these attributes into national legislation and project them into other regulations and regulations, the aim of which is to ensure a coordinated procedure in ensuring adequate security of citizens and the state against the current threats of international terrorism and other adverse factors that could adversely affect the situation in Europe and the world.

a) Implementation process in national strategic materials and legal documentation until 2013

A basic evaluation of the previous measures of the CR security policy and a summary of documents important for further international cooperation in the fight against terrorism is given in the Strategy for the fight against terrorism from 2013.[6]

The security strategy of the CR ranks terrorism among the leading threats. This trend is captured, for example, in the study "Global Trends 2030 ".[7] The counter-terrorist efforts of the CR go hand in hand with efforts at the level of the EU and NATO. In doing

[6] Strategie pro boj proti terorismu od roku 2013 (Strategy for the fight against terrorism from 2013). Available at: https://www.mvcr.cz/soubor/strategie-ceske-republiky-pro-boj-proti-terorismu-pdf.aspx (accessed on 11.09.2022).

[7] National Intelligence Council (2012). Global trends 2030. Alternative Worlds. Available at: http://www.dni.gov/files/documents/GlobalTrends_2030.pdf (accessed on 11.09.2022).

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so, it also uses key EU documents, such as the European Counter-Terrorism Strategy and the associated EU Action Plan for Combating terrorism, the EU Sanction Lists created in connection with sanctions against the financing of terrorism, the Strategy for Combating Radicalisation and Recruitment, and the European Union Action Plan for Combating radicalisation and recruiting, Action plan to strengthen the security of explosives, Action plan on the subject of chemical, biological, radiological substances and nuclear materials, regular half-yearly report of the anti-terrorist coordinator of the European Union, etc.

In this context, activities within the United Nations (UN) cannot be neglected, especially the implementation of the UN's Global Strategy for Combating terrorism from 2006 and the CR's cooperation with the UN's anti-terrorist bodies. The CR implements the Stockholm Program for the area of freedom, security and law in the service of citizens (2010-2014), which also regulates issues of the fight against terrorism.

The European Commission created an Action Plan for the Stockholm Program that clearly defines "Lone Wolves" - these are individual terrorists who act in isolation from terrorist organisations or terrorist associations. This document was also used in the national anti-terrorist documentation.

The Counter-Terrorism Committee of the UN Security Council /CTC/ in the implementation of UN Security Council Resolution 1373 (2001), the UN Security Council Committee 1267 for the implementation of sanctions against Al-Qaeda and the Taliban, and the Counter-Terrorism Implementation Task-force. The CR, following its alliance obligations, constantly monitors and evaluates the dynamically developing international-political situation to find ways to support international anti-terrorist efforts in the form of participation in foreign stabilisation missions of military and non-military nature and further active involvement in working groups of the EU (Terrorism Working Group, COTER) and the Council of Europe (The Committee of Experts on Terrorism). Purely for the area of extremism, there is a separate government document, "The concept of combating extremism", which is updated and evaluated annually.

b) Principles of the fight against terrorism

Due to the transnational nature of international terrorism, the security forces pay significant attention to ensuring that domestic procedures are harmonised to the maximum extent with efforts at the global level, with an emphasis on the activities of the EU, the NATO and the United Nations.

The security services of the CR perceive the responsibility for protecting the public from terrorism, but they also do not lose sight of the issue of protecting the privacy of the state's residents. Every single measure mentioned in this document emphasises the balance of two core values, which are the safety and freedom of the individual. The CR fully respects the basic principles of a democratic state and democratic values; it designs its actions not only in the fight against terrorism in such a way that there is no limitation of the basic rights and freedoms of citizens beyond the framework given by the relevant laws and appropriate to the given situation. These are mainly the Police of the CR and the Intelligence Service of the CR.

Basic principles in the fight against terrorism in the CR:

- Compliance with the fight against terrorism with the Security Strategy of the CR and other essential documents;
- Respecting the principles of democracy and protection of human rights;
- Cooperation and information sharing between interested institutions;
- Deepening the involvement of the CR in international activities (however, this does not mean transferring activities that we can solve at the national and local level);

- Building and deepening trust between like-minded foreign partners;
- Examination (practice) of abilities to face the threat of terrorism;
- Education;
- Active approach to threat prevention;
- Informing the public to an appropriate and reasonable extent;
- Maximum assistance, support and protection to entities that provide information about planned terrorist actions.

c) Legislative and international-contractual issues

The legal system of the CR currently allows the prosecution of terrorist activities in their entirety. At the same time, a terrorist act is understood not only to carry out specific attacks but also any logistical support of terrorist activities, with a special emphasis on the effort to finance them. In the same way, the area of protection, compensation and assistance to victims of terrorism and the protection of witnesses and other persons involved in criminal proceedings (i.e. including cases related to terrorism) is adequately covered. In this context, the situation (including examples based on foreign developments and modifications) related to the possibility of further legislative changes are still being studied.

The CR is currently a contracting party to all thirteen universal anti-terrorism instruments, as well as the European Convention on the Suppression of Terrorism (an agency of the Council of Europe). The necessity of fulfilling obligations arising from specific international instruments necessitated the adjustment of the liability of legal entities in the Czech legal system. By adopting Act No. 418/2011 Coll. on the criminal liability of legal entities and proceedings against them, the CR fulfilled a number of international obligations and European regulations, including anti-terrorist instruments. Specifically, this is the fulfilment of the Framework Decision of the European Union on the fight against terrorism (2002/475/SVV), which explicitly requires the introduction of criminal liability of legal entities into the legal system of the member states.

In principle, all legal entities are subject to criminal liability, i.e., not only commercial companies but also foundations, associations or registered churches. Although legal entities are not responsible for all criminal acts, they are responsible for approximately 80 selected criminal acts recorded in international instruments (including terror, terrorist attacks, incitement to hatred, etc.). By accessing these instruments (or thoroughly implementing already adopted mechanisms), the CR will increase its capabilities for international cooperation (for example, including the enforcement of foreign decisions on the sanctioning of the property of legal entities used for criminal activities, e.g., for the financing of terrorism).

A legal person is responsible "in addition to" a natural person for a crime committed, not only if the crime is committed by a member of its management, but also if such an act is committed by an employee on the instructions of a body of the legal person or in case of neglect of preventive control measures. In this way, the law creates pressure on legal entities.[8] The obligations of the CR towards the United Nations regarding the treaty agenda on terrorism are covered in principle. Only three amendments or protocols to the conventions adopted in 2005 within the framework of the International Atomic Energy Agency (IAEA) and the International Maritime Organization, which relate to the fight against terrorism, have not been ratified.

[8] Especially the Law No. 40/2009 Sb. of the CR [Trestní zákoník (Criminal Code) - § 311: Teroristický útok (Terrorist attack)].

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Examples of international obligations,[9] related to the fight against terrorism, the successful implementation of which requires a valid law on the criminal liability of legal entities and proceedings against them in risky situations to prevent criminal activities of their employees without weakening the individual responsibilities of individual natural persons for criminal activities.

Criminal liability is imposed against legal entities in criminal proceedings, which have the most balanced protection of the suspect's rights in relation to the powers of law enforcement authorities. This allows law enforcement authorities to choose the optimal course of action against all suspects while at the same time using a wide network of foreign judicial cooperation agreements. The provision on effective regret for a legal entity also contributes to this. The diverse nature and power of legal entities are matched by a wide range of sanctions, which should enable the appropriate punishment of small and large legal entities, with the basic sanction being a fine (in the amount of CZK 20,000 to 1.46 billion) and then confiscation of property or other property values, prohibition of activity until the dissolution of the legal entity.

The adoption of the law on criminal liability of legal entities and proceedings against them is an important conceptual element of the state's criminal policy and security architecture, which aims to have long-term positive consequences for the country's internal security. As part of international legal activities, the MI CR concludes bilateral agreements on police cooperation between the Police of the CR and the police authorities of other countries. One of the standard obligations contained in these treaties is cooperation in the fight against terrorism and its financing.

d) Current examples of international anti-terrorist cooperation, including the implementation of the current EU strategy into national law

The EU pays special attention to the issue of combating terrorism, as well as radicalism and violent extremism, which is reflected in a number of their directives, documents and measures aimed at combating these negative tendencies with the aim of strengthening the security situation in the region. To effectively combat this danger, the EU strategy focuses on four main pillars: prevention, protection, prosecution and response. The CR is trying to consistently transpose these attributes into national legislation and project them into other regulations and regulations, the aim of which is to ensure a coordinated procedure in ensuring adequate security of citizens and the state against the current threats of international terrorism and other adverse factors that could adversely affect the situation in Europe and the world.

The EU began to form in the middle of the last century and gradually reached its current form, where it represents an essential political and economic actor in international relations. During the last decades, the EC has continuously expanded its influence and leading position in the formation of European integration, which was manifested mainly in economic and political cooperation, the main objective of which was to contribute to the creation of a common market, which will respect the free movement of people, goods, services and capital. This whole process, as well as intensive

[9] United Nations Convention against Transnational Organized Crime, 29 September 2003, No. 39574, Amending Protocol (ETS 190);European Convention on the Suppression of Terrorism (ETS 90); Convention on Cybercrime (ETS 185); Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 189); Council of Europe Convention on the Prevention of Terrorism (ETS 196); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198); United Nations Security Council Resolution 1373 - counter-terrorism, adopted unanimously on 28 September 2001, is a counter-terrorism measure passed following the 11 September terrorist attacks on the United States.

efforts to integrate the single market and loosen border controls, led to a certain extent to the need to pay more attention to security issues, where the growing influence of the phenomenon of world globalisation, migration, organised crime and international terrorism began to manifest itself. As a result of many factors, such as war conflicts, adverse health, social and working conditions or threats of natural disasters resulting from climate change and global warming, the number of people who migrate for a better and safer life increases yearly. Related to this is the increasing danger of security threats at the national and international levels.

The EU, through its specific mechanisms, must constantly update its foreign and security policy, including solutions to the current problems of the fight against terrorism, following the development of the security environment. These efforts were also manifested in the creation of Directive 12017/541[10] on the fight against terrorism or Regulation 2017/458 aimed at strengthening controls at external borders.[11] These documents of the European Parliament and the Council of the European Union are gradually implemented into national legislation and other regulations related to counter-terrorism measures. National security services are alert to the specific threats of extremism, which is spread by violent right-wing ideology through various forms, where social networks and other forms of Internet radicalisation also play a significant role. Currently, it appears that the population in EU countries ranks terrorism among the main global challenges. There are signs that the EU's work in the fight against terrorism is paying off.[12] Between 2019 and 2021, 1,560 people were arrested in EU member states on suspicion of terrorism-related offences. Around 29 jihadist or far-right plots were foiled across the EU during the same period. In 2021, there were 15 terrorist incidents in the Member States, compared to 57 in 2020.

The combination of social isolation and more time spent online during the COVID-19 pandemic has exacerbated the risks posed by violent extremist propaganda and terrorist content online, particularly among younger people.

The role of the EU is essential to ensure that the work of the Member States in the fight against extremism is effectively coordinated. Of course, the threat of terrorism does not begin and end at European borders. The safety of citizens is directly affected by what happens elsewhere. The EU continues to work with international organisations and third countries to share information to ensure the safety of citizens around the world, and the EU Counter-Terrorism Coordinator plays a vital role in this work.

4. ACTIVITIES OF THE DEPARTMENT OF CRISIS MANAGEMENT WITHIN SCIENTIFIC RESEARCH ACTIVITIES AT THE POLICE ACADEMY OF THE CZECH REPUBLIC IN PRAGUE

A number of research projects are underway within the Police Academy of the Czech Republic in Prague (PACR), which also impact the CR's security system, including crisis management in the field of internal security and terrorism.

[10] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, pp. 6–21).

[11] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (OJ L 132, 20.5.2017, pp. 1–25).

[12] Eurobarometer, 2022. Latest surveys and publications. Available at: https://europa.eu/eurobarometer/screen/home (accessed on 11.09.2022).

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As part of the institutional research of the PACR, representatives of the Department of Crisis Management and other workplaces of the PACR are implementing a partial research project entitled **Streamlining the functioning of the population protection and crisis management system in the CR,** carried out as part of **the Development Program of the PACR as a research organisation for the years 2017 – 2023**.

The project is aimed at solving extraordinary events and crisis situations when it is necessary to prepare forces and resources that can be deployed for immediate use for the benefit of public administration and residents who may be negatively affected by emergencies and crises. A significant challenge for this area is, for example, security challenges such as terrorist attacks and the wave of migration. The most vulnerable are elements of the transport infrastructure, including civil aviation, or places with a high concentration of population (which are not necessarily elements of the critical national infrastructure), such as social, political, cultural and sports gatherings, large shopping centres, large hotels, etc.

To identify and analyse the possible eventualities of the further development of the security situation, it is possible to use the previous experience of research at the PACR, focused on the creation of scenarios, including the updating of methodologies for their processing as part of the modelling process of the most likely risks and threats related to the CR (probability, impacts, timing, countermeasures, response, etc.). The model scenarios that have already been processed have been checked for their relevance, and especially in the area of a large-scale migration wave, it is necessary to incorporate current findings and supplement them with measures and procedures that can be used in an alternative future (desirable and undesirable future - with an emphasis on the functioning of the security system of the CR).

As part of the elaboration of new scenarios in connection with the updated methodology for creating model situations, the effort to propose appropriate methodological, organisational, resource and other measures for solving specific problems in the monitored areas, using foreign as well as domestic experience (best and worst practice), dominates. When processing the scenarios of model situations, attention will be paid to the practical use of the results for ordinary solvers of extraordinary events and crisis situations (for example, in the form of manuals and recommendations).

The aim of the activities within this project is mainly to:

- **Create** model scenarios for individually selected "stress situations" that have not been the subject of previous research by the PACR or other academic workplaces (following on from Sub-research task 2/1, completed in 2015).
- **Develop** proposals for streamlining (helping to bridge potential weaknesses) the functioning of the crisis management system within the CR (proactive approach to some emerging challenges).
- **Map** new trends in "crowd management", i.e., managing a potentially aggressive crowd with security forces, technical measures and other means.
- **To map** the possibilities and limits for the potential use of other components of the security system, such as new forms of volunteering (volunteer groups) or the use of the capacities of the private security service (the private sector as a whole).
- **To propose** (technical, organisational or other) measures to reduce the vulnerability of critical infrastructure (national and European) on the territory of the CR (including vulnerability due to external influences, the

effects of natural disasters and intentional anthropogenic acts, terrorist attacks and sabotage).[13]

- **Formulate** recommendations to improve mutual communication between actors within the public and private sectors, education of owners and operators (manuals of recommended behaviour for operators of places with a large concentration of people). The same applies to the topic of communication with the public (groups of society) during emergencies and crisis situations.
- **Methodically assist** the application of **business continuity management** within critical infrastructure entities.
- **Propose** recommendations to streamline the functioning of the population protection system and protection of critical infrastructure (including protection against the delivery of IEDs and weapons to the site of a terrorist attack).

Other areas implemented within the security research of the Ministry of Defense are two projects: **"Use of radiation methods for detection and identification of CBRNE materials"** and **"Elemental characterisation of microtraces and narcotic and psychotropic substances by nuclear analytical methods".**

In particular, the following scientific research activities are carried out within the framework of these projects:

- Study of various sources for the use of detection of effects and identification of CBRNE substances and treasures for the preparation and use of prepared methodologies and continuous processing of professional monographs, articles and contributions for organised and prepared events - for conferences and, where appropriate, in the proceedings of events that did not take place due to the pandemic. A number of events took place in the form of online or virtual conferences.
- Assessment of organisational and technical systems of radiation protection and study of national radiological standards and diagnostic reference levels, including the field of radiological physics.
- Identification and preparation of documents for cooperation with representatives of entities that can use the results of the research and can be involved in practical solutions and preparation to ensure the results and outputs of the project.
- Preparation and assurance of certification of the methodology for detection and identification of explosives using a DT generator (University of Mining and Technology Ostrava, Faculty of Electrical Engineering and Informatics) and Preparation and assurance of certification of the methodology for detection of enriched uranium (Czech Technical University in Prague).
- As part of the project, relevant documents will be provided on the needs of radiation methods for individual areas of security practice, including the usability of radiation methods by the security components of the CR. For this, the PACR will use both its expert background in this area and also a wide network of contacts in the field of security practice in the CR.

[13] Ensuring the recovery of critical infrastructures consists in efforts to minimize the recovery time in order to prevent the development of a crisis situation (its seriousness usually increases exponentially depending on the time of the interruption of the critical infrastructures) taking into account the effects of the interruption of the function of critical infrastructure elements.

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- Implementation of laboratory measurements of various samples of drugs and other materials for the application of the use of similar projects in this research. Examples include the preparation and measurement of MDMA methamphetamine tablets, the analysis of the binary mixture of cocaine and levamisole, the use of ab-initio simulations, the analysis of the possibility of using the method of elemental analysis by nuclear methods in the research project "Drugs and management - proof of intoxication and a condition excluding competence" - VJ01010090.

In addition to the basic goal of the mentioned projects to use model scenarios to improve the quality of the tools of the security system of the CR and to detect samples of CBRNE substances, drugs and other materials from the point of view of their use for their application in forensic practice, they can also be used in the field of combating terrorism and ensuring readiness for new threats.

5. CONCLUSION

Following the optimisation of the legal environment and updating the security system prepared by the government, the representatives of the PACR proposed some new perspectives on this optimisation. For this purpose, knowledge from the academy's scientific research activities was also valuable and applicable.

Among other things, improving (optimising) the safety management system in the CR is recommended. In addition, it would be appropriate to consider changes in the legal regulations governing crisis management in order to introduce comprehensive security management regarding the solution of serious events and situations before the declaration of crisis situations. The experience of the Covid-19 pandemic and the current wave of migration has shown that if there is no high-quality legislation to deal with extraordinary events before declaring a state of crisis, it is necessary to use crisis measures, which often arouse considerable reservations among politicians and the public. The term "emergency event" (hereafter referred to as "EE") can not only be understood according to the Act on Emergency Situations to carry out rescue and liquidation work but also in the areas of internal security and public order, protection of the economy and critical infrastructure when rescue and liquidation work is not carried out.

The need for two-system risk management has been demonstrated by practice. For example, in the case of floods, which are dealt with following the Water Act at a lower level of threat, and in the case of a worsening situation and the ineffectiveness of flood measures according to the Water Act, this pre-crisis risk management system is changed by the declaration of crisis situations to crisis management according to the Crisis Act.

It is also possible to consider whether an extensive revision of the so-called crisis legislation (rather, the legal regulations governing crisis management) is necessary, as stated in the government's program statement. Basic attention should be paid to legal regulations that would make it possible to solve all serious emergencies and situations according to the model of the Water Act, which, among other things, contains a pre-crisis system of risk management for floods and droughts, including the possibility to order extraordinary measures and obligations, which can even temporarily limit some constitutional rights and freedoms.

When determining the list (scope) of legal regulations enabling the solution of serious MU, we recommend starting from the same procedure used for crisis management in the Threat Analysis for the CR. We propose to impose by law on all ministries and other central administrative authorities the obligation to analyse threats

within their scope in a similar way as for the processing of type plans and to ensure the necessary additions or new legislation for their pre-crisis solution according to the model of the Water Act. In the future, the problems that had to be solved, for example, during the Covid-19 pandemic in terms of the inadequacy of the Act on the Protection of Public Health and the Pandemic Act or for measures to deal with the wave of migration, would be eliminated.

The above recommendations will be the subject of further discussion, and the question remains to what extent they will be accepted and implemented.

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