ANNUAL SCHOLARLY LEGAL JOURNAL
OF COMENIUS UNIVERSITY BRATISLAVA, FACULTY OF LAW

SYEUL

SLOVAK YEARBOOK OF EUROPEAN UNION LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988
ISBN (print): 978-80-7160-694-9
ISBN (e-book): 978-80-7160-695-6
DOI: https://doi.org/10.54869/syeul.2023.3

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Publication was supported by the project:
Jean Monnet Centre of Excellence
"Rule of Law in the European Union"
Grant No 620758-EPP-1-2020-1-SK-EPPJMO-CoE

Co-funded by the European Union

Published once a year by Comenius University Bratislava, Faculty of Law
print and online:
https://syeul.flaw.uniba.sk
https://doi.org/10.54869/syeul.2023.3

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TABLE OF CONTENTS:

ARTICLES

SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

THE EU COMPETENCE IN CRIMINAL LAW AND NATIONAL IDENTITY AS AN OPT-OUT FOR THE MEMBER STATES OF THE EUROPEAN UNION / Sára Kiššová

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Abstract: *The article examines the EU's competence in criminal law, and the ways in which the EU can intervene in this area within the national law of the Member States. Considering the current debate in Slovakia regarding amendments to criminal codes and the proposal to abolish the Special Prosecutor's Office, the paper discusses the delimitation of competence in this respect between the EU and the Member State. The article also discusses the possibility of a Member State to argue national identity in Article 4(2) TEU on the issue at hand.*

Key words: *National Identity; Constitutional Identity; Primacy of EU Law; the Contro-limiti Doctrine*

Suggested citation:
Kiššová, S. (2023). The EU Competence in Criminal Law and National Identity as an Opt-Out for the Member States of the European Union. *Slovak Yearbook of European Union Law*, vol. 3, 9-22. https://doi.org/10.54869/syeul.2023.3.810

1. INTRODUCTION

The question of national identity is increasingly coming to the fore in the context of the discourse on values in the European Union (hereinafter also referred to as the "EU"). Reference to national identity can be found in some judgments of constitutional courts of the Member States such as Poland, Romania, Hungary, the Czech Republic, Italy, and Germany.[1] In any case, references to national identity in the judgments of the national courts of the Member States are not in themselves a problem; on the contrary, they can make an interesting contribution to the field of constitutional law of the European Union.

In Slovakia, the end of the year 2023 and the beginning of the year 2024 will be marked by discussions on the proposed abolition of the Special Prosecutor's Office, which is currently a special part of the General Prosecutor's Office,[2] and changes to the Criminal Code and the Criminal Procedure Code. Among the changes in the Criminal Code are announced, for example, adjustment of the basic principles for the imposition of penalties, changes in the limitation period, changes in the amount of damages, or reduction of penalties for property and economic crimes. Among the amendments to the Criminal Procedure Code are, for example, changes in the legal regulation of the

[1] Constitutional Court of the Czech Republic, Pl. ÚS 29/09 (3 November 2009); Constitutional Court of the Czech Republic, Pl. ÚS 5/12 (31 January 2012); Constitutional Court of Romania, No 390/202 (8 June 2021); Constitutional Court of Hungary, Decision No. 22/2016 (XII.5.) AB; Constitutional Court of Poland, K 3/21 (7 October 2021); Constitutional Court of Italy, No 24/2017 (26 January 2017).
[2] § 38(1) a) Act of 28 March 2001 no. 153/2011 Z.z. o prokuratúre.

cooperating person and the suspect or amendment in the discontinuation of prosecution in the preparatory proceedings (pre-trial proceedings) pursuant to Article 215(1)(a), (b), (c) of the Criminal Procedure Code. As regards the proposal to abolish the Special Prosecutor's Office, so far, from the information available on the Internet, it does not appear that the abolition of the Special Prosecutor's Office would mean that the active criminal proceedings would come to an end. There is an assumption that if the Office were to be abolished, these proceedings would be transferred to the regional prosecutor's offices through an organisational change.[3]

The fact remains that at the time I am writing this paper, I have almost no available academic information on the impact of the abolition of this office on human rights or the rule of law in the Slovak Republic, nor do I have any academic articles dealing with the impact of possible changes to our criminal codes. I have media reports by experts and a few online blogs. All considerations regarding the situation in question in relation to EU law will, therefore, be conducted on a hypothetical level with a purely theoretical-legal interest. It is not the subject of this paper to assess the correctness or incorrectness of the proposed changes, nor is it relevant to this article who proposes the changes in question.

In this paper, I would like to take a strictly theoretical look at the situation in question (organisational change of the prosecutor's Office of a Member State and change of the criminal codes of a Member State) from the point of view of the obligations of EU law. I would also like to refer to national identity in Article 4(2) Treaty on the European Union (hereinafter also referred to as the "TEU").

2. COMPETENCES OF THE EUROPEAN UNION IN THE FIELD OF CRIMINAL POLICY OF THE MEMBER STATES

The EU's competence in criminal matters is currently contained in the shared competence in Article 4 of the Treaty on the Functioning of the European Union (hereinafter also referred to as the "TFEU"). Article 4(2)(j) contains the 'area of freedom, security and justice'. Furthermore, this area is covered by Articles 67 et seq. TFEU. Within this area of EU shared competence, the relevant articles for procedural criminal law and substantive criminal law are Articles 82 and 83 TFEU, which can be found in the chapter entitled "judicial cooperation in criminal matters".

However, both provisions must be read in conjunction with Title V, Chapter 1 TFEU, which sets out the general objectives for this area to be achieved (Herlin-Karnell, 2012, p. 335). In the context of the Europeanisation of criminal law, we can talk about the convergence of the elements of selected crimes (listed below) and the development and strengthening of cooperation between Member States in criminal matters (Klimek, 2017, p. 21).

In the area of substantive criminal law, Article 83 TFEU allows for the establishment of "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". For this reason, this Article defines ten criminal areas, the so-called Euro-crimes, which are described in EU primary law mainly because of their particularly serious nature and their typical cross-border dimension, and therefore require a common approach within the Union (Bogensberger, 2019, p. 900). The provision in

[3] For example, see: Kurilovská Lucia: Neexistuje právo na zákonného prokurátora, In: Rozhovory s Mimi Šramovou, online, 18.12.2023, Youtube. Available at: https://youtu.be/fx4G4Sndp-o?si=UVsLcbJX6tQRbZQh&t=743 (accessed on 31.12.2023).

question lists crimes such as terrorism, several types of trafficking with *res extra commercium*, money laundering, organised crime, corruption, etc. This list mainly focuses on the protection of the European Union's financial interests; however, paragraph 2 contains a general clause allowing the Union to approximate further if this proves to be 'essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures...'. In this context, Herlin-Karnell notes the rather broad definition of the EU's competence by this provision (2012, p. 339).

As regards criminal procedural law, Article 82(2) a-c) TFEU contains a list of areas within the EU's legislative competence where minimum rules may be laid down, such as the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime. The European Union can thus adopt minimum rules on selected procedural rights of persons in criminal proceedings. However, the procedural rights of persons in criminal proceedings are also protected within the EU by Article 47(2) of the Charter of Fundamental Rights of the European Union, which is, in essence, one of the many projections of the rule of law enshrined in Article 2 TEU.[4] It is also essential to recall the membership of all Member States in the Council of Europe and, thus the automatic protection of the procedural rights of persons by the provisions of the European Convention on Human Rights. Moreover, Article 82(2)(d) TFEU constitutes a general clause for the approximation of any other specific aspect of criminal proceedings, which, however, the Council must identify in advance by a decision.[5]

As regards the competence of the Court of Justice of the European Union (also as "CJEU"), prior to the adoption of the Lisbon Treaty, there was no general jurisdiction in this area. The jurisdiction of the CJEU could only be established voluntarily based on a declaration or acceptance of such jurisdiction by the Member States (Herlin-Karnell, 2012, p. 337). Following the adoption of the Lisbon Treaty, which, among other things, abolished the three-pillar structure of the EU pillars, the area of freedom, security, and justice came under the general jurisdiction of the CJEU, albeit with a transitional period of five years.[6] The Court of Justice can thus decide on infringement proceedings against a Member State under Article 258 TFEU or answer a referred question for a preliminary ruling in pending proceedings before a national judicial authority in respect of a person who is in custody under Article 267 TFEU, whereby the Court of Justice acts without delay. From the above, we can conclude in this section that the European Union has specific competencies in the field of criminal policy of the Member States, which are laid down in primary EU law. From a general point of view, this includes selected areas of substantive criminal law, procedural criminal law (criminal proceedings), cooperation in criminal matters between Member States (recognition of judicial decisions - Article 82 TFEU), and, finally, the creation of bodies to promote cooperation between EU Member States in criminal matters, such as Eurojust, Europol and so on.[7] For these reasons, the EU has an interest in scrutinising legislative changes within Member States and may scrutinise parts of changes that explicitly affect the EU in selected areas.

On the other hand, EU primary law also guarantees specific breaks that a Member State can use if it perceives that proposed legislation in a particular criminal area interferes with fundamental aspects of its criminal justice system. One of these breaks is Article 82(3) TFEU and Article 83(3) TFEU, which allow a Member State to object to or

[4] Art. 47(2) follows as: "Everyone has the right to have his or her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law."
[5] It is important to draw attention to the unanimous vote of the Council following the consent of the European Parliament.
[6] Article 10 of the Protocol (No 36) on transitional provisions attached to the Treaty of Lisbon.
[7] See Articles 85 and 88 TFEU.

DOI: 10.54869/syeul.2023.3.810

trigger the suspension of an ordinary legislative procedure in progress and to submit a draft directive to the European Council which will decide unanimously on the proposal. In Article 69 TFEU, the necessity of respecting the principles of proportionality and subsidiarity (in accordance with Protocol no.2) in legislative initiatives under Chapters 4 and 5 of Title V is also recognised.

Here, I will extend the scope of the emergency brakes in this area by adding the Union's obligation to respect the national identity inherent in the fundamental political and constitutional systems of the Member States, as defined in Article 4(2) TEU. The concept of national identity (as I usually refer to the first part of Article 4(2) TEU in my papers) is an essential element of the EU primary law in relation to the obligations of Member States arising from their membership in the EU and with regard to the principle of the primacy of EU law. Thus, in Chapter 3 of this paper, I will focus on the content of the notion of national identity and look for possible links with the criminal law and criminal policy of a Member State. I will be interested in whether a Member State can refer to the structure of its criminal justice system as an element of its national identity and whether Article 4(2) TEU can also be invoked in the case of changes to criminal codes.

3. THE CRIMINAL POLICY OF A MEMBER STATE AND NATIONAL INDENTITY IN ARTICLE 4(2) TEU

As regards the general definition of the elements of the concept of national identity, I must point out that despite the presence of the concept of national identity in EU primary law for more than thirty years, there has been both: insufficient academic research on the concept and insufficient judicial interpretation of the concept of national identity by the Court of Justice.[8] The Court's interpretation of the content of the concept of national identity has been rather narrow, firstly because the concept of national identity has been referred to by the Member States in their submissions mainly as a secondary argument and,[9] secondly, I consider that in many cases the Court has avoided the possibility of interpreting the concept in the context of the issues at stake in the cases in question.[10]

There will be no room in this section for a comprehensive examination of the concept of national identity in Article 4(2) TEU; I have done that elsewhere (Kiššová, 2023). For these reasons, I will focus *in medias res* only on the essential conclusions of the research already carried out, which I will present in the context of the selected issues of this Article. The main objective of this chapter is to examine the substance or elements of the concept of national identity in Article 4(2) TEU and to explore whether it is hypothetically possible for a Member State to claim interference with its national identity if it were to be criticised by the European Union for an organisational change in the form of the abolition of a specific branch of a particular public authority. I will also be interested to see whether a Member State can make the same argument in relation to a proposed change to national criminal codes.

[8] Compare this with the principle of subsidiarity, which was also incorporated into EU primary law by the Maastricht Treaty in 1992 with the same aim of protecting the sovereignty of Member States as the concept of national identity.

[9] See e.g.: CJEU, judgment of 24 May 2011, European Commission v Grand Duchy of Luxembourg, C-51/08, ECLI:EU:C:2011:336; CJEU, judgment of 15 March 2006, Eurojust v Spain, C-160/03, ECLI:EU:C:20045:168.

[10] See here: Opinion of Advocate General Kokott of 15 April 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", C -490/20, ECLI:EU:C:2021:296, and then cf. CJEU, judgment of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", C-490/20, ECLI:EU:C:2021:1008.

3.1 The Division of Competencies within a Member State as an Element of the Concept of National Identity in Art 4(2) TEU

As I have indicated above, the concept of national identity is an autonomous concept of the EU law, so its meaning and substance can only be defined or interpreted by the Court of Justice. However, on the other hand, the Member States determine what is perceived as part of, or an element of, national identity within their national law (and, in particular, their constitutions and constitutional laws). In this section, I will not avoid partly addressing the notion of 'constitutional identity (for example: Kelemen and Pech, 2019; Hamuľák, Kopal and Kerikmäe, 2017; Blagojević 2017; Drinóczi, 2020; Calliess and van der Schyff, 2021). Some authors interchange "national identity" and "constitutional identity". Similarly to Cloots (2016, pp. 82-98), I believe that the synonymous use of the terms interchangeably in the context of Article 4(2) TEU is not entirely correct (Kiššová, 2023, pp.91-127), given the importance of the concept in EU primary law. I believe both concepts include certain elements of the material core of a Member State's constitution, which the Member State perceives as unchangeable under any circumstances. However, regarding Article 4(2) TEU, only certain elements of the identity of a Member State may fall within the protection of the concept of national identity, namely those elements which will fall within the scope of the concept of "national identity" in Article 4(2) TEU, that scope being defined by the Court of Justice.

Although the concept of national identity has been present in EU primary law since the adoption of the Maastricht Treaty, the wording of the concept has changed (in)significantly through subsequent revisions until the Lisbon Treaty.[11] From the analysis of particular court proceedings in which reference has been made, either directly or indirectly, to the concept of national identity, the post-2009 jurisprudence is particularly relevant for us due to the different wording of the concept. However, in this respect, we do not miss anything in terms of interpretation with regard to the case law in which the concept of national identity appeared before 2009 because in that period, the concept of national identity was dealt with marginally, and by the Advocates General[12] rather than by the Court of Justice.[13] Following the adoption of the Lisbon Treaty, it is possible to identify case law that sheds more light on the concept of national identity. However, based on previous research, I have to conclude that the Court of Justice is taking a more passive approach. So far, it can be stated that the elements of the concept of national identity that Member States can point to include i) the form of the state system,[14] ii) the state (official) language,[15] iii) the distribution of powers in a Member State,[16] which is hand in

[11] The changes in the wording of the concept are particularly noticeable when comparing Article F(1) of the Maastricht Treaty with the later Article 6(3) of the Amsterdam Treaty and the current Article 4(2) TEU, which is the most detailed of all the versions in terms of specifying the notion of national identity within the provision.
[12] Opinion of Advocate General Maduro of 20 September 2005, Marrosu and Sardino, C - 53/04, ECLI:EU:C:200, paragraphs 39-40; Opinion of Advocate General Maduro of 8 October 2008, Michaniki, C-213/07, ECLI:EU:C:2008:544, para 33; Opinion of Advocate General Colomer of 25 June 2009, Umweltanwalt von Kärnten, C-205/08, ECLI:EU:C:2009:397, paragraphs 43-47.
[13] In this respect, I refer to two similar cases: CJEU, judgment of 2 July 1996, Commission v Luxembourg, C-473/93, ECLI: EU: C: 1996: 263, and CJEU, judgment of 24 May 2011, European Commission v Luxembourg, C-51/08, ECLI: EU: C: 2011: 336 in which the argument of national identity was present, but the Court's judgment lacks an interpretation of the elements of the concept of national identity.
[14] CJEU, judgment of 20 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, C-208/09, ECLI:EU:C:2010:806.
[15] CJEU, judgment of 12 May 2011, Runevič-Vardyn, C-391/09,ECLI:EU:C:2011:291.
[16] CJEU, judgment of 12 June 2014, Digibet Albers, C-156/13, ECLI:EU:C:2014:1756; CJEU, judgment of 21 December 2016, Remondis v Region Hannover, C-51/15, ECLI:EU:C:2016:985.

DOI: 10.54869/syeul.2023.3.810

hand linked to iv) the choice of the model of the relationship between the state and religious entities.[17]

For the purposes of this paper, the element of interest to us will be the "redistribution of powers in a Member State". In this context, there are several judgments of the Court of Justice, particularly concerning the internal distribution of competence in cases of provisions of the Treaties or of secondary law conferring powers or imposing obligations on Member States to apply EU law. In these instances, it has been stated several times that the question of how Member States may confer the exercise of powers or the performance of duties on national authorities is a matter exclusively for the constitutional system of each Member State.[18] Similarly, Advocate General Mengozzi stated in his Opinion that "[i]t is nevertheless clear from the case-law that the internal organisation of the State does not fall under EU law".[19]

Given the context that inspired this paper, it can therefore be concluded that part of the concept of national identity is the preservation of the sovereignty of Member States to determine the internal organisation of public authorities and the conferral of powers on those authorities. In other words, it is entirely in the hands of the Member States themselves to determine the internal structure of public authorities, for example, the form of organisation of the judicial system, the form and organisation of the public prosecutor's Office, or the organisation of district and regional authorities, etc.

Despite the sovereignty of the Member States in relation to the internal organisation of public authorities, respect for the rule of law and democracy, in particular, must be maintained. Specific organisational changes may also affect the efficiency of exercising a particular area within the Union's competencies. Therefore, it is necessary to guarantee this efficiency vis-à-vis the EU in the event of organisational changes.

3.1.1 The Limits of the Elements of the National Identity of a Member State

Elements of national identity, which can take different forms in the fundamental political and constitutional systems of Member States, have their limits. This means that the mere fact that a Member State points to an interference with an element of a Member State's national identity will not always automatically be a "roadblock" for the EU and the EU law in a particular matter. Of all the elements of national identity identified, the focus will be left furthest at the element of "distribution of competencies within a Member State" and I will proceed to the specific cases on which the objective of this subchapter can be demonstrated.

As I mentioned above, the concept of constitutional identity is present in the current discourse in various areas of EU law, alongside that of national identity. These two concepts have come to be used most prominently by some Member States over the last ten years, but each in a different context and for a different purpose. I have already dealt with this topic elsewhere, so I will skip a more detailed description of the issue and move on to specific ideas related to the paper's topic (Kiššová, 2022).

[17] Opinion of Advocate General Tanchev of 9 November 2017, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V, C-414/16, ECLI:EU:C:2017:85; Opinion of Advocate General Kokott of 16 February 2017, Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe, C-74/16, ECLI:EU:C:2017:135.

[18] CJEU, judgment of 3 April 2014 , Cascina Tre Pini Ss v Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others, C-301/12, ECLI:EU:C:2013:420, para 42; CJEU, judgment of 4 October 2012, European Commission v Belgium, C-391/11, ECLI:EU:C:2012:611, para 31; CJEU, judgment of 16 July 2009, The Queen, on the application of Mark Horvath v Secretary of State for Environment, Food and Rural Affairs, C-428/07, ECLI:EU:C:2009:458, para 50.

[19] Opinion of Advocate General Paolo Mengozzi delivered on 30 June 2016, Case C-51/15 Remondis GmbH & Co. KG Region Nord v Region Hannover, ECLI:EU:C:2016:504, paras. 38-39.

A relevant example of the limits of the element of national identity (or protection of national identity, in this particular case also constitutional identity) of a Member State is Poland, in the context of its not-so-distant "rebellion" regarding the primacy of EU law, which could be observed in the national proceedings of the Constitutional Court of Poland in the cases P 7/20[20] and K 3/21.[21] In my opinion, there was no substantive and professional argumentation on the part of Poland as regards the protection of their national or constitutional identity. Even if their argumentation had been more substantiated, the argument for the protection of national or constitutional identity would not have gone through, mainly because of the factual situation, which was most concerned with the values on which the EU is based. In case P 7/20, a member of the Disciplinary Board sought an answer to the question of whether Poland had to implement the interim measure concerning the organisational structure and functioning of the constitutional bodies within the judiciary of that Member State, which had been issued by the Court of Justice in Case C-791/19, and which concerned an area which had not been transferred to the European Union.[22] In these domestic proceedings, the Constitutional Court held that Articles 4(3) TEU and 279 TFEU "are incompatible with the Polish Constitution in so far as the Court of Justice ultra vires imposes obligations on the Republic of Poland as a Member State of the EU by ordering interim measures concerning the organisational structure and functioning of the Polish courts and how proceedings before those courts are to be conducted".[23] At the end of the day, it can be stated that the Constitutional Court was correct in this particular statement, given what has been argued above, however, such sovereignty of a Member State "ends" when certain decisions of a Member State create a violation of one of the values set out in Article 2 TEU. In the present case, it was the manner and conduct of the proceedings of the Disciplinary Chamber that interfered with the rule of law since, inter alia, the substance of the judicial decisions could be qualified as disciplinary misconduct by the judges of the general courts, or the way in which the Disciplinary Chamber was itself appointed.[24] Such a setting of the Disciplinary Chamber thus significantly interfered with the independence and impartiality of the judicial system, which is one of the elements of the principle of the rule of law (Rawls, 1999, pp. 208-210).

The fact that the limits of respect for national identity in Article 4(2) TEU are indeed rooted in Article 2 TEU was recently confirmed in a judgment of the Court of Justice. Despite several question marks surrounding this concept, the Court has, for the first time, expressed itself more comprehensively towards Article 4(2) TEU in the annulment proceedings brought by Poland and Hungary. The paradox is that the proceedings to which I am referring are, in principle, also (but not only) the result of the aforementioned national proceedings brought by Poland since the action for annulment in question concerned a mechanism of conditionality, which again can only be seen as a reaction (a new mechanism) to the absolute ineffectiveness of other mechanisms for the protection of the rule of law - i.e., Article 7 TEU (see more: Máčaj, 2022, pp. 49-84). In Hungary v. European Parliament (C-156/21) and Poland v. European Parliament (C-

[20] Constitutional Court of Poland, P 7/20 (14 July 2021).
[21] Constitutional Court of Poland, K 3/21 (7 October 2021).
[22] CJEU, order of 8 April 2020, European Commission v Republic of Poland, C-791/19 R, ECLI:EU:C:2020:277.
[23] Press release on P 7/20: The obligation of an EU Member State to implement interim measures pertaining to the organisational structure and functioning of constitutional authorities within the judicial branch of government of that Member State. 14 July 2021, available at: https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa (accessed on 31.12.2023).
[24] Ibid., par. 3.

157/21), the Court dealt with a number of issues. Still, the Court's response to Hungary's arguments regarding national identity in Article 4(2) TEU is relevant to this subchapter. In this regard, the Court noted that, despite the different national identities of each Member State, which the Union respects by their membership in the Union, the Member States recognise the values in Article 2 TEU, which are the common values of their constitutional traditions, which they have committed themselves to uphold at all times. According to the Court of Justice, national identity cannot be interfered with if the national identity is contrary to Article 2 TEU.[25] However, I cannot fully agree with the Court of Justice in this view, given the multiple societal value issues/disputes across the EU and the broad interpretation of the concept of the rule of law. However, I will not address this at this point in this paper.

3.2 Criminal Codes of Member States under the Protection of National Identity or Constitutional Identity - the Taricco case

Above, I have discussed the EU's competence in the field of criminal law, concluding that there is as yet no separate legal area of EU criminal law but that there has been a significant Europeanisation of criminal law in certain areas. In this respect, I have defined the ways in which the EU (or the European Public Prosecutor's Office) can challenge specific changes/amendments within the criminal codes of the Member States. I have also discussed the definition of the different elements of the concept of national identity in Article 4(2) TEU. To summarise, among the elements identified so far by the Court are i) the form of the state system, ii) the national (official) language, iii) the distribution of powers within the Member State, and iv) the choice of the model for the relationship between the state and religious entities. I dare to call everything else that a Member State defines as its material core, hardcore, or constitutional tradition constitutional identity.

For this reason, I believe a distinction must be made between the two concepts because each encompasses different elements of the identity of a Member State. If I could express it in propositional logic, it would read as follows: Every element of the national identity of a Member State may also be an element of the constitutional identity of a Member State, yet not every element of the constitutional identity of a Member State is also an element of the national identity of a Member State. It, therefore, follows that a Member State can claim respect for only some parts of its fundamental political and constitutional system, while the remaining parts appear at first sight to be subject to the principle of the primacy of EU law. I believe it is rather unlikely that a Member State would be able to claim its national or constitutional identity when amending criminal codes introduced by a Member State. More likely is a situation in which amendments to criminal codes would have to be made precisely due to secondary EU law, and an element in the transposition would conflict with a Member State's national identity. Given that national identity is quite narrowly defined, I assume that in the event of an objection to a change introduced by the EU, either the emergency brakes of Articles 82(3) and 83(3) TFEU would have to be invoked first. Otherwise, it would have to be well-argued why the change in question interferes with the fundamental constitutional system of a Member State.

[25] CJEU, judgment of 16 February 2022, Hungary v European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97, paras. 232-234.

3.2.1 What if an EU Act Collides with an Element a Member State Classifies under its Constitutional Identity?

No mechanism in EU law protects the constitutional identity of a Member State, so one can only observe and evaluate the practices of, for example, Germany or Italy in particular cases.[26] In this respect, the Taricco case is also relevant to criminal law and the protection of financial interests.[27] The Taricco case aptly demonstrates the way in which the EU can interfere in certain areas of a Member State's criminal policy and how the very act of the EU can run against a Member State's constitutional principle.

The case concerned the issue of limitation periods for certain tax crimes under Italian criminal law and the issue of criminal prosecutions relating to tax fraud.[28] However, tax fraud crimes usually consist of very complex investigations, so the proceedings take a very long time already at the preparatory stage of the criminal investigation. The way in which limitation periods have been set in Italy and their possible extension has led, in relation to the length of such proceedings (at all stages of the criminal procedure), to de facto impunity in these types of cases in Italy, which was not an isolated but a standard phenomenon.[29] This resulted in the impossibility of recovering the tax that was the subject of the crime in question by the Italian tax authorities, which, at the end of the day, also affected the EU's financial interests.

The Italian Constitutional Court referred this issue to the Court of Justice for a preliminary ruling, with the result that the Italian criminal law provisions at issue, which provide for short limitation periods, may have adversely affected the Member States' compliance with their obligations under Article 325 TFEU - i.e., to protect the financial interests of the European Union by adopting effective and dissuasive penalties.[30] In other words, it is not certain whether the Court of Justice has held that, in practice, Italian judges have an obligation to ensure the full effect of Article 325(1) and (2) TFEU, and they must refrain from applying the provisions of national law governing limitation periods for VAT crimes or whether limitation periods should be extended.

In any event, putting either approach into practice would bring the CJEU's ruling into conflict with Article 25 of the Italian Constitution, which enshrines the principle of legality, which the Italian Constitutional Court interprets as "prohibiting a retroactive application in peius of the limitation period (or the non-application of the same) over the time". In contrast, the Court of Justice does not interpret the principle of legality in this way.[31] Italy regulates limitation periods within the field of substantive criminal law. Consequently, a situation has arisen where either the Italian national courts would ignore the Court of Justice's ruling in the Taricco case and thus violate the principle of the primacy of EU law, or they would follow the Court's instructions and de jure and de facto disregard the principle of legality, which, moreover, is perceived as the core of the Italian constitutional system, i.e., constitutes an element of Italy's constitutional identity.[32] In this situation, Italy thus chose the path of protecting its constitutional identity through the so-

[26] Federal Constitutional Court of Germany, Judgment of the Second Chamber of 30 June 2009-2 BvE 2/08; Federal Constitutional Court of Germany, Order of the Second Chamber of 14 January 2014-2 BvR 2728/13; Constitutional Court of Italy, No 183/1973 (18 December 1973); Constitutional Court of Italy, No 232/1975 (22 October 1975); Constitutional Court of Italy, No 170 /1984 (5 June 1984); Constitutional Court of Italy, no. 232/1989 (13-21 April 1989).
[27] CJEU, judgment of 8 September 2015, Taricco and Others, C-105/17, ECLI:EU:C:2015:555.
[28] Articles 157-161 of Italian Criminal Act No 251 of 5 December 2005.
[29] CJEU, judgment of 8 September 2015, Taricco and Others, C-105/17, ECLI:EU:C:2015:555, para 24.
[30] Ibid., para 58.
[31] Ibid.
[32] Constitutional Court of Italy, no. 24/2017 (26 January 2017), para. 7.

DOI: 10.54869/syeul.2023.3.810

called doctrine of controlimiti, and the Italian Constitutional Court initiated a dialogue with the Court of Justice in yet another national proceeding through the reference for a preliminary ruling in the MAS and MB case (also called the Taricco II).[33] In its judgment, the Court of Justice held that the Italian national courts should not disapply the national provisions on limitation periods "[i]f such a waiver would lead to an infringement of the principle of the legality of crimes and penalties on account of the lack of certainty of the applicable law or on account of the retroactive application of legislation which lays down stricter conditions of criminality than those in force at the time of the commission of the crime".[34]

It follows from the above that Member States can argue against EU acts if they interfere with their constitutional identity, which can also be reflected in their criminal codes (however, in general, it does not matter which area of law it would be). The Taricco case shows that there can be situations where certain criminal law instruments are viewed or interpreted differently by each of the parties. In conclusion, I would add that the key to resolving similar situations is maintaining mutual respect between the EU and a Member State. In the event of a dispute, it is always necessary to establish a dialogue, for example, by initiating a reference for a preliminary ruling or by using other diplomatic channels.

4. COMMUNICATION BY THE EUROPEAN UNION ON AMENDMENTS TO CRIMINAL CODES AND CHANGES TO THE ORGANISATION OF THE PUBLIC PROSECUTOR'S OFFICE

In the case of proposed changes to Slovakia's criminal codes, the EU may, in particular, examine the impact of legislative amendments on the protection of the EU's financial interests. In the rest, the EU can review whether the changes are consistent with the values in Article 2 TEU, particularly concerning the rule of law and human rights. In the EU, this will mainly be the responsibility of the European Commission, but the European Public Prosecutor's Office, which started its work in 2021, is also important in this area.

In a situation such as the current one in Slovakia, the EU or the European Public Prosecutor's Office can comment on the way in which the individual elements of the Euro-crimes are to be amended or even on amendments to the penalties of the Euro-crimes. The European Union may (despite the necessary reform) criticise the excessively low penalties for economic crimes in the sense of not respecting the principle of criminal law that penalties should be not only proportionate but also dissuasive. This is because the European Public Prosecutor's Office may be affected by the reduction of criminal rates in terms of the possibility of investigation methods, according to Article 30 of Council Regulation (EU) 2017/1939.[35] Based on this provision, the European Prosecutor's Office is only entitled to use certain forms of securing evidence provided that the crime under investigation is punishable by a custodial sentence with a maximum penalty of at least four years.[36]

The European Public Prosecutor's Office can also be interested in amending the procedural criminal law of the Member States, in particular, to ensure effective

[33] CJEU, judgment of 5 December 2017, M.B.A. v M.B., C-42/17, ECLI:EU:C:2017:936, [Taricco II].
[34] Ibid., paras 62 and 64.
[35] The Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').
[36] For example: freeze instrumentalities or proceeds of crime, intercept electronic communications, rack and trace an object by technical means, etc.

investigations of crimes against the EU's financial interests. In this sense, however, and based on the previous chapters, the EU does not, in my opinion, have a legal basis for criticism of the form and structure of the judicial authorities. However, it has a legal basis for criticism of the quality of the process within these authorities. Therefore, the European Public Prosecutor's Office can comment on and challenge changes that would adversely affect the quality of Euro-crimes investigations in terms of the specialisation and expertise of investigators or judges. However, I believe that, provided that the Slovak legislator will and can guarantee the referral of criminal proceedings prepared and initiated by the Office of the Special Prosecutor to regional prosecutor's offices, and provided that all the principles of the criminal procedure and the efficiency of criminal investigations (not only against the financial interests of the EU) are preserved, I do not perceive the mere fact that the Office would be abolished as a reason for the objection of violation of the rule of law. I would only see such a violation if it appeared that the Office of the Special Prosecutor would cease to exist, and all pending and active pre-trial criminal proceedings would be abolished.

On the contrary, I can imagine criticism in the light of the proposed changes of the change of jurisdiction for some economic crimes (based on changes in the substantive criminal law), which would be transferred from the specialised criminal Court to the district courts. This amendment would also change the jurisdiction of the National Criminal Investigation Agency in these pre-trial proceedings. It would thus remove the specialisation of investigators and judges for a certain interim period. District judges and district/county investigators would, therefore, have to become more familiar with the agenda in question, as it is mainly in economic and competition law.

5. CONCLUSION

This paper sought to explore the area of EU competence in the field of the criminal law of the Member States, with the secondary objective of examining the possibilities for Member States to invoke national identity in Article 4(2) TEU and, in some cases, constitutional identity, in their criminal policy. In general, I can state that certain areas of criminal law have been subjected to a level of Europeanisation that collectively can be referred to as "the 'EU criminal law". Within this area, however, we are dealing in particular with the protection of the EU's financial interests, but also with terrorism or trafficking *res extra commercium*.

The paper was largely inspired by current events in Slovakia regarding proposed amendments to the criminal codes and, at the same time, the proposal to abolish the Special Prosecutor's Office. Based on these facts, I was interested in whether and how the EU is entitled to intervene and respond to the changes in question. In particular, I was interested in the question of the organisational structure of the bodies of the judicial system and the relationship between EU law and the criminal codes of the Member States. In this part, I concluded that the very division of powers between national public authorities falls within the elements of national identity in Article 4(2) TEU while also pointing out the limits of such respect for national identity. On the other hand, the relationship is already somewhat more complicated when it comes to the question of criminal codes and national identity. The outcome of such an encounter between an EU law/act and the norms of criminal codes that we could subsume under the elements of national identity would depend on the situation at hand, which would have to be genuinely exceptional. However, I consider that the argument for the protection of national identity would be viable in the case of a conflict between a norm of EU law and national law rather than a change in criminal codes by a Member State.

DOI: 10.54869/syeul.2023.3.810

However, on this occasion, I have pointed out a situation in which an EU act and an element of the constitutional identity of a Member State may come into collision. At the same time, the fact remains that the protection of, or respect for, the constitutional identity of a Member State is in no way guaranteed in EU law. For this reason, the constitutional identity control mechanisms have been established by the constitutional courts of the Member States, which are trying to deal with the situations in question on their own. In addition to the Federal Constitutional Court of Germany, the Italian Constitutional Court has also been involved in the issue of constitutional identity control in the Taricco case, in which I have briefly analysed and demonstrated how the primacy of EU law and the fundamental constitutional principle of criminal law could come into a clash.

The cases, such as the *Taricco* case, highlight that criminal law is indeed only partially "harmonise" in the EU, mainly focusing on selected areas of criminal law. The current debate on amendments to criminal codes in Slovakia is also an excellent example of how the EU is dutifully fulfilling its role as a "watchdog" for Member States' compliance with their obligations under EU law. However, alongside the 27 criminal policies of the Member States, there is an EU criminal policy, which may not in all cases share the same view on some parts of criminal law yet has an important role to play in the functioning of the EU and the corresponding respect for the values in Article 2 TEU. However, it must not be forgotten that most EU actions are political actions. Therefore, I believe it is always necessary to take a critical yet factual view of all aspects of it. In this instance, I perceive it as essential for Member States to be cautious and aware of the limits in the areas that we share with the EU and to monitor individual actions of the EU closely, in the sense of the motto "trust but verify". Finally, I shall only add that it is more important than ever in today's society to initiate dialogue and have the will to enter into discussions.

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SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

SLOVAKIA BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS IN RECENT YEARS – AN UPCOMING FAIR TRIAL PROBLEM? / Adam Máčaj

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Abstract: *The paper aims to clarify whether the recent applications made against Slovakia and communicated by the European Court of Human Rights to the government for observations disclose presence of increasing fair trial issues for the country. More specifically, the paper focuses on whether applications alleging deficiencies in the fairness of criminal proceedings in Slovakia have recently gained traction. The paper contributes to the debate by performing a quantitative analysis of applications communicated to the government of Slovakia from 2019 to 2023, considering the proportion of criminal proceedings-related applications in relation to the overall amount of applications communicated. It shows that as the overall amount of communicated cases declined between 2019 and 2021, the issues associated with criminal proceedings remained consistent in absolute terms, but gained traction in relative numbers. Moreover, in 2023, when the overall amount of cases communicated is again on the rise, the issues of fair trial in criminal proceedings are similarly on the rise. Finally, the paper seeks to identify the most common topics of interest to the European Court of Human Rights, and discuss the potential implications arising for Slovakia.*

Key words: *Slovakia; European Court of Human Rights; Right to a Fair Trial; Criminal Proceedings*

Suggested citation:
Máčaj, A. (2023). Slovakia Before the European Court of Human Rights in Recent Years – an Upcoming Fair Trial Problem?. *Slovak Yearbook of European Union Law*, vol. 3, 23-34. https://doi.org/10.54869/syeul.2023.3.818

1. INTRODUCTION

In recent months, public discourse in Slovakia has been overwhelmingly devoted to discussions of alleged threats to right to a fair trial and role of the law enforcement, in particular Special Prosecution Office, while the public discourse was simultaneously focused on the alleged breaches of the rule of law resting in attempts to dismantle the body. Both debates regarding human rights, as well as the rule of law, are topics of an ongoing debate in the European Union more broadly (Kiššová, 2022a, 2022b; Mokrá, 2021). Unsurprisingly, even this discussion therefore caught the attention of the European Union (hereinafter "EU") and its institutions, as regards not only rule of law generally, but protection of the EU budget, and framework of the conditionality

mechanism within the so-called Rule of Law Regulation (European Parliament, 2023; European Public Prosecutor's Office, 2023; Rhawi, 2023).[1]

Without assessing the merits of legislative changes and their impact on the rule of law situation in Slovakia, this paper aims to assess position the right to a fair trial has in Slovakia from an international standpoint. More specifically, the paper considers whether the European Court of Human Rights (hereinafter "ECtHR") demonstrates an increased interest in cases involving right to a fair trial under Art. 6 of the European Convention on Human Rights (hereinafter "ECHR"). To do so in the context of contemporary discussion as regards prospective legislative amendments in Slovakia, it focuses specifically on cases where fair trial is of concern in criminal proceedings. In order to examine the interest of the ECtHR, the analysis focuses on the communicated cases, which the ECtHR deems admissible and requires Governments to submit observations thereto.

Since the alleged fair trial violations are inferred specifically as regards activities of the recent years, and these serve as grounds for proposed legislative changes (Office of the Government of Slovakia, 2023), the particular issue this paper is analysing is the manner in which analysis of fair trial problems identified by the ECtHR should be conducted to yield the most recent results. As the proceedings before the ECtHR usually take years between lodging of an application and a final judgment, the analysis of recent judgments would not provide findings concerning fair trial as regards the criminal proceedings conducted most recently. For that purpose, the contemporary analysis must be targeted on relevant current cases the ECtHR has recently communicated to the government of Slovakia for observations, due to several reasons. Firstly, all communicated cases are available and public, offering a most comprehensive and transparent database of most recent applications against any particular State Party to the ECHR. Secondly, in comparison to quantitative analysis of applications lodged with the ECtHR, the analysis of communicated cases offers a better insight into focus of the ECtHR itself, not the individual applicants. It will thus consider only the applications which have not been declared inadmissible without communicating the case, and thus will eliminate the clearly inadmissible and most frivolous cases. Thirdly, as the communicated cases concern allegations far more recent in comparison to judgments, quantitative analysis thereof, as provided below, offers a chance to answer the question whether the ECtHR has taken an increased interest in fair trial during criminal proceedings in Slovakia more recently.

In performing a quantitative analysis of the communicated cases, the paper seeks to assess the interest of the ECtHR in situation of criminal cases in Slovakia generally. However, the paper complements the assessment with a qualitative approach, where the individual communicated cases in this area are further categorised and disaggregated into the specific topics of interest that the ECtHR is concerned with as regards criminal procedure and its potential deficiencies. Granted, although these findings are not determinative of the actual violations of human rights in criminal proceedings in Slovakia, and the analysis is limited entirely to pending cases only, its findings may be regarded only as preliminary. Nevertheless, this approach is efficient for findings concerning the most recent events from the perspective of the ECtHR, instead of analysing final judgments only. While the pending cases may therefore end with finding no violation of the ECHR, or being struck out for other reasons, the results presented here serve as an essential interim assessment of deficiencies in right to a fair trial in criminal proceedings that may yet be discovered and documented more extensively.

[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/1, 22 December 2020.

2. COMMUNICATIONS OF APPLICATIONS MADE AGAINST SLOVAKIA BY THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN 2019 AND 2023 – THE QUANTITATIVE ASPECTS

In assessing whether the ECtHR has taken an increased interest in criminal limb of the right to a fair trial in Slovakia, the communicated cases that have been published the HUDOC database were analysed.[2] The recent five years of communicated cases represent a relevant pool of most recent cases deemed presumptively admissible and significant enough to warrant observations from the government. These cases spanned the communications referred to two subsequent governments formed of various political parties, and deal with factual circumstances and criminal proceedings preceding even 2019, but also proceedings that started or took place since the transfer of power following the 2020 elections.

Among the communicated cases, facts of the case were considered first, in order to ascertain whether these disclose that the applications raise allegations pertaining to criminal charges or investigations against the applicants. Where the communicated applications did not disclose issues related to criminal proceedings, they were not considered any further. In cases where the allegations raised were related to criminal proceedings or criminal activity, but concerned merely issues related to the serving of sentences, conditions in prisons etc., these were similarly left out of further considerations.

Overall, there were 97 cases communicated to the government of Slovakia between 2019 and 2023. Out of those, 41 were related to allegations of violations of the ECHR concerning criminal proceedings in light of the criteria set out above, and were accordingly considered further (see below).

When disaggregating the communications by year of communicating the application, it is notable that more than 40 % (18 out of 41 communications) were made to the Slovak government in 2023 only. In all the preceding years assessed, the number of applications communicated remained in single digits (between 4 criminal proceedings-related communications in 2022 and 7 communications in 2020).

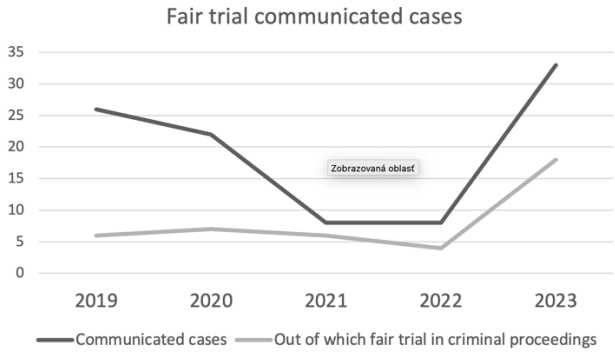

Figure 1

[2] The database is publicly available free of charge on: https://hudoc.echr.coe.int/

DOI: 10.54869/syeul.2023.3.818

Once communications not related to criminal proceedings were eliminated, the analysis of the individual communications shifted from the facts of the case to the specific complaints raised by the applicants that the ECtHR communicated to the government. Principally, the allegations raised fell within three categories, occasionally intertwined. First group of the allegations related to Art. 6 of the ECHR and right to a fair trial, particularly as regards final decisions of domestic courts. Second group related to Art. 5 of the ECHR and the issues in connection with deprivation of liberty, mostly concerning pre-trial detention, its length, lawfulness, and conditions in pre-trial detention facilities. Finally, a number of other provisions were invoked in the communicated cases, mostly Arts. 3 (prohibition of ill-treatment), 8 (right to private and family life) and 13 (right to an effective remedy.

What is notable is that these allegations pertaining to provisions other than Arts. 5 and 6 of the ECHR are relatively novel in the communications. Allegations of violations of right to liberty and security or right to a fair trial are evenly dispersed across the considered period of 2019-2023, with the largest amount of four Art. 5 communications in 2023 and five Art. 6 communications in 2020. Other than that, the amount of communications remains fairly consistent, e. g. with two communications related to both provisions in 2019, three communications related to both provisions in 2021.

However, such is not the case with communications related to cases where the applicants allege violations of provisions of the ECHR other than Arts. 5 and 6. The heightened attention paid to these provisions in relation to criminal proceedings has seen even higher increase than the share of criminal cases amongst the overall amount of communications. Over 70 % (12 out of 17 communications containing these allegations) of the allegations assessed over a five year period were communicated to the government in 2023 alone.

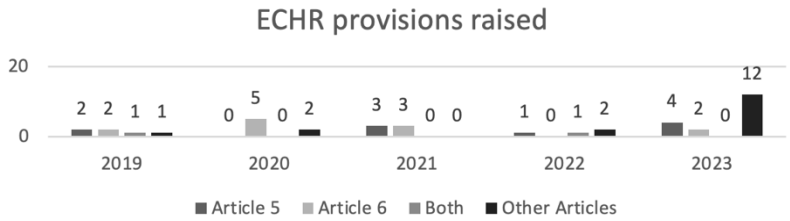

Figure 2

Finally, given this substantial increase in allegations related neither to Art. 5 nor Art. 6 of the ECHR, it must be ascertained what was the specific subject-matter of the applications that have been responsible for such an increase in amount of communicated cases in this category.

Several important results arise from the assessment. Firstly, the only identified category where there was not a substantial increase in the amount of communicated cases are the communications of applications that are not made by defendants in criminal proceedings. The communicated applications lodged by victims alleging e. g. use of force by police, ineffective investigation of crimes, or other rights from the position of victims of crimes, remain relatively rare in the last five years and appear rarely in the ECHR's docket, with two communications in 2023 and one in 2020.

Secondly, the complaints made by the defendants and communicated to the government are significantly more common in the recent years, specifically in two areas:

allegations concerning searches and interferences with privacy (most often made under Art. 8 of the ECHR) and allegations concerning detention conditions and regimes defendants face when deprived of their liberty (most often made under Arts. 3, 5 and 8 of the ECHR). Both types of communications had a single case communicated in the HUDOC database between 2019 and 2021. On the other hand, there were four communications related to searches and interferences with privacy made in 2023 alone, and five communications concerning detention conditions and regimes made in the last two years. Taken together, in 2022 and 2023, these two types of communications alone represent over 40 % of all communications against Slovakia as regards criminal proceedings (nine cases out of twenty two), and over 20 % of all communications made to Slovakia (nine cases out of forty one).

Finally, there is an apparently marginal category of two communications dealing with asset freezing during criminal proceedings, and its compatibility with Art. 1 of the Protocol to the ECHR. While fairly insignificant in the last five years in terms of overall communications, both communications were made in 2023 only, on a topic that has been until then absent from the communications made to the Slovak government.

Figure 3

3. DISCUSSING THE TRENDS AND IMPLICATIONS OF APPLICATIONS COMMUNICATED TO THE GOVERNMENT OF SLOVAKIA

From the available data, it is apparent that overall, the number of both the cases communicated in 2023, as well as the proportion of communications dealing with criminal proceedings, have increased significantly. Moreover, the amount of communicated applications had been in decline up until 2022, while the absolute numbers of communications related to criminal proceedings have remained fairly consistent until the same year. The overall proportion of communications dealing with the issue has therefore remarkably increased in comparison to 2019, the starting point of the assessment.

Looking into the content of the allegations, the rights most intimately associated with criminal proceedings – Arts. 5 and 6 of the ECHR – were the subject-matter in the

DOI: 10.54869/syeul.2023.3.818

communications from the ECtHR to the Slovak government at a consistent rate. On the other hand, the ECtHR communications represent a substantial increase of allegations related to other substantive provisions of the ECHR, which the government will have to face.

Finally, regarding the content of other communicated cases, not associated with Arts. 5 and 6 of the ECHR, several conclusions can be made. Firstly, the cases of victims of crimes and their position in criminal proceedings, while lodged with the ECtHR against Slovakia and being communicated to the government, are currently not yet increasing with sufficient severity to indicate a trend. That being said, similar cases are persisting even in the ECtHR jurisprudence against Slovakia, and it seems that the persisting deficiencies in e. g. investigating police racism, or structure of the police inspection, are ongoing trends.[3]

Secondly, in terms of cases communicated to the government of Slovakia, the situation of interferences with privacy, as well as conditions of detention, are facing increased attention. Despite the fact that these types of cases are not associated with Arts. 5 or 6 of the ECHR, and do not deal with issues of fair trial or detention directly, they have formed a substantial part of cases related to criminal proceedings communicated to the government of Slovakia, in particular since 2022. This signals an increase in the amount of allegations that the ECtHR deems admissible and necessary to communicate to the government of Slovakia for their observations. Contrary to the consistent amount of cases related to fair trial and personal liberty, these types of criminal proceedings-related communications are on the rise and it remains to be seen whether the trend will persist despite the recent, as well as planned, changes to the criminal law in Slovakia.

Moreover, an interesting development to follow is the consideration of asset freezes in criminal proceedings from the viewpoint of right to property in Slovakia. The ECtHR has not communicated similar cases until 2023, and it could signal an emerging broader interest in the regime of asset freezes and interferences with right to property in the criminal procedure in Slovakia. Various aspects of right to property, its deprivation and control via criminal proceedings were already subject of scrutiny by the ECtHR, and it already found a violation of Article 1 of Protocol to the ECHR as regards other states.[4]

4. CONCLUSIONS

The purpose of this paper was to assess the emerging trends in content of the applications alleging violations of the ECHR stemming from criminal proceedings, which the ECtHR has communicated to the government of Slovakia for observations in the last five years.

Overall, the trend towards increasing proportion of communications dealing with criminal proceedings is evident, especially since 2022. However, the available data also shows that the increase in these cases is not present across the board. In fact, in the majority of the communicated cases, the ECtHR was not interested in observations

[3] See e.g. ECtHR, Mižigárová v. Slovakia, app. no. 74832/01, judgment of 14 December 2010, ECLI:CE:ECHR:2010:1214JUD007483201; ECtHR, Lakatošová and Lakatoš v. Slovakia, app. no. 655/16, judgment of 11 December 2018, ECLI:CE:ECHR:2018:1211JUD000065516; ECtHR, R.R. and R.D. v. Slovakia, app. no. 20649/18, judgment of 1 September 2020, ECLI:CE:ECHR:2020:0901JUD002064918; ECtHR, M.B. and others v. Slovakia, app. no. 45322/17, judgment of 1 April 2021, ECLI:CE:ECHR:2021:0401JUD004532217; ECtHR, M.B. and others v. Slovakia (no. 2), app. no. 63962/19, judgment of 7 February 2023, ECLI:CE:ECHR:2023:0207JUD006396219.

[4] See e.g. ECtHR, Kruglov and others v. Russia, app. nos. 11624/04 and others, judgment of 4 February 2020, ECLI:CE:ECHR:2020:0204JUD001126404; ECtHR, Shorazova v. Malta, app. no. 51853/19, judgment of 3 March 2022, ECLI:CE:ECHR:2022:0303JUD005185319.

related to right to a fair trial or right to liberty and security. Rather, the communicated cases more prevalent in recent years focus on various other substantive rights associated with interferences during criminal proceedings, such as privacy, property, or detention conditions.

Therefore, these findings present several implications, as well as questions for further assessment. Firstly, it is obvious that the government of Slovakia will face increased pressure in responding to these allegations, and could face increased international pressure, depending on the proportion of the cases it loses, and the gravity or systematic nature of human rights violations the ECtHR may find. Additionally, it will be interesting to assess the development of trends in communicated cases against Slovakia post-2023, with a view to ascertaining the effect change of the government will have on the flow of new applications, stemming from factual circumstances taking place in 2024 onwards.

Despite the contemporary concerns about fair trial in criminal proceedings, which the recent communications from the ECtHR seem to support, there are caveats to be made about the implications drawn from analysis of the communicated cases only and the analysis cannot be conclusive in certain aspects. The findings from the quantitative analysis communicated cases is merely an indicator of interest the ECtHR has in cases, not the actual violations that may or may not be found eventually. Therefore, a more accurate insight into the fair trial deficiencies in Slovakia from the perspective of the ECtHR is only possible as regards older periods. Essentially, this is possible if two conditions are fulfilled. Firstly, the quantitative analysis in this regard would have to cover predominantly time periods from which most of the communicated cases concerning criminal proceedings were already decided by the ECtHR, whether by admissibility decisions, or final judgments. Secondly, given the length of proceedings before the ECtHR, the relevant timeframe assessed would presumably cover factual allegations arising even years prior to the time-period during which the assessed applications were introduced. In this regard, other international bodies produce arguably more timely reports on the fair trial situation in Slovakia (European Commission, 2023; U.S. Embassy in Bratislava, 2022). Nevertheless, the increased interest flags the issue for further consideration in the future, in particular once the communicated cases assessed will progress towards judgments.

ANNEXES

Annex A – Table of cases before the European Court of Human Rights communicated against Slovakia between 2019 and 2023[5]

Application no.	Date communicated	Criminal procedure	Articles included	Notes
21662/23	6.11.2023	Yes	6	with Arts. 8, 13 and 18
29229/22	6.11.2023	No		
42073/22	9.10.2023	No		
12862/22	18.9.2023	Yes	Other	Art. 8, search
29359/22	18.9.2023	No		

[5] As available in the HUDOC database.

DOI: 10.54869/syeul.2023.3.818

9152/23	18.9.2023	No		Concerns prison sentence without relation to criminal proceedings
15008/22	18.9.2023	No		
50301/22	18.9.2023	Yes	6	
6796/23, 8123/23, 13641/23, 13848/23, 16058/23, 20789/23	18.9.2023	No		Concerns prison sentence without relation to criminal proceedings
8280/23	18.9.2023	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
2091/22	5.9.2023	No		
21846/21	10.7.2023	No		
23112/22	10.7.2023	Yes	5	
23445/21	10.7.2023	No		
46293/22	10.7.2023	No		
49617/22	10.7.2023	Yes	Other	Arts. 8, 13, search
57748/21	10.7.2023	Yes	Other	Art. 8, search
34483/21	30.5.2023	No		
17242/22	15.5.2023	Yes	Other	Art. 13, A1P1, freezing order
30483/22	15.5.2023	Yes	5	
33603/22	15.5.2023	Yes	Other	Art. 8, search, use of force
38283/21	15.5.2023	No		
40478/22	15.5.2023	Yes	Other	A1P1, freezing order
43341/22	15.5.2023	Yes	Other	Arts. 3, 8, detention conditions
56545/21	15.5.2023	Yes	Other	Arts. 3, 8, detention conditions
13284/22, 12127/23	15.5.2023	Yes	Other	Arts. 8, 13, 18, search
39980/22	5.4.2023	No		
38838/21, 39024/21, 45671/21 and 15011/22	9.2.2023	Yes	5	
30515/22	6.2.2023	No		
36989/21 and 7 945/22	6.2.2023	Yes	5	

16627/21 and 47 others	24.1.2023	No		
22083/21	13.1.2023	Yes	Other	Arts. 3, 5, detention conditions and duration
48587/21	13.1.2023	Yes	Other	Arts. 4, 8, ineffective investigation
12131/21	12.12.2022	No		
41955/22	8.12.2022	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
50704/21 27787/22 and 30195/22	21.11.2022	Yes	Both	
55792/20 and 3 5253/21	25.10.2022	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
34281/20	9.9.2022	No		
5541/22	6.7.2022	No		
57752/21	7.2.2022	No		
45645/21	10.1.2022	Yes	5	
59217/21	17.12.2021	Yes	5	
615/21 9427/21 and 36765/21	2.11.2021	Yes	5	with Art. 8
31870/20 31896/20 and 31903/20	20.10.2021	Yes	6	with Arts. 8 and 13
35015/20	20.10.2021	Yes	6	
55788/20 and 3 others	28.9.2021	Yes	5	
6251/20	13.9.2021	No		
35673/18	5.2.2021	No		Concerns prison sentence without relation to criminal proceedings
32084/19	4.1.2021	Yes	6	
4315/18	16.12.2020	Yes	6	
63703/19	5.12.2020	Yes	6	
41217/20 and 4 others	5.12.2020	No		
35025/20	27.11.2020	Yes	6	
43932/19	27.11.2020	No		
43995/19	27.11.2020	No		
18593/19	17.11.2020	Yes	Other	Arts. 8, 13, wiretapping

DOI: 10.54869/syeul.2023.3.818

20877/19	17.11.2020	No		Concerns prison sentence without relation to criminal proceedings
55617/17	19.10.2020	No		
37574/19	4.9.2020	Yes	6	with Arts. 2, 3 and 13, ineffective investigation
81292/17	4.9.2020	No		Concerns prison sentence without relation to criminal proceedings
19990/20	4.9.2020	Yes	6	
40925/17	9.7.2020	No		
63783/19	15.6.2020	No		
737/19	15.6.2020	No		
31975/19	11.6.2020	No		
42149/17	4.6.2020	No		
33160/17	27.5.2020	No		
74543/17	27.5.2020	No		
63962/19	20.3.2020	Yes	Other	Arts. 3, 13 and 14, ineffective investigation
16231/17	14.1.2020	No		
34159/17	14.1.2020	No		
14661/17	29.11.2019	No		
15765/17	29.11.2019	No		
46341/17	29.11.2019	No		
17101/19	12.11.2019	Yes	5	
43225/19	14.10.2019	No		
26826/16	2.10.2019	No		
41510/16 and 81651/17	2.10.2019	No		Concerns prison sentence without relation to criminal proceedings
7286/16	2.10.2019	Yes	6	with Art. 8, wiretapping
40132/16	17.9.2019	Yes	5	with Art. 13
56293/15	17.9.2019	No		
7796/16	17.9.2019	No		
27429/16	16.9.2019	No		
45558/15	16.9.2019	No		Concerns prison sentence without relation

				to criminal proceedings
56751/16 and 33762/17	16.9.2019	No		
39654/15	12.9.2019	Yes	Both	
25220/15	11.9.2019	No		
28081/19 29664/19 and 35946/19	11.9.2019	Yes	6	
25175/15	8.7.2019	No		
57085/18 (judgment 38321/17)	28.5.2019	Yes	Other	Arts. 3, 8, 13 and 14, ineffective investigation
36446/17	24.5.2019	No		
2749/17	3.4.2019	No		
35361/17	3.4.2019	No		
55610/18	3.4.2019	No		
74175/17	3.4.2019	No		
75041/17	3.4.2019	No		
38321/17 and 8 others	13.3.2019	No		Concerns prison sentence without relation to criminal proceedings

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ECtHR, R.R. and R.D. v. Slovakia, app. no. 20649/18, judgment of 1 September 2020, ECLI:CE:ECHR:2020:0901JUD002064918.
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SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

EU SANCTIONS AGAINST RUSSIA - THE IMPACT ON THE RUSSIAN AND EU MARKETS / Viktória Jánošová

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Abstract: *The nature of sanctions imposed on Russia, especially by the European Union, goes beyond mere punitive measures and takes on a multifaceted character with global repercussions. These sanctions are designed not only to exert economic pressure on Russia but also to serve as a diplomatic tool to influence behavior and promote adherence to international norms. The global impact of these sanctions extends beyond the direct consequences felt within Russia and the EU, touching various aspects of the world economy and geopolitical landscape. This paper analyses the impact of sanctions against Russia adopted following Russia's military aggression against Ukraine and its consequences in the EU and Russian economy. The author will primarily delve into shifts in import and export dynamics among these nations within the specified timeframe, with a particular emphasis on the oil and gas market. Within this framework, the focus will be directed towards discerning anticipated economic projections and their implications.*
Key words: *Russian Invasion of Ukraine; EU Sanctions against Russia; Economic Impact; Oil and Gas Market*

Suggested citation:
Jánošová, V. (2023). EU Sanctions Against Russia - The Impact on the Russian and EU Markets. *Slovak Yearbook of European Union Law*, vol. 3, 35-50. https://doi.org/10.54869/syeul.2023.3.796

1. INTRODUCTION

Following Russia's widely condemned invasion of Ukraine, numerous countries have imposed sanctions and expanded existing sanctions. These measures have had repercussions not only on Russia's economy but also on the global economy. Sanctions are employed as a coercive strategy to advance specific policy objectives, in this instance, aimed at diminishing Russian influence across various domains. They also serve as a non-military alternative, given that engaging in a full-scale war is categorically ruled out. The deployment of troops to Ukraine or the enforcement of a no-fly zone over Ukraine could potentially escalate into a direct confrontation with Russia. Additionally, Ukraine faces a significant disadvantage due to its lack of affiliation with any military alliance. Despite the establishment of formal relations between NATO and Ukraine in 1992, Ukraine has yet to attain full NATO membership. Russia has consistently resisted Ukraine's and other neighbouring countries' aspirations to join the alliance, primarily due to concerns about territorial encroachment. As a result, Ukraine remains categorised as a NATO partner country, meaning it does not benefit from the security guarantees outlined in the Alliance's founding treaty.

The allegiance of the European and Western community is unmistakably evident. Voices, including that of Josep Borrell, convey a sense that we are facing some of Europe's most challenging times since World War II. Beyond being a clear violation of

international law, it also infringes upon the fundamental principles of human coexistence. It is undoubtedly a situation that demands urgent and decisive action to address the unfolding challenges.[1]

What can we do to help Ukraine without direct military action and aggravating the situation between the West and Russia even more? It is necessary not only to strengthen Ukraine, but also to weaken Moscow's war effort. In addition to political, military, financial and humanitarian support for as long as necessary, the imposed sanctions must demonstrate their effectiveness. However, there is no possibility for European Union to sever all economic ties with Russia immediately, so the sanctions had to be gradual. Since February 2022, the EU massively expanded restrictive measures against Russia through adopting eleven separate packages of restrictive measures, and actively developing a twelfth package of anti-Russian sanctions. The sanctions list was extended by a significant number of persons and entities and adopted unprecedented measures with the aim of significantly weakening Russia's economic base, depriving it of critical technologies and markets, and significantly curtailing its ability to wage war.[2]

It is important to note, that these sanctions do not have only a severe impact on the Russian economy and financial system but also have a profound impact outside of Russia. It is significant due to the size of Russia's economy, which was before the war the 11th largest in the world and Russia's integration in the global economy. Russia has also been a key global supplier of natural gas, oil and several metals such as titanium, aluminium, nickel and chemical gases used in semiconductor production, wheat, and fertilizers, among other commodities. Global economy, which was still struggling to recover from the COVID-19 pandemic received another shock from Russia's isolation. Results of sanctions have contributed to disruptions in global supply chains, higher global commodity prices, and a slowdown in global economic growth. The EU remains to the coalition imposing sanctions, but at the same time faces the greatest potential economic disruption as Russia's strongest economic partner. However, the EU was always heavily dependent on energy imports from Russia, especially natural gas.[3]

Current EU sanctions against Russia caused enormous instability in the oil and gas market in Europe. Due to inflation and rising prices in all areas, there is a sceptical mood regarding the sanctions in many European countries. Especially in countries, which due to their geographic situation suffer from a specific dependence on Russian supplies and have no viable alternative options. It is important to establish a clear understanding of the purpose and effectiveness of sanctions, with an added focus on comparing their consequences in the EU and Russia. This paper aims to elucidate that the repercussions of sanctions have inflicted severe damage on the Russian economy, rendering the situation there significantly more dire than in the EU.

[1] European Commission (2022a). Press Statement by High Representative/Vice-President Josep Borrell on Russia's aggression against Ukraine. Published on 24 February 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1324 (accessed on 31.12.2023).
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2. SANCTIONS

Sanctions *stricto sensu* in international law are coercive measures taken *ad normam (*in response to a violation of international law) as part of a decision by a competent social organ. In a broader context, sanctions in international law encompass measures imposed by states, international organisations, or coalitions against another state, entity, or individual, due to behaviour considered objectionable or contrary to established international norms, laws, or agreements. These measures serve as a non-military diplomatic tool to influence the behaviour of the targeted entity and encourage compliance with international law and accepted standards of conduct (Asada, 2020, pp. 4-5).

The EU had imposed a series of sanctions against Russia in response to various geopolitical events and actions taken by the Russian government, such as the illegal annexation of Crimea and Sevastopol in 2014,[4] the non-implementation of the Minsk agreements in 2014-2015[5] and the deliberate destabilisation of Ukraine in the context of the war in February 2022.

Presently, the EU imposes three types of sanctions on Russia. The first targets individuals and entities deemed responsible for violating Ukraine's sovereignty. The second involves restrictive measures related to Crimea and Sevastopol, while the third category encompasses broader economic sanctions against Russia. The first type is individual sanctions against specific citizens and entities guilty, according to the European Union, of violating the sovereignty and territorial integrity of Ukraine. The initial sanctions were enacted on 17 March 2014, through the Council's adoption of Decision 2014/145/CFSP. This decision mandated travel restrictions and the freezing of funds and economic resources for specific individuals deemed responsible for actions that undermine or threaten the territorial integrity, sovereignty, and independence of Ukraine.[6] The second category of sanctions pertains to restrictive measures against Crimea and Sevastopol, having been ratified concurrently with Regulation (EU) No 269/2014/CFSP, which delineates restrictions against actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine.[7] In this instance, the Council, on 23 June 2014, adopted Decision (EU) No 2014/386/CFSP in response to the peninsula's accession and complete integration into Russia.[8] The third category comprises anti-Russian economic sanctions, enacted on 31 July 2014, through Council Decision (EU) No

[4] Decree of the President of the Russian Federation No. 63-rp dated March 17, 2014 "On the signing of the Treaty between the Russian Federation and the Republic of Crimea on the admission of the Republic of Crimea to the Russian Federation and the formation of new subjects within the Russian Federation" [Распоряжение Президента Российской Федерации от 17.03.2014 № 63-рп "О подписании Договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов"]. Available at: https://web.archive.org/web/20140318095051/http://pravo.gov.ru:8080/page.aspx?92062 (accessed on 31.12.2023).

[5] Aljazeera (2022). Ukraine-Russia crisis: What is the Minsk agreement?. Published on 9 February 2022, available at: https://www.aljazeera.com/news/2022/2/9/what-is-the-minsk-agreement-and-why-is-it-relevant-now (accessed on 31.12.2023).

[6] Council Decision (EU) No 145/2014/CFSP of March 17, 2014, concerning restrictive measures with respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine, 17 March 2014, pp. 16–21, ELI: http://data.europa.eu/eli/dec/2014/145(1)/oj

[7] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. ELI: http://data.europa.eu/eli/reg/2014/269/oj

[8] Council Decision (EU) No 386/2014/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, 24 June 2014, pp. 70, 71, ELI: http://data.europa.eu/eli/dec/2014/386/oj

DOI: 10.54869/syeul.2023.3.796

512/2014. These measures were implemented in the aftermath of the Malaysian Boeing crash, reflecting Russia's actions destabilising the situation in Ukraine.[9]

The EU massively expanded the sanctions after February 2022 in response to the illegal annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions resp. after the recognition of the DPR[10] and the LPR[11] and the start of hostilities by the Russian Federation on the territory of Ukraine. Yet, the restrictive measures instituted in 2022 do not stand as an autonomous category of sanctions; rather, they constitute an integral component of the economic anti-Russian sanctions established in July 2014 through Council Regulation (EU) No 833/2014.[12] This regulation forms the basis for all subsequent sanctions packages implemented in response to the invasion of Ukraine in 2022 (Voynikov, 2022, p. 3). The continuous integration of sanctions within this established framework demonstrates the EU's strategic and comprehensive approach to addressing ongoing geopolitical crises and safeguarding the principles of international law.

These measures were implemented to address concerns regarding Ukraine, specifically actions undermining or threatening its territorial integrity, sovereignty, and independence, as well as human rights violations and other geopolitical developments. Currently, the primary EU restrictive measures against Russia apply to almost 1800 individuals and entities combined. In June 2023, the EU adopted its eleventh package, sanctioning additional 71 individuals and 33 entities.[13] Sanctions on individuals involve travel bans and asset freezes, targeting those believed to be engaged in activities violating international law or norms. These restrictions include travel prohibitions to certain countries, preventing listed individuals from entering or transiting through EU territory by land, air, or sea, and freezing assets held in foreign jurisdictions. This entails the freezing of all accounts belonging to the listed persons and entities in EU banks. The prohibition extends to any direct or indirect making of funds or assets. Presently, there are 21.5 billion EUR of assets frozen in the EU, and 300 billion EUR of assets from the Central Bank of Russia are blocked in the EU and G7 countries.[14] The individuals targeted by these sanctions include prominent figures such as Russia's President Vladimir Putin, Minister for Foreign Affairs Sergey Lavrov, former Ukrainian President Viktor Yanukovych, Yevgeny Prigozhin,[15] and leaders of the Wagner group. Additionally, members of the Russian State Duma, the National Security Council, the Federation Council of the Russian Federation, ministers, governors, local politicians (including the Mayor of Moscow), high-ranking officials, military personnel, influential business figures, oligarchs, and individuals

[9] Council Decision (EU) No 512/2014/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 31 July 2014, pp. 13–17, ELI: http://data.europa.eu/eli/dec/2014/512/oj

[10] Donetsk People's Republic.

[11] Lugansk People's Republic.

[12] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 31.7.2014, pp. 1–11, ELI: http://data.europa.eu/eli/reg/2014/833/oj

[13] Council Regulation (EU) No 1214/2023 of 23 June 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 23.6.2023, pp. 1–329, ELI: http://data.europa.eu/eli/reg/2023/1214/oj

[14] The Group of Seven is an informal grouping of seven of the world's advanced economies, including Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States, as well as the European Union.

[15] Prigozhin, a Russian mercenary leader and oligarch, openly criticised the Russian Defence Ministry for corruption and false reasons behind the war in Ukraine. On June 23, 2023, he launched a rebellion against the Russian military leadership. Two months later, on August 23, 2023, Prigozhin was killed in a plane crash in Tver Oblast, north of Moscow, along with nine others.

associated with pro-Kremlin and anti-Ukrainian propaganda are subject to these measures.[16]

There are several more individuals being sanctioned due to responsibility or involvement in operations such as atrocities committed in Bucha and Mariupol, deportation and forced adoption of Ukrainian children, missile strikes against civilians and critical infrastructure, recruitment of Syrian mercenaries to fight in Ukraine, manufacture and supply of drones and looting of Ukraine's cultural heritage. Sanctioned entities includes banks and financial institutions, political parties, armed forces and paramilitary groups, companies in the aviation, shipbuilding and machine building sectors, companies in the military and defence sectors, the movement All-Russia People's Front, media organisations responsible for propaganda and disinformation, the Russia-based private military entity Wagner Group and the Russian media organisation RIA FAN.[17]

Another part of economic sanctions is a number of trade restrictions on Russia, which are linked to technology and defence restrictions or to import of services. These sanctions can also limit the export of certain technologies, especially those with potential military applications, to the sanctioned country. The list of banned products is based on concept of targeted sanctions. These sanctions are designed to minimise negative impacts on the general population and instead focus on the individuals or entities responsible for the objectionable activities. It follows that the export and import restrictions exclude products primarily intended for consumption and products related to health, pharma, food, and agriculture, in order not to harm the Russian population. At the same time, these are restrictions designed to maximise the negative impact of the sanctions for the Russian economy while limiting the consequences for EU businesses and citizens (Voynikov, 2022, p. 3). Since February 2022, the EU has banned €91.2 billion in imported goods and over €43.9 billion in exported goods to Russia, which means that 58% of imports and 49% of exports are currently sanctioned, compared to previous years.[18]

The oil ban, a pivotal component of the sixth package of sanctions outlined in Council Regulation (EU) No 879/2022 on June 3, 2022, is a stringent measure prohibiting the acquisition, import, or transfer of seaborne crude oil and specific petroleum products from Russia to the EU. This restriction, implemented to address the geopolitical situation, marks a significant step in curbing key energy imports and has far-reaching implications for global economic dynamics. These restrictions apply for crude oil from 5 December 2022 and for other refined petroleum products from 5 February 2023. Those EU member states that, due to their geographic situation, suffer from a specific dependence on Russian supplies and have no viable alternative options were given a temporary exception for imports of crude oil by pipeline.[19]

In conclusion, the EU has implemented a comprehensive set of sanctions against Russia, targeting individuals, entities, and economic activities deemed responsible for actions undermining Ukraine's sovereignty. The multifaceted approach includes individual sanctions, restrictive measures related to Crimea and Sevastopol, and broader

[16] European Council (2023). EU sanctions against Russia explained. Available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions (accessed on 26. 06. 2023).
[17] Ibid.
[18] Ibid.
[19] Council Regulation (EU) No 879/2022 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 03 June 2022, (17). ELI: http://data.europa.eu/eli/reg/2022/879/oj

DOI: 10.54869/syeul.2023.3.796

economic sanctions. Notably, the ban on seaborne crude oil and specific petroleum products, implemented in the sixth package of sanctions, has emerged as a focal point with profound global economic repercussions. This particular measure stands out as the most extensively discussed, reflecting its substantial impact on the world economy. This measure underscores the EU's commitment to address the geopolitical situation and its readiness to implement impactful restrictions on key energy imports.

3. THE ECONOMIC IMPACT

In 2021, Russia ranked among the world's top three oil and gas producers, standing alongside Saudi Arabia and the United States and played a significant role in supplying approximately 25% of the oil and over 43% of the natural gas consumed by the EU.[20] When President Putin initiated the invasion of Ukraine in February 2022, it was not feasible for the EU to completely cut off all economic connections with Russia at once. As a result, the EU continued to contribute to Moscow's revenue by purchasing fuel from Russia. The imposed sanctions were introduced gradually, with notable exemptions, as Western nations sought to manoeuvre through uncharted territory.

However, President Putin had been anticipating the potential for an economic showdown with the West for quite some time. Alexey Kalmykov, a journalist of the BBC's Russian service points out that Putin had been making preparations for this economic conflict since 2014 when sanctions were first imposed on him in response to his initial actions in Ukraine and the annexation of Crimea. Over the past eight years, Russia has amassed significant foreign exchange reserves. It achieved this by selling more fossil fuels than ever before and reinvesting the profits in expanding its pipeline infrastructure. Additionally, Russia made strategic investments in Western technology, assets, and critical infrastructure, including gas storage facilities and oil refineries within the EU. Despite the absence of a complete embargo, Russia continued to reap substantial profits by selling fossil fuels to Europe, especially as prices soared and oil supplies remained uninterrupted. The Kremlin also turned gas into a weapon by reducing supplies to Europe by 80%.[21] This context underscores the calculated measures taken by Russia in anticipation of an economic showdown, showcasing its strategic preparations and the complexity of the situation.

As a response, the EU has enacted export restrictions of goods to Russia, impacting approximately a third of their total value. These restrictions primarily target transport equipment, making up over 45% of the banned products' total value, followed by chemicals (19%), electronics (12%), and machinery (11%). The extent to which these sanctions impact different industries varies significantly, with intermediate goods being more affected than final products (40% versus 23%, respectively). The EU's exports of restricted products to Russia had been steadily decreasing and were nearing zero. Simultaneously, exports of non-sanctioned items saw a slight increase in the last quarter of 2022. Additionally, exports from countries that did not impose sanctions on Russia started rising in April-May 2022, according to both Russian customs data and mirrored trade statistics. This increase applied to both sanctioned and non-sanctioned products. In the final quarter of 2022, when EU exports of sanctioned products nearly stopped

[20] European Commission (2022b). In focus: Reducing the EU's dependence on imported fossil fuels. Published on 20 April 2022, available at: https://commission.europa.eu/news/focus-reducing-eus-dependence-imported-fossil-fuels-2022-04-20_en (accessed on 31.12.2023).

[21] CE Noticias Financieras English. War in Ukraine: what is the impact of sanctions against Russia after one year of invasion?, In: ProQuest One Business, last reviewed on 25 February 2023, available at: https://uaccess.univie.ac.at/login?url=https://www.proquest.com/wire-feeds/war-ukraine-what-is-impact-sanctions-against/docview/2779731239/se- 2?accountid=14682 (accessed on 31.12.2023).

completely, exports from non-sanctioning countries exceeded pre-war levels by a small margin (Borin et al., 2023). This dynamic highlights the nuanced outcomes of the EU's sanctions, affecting different sectors in varying degrees and shaping the overall trade landscape with Russia.

In recent times, Russia's contribution to the European Union's imports of petroleum oils and natural gas has steadily declined. Starting from the second quarter of 2022, this trend has persisted. Specifically, imports of petroleum oils from Russia have seen a substantial decrease, plummeting from a monthly average of 8.7 million tonnes in the second quarter of 2022 to just 1.6 million tonnes in the second quarter of 2023. This marks an 82% decrease in imports from Russia. In contrast, imports from sources outside the EU, excluding Russia, have shown an opposite trajectory, increasing by 5.8 million tonnes. These imports have risen from 31.5 million tonnes to 37.3 million tonnes. In the second quarter of 2023, EU natural gas imports experienced a notable decline, amounting to a 17% reduction in net mass compared to the same quarter in 2022. This decrease appears to be in line with the EU's commitment to reducing gas consumption as part of its reduction plan. Specifically, imports of natural gas from Russia witnessed a decrease during this period, dropping from an average monthly volume of 5.1 million tonnes in the second quarter of 2022 to 2.5 million tonnes in the second quarter of 2023.[22]

The sanctions imposed bilaterally have had both direct and indirect consequences on the trade of oil and natural gas. The impact is now visible in a growing diversification of energy suppliers. During the second quarter of 2022, Russia held the top position as the primary supplier of petroleum oils to the EU, accounting for 15.9% of the total imports. However, by the second quarter of 2023, Russia's ranking had dropped significantly to 12th place, with a reduced share of just 2.7%. This marks a substantial decline of 13.2% to the previous year. Conversely, Norway witnessed a notable increase of 3.5%, reaching 13.7% in share. Kazakhstan also experienced growth, with an increase of 3.2%, reaching 10.2%. The United States and Saudi Arabia saw their shares rise by 2.1% and 2.3%, respectively, reaching 13.6% and 9.0%. Additionally, Libya emerged as a significant partner, contributing to 8.1% of the European Union's imports of petroleum oil.[23]

A similar trend was observed in the case of natural gas in its gaseous state, as Russia's share declined by 14.5% to 13.8% of the total EU imports. In contrast, Algeria (+9.3%) and Norway (+6.2%) saw significant increases in their shares. During the second quarter of 2023, Norway emerged as the EU's top natural gas supplier, accounting for 44.3% of total EU imports, followed by the United Kingdom at 17.8% and Algeria at 16.5%. Regarding liquefied natural gas (LNG), the United States maintained its position as the leading supplier to the EU in the second quarter of 2023, with a substantial share of 46.4% of total EU imports. Russia followed at 12.4%, with Qatar at 10.9%, Algeria at 9.9%, and Nigeria at 5.1%. Among these suppliers, Algeria and Nigeria were the only ones to experience an increase in their shares, with gains of 5.2% and 1.0%, respectively, compared to the second quarter of 2022. Conversely, the shares of the United States, Russia, and Qatar decreased by -2.8, -2.7, and -1.1 percentage points, respectively. Notably, Norway and Oman also emerged as important LNG suppliers, contributing shares of 3.3% and 2.9%, respectively.[24]

[22] Eurostat (2023). EU imports of energy products continued to drop in Q2 2023. Published on 25 September, available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230925-1 (accessed on 31.12.2023).
[23] Ibid.
[24] Ibid.

DOI: 10.54869/syeul.2023.3.796

The decline in natural gas imports reflects the EU's commitment to environmental goals. These trends showcase the lasting impact of geopolitical events on energy trade dynamics and the EU's proactive approach to adapt its energy resource strategies. Bilateral sanctions have significantly reshaped the EU's energy supplier landscape, prompting a strategic shift to diversify sources in response to evolving political and economic conditions. This diversification is a calculated response to geopolitical events and trade constraints, aiming to secure energy resources from a more varied set of partners. The combination of supply chain disruptions, the challenge of rapid diversification, global market dynamics, and broader economic impacts contributed to higher oil and gas prices in Europe post-sanctions on Russia. The reduction in Russian energy exports created a supply deficit, and the imbalance with constant or increasing demand exerted upward pressure on prices. This fundamental economic principle of supply and demand dynamics elucidates how disruptions in the energy supply chain can lead to elevated prices in the affected region.

In summary, when the European Union's export bans on goods to Russia were fully implemented, there was a significant and noticeable reduction in Russia's overall imports. It is assumed that Russian markets were unable to completely substitute the absence of EU products with alternatives from other sources. The extent of replacing imported mid- and high-tech products with domestic alternatives is notably lower than the average across different product categories. The overall statistics mask significant variations at the individual product level, with some products showing more successful substitution than others. One might anticipate that Russia would prioritise the replacement of high-tech products, particularly given the increasing military requirements. However, this has proven to be challenging, primarily because before the conflict, sanctioned countries supplied more than half of Russia's imports in this category. Consequently, the effectiveness of import substitution for mid- and high-tech goods has been limited, while these products have borne the brunt of the sanctions. Imports from countries that did not impose sanctions remained relatively stable. In contrast, imports from the EU and other sanctioning countries plummeted by over 80%, resulting in a significant shortage of approximately $7 billion in just one quarter (Borin et al., 2023).

While semiconductors and electronic integrated circuits make up just 1% of Russia's total import value, their significance in various industries, especially military applications, cannot be overstated. With the imposition of export bans by the EU and other sanctioning countries, exports of these critical components to Russia came to a complete halt, while imports from non-sanctioning nations experienced an increase. However, it's essential to note that the extent of substituting these imported semiconductors varies between two sources of data. Mirror trade statistics indicate rather modest import substitution, resulting in an overall gap of nearly $300 million in Russian semiconductor imports. In contrast, Russian customs data reveal a substantial spike in imports from non-sanctioning countries, predominantly attributed to heightened imports from China, a trend not reflected in mirror statistics. Intriguingly, a significant portion of the increase in Russian imports from China lacks a reported origin. At the end of 2022, the share of semiconductors with an unknown production origin was negligible. In 2023, it has become a substantial portion, accounting for nearly half of Russia's semiconductor imports. This strongly implies that these goods may have been manufactured in other countries, potentially including those that have imposed sanctions (Borin et al., 2023).

The question arises whether have EU products been re-routed by other countries towards Russia? While the general level of import substitution has shown constraints, estimated at around 10% to 25%, it is noteworthy that certain EU products affected by

export restrictions may have found their way into Russia through another countries. One potential path taken by these exports can be identified by examining the significant increase in both imports from the EU and exports to Russia for specific countries. For instance, countries like Turkey, Kazakhstan, and Armenia have experienced a notable upswing in both these figures. Additionally, other neighbouring countries and even Serbia could potentially serve as routes for these goods to reach Russia. Furthermore, it's important to note that products exported by the EU, originally intended for third countries based on EU customs data, could potentially be redirected to Russia without even being officially recorded as imports in those third countries. This phenomenon, often termed as 'ghost trade,' has witnessed an increase in discrepancies between what the EU reports as exports and what third countries report as imports. This trend is particularly notable in the case of certain countries, such as Kazakhstan and Armenia. While preliminary analysis supports the existence of these discrepancies at the aggregate level, a more detailed examination of the data reveals that the increase in discrepancies is consistent for both products subject to sanctions and those that are not. This suggests that there may be factors beyond just evading sanctions at play here (Borin et al., 2023).

From a legal standpoint, the question of potential re-routing of EU products to Russia through intermediary countries raises concerns regarding compliance with the EU's export restrictions. If EU products subject to export restrictions are indeed finding their way to Russia through third countries, it could be viewed as circumvention of the sanctions regime. This may entail violations of the EU's sanctions laws and regulations, which are designed to restrict the flow of specific goods to Russia in response to geopolitical events. The concept of 'ghost trade,' where exports intended for third countries are redirected to Russia without proper recording, poses additional legal challenges. Such practices could undermine the effectiveness of the EU's sanctions framework and may warrant further legal scrutiny and investigation to ensure the integrity and enforcement of export controls. Additionally, the discrepancies noted in trade data necessitate a thorough legal examination to discern whether these deviations result from intentional circumvention, logistical disruptions, or other factors. Addressing these legal intricacies is crucial to maintain the integrity and efficacy of the EU's sanctions regime.

However, while President Putin's short-term strategies have proven profitable, most economists concur that they are not sustainable in the long run, highlighting potential vulnerabilities. The introduction of an oil price ceiling on December 5, along with the European embargo on Russian oil, has not been utilised yet, largely due to the fact that Urals oil from Russia has been more competitively priced.[25] Presently, a barrel of Urals oil, whose value has declined following the EU's ban on Russian oil imports by sea, is being exported for approximately $50. According to a study by Crea from January 2023, Moscow is incurring daily losses of approximately $175 million in fossil fuel exports due to the sanctions. Nevertheless, Russia has managed to find new customers for its energy products.[26]

As for Russian exports over the past year, Moscow has successfully shifted its focus towards exporting oil and gas to Asian markets - the only alternative to the EU

[25] CE Noticias Financieras English. War in Ukraine: what is the impact of sanctions against Russia after one year of invasion?, In: ProQuest One Business, last reviewed on 25 February 2023, available at: https://uaccess.univie.ac.at/login?url=https://www.proquest.com/wire-feeds/war-ukraine-what-is-impact-sanctions-against/docview/2779731239/se- 2?accountid=14682 (accessed on 31.12.2023).

[26] CREA (2023). EU oil ban and price cap are costing Russia EUR 160 mn/day, but further measures can multiply the impact. Available at: https://energyandcleanair.org/wp/wp-content/uploads/2023/01/CREA_EU-oil-ban-and-price-cap-are-costing-Russia-EUR160-mn-a-day-but-further-measures-can-multiply-the-impact.pdf (accessed on 31.12.2023).

DOI: 10.54869/syeul.2023.3.796

market. The primary customers of Russian oil are now predominantly China, India, and Turkey. These countries have been procuring Russian oil at substantial discounts, acquiring it at prices significantly below the global benchmark, Brent crude oil. Since the onset of the Russian invasion, India, China, and Turkey have substantially boosted their purchases of Russian oil. At the beginning of 2022, Russia contributed to less than 2% of India's oil imports. However, the current trend suggests that it is steadily progressing towards becoming India's primary and most significant source of oil supply. As a collective, these nations now represent a significant majority, accounting for 70% of all Russian sea-borne oil flow (Menon, 2023).

Despite short-term gains, economists express concerns about the sustainability of President Putin's strategies, emphasising potential long-term vulnerabilities. The imposition of an oil price ceiling and the European embargo on Russian oil, though not yet activated, poses challenges. The decline in Urals oil value and daily losses in fossil fuel exports, as indicated by a Crea study, underscore the economic impact of sanctions. Russia's ability to find new customers, particularly in Asian markets demonstrates adaptive measures. The shift toward these markets, with substantial discounts offered, has reshaped Russia's oil export dynamics.

Regarding gas exports, Russia initiated a gas dispute by significantly reducing gas supplies to Europe following its military actions in Ukraine. These reductions, disguised as technical and commercial reasons, aimed to pressure EU nations into withdrawing support for Kyiv. Concurrently, the EU had already been planning to decrease its reliance on gas, as illustrated by its Fit for 55 plan introduced in the summer of 2021. This plan outlined substantial reductions in greenhouse gas emissions by 2030, which, in turn, would reduce dependence on fossil fuels, including Russian gas. Prior to the Russian military intervention in Ukraine, there was a recognised need to identify fresh markets for Yamal gas. China emerged as the primary choice for this endeavour. A memorandum for a pipeline from Yamal to China was initially signed during Putin's visit to China in 2006. However, discussions on the project's specifics remained stagnant until 2022, when it transitioned from a potential business opportunity to an imperative necessity. It's worth mentioning that in 2019, Russia successfully exported a substantial volume of 165 billion cubic meters of pipeline gas to Europe and Turkey through the Siberia pipeline. However, the projected capacity of Power of Siberia 2 is notably smaller, standing at only 50 billion cubic meters (Vakulenko, 2023).

In conclusion, it can be inferred that Russian crude oil export volumes are not anticipated to experience a substantial impact due to the redirection of trade from sanction-imposing countries to those that have not imposed sanctions. As a result, they have effectively shifted their focus from the EU market to the Asian market. This strategic shift has allowed them to circumvent the prevailing oil price ceiling set by the G7.

Sergei Vakulenko, an energy expert at the Carnegie Endowment for International Peace, a Washington-based think tank, emphasised that Russia continues to wield substantial influence in the global energy market. He underscored the challenges of opposing such a major player, acknowledging that it is not a task that can be accomplished in a day.[27] Vakulenko further discussed the transition of gas exports from Europe to the Chinese market and acknowledged that even if Power of Siberia 2 is successfully put into operation, it will not be capable of completely compensating for the loss of the EU market. From a profitability perspective as well, the project falls behind

[27] CE Noticias Financieras English. War in Ukraine: what is the impact of sanctions against Russia after one year of invasion?, In: ProQuest One Business, last reviewed on 25 February 2023, available at: https://uaccess.univie.ac.at/login?url=https://www.proquest.com/wire-feeds/war-ukraine-what-is-impact-sanctions-against/docview/2779731239/se- 2?accountid=14682 (accessed on 31.12.2023).

compared to the former gas trade with Europe. The profit margin from gas exports to Europe varied by country, but during the period of 2015 to 2019, Germany, as a key market, paid an average of $220 per 1,000 cubic meters for gas imports. Gas prices generally align with oil prices, historically through established formulas, and more recently through market dynamics. During that same period, the average price of Brent crude oil was $57 per barrel. In contrast, calculations for China are based on a price of Brent oil at $60 per barrel and the pricing formula outlined in the contract for the original Power of Siberia pipeline, which delivers gas from eastern Siberia to China. The projected average revenue for gas transported to the Chinese border via the Power of Siberia 2 pipeline would be approximately $170 per 1,000 cubic meters. By factoring in the estimated pipeline length and tariff calculations, the transportation cost amounts to roughly $97 per 1,000 cubic meters, resulting in a netback of $73 per 1,000 cubic meters. This represents a significant drop compared to the previous netback of $135-155 from sales to Germany (Vakulenko, 2023). The contrast in pricing formulas and estimated costs underscores the economic challenges Russia faces in transitioning its energy exports.

Notably, the International Monetary Fund (IMF) has issued a caution regarding the repercussions of Western sanctions on Moscow, stating that their full impact is yet to be realised. The Russian economy has significant reliance on capital goods from Western countries and it is expected that as time progresses, the effects of these sanctions will become more pronounced. Moreover, when looking at the medium term, particularly in 2027, the IMF's projections indicate Russia's economic output to be 7% lower compared to pre-war levels. This suggests that the conflict is likely to exert a lasting and substantial impact on the Russian economy, with significant consequences (Marrow, 2023).

The Statista portal has also presented comprehensive data over a broader time span. In 2021, Russia's GDP growth was at 5.62%. However, following the intervention in Ukraine in 2022, it decreased to -2.05%. Projections for 2027, as indicated by Statista, anticipate a further decline, with estimates falling below 0.8%.[28] This means that both the International Monetary Fund (IMF) and Statista project a considerable and enduring negative impact on Russia's economy due to Western sanctions and indicating a downward trend in GDP growth.

4. CONCLUSION

In the wake of Russia's invasion of Ukraine, the global community has responded with widespread sanctions, aiming not only to curtail Russia's economic activities but also to diminish its influence across various domains. These measures serve as a non-military strategy to enforce specific policy objectives and avoid escalating the conflict into a full-scale war. The geopolitical landscape, particularly NATO-Ukraine relations, plays a crucial role, as Ukraine's lack of NATO membership exposes it to vulnerabilities. The gravity of the situation is underscored by voices like Josep Borrell, who equates the events to some of Europe's darkest moments since World War II, demanding urgent and decisive action.

Addressing the crisis in Ukraine without direct military involvement poses challenges and necessitates a multifaceted approach. Supporting Ukraine's resilience

[28] Statista (2023). Russia: Real gross domestic product (GDP) growth rate from 2018 to 2028. Published on April 2023, available at: https://www.statista.com/statistics/263621/gross-domestic-product-gdp-growth-rate-in-russia/ (accessed on 31.12.2023).

while weakening Moscow's war efforts is imperative. The sanctions, introduced gradually by the EU since February 2022, have played a pivotal role. These sanctions, comprising eleven separate packages, aim to significantly undermine Russia's economic base, deprive it of critical technologies and markets, and curtail its ability to wage war.

The impact of these sanctions extends beyond Russia's borders, affecting global supply chains, commodity prices, and economic growth. The EU, despite facing potential economic disruptions as Russia's primary economic partner, remains committed to the coalition imposing sanctions. The sanctions' effectiveness is evident in the severe damage inflicted on the Russian economy, surpassing the challenges faced by the EU.

The economic impact is probably the most cognizable in the oil and gas market, where Russia's status as a top supplier to the EU has diminished drastically. This comprehensive examination of the economic landscape between the second quarter of 2022 and the second quarter of 2023 reveals several key trends and developments. One of them is the fact that Moscow facing daily losses of approximately $175 million in fossil fuel exports due to sanctions, has successfully sought alternative markets. Russia has strategically redirected its focus towards Asian markets, with primary buyers such as China, India, and Turkey procuring Russian oil at substantial discounts, constituting 70% of all Russian sea-borne oil flow. Primary buyers, including China, India, and Turkey, now procure Russian oil at substantial discounts, constituting 70% of all Russian sea-borne oil flow. A memorandum for a pipeline from Yamal to China, initially signed in 2006, gained renewed significance in 2022. Yet, the projected capacity of Power of Siberia 2, constituting only 30% of the previous volume, falls short of compensating for the loss of the EU market. The anticipated average revenue for gas transported through this pipeline to China is around $170 per 1,000 cubic meters, resulting in a significant drop compared to the previous netback from sales to Germany.

EU measures have led to a significant reduction in Russia's overall imports, exposing vulnerabilities in high-tech sectors. In the realm of high-tech products, Russia faces challenges in replacing critical components, particularly semiconductors and electronic integrated circuits. The imposition of export bans by the EU and other sanctioning countries has halted these critical component exports to Russia, prompting a surge in imports from non-sanctioning countries, notably China. Intriguingly, a significant portion of these imports from China lacks a reported origin, indicating potential paths through other non-sanctioning countries.

In response to the conflict, the European Union has diversified its energy suppliers. Norway has emerged as a top partner for gas and oil, along with increased collaboration with the United States. Algeria has become a significant partner in gas supply, contributing to the EU's efforts to replace Russian suppliers, although at slightly higher prices. Liquefied natural gas (LNG) remains a crucial component of the EU's energy portfolio, with the United States as the leading supplier.

The IMF warns that the full impact of Western sanctions is yet to be realised, anticipating a lasting and substantial economic decline in Russia, with projections indicating a 7% decrease in economic output by 2027 compared to pre-war levels. Statista data reveals a decline in Russia's GDP growth from 5.62% in 2021 to -2.05% in 2022, with further projections below 0.8% for 2027. President Putin's short-term economic strategies have demonstrated profitability, yet economists caution against their long-term sustainability. The introduction of an oil price ceiling and the European embargo on Russian oil pose additional challenges. Russia's shift towards Asian markets for energy exports, particularly to China, India, and Turkey, mitigates some losses but fails to fully compensate for the EU market.

In conclusion, the sanctions imposed on Russia have proven effective in achieving their intended objectives, significantly weakening Russia's economic position.

The long-term consequences, both for Russia and the global economy, are yet to fully unfold, emphasising the need for continued scrutiny and assessment of geopolitical and economic dynamics.

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DOI: 10.54869/syeul.2023.3.796

SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

BILATERAL INVESTMENT TREATIES WITHIN THE EU /

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This work was supported by the Slovak Research and Development Agency under the contract No. APVV-20-0567.

Abstract: *Foreign direct investment falls under the scope of the common commercial policy, a competence exclusively defined for the Union by the Lisbon Treaty. Bilateral investment treaties are also encompassed within the realm of foreign direct investment. Within the context of the European Union, this area is also important from the perspective of completing the EU's internal market. EU Member States have been, and continue to be, parties to numerous bilateral investment treaties. The present article aims to delineate the effects of the Lisbon Treaty on bilateral investment treaties, both intra- and extra-EU, and to present the status quo of this area under analysis within the European Union. A partial objective is also to scrutinize the potential impact on practice and assurances afforded to investors within the Union.*

Key words: *Bilateral Investment Treaties; Foreign Direct Investment; the EU Internal Market; Treaty of Lisbon*

Suggested citation:
Moravcová, D. (2023). Bilateral Investment Treaties Within the EU. *Slovak Yearbook of European Union Law*, vol. 3, 51-64. https://doi.org/10.54869/syeul.2023.3.807

1. INTRODUCTION

The completion of the EU's internal market, anchored in the assurance of the four fundamental freedoms, has significantly impacted the attainment of the EU's economic objectives. Naturally, the economic environment created by the Union has both attracted investors from third countries and stimulated investments within EU member states. The terms and conditions governing investments by entities from one country in a host country require regulation, with the preferred instrument globally being bilateral investment treaties (hereinafter referred to as "BITs"), which fall under the category of International Investment Agreements. This instrument has been used by EU Member States both *vis-à-vis* third countries and among themselves. The Lisbon revision of the founding treaties, forming part of primary law and standing at the top of the hierarchy of sources of Union *acquis*, has introduced several changes. It has also formally incorporated foreign direct investment as part of the EU's competences under the framework of the common commercial policy. From our perspective, this step was inevitably necessary considering the completion of the internal market, which is based on the principle of non-discrimination, equal treatment, and the exhaustive definition of permissible restrictions on the four guaranteed freedoms: the free movement of goods, persons, services and capital.

The presented article aims to delineate the impact of the Lisbon Treaty on bilateral investment treaties binding the Member States of the Union. In this article, we will concentrate on both bilateral investment treaties concluded between EU Member

States (hereinafter referred to as "intra-EU BITs") and those concluded by Member States with third countries (hereinafter referred to as "extra-EU BITs"), as they are governed by different regimes and have varying legal effects. The article primarily focuses on the practical consequences of the Lisbon revision on BITs, not only from the standpoint of the provisions of EU law, but especially in light of the key case law of the Court of Justice of the European Union (hereinafter referred to as the "CJEU") addressing the subject under analysis. Additionally, the article addresses the question of whether the Lisbon Treaty revision in the area of foreign investment was a necessary step to ensure the effective functioning of the EU internal market. We will also examine the effects and position of BITs in the EU legal order. A partial objective is to scrutinize the practices of the Slovak Republic and identify the consequences of the EU perspective for the Slovak Republic, which has been or still is a party to several BITs. Furthermore, we will attempt to assess whether the status quo potentially has a negative impact on investors within the EU.

2. BILATERAL INVESTMENT TREATIES IN GENERAL

In the globalised world, bilateral investment treaties are the preferred instrument through which States regulate the terms of investment between entities across borders and other investment-related elements. Nevertheless, this is not an entirely novel instrument, as investment treaties in a comparable form have been present in the practices of states since the 1950s. Historically, they took the form of bilateral trade agreements, known as treaties of friendship, commerce, and navigation. As stated by J. W. Salacuse, these treaties were initially designed to enhance trade between the contracting parties and occasionally included conditions for the establishment of entities within those countries, among other provisions. The incidence of such treaties was particularly significant in the post-war period in the USA, aiming to safeguard domestic entities investing in other countries. During this period, trade agreements were not a novelty in Europe either, with the late 1960s seeing a boom in the conclusion of such agreements by European countries focused exclusively on foreign investment. Some authors posit that this increase in contracting by European countries, compared to the US, was attributed to the comparatively lesser demands made by European states during the negotiation of treaty terms at that time (Salacuse, 1990, p. 657).

From our perspective, the emphasis on the regulation of foreign investment is also directly linked to the integration processes that unfolded on the European continent during this period. In 1952 and 1958, Euratom, the European Economic Community, and the European Coal and Steel Community were established. The original objectives were purely economic, focusing on removing trade barriers, ensuring the free movement of persons, and protecting competition, etc. (Siman and Slašťan, 2012a, p. 36). We therefore think that, as economic integration deepened, it was only a matter of time before there arose a necessity to focus on the area of foreign direct investment, even though the original treaties did not explicitly mention these competences. From our standpoint, it is precisely the integration processes on the European continent and the interest of countries in cooperating in trade that have influenced, among other factors, the expansion of bilateral investment treaties concluded by countries worldwide. Naturally, such treaties were primarily entered into by key actors, notably Switzerland, France, Italy, the United Kingdom, the Netherlands, Belgium, and Germany, with the objective of recovering investments lost due to the Second World War defeat (Salacuse, 1990, p. 657).

Nowadays, bilateral investment treaties are a preferred instrument for regulating the relations relating to the investment of entities within the contracting parties. In recent years, we have heard about them in the context of the European Union, particularly in

connection with their effects in light of the Lisbon revision of the founding treaties and the key case law of the CJEU. Before focusing on the Union's perspective on bilateral investment treaties, we consider it important to at least briefly introduce the nature of this instrument. Bilateral investment treaties are international treaties falling under the public international law area and the Vienna Convention on the Law of Treaties regime. They are treaties setting out the terms and conditions for direct investment by nationals and companies of one country in another, host country (EUR-Lex, 2017). The UNCTAD database to date registers 2219 BITs in force worldwide (UNCTAD, 2023a). Looking at the content of some of the more recent BITs, we can see that they include really broad perspectives on the terms and conditions of investment within the contracting states. Standardly, they contain general conditions for the promotion and protection of investment, conditions for expropriation, the institute of related damages and compensation for losses, the guarantee of the free movement of payments and provisions on transfers, etc. BITs also usually contain provisions for the settlement of disputes between a contracting party and the investor of the other contracting party, including arbitration clauses. In addition to the above, BITs, like other international treaties, contain provisions on the scope of the treaty, rules of implementation, the purpose of the treaty normally contained in the preambular part, etc.[1] These types of international agreements typically contain so-called sunset clauses (sometimes also referred to as survival or grandfathering clauses) in order to enhance investor protection and respect the principle of legitimate expectations. Such clauses guarantee the protection of investments originated during the period when the agreement was in force even after its termination, for a predetermined protection period, usually set for 5, 10, 15, or 20 years (Lavranos, 2023). In the following parts of the article, we will deal exclusively with Union perspectives on bilateral investment treaties, focusing on both intra- and extra-EU BITs and their effects within the Union law.

3. INTRA-EU BILATERAL INVESTMENT TREATIES

The European Union has successfully realized the completion of the internal market, ensuring the unrestricted movement of the four fundamental freedoms: the free movement of goods, services, persons, and capital. For the purposes of the present article, the most pertinent is the free movement of capital, introduced as freedom by the Maastricht Treaty. The free movement of capital not only facilitates the practical implementation of the other freedoms but also constitutes a crucial step in the subsequent establishment of the Economic and Monetary Union, representing a higher level of economic integration (European Parliament, 2023). The founding treaties, forming part of the EU's primary law, prohibit all restrictions on the free movement of capital and payments between Member States and between Member States and third countries,[2] thereby imparting an extraterritorial dimension to this freedom. The general prohibition of restrictions is accompanied by a set of exceptions considerably broader than those for the other freedoms, a characteristic attributed to the extraterritorial nature

[1] See e. g. Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of the Republic of Kazakhstan; Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments; Agreement between the Government of the Slovak Republic and the Government the State of Kuwait on Promotion and Reciprocal Protection of Investments and others.

[2] Art. 63 of the Consolidated version of the Treaty on the Functioning of the European Union (hereinafter referred to as the "TFEU").

DOI: 10.54869/syeul.2023.3.807

of this freedom.[3] The free movement of capital encompasses not only the free movement of payments but also the free movement of capital in the form of any investment. The area of bilateral investment treaties is therefore directly linked to this freedom, guaranteeing the free movement of investment within the internal market for all entities from the Member States, without discrimination and under the same conditions applicable to domestic entities.

The common commercial policy was named in the Treaty establishing the European Community among the activities entrusted to the Community for the purpose of achieving the objectives set out in the founding Treaties. Among the areas covered by the common commercial policy, foreign direct investment was not yet addressed in the EC Treaty.[4] Change was only brought about by the Treaty of Lisbon, which revised the founding Treaties and under which the EU replaced the Community. It renamed the EC Treaty into the Treaty on the Functioning of the European Union, without replacing it, only amending it (Siman and Slašťan, 2012a, pp. 61-62). The Treaty of Lisbon has introduced a number of key changes, the most significant of which, for the area under analysis, is the amendment of the competences in relation to the common commercial policy. It has clearly defined the areas of exclusive competences of the Union, among which it has included the common commercial policy. The Union's exclusive competence means that, by conferring competence on the Union in a certain area, the Member States have lost their legislative powers and exercise them only based on a power of competence conferred by the Union, or to implement Union acts (Siman and Slašťan, 2012a, p. 83). The common commercial policy is thus clearly entrusted to the competence of the Union, and the Member States are significantly paralysed in this field when adopting legislation or taking on obligations in this area through international treaties. The common commercial policy is defined more comprehensively in the TFEU compared to the EC Treaty and Article 207 establishes that the common commercial policy shall be based on uniform principles, inter alia, in relation to foreign direct investment.[5] Based on the aforementioned, it can therefore be stated unequivocally that foreign direct investment falls within the exclusive competence of the Union within the limits of the common commercial policy. To define the scope of foreign direct investment, "[I]t is settled case-law that direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity" and all the "EU acts concerning 'foreign direct investment' fall within the common commercial policy".[6] In this area, the European Investment Policy focuses on improving the business environment for investment purposes, the principle of non-discrimination, investment promotion activities, increasing the attractiveness of investing in Member States by non-EU entities, etc (European Commission, n.d.).

Investors within the Union are beneficiaries of the internal market freedoms, which include the freedom of establishment and, in particular, the free movement of capital, and which are established directly by the founding treaties forming part of the EU's primary law. In practice, the internal market freedoms are complemented by guarantees stemming both from the fundamental principles of the EU acquis and from the human rights protection enshrined in the Charter of Fundamental Rights of the European Union. Especially the Charter's guarantees are important in the context of the

[3] Exceptions to the prohibition of restrictions are specified in Articles 64-66 of the TFEU.
[4] Articles 3 and 133 of the Treaty establishing the European Community.
[5] Art. 207 TFEU.
[6] Opinion of 16 May 2017 delivered pursuant to Article 218(11) TFEU, 2/15, EU:C:2017:376, paras 80,81.

internal market since the Charter itself is activated in practice only in matters concerning the EU acquis. Although the Union per se is not a contracting party, all the Member States are parties to the European Convention on Human Rights, which guarantees fair and equitable treatment, the right to a fair trial, the conditions and standard of expropriation, and other related rights (Ruoppo, 2022). Therefore, questioning the high standard of investor protection within the Union in the internal market would not be appropriate.

As we have mentioned, bilateral investment treaties are international agreements regulating the terms and conditions of investment by entities of one country in another country. In this part of the article, we will focus on the so-called Intra-EU BITs, which are concluded between EU countries. The EU internal market is based on the principle of non-discrimination and equal treatment and therefore, from our point of view, the question is whether, in the first place, we could speak of reverse discrimination regarding intra-EU BITs, whereby selected entities investing within Union Member States benefit from BITs whereas such benefits would be lacking in the case of entities from other Member States. In addition to the foregoing, the very existence of intra-EU BITs, which since the Lisbon revision regulate an area in which Member States no longer have conferred competence, is problematic. Indeed, the issue has been addressed in the case law of the CJEU, which has examined the existence and validity of intra-EU BITs from several perspectives. In 2015, there were around 200 BITs in force between Member States, most of which date back to the end of the 20th Century when the parties were not yet EU Member States.[7] As the European Commission has rightly declared, in our opinion, the completion of the internal market, in which both the free movement of capital and the freedom of establishment are guaranteed, respecting the principle of non-discrimination, makes the existence of BITs between Member States redundant. Investors within the EU benefit from a uniform level of protection, which is guaranteed directly by the EU acquis. It has drawn attention to the aforementioned conflict with internal market rules and has gradually begun to appeal to Member States, through letters of formal notice, to terminate BITs within Member States. The Commission has drawn Member States' attention to the potential conflict of these BITs with EU law, the lax approach of the Member States to the Commission's pointing out led the Commission to initiate the first step in infringement proceedings against the Member States under the Articles 258-260 of the TFEU (European Commission, 2015).

The issue of intra-EU BITs has assumed a broader perspective since 2015, particularly following the pivotal judgment in the *Achmea* case. The *Achmea* dispute concerned a bilateral investment treaty from 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic. The dispute arose between *Achmea*, a Dutch company which, through a subsidiary, provided private health insurance on the Slovak market, and the Slovak Republic on the other side. It concerned compensation for damages caused by the Slovak Republic to *Achmea* which was decided by an arbitral tribunal on the basis of an arbitration clause in Article 8 of the BIT. The Slovak Republic contested the validity of the arbitral award and the whole case came before the Bundesgerichtshof (Federal Court of Justice, Germany), which referred questions for a preliminary ruling. The first preliminary question basically asked about the potential conflict of the arbitration clause with Article 344 TFEU[8] and, consequently, about the relationship, if any, of such BITs to the preliminary ruling procedure before the CJEU.

[7] The situation was similar in 2018. Among the first countries to terminate BITs between Member States were Ireland and Italy. For more information see: European Commission (2018a).

[8] Art. 344 TFEU: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

DOI: 10.54869/syeul.2023.3.807

The Court also raised the question of whether in the present case, the prohibition of discrimination under Article 18 TFEU[9] was not infringed. The Court stated that the Treaty could not undermine the autonomy of the Union's legal order and reiterated its unique nature and fundamental characteristics, which are its primacy over the laws of the Member States and the direct effect of a number of provisions of the Union's acquis. To respect these characteristics, a judicial system has been created to ensure a uniform interpretation of Union law in order to guarantee the full and consistent application of Union law within the Member States.[10] Through cooperation between the CJEU and the national courts in the context of preliminary rulings, these objectives are also translated into practice. First of all, the Court of Justice has emphasised that, because of the primacy of Union law, the arbitral tribunal is also obliged to apply it regardless of the applicable law. At the same time, it confirmed that it does not meet the conditions and requirements to be able to initiate a preliminary ruling procedure based on Article 267 TFEU. The Court pointed out that this arbitral tribunal could not be qualified as an ordinary commercial arbitration, since by the clause the Member States had in principle excluded disputes which might concern the application or interpretation of Union law from the jurisdiction of their judicial authorities,[11] whereas the TEU, in Article 19, obliged them to establish the remedies necessary to ensure effective legal protection[12] in areas relating to the Union acquis. The arbitration clause contained in Article 8 of the BIT therefore threatens the autonomy of the EU acquis, is capable of undermining the principle of mutual trust between the parties and does not allow the preliminary ruling procedure to be initiated in the dispute concerned. Arbitration clauses in intra-EU BITs therefore directly conflict with the principle of sincere cooperation[13] under which "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."[14]

Despite the explicit conclusions in the *Achmea* judgment, in the proceedings of *Poland v PL Holdings Sàrl* there was, in our opinion, a kind of attempt to avoid the consequences of the *Achmea* judgment in the form of an ad hoc arbitration agreement that allowed the continuation of the arbitration proceedings which had been initiated based on the same arbitration clause in the BITs, which had already been declared incompatible with selected provisions of the EU acquis in the *Achmea* judgment. This form of *ad hoc* clause has also been declared incompatible with EU law by the Court of Justice.[15]

The *Achmea* judgment is not solely a preliminary ruling binding on the court that initiated the proceedings, rather, the interpretation provided therein becomes an integral part of the judicial normative framework. It elucidates the meaning of the provisions of EU law from their inception, rendering the interpretation retroactively applicable. In this context, potential conflicts with the principle of legal certainty must be acknowledged, and the Court may, therefore, limit such effects in specific cases (Siman and Slašťan, 2012b, p. 360). Here we would like to explore the previously mentioned sunset clauses, designed to safeguard the legitimate expectations of investors by allowing them to initiate investment claims during a specified period after the termination of the contract. In this regard, we share the perspective that the rule of law may be compromised to some

[9] Art. 18 TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited..."
[10] CJEU, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paras. 1-23, 32-33, 35-36.
[11] Ibid., paras. 49,55.
[12] Art. 19 of the Consolidated version of the Treaty on European Union (hereinafter referred to as the "TEU").
[13] CJEU, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, paras 58-59.
[14] Art. 4(3) TEU.
[15] CJEU, judgment of 26 October 2021, PL Holdings, C-109/20, EU:C:2021:875.

extent if intra-EU BITs are terminated without the prior removal of these clauses, based also on the aforementioned *Achmea* judgment (Lavranos, 2023). Nonetheless, as previously noted, the termination of intra-EU BITs should not, in practice, diminish the level of investor protection within the EU. However, we would like to highlight an unfortunate situation concerning the retention of sunset clauses in treaties that are to be terminated due to conflicts with the EU acquis. This is particularly concerning for investors who relied on the provisions of these BITs, believing that, even after the treaty's termination, they remained assured of investment protection through the specified clauses. Although, as we have asserted multiple times, their level of protection will not be compromised in practice, from a legal standpoint, we view the situation as problematic in terms of legitimate expectations and legal certainty for investors.

The *Achmea* judgment confirmed what the Commission has been pointing out since the entry into force of the Treaty of Lisbon, and that is the collision of intra-EU BITs with the EU acquis. Following the situation, the Commission reassured investors that they can rely directly on the protection guaranteed by EU law, which certainly protects all investments throughout their lifecycle (Hallak, 2022, p. 7). In *Achmea*, however, the Court of Justice examined BITs only with regard to the arbitration clauses contained therein and we therefore consider it necessary to point out that even their mere existence, as the Commission notes, does not comply with EU law and, in particular, with the rules of the internal market. Until 2016, the Commission, through its reasoned opinions, sent a formal request to a number of Member States, but following the *Achmea* judgment, the dialogue with all Member States has intensified considerably (European Commission, 2018b). In 2019, Member States signed a declaration on the legal consequences of the *Achmea* judgment and on investment protection in cases where Member States have committed to terminate their bilateral investment treaties within the EU. The Declaration cannot be seen as legally binding, rather it can be seen as a promise by Member States to be open on the issue of terminating all intra-union BITs and its strength is, from our point of view, significant politically. In the wake of the Declaration, the agreement for the termination of intra-EU bilateral investment treaties was signed by 23 Member States on 5 May 2020. It was signed by Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.[16] The agreement entered into force on 29 August 2020 (European Commission, 2020a). Under Article 2, the BITs shall be terminated according to the terms set out in this Agreement, whereby, in order to ensure legal certainty, the sunset clauses referred to above shall be terminated and shall have no legal effect.[17] Since not all the Member States signed the agreement, not all intra-union BITs were covered by the agreement and therefore the Commission continued the dialogue against the remaining states and sent formal notices to e.g. the UK and Finland. The Ministry of Finance of the Slovak Republic has published a list of BITs concluded by the Slovak Republic, but for intra-union BITs, it has indicated that it considers them inapplicable due to their conflict with the EU law (Ministerstvo financií SR, n.d.). The case law of the Court of Justice, the pressure from the European Commission and the agreement on the termination of BITs itself have gradually brought results, and today, if we look at the UNCTAD website, we find that Member States have indeed terminated all intra-EU BITs, even those that were not parties to the Agreement from 2020

[16] See current status and reservations here: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en

[17] Art. 2 of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union.

DOI: 10.54869/syeul.2023.3.807

(UNCTAD, 2023b). Therefore, in the context of intra-EU BITs, we can without any doubt talk about incompatibility with EU law also *pro futuro*, and the only potentially questionable aspect from our point of view is the legal dimension of the withdrawal of sunset clauses from the perspective of legal certainty and legitimate expectations. By guaranteeing the highest level of protection by EU law, this question is probably irrelevant for practice anyway.

4. EXTRA-EU BILATERAL INVESTMENT TREATIES

In addition to intra-EU bilateral investment treaties, EU Member States also conclude so-called extra-EU BITs with non-EU countries. The consequences of the *Achmea* judgment pertain exclusively to intra-EU BITs. However, it cannot be overlooked that the revision of the Lisbon Treaty, which has conferred competence on direct foreign investment to the EU, also affects BITs concluded by Member States with third countries, and these BITs will be the subject of this section of the article. Naturally, the European Union and its Member States provide a lucrative environment for external investors, primarily due to the high degree of economic integration within the EU. As non-Member States are also parties to these BITs, despite the competence of the EU, it is not possible to subsume these treaties under a regime identical to that of intra-EU BITs. By analogy, if we look at the Court of Justice's opinion dealing with CETA, we can apply to extra-EU BITs the conclusion that "[H]owever, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State".[18]

It is necessary to note that these treaties are governed by a different regime than purely intra-EU BITs, which are concluded between the countries of the EU internal market, which distinguishes them from those external BITs. Naturally, after the Lisbon revision, it was necessary to pay attention to these treaties as well, which is why the Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries[19] was adopted in 2012. The aim of the Regulation was to ensure full compatibility of these BITs with EU legislation. The very fact that the rules adopted in the form of a Regulation indicate the importance of a uniform procedure, since a regulation has general application and "[I]t shall be binding in its entirety and directly applicable in all Member States."[20] The Regulation is basically in force since 9 January 2013. It divides the extra-EU BITs essentially into 3 groups, namely agreements signed before the Lisbon revision, i. e. before 1 December 2009, BITs signed in the period between the Revision and the application of the Regulation, i.e. between 1 December 2009 and 9 January 2013, and BITs concluded after the date of application of the Regulation from 9 January 2013. The first category of contracts concluded before 1 December 2009 were subject to the notification obligation of the Member States to the European Commission. These treaties remain in force until the Union exercises the same competence and concludes a BIT with the country concerned, which will subsequently bind all the Member States. The Commission also assesses these treaties and Member States cooperate with the Commission in this matter, in particular on potential obstacles to the negotiation of a BIT between the EU and the third country concerned.[21] In cases

[18] Opinion of 30 April 2019 delivered pursuant to Article 218(11) TFEU, 1/17, EU:C:2019:341, para. 129.
[19] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (hereinafter referred to as the "Regulation").
[20] Art. 288 TFEU.
[21] Articles 2-6 of the Regulation.

where such treaties conflict with EU law, the Regulation allows them to be amended or a new treaty to be negotiated, subject to the conditions set out in the Regulation. The same conditions apply to the conclusion of new BITs after the entry into force of the Regulation, but the whole process is monitored by the Commission and the Member States need to be authorised to enter into formal negotiations with a third country. The whole process and conditions for authorisation are contained in Articles 7-11 of the Regulation. Member States are subsequently obliged to submit the results of the negotiations and the text of the intended BIT to the Commission, whereby the Commission has the option to authorise the entry into force of the proposed BIT, or it has the option not to authorise the BIT, in which case the Member State cannot continue the negotiations and the BIT cannot be concluded.[22] Regarding BITs concluded within the above-mentioned intermediate period, they are subject to a similar regime, the Commission will assess these BITs and either authorise their continuation or not authorise the BIT in question and the Member State must subsequently suspend the negotiations or cancel the steps already taken.[23] Therefore, in principle, it is also important for extra-EU BITs for the future that they should not interfere with the EU *acquis*, that no negotiations on a BIT between the EU and the country concerned should be ongoing and that such a BIT will not have the potential to jeopardise the future treaty negotiations between the EU and the country concerned (European Commission, n.d.).

The Commission constantly monitors the situation, assists Member States in this area, and even has issued Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries. We find there the model formulations of the articles with commentaries, definitions of the basic notions to ensure equal understanding of the key concepts between the parties, a clause that is intended to respect the rights and obligations of a contracting party that is part of the regional economic integration organization, like the EU itself, there is a model formulation of the prohibition of discrimination, as well as other important recommended content of the agreements (European Commission, 2023a). We consider this model document to be extremely beneficial for practice, as it can speed up the whole negotiation process under the supervision of the Commission and, at the same time, the Member State will avoid potential collisions of the treaty that will arise in the future negotiations of the Union itself with the concerned country on the BIT. Also, from the point of simplicity, we think it is beneficial for states to use this document when negotiating any new BITs.

Following the entry into force of the Regulation, Member States have notified the Commission of 1360 Treaties which they wish to maintain or for which they require the Commission's authorisation to enter into force. Germany had the highest number of treaties concluded, followed by Italy and France. According to the Commission's 2020 report, a total of 241 authorisations to open negotiations were granted based on Article 9 out of 304 requested, 76 requests were made under Article 11 for authorisation to conclude a new BIT or to amend an existing BIT, of which 48 were granted. Under Article 12, 62 requests for authorization were submitted and 33 were accepted from the key interim period (European Commission, 2020b). These numbers are not exactly relevant, because some of the processes were still ongoing and the Commission's report is from 2020, but they show us very clearly what the Commission's approach is and that it is trying to make a strict selection between the treaties that are compatible with EU law and those that are not. Also, as we see in the report, the application of the Regulation in practice was most relevant in the early years of its existence, when it made "order" in the

[22] Articles 7-11 of the Regulation.
[23] Art. 12 of the Regulation.

DOI: 10.54869/syeul.2023.3.807

existence of extra-EU BITs and the number of requests decreased over the years (European Commission, 2020b). We presume that the very fact that the EU per se concludes these agreements, which subsequently bind all the Member States, has significantly influenced states in negotiating BITs along their lines.

Focusing on the Slovak Republic, since 2013, BITs between the Slovak Republic and Turkey (2013), Morocco (2014), Kazakhstan (2016), Iran (2017), and the United Arab Emirates (2018) have entered into force, except the last two having been signed in 2007-2009 (UNCTAD, 2023c). If we look at the model published by the Slovak Republic on the UNCTAD website, we find that to a significant extent some of the articles are identical in content to those proposed by the Commission in the aforementioned Annotations to the Model Clauses. In some parts we see that they are more extensively drafted than in the Commission's model and go beyond, but do not, from our point of view, conflict with EU law, since there we clearly find a stated obligation of the host state to respect the obligations arising from EU membership (UNCTAD, 2023d). We think that, although the Member States still have a number of Extra-EU BITs in force, over time there will be fewer of them as the Union exercises its external powers and we think that, under the influence of globalisation across the world, it will itself negotiate BITs with more and more third countries. This practice is also indicated by the reduction in the number of authorisations granted over time, which have declined significantly in recent years (European Commission, 2023b). Concerning the Slovak Republic, the last authorisation was granted in 2019, by which "[T]he Slovak Republic is authorised to open formal negotiations with the Republic of Ecuador to conclude a bilateral investment agreement with this country."[24] Focusing on the effects of these BITs, in the case of individual treaties between a Member State and a third State, these treaties do not produce legal effects within EU law, only effects in the legal order of the Member State being party to the treaty. The situation is different in the case of BITs to which the Union per se is a contracting party and which are therefore also capable of producing effects in Union law. We are of the opinion that these treaties also contain provisions that are clearly worded, legally perfect and from which there are clear rights and obligations arising for the parties. Selected provisions of these treaties have an immediate and direct effect on trade[25] and we therefore consider that, also given the purpose of the treaties in question, some of their provisions are capable of producing direct effect. However, since the immanent part of the rules of the internal market is covered by primary law, the fact that we would give direct effect to these investment treaties would not alter the fact that the provisions of primary law prevail and the treaties must be negotiated in accordance with them. The situation would be different when considering the provisions of secondary law, which should be in conformity with the directly effective provisions of the international treaty.[26]

5. CONCLUSION

The objective of the present article was to identify the key impacts of the Lisbon revision of the founding treaties on bilateral investment treaties to which EU Member States are parties. In the article, we initially focused on so-called intra-EU BITs, which are exclusively concluded between Member States. In light of the competences determined by the Lisbon Treaty, we assessed that there is no room for maintaining these BITs within

[24] Art. 1 of the Commission Implementing Decision of 30.7.2019 authorising the Slovak Republic to open formal negotiations to conclude a bilateral investment agreement with the Republic of Ecuador, C(2019) 5484 final/2. Retrieved from: https://rb.gy/p22fcn (accessed on 31.12.2023).
[25] Opinion of 16 May 2017 delivered pursuant to Article 218(11) TFEU, 2/15, EU:C:2017:376, para. 95.
[26] CJEU, judgment of 9 September 2008, FIAMM a i./Rada a Komisia, C-120/06 P, EU:C:2008:476, para 110.

the EU internal market. The internal market is grounded in the principles of non-discrimination and equal treatment, while a preferential regime under the scope of intra-EU BITs is, in our view, incompatible with the rules of the internal market as it has the potential to favour entities from a specific Member State, for instance, in benefiting from the freedom of establishment in the host Member State. In our opinion, the regime introduced by the Lisbon Treaty for foreign investment was, therefore, a necessary step to ensure the effective functioning of the internal market. The Court of Justice examined the compatibility of these BITs with EU law in the *Achmea* judgment and deemed them incompatible, particularly in the context of arbitration clauses conferring jurisdiction on the arbitral tribunal. As a consequence of the *Achmea* judgment, and also due to the pressure exerted by the Commission in the context of terminating intra-EU BITs, Member States have gradually terminated these treaties, and today, these treaties are no longer in force. A potential legal issue we identified pertains to the sunset clauses contained in these BITs. The abrogation of these clauses, in our opinion, slightly jeopardizes the principle of legitimate expectations and the legal certainty of investors falling under the regime of terminated BITs. This issue is more of a legal concern, as in practice, as guaranteed by the Commission, the termination of intra-EU BITs certainly does not diminish investor protection; on the contrary, they benefit from the guarantees provided by EU law and, in addition, all Member States are parties to key human rights instruments, particularly the European Convention on Human Rights. Therefore, we believe that the practical transition to an internal market regime without intra-EU BITs has been seamless, and investors have not experienced a reduction in guarantees and protection.

The situation differs in the case of extra-EU BITs, which came under considerable scrutiny from the European Commission following the Lisbon revision. The key Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries was adopted on this matter. Under this regulation, the Commission assessed the existing BITs that Member States have in force and took a step-by-step view on whether to authorize these BITs or consider them incompatible with Union law, especially internal market rules. In the first years after the entry into force of the Regulation, the Commission fulfilled most of its obligations under the Regulation. Today, its activities are more focused on approving new treaties or amendments to existing extra-EU BITs. Since for a large number of countries the Union has per se negotiated bilateral investment treaties that bind all Member States, individual treaties with a given country would be redundant. Therefore, looking ahead, in our view, globalization will significantly reduce the number of individual BITs and proportionally increase the number of BITs that the Union will conclude with countries around the world. A partial objective was to examine the effects of BITs in the Union acquis, where, as we have indicated, the only BITs capable of producing even a direct effect in Union law are those concluded by the Union per se with third countries. The provisions of these BITs, which are capable of having direct effect, will be given primacy of application over secondary law acts. However, primary law, at the top of the hierarchy of sources of the EU *acquis*, covering, *inter alia*, the freedoms of the internal market, will always prevail. All other treaties concluded individually by Member States have effects only within their legal systems and not within the EU law.

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Treaty establishing the European Community.
Treaty on European Union.
Treaty on the Functioning of the European Union.

DISCUSSION PAPERS

SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

COMMERCE CLAUSE VS. HARMONISATION CLAUSE – IDEAL TOOL FOR EXPANDING POWERS IN THE FIELD OF MARKET REGULATION? / Igor Sloboda

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Abstract: *The European Union, like the United States, is creating an internal market within its Member States, which it is adopting the necessary coherent framework of measures to ensure the functioning of that market. In both cases, the measures derive their legal basis from provisions of supreme legal force in the form of the Treaty on the Functioning of the European Union or the Constitution of the United States of America. The paper focuses on a comparison of the provisions of Article 114 of the Treaty on the Functioning of the European Union, the so-called Harmonization Clause, and Article 1, Section 8 (3) of the United States Constitution, the Commerce Clause, the application of which poses a problem in some cases and raises several jurisdictional issues. The aim of this paper is to analyse and compare the limits of the legislator's powers in relation to the use of internal market regulatory instruments.*

Key words: *Article 114 TFEU; Commerce Clause; Harmonisation Clause; Market Regulation; European Union; US Constitution*

Suggested citation:
Sloboda, I. (2023). Commerce Clause vs. Harmonisation Clause – Ideal Tool for Expanding Powers in the Field of Market Regulation?. *Slovak Yearbook of European Union Law*, vol. 3, 67-78. https://doi.org/10.54869/syeul.2023.3.817

1. INTRODUCTION

The area of market regulation and related national and international trade is one of the most discussed topics of legislation, also due to its constant topicality and the necessary reflection of current challenges. The question of extending competences based on application practice has been the subject of professional debate for quite a long time (Eule, 1982, p. 432). Not only nowadays, the highest judicial authorities of the USA and the EU have made significant contribution to this debate through their decision-making activity.[1]

Over the course of nearly three centuries, the U.S. legal order has seen the development of comprehensive rules for the exercise of the powers vested in the legislatures of the states represented in Congress by Article 1, Section 8 (3) of the U.S. Constitution, as well as the limitation of their exercise through the precedent-derived Dormant Commerce Clause (Nagy, 2023, p. 315).

[1] Gibbons v. Ogden, LRD v. Jones & Laughlin Steel Corp, United States v. Darby, C-300/89, C-376/08, C-491/01 and more.

The post-war integration grouping of the European Communities gradually developed, leading to the creation of the Common Market. This has resulted in the establishment of rules that allow the legislature to directly regulate areas within the internal market of the EU (Kaczorowska, 2016, pp. 4-6). Where primary law does not allow the legislator to invoke specific provisions of the Treaty on the Functioning of the European Union (TFEU), it may also use a secondary option, in the form of Article 114 TFEU, in order to achieve the objectives of the internal market.[2] This provision has a wide scope, allowing the adoption of secondary legislation to approximate the legal situation in Member States (MS).[3] This is an ideal instrument for the legislator to eliminate differences between the national laws of the MS. However, this procedure has long been criticised for the gradual expansion of new regulations into areas that fall within the competence not of the European Union but of the MS and have minimal connection with the functioning of the internal market (Kaczorowska, 2016, p. 187, 188).

Over the years, a similar problem has regularly arisen under U.S. law, where Congress has attempted to subsume unrelated regulation under market regulation by flexibly and broadly interjecting a Commerce Clause provision (McGinnis and Somin, 2004, pp. 112-114).

Scientific methods of analysis, synthesis and comparison of available sources will be used to process the paper. The analysis will cover the literature on the subject, legal acts, court decisions of the Court of Justice of the European Union (CJEU) and Supreme Court of the United States (SCOTUS), as well as other relevant sources on the subject. The extent of the legislator's statutory and judicial limits will compare. As a result, it should be assessed whether, also through the decision-making activity of the supreme judicial authorities, conditions are created for the extension of powers into areas that are only minimally related to market regulation.

2. MARKET REGULATION THROUGH THE COMMERCE CLAUSE

For several years before the present Constitution of the United States was ratified, the regulation of commerce was within the power of the states. Rather than as a unit, the states viewed each other as commerce rivals. The result of the rivalry between the states was the imposition of various barriers, mainly in the form of tariffs or similar charges or quantitative restrictions. This led to many problems and weakened the state externally as well as internally, alternating crises culminating in demands for the adoption of market regulations, which eventually manifested itself in the adoption of the provision of Article 1, Section 8, Clause 3 of the Constitution, under which the powers of Congress include the following: "*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*,". The predominant interest of market regulation, especially at the beginning, was international trade and the area of internal trade was left only in relation to ports. Only later, with the massive development of industries in different areas of the country, did the approach begin to change and attention began to turn towards domestic trade, which was becoming increasingly important (Egan, 2015, p. 80, 81). Thus, the main intention in including the said clause in the Constitution was to prevent the emergence of similar impediments to admissions.

From the adoption of the Constitution to the present day, we can identify several interpretive periods in the Court's interpretive practice (Chemerinsky, 2015, p. 371; Schütze, 2014). For the purpose of this paper, we will use the division into only two

[2] Article 114 (1) TFEU.

[3] CJEU, judgement of 10 December 2002, British American Tobacco (Investments) and Imperial Tobacco, C-491/01, ECLI:EU:C:2002:741.

periods – before and after 1995. The question of choosing the most appropriate interpretive method reflects these periods quite accurately. The ones most encountered are originalism, textualism, precedentialism and constitutionalism but also structuralism (Pushaw, 2003). Considering these periods, despite the different approaches in interpreting the provisions, the court has maintained consistency in the issues that have been examined in each case. The three questions are as follows:

1. What is commerce?
2. What does it mean among the states?
3. Has Congress acted in accordance with or in violation of the Tenth Amendment? (Chemerinsky, 2015, p. 371)

The first case heard by the SCOTUS dealing with the Commerce Clause was Gibbons v. Ogden from 1824, when the Court evaluated the above issues as follows. For the purposes of that case, the court dealt with the first issue as follows: "*……The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse…"*[4] Thus, the court rejected one of the parties´ arguments and did not agree with the proposed narrower interpretation, instead leaning towards the idea that "there is something more at stake," and so on that basis we can understand commerce in all its forms (Chemerinsky, 2015, p. 373). In seeking an answer to the second question, the court was faced with a choice between three options. Under the first opinion, the court considered interpreting "among the several states" in several ways, ultimately settling on the following interpretation: "The *word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. … Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States that one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power to every description."*[5] This option, unlike the other two, did not present a clearer definition as it is necessary to examine the substantive impact on a case-by-case basis (Chemerinsky, 2015, p. 374). On the final issue, concerning the potential compliance with or exceedance of the Tenth Amendment's limitation on congressional power, the court concluded that, despite the constitutional limits, Congress has sufficient authority to regulate, commerce to the fullest extent possible.[6]

2.1 Interpretation Until 1995

Several years after Gibbons vs. Ogden, there gradually comes a period in the Court´s decision-making when it begins to move away from its extensive interpretation and instead begins to lean toward the idea of the least possible congressional intrusion. As early as 1870, the Court struck down a federal statute on the ground that it exceeded the application clause´s limits; it was followed shortly thereafter by another statute. Several factors played a role in the Court ´s change in position. In the late 19th and early

[4] SCOTUS, Gibbons v. Ogden, 22 U.S. 1 (1824) paras. 189-190.
[5] Ibid., paras. 194-195.
[6] Ibid., paras. 196-197.

DOI: 10.54869/syeul.2023.3.817

20th centuries, Congress began to gradually enact several federal statutes. During this period, legislation that has a broad economic scope, including overlap with competition law, also begins to be enacted under the Commerce Clause. The Great Depression posed a challenge not only to the government but also to Congress, requiring the adoption of several reforms that would ultimately "restart the economy". The SCOTUS proved to be a powerful counterweight to Congress during this period, with many regulations being declared unconstitutional, particularly for encroaching on the powers of the states. It was during this period that the SCOTUS decision-making developed the concept of "dual federalism", which it invoked in striking down acts. Under that concept, it rejected an expensive interpretation of the term "commerce" such as that in Gibbons, but limited it to its narrowest meaning, leaving all other phases of commerce to national regulation. The Court took an equally restrictive approach to the interpretation of "interstate commerce, recognising Congress´s power to legislate with respect to commerce only of it presented a substantial impact on the operation of interstate commerce, leaving all other cases to the discretion of the individual states to enact legislation. In the case of a Tenth Amendment violation, the Court was inclined to hold, as in the case of the interpretation of the term "commerce", that some part of the regulation of commerce was within the exclusive power of the States, and that where a federal statute was enacted interfering with that power, it constituted an unconstitutional encroachment (Chemerinsky, 2015, pp. 375-383).

In the second half of the 1930´s, there was again a change in the Court´s approach to interpreting the provision, and within few years, it handed down judgements in which it reconsidered its previous approach, abandoning a restrictive interpretation and reverting back to an expensive interpretation the cases of NLRB v. Jones & Laughlin,[7] United States v. Darby[8] and Wickard v. Filburn,[9] by which it gradually abandoned his previous doctrine. Even with the return to an expensive interpretation and broader construction of the Clause, it was relatively easy for the legislature to subsume several enactments under the Commerce Clause over the course of the twentieth century, and so its application was gradually extended to civil rights[10] or criminal law as well (Chemerinsky, 2015, pp. 390-395)[11].

2.2 Interpretation After 1995

The United States v. Lopez case represented a major turning point, when the SCOTUS once again departed from its previously expansive interpretation of Commerce Clause, after more than half a century, and once again returned to its original, restrictive interpretation. At issue in Lopez was a case in which a student was convicted under the Gun-Free School Zones Act of 1990 for bringing a gun to school. The legislature justified the statute in question primarily by arguing that endangering a place intended for educational activity, that process could be negatively affected resulting in fewer productive citizens. This has a negative impact on economic activity and hence on society´s prosperity, which in turn has a significant direct impact on trade.[12] That argument was rejected by the court.

Based on a review of its previous decisions, the SCOTUS concluded that they could not be used to justify the act in question, since the test of substantial effects was

[7] SCOTUS, NLRD v. Jones & Laughlin Steel Corp., 301 U.S. 1(1937).
[8] SCOTUS, United States v. Darby, 312 U.S. 100 (1941).
[9] SCOTUS, Wickard v. Filburn, 317 U.S. 111 (1942).
[10] SCOTUS, Katzenbach v. McClung, 379 U.S. 294 (1964).
[11] SCOTUS, Perez v. United States, 402 U.S. 146 (1971).
[12] SCOTUS, United States v. Lopez, 514 U.S. 549 (1995), para. 654.

limited to economic activity only.[13] The court also confirmed that: "*The possession of a gun on a local school zone is no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."*[14]

So, what conclusions does the decision ultimately draw for the application of the Commerce Clause rules? The significance of the judgement is not only highlighted by the fact as mentioned above, that a federal law has been struck down after a long time, but also by the fact that Court has gone further than in the past and, in addition to tying it to economic activity, has established new rules for invoking the Commerce Clause. In addition to providing that the legislature may proceed to enact new regulations only within the scope of those powers expressly granted to it by the Constitution, the court delineated three specific areas where Congress may invoke the Commerce Clause as a basis for regulation. First, Congress may proceed to enact legislation only if the regulation "*channels of interstate commerce*".[15] In the latter case, Congress may proceed to enact legislation to "*protect the instrumentalities of interstate commerce, or persons or thing on interstate commerce, even though the threat may come only from interstate activities*[16] Lastly, Congress has the power to regulate "*those activities having a substantial relation to interstate commerce respectively those activities that substantially affect interstate commerce*[17] ". Although on the one hand the Court returned to the pre-1937 interpretation, it went further than in the past and delineated for the legislature three specific areas in which legislation enacted by Congress must be deemed constitutional.

Of the above three possibilities, the third one garnered the most attention. This is because its broad language could be used to justify statutes in a wide range of situations. The court was aware of this, and acknowledged the ambiguity in its ruling, but it is also clear from previous decisions that, despite its broad interpretation, the court has never concluded in its decisions that Congress has found the trivial impact on commerce sufficient to permit it to proceed to enact a regulation invoking the Commerce Clause. [18] It will therefore be necessary to approach to so-called substantial impact test. "*Admittedly, a determination whether an interstate activity is commercial or non-commercial may in some cases result in legal uncertainty. But so long as Congress authority is limited to those powers enumerated in the Constitution, and so long those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty"*.[19] As Boykin points out, the Court´s elaboration of the substantial effects doctrine undermines the principles upon which federalism is built by allowing, under the guise of regulating interstate commerce, the creation and expansion of regulations whose primary objectives are non-commercial (Boykin, 2012, p. 114).

The Lopez case set a real precedent in previous decisional activity how the SCOTUS would approach its consideration of the legality of acts derived from the Commerce Clause in the years to come, as it did in the United States v Morrison[20],

[13] Ibid., paras. 559-562.
[14] Ibid., para. 567.
[15] Ibid., para. 568.
[16] Ibid., para. 568.
[17] Ibid., para. 568 and 569.
[18] Ibid., para. 559, SCOTUS, Maryland v. Wirtz, 392 U.&s. 183 (1968), footnote 27.
[19] Ibid., para. 566.
[20] SCOTUS, United States v Morrison, 529 U.S. 598 (2000).

DOI: 10.54869/syeul.2023.3.817

Gonzales v. Raich[21], National Federation of Independent Business v. Sebelius[22] or Tennessee Wine and Spirits Retailers Association v. Thomas.[23]

3. MARKET REGULATION THROUGH THE HARMONISATION CLAUSE

The creation of a common internal market was the main idea on which the European Community was built. The completion of the internal market was to be achieved in two ways. The first was to remove all barriers to free trade based on the legislation contained in the Treaties. The second was to gradually approximate and the harmonise the rules of the MS (Schütze, 2014).

Under the principle of conferral of powers, the EU can only legislate within the scope of the Treaties.[24] Any legislative act adopted must have its legal basis in the Treaties.[25] The correct choice of legal basis is therefore crucial for the choice of legislative procedure.[26] As the CJEU has also stated: "*It must first be observed that in the context of the organisation of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution´s conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure.*"[27] The choice of an incorrect legal basis may result in the annulment of the legal act by the CJEU.[28]

Under the ordinary legislative procedure, the legal basis for the proposed legislation can only be derived from specific provisions of the Treaty. Article 114 can only be invoked by as an alternative by the legislator if the legal basis cannot be "subsumed" under another specific provision. The scope of Article 114 TFEU is relatively broad, but even in principle it is not unlimited.

When Article 114 TFEU is invoked, the legislator must, in the first instance, deal with the limitations arising both from the Article itself and from other provisions of the TFEU.[29] Provisions relating to fiscal policy, the free movement of persons and the rights and interests of the employees are excluded from the scope of the Article.[30] If the proposed legislation does not fall within one of the above-mentioned areas, the legislator can only apply Article 114 TFEU in the alternative if there is no other provision of the TFEU which provides a specific legal basis for the proposed legislation and which can be invoked. The subsidiary nature of the provision is clear from the first sentence of Article 114 TFEU itself: "*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26*." As the previous sentence implies, it is essential to link the proposal to the achievements of the objectives of the internal market. The process of adopting a new legislative act must then be carried out through the ordinary legislative procedure,[31] which is less likely to be abused due to the involvement of the Parliament and the Committee (Kaczorowska, 2016, p. 187).

In addition to the limitations arising directly from Article 114 TFEU, the legislator must comply with several conditions laid down by the CJEU. On the one hand, the CJEU

[21] SCOTUS, Gonzales v. Raich, 545 U.S. 1 (2005).
[22] SCOTUS, National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
[23] SCOTUS, Tennessee Wine and Spiritis Retailers Association v. Thomas, 588 U.S. (2019).
[24] Article 5 (1) TEU.
[25] Article 5 (2) TEU.
[26] Article 289 (1) and (2) TFEU.
[27] CJEU, judgement of 11 June 1991, Commission/Council, C.300/89. ECLI:EU:C:1991:244, para.10.
[28] CJEU, judgement of 22 October 2013, Commission/Council, C-137/12, ECLI:EU:C:2013:675, para.77.
[29] For example, Article 168 (5) TFEU.
[30] Article 114 (2) TFEU.
[31] Article 114 (1) TFEU.

has adopted a rather flexible interpretation, but on the other hand, in order to establish certain rules of harmonisation and approximation, it has also expressed limits to its application. It can therefore be said, that to a certain extent, its rulings have given the Commission effective margin of manoeuvre. The proposal must therefore realistically aim to achieve the objectives of the internal market[32] and if the aim of the legislation to be adopted is to prevent the creation of (potential) barriers, the legislator must demonstrate the likelihood of the adoption of such a "crash" measure.[33] If the mere identification of disparities between the national laws of the MS is not sufficient to invoke Article 114 TFEU, the legislator may invoke it directly in the case of disparities that constitute an obstacle to the four fundamental freedoms and which directly affect the internal market and its functioning[34] or competition.[35] However, these risks cannot be abstract.[36] Where the removal of barriers to trade in a harmonised area has already been achieved by an act adopted based on Article 114 TFEU, the legislator cannot be restricted in its ability to reflect any changes in circumstances or (scientific) knowledge by amending the act, all on accordance with the task of safeguarding the interests recognised by the Treaty.[37] It should be noted that, depending on the circumstances and context of the harmonised area, the legislator has a certain degree of discretion in choosing the most appropriate method of approximation, which is particularly true in areas requiring the adoption of rules containing complex technical details.[38]

Furthermore, Article 114 TFEU cannot be used to replace or circumvent the procedure laid down in Article 352 TFEU and thus create a new rule superior to the national law of the MS.[39] The higher tendency to use Article 114 TFEU, despite the potential appropriateness of Article 352 TFEU, is mainly due to the fact that, while the ordinary legislative procedure is sufficient for Article 114 TFEU, the unanimity of the Council of the European Union is necessary for the adoption of an act when Article 352 TFEU is used.[40] The legislator tends to avoid adopting acts under this procedure, partly because of the difficult negotiations involved in reaching a consensus and then obtaining assent.

When the legal basis in Article 114 TFEU is invoked, the problem is often one of preventive harmonisation, which the Commission resorts in some cases. Not so long ago, it used the argument of the potential adoption of several legislative proposals in some MS as one of the reasons for invoking Article 114 TFEU. As the present proposal shows, one of the reasons for recourse to preventive harmonisation was the potential risk of

[32] CJEU, judgement of 8 June 2010, The Queen, Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd/Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, para. 32.
[33] Ibid., para. 33.
[34] CJEU, judgement of 12 December 2006, Germany/Parliament and Council, C-380/03, ECLI:EU:C:2006:772, para. 37.
[35] CJEU, judgement of 5 October 2000, Germany/Parliament and Council, C-376/08, ECLI:EU:C:2009:808, para. 84 and 106.
[36] Ibid., para. 84.
[37] CJEU, judgement of 8 June 2010, The Queen, Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd/Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, para. 34.
[38] CJEU, judgement of 6 December 2005, United Kingdom/Parliament and Council, C-66/04, ECLI:EU:C:2005:743, para. 45.
[39] CJEU, judgement of 2 May 2006, Parliament/Council, C-436/03, ECLI:EU:C:2006:277, paras. 37-46.
[40] Article 352 (1) TFEU.

DOI: 10.54869/syeul.2023.3.817

fragmentation of internal market legislation, as some MS were considering the adoption of legislation which could (partially) cover the content of the present proposal.[41]

4. COMPARISION OF THE LEGISLATIVE AND JUDICIAL LIMITS ON THE APPLICATION OF THE PROVISIONS UNDER REVIEW

In the last chapter of this paper, we will compare the different conditions set by the legislator in the US and the EU legal order, as well as the limits set by the decisions of the highest judicial authorities.

4.1 Legal Limits

In the case of legislative limits, the TFEU provides a clearer definition of the conditions under which the legislator may invoke the legal basis in Article 114 TFEU. As already explained in Chapter 3, the provision itself implies limits of application within which the use of the Article as a legal basis is explicitly excluded. It can only be applied in the alternative where no legal basis can be derived from any other provisions of the Treaty. The main substantive difference with the US Constitution is, in particular, the number of provisions relating to the regulation of the internal market. Whereas in the case of the Treaty, the legislator has several specific provisions at its disposal in order to achieve the objectives of Article 26 TFEU, and Article 114 together with Article 352 are intended to serve only as "secondary crutches".

Congress can only rely on the Commerce Clause, the only statutory limitation of which is found in the Tenth Amendment to the Constitution. Unlike a Treaty, the US Constitution contains no specific provisions for regulating various market freedoms; thus, the legislature is to some extent free to a much broader interpret the clause much more broadly, which in this case is limited at most by the Constitution's enumerated distribution of powers.

4.2 Judicial Limits

SCOTUS has altered its approach to interpreting the Commerce Clause and the powers of the legislature under it multiple times over the years. Currently, an originalist approach to interpretation is evident. The first major limit imposed on the legislature was the derivation of the Dormant Commerce Clause, which prevents the legislature from creating barriers to commerce. Over the years, in addition to the substantial effects test, the Court has developed three conditions that the legislature must meet for legislation to be adopted is to be achieved.

CJEU has repeatedly confirmed the Commission's obligation to demonstrate the likelihood of the adoption of different legislation at national level and that the objective of the measure adopted was to avoid fragmentation. However, subsequent decisions and practice have confirmed that the mere possibility that MS might consider adopting a regulation is sufficient for the legislator to argue in this regard. This can be an effective way of subsuming almost any adopted regulation, provided that the proposal also meets the other conditions, not only the Treaty conditions.

[41] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15.12.2020, point 1.

5. CONCLUSIONS

Based on the facts presented in the previous chapters, it can be concluded that both in the United States and in the European Union, the legislator tends to go beyond the limits set by the provisions of the highest legal force and, on the pretext of regulating commercial and market rules, to enter directly into areas that are of a minimal or purely non-commercial nature.

In the case of both the TFEU and the US Constitution, there are certain legal and judicial limits to the use of the legal basis of the provisions in questions. In most cases, it has been the legislature whose approach to the interpretation of both provisions has served as a significant incentive for the supreme courts to subsequently, during their adjudicative activity, proceed to consider the scope of the powers conferred on the legislature. The reasons for the legislatures approach may vary from case to case.

Over the years, we have seen the different approaches taken by the courts in their interpretation and construction. It is, of course, a matter for consideration whether strict adherence to an expansive or restrictive interpretation is also beneficial in the light of social developments or vice versa. It is also a question of whether the highest courts should be the ones to lay down rules for the legislature based on which it can adopt certain laws. The cases compared above show how, in certain circumstances, the courts can act as an effective brake on the legislature, especially when it resorts to an overly broad interpretation of its powers.

In the case of the CJEU, we can expect it to remain in the current discourse, where it is likely to continue with a flexible interpretation. In the case of the SCOTUS, there is no indication that its approach to constitutional interpretation is likely to change in the near future, and so it is likely to remain restrictive interpretation. Whether the approach of one court or the other will change is, of course, a matter for the future and, as with the cases under review, may come unexpectedly. Personally, I am inclined to believe that both the legislator and Court should stick to the letter of the Treaty and not use the instruments of internal market regulation to regulate areas where there is little or no impact on trade or commerce.

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DOI: 10.54869/syeul.2023.3.817

SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (print): 2729-8574
ISSN (online): 2729-9988

RECENT NOVELTIES ABOUT APPEAL TERM IN CONTROVERSIES CONCERNING PUBLIC TENDERS IN ITALIAN LEGAL ENVIRONMENT / Raffaele Caroccia

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Abstract: *The aim of this paper is to outline overview of amendments present in the Italian legal environment regarding appeal in public tender controversies. The content analysis will be conducted based on the Court of Justice of the European Union rulings, then referring to Italian administrative case law and finally focused on the Italian new legislative regulation concerning public tenders.*

Key words: *Appeal Term; Public Tenders; EU Law; Administrative Judgements; Italian Legal Environment*

Suggested citation:
Caroccia, R. (2023). Recent Novelties About Appeal Term in Controversies Concerning Public Tenders in Italian Legal Environment. *Slovak Yearbook of European Union Law*, vol. 3, 79-87. https://doi.org/10.54869/syeul.2023.3.748

1. INTRODUCTION

The present paper focuses on analysis of the legal regulation of appeal term in Italian legal environment. The identification of the above-mentioned term has not been made by Italian law until last year. Only in 2023, with the reform of public tender regulations, there has been a clear legal identification. Before this date there was room only for judicial solutions, which were neither clear nor predictable. This was a big and thorny question point as far as rule of law is concerned. The paper focus to answer the question, whether the new legislation satisfies the requirements and the principles of rule of law, as set in EU law.

To elaborate on that, the analysis will be conducted based on the understanding and interpretation of the appeal term as stated in EU directives and the interpretation provided by Court of Justice of the European Union (hereinafter CJ EU). It will be afterwards followed by the analysis of its application on national level – in the Italian law, particularly focused on the recent legislative amendments. The analysis will also essentially rely on main scholarly contributions, which are the framework according to which Italian legislative has recently operated. Therefore, the methodology of this paper is using a content analysis of rulings and legislative acts, through which the *rationale* of these choices is to be identified.

Italy clearly incorporated its legal obligations regarding public procurement procedures in its agreement with the European Commission for the management of Next Generation EU funds (see D'Alterio, 2022). In particular, the need to streamline and speed up procurement procedures was identified. One of the tools envisaged to regain competitiveness is a more adequate telematic management of procedures.

Consequently, specific resources have been allocated to equip Administrations with state-of-the-art IT infrastructures. In addition, a reform of the procurement code was agreed upon, which has been carried out without any new directives being issued. This reform responds to the needs of the so-called national recovery and resilience plan and also aims to overcome some of the objections raised by the EU Commission to Italian legislation. In particular, one element that had to be affected was the time limit for appeal, which – as said before – was not at all clear.

2. APPEAL TIME LIMIT IN THE EU LEGISLATION

To identify the latter, one must start with an analysis of EU law (see Greco, 2008; Barbieri, 2009). It sets the time limit for lodging an appeal from the knowledge of the reasons for the award decision.[1]

It could be said, in short, that the principle of effectiveness postulates that the *dies a quo* is triggered by actual knowledge or concrete recognition of the defects of an award decision.

In EU law, in fact, the time limit for appeal as far as public tenders are concerned is clearly identified as a tool necessary to make individual protection effective. This aim is relevant for national regulation of judicial administration and procedure and must be preserved by the national legislatures in order to guarantee the full effect of EU law.[2] Effective protection in fact is not such if it is not characterized by the full right of access to the judge as its logical antecedent.

So, the first quality of national legislation to be coherent with EU one is a clear identification of the appeal term. Moreover, an unprecedented, detailed regulation of procedural aspects is also the result of the awareness that it is necessary to give concrete meaning to the substantive rules and thus enable the freedom of establishment and the principle of freedom to provide services.

It is no coincidence that, in the awareness that a compensation remedy in equivalent form is not fully satisfactory and that therefore the specific compensation form must be guaranteed, in the so-called appeals directive 2007/66/EC the standstill institute, both substantive and procedural, is linked to the time limit for appeal.[2]

This consists – as it is well known – of an initial period of 35 days, as provided for by the Italian legislator, calculated from the communication of the award decision complete with a summary report of the reasons that determined it, and a second similar period, which may begin after the appeal has been lodged pending the decision on the

[1] Art. 1, c. 3 Dir. 89/665/EEC, as replaced by Dir. 2007/66/EC: "Member States shall ensure that review procedures are available, under detailed rules which the Member States may establish, to any person having or having had an interest in obtaining the award of a particular contract and who has been or risks being harmed by an alleged infringement". The guarantee of a full contestability of measures concerning the award of a contract is accentuated by recital 122 of Directive 24/2013/EU.

[2] The first deadline is provided for in Art. 2a(2) Dir. 89/665/EEC, as replaced by Dir. 2007/66/EC (which requires that the communication be accompanied by a clear and reasoned report): "The conclusion of a contract following the decision to award a contract falling within the scope of Directive 2004/18/EC may not take place before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision was sent to the tenderers and candidates concerned, if fax or electronic means were used to send it, or if dispatched by other means of communication before the expiry of a period of at least 15 calendar days with effect from the day following the date on which the contract award decision was sent to the tenderers and candidates concerned, or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision." The second is laid down in Article 2 of the same directive: "Where a body of first instance, which is independent of the contracting authority, receives an application for review concerning a contract award decision, the Member States shall ensure that the contracting authority may not conclude the contract before the review body has made a decision on the application for interim measures or on the merits of the application."

precautionary application attached to it, during which the conclusion of the contract is prevented.

These two periods of time serve precisely to allow a person who has arrived in a different position from the successful tenderer to fully assess the possibility, costs, and prospects of success of a judicial review. Once he has made up his mind, they then allow him to gather the necessary material for the same and to provide for notification, without the claim to the award of the tender being frustrated by surprise stipulations and as long as an initial examination of his grievances has not been reached.

Therefore, consistent with this *rationale*, the time limit to appeal should only start from the moment when it is possible to clearly consider the possibility of an appeal, so that its accrual can be postponed until all relevant documentation is materially made available to an economic operator.

3. THE INTERPRETATION BY THE COURT OF JUSTICE OF THE EU

It is not surprising that according to the CJ EU interpretation, the exercise of the right to appeal cannot exists without proper reasoning and the precise content of any infringing act; moreover, the simple knowledge is not sufficient as it must be qualified with the characteristics of adequacy, detail, and precision.

Similar characteristics are to be applied also by national regulations, which must unambiguously clarify rights and duties (i*.e.,* the procedural burdens) of economic operators and the respective timeframes for exercising them.

Even in older case law, the importance of the statement of motivation was such that it was a condition of the act's existence.[3]

More recently and directly regarding the regulation of public tenders, the CJ EU introduced some additional clarifications to this general approach.

First, while noting that the right to appeal may legitimately suffer from time limitations to ensure the certainty of legal relations, it was stated that the time limits introduced by national legislations must respect the criterion of reasonableness. This is necessary in order not to nullify the useful effect of EU provisions.[4]

An extension and clarification of this principle concerned the time limits for contesting clauses of public tender announcements deemed unlawfully detrimental to competition;[5] if a time limit (then of 60 days) provided for by Italian law and calculated from the date of publication of the announcement to initiate such a judgment is reasonable in abstract, one must also bear in mind that the application of this procedural rule must be dropped in the precise circumstances of the case. Indeed, if the interpretation of the clause has become ambiguous only because of the conduct of the contracting authority and only an enforcement decision has made its meaning clear, it is

[3] See CJEEC, judgment of 10 December 1957, Usines à tubes de la Sarre, joined cases 1/57 and 14/57, ECLI:EU:C:1957:13; CJEC, judgment of 9 January 1997, Commission of the European Communities v Sociedade de Curtumes a Sul do Tejo Ldª (Socurte), Revestimentos de Cortiça Ldª (Quavi) and Sociedade Transformadora de Carnes Ldª (Stec), C-143/95, ECLI:EU:C:1997:3; CJEC, judgment of 6 December 1990, Wirtschaftsvereinigung Eisen- und Stahlindustrie v Commission of the European Communities, C-180/88, ECLI:EU:C:1990:441; CJ, sec. II, judgment of 12 December 2006, Organisation des Modjahedines du peuple d'Iran v Council of the European Union, T.228/02, ECLI:EU:T:2006:384; CJEU, judgment of 28 January 2010, Uniplex (UK) Ltd v NHS Business Services Authority, C-406/08, ECLI:EU:C:2010:45.

[4] See CJEU, judgment of 12 December 2002, Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH., C-470/99, ECLI:EU:C:2002:746.

[5] See CJEU, judgment of 27 February 2003, Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA, C-327/00, ECLI:EU:C:2003:109.

DOI: 10.54869/syeul.2023.3.748

only from the latter that the time limit for judicial review can legitimately start, without the lapse of the time limit for challenging the announcement being able to explain prejudicial effects that can be avoided by voiding the exclusionary clause.

Subsequently, precise indications were given as to how to identify the *dies a quo* for lodging a public procurement appeal in relation to acts other than announcement.[6] In particular, it was made clear that the time-limit, however fixed by national law, runs not from the moment when the rejection of a tender was communicated, but from the different time at which the tenderer is or should be aware of the reasons why his proposal was not preferred to that of others. In the CJ EU's reasoning there operates – it should be noted – an approximation of the presumption of cognizability of the defects to their actual knowledge. And not only that: the CJ EU also added that, in a necessary balancing act between the principle of effectiveness and the principle of stability of administrative decisions, all time-limits in the matter of trails affecting public contracts must be fixed in a sufficiently clear, precise and comprehensible manner so as to provide citizens and enterprises with a framework on which they can rely and without frustrating their right of defence. Therefore, time limits must be set unambiguously and without leaving any margin of appreciation to the adjudicating body as to whether the limitation period has expired, which would make it unpredictable. On the other hand, national courts are required to interpret national legislation in the sense of voiding it if it conflicts with effectiveness and, therefore, in the sense of extending the time limit for bringing an action by calculating it from the moment of actual knowledge of the reasons for the harm suffered by an economic operator.

Subsequently[7] – this time in relation to provisions of Italian law and with specific reference to the conditions for the admissibility of the main appeal and the additional grounds of appeal in the tendering procedure – the question was examined as to the manner in which the time limit was to be identified, asking whether it could start to run "*from the time when the person concerned actually became aware or had the possibility of becoming aware, by showing ordinary diligence, of the existence of an infringement, and not from the date of the communication of the decision of final award of the contract*". Unsurprisingly, the CJ EU pointed out that objections formulated on the basis of elements that could not be deduced from the adjudication and arising from facts subsequent to the latter can validly be brought before the court within a time limit calculated from the date of knowledge of the events and certainly not from the date of communication of the decision. The admissibility of additional grounds in a case that is already pending is of no relevance in altering that conclusion; in fact, to reason in such a way would burden an economic operator with the challenge "*in abstracto*" of an administrative measure and the formulation only at a later time of any precise grievances, moreover, not referring to the content of the first administrative measure. The case is different in relation to complaints related to factual or legal aspects preceding the award measure, for which the ordinary method of calculating the time limit applies.

Again in relation to an Italian regulation[8] – the abrogated hyper-special rite provided for in Article 120, c. 2 *bis,* Code of Administrative Process, which was a special trial concerning admissions/exclusions from a public tender, that was abolished in 2019 and put on participants a duty to contest immediately each other admission to the tender

[6] CJEU, judgment of 28 January 2010, Uniplex (UK) Ltd v NHS Business Services Authority, C-406/08, ECLI:EU:C:2010:45.

[7] CJEU, judgment of 8 May 2014, Idrodinamica Spurgo Velox srl and Others v Acquedotto Pugliese SpA, C-161/13, ECLI:EU:C:2014:307.

[8] CJEU, order of 14 February 2019, Cooperativa Animazione Valdocco S.C.S. Impresa Sociale Onlus v Consorzio Intercomunale Servizi Sociali di Pinerolo and Azienda Sanitaria Locale To3 di Collegno e Pinerolo, C-54/18, ECLI:EU:C:2019:118.

– the CJ EU has affirmed its compatibility with EU law, only if the decisions are accompanied by a report capable of guaranteeing the interested parties knowledge of the logical-legal process followed by the P.A. in their adoption. In the absence of the latter, it is not legitimate to accrue a forfeiture in respect of objections based on acts that are neither known nor knowable.

Similar reasoning was also followed by the CJ EU in a later ruling concerning an appeal against a decision to admit a competitor and in relation to Romanian law.[9] In particular, the CJ EU reiterated the need – for the purposes of calculating the *dies a quo* – to distinguish between a mere communication of the administrative decision and a document accompanied by a report constituting its motivational content. It is only the receipt of the latter document that triggers the lapse of the appeal term.

A final element, recently explored by the CJ EU,[10] has to do with how a bidder becomes aware of the proposals of its competitors. The rationale followed by the Court hinges on a premise and a general consideration. Clearly – this is the premise – knowledge of opposing bids cannot be allowed for anti-competitive purposes, i. e. it cannot become a tool with which one can acquire data in order to undermine in future procedures or in the tender itself the chances of success of another competitor or imitate its proposals. This limitation applies, however, only in the case of the existence of an expectation of confidentiality related to technical or commercial secrets. The right of access to a competitor's bid is – this, on the other hand, is the general consideration – a substantial part of the right of defence and it may be necessary to guarantee the same precisely in order to allow for the assessment of the admissibility of an appeal with a real hope of success in accordance also with a canon of good administration. Consequently, there must be a precise motivation of the choices of secrecy and an immediate justiciability of the decisions by which access is denied to a tender or parts of it, even if the latter dispute is not immediately linked to a request for justice contesting the award of the contract to another party. The phase of the decision on ostention and its contestation may therefore also take place prior to the award.

As a result, it can be said that the above-mentioned Remedies Directive – as consistently interpreted by the CJ EU – is clear on this point: the time-limit is triggered only when the injured party knows the reasoning behind the act that has affected him and can thus appreciate its possible unlawfulness in concrete terms.

This is a basic guarantee as far as rule of law is concerned. For a correct framing of the problem, therefore, the central element is the identification of when the P.A. performs the (full) burden of communication.

4. ITALIAN LEGAL FRAMEWORK: JURISPRUDENCE AND NEW LEGISLATIVE REGULATION

Italian legal framework was not clear about the latter element.[11] The discipline had so to be built by administrative judges case by case, thus putting in question the predictability and the certainty of legal effects. The most important ruling about this topic was State Council Plenary Assembly no. 12, 2nd July 2020.[12]

[9] CJEU, judgment of 24 February 2022, Alstom Transport SA v Compania Nationala de Cai Ferate SA, C-532/20, ECLI:EU:C:2022:128.
[10] CJEU, judgment of 7 September 2021, 'Klaipėdos regiono atliekų tvarkymo centras' v UAB, C-927/19, ECLI:EU:C:2021:700.
[11] For an analysis of Italian legislation see Sandulli (2023) and Taglianetti (2019).
[12] About the ruling see Sandulli (2020).

DOI: 10.54869/syeul.2023.3.748

The ruling was pronounced according to the public tender code, which has now been abolished. Its principles anyway are the ones that were followed in the reform; so it is still important a reference to the ruling. The solution given to the problem led to the creation of a complex 'eclectic' jurisprudential rule, according to which the time limit may run from various events, which are complementary to each other. All in the effort – admittedly not easy – to balance certainty and effectiveness.

The first element, to which attention should be paid, is the publication made pursuant to Article 29 of Legislative Decree 50/16, from which a legal presumption of knowledge arises. This introduces a real first burden on operators to be diligent in consulting the sites of contracting stations.

The communications made by the latter and accepted by the participants then give operators the opportunity to acquire information, relating both to new defects and to illegitimacies already emerging from the published acts; they thus provide a way of calculating the time limit for lodging a main appeal or additional grounds with special reference to unpublished documents, relevant - for example - to contest an assessment of non-anomaly. Obviously, if publication has not taken place, the time limit starts only from the moment of receipt of the personal notice.

In the case of access, which can be exercised within 15 days of the communication (the second burden introduced by case law on private individuals and without the law specifying a time limit for this activity), there is also an extension of the time limit for appeal for the same period of 15 days, again only for complaints related to the documents known subsequently.

Finally, an obstructive conduct by the P.A., which allows access beyond the fifteenth day, results in the time limit running afresh in its entirety.

The Constitutional Court issued ruling 204 28th October 2021, confirming the legitimacy of the above exposed solution. The latter had been built by judges in a posthumous way and was not at all clear and unambiguous, as it was built upon at least three exceptions. Anyway, it has been the base of the recent reform of public tender regulation, which has (finally) given it a clear legal basis.

Furthermore, the reform on the calculation of the time limit for appeals in the procurement procedures trials[13] was constructed according to this criterion: "*if everything is accessible online, there will no longer be any doubt as to the knowledge of the infringing acts*" (Carbone, 2023).

So, the importance of an electronic management of communications between P.A. and enterprises has been stressed in the Italian legal environment; we can note that this second part of the reform has been made possible only thanks to the EU Recovery Plan.

Furthermore, the legislative seems to have (partially) accepted the suggestion by Scholars, who had pointed out that in order to overcome the problem on which the Council of State and the Constitutional Court had intervened, it was necessary to make a connection between: i) the P.A.'s communication duties; ii) the expiry of the appeal term; iii) the period of inhibition from entering into the contract; iv) the effectiveness of the award following the verification of the requirements. It was thus confirmed that the issue at hand had to be clarified by an amendment of a substantive – rather than a procedural - nature.

In the new legislative regulation, the expiry of the time limit is so linked to the notification of the results of the tender pursuant to Article 90. Together with this fulfilment, the provision of the information identified in detail by another provision of the

[13] Made by legislative decree n. 36 2023 and in force since July of the same year.

legislative decree, Art. 36, should be made available electronically. This disclosure in any case must take place no later than 5 days after the adoption of the award. A reciprocal provision of the same data and offers is planned for the first five operators.

It is precisely the notification of the award measure that unequivocally triggers the term for appeals; the award decision can now only be taken when the requirements of the operator proposed as the winner had been verified by the tender commission.

Finally, the entire system of access to documents is no longer based on the request of the parties, but on a specific burden on the public authorities.

The latter is required to make a prior decision on the secrecy of certain parts of the bids, which can be challenged through a trail concerning only the righteousness of disclosure decisions. In any case, non-disclosure decision does not block the time limit for filing an appeal.

This feature of the new legislative text unfortunately leads one to believe that there will be generalized and reciprocal trials regarding non-disclosure decisions. This confirms that the legislator believes that in this area the efficiency of a short timeframe for settling disputes is more important than the guarantee of effective protection.

Anyway, this solution must be interpreted in coherence with CJ EU ruling in C-927/19 as mentioned above.

5. CONCLUSION

A few final remarks can be made before assessing if the new regulation is coherent with rule of law principle. The reference for the calculation of the *dies a quo* to the publication, without the experiment of individual notice, no longer seems usable.

Similarly, there seems to be an exclusion of an alternative criterion, linked to actual knowledge without notification, for the computation of the running of the time limit. Therefore, making available of documents without prior notice cannot be considered sufficient for the calculation of the *dies a quo*.

Consequently, prior to the fulfilment of the individual duty to notify, an interest in appeal cannot be traced; the commencement of the appeal term could however be postponed by the making available of the documents pursuant to Article 36 of Legislative Decree 36/2023, if not contemporaneous with the notification, in order for the system to be in line with the coordinates deriving from EU law.

An exclusion of the extension of the time limit calculated from the fulfilment of the latter burden would, in fact, conflict with the indications of European case law, although such a reading may be erroneously inferred from the literal wording of the provision.

In truth – for a correct exegesis of the legal framework – the principle that one cannot appeal against what one does not know must be respected. This is a clear move toward a solution more coherent with rule of law. In fact, law finally recognizes – overcoming the jurisprudential elaboration referred to above – that for the purposes of calculating the procedural term, the private individual cannot be charged with a duty of continuous vigilance in the absence of individual notification. This conclusion is also the only one capable of cutting off the space for opportunistic behaviour.

However, it seems that the bet has been placed mostly on purely technical tracks: it is assumed that a massive use of information technology could unravel a legal problem. The use of technology is, in fact, a choice on which the legislator has placed a non-substitutable bet. But we must not forget that cases of malfunctioning of platforms and computer systems during tenders are not uncommon, so much so that *ad hoc* case law has been formed on them. These rulings have made it possible to identify the liability

DOI: 10.54869/syeul.2023.3.748

regime in the case of so-called cyber risk,[14] which occurs when a platform does not work properly.

Therefore, a technological problem is enough to jeopardize the delicate mechanism put in place by the reform (this is assuming that all contracting stations immediately equip themselves with state-of-the-art computer systems, a rather optimistic possibility). So, we can say on the other hand that rule of law standards have not been fulfilled.

Latest legislative efforts - to make administrative action more knowable - to burden public authorities with special electronic communication obligations had unfortunately not been successful. On the contrary, the (even malicious) omissions of the Administrations - welded to (almost constant) jurisprudential rigidity - had given rise to a real 'toxic mixture' to the detriment of private individuals, who were burdened with the necessity of bringing the aforementioned appeals *in abstracto*. So, the answer to the question is that rule of law is still at stake, even with the new legislative framework.

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DOI: 10.54869/syeul.2023.3.748