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Table of Contents

ARTICLES

REVIEWS

ARTICLES

SAMO BARDUTZKY[1]

Limits in Times of Crisis: on Limitations of Human Rights and Fundamental Freedoms in the Slovenian Constitutional Order

ABSTRACT: *The purpose of this article is to discuss the issue of limitations of human rights and fundamental freedoms in the 1991 Constitution of the Republic of Slovenia. The discussion is set in the context of a large-scale health crisis, i. e. the SARS-CoV-2 (the virus) and COVID-19 (the disease) epidemic. The article first describes the position of human rights and fundamental freedoms in the Slovenian constitutional order, and discusses the possibilities to limit human rights and fundamental freedoms. In this section, the article introduces the concept of 'limitations on limitations' (similar to the German Schranken-Schranken) and presents the requirements of such limitations in Slovenian constitutional law. It then turns to the mechanism of temporary suspension and restriction of human rights and fundamental freedoms during a war or state of emergency as foreseen in Article 16 of the Constitution. In the third part, the article discusses the limitations of human rights and fundamental freedoms enacted brought forward by the government measures intended to tackle the epidemic, i.e. the concrete substatutory norms passed between March and October 2020. This article presents selected issues and affected human rights such as freedom of movement, personal liberty, right to health, and freedom of assembly. The final part of the article discusses the concept of 'limitations on limitations' that has demonstrated its relevance for the protection of a meaningful level of human rights in the period of the epidemiological crisis.*

KEYWORDS: human rights and fundamental freedoms, Constitution of Slovenia, limitation of human rights, epidemic, COVID-19 pandemic, state of emergency.

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Introduction

The purpose of the present text is to discuss the issue of limitations of human rights and fundamental freedoms in the Constitution of the Republic of Slovenia adopted in 1991 (Constitution).[2] The discussion is set in the context of a large-scale health crisis, the SARS-CoV-2 (the virus) and COVID-19 (the disease). In Slovenia, the epidemic was first declared in March 2020 and the then again in October 2020.[3]

In contrast with a number of other European countries, Slovenia never declared a state of emergency in response to the epidemic. Instead, it remained in a state of normalcy, but as the facts soon became abnormal, also the constitutional framework was stretched to its extreme boundaries.[4] The task of the present account is to study the limitations on human rights and fundamental freedoms in this unusual context.

The article consists of four parts. First, it focuses on the day-to-day functioning (in other words, in 'ordinary' times when there is no crisis) of human rights and fundamental freedoms in the Slovenian constitutional system. It describes the position of human rights of fundamental freedoms in the Constitution, and discusses the exercise of human rights and fundamental freedoms directly based on the Constitution and the regulation by legislature of areas where human rights and fundamental freedoms can be invoked. It then focuses on limitations of human rights, elaborating the general limitations clause (art. 15, para. 3 Constitution) and special limitations clauses. Finally, this part of the article is devoted to the issue of 'limitations on limitations'. An understanding of the day-to-day regime of human rights and fundamental freedoms is the necessary backdrop for the evaluation of the limitations introduced during the epidemic.

The second part of this article presents the mechanism of temporary suspension and restriction of human rights and fundamental freedoms during a state of emergency or war as laid down in art. 16 Constitution. It dissects the elements of this mechanism and concludes by discussing the difference between the limitations of human rights and fundamental freedoms in art. 15, para. 3 Constitution on one hand, and temporary suspension and restriction of human rights and fundamental freedoms in art. 16 Constitution on the other. The purpose of the presentation of the art. 16 Constitution mechanism, despite that it was not (yet?) deployed during the COVID-19 epidemic, is to demonstrate the alternative possibilities available to the Government and National Assembly during crises. Without an awareness of alternative approaches made possible by the constitution-maker, an evaluation of the limitations introduced during the COVID-19 cannot be complete.

The third part of the article discusses the limitations of human rights and fundamental freedoms as experienced in the Slovenian legal system during and after the

2 Ustava Republike Slovenije (URS, Eng. 'Slovenian Constitution'), Official Gazette RS, No. 33/91-I.

3 Ordinance 19/20, Official Gazette RS, No. 19/20, 12.3.2020; Ordinance 146/2020, Official Gazette RS, No. 146/2020, 18.10.2020.

4 Something Saša Zagorc and I referred to as 'business as usual, but to the unusual extremes'; see Zagorc and Bardutzky, 2020.

COVID-19 epidemic. This part is organised into subsections, each discussing one of the individual human rights and fundamental freedoms that were limited during and after the epidemic.

The fourth part of this text purports to identify the lessons learnt from the limitations of human rights and fundamental freedoms adopted during the epidemic. In part, the constitutional experience of the COVID-19 epidemic confirms the relevance of the limitations-on-limitations as established in the case law of the Slovenian Constitutional Court. But also, with regard to the measures taken to combat the epidemic, we observed requirements that are perhaps not commonly considered crucial limitations on limitations, but on which this particular crisis has shed new light.

1. Limitations on human rights and fundamental freedoms in the day-to-day functioning of the Slovenian Constitutional Order

■ *1.1. Position of human rights and fundamental freedoms in the Slovenian Constitutional Order*

Pursuant to art. 15, para. 1 Constitution, human rights and fundamental freedoms are to be exercised directly based on the Constitution. The inclusion of this provision in the text of the 1991 Constitution resolves the dilemma authoritatively: human rights and fundamental freedoms are not conceived of merely as guidelines for the legislature, but are tangible legal guarantees that can be invoked by their bearers in judicial and other proceedings.[5] Furthermore, there is an explicit guarantee in art. 15 para. 4 Constitution of the judicial protection of human rights and fundamental freedoms, further cementing the status of human rights and fundamental freedoms and directly invokable legal arguments in judicial and other proceedings.

That said, the legislative power is not barred from regulating areas where human rights and fundamental freedoms can be invoked. The attempts of the legislature to set rules in these areas will be considered either as *limitations* on human rights and fundamental freedoms, the basis for which is in art. 15, para. 3 Constitution, or as 'regulation of the manner in which human rights and fundamental freedoms are exercised', the basis for which is in art. 15 para. 3 Constitution. Pursuant to art. 15, para. 2 Constitution, the legislature will be allowed to regulate the manner in which rights are exercised in two situations: first, 'whenever the Constitution so provides', and second, 'where this is necessary due to the particular nature of an individual right or freedom'.[6]

5 Constitutional Court RS, case U-I-25/95, 27.11.1997. See also Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.

6 An example of the former scenario is art. 44 Constitution: 'Every citizen has the right, *in accordance with the law*, to participate either directly or through elected representatives in the management of public affairs' (emphasis added). An example of the former is the right to an impartial judge, art. 23, para. 1 Constitution.

Not all human rights and fundamental freedoms can be meaningfully exercised simply on the basis of the constitutional provision. This will normally only be possible for rights of negative status (e.g. the prohibition of torture, protection of human life). Given that the state is barred from action, it does not need to set up a legislative framework barring itself from action.[7]

In contrast, rights of positive status will usually require legislative action for the bearers of the rights to be able to meaningfully exercise and enjoy them (e.g. right to be judged by an independent and impartial judge, and many social rights such as the right to health care).

Whether a certain legislative provision under review should be considered a para. 3 limitation or para. 2 regulation will depend on a case-by-case assessment. Certain legislative solutions might appear to be limiting a right enshrined in the Constitution. However, a review of constitutionality might show that the legislature was merely regulating the manner in which the right is to be exercised.[8]

■ *1.2. The general limitations clause (art. 15, para. 3 Constitution)*

According to art. 15, para. 3 Constitution, human rights and fundamental freedoms shall be limited only in two situations: (a) by the rights of others, and (b) whenever that is explicitly provided in the text of the Constitution.

The former is a limitation clause that could hypothetically apply to any of the individual human rights and fundamental freedoms in the Constitution, excepting rights recognised as absolute (e.g. prohibition of torture, inhuman and degrading treatment in art. 18 Constitution). Thus, it is of general character.

The latter, however, refers to instances where the constitution-maker has decided to provide an express authorisation in the text of the relevant constitutional clause for the legislature to limit the right in question (see 1.3. Special limitations clauses, paras. 1-3).

Already in the mid-1990s, the Constitutional Court added the third situation that justifies a limitation: the pursuit of public interest (Slov. 'javni interes or javna korist').[9] It thus allowed for a wider margin of appreciation of legislative action. While in the beginning, the Constitutional Court permitted limitations justified by 'public interest that protects the rights of others', this third, judicially created basis for human rights limitations expanded even further to public interest, which protects other constitutional categories, and in the last stage, public interest that does not need to be derived from a constitutional clause.[10] In a 2017 decision, the Court commented on public interest as a 'separate, independent constitutionally accepted objective of human rights limitations'.[11]

7 This may become more complicated when positive obligations enter the picture.
8 E.g. in Constitutional Court RS, case U-I-218/04-31, 20.4.2006.
9 Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.
10 Štefanec, 2018, pp. 317-332.
11 Constitutional Court RS, case U-I-52/16, 12.1.2017, para. 26, footnote 23.

By introducing a clause laying down the conditions under which a limitation of a human right or fundamental freedom can be permitted, the Constitution introduced a distinction between permissible and impermissible limitations.[12] We refer to the latter as violations (Slov. 'kršitev') and thus a breach of the Constitution. In this way, the Slovenian human rights law follows the two-stage approach to the understanding of human rights.[13] The first phase is supposed to establish whether the statutory norm under review is covered by the human right in question, for example, that the statutory norm encroaches upon the right in question. The conclusion that it is does not immediately leads to the conclusion that the constitution has been violated. This will be determined in the second stage, when the permissibility of the limitation is decided on.

■ *1.3. Special limitations clauses*

In many instances, the text of a particular constitutional clause will contain an authorisation to the legislature to limit the right. The term of art commonly used in Slovenian constitutional law is 'zakonski pridržek' (statutory reservation), most probably a translation of the German term 'Gesetzesvorbehalt'.[14]

This can either be more generally formulated (e.g. 'Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law', art. 39, para. 2 Constitution) or the reasons that can serve as justifications for limiting the particular human right or fundamental freedom can be expressly listed. An example of the latter is the text of art. 32 Constitution (freedom of movement), which in para. 2 contains a special limitations clause with a list of reasons for justification: 'This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order, or if the defence of the state so demands'.

The relevance of the special limitations clauses has diminished since the judicial creation of the third possible justification ground (i.e. the protection of public interest).

Notably, when the Constitution does not include a list of grounds that justify a limitation on an individual human right or fundamental freedom, but another document protecting human rights does, the Slovenian Constitutional Court will 'import' the list of justifying grounds and only permit limitations justified by the grounds listed in international human rights law. An example is the list of grounds capable of justifying a limitation on freedom of religion in art. 9, para. 2 European Convention on Human Rights (ECHR).[15] The Slovenian constitutional clause protecting freedom of conscience

12 The Slovenian term for limitation being 'omejitev' (the terminology of the 1991 Constitution) or 'poseg' ('encroachment').

13 On the two-stage approach, see for example, Gardbaum, 2007, pp. 789-854.

14 For the definition of *Gesetzesvorbehalt* in the German system of fundamental rights, see Sachs, 2017, p. 148.

15 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others', art. 9, para. 2 ECHR.

and religion (art. 41 Constitution) does not contain a similar list. However, limitations on art. 41 Constitution rights are only acceptable if they can be justified by one of the grounds listed in art. 9, para. 2 ECHR.[16] This position is founded on the 'minimum protection clause' of art. 15, para. 5 Constitution.[17]

■ *1.4. Limitations on limitations*

The centre of this account is the idea that the constitutional system with a two-stage approach to human rights protection, wherein human rights and fundamental freedoms can be limited, requires a mechanism that will prevent the limitations from becoming a conduit for the obliteration of human rights protection altogether. In the German literature, this mechanism is usually called 'Schranken-Schranken', or 'limitations on limitations'.[18] Alternatively, these limitations can be referred to as a set of 'general requirements' on the human rights limiting norm.[19] In the next subsections, a set of requirements are presented that may be considered such limitations on limitations under the Slovenian constitution.

1.4.1. Demand for legitimacy and proportionality of the limitation

When the Slovenian Constitutional Court finds that the exercise of power (most commonly by the legislative branch) is a limitation of a human right or fundamental freedom and therefore, art. 15, para. 3 Constitution is applicable, the established practice is to submit the contested limitation to first, a legitimacy test (Slov. 'test legitimnosti'), and second, to a strict proportionality test (Slov. 'strogi test sorazmernosti').[20] The strict proportionality test is further divided into three prongs: necessity (Slov. 'nujnost'), appropriateness (Slov. 'primernost'), and proportionality in the stricter sense of the word (Slov. 'sorazmernost v ožjem smislu[21]).

The question the Court asks itself when performing the legitimacy test is whether the contested measures are pursuing a constitutionally legitimate test. Logically, the exercise of the legitimacy test will be closely connected to art. 15, para. 3 Constitution, which lists the possible grounds that can justify a limitation of a human right, and to the third, judicially created justification (see 1.2. The general limitations clause (art. 15, para. 3 Constitution), para. 4).

The (strict) proportionality test does not have that clear an anchor in the text of the Constitution. As per Constitutional Court case law, the principle of proportionality

16 Constitutional Court RS, case U-I-140/14, 23.5.2018, para. 20.

17 'No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent', art. 15, para. 5 Constitution.

18 Marsch, Vilain, Wendel, 2015, p. 365.

19 Sachs, 2017, p. 179.

20 Constitutional Court judge Accetto describes this division of the proportionality review into two (sub-)tests as a Slovenian peculiarity, see Concurring Opinion to Constitutional Court RS, case Up-320/14, U-I-5/17, 14.9.2017, para. 4.

21 Lovro Šturm also uses the Slovenian word of Latin origin 'proporcionalnost'. See also Šturm, 2011 on art. 2 Constitution, in Avbelj et al., 2011.

is a foundational principle of Slovenian constitutional law stemming from the principle of the state governed by law (Slov. 'pravna država') in art. 2 Constitution.[22] However, at least in the earlier case law of the Constitutional Court, the Court cites as the legal basis for performing a strict proportionality test the norm in art. 15, para. 3 Constitution.[23]

Essentially, the three prongs of the strict proportionality test are three questions the Constitutional Court poses: (a) is the contested measure such that it can attain a constitutionally legitimate goal? ('appropriateness'); (b) is the contested measure at all necessary for the attainment of the constitutionally legitimate goal, and if so, is it the least invasive alternative with which the constitutionally legitimate goal can be attained? ('necessity'); and (c) is the weight of the consequences of the contested limitation proportional to the value of the constitutionally legitimate goal or to the benefits arising from the limitation? ('proportionality stricto sensu').[24]

1.4.2. Demand for clarity and precision in the norms that limit human rights and fundamental freedoms

Case law of the Constitutional Court confirms that one of the limitations on limitations of human rights and fundamental freedoms is also that the statute that limits a human right (on the requirement to follow the correct form see *1.4.4. Requirement to follow the correct legal form*) is sufficiently clear and defined.[25] The purpose of this requirement is to on one hand ensure that the individual or legal person can ascertain his rights and obligations from the legal form and be certain of the consequences of potential breach of the norm. On the other, this requirement protects the individual from potential illegitimate encroachments upon his rights and legal interests[26]; in other words, the purpose is to protect the addressee from the arbitrary exercise of public power.

1.4.3. Requirement to preserve, despite the limitations, the core of the human right or fundamental freedom

This requirement is not frequently invoked before or by the Constitutional Court, at least not in comparison to the tests of legitimacy and proportionality, which are a staple of constitutional review in Slovenia. There is no express legal basis for this requirement, as for example, in the 'Wesensgehaltgarantie' in art. 19, para. 2 Grundgesetz.[27] It is likely that the intellectual impact of the German doctrine also manifested in (some) Slovenian Constitutional Court judges' conception of human rights and fundamental freedoms. The most detailed conception was proposed by Judge Zobec in his separate opinion to Constitutional Court RS, case Up-360/05. According to him, every constitutionally protected right has three layers. The first is its firm, inaccessible existential *nucleus*.

22 Šturm, 2011 on art. 2 Constitution, in Avbelj et al., 2011.
23 See *supra*.
24 See *supra*.
25 Constitutional Court RS, case U-I-220/03-20, 13.10.2004, para. 14.
26 Constitutional Court RS, case U-I-220/03-20, 13.10.2004, para. 15. See also Constitutional Court RS, case U-I-145/03, 23.6.2005, para. 25.
27 See for example, Sachs, 2017, p. 189 or Marsch, Vilain, Wendel, 2015, p. 367.

It is surrounded by the second, less firm layer, prone to art. 15, para. 3 Constitution limitations. The third, most porous layer is where human rights are prone to art. 15, para. 2 Constitution regulations of the manner in which they are exercised.[28] However, in some instances, it seems that—to use Judge Zobec's terminology—the Constitutional Court conflates the first and second layer. The *nucleus* is the layer prone to art. 15, para. 3 Constitution limitations, and thus distinguishable from the layer where the right will only be regulated pursuant to art. 15, para. 2 Constitution.[29]

1.4.4. Requirement to follow the correct legal form

The text of art. 15, para. 3 Constitution does not prescribe the legal form in which a human right or fundamental freedom can be limited. This is in contrast with the text of para. 2 Constitution. The manner in which rights are exercised can only be regulated in a parliamentary statute (Slov. 'zakon').[30] At first sight, this makes little sense. By definition, a para. 3 limitation of a human right is an activity where the norm-giver should be exposed to stricter scrutiny and heightened procedural guarantees than for a para. 2 regulation.[31] Was the omission of a requirement of form on the part of the constitution-maker intentional? Possibly, the constitution-maker anticipated that human rights and fundamental freedoms would be limited not only abstractly by lawmakers, but also in concrete cases by courts.

Regardless of the omission described in the preceding paragraph, in its early years, the Slovenian Constitutional Court nevertheless insisted on 'zakon' as the only acceptable form for limitations of human rights and fundamental freedoms.[32] Later, references to this requirement rarely appear in the Court's argumentation. The last reference—in the majority judgment—is possibly in 2005.[33] The requirement has not disappeared completely from the minds of the judges, however, and is occasionally mentioned in their separate opinions.[34]

At the same time, the Constitutional Court has on occasion accepted a limitation of a human right and fundamental freedom enacted in a substatutory norm, and proceeded to perform a strict proportionality test. For example, the Constitutional Court did not require for a limitation of a human right or fundamental freedom to come in

28 Dissenting Opinion of Judge Zobec to Constitutional Court RS, case Up-360/05, 12.11.2008, para. 5.

29 Constitutional Court RS, case U-I-74/14, 17.6.2015, para. 11. With regard to right to private property, see Constitutional Court RS, case U-I-47/15, 24.9.2015, para. 15.

30 See *supra*.

31 Concurring Opinion of Judge Sovdat to Constitutional Court RS, case Up-2530/06, 15.4.2010, para. 5.

32 Constitutional Court RS, case U-I-158/95, 2.4.1998, para. 15.

33 Constitutional Court RS, case U-I-145/03, 23.6.2005, para. 25.

34 Dissenting Opinion of Judge Zobec to Constitutional Court RS, case Up-360/05, 12.11.2008, para. 5. Most recently, it seems this happened in the Dissenting opinion of Judge Korpič-Horvat to Constitutional Court RS, case U-I-289/13, 14.3.2016. The dissenting opinion cites the Constitutional Court RS, case U-I-123/11, 8.3.2012, as the authority, but Constitutional Court RS case U-I-123/11 does not clearly lay down the requirement to follow the form of statute.

the form of a statute when it was enacted in an act of local self-government regulating the original competence of the local government.[35]

1.4.5. Prohibition of discrimination

Pursuant to art. 14, para. 1 Constitution, 'everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance'.

Prohibition of discrimination may not be customarily conceived of as a limitation on limitations of human rights and fundamental freedoms. In the sense of the methodology of the review of constitutionality, the approach is that an applicant aggrieved by a discriminatory law will invoke the constitutional prohibition of discrimination (art. 14, para. 1 Constitution) in conjunction with the individual constitutional right that he alleges is not respected in a manner that respects equality regardless of personal circumstances.

Review of constitutionality employs a different optic. However, a claim can still be made on a conceptual level of a limitation of human rights and fundamental freedoms. The consequence that human rights would not be equally guaranteed because of a personal circumstance would be unacceptable. In that sense, prohibition of discrimination represents a conceptual limitation of limitations.

2. Temporary suspension and restriction of rights during a war or state of emergency (art. 16 Constitution)

As discussed, in the Slovenian constitutional system, limitations of human rights and fundamental freedoms occur on a day-to-day basis as the result of the legislative branch seeking a compromise between the rights of addressees of statutory norms, public interest, and the will of the democratic majority. As long as the requirements of art. 15, para. 3 and art. 2 Constitution are respected, such limitations do not constitute a violation of the Constitution. However, a further possibility of the creation of legal norms in the fields protected by human rights and fundamental freedoms is foreseen by the Constitution. This latter possibility is strictly limited to two potential extraordinary situations. As per art. 16, para. 1 Constitution, '[h]uman rights and fundamental freedoms [...] may exceptionally be temporarily suspended or restricted during a war and state of emergency'.

However, as art. 16 Constitution has not been invoked to this day, the working of the mechanism it sets up has not yet been observed. Hence, attempts to interpret this constitutional clause are somewhat speculative, and in the future might turn out to have been wrong. Notwithstanding, art. 16 contains numerous elements that define

35 Constitutional Court RS, case U-I-313/96, 8.4.1999. See also Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.

the parameters of interpretation of the 'temporary suspension or restriction' of human rights and fundamental freedoms. These elements are briefly discussed below.

■ *2.1. Elements*

2.1.1. Declaration of a State of Emergency as a Precondition

First, as a precondition for the invocation of art. 16 Constitution, a state of war ('vojno stanje') or emergency ('izredno stanje') must be *declared*. First, art. 92 Constitution lays down the material condition under which a state of emergency can be declared, that is: when a great and general danger threatens the existence of the state.[36] (The constitution-maker did not deem it necessary to define 'war'.[37]) Second, there needs to be an act of declaration by the competent state organ for the state of emergency to begin. In the first line, the competent organ is the National Assembly acting upon the proposal of the Government (art. 92, para. 1 Constitution). Only if the National Assembly is unable to convene does the President of the Republic decide. Even if the decision-making power is transferred to the President of the Republic, he or she can only act upon the proposal of the Government.[38]

2.1.2. Institutional Setting

Similarly, pursuant to art. 92 Constitution, the National Assembly enacts and repeals urgent measures during a state of emergency or war.[39] If it is unable to convene, however, this power passes to the President of the Republic, who in accordance with art. 107 Constitution, is thus empowered to issue decrees with statutory power (Slov. 'uredbe z zakonsko močjo'), turning into a 'substitute legislature'.[40] Both the National Assembly and President of the Republic act upon the proposal of the Government.

2.1.3. Proportionality

The temporary suspension or restriction of human rights and fundamental freedoms during a state of emergency or war can be adopted 'only for the duration of the war or state of emergency, but only to the extent required by such circumstances' (art. 16, para. 1 Constitution).

36 Compare this to the formulation in art. 15 ECHR: '…public emergency threatening the life of the nation…'. The standard translation of ECHR to Slovenian uses the word 'narod' to translate 'nation', which usually denotes a group of people with a common ethnic identity. For example, in the standard English translation of art. 3, para. 2 Constitution is 'Slovenia is a *state* (Slov. 'država') of all its citizens and is founded on the permanent and inalienable right of the Slovene *nation* (Slov. 'narod') to self-determination' (emphasis and explanations in parentheses added).

37 A definition of the 'state of war' ('vojno stanje'), however, is in the Defence Act, Official Gazette RS, No. 103/04, 20.12.1994, pursuant to art. 5, para. 5, 'a state of war shall be declared in the case of a military attack on the country, or a military attack on an ally of Slovenia'.

38 Žgur, 2016, p. 446.

39 The provisions of Chapter VII of the Rules of Procedure of the National Assembly, Official Gazette RS, No. 92/07, 2.4.2002, regulate the work of the NA during a state of emergency or war.

40 Žgur, 2016, p. 446.

The general idea of proportionality, i.e. as adjusting the response of the public power to the events in the life of the society to the gravity of these events, is thus articulated through two explicit orders of the constitution-maker to the emergency legislature (be it the National Assembly or President of the Republic). First, as it is only possible to introduce a temporary suspension/restriction pursuant to art. 16 Constitution, it will also lapse as the state of emergency or war finishes.

Second, the intensity and invasiveness of the measures must not exceed whatever is necessary to combat the adverse events that threaten the existence of the state. The equilibrium between what the situation requires and the measures adopted to react to the situation is the essence of proportionality. In addition, art. 16 Constitution rule has to be read in conjunction with art. 92 Constitution, which enables the National Assembly/President of the Republic to adopt *necessary* (Slov. '*nujne*') measures. The word 'nujne' is the same as that used in one prong of the strict proportionality test. It implies that the necessity test is to be used when temporarily restricting or suspending human rights and fundamental rights during a state of emergency.

2.1.4. Prohibition of Discrimination

One requirement of art. 16 Constitution is also that measures temporarily restricting or suspending human rights and fundamental freedoms 'do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance'. This builds an explicit prohibition of discrimination into the art. 16 Constitution mechanism.

Note that the list of protected grounds no longer mirrors that in the general prohibition of discrimination in art. 14 Constitution.[41] In 2004, the constitution-maker amended art. 14 to explicitly list disability as a protected ground, but did not amend art. 16. It was not disputed before 2004 that disability is a protected ground covered by 'other personal circumstance'.[42] Hence, disability is certainly also a protected ground as far as art. 16 is concerned.

2.1.5. Absolute rights

Art. 16, para. 2 Constitution contains a list of rights[43] that cannot be temporarily suspended or restricted during a period of war or state of emergency, which in that sense, represents an exception from the rule established in art. 16, para. 1 Constitution. The literature commonly refers to these rights as 'absolute' as they cannot be limited during a state of emergency or war.[44] The question as to whether the absolute status protected during a state of emergency or war by art. 16, para. 2 Constitution extends to 'everyday'

41 See *supra*.

42 Šturm, 2011, on art. 14, para. 1 Constitution, in Avbelj et al., 2011.

43 Art. 17, inviolability of human life; art. 18, prohibition of torture; art. 21, protection of human personality and dignity; art. 27, presumption of innocence; art. 28, principle of legality in criminal law, art. 29, legal guarantees in criminal proceedings, art. 41, freedom of conscience.

44 Černič, 2019, on art. 16, paras. 1-2, in Avbelj et al., 2019.

situations when human rights and fundamental freedoms can be limited based only on art. 13, para. 3 Constitution does not yet have a definitive answer. On one hand, the conclusion is that the absolute rights in art. 16, para. 2 should not be limited based on art. 15 Constitution. Simply, if the constitution-maker wished to keep them intact even when the existence of the state is threatened, then they are undoubtedly off-limits when no such danger lurks.

Simultaneously, the Constitutional Court permits an art. 15, para. 3 limitation on the freedom of conscience that occurs in the normal life of the constitutional system outside a state of emergency or war. The status of this right is far from absolute, as the Constitutional Court performed a strict proportionality case when it reviewed a law that introduced the compulsory stunning of animals before slaughter and thus prevented animal slaughter in accordance with the teachings of Islam.[45] At the same time, the Constitutional Court recognizes the absolute character of prohibition of torture (art. 18 Constitution) and prohibits limitations pursuant to art. 15, para. 3.[46] It does not, however, cite the list of absolute rights in art. 16, para. 2 to support its position.[47] Thus, a position on the art. 16, para. 2. list does not necessarily guarantee an absolute character to an individual human right or fundamental freedom in relation to the limitations in art. 15, para. 3. In fact, even whether this position could serve as an argument for immunity from art. 15, para. 3 is not entirely clear.

■ *2.2. Difference between art. 15, para. 3 limitations and art. 16 temporary suspension and restriction*

Art. 16 Constitution foresees the possibility of the 'temporary suspension' (Slov. 'začasna razveljavitev') and/or 'restriction' (Slov. 'omejitev') of human rights and fundamental freedoms. In the Slovenian text, the verb 'omejiti' (English 'to limit') in art. 16 is the same as the one used in art. 15, para. 3 Constitution. In the standard English translation of the Constitution, however, two different words are used. Regardless, the constitution-makers did not only foresee an 'omejitev' during a war and state of emergency. They added 'začasna razveljavitev'. The standard English translation of the Constitution uses the word 'suspension' here, although a more standard equivalent of 'razveljavitev' is 'repeal' or 'revocation'. This leads to the conclusion that the art. 16 regime enables deeper encroachments upon human rights and fundamental freedoms than the day-to-day regime of art. 15, para. 3.

This understanding was recently confirmed by the Constitutional Court.[48] In U-I-83/20, the Slovenian Constitutional Court did not apply art. 16, as a state of emergency had not been declared. Nevertheless, as the applicant claimed that the restrictive measures adopted during the COVID-19 epidemic were potentially only acceptable during a

45 Constitutional Court RS, case U-I-140/14-21, 25.4.2018. See also Constitutional Court RS, case U-I-68/98, 22.11.2001.

46 Constitutional Court RS, case U-I-292/09-9, Up-1427/09-16, 20.10.2011, para. 18.

47 Constitutional Court RS, case U-I-238/06, 7.12.2006, para. 14.

48 Constitutional Court RS, case U-I-83/20-36, 27.8.2020, para. 62.

state of emergency, the Court had the opportunity to indicate its understanding of the difference between art. 15, para. 3 and art. 16 is. All the court said in U-I-83/20 was that the temporary suspensions in art. 16 can encompass 'more invasive' measures than those acceptable under art. 15, para. 3. It did not pronounce its position on what test it would use to review these measures, for example.

3. Government measures to tackle the COVID-19 epidemic from the perspective of the limitations of human rights and fundamental freedoms

■ *3.1. Freedom of movement*

According to art. 32, para. 1, Constitution, '[e]veryone has the right to freedom of movement, to choose his place of residence, to leave the country, and to return at any time'. Para. 2 allows for limitations of this right, *inter alia*, 'to prevent the spread of infectious diseases'. Art. 39, para. 1, point 2 ZNB[49] provides a legal basis for the 'prohibition or limitation of movement of people in infected or directly endangered areas'. On this basis, on 19 March 2020, the Government instituted a temporary 'general prohibition of movement' (and of assembly, see below 3.3.) on public places and surfaces, and access to public places and surfaces.[50] This was an unprecedented decision in the history of independent Slovenia, as the country had never before experienced a nearly total ban on movement with the broadest scope *ratione personae* imaginable (only movement for the purpose of the exercise of public power was excluded) and a general scope *ratione loci*. The ordinance in art. 3 contained a number of exceptions, for example, commuting to work, traveling to access medical services, traveling to access car mechanics, providing help to persons in need, and access to the limited number of shops and services that remained open (see below 3.5.). Very importantly, the list of exceptions included 'access to parks and other surfaces for walks'.

This last exception provided for modest possibilities of relaxation in contact with nature, and limited outdoor physical activity (e.g. running or cycling), both very important to the Slovenians. The remaining exceptions enabled the people to satisfy only their most essential needs (e.g. acquiring food and medications) while remaining productive members of society by being able to commute to their workplace. The 'parks and surfaces for walks' exception made possible the only activity that helped people remain something beyond mere labourers-consumers and participants in the economy. As for the people who are not active in the economy (e.g. old-age pensioners, the unemployed, children who at that time participated in classes via videoconference),

49 Zakon o nalezljivih boleznih (ZNB, Eng. 'Communicable Diseases Act'), Official Gazette RS, No. 69/95, 1.12.1995.

50 Ordinance 30/20, Official Gazette RS, No. 30/20 and 38/20, 19.3.2020.

their 'right' to move around would have been practically annulled if it was not for the parks exception.

Only 10 days later, on 29 March 2020, the general prohibition of movement was expanded to also ban movement that would cross municipality boundaries.[51] This additional limitation on the right to freedom of movement was triggered by reports of sun-seekers, hikers, and picnickers who allegedly flooded popular Slovenian tourist spots in March 2020.[52] It was still possible, for example, to commute to work by crossing municipality borders, but art. 1 explicitly banned access to parks and walking surfaces in another municipality.

While the list of exceptions was progressively expanded with consecutive government ordinances, the general ban on movement was in force until 18 May 2020, a couple of weeks after the official end of the pandemic.[53]

With an increasing number of cases and pressure on the health system, on 14 October 2020, the Government prohibited or limited movement between statistical regions,[54] again with a list of exceptions.[55] On 19 October 2020, a 9 pm–6 am curfew was introduced, with a modest list of exceptions.[56]

■ *3.2. Right to personal liberty*

The Constitution guarantees everyone the right to personal liberty (art. 19, para. 1), and additionally prohibits deprivation of liberty 'except in such cases and pursuant to such procedures as are provided by law' (para. 2).

There are two noteworthy phenomena in this regard. The first was the issuing of quarantine decisions by the Ministry of Health to those citizens and residents of Slovenia that returned from countries included on the so-called 'red list'.[57] Persons submitted to the obligation to quarantine for 14 days are effectively deprived of their liberty as they are not allowed to leave the address specified in the quarantine decision.[58] The ZNB foresees that persons can be put in (involuntary) quarantine when 'there is a suspicion that they were in contact with someone who has fallen ill' with one of certain communicable diseases (art 19, para. 1).[59] With this formulation, art. 19 ZNB sets a standard of proof ('suspicion') and instructs the Ministry of Health to establish a certain set of facts (e.g. who has the person in question been in contact with). The government ordinance disregards all statutory requirements and instructs

51 Art. 1, Ordinance 38/20, Official Gazette RS, No. 38/20, 51/20, 52/20, 29.3.2020.
52 Constitutional Court RS, case U-I-83/20-36, 27.8.2020, paras. 2, 24.
53 Ordinance 60/20, Official Gazette RS, No. 60/20 and 69/20, 29.4.2020.
54 Slovenia does not have regions or units of local self-government larger than the aforementioned municipalities. Until this point, statistical regions were not used beyond statistics.
55 Art. 3, Ordinance 143/20, Official Gazette RS, No. 143/20, 14.10.2020.
56 Ordinance 147/20, art. 1, Official Gazette RS, No. 147/20, 19.10.2020.
57 Art. 9, Ordinance 83/20, Official Gazette RS, No. 83/20, 7.6.2020.
58 In that sense, quarantine is comparable to or potentially even a harsher measure than house arrest (Slov. 'hišni pripor') pursuant to art. 199.a, Criminal Procedure Act (Slov. 'Zakon o kazenskem postopku'), Official Gazette RS, No. 32/12, 29.9.1994.
59 A person that has fallen ill, conversely, can be ordered to isolate under art. 18 ZNB.

the Ministry of Health to issue quarantine decisions automatically upon arrival from a red list country.

Second is the deprivation of liberty of the residents of senior citizens' homes. With the appearance of the first confirmed cases of COVID-19 in Slovenia, many senior citizens' homes declared that visits to residents were no longer allowed, but often also that residents were not allowed to leave the home.[60] To be prohibited from leaving the senior citizens' home, usually a building housing a few hundred people that is perhaps surrounded by a park, is certainly tantamount to a deprivation of liberty. For example, this would be the case if we were to apply the criteria from the ECHR Guzzardi case.[61] It is not entirely clear how the decision to deprive residents of senior citizens' homes of liberty was made, but it seems that it was simply a decision of the directors of the homes. Senior citizens' homes are generally public institutions of social care.[62] The legal basis that would empower the director of a senior citizens' home seems non-existent.[63]

■ *3.3. Freedom of assembly*

In art. 42, para. 1, the Constitution guarantees 'the right of peaceful assembly and public meeting'. The ZNB foresees a ban of assembly in schools, cinemas, public establishments, and other public places until the danger of spreading a communicable disease ceases (art. 39, para. 1, point 3). Limitations on the constitutionally guaranteed freedom of assembly were adopted in the form of a ministerial decree (Slov. 'odredba') on 10 March 2020, before the declaration of the epidemic, on 10 March 2020 (a limitation of sporting and other events with more than 500 participants in open public spaces).[64] Simultaneously with the temporary general prohibition of movement described *supra*, the government ordinance of 29 March also instituted a temporary general prohibition on assembly. In contrast with the prohibition of movement, no exceptions were foreseen.[65] On 18 May 2020, the government ordinance annulling the general prohibition of movement also changed the situation regarding assembly. Assembly was no longer prohibited, only 'temporarily limited', and only prohibited if there were more than 50 people assembling or if safety measures could not be complied with.[66] During the summer, assemblies of more than 10 and less than 50 people were permitted under the condition that the organiser maintained a list of participants and their contact

60 See for example, the Notification of the director of the Rakičan Senior Citizen's Home of 8 September 2020 (on file with the author).

61 Case of Guzzardi v. Italy (Application no. 7367/76), Judgement, Strasbourg, 6 November 1980, para. 95.

62 Art. 50, Zakon o socialnem varstvu (ZSV, Eng. 'Social Assistance Act'), Official Gazette RS, No. 3/07, 4.11.1992.

63 Newspaper Article in 'Dnevnik', quoting from the Slovenian Human Rights Ombudsman, 4.7.2020.

64 Art. 1, Decree 17/20, Official Gazette RS, No. 17/20 and 30/20, 10.3.2020.

65 Art. 1, Ordinance 38/20.

66 Arts. 1-3, Ordinance 69/20, Official Gazette RS, No. 69/20, 15.5.2020.

information.[67] The rising number of confirmed cases in September and October 2020 brought about stricter limitations on assembly, bans on certain types of events, and a general ban of assembly for groups exceeding 10—and later 6—people.

Noteworthy is that on a normative level, government ordinances have never provided an exception from the limitation of assembly that would cover assemblies, the purpose of which is expression of political opinion (presumably with a requirement to respect safety measures). This did not even occur as the restrictions on freedom of movement and assembly significantly loosened in May 2020 to enable access to the majority of services and economic activities. This is connected to the facts on the ground: Since the second half of April, and despite the ban on movement, anti-government protests were held in the centre of Ljubljana and other cities. The protestors' discontent was not necessarily with measures to tackle the pandemic, but with what was considered the corrupt handling thereof and other government moves perceived as taking advantage of the crisis to consolidate its power.[68] The police have mostly refrained from issuing fines to protesters that (most probably) violated the general prohibition of movement. Thus, *de facto*, there was room for the collective expression of political opinion, not on the normative level, but as per the decision of individual police commanders.

■ *3.4. Family life and the rights of children*

Until the 22 October 2020 amendments[69] to the 19 October 2020 government ordinance banning travel between statistical regions,[70] which added 'maintaining contact with children' to the list of exceptions, the list of exceptions to bans on free movement consistently excluded family unity as a justified reason, with the exception of providing assistance to persons in need. The matter here is not visits to distant relatives, which surely was a difficult limitation for a number of Slovenians, but maintaining contact between children and their parents that do not live together. (This was also not among the exceptions for the strict quarantining regime in place when re-entering Slovenia after a stay in a foreign country,[71] ignoring the fact that there are also children whose parents live across the border.) A prolonged inability to maintain contact with a parent may have detrimental effects on the well-being of a child,[72] especially because chil-

67 This was problematic as it contains an obligation to collect and process personal data. Personal data can be collected and processed either on the basis of a statute or personal consent: art. 8, para. 1, Zakon o varstvu osebnih podatkov (ZVOP-1, Eng. 'Personal Data Protection Act'), Official Gazette RS, No. 94/07, 15.7.2004. This is based on the Constitutional right of protection of personal data (art. 38). An obligation to collect personal data enacted in a substatutory legal act such as the government ordinance violates the ZVOP-1 rule.

68 Newspaper Article on BBC: 'Slovenia cyclists hold anti-government protest', 9.5.2020; newspaper article on Reuters: M. Novak, 'Slovenian cyclists stage anti-government coronavirus protest', 8.5.2020.

69 Art. 2, Ordinance 151/20, Official Gazette RS, No. 151/20, 22.10.2020.

70 Art. 1, Ordinance 147/20.

71 Art. 10, Ordinance 83/20.

72 The text contains a number of resources linked to the detrimental effect of parent-child separation. See D.-M. Ordway, 'Family separation', 27.6.2018.

dren were also unable to spend time with their school friends and other peers during the period of the general prohibition of movement. After all, children are expressly protected from separation from their parents by virtue of the 1989 Convention on the Rights of the Child (art. 9).[73]

■ *3.5. Free economic initiative*

In its third chapter, entitled 'Economic and Social Rights', the Constitution guarantees free economic initiative. This right has been recognized as one of the human rights and fundamental freedoms by the Constitutional Court.[74] The ZNB foresees the possibility of a 'limitation or ban on the sale of individual products' (Art. 39, para. 1, point 4). Between mid-March and mid-May, however, a government decree enacted a general ban on the sale of goods and services to consumers, combined with a list of the types of shops that were still allowed to operate. The list of exceptions was progressively expanded until finally, in mid-May, the government decree only prohibited certain economic activities (e.g. night clubs).[75] The October 2020 measures again closed restaurants, cafes, and bars.[76]

■ *3.6. Right to health*

The right to health care (under conditions set down by a statute) is a human right and fundamental freedom guaranteed in art. 51 Constitution. The ZNB (art. 37, para. 1) foresees the power of the health minister/government to react to an epidemic, by enacting a duty of medical workers to perform their duties and limiting their right to strike (point 1), as well as attributing 'special tasks to natural and legal persons that perform medical activities' (point 3). These loosely formulated powers of the executive branch of power were cited as the legal basis for measures that practically halted the country's health system (with the exception of treating patients with COVID-19 and the aforementioned exceptional cases) for almost two months. Thus, on 16 March 2020, a government decree cancelled all preventive, specialist, surgical, and dental services until further notice with limited exceptions.[77] On 20 March, the exceptions were further limited and included only urgent services and the treatment of pregnant women, for example.[78] This measure was in force until 9 May 2020.[79] This meant that the significant number of people suffering from illnesses and medical conditions unrelated to COVID-19 could not receive any medical attention as they were not in immediate danger.

73 UNTS Volume Number: 1577 (p. 3).
74 Constitutional Court RS, case U-I-40/12-31, 11.4.2013, paras. 17-18; Pernuš-Grošelj, 2002, on art. 74 Constitution, in Šturm et. al., 2002.
75 Arts. 1-2, Ordinance 25/20, Official Gazette RS, No. 25/20, 15.3.2020; art. 2, Ordinance 67/20, Official Gazette RS, No. 67/20, 13.5.2020.
76 Art. 4, Ordinance 143/20.
77 Decree 22/20, Official Gazette RS, No. 22/20, 13.3.2020.
78 Art. 2, Ordinance 32/20, Official Gazette RS, No. 32/20, 20.3.2020.
79 Art. 1, Ordinance 65/20, Official Gazette RS, No. 65/20, 8.5.2020.

A special case of limitations of the right to health care was the treatment of elderly residents of senior citizens' homes. These institutions were among the most affected by COVID-19.[80] Often, a decision was made not to transfer residents that had fallen ill to hospitals, but to set up a 'red zone' in the senior citizens' home. There are indications that the level of medical care available in senior citizens' homes was not equivalent to that provided in hospitals.[81]

4. Revisiting the doctrine of limitations on human rights and fundamental freedoms: what really matters?

■ *4.1. Proportionality*

The approach of the Slovenian executive branch of government in designing measures to tackle the spread of the disease has often resonated with the popular 'Law of the instrument' adage according to which to someone holding a hammer, everything looks like a nail.[82] The enacted prohibitions were often of extremely broad application, with apparently little thought put into the consequences for different addressees. The differences between the Spring 2020 approach and Autumn 2020 approach are striking. In Spring, one of the first measures was a general prohibition on movement. In Autumn, the government first limited movement between statistical regions, then temporally (curfew), then across municipality borders. While the Autumn measures are also far from perfect, this illustrates how much room for manoeuvre there is if the norm-giver is prepared to consider reactions that while appropriate for attaining a legitimate goal, seek to limit individual freedoms as little as possible. Still, the introduction of the curfew, for example, remains questionable from the standpoint of proportionality. The justification for the curfew according to the Minister of the Interior was that many infections stemmed from private gatherings at night. However, private gatherings (with more than six participants) were *per se* prohibited at the time the curfew was introduced. This leads to the conclusion that movement during the night by itself is not dangerous. A curfew is needed as it is difficult for the state to enforce the other prohibitions. At face value, this approach is dangerous from the perspective of ensuring the proportionality of government action. Why would we, COVID-19 or not, not simply ban cars, thus making sure nobody exceeds the speed limit or drives inebriated? On the other hand, it is clear that a curfew might be unavoidable to preserve lives in cases of endemic violence or looting during riots. The line separating the two sets of situations

80 In April 2020, one-fifth of all infected Slovenians were residents of senior citizens' homes: see V. Jager, 'Zakaj tako s starejšimi?' (V. Jager), 10.4.2020, para. 2. According to data available in mid-April 2020, of the 197 residents and 127 members of staff of the Šmarje pri Jelšah Senior Citizens' Home, 149 residents and staff members were infected, and 22 residents had died: newspaper article in 'Delo', Malovrh and Kuralt, 15.4.2020.

81 V. Jager, paras. 6, 8.

82 A definition of 'Law of the instrument' is accessible via Wikipedia.

is not clear and was not discussed by the executive branch. We therefore remain in a 'proportionality grey zone'.

This unfortunate situation is not aided by the lacklustre approach of the Constitutional Court when it reviewed the April 2020 ban on movement across municipal borders.[83] The Court posited that as this ban helped limit contact among people and thus, the spreading of the disease, and as the government was not in a position to forecast whether the individual (milder) measures would stop the spread, the measure successfully passed the necessity test.[84] The Court did not, as is common, discuss possible milder alternatives to ascertain whether a less invasive measure was available. It is not surprising that the Court decision did not curtail the 'hammer-nail' approach of the government in preparing the measures after the decision of the Court.

In the situation of a communicable disease crisis or epidemic, proportionality as perhaps the most important limitation on the limitations of human rights and fundamental freedoms remains important. Clear is how it can prevent excessive limitations, but at the same time, permit properly balancing rights and freedoms on one hand, and the protection of health on the other. Unfortunately, this was not thanks to the reaction of the Constitutional Court.

■ *4.2. Temporal limits*

In the *ad interim* order issued in case U-I-83/20 in mid-April 2020, the Constitutional Court temporarily stopped the application of one of the articles of the government decree banning movement across municipal borders within Slovenia, which foresaw the validity of this measure 'until further notice'. According to the Constitutional Court, this clause would mean that these measures become permanent, which is not necessary in attaining the goal pursued by the decree. The government has to periodically verify the proportionality of the measures and only extend their validity if based on the situation and opinion of health experts, it concludes that they continue to be necessary in attaining goals.[85]

Since the *ad interim* order of the Constitutional Court, the government has indeed systematically periodically verified the measures, most commonly on a weekly basis.[86] Certainly, this simple requirement as posited by the Constitutional Court, 'reduces the possibility of disproportionate encroachments on human rights and fundamental freedoms, and does not put the health and life of people at greater risk due to the spreading of the epidemic.'[87] In addition, this approach has the potential to prevent the regime adopted to tackle the crisis to simply perpetuate beyond the crisis situation and become the new normal. Its potential to prevent disproportionate encroachments is also severely limited if the accountability of the government that

83 Constitutional Court RS, case U-I-83/20, 27.8.2020.
84 Ibid., paras. 52-54.
85 Order U-I-83/20-10, Constitutional Court RS, case U-I-83/20-10, 16.4.2020, para. 26.
86 See for example, art. 6, Ordinance 92/20, Official Gazette RS, No. 92/20, 29.6.2020.
87 Order U-I-83/20-10, para. 26.

is under the requirement of periodical verification is not strong enough to dissuade it from simply automatically renewing the measures week after week. If the courts, or citizenry, or legislative branch, or independent institutions do not put the government under sufficient pressure to engage in serious consultations with the experts before renewing, this requirement may serve for little more than presenting the executive branch with a veneer of legality.

■ *4.3. Clarity, precision, and quality of legislative drafting*

Many government decrees that limited human rights and fundamental freedoms were written in an unclear manner that made it difficult for the addressees of the legal norms to be certain whether they are acting in line with the law or not. In a situation where measures are temporary and change relatively rapidly, lawyers cannot count on their usual 'fix' for poorly written law, namely that the courts with the development of case law will find the correct interpretation and restore legal certainty. Instead we learnt that the *de facto* power to interpret the law in such a situation ends up with the drafters or makers of this law. An important role is played by the media, who may or may not correctly transmit the message to the public. If neither the responsible government official nor the journalists have legal training, chances are something will go wrong. On a few occasions in press conferences, the Slovenian Interior Minister, confronted with journalists' questions, interpreted the freshly adopted government ordinance *contra legem*, mostly by adding new exceptions to a prohibition enacted in an ordinance. Clearly, in a state governed by the rule of law, this is unacceptable. If the list of exceptions is missing something (e.g. it is a relatively logical exception that a person walking their dog can stay outside during the curfew), the government needs to change the text of the ordinance and publish the new ordinance. This will enable the courts to not only analyse the culpability of the citizens charged with violation, but also the proportionality of the measures and application thereof when seized with appeals against fines for violating the curfew.

■ *4.4. Justification and scientific rationality*

It seems clear that when the executive branch of the government adopts measures to protect public health, these need to be based on the findings and recommendations of public health experts.[88] This requirement can legitimately be considered a limitation on limitations of human rights and fundamental freedoms when the decision to adopt limitations is linked to scientific rationality. This does not mean that the executive branch has to completely relinquish its decision-making power. The final choice of the available alternative measures, assessment of the restrictive or invasive effect they have on individuals, feasibility of the enforcement, and so on are all questions best answered by the executive branch (and then, if it comes to that, subsequently controlled by the judicial branch).

88 Constitutional Court RS, case U-I-127/01, 12.2.2004, para. 19.

The separate opinions in U-I-83/20 reveal the discontent of a minority of judges with the assurances put forward by the government that the measures were adopted based on expert recommendations.[89] The revelation that the Constitutional Court actually required some time and energy to establish the facts—in other words, whether and in what way expert recommendations reached government decision-making—is disconcerting. If this is a demanding task for the Constitutional Court, how is the public supposed to confirm that the measures befalling them are justified from an expert viewpoint.

This is aggravated when limiting measures are adopted in the form of substatutory (executive) norms. When a norm that limits human rights and fundamental freedoms is adopted in the form of a statute, the Rules of Procedure of the National Assembly apply. The latter require (for every statute) a thoroughly justified proposal (a 'Bill') supported by arguments.[90] There are similar requirements in place for the proposal of a substatutory act (e.g. a government ordinance) in the Rules of Procedure of the Government,[91] but as this is an internal procedure, parliament cannot hold the Government accountable for a proposal poorly supported with arguments. It would be sensible to consider a requirement for substatutory norms to include a short preamble. In addition to stating the legal basis, which happens already, it could follow the example from EU law (art. 296, para. 2 Treaty on the Functioning of the European Union) and cite the written opinions or recommendations of all the institutions or experts consulted in the process. These could easily be made available through the government website.

■ *4.5. Statutory basis*

The preceding discussion on the correct form of limitation of a human right or fundamental freedom was left open. Is it possible that the epidemic has changed that? In U-I-83/20, the majority of the Court saw no issue with the limitation of a human right or fundamental freedom in the form of a government ordinance.[92] The majority of the Court decided not to check whether the government ordinances went beyond the statutory authorisation in ZNB or not. Overstepping the statutory authorisation boundaries was perhaps not striking in the case at hand; however, in the general ban on the sale of goods and services discussed earlier, an average lawyer will probably find it difficult to find a loyal interpretation of the ZNB clause that envisages the 'ban or limits on the sale of specific products' that can then support such an all-encompassing measure as a general ban, which also covers services not mentioned in the ZNB. In the first round

89 Dissenting Opinion of Judge Čeferin to Constitutional Court RS, case U-I-83/20, 27.8.2020, paras. 12-20; Dissenting Opinion of Judge Accetto, ibid., paras. 27-33.

90 Art. 115, Poslovnik državnega zbora (PoDZ-1, Eng. 'Rules of Procedure of the National Assembly'), Official Gazette RS, No. 92/07, 2.4.2002.

91 Art. 8.c, Poslovnik Vlade Republike Slovenije (Eng. 'Rules of Procedure of the Government of the Republic of Slovenia'), Official Gazette RS, No. 43/01, 10.5.2001.

92 Constitutional Court RS, case U-I-83/20, para. 37.

of the 2020 epidemic, the National Assembly amended the ZNB.[93] However, it refrained from expanding the list of powers given to the executive branch in art. 39. One cannot help but wonder why. With such a permissive attitude of the Constitutional Court, the legislative branch may not feel remorse for omitting a reform of the authorisations pursuant to the ZNB. Indeed, the decision in U-I-83/20 has struck a painful blow to the requirement to follow the correct form when limiting human rights.

However, does that not mean we should not, as a matter of a normative claim, insist on respect for this requirement? The case of the epidemic and ZNB illustrates its value very well. An expansion of powers of the executive branch in the statutory text will have to undergo parliamentary scrutiny and a transparent debate, in the course of which the proportionality of the potential new measures will also be discussed. To simply stretch the measures enacted in substatutory acts to the limits of and beyond the statutory authorisation might only come under scrutiny in procedures before the courts. There, the executive and legislative branch will keep their fingers crossed for a deferential approach, and ultimately, 'get away with it'.[94]

■ *5. Final thoughts*

The epidemic and measures to tackle it have proven to be a remarkable test for the mechanism of limitations on limitations in the Slovenian system of protection of human rights and fundamental freedoms. We see that the need to react quickly has eroded many of these limitations and highlighted others that may not have been in the limelight before. It is hoped that rather than leading towards a twilight of the Slovenian *Schranken-Schranken*, the COVID-19 episode will in its aftermath motivate Slovenian constitutional lawyers to vigorously discuss the role of human rights and fundamental freedoms, and the limitations thereof.

93 Art. 1, Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo (ZIUZEOP, Eng. 'Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy'), Official Gazette RS, No. 49/20, 10.4.2020.

94 Zagorc and Bardutzky, 2020, para. 17.

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Red Signal from Karlsruhe: Towards a New Equilibrium or New Level of Conflict?

ABSTRACT: *In its PSPP decision, the German Constitutional Court for the first time declared an EU act ultra vires. The decision resulted in a flood of studies, blog posts, and comments. Most criticised the verdict raising a series of objections. We agree with some objections. However, the present study approaches the judgment from the other side. It seeks to understand the situation of the constitutional courts of Member States in the EU legal system, to examine their main dilemmas in relation to EU law, and to explore their possibilities regarding their main task, which is the protection of constitutions. The study highlights the fundamental structural tension that currently characterises the EU legal system concerning Member States' sovereignty and examines how a balance can be struck in addressing this tension.*

KEYWORDS: primacy of EU law, constitutional review, *ultra vires* acts, principle of proportionality, identity review, *ultra vires* review.

On 5 May 2020, the German Federal Constitutional Court (*Bundesverfassungsgericht* – GFCC) delivered a judgment concerning the European Central Bank's Public Sector Asset Purchase Program (PSPP), stirring European talks on the boundaries between the competences of the EU and its Member States.[2] The GFCC's judgment questioned how the Court of Justice of the European Union (CJEU) and European Central Bank (ECB) exercised their powers in this matter and opened new perspectives in the turbulent relations between the EU and one of the most prestigious constitutional courts in Europe.

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2 *PSPP*, BVerfG 2 BvR 859/15 (Urteil vom 5. Mai 2020); available at: https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915.html (accessed: 30 October 2020).

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1. Background

The PSPP, launched in 2015, enables the ECB and national central banks to buy bonds and other marketable debt instruments issued by Member States' governments or other recognised organisations (i.e. local governments) in the Eurozone.[3] It aims to ease monetary conditions to return the average inflation rate to the 2% level, the ECB's inflation target, and to reinvigorate the economy of Eurozone states. Under PSPP, complex eligibility criteria exist for securities that can be purchased by the ECB or national central banks.

The four constitutional complaints insisted that the PSPP violated the principle of the conferral of competences under Article 5(1) of the Treaty on European Union (TEU), prohibition of monetary financing by central banks of Member States budgets' under Article 123(1) of the Treaty on the Functioning of the European Union (TFEU), and constitutional identity as it encroached on the German parliament's budgetary powers. In the proceedings, the German Federal Constitutional Court (GFCC) referred five questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling, raising the validity of the ECB decisions concerning the PSPP (*Weiss* case). This was not the first occasion the GFCC has questioned the validity of ECB's decisions. In the *Gauweiler* case, it also had doubts regarding the ECB's Outright Monetary Transactions (OMT) Programme designed to buy government bonds. The OMT Programme finally passed the test as the CJEU found no evidence that the ECB exceeded its mandate by adopting the programme.[4]The CJEU has also not found any factor in *Weiss* that would affect the validity of the ECB decisions.[5]

The GFCC has — in essence, and given the CJEU's *Weiss* ruling — reached the following conclusions. (i) As the ECB has failed to demonstrate and substantiate that the PSPP is in accordance with the principle of proportionality, the programme constitutes — in a procedural sense — an *ultra vires* act (para. 116.). Consequently, the *Bundestag* and federal government are required to take steps to ensure that the principle prevails when the ECB implements the PSPP and to restore conformity with the Treaties. (ii) An *ultra vires* act of the EU has no binding effect within the German jurisdiction, and German state organs may not implement and execute them. After a transitional period of no more than three months, this also holds for the *Bundesbank* unless the ECB demonstrates 'in a comprehensible and substantiated manner' that objectives of its monetary policy are not disproportionate to the economic policy effects resulting from the programme (para. 235.). (iii) Furthermore, the CJEU's *Weiss* judgment is an *ultra vires* act to the extent that it considered the ECB's PSPP decisions to be appropriate

3 PSPP is one of the four components of the (expanded) Asset Purchase Programme (APP). The constitutional complaints also challenged the Corporate Sector Purchase Programme (CSPP). The Court separated this part of the proceedings for future decision.

4 C-62/14 Gauweiler and Others, ECLI:EU:C:2015:400.

5 C-493/17 Weiss and Others, ECLI:EU:C:2018:1000.

and proportionate. The interpretation of the Treaties and delimitation of EU and Member States' competences put forward by the CJEU in its preliminary ruling was clearly untenable or incomprehensible (i.e. objectively arbitrary). This act of the CJEU is not binding on the GFCC. The CJEU exceeds its mandate conferred in Article 19(1) TEU if it manifestly disregards the general legal principles and traditional methods of interpretation common to the legal systems of Member States (para.112). (iv) The Bundestag and German federal government violated the complainants' constitutional rights because they did not challenge the ECB decisions concerning the PSPP, which were insufficient in bearing out that the programme satisfies the proportionality requirement (para. 116.).

The conflict revolved around the delimitation of EU monetary policy (EU competence in the Eurozone) and economic policies, which fall basically within Member State competences, and around the assessment of the effects of PSPP as a monetary instrument in the field of economic policy.[6] For the GFCC, the principle of proportionality seemed a necessary instrument according to Article 5 TEU in solving the dilemmas pertaining to delimitation. For the GFCC, if EU institutions do not give due consideration to this principle in such a context, their acts may qualify *ultra vires* in a constitutional review. The ECB has not substantiated in its PSPP decisions that the adopted monetary measures were proportionate. In *Weiss,* the CJEU did not apply a coherent standard of proportionality review (its reasoning being 'simply not comprehensible', paras. 116. and 153.); therefore, it was unable to properly delimit the ECB's competences. For the first time in the history of European integration, the GFCC declared that it is not bound by a preliminary decision of the European Court adopted at its own referral.

The *PSPP* judgment puts an external constitutional control on how EU institutions (the ECB and CJEU in this case) exercise the competences conferred on them by Member States. This leads to the main legal battlefield, where one party raises the flag of the primacy of EU law and competences of the CJEU having the last word on the EU's law. The other side brings about the principle of conferral of competences and requirements of democratic legitimation and control.

2. The context

The relationship between the constitutions (and constitutional courts) of Member States and EU legal order has two sensitive aspects that raise practical dilemmas.[7] These dilemmas might be exacerbated in proceedings before the CJEU or in the constitutional adjudication in Member States, raising specific jurisdictional issues and problems of legal and constitutional interpretation.

6 For a detailed analysis presented on this issue in light of the PSPP ruling, see Goldmann, 2020, pp. 1073–1075.

7 Hereinafter, by constitutional court I also mean the supreme courts of some Member States, which conduct constitutional adjudication.

■ *2.1. The dilemma of checking or not checking the exercise of EU competences*

The first sensitive aspect is the possible control of the exercise of EU competences. The powers conferred to the EU and enshrined in EU Treaties are general and vague. Their boundaries are formed continuously during the functioning of the Union in adopting certain EU legal acts or settling various legal disputes. Provisions of general EU competences only make sense *ex post* in the light of subsequent CJEU case law. The question is of whether Member States' constitutional courts can play a role in this diversified process in which EU competences are given specific substance.

This need arises because the EU legislation and CJEU tend to draw the boundaries of EU competences very broadly to meet the goals of integration and ensure the effective operation of the EU. Various techniques have been developed to extend EU competences, such as the doctrine of implied powers; extension of powers on the basis of non-discrimination clauses; or extensive interpretation of competence clauses based on Union objectives supported by a general, subsidiary competence clause (Article 352 TFEU).[8]

Although the CJEU is the final arbiter of the interpretation of the Treaties and competence clauses contained therein, the constitutional courts are not disinterested in the matter. There is sometimes a need for constitutional courts to interpret those constitutional provisions based on which competences have been conferred to the EU. As the EU competences set out in the Treaties and State powers conferred under the relevant constitutional clauses necessarily coincide,[9] interpretations from the opposite direction might easily give rise to conflict.

The dilemma of a constitutional court is whether to act if it appears that a specific EU measure has exceeded the powers conferred on the EU (the possibility of *ultra vires* review). However, there are strong arguments against this regular *ultra vires* review. (i) The powers conferred are reflected and specified in the Treaties of the Union (and not in the constitutions of Member States). The CJEU is ultimately responsible for the interpretation of the Treaties, not the constitutional courts. (ii) The interpretation of a provision in the Treaties may carry a great deal of uncertainty, and typically, more than one reasonable interpretative alternative is conceivable. A constitutional court could find itself in an impossible situation if it tried to engage in a detailed interpretation of the Treaties in competition with the EU court. (iii) Insurmountable problems may arise if through its constitutional court, a Member State regularly examined and disputed on different grounds and perceptions the exercise of EU competences even where other Member States do not raise specific objections to relevant EU legal acts.[10]

These considerations presumably play a role in that *ultra vires* review is considered by constitutional courts that maintain this possibility as an extraordinary tool. The constitutional court steps in from the background when an EU act adopted *ultra*

8 In its Lisbon ruling, the Danish Supreme Court examined this rule of competence at length but did not raise any objection to it, *Hausgaard*, Højesteret199/2012 (20/02/2013) UfR 2013,1451 H, para. 3. available at: https://domstol.dk/media/0xebqufh/199-12-english.pdf (accessed: 30 October 2020).

9 Cf. *Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30.Juni 2009) para. 234.

10 See also Blutman, 2017, p. 2.

vires slips through the CJEU's scrutiny (typically in annulment or preliminary ruling proceedings).

■ *2.2. The dilemma of primacy*

The second sensitive aspect is the question of primacy (i.e. priority in application). This problem arises when a constitutional rule and an EU legal act are incompatible concerning a specific legal issue.

The CJEU's approach is simple. The primacy of EU law extends to this situation, and any EU rule takes precedence over constitutional provisions in the same way as over Member States' sub-constitutional law.[11] This is based on the need for uniform, equal, and effective enforcement of EU law.[12] The relevant practice of the CJEU has been consequent since the early 1970s.

Thus, it is primarily for the constitutional courts to find a way to resolve such conflicts. The dilemma of the constitutional courts is as follows. They are also bound by the principle of sincere cooperation in EU matters [Article 4(3) TEU], and more generally, by the EU legal order of which Member States have become part. However, their main task is to protect the constitution, which does not provide explicitly for the primacy of EU law. Even the Treaties are silent on any primacy of EU law.

In some Member States, this situation has been clarified.[13] Some constitutional courts have clear, explicit reservations about the Luxembourg approach, for at least one fundamental reason. The EU is not a federal state, but an international organisation based on the cooperation of sovereign states, which must also be reflected in deciding the primacy dilemma. The EU must show '*constitutional tolerance*' towards Member States.[14] The constitution of a Member State is the most fundamental legal embodiment of the sovereignty and cannot in all its parts simply be subordinated to EU law. Following such considerations, there are constitutional courts that theoretically do not recognise the primacy of EU law over constitutional rules.[15]

11 11-70 *Internationale Handelsgesellschaft mbH*, EU:C:1970:114, para. 3. Similarly for example, C-473/93 Commission v Luxemburg EU:C:1996:263, paras. 10. and 50.; C-285/98 *Kreil*, EU:C:2000:2, paras. 5. and 32.

12 The CJEU press release issued after the PSPP ruling emphasised the legal equality of Member States without mentioning the primacy of EU Law, Press Release No. 58/20, Press release following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020), available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed: 30 October 2020).; see also Chronowski, 2020, p. 78. For a criticism of equality arguments applied to support the primacy of EU law, see Lindeboom, 2020, pp. 1037–1040.

13 For a detailed comparative analysis, see Fazekas, 2009, pp. 61–188.

14 For the question of constitutional tolerance, see for example, Martinico and Pollicino, 2008, pp. 106–108.

15 Such is the case with the Spanish Constitutional Court, which stated in Opinion 1/1992. that EU (Community) law did not take precedence over the Spanish Constitution; García, 2005, pp. 1003–1005. It seems that the Polish Constitutional Court's decision on the Accession Treaty of 2003 now also falls here; K 18/04. (11.05.2005); available at: https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf (accessed: 30 October 2020). For the relevant practice of Member States' constitutional courts, see also Tatham, 2013, pp. 205–268.

In this precarious situation, the majority of constitutional courts are reluctant to rule explicitly, even in a declarative manner, on the issue of the primacy of EU law.[16] However, an aspect of the constitutional adjudication indirectly refers to the position a constitutional court takes concerning the relationship between EU law and the constitutional rules. The crucial question is whether a constitutional court is willing to subject existing EU legal acts to constitutional review.[17]

■ *2.3. Limited constitutional review as a possible reply to the primacy dilemma*

Some constitutional courts reserve, at least in theory, the power to exercise constitutional review over EU acts, although they do not do so on the same basis.[18]Theoretically, a model for such a review was already formed in the early stages of European integration. In the 1970s, two constitutional courts (GFCC and the Italian Constitutional Court) were willing to protect fundamental constitutional rights against the effects of EU (Community) law.[19] If a review based on constitutional fundamental rights is possible,[20] one based on other standards might also be possible. EU legal acts can also be reviewed to determine whether they infringe on a Member State's sovereignty (sovereignty review). In this area, the cornerstone ruling is the GFCC's *Maastricht* decision (1993).[21] The Treaty of Lisbon introduced a further opportunity to apply in principle a third type of standard underlying constitutional reviews. Under Article 4(2) TEU, the EU must respect the national identity of its Member States, including their political and constitutional order (identity review). Thus, at least three types of constitutional review can be distinguished: (i) review based on fundamental rights, (ii) sovereignty review, and (iii) identity review.[22]

The practice of constitutional courts that maintain the possibility of constitutional review is mixed in terms of the use of constitutional standards. For example, the Hungarian Constitutional Court recently declared that it was willing to apply any

16 Lindeboom claims that most constitutional courts in the EU do not recognise the primacy of EU law over their constitutions; Lindeboom, 2020, p. 1041.

17 See also Blutman, 2017, pp. 1-2.

18 These courts seem to include for example, the German, Polish, Czech, Hungarian Constitutional Courts, perhaps the French *Conseil d'État* and Danish Supreme Court.

19 These were, at least theoretically, the heydays of fundamental rights review from the *Frontini* and *Internationale Handelsgesellschaft* (*Solange I)* decisions to the 1984 *Granital* and 1986 *Wünsche Handelsgesellschaft (Solange II)* rulings. For a detailed overview of these events, see Craig and de Búrca, 2015, pp. 278–304.

20 *Solange I,* BVerfG 2 BvL 52/71 (Beschluss vom 29.05. 1974) BVerfGE 37, 271; point B/I/4.

21 *Maastricht,* BVerfG (Urteil vom 12. 10. 1993) 2 BvR 2134/92 und 2159/92; BVerfGE 89, 155; point C/I/3. (para. 106).Sovereignty review is primarily, though not necessarily, aimed at examining whether in adopting an act, the EU has remained within the powers conferred on it by Member States (*ultra vires* review). For an overview of the GFCC's *ultra vires* doctrine, see Schneider, 2020, pp. 968–970.

22 These three types of constitutional review do not entirely accord with the GFCC's practice, for example, Petersen, 2020, p. 999. Note that from a procedural viewpoint, a constitutional review is conceivable either as *direct or indirect.* In the case of direct control, the constitutional court reviews directly an EU legal act and limits its effects if it violates the constitution. In the case of an indirect review, it scrutinises an internal legal act promulgating, implementing, or transposing an EU act with a view to declaring it unconstitutional due to its content originating from EU legal acts.

of the three reviews, but did not clarify the range of constitutional provisions to be protected this way.[23] The Czech Constitutional Court essentially applies an *ultra vires* review.[24] In the practice of the GFCC, in addition to *ultra vires* review, identity review came to the fore and absorbed the fundamental rights review.[25] However, it seems the Polish Constitutional Court wants to protect the entire constitution from EU law, not only some of its provisions.[26]

Since the primacy dilemma cannot be resolved,[27] the actors (primarily the constitutional courts) have begun to look for soft solutions to avoid sharpening the conflict and to find an intermediate path. Traces of self-restraint ('*cooperative constitutionalism*') can clearly be detected on the side of the constitutional courts. The responsibility is enormous: the EU legal order can be fragmented along the constitutional rules of the 27 Member States.[28] This type of self-restraint has at least two aspects. Constitutional courts reserving the possibility of constitutional review typically do not want to protect the whole constitution against EU law, but only certain essential provisions or features thereof (e.g. articles of sovereignty, constitutional fundamental rights). Furthermore, constitutional review is not automatic, but exceptional and used as a last resort (limited constitutional review).

This cautious approach seemed sufficient to deal with the primacy dilemma in practice. A practical balance has been established in the spirit of cooperative constitutionalism. The CJEU has consistently insisted on the primacy of EU law. On the other hand, some constitutional courts declared the possibility of constitutional review, and exercised it, but almost exclusively in the form of indirect review, which at most led to the repeal of internal acts. This practical balance was upset by the PSPP judgment.[29] As such, the latent conflict became visible and again exacerbated.

3. New balance or a new level of conflict?

■ *3.1 Some effects of the PSPP ruling*

The PSPP ruling is incompatible with the Treaties in that, it deprived the CJEU's preliminary ruling of its effects within the German jurisdiction and made the application of other binding EU acts (ECB decisions) contingent on further requirements. This is not the

23 Decision 22/2016. (XII. 5.)AB; ABH 2016, 456.

24 See the notable case of '*Slovak pensions*' (Pl. ÚS 5/12, 2012/01/31.); however, the Czech Constitutional Court only wants to protect the constitutional order and substantive core of the constitution, Pl. ÚS 19/08: Treaty of Lisbon (I) (2008/11/26) para. 85.

25 *Gauweiler,* BVerfG, (Urteil vom 21. Juni 2016) 2 BvR 2728/13, para. 153.

26 K 18/04. (2005/05/11) (cited above) especially paras. 1. and 13.; however, in the subsequent practice, the possibility of identity review has been emphasised, see Skomerska-Muchowska, 2017, pp. 128-133.

27 Both the absolute primacy approach and application of constitutional review over EU legal acts have their own, although incompatible, logic, Wendel, 2020, p. 982.

28 All this is also acknowledged by the GFCC, for example, *Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30. Juni 2009) BVerfGE 123, 267; para. 240.

29 Some features of this practical balance are analysed by Petersen, 2020, pp. 996–998.

first time a constitutional court in a Member State considered a CJEU judgment an *ultra vires* act or explicitly and deliberately disapplied a preliminary ruling in the same case.[30] However, the PSPP ruling makes a significant difference as follows. (i) GFCC might easily be seen as *primus inter pares* among European constitutional courts.[31] Its patterns and constructions of constitutional reasoning are usually followed by other constitutional courts, especially in CentralEuropean countries. (ii) The GFCC decided on a major issue, as APP is at the foundation of European economic crisis management in the EU. (iii) The PSPP ruling concerns one of the exclusive competences of the Union (monetary policy), where it is especially important that the unity of EU rules is maintained. (iv) The authority of the GFCC meant the decision had extremely wide press coverage and provoked innumerable — and mostly negative — professional comments.[32]

The PSPP ruling did not cause substantial damage. It was the *Bundesbank* that the most got stuck between the cogwheels of the EU and German constitutional mechanism. Its president did not hesitate to state that they were convinced of the proportionality of the PSPP.[33] The ECB Governing Council made public its proportionality considerations relating to the APP, concluding that the APP (and another programme) 'were proportionate measures'.[34] Thereafter, the Bundestag, approving a motion filed by four fractions, concluded on 2 July 2020 that the proportionality requirements set out in the PSPP ruling by the GFCC were met.[35]

The PSPP ruling exemplifies the dangers of the situation when a national court considers and interprets EU acts applicable in 27 Member States from its own viewpoint. We have seen that the GFCC has tried to delimit EU competences using the principle of proportionality. Some commentators have shown how wrong this is, as the principle under Article 5 TEU is not to delimit EU competences, but to limit the way in which existing (and established) EU competences are exercised.[36] In addition, the GFCC applied a specific, three-pronged version of the principle of proportionality, which is

30 Czech Constitutional Court in case Pl. ÚS 5/12 (judgment of 31 January 2012) point VII; available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl US 5-12.pdf (accessed: 30 October 2020); or Supreme Court of Denmark in case 15/2014 *DI, acting on behalf of Ajos A/S* v *Estate of A* (December 6, 2016) ; https://domstol.dk/media/2udgvvvb/judgment-15-2014.pdf (accessed: 30 October 2020).

31 Editorial Comments, 2020, p. 965.

32 For an overview of the reactions, see Giegerich, 2020, p. 12.; Goldmann, 2020, pp. 1058–1059.; Chronowski, 2020, pp. 77–78.

33 'The trough is likely to be behind us now' Interview with Jens Weidmann, Frankfurter Allgemeine Sonntagszeitung (21.06.2020); available at: https://www.bundesbank.de/en/press/interviews/-the-trough-is-likely-to-be-behind-us-now--835032; (accessed: 30 October 2020).

34 Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3–4 June 2020; point 1, available at: https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html (accessed 30 October 2020).

35 For the text of the motion, see https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf; for the decision of the Bundestag, see https://www.das-parlament.de/2020/28_29/europa_und_die_welt/704622–704622; (accessed: 30 October 2020).

36 Wendel, 2020, pp. 985–986.; Editorial Comments, 2020, pp. 969–971.; Giegerich, 2020, p. 7.; Meier-Beck, 2020, point [4].

not generally known and applied in the courts of other Member States or by the CJEU.[37] It was also said that the GFCC acted like an appeal court superior to the CJEU when setting aside the CJEU's judgment for arbitrariness.[38]

Even if the ruling is mainly theoretically significant, one of the most prestigious constitutional courts in the EU has certainly set a model for other constitutional courts in terms of applying constitutional review over certain EU acts. Moreover, it rightly expressed the need for a greater emphasis on the clear statement of reasons in the EU legal acts including certain decisions of the CJEU. However, most importantly, the decision has highlighted the fundamental tension in the structure of EU legal order that has existed since its creation. Next, I examine this last issue more closely because it has been somewhat overshadowed in the comments.

■ *3.2. Fundamental structural tension in the EU legal order*

The PSPP ruling is a sign of fundamental tension existing within the EU legal order. It is easy to find flaws in the decision and to point out which Treaty provisions this ruling has violated. Moreover, it is easy to see how this unilateral national decision could damage the idea of European cooperation. However, the constitutional courts of Member States are to some extent entrapped. They must defend the constitution of a sovereign state within a larger legal system claiming primacy for itself.

In the EU legal order, fundamental structural tension exists between the following factors. On one side is the sovereignty of Member States and opportunities for that sovereignty to be exercised in the EU. On the other are three basic features of the EU legal order: (i) majority-based decision-making in the legislative organs of the EU (as a general rule), (ii) absolute primacy of EU law (which is thus far only a principle derived by the CJEU from the general characteristics of the EU legal order), and (iii) the monopoly of the common court (CJEU) in the interpretation of EU law and EU competences. Combined, these three characteristics of the EU legal order are better suited to a federal state than to the features of an international organisation made up of sovereign states. This underlying tension could lead to conflicts of competence between the EU and a Member State at any time, even in the area of exclusive EU competences, as the PSPP judgment shows.[39] This underlying tension may also lead to conflicts between the CJEU and national constitutional courts.[40]

If we take it in an operative sense that the EU Member States are sovereign and think about its consequences, two further factors must be acknowledged. One is that the sovereignty of Member States must have indispensable and state-specific elements that make these states sovereign. If the constitution is the supreme embodiment of sovereignty in the legal sense, then these essential and state-specific features of

37 Editorial Comments, 2020, p. 972.; Chronowski, 2020, p. 77.; Simon and Rathke, 2020, p. 954.
38 Editorial Comments, 2020, p. 966.
39 Some contend that such claims about structural tensions and jurisdictional conflicts are misleading because Member States can collectively change the law; for example, Editorial Comments, 2020, p. 968.
40 Cf. Simon and Rathke, 2020, p. 955.

sovereignty appear in basic constitutional norms (*sovereign identity core of the constitution*). This core is context-dependent and formed in political and legal disputes.[41] The other factor is that relations with the EU need procedures and legal remedies to protect this core of the constitution.

Hereinafter, I refer to claims or concerns of Member States relating to the sovereign identity core of their constitution as *essential, exceptional, and specific constitutional claims or concerns*. Thus, this is not about any interest of a Member State. Member States may experience harm to their various interests in EU decision-making. This is almost natural in collective decisions based on compromises. Here, I refer to an interest of a Member State that in an exceptional situation raises constitutional concerns in relation to its sovereign identity core of its constitution. All this must be reckoned with if we take seriously the consequences of the proposition that an EU Member State is sovereign.

The enforcement of an essential, exceptional, and specific constitutional claim can typically be seen as a type of *ultra vires* claim (qualified *ultra vires* claim). There may be other objections from Member States that the EU has adopted *ultra vires* acts, but that do not affect the sovereign identity core of the constitution (but to some extent, necessarily violates sovereignty — normal *ultra vires* claims).[42]

Conflicts can only be prevented and balanced if there are channels through which Member States can raise their essential, exceptional, and specific constitutional concerns at the EU level. If such channels do not exist or are malfunctioning, constitutional courts can use their constitutional means to signal and temporarily resolve their problems. Obviously, their aim cannot be to break the unity of EU law and reduce its effectiveness. However, they may not in exceptional or final cases waive the use of constitutional protection means. In this sense, the GFCC's (now) ex-President Andreas Voßkuhle wrote about the 'emergency brake procedure' ('*Notbremse-Verfahren*') to be applied *ultima ratio*.[43]

Based on this, in practice, there are three levels in which a Member State can protect essential, exceptional, and specific constitutional interests (institutional-procedural background): (i) in EU legislative procedures (basically in the Council or European Council), (ii) before the CJEU, and (iii) by the use of constitutional review.

41 For an attempt to identify the range of such constitutional rules as inalienable constitutional competences, see for example, the *Lisbon ruling* of the Polish Constitutional Court, K 32/09 (24.11.2010.) point III.2.1. available at: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf (accessed: 30 October 2020); cf. Skomerska-Muchowska, 2017, p. 160. or the *Lisbon ruling* of the GFCC [*Lissabon*, BVerfG 2 BvE 2/08 (Urteil vom 30. Juni 2009) BVerfGE 123, 267] especially paras. 208–243.

42 A separate question is whether an essential, exceptional, and specific constitutional concern can be raised against an *intra vires* EU act. For example, before the Hungarian Constitutional Court, identity review can be not only an *ultra vires* review, but also *intra vires* review; Decision 22/2016. (XII.5.) AB, para. 46. It depends on whether the sovereign identity core of a Member State constitution delimits EU competences or only restricts the way in which EU competences are exercised. I left this issue open because it would need detailed further consideration.

43 Voßkuhle, 2009, p. 28.

3.3. In search of a balance at the second level: procedures before the CJEU

As in EU decision-making procedures, issues are mostly decided by a majority vote, and a Member State cannot always prevent a decision detrimental to its interests. This is the case even if it is about its essential, exceptional, and specific constitutional interests or if the Member State considers the decision-making body of the EU to be acting *ultra vires*. An individual Member State has procedurally lost control of decision-making in the common organisation, but its constitutional interests may be protected by the CJEU against *ultra vires* acts of the Union (second level of protection).

At the second level of protection, a normative background exists that allows essential, exceptional, and specific constitutional interests to be asserted before an EU court. In the case of *ultra vires* claims, this includes all Treaty provisions that describe the competences of the Union (*competence clauses*), that allow Member States to derogate from a general EU obligation (*saving clauses*), and possibly basic procedural rules governing the adoption of EU legal acts (*basic procedural rules*). The institutional-procedural background is also ensured (annulment and preliminary ruling procedures before the CJEU).

In EU matters where decisions are taken by majority vote, the CJEU has a key role in alleviating the fundamental structural tension. All depends on how the CJEU interprets the competence provisions and saving clauses in the Treaties. There are good examples in this regard (*Omega* ruling)[44] but there are also examples of a restrictive approach (*Melloni* ruling).

The Treaty of Lisbon introduced two provisions that can be considered as gates for general constitutional reservations. One is Article 4(2) TEU, which protects national identity against decisions of the EU (*reservation concerning national identity*). The other is Article 53 of the Charter of Fundamental Rights, according to which the Charter shall not be interpreted as restricting the protection of fundamental rights under Member States' constitutions (*reservation concerning fundamental rights*). These two provisions would be suitable for neutralising identity and fundamental rights reviews as developed by some constitutional courts. However, the CJEU took a restrictive approach in their interpretation.[45]

The CJEU has strongly limited the practical effects of the reservation contained in Article 53 of the Charter. In its notable *Melloni* judgment, it placed severe restrictions on the application of a national (constitutional) level of protection of fundamental rights. The national treatment must not jeopardise the level of protection as defined by the Charter and as interpreted by the Court and the primacy, unity, and effectiveness of EU law.[46] Article 53 of the Charter as interpreted therefore recognises only a narrow

44 EU: C: 2004: 614, where human dignity as a *national principle* proved to be a valid public policy exception, cf. Petersen, 2020, p. 1001.

45 Articles 346 and 347 TFEU (of pre-Lisbon origin) have functions similar to those of Article 4(2) TEU or Article 53 of the Charter. They list situations or fundamental State interests in respect of which States do not have to apply certain provisions of EU law. However, these provisions have a narrow scope, and at this time, no practical significance.

46 C-399/11 Melloni, EU: C: 2013: 107, para. 60. The wording of this statement is not accidental, the finding was confirmed by the Court, for example, in Opinion 2/13 Accession of the European Union to the ECHR, ECLI:EU: C: 2014: 2454, para. 188.

or even theoretical reservation. Moreover, this restriction is extremely vague and even contradictory. It is difficult to imagine specific cases where the application of a higher, national level of fundamental rights protection against EU acts would not in principle 'jeopardise' the coherence or effectiveness of EU law. Such reservations reflect the need precisely for individual treatment in exceptional cases.

Article 4(2) TEU protects the national identity inherent in Member States' constitutional and political systems and may serve as a counterweight to the primacy of EU law.[47] This is not easy to interpret, but if necessary, the CJEU will give the final word. Thus far, the Court has been very cautious, although it has had to rule on this Article primarily in internal market cases. Accordingly, the protected element of the constitutional and political system is the protection of the official language of the state,[48] the question of the status of the State and abolition of noble titles,[49] or the division of powers within the state.[50]

However, the Court considers this Treaty provision to be simply one of the saving clauses, the application of which is subject to at least three restrictions. The first is that the legal equality of Member States must also be respected. This is a counterbalance to the protection of national identity, as Member States have the same obligations under EU law and the effects of the reservation call for exceptional, individual treatment, in other words, *ad hoc* exemption from certain obligations based on EU legal acts. The second limitation is that there may be competing interests possibly enforceable against the protection of national identity. It is only an aspect of a comprehensive assessment made in a case against the free movement of persons,[51] for example, or the principle of non-discrimination.[52] The third limitation is that the CJEU considers the protection of national identity a normal, usual saving clause subjected to the scrutiny of necessity and proportionality.[53]

The court's approach can hardly be considered generous. Thus, it is questionable whether the essential, exceptional, and specific constitutional interests of Member States can prevail by the application of general saving clauses before the CJEU.

■ *3.4. In search of a balance at the third level: constitutional review?*

The question is whether a third level of filter is needed to balance the structural tension in the EU legal order, in other words, to maintain the possibility of constitutional review. In the current situation, some constitutional courts believe this is needed. It is a warning that care must be taken to maintain equilibrium at the EU level as well. On the other hand, it is an emergency brake procedure in the sense used by Voßkuhle.

47 von Bogdandy and Schill, 2011, p. 1447. However, the principle of equality of Member States enshrined in the same provision might support the primacy of EU law over national legal rules, see Lindeboom, 2020, especially p. 1042.

48 C-391/09 Runevič-Vardyn, EU: C: 2011: 291, para. 86.

49 C-208/09 Sayn-Wittgenstein, EU: C: 2010: 806, paras. 83. and 92.

50 C-51/15. Remondis, EU: C: 2016: 985, para. 40.

51 C-208/09 Sayn-Wittgenstein, EU: C: 2010: 806, para. 83.

52 C-393/10 O'Brien, EU: C: 2012: 110, para. 49.

53 E.g. C-202/11 Anton Las, EU: C: 2013: 239, para. 33. or C-438/14 Bogendorff von Wolffersdorff, EU: C: 2016: 401, para. 73.

The practice of the constitutional courts of Member States in this respect differs. (i) Some constitutional courts accept the absolute primacy of EU law and consider the remedies available before the CJEU sufficient to protect any constitutional interests that may arise. (ii) Numerous constitutional courts do not recognise the absolute primacy of EU law over constitutional norms, but have not established a procedure or have no jurisdiction to conduct a procedure to enforce this reservation. (iii) Some constitutional courts have in principle established the possibility of constitutional review over EU law, but this is either not or only indirectly exercised (over internal acts because their content is based on EU legal acts). For a long time, the GFCC did so by floating the possibility of constitutional review. Maybe we can call this a yellow signal. It means nothing more than readiness, an intention to actually apply such a review. The constitutional courts long considered this sufficient. According to Voßkuhle, 'emergency brake procedures' are justified when they do not have to be used.[54] (iv) Three constitutional courts have limited the effects of EU legal acts in exercising constitutional review. One of these is the GFCC. With its PSPP ruling, the yellow signal turned red. All three constitutional courts essentially limited the effects of EU acts on the grounds that they were adopted *ultra vires* by EU institutions.

The concern of the constitutional courts is clear. How can a Member State find protection against the CJEU's sometimes strong integrationist approach when the State's essential constitutional interests or sovereignty may clearly be harmed? There is currently no such forum within the EU. This is the point where some constitutional courts need to make their presence felt. Constitutional courts that retain the possibility of exercising constitutional review show extreme caution. They do not want to question the CJEU's authority, but do want to signal when the fundamental constitutional interests of a Member State are at stake. They do not provide any excuse for breaches of EU law, but want to make it clear that there is a limit to sincere cooperation in exceptional situations.

The self-restraint of constitutional courts is reflected at least in four respects. (i) Thus far, they have kept themselves away from exercising *intra vires* review by which a Member State seeks individual, exceptional treatment not only vis-à-vis the EU but also vis-à-vis the other Member States. Notwithstanding, the possibility of such a review is open at some constitutional courts (e.g. GFCC or the Hungarian Constitutional Court). (ii) They do not seem to intend to escape the second level, namely the procedure before the CJEU. In practice, this means that in the event of a relevant constitutional problem, the court will have to seek a preliminary ruling from the CJEU (*ultra vires* review as an *ultimate tool*).[55]

54 Voßkuhle, 2009, p. 28.

55 The Hungarian Constitutional Court, which keeps itself away from the preliminary ruling procedure, did not envisage such a step in its Decision 22/2016. (XII.5.) AB, where it laid the foundations of a possible constitutional review procedure. However, if a reference for a preliminary ruling is taken as a mandatory step in the case of *ultra vires* review, the constitutional court will not only confront an EU legal act considered *ultra vires* but will also have to subject to criticism the preliminary ruling of the CJEU delivered in the case in assessing the relevant legal act. The problem of double-control turned out well in the PSPP case. However, it raises the question of seeking a second preliminary ruling on the previous CJEU judgment, which is suspected to be *ultra vires*; cf. Simon and Rathke, 2020, p. 955.

(iii) In the system of EU cooperation, the constitutional review cannot be a usual tool. Its *exceptional nature* is declared and the conditions of its use are more or less described. (iv) As to the *ultra vires* review, constitutional courts want to exercise it only if there is a suspicion of a clear (manifest) excess of competence by the EU.

4. Concluding remarks

The possibility of national constitutional review by constitutional courts is a reality in the EU legal order as it currently stands. This exceptional and limited tool serves to maintain the equilibrium between the drifts of integration and Member State sovereignty. This follows from the sovereignty of Member States, and is consistent with common ideas we use daily relating to the EU legal system.

Is there *multilevel constitutionalism* or *legal pluralism* or *constitutional pluralism* in the EU? However, the essence of pluralism is that there is no hierarchical relationship between its autonomous elements.[56] If we talk about *constitutional tolerance* on the part of the EU, it expects from the CJEU to exercise judicial self-restraint with regard to the constitutional systems of Member States.[57] *European judicial dialogue* is a nice idea, but can only be considered if it is mutual and meaningful.[58] The CJEU could decrease the reservations expressed by constitutional courts by being more open to their essential constitutional concerns and establishing a higher or more intensive level of review for competence disputes.[59]

Constitutional review does not mean that national courts should not follow CJEU decisions. It shall not serve as an excuse for failure to fulfil EU legal obligations and may not damage the authority of the CJEU. This exceptional and ultimate instrument should be provided as a remote option to the constitutional courts to protect essential, exceptional, and specific constitutional interests. This is the basis for maintaining equilibrium. As Schneider puts it, *ultra vires* review 'is a constitutional mechanism that does not play hell with European law, but truly complements any union based on multi-level cooperation'.[60]

56 Skomerska-Muchowska, 2017, p. 106.; Wendel, 2020, p. 982. Moreover, one important feature of the pluralist model is that the ultimate judicial authority is not determined, Petersen, 2020, p. 996.

57 Martinico and Pollicino, 2008, p. 107.

58 The GFCC could not have been a good experience with the preliminary ruling proceedings. Even in the *Gauweiler* judgment, the CJEU hardly responded reassuringly to the GFCC's concerns. In *Weiss*, it was striking how briefly it dealt with the proportionality problem relating to the strong effects of the relevant ECB decisions on economic policy; cf. Grimm, 2020, pp. 947-948.

59 Simon and Rathke, 2020, p. 955.

60 Schneider, 2020, p. 970.

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LAURENT GROSCLAUDE[1]

The French «Société Par Actions Simplifiée – SAS», All Purpose Vehicle!

ABSTRACT: *The Société à Responsabilité Limitée or the limited liability company (SARL) and the Société Anonyme or the public limited company (SA) were perceived as relatively rigid or inadequate company types. Besides the reform of these traditional types of company forms, in 1994, a new company type was created as a flexible vehicle for businesses: the Société par Actions Simplifiée – the SAS (simplified joint stock company). Further changes in 1999 and 2008 made businesses even more adaptable. In 2019, more than 65% of newly created legal entities were established as a SAS; SARL around 30%, and SA less than 2%. SAS has a single member variant, the SASU (U for unipersonnel – one person). The French experience showed that the simplified joint stock company responded to a real economic and organisational need. The new company form based on limited liability has become widely accepted and useful. The simplified joint stock company was introduced by Poland as a new company form in 2019. Other states may also consider the French experience based on the comparative advantages of this peculiar business organisation.*

KEYWORDS: French company law, company law reform, flexibility of company forms, simplified joint stock company, comparative advantages of the simplified joint stock company.

Unlike common law jurisdictions, French company law was, until recently, very rigid and inadequate for modern business trends.

Two main types of vehicles were predominant until the 2000s: the SARL (Société à Responsabilité Limitée or the limited liability company) and the SA (Société Anonyme – or the public limited company). Created in 1925, the SARL[2] was designed to meet the needs of small traditional businesses. Since its legislation, it has only been revised minimally. The *intuitus personae* is at the foundation of the

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2 Commercial Code art. L. 223-1 and seq.

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SARL; for instance, the assignment of shares to third parties requires prior consent from the other partners. More than 1.4 million SARL are still in operation in France. This structure is currently popular and adapted to small entities. As a backbone of the development of capitalism at the end of the 19th century, the French SA was established in 1867 and totally reformed in 1966. An SA can make public offerings and be listed or remain private.[3] Until 2015, a minimum of seven shareholders were required by the commercial code at the foundation of the SA. This rule, based on historical considerations, was obsolete and has halted the creation of new SA. Until the reform of 2015, this partly explained the success of the SAS, which can be formed with only two founders (and one for the sole-member form – the SASU). Additionally, the SA is designed for large businesses and its governance structure is complicated and demanding.[4]

The relative inadequacy of French law to modern business needs resulted in quite significant consequences: (a) for the first time, in the early the 2000s, France ranked poorly in the World Bank *Doing Business* ranking. This popular ranking assesses world economies based on diverse criteria, one of which is the ease of establishing a new company. (b) Major companies made the choice to relocate their head office in other European Union (EU) countries said to be more business friendly. The choice to establish businesses in countries such as Ireland, the United Kingdom (UK), or the Netherlands (NL) was not based solely on fiscal reasons. For instance, in the late 90's, the mother company of Airbus (named EADS at this time, Airbus Group today) chose the form of a *Naamloze Vennootschap* based in NL because, at the time, Dutch law was more flexible than French. (c) Last but not least, this period has seen a significant increase in shareholder agreements. The reason is simple: what was otherwise impossible to provide in the articles of association of the company due to the legislation rigidity, became feasible within the framework of "private" agreements.

Urged by lawyers and legal practitioners, the French Parliament gave birth to a new type of company, the *Société par Actions Simplifiée* – SAS (Simplified Joint Stock Company) in three steps: (a) First, in an act promulgated on 3 January 1994,[5] the newly created SAS was only accessible to groups of a significant size. All shareholders must have been legal entities with a minimum capital of 1,5 million Francs (currently 230 000 €); this vehicle was mostly used as a holding company or a joint venture for large groups. (b) The second act was voted in on 12 July 1999;[6] the SAS opened to individuals and became a very successful vehicle for small- and medium-sized businesses. (c) Last,

3 Monsèrié-Bon and Grosclaude, 2016.

4 There are two main forms of governance organisations in the French SA. The most popular is the one with a Board of Directors and a Chief Executive Officer (CEO) (Com. code art. L. 225-17 and seq); another model is the one with a directory and supervisory committee. The latter has been inspired by German business law (Com. code art. L. 225-57 and seq).

5 Loi n° 94-1 du 3 janvier 1994 ;

6 Loi n° 99-587 du 12 juillet 1999 ;

a third act dated 4 August 2008[7] has made the SAS more attractive by waving minimum capital requirements and opening to sole-membership.

Since then, the SAS has always maintained its popularity; in 2019, it represented more than 65% of the newly created legal entities in France.[8] The SAS is compatible with all types of activities and all business sizes, with only one restriction: the exclusion from public offerings and, thus, stock listing. There is almost nothing one cannot operate within the framework of an SAS. Therefore, the "old" SARL is at risk.

1. SAS at-a-glance

The main features of this type of company are the following: (a) SAS is a form of commercial company. Therefore, regardless of the activity offered, this entity is always regarded as commercial. SAS has no limitation when it comes to the type and size of the activity. It can fit both very small enterprises and large firms. As for the type of economic activity, the spectrum of the SAS is one of the broadest: all commerce, industry, craft industry, liberal professions, both domestic and international. (b) SAS remains a private company that is prohibited from making a public offering. Thus, it cannot be listed on a stock exchange. Depending on the clauses provided in the articles of association, the SAS can be open to third parties or completely private.[9] (c) SAS can be set up by individuals and/or legal entities, profitable or not-for-profit. Thanks to its flexibility, this structure is popular as a parent/holding company or to frame an international joint venture. When it comes to the minimum number of shareholders, the French commercial code provides the simplest solution: one. The SASU (U for *unipersonnel* – sole proprietor) represents one-third of the total companies created in France each year; it is used both by sole entrepreneurs to protect their personal assets and groups to launch fully-owned subsidiaries. (d) Indeed, SAS is a limited liability company, in which shareholders do not risk their own patrimony (unless they are the guarantor for the legal entity). Minimum contributions are not required, and the SAS can be constituted with a minimal investment of only 1 €.[10] (e) The procedure of incorporation in France is quick, cheap, and simple; almost all formalities can be completed online.[11] Apart from the amount of capital[12] and the law firm honorarium, the current fees for the creation of an SAS do not exceed 300 €.

7 Loi n° 2008-776du 4 août 2008 ;

8 In comparison, the SARL has represented around 30 % and the SA less than 2 %.

9 See point 4 *infra*.

10 Before 2008, the capital requirement was 37 000 €.

11 The government of France is currently (2021) establishing a one-stop-shop to complete all the business procedures for start-up, amendments, dissolution… concerning all enterprises, both sole-ownership and companies. *Loi PACTE* dated 22 May 2019.

12 Com. code art. L. 225-3 provides that the only 50% of the capital must be paid at the time of start-up. The balance must be paid within five years.

2. Articles of association vs. mandatory provisions

The distinctive feature of the SAS in comparison to all other business vehicles is that it has very few mandatory provisions. Therefore, there is adequate flexibility for the articles of association to rule governance, collective decisions, and relationships between shareholders.

When one opens the French commercial code, there is a striking number of provisions devoted to each company: (a) SARL – 44 articles, of which most are mandatory; (b) SA – more than 250 provisions, mostly mandatory; (c) SAS – 22, of which most are not mandatory and simply validate the articles of association.[13]

This latitude in drafting articles of association is highly appreciated by lawyers and *in-house* counsel, who can customise the organisation of the SAS to meet the real needs of their clients. In practice, whereas almost all SA and SARL are copy-pasted and look very similar, most of the SAS are unique, especially when it comes to governance structure.

In return for this freedom, and unlike other types of companies, the Commercial code does not provide any default rules, which means that the articles of association have to be drafted in a very detailed manner to anticipate all situations.

To illustrate this drawback, let us compare the issue of the Director's dismissal in the SARL and in the SAS. In SARL, article L. 223-25 Com. code provides that the dismissal of the Director (*gérant* in French) requires a collective decision taken by the majority of shareholders. This text adds that the Director is entitled to damages if the dismissal decision does not rest on fair grounds. The articles of association may remain silent, and in this case, the legal provision applies. When it comes to the SAS, the articles of association may decide freely if the President is or is not dismissible and, if so, under which conditions (grounds, procedure...); however, if the articles do not foresee this situation, no default rule is taken from the SA legislation. The SARL rules do not automatically apply. In the case of a dispute, a court will be powerless.

Another example is the requirement of a quorum for collective decisions. Here again, the company charter is free to set (or not) a quorum for collective decisions. Sometimes, the founders or their counsel set forth a quorum upon first convening (one half of the shares, for example) and do not provide any alternatives if this quorum is not met. In this particular case, the default rules contained in the commercial code for the SA will not apply and the SAS will be in a difficult situation, whereby no decisions can be made.

These two examples clearly show the benefits and consequences of applying such freedom, in which the drafters of the articles of association are experts who master this business vehicle and are aware of the absence of a default rule. Articles must be comprehensive.

13 Nevertheless, some sections of the SA legislation are applicable to the SAS, like the ones on capital, issuance of securities, etc.

3. SAS governance and collective decisions

In most of the companies in France, governance and collective decisions are regulated through civil or commercial codes, with limited room for articles of association. These pieces of legislation deal with the architecture of the governance (type of organs), the conditions for appointment and dismissal, the powers, the liability, financial compensation, collective decisions, competence of the shareholders' general meeting, as well as the conditions of a majority and/or quorum.

In contrast, the SAS offers almost unlimited freedom to founders. The only mandatory provisions pertain to (a) the obligation to appoint one "President" of the SAS, acting as a CEO;[14] (b) the non-invocability to third parties of the provisions limiting the powers of the President; (c) the Directors' liability, both civil and criminal: grounds for liability, type of actions, possible plaintiffs, and statutes of limitation are non-negotiable; and (d) a list of necessary decisions to be taken by means of collective decision-making.

On all the other aspects, governance and collective decisions are a blank page for the founders, who can decide freely on the governance structure. At the very least, the company shall appoint one President, but there's a room for any collegial body. Two models are often found: a strategic collegial organ[15] endowed with decision-making powers and/or a supervisory collegial organ aiming at controlling governance bodies (empowered with a right of information and sanction). In some middle-size SAS, the governing structure could be more complex, including various *ad hoc* committees in charge of remuneration, long-term strategy, and environmental policy.

In addition, the articles of association frequently make provision for a "General Director", who may play the role of a Deputy President, based on the stipulations of the articles of association. This person can have exactly the same powers as the President, but surprisingly the commercial code prohibits the creation of a "Vice-President" position.

Deputy General Directors, in charge of a sector of the activity, may also assist the General Director: (a) decide freely on the President and members' governance organs status: conditions for appointment and dismissal; power limitation and financial compensation are decided by the articles of association; the President is not necessarily elected by the shareholders and could be appointed by a minority shareholder or, in extreme circumstances, by a third party; (b) without limitations, set the modalities of collective decisions: by means of teleconference or videoconference, in the presence of shareholders, with or without quorum requirements, etc. As for the conditions of majority, most of the SAS makes the distinction between annual general meetings,

14 Com. code art. L. 227-5.

15 For example, the aircraft manufacturer Airbus is incorporated as a SAS and has a Board of Directors, which has more powers that the traditional Board of Directors in a public limited company (French SA).

in which decisions are taken based on an absolute majority rule, and extraordinary general meetings, which are governed by a qualified majority rule.

Even though the imagination of the drafters is not unlimited, in practice, SAS governance models are very diverse and each entity can be tailored to the needs of its founders; thus, each appears unique in this regard.

4. Provisions on share transfers

Here again, freedom is the rule and mandatory provisions are the exception. Pursuant to articles L. 227-13 to 16, the articles of association may (a) submit the assignment of shares to the company's assent; (b) freeze any share transfers, thanks to the introduction of an inalienability clause; and (c) provide the possibility of shareholder exclusion.

The shares assignment approval (in French *clause d'agrément*) is simply an option in the hands of the founders. If they do not include such a provision in the articles, the SAS will be fully open; conversely, the founders may lock the SAS by requiring that all transfers receive prior approval. In practice, what is often observed is an in-between clause (i.e., submitting only certain transfers, say the ones to third parties, for shareholder approval). Since no default provisions apply,[16] the drafters must foresee all the modalities of the clause. This includes: (a) the limits to which the transfer clause applies; a scope has to be defined for the type of transfer (share purchase only, donation, exchange, etc.), and the category of assignee concerned: third party, existing shareholders, familial circle, spouses, etc. (b) the procedure of the approval: means of information of the assignment project by the assignor, content of the information, recipient, time-frame for the decision, organ or person in-charge, application of the *silence equals consent* rule. (c) the solution in case the assignment is not cleared: shares purchaser and price issues.

The inalienability clause[17] is a very atypical provision that can be introduced in the articles of association to offer more security to an investor. As a serious derogation to the principles of ownership rights set forth by the French constitution, inalienability is only possible for a maximum of 10 years. However, the articles of association can invoke various forms of this clause by targeting certain shares or certain shareholders, or by limiting its application to certain transfers (purchase f.i.). In practice, the inalienability clause is not commonly used.

The exclusion clause is probably the SAS' most frequently drafted provision. Unlike other forms of companies, the SAS founders may explicitly draft such a clause to compel a shareholder to sell his/her shares[18]. This clause is useful in solving

16 See point 2 *supra*.

17 Com. code art. L. 227-13.

18 It is still unclear if an exclusion clause may be introduced in the articles of association of other forms of companies.

intra-company conflicts, as well as to squeeze out shareholders who concurrently hold another position (employee or Director) that they have lost for some reason. The drafting of an exclusion clause requires special attention due to both the litigation risk and the requirements set forth by the French *Cour de cassation*. A valid exclusion clause shall comprise the following: (a) The grounds for exclusion, even if article L. 227-16 Com. code does not require any formal reasons for excluding a shareholder. Discretionary exclusion is difficult to conceive and would represent a significant litigation risk. (b) The exclusion procedure. On this particular aspect, the articles of association may designate any organ of the SAS or even a person to decide on the exclusion. French courts have ruled on two limits pertaining to the procedure: first, if the decision is made by way of vote, the shareholder whose exclusion is intended shall take part in this deliberation[19]. Second, pursuant to Article 6 of the European Convention on Human Rights[20], the procedure shall respect the rights of defence, which means that the shareholder has to be informed of the grievances and has the right to respond before the decision is made. (c) The clause shall foresee the question of the determination of the assignee of the shares of the excluded person, and obviously determine the price. (d) After the exclusion has been pronounced, the shareholder may be reluctant to transfer his/her shares to the designated assignee; the articles of association may provide the suspension of the shares' non-financial rights, that is, at principal, the voting right.

5. Financing opportunities

When it comes to financing instruments, the SAS offers many opportunities. Once again, the only limitation is the prohibition of making a public offering (I.P.O.) and, thus, quoting shares on a stock-exchange market.

SAS can issue ordinary shares, as well as preference shares.[21] The latter are often issued to counterbalance the minority positions of venture capital investors. Preference shares may provide specific rights, such as multiple voting rights, veto rights, preferential right to subscribe, right to a definite number of seats on the board of the company, etc.

The SAS can also issue bonds (not for listing) and quasi-equity instruments, such as convertible bonds or subordinated securities. Quasi-equity instruments will be of high utility in the context of an economic crisis in relation to Covid-19. These financial instruments offer the advantage of reinforcing the company's proper funds and, therefore, do not weaken its balance sheet. In addition, most quasi-equity securities are compliant with EU competition rules, especially the prohibition of state aid.[22]

19 Cass. com 23rd October 2007 (N° 06-16.537).
20 Right to a fair trial – Convention dated 4th Nov. 1950.
21 Com. code art. L. 228-11 and seq.
22 The government of France announced in September 2020 that its plan for economic recovery will resort to these type of quasi-equity instruments.

In addition, SAS may raise funds through crowdfunding platforms. Recent crowdfunding legislation in France is very welcoming and has set high caps for both equity crowdfunding and crowdlending.[23]

6. Tax regime

French legal entities may be subject to two different tax regimes: income tax or corporate tax. By default, the SAS is subject to the corporate tax system, which is a flat tax system in which benefits are taxed at a single rate of 28%.[24] SMEs benefit from a reduced rate of 15% of their taxable profits up to 38 120 €.

Subject to size requirements, SAS may elect the income tax system for its first five years of operation. Income tax is a "flow-through" system, whereby benefits are not taxed at the level of the legal entity but in the hands of the shareholders and in proportion of their share in the capital. When a company generates a deficit, which is often the case at the early stage of operation, it may contribute to reducing the personal taxation of its shareholders.

7. Conclusion

The SAS has many advantages compared to other vehicles that experts had predicted 10 years ago would cause the gradual extinction of the *old* SARL. Contrary to all expectations, SARL still resists the assaults of the young and flexible SAS. Among the justifications for this relative resistance, the social regime of the Directors can be less costly in the SARL (even though less protective) and, from the legal perspective of personal civil liability, a SARL start-up can be less risky than a SAS.

23 SAS can access crowdfunding platforms up to 8 M€ per year.

24 This rate reached 33% before 2018. At the end of President Macron's term in 2022, it will decrease to 25%, which is the average taxation rate in Organisation for Economic and Co-operative Development (OECD) countries.

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TATJANA JOSIPOVIĆ[1]

Restrictions of Fundamental Rights in Private Law Relations in the Special Legal Order, with Exceptional Regard to the Specific Circumstances Caused by the Epidemic

ABSTRACT: *In this text, the author analyses the intervention measures within the realm of private law relations that were aimed at alleviating or possibly also eliminating the consequences of the serious epidemic. The author presents and analyses the measures introduced in Croatian law to protect private law entities in their private law relations affected by the consequences of the pandemic and the public health measures. The author's focus is on the impact of these measures on the protection and restriction of fundamental rights in private law relations to establish whether they met all the necessary requirements when allowing for such restrictions of fundamental rights in private law relations. The aim of this paper is to consider the criteria for the assessment and proportionality of these measures which in private law relations restrict people's fundamental rights while being imposed to protect people's health in a serious epidemic.*

KEYWORDS: fundamental rights, specific circumstances, epidemic, private law, rights restrictions, proportionality, balancing test.

1. Introduction

A very serious epidemiological situation caused by the COVID-19 pandemic called for diverse and extremely restrictive intervention measures to protect public health. These protective measures have had a serious impact on societies and on almost all aspects of people's lives, their businesses, the operation of legislation, public administration, and judiciaries, as well as the functioning of educational and cultural institutions and health and social systems of countries worldwide. Any decisions on how to organise

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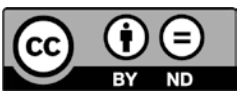

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the content and the intensity of these measures against such a serious epidemiological situation have been very challenging for all national legislators because never before have they been confronted with such a complex and dangerous health crisis.

When it started, the situation called for urgent establishment of a system to ensure optimal and efficient protection of people's health and a fast reaction to prevent further spreading of the infection. However, it was very important to organise the necessary measures in such a way that their implementation would not result in a total standstill of all social, cultural, educational, and economic activities; a complete cessation of the work of public administration and the courts; and the loss of jobs, collapsed businesses, bankruptcies, insolvencies, and over-indebtedness because of unemployment. The implemented measures were aimed at restricting the movement of people, the operation of companies, the provision of services, and the usual activities of the courts and public bodies. Other types of measures were also introduced to give support to specific social groups that faced the greatest exposure to infection (e.g. monetary subsidies were given to employers to preserve workplaces, to protect them from insolvency, to free people from having to fulfil their financial commitments or to postpone the payment of their tax obligations and other expenses). It was also very important to think immediately of alternative ways of doing business (e.g. electronic delivery of court submissions and applications to administrative bodies, online court trials, online conferences, and the like). All the protective measures had to be organised in such a way as to observe all fundamental democratic values, the rule of law, and fundamental human rights as integral components to any democratic society. The content of the imposed measures and their intensity had to be carefully selected, so as not to infringe on people's fundamental rights or to do so to the least extent possible. If the restrictions were unavoidable and absolutely necessary, they had to be justified and proportionate to the goals the measures were meant to achieve.[2]

In this text, the author analyses the intervention measures within the realm of private law relations that were aimed at alleviating or possibly also eliminating the consequences of the serious epidemiological situation caused by COVID-19. The author presents and analyses the measures introduced in Croatian law to protect private law entities in their private law relations affected by the consequences of the pandemic and the public health measures. The author's focus is on the impact of these measures on the protection and restriction of fundamental rights in private law relations to establish whether they met all the necessary requirements when allowing for such restrictions of fundamental rights in private law relations. The aim of this paper is to consider the criteria for the assessment and proportionality of these measures which in private law relations restrict people's fundamental rights while being imposed to protect people's health in very serious epidemiological circumstances. A question arises whether it is possible to apply a traditional and well-known test of proportionality, usually applied in vertical relations regarding the measures restricting fundamental rights, or whether

2 See e.g. Council of Europe-Information Documents, 2020, p. 2. See Ludwig Boltzman Institut Menschen Rechte, Universität Wien, 2020, p. 5.

the criteria for assessing the allowability of restricting fundamental human rights should be determined by specific private law relations and in particular by the circumstances in which they are created, achieved, and terminated by the will of equal private law entities.

2. Protective measures and private law

The consequences of this serious epidemiological situation and the implementation of protective measures to remove them or to mitigate them had a serious impact on the position of private law entities in their private law relations from the very beginning of the crisis. In a whole series of private law relations, and particularly those involving residential lease contracts, commercial lease contracts, credit contracts, residential mortgage loan contracts, and other private law relations characterised by a relationship between debtor and creditor, significant changes have occurred in the economic positions of the parties. Because of this health crisis followed by an economic crisis, many debtors were suddenly no longer able to fulfil their commitments. The pandemic and the measures aimed at prohibiting or restricting the operations of economic enterprises resulted in decreases of their expected income, and it became difficult for them to regularly meet their contractual obligations or to pay their outstanding debts. As a result, already at the outset of the epidemiological crisis, it was necessary to modify contracts, to terminate them, to seek forced collection of debts, or to activate various private law instruments which protect creditors in cases of failed or irregular fulfilment of financial obligations.

However, because of very specific circumstances caused by the pandemic, its scope and intensity, as well as its unpredictable duration, it was obvious that the application of traditional private law rules and instruments providing for market relations cannot fully and efficiently solve the existing problems in private law relations caused by the pandemic, nor can their application prevent potential problems in the fulfilment of private law commitments.[3,4] It became clear that acting in accordance with the general private law rules providing for the duty to act in good faith and fair dealings in performing a free market obligation, using traditional remedies for non-performance, termination of a contract, forced collection of claims, forced evictions from rented flats and business premises, institution of insolvency proceedings, or any similar method,

3 Alderman, R. et al., 2020, p. 438; Wiewiórowska-Domagalska, 2020; Ganuza and Gómez Pomar, 2020; Schmidt-Kessel and Möllnitz, 2020.

4 The same was the case during the financial crisis of 2008 when, because of a high rate of unemployment and over-indebtedness, it was impossible to collect debts or to fulfil the obligations arising from a loan contract, a contract for public services, and the like. Not even then was it possible to remove the consequences of the crisis reflected in private law relations through the classical private law provisions, but specific *ad hoc* measures were adopted to write off debts, to postpone enforcement, to protect people's homes in enforcement proceedings, or to convert foreign currency loans. See e.g. Josipović, 2019.

would lead to an even deeper social and economic crisis or to even greater restrictions and violations of some fundamental rights (the right to a home, the freedom to conduct a business, the right to property, the right to an effective remedy). The application of traditional rules which in the national private law provide for a change or termination of private law relations, an agreed change or modification of contractual relations, or an exemption from the obligations or any other such measure would not adequately protect the parties in these specific circumstances caused by the pandemic. Not even the application of private law provisions on the stipulation of private law relations, such as the interruption of the limitation period for special circumstances; the termination or alteration of a contract when its fulfilment is impossible or more difficult because of some *force majeure*; or unpredictable and suddenly changed circumstances (*clausula rebus sic stantibus*) that could not be prevented, removed, or avoided would not always lead to an efficient and just solution to a problem in private law relations caused by an epidemiological crisis.[5] In most cases, the application of such private law provisions is based on the parties' agreement, or on a court decision by which an individual private law relationship is terminated or modified in some extraordinary circumstances.[6] All this requires negotiations; readiness of all parties to amend the contract; or voluntary omission to take measures to collect outstanding claims or, if there is no agreement, to take account of any expenses and arrears, to bring court actions to settle disputes arising from *force majeure* or extraordinary circumstances. In addition, the traditional enforcement law provisions, including special rules on the exemption from enforcement and its postponement in the cases provided for by law cannot ensure a full protection of debtors who, because of the pandemic, are prevented from paying their outstanding debts. Although all these rules usually take into consideration the difficult social, family, or economic situation of debtors, the reasons for their application cannot always be equated with the circumstances caused by the pandemic. Possible postponement or exemption from enforcement must be decided by the court depending on the circumstances of every individual case.

Private law provisions are based on private autonomy and the freedom to enter into contracts. The concept of stipulation of private law relations in national legal orders is based on their stipulation in situations which enable the parties to act in the usual way, to do business, to find permanent jobs, and to avail themselves of legal remedies to protect their rights before the courts. It is the aim of private law provisions, in accordance with the values and principles on which the national legal order is based, to balance the parties' rights and obligations in various private law relations, to ensure the legal freedom of contract, and to efficiently protect their rights. The application of the private law provisions establishes a balance between the parties' rights and obligations and results in the adjustment of these relations to the expectations the parties

5 Alderman, R. et al., 2020, pp. 438–440.

6 For a comparative overview of amending or terminating contracts because of the changed circumstances in individual national legislation in Europe, see von Bar et al., 2009, pp. 737–741.

had at the time of their establishment.[7] However, all these rules, designed for normal circumstances, cannot adequately solve or prevent all the problems in private law relations arising from the pandemic, problems that seriously endanger people's lives and health, their property, and their economic activities, and finally result in extensive economic damage.[8]

These circumstances caused by the pandemic have a drastic impact on people's capacity to fulfil their obligations, by changing the legal position of lessees, workers under labour contracts, and creditors who must collect their outstanding claims. The nature of the affected private law relations varies, and they call for special *ad hoc* measures to regulate them, to avoid even greater damage for the parties and for all parties to achieve a new just balance in their private law relations in accordance with special circumstances caused by the pandemic.

Since the beginning of the pandemic, countries have intervened in various ways in private law relations, and a number of public law measures have been introduced to protect the population's health. It was also important to maintain and continue all business activities, preserve the validity of the existing contracts,[9] and the fulfilment of contractual obligations,[10] as well as to ensure some fundamental rights (the right to a home, the right to work, freedom to conduct a business, the right to property). The applied approach determined the private law areas where such immediate intervention was necessary (loan agreements, lease agreements, and the like).

The introduced measures addressed a number of very complex issues such as the financial protection of debtors from enforcement and compulsory claim collection, the termination of credits, loan defaults, financial protection of creditors from insolvency, loss of income and/or money caused by non-payment of debts, as well as the protection of consumers from aggressive debt collection. Some measures were aimed at maintaining the *status quo* in contractual relations,[11] or at facilitating the debtor's position. Some of them targeted the position of debtors, or were aimed at temporary relief of the obligations of consumers and companies experiencing financial distress, enabling debtors to keep their businesses going, making it possible for debtors to protect their homes and families, and generally raising consumer awareness of these new financial challenges. Indeed, the measures were very diverse, but they were all informed by a close dialogue between the legislators, particular industries, consumer and business associations, government, and independent regulators. However, the most common measures were such legislative measures as specific new laws or amendments to the existing laws to address the problems of the standstill, or postponement of the exercise of people's rights, as well as the implementation of the parties' private law commitments. It is often necessary to extend, for at least a short period of time, the existing

7 Menezes Cordeiro and Menezes Cordeiro, 2020.
8 The same in Alderman, R. et al., 2020, p. 439.
9 Ganuza and Gómez Pomar, 2020.
10 Wiewiórowska-Domagalska, 2020.
11 Some authors emphasise that such measures are based on the principle of risk crystallisation – see Menezes Cordeiro and Menezes Cordeiro, 2020.

contractual relations (e.g. in lease contracts, mortgage credit contracts, etc.) and/or postpone the pending court proceedings for the payment of claims (in enforcement or bankruptcy proceedings).[12] In addition to all the above measures, various government measures and policies, court and supervisory guidance systems (independent regulators), national bank recommendations, professional associations' rules, voluntary guidance, company policie, as well as measures of special market supervision, were introduced.

The main characteristics of such measures have been temporary duration (for a clearly specified time limit), possibility of extension, application to only some specific private law relations such as loans or lease agreements with lists of exceptions stipulated by law. In most cases, such measures have consisted either of a voluntary or a mandatory moratorium on the rights and the fulfilment of obligations arising from contractual relations (measures related to the existing and/or new agreements),[13] to temporarily postpone forced payments (enforcement) or delay the institution of bankruptcy proceedings (measures related to insolvency):

12 See Alderman, R. et al., 2020, pp. 441–445. In Austrian law, temporary suspension to terminate residential lease contracts and short-term extension of contracts (up to 1/7/2022) are regulated. See Ofner, 2020, pp. 107–108. Slovak law provides for temporary suspension to terminate residential lease contracts from 1/4/2020 to 30/6/2020. See Gajdošová, 2020. Portuguese law provides for temporary suspension to terminate residential lease contracts (up to 30/9/2020), postponement of paying rent, postponement of evictions for residential and non-residential tenancies (up to 29/5/2020), and a moratorium for credits. See da Costa Afonso, 2020; Menezes Cordeiro and Menezes Cordeiro, 2020.I
British law provides for special notice periods when cancelling lease contracts for non-payment. See Beale and Twigg-Flesner, 2020. German law provides for the right to temporary rejection of the fulfilment of the contract by the consumer or SMSs from essentially long-term contracts concluded before 8 March 2020, temporary postponement of the right to cancellation of a lease contract for non-payment, *ex lege* postponement of the obligation for three months under consumer contracts, and the right of organisers of leisure activities to issue vouchers instead of refunding the costs to users of services. See Schmid, 2020, pp. 114–115; Schmidt-Kessel and Möllnitz, 2020. Greek law regulates, among other things, *između ostalog*, temporary postponement of paying rent from residential lease contracts; see Dacoronia, 2020. Spanish law provides for the postponement of evictions from residential buildings and rented flats, extension of lease contracts for six months, postponement of the payment of rent, and a moratorium on the payment of rent. See Gómez-Ligüerre and Milà-Rafel, 2020. Swiss law regulates time limits for paying rent prolonged in residential lease contracts. See Wolf and Minnig, 2020. Italian law introduced postponement of evictions of lessees from residential buildings. See Pertot, 2020, p. 138. Lithuanian law regulated, for example, exclusion of the right of the consumer to abandon a contract because of non-payment of the obligations from the contract on event services and issuance of vouchers. See Mikelėnas, 2020. Russian law has special rules on postponement of paying the obligations from a loan agreement, the debtor's right to change the conditions of a loan agreement, the lessor's obligations to change the lease agreement to lower the rent, and postponement on paying the rent. See Dmitrikova and Sychenko, 2020. Polish law has special rules on the extension of lease contracts, prohibition on increasing the amount of rent, consumers' vouchers for cancelled events, and suspension of the payment of obligations from a loan agreement. See Wiewiórowska-Domagalska, 2020.

13 See Ganuza and Gómez Pomar, 2020.

INSOLVENCY-RELATED MEASURES	• special moratorium for insolvency proceedings (*ex lege*, on the debtor's request without the creditor's consent) • suspension of the obligation to file for insolvency • suspension of directors' obligations to file for bankruptcy proceedings • suspension of the creditors' right to sue debtors for insolvency • suspension of the fulfilment of a restructuring plan • a new right of a debtor to apply for a conversion of the bankruptcy liquidation process to a restructuring or a settlement process • protection in bankruptcy proceedings for newly granted loans (loans are not considered as disadvantageous to creditors)
ENFORCEMENT-RELATED MEASURES	• temporary restrictions on debt collection and the enforcement proceedings moratorium • moratorium on the execution against pledged property • unblocking debtors' accounts • measures to stop the enforcement of monetary debts • moratorium on evictions • moratorium on public auctions • suspension of limitation periods for debt-collection system
MEASURES RELATED TO EXISTING AGREEMENTS	• temporary relief from loan repayments • obligation to offer new repayment terms for the existing credit obligations • statutory rescheduling of consumer loan payments • voluntary repayments/restructuring programme for loans – loan extension • temporary restrictions on interest, fees, charges associated with late payments or loan defaults • temporary prohibition against withdrawing, cutting off, or suppressing loans • temporary prohibition against terminating agreement unilaterally or judicially because of breach of payment obligations by the affected business entity • suspension of landlords' rights to terminate leases/tenancy/rent agreements if the failure to pay is due to the effects of COVID 19 • short extension of fixed-term residential tenancy agreements • extension of time limits for paying rent • easily accessible, prompt, and fair relief options from contractual obligations • nullity of debtor's transactions on transferring property and undertaking obligations during the moratorium • suspension of the effects of defaults and delays of payments • suspension of payment obligations arising from loans • suspension of the prescription for claims • suspension/extension of procedural time limits for remedies • issuing travel vouchers for travel package contracts • prohibition on rent increases • reduction or fixed prices for utilities, electric power, water supply, gas

MEASURES RELATED TO NEW FINANCIAL AGREEMENTS	• new COVID financial instruments accessible via digital means with low interest • new transparency rules • special protection in bankruptcy

Table 1 Measures for the protection from insolvency/debt problems caused by COVID-19 [14]

As already noted, the organisation of measures or the mitigation of the consequences of the pandemic when it comes to private law relations required a very specific approach aimed at balancing the conflicting subjective private rights of the parties to achieve a just balance between them in the difficult conditions arising from the pandemic. Namely, these are measures with so-called horizontal legal effects because they apply equally to natural or legal persons whose subjective private rights deserve the same level of protection. In addition, the application of these measures may also have an effect on the exercise of fundamental rights of the participants in private law relations (the right to a home, the right to freely conduct business, the right to an effective remedy). Some of these fundamental rights may be restricted.[15] In some cases, the achievement of optimum balance between these fundamental rights is very difficult (such as between the right to property and the right to a home). This is why the approaches to the stipulation of these measures by national legislators were different for specific private law relations.

In some cases, national legislators regulated measures with *ex lege* moratorium effects without any possibility of lifting the moratorium or measures with the possibility of lifting the moratorium in whole or only in part *vis-à-vis* a concrete consumer or business entity (if not affected by the COVID 19 crisis). In some cases, these have been individual measures determined by the court or an administrative body on the basis of a general regulation. Some measures have had an 'opt in' effect (voluntary application on request), while others offered an 'opt out' effect (voluntary exclusion, application of ordinary rules on request). At the same time, there are also differences in the organisation of the personal and substantial area of application of the measures. Some of them apply only to particular types of contracts (for example a residential lease contract), or only to consumer contracts, in other words, the protection of natural persons as consumers. Other measures apply solely to the claims arising from the COVID-19 crisis, while some relate to all claims existing before and during the COVID-19 crisis.

14 Data in the table categorised based on the data on the measures taken in individual countries were published in the following publications: Squire Patton Boggs, 2020a; Squire Patton Boggs, 2020b; European Commission Directorate-General Justice and Consumers Directorate A: Civil and Commercial Justice Unit A.1 : Civil justice, 2020a; European Commission Directorate-General Justice and Consumers Directorate A: Civil and Commercial Justice Unit A.1 : Civil justice, 2020b.

15 See Alderman, R. et al., 2020, p. 444; United Nations Human Rights Special Procedures (2020). It arises from the recommendation in the document that through the measures taken in individual countries regarding a moratorium on the payment of obligations from loan agreements and eviction documents, the fundamental housing rights of renters and mortgage payers are protected.

3. Protective measures in Croatian private law

Because of the coronavirus pandemic, the Republic of Croatia has not activated Article 17 of the Constitution according to which, during a state of war, or any clear and imminent danger to the independence and unity of the Republic of Croatia, or in the event of any natural disaster, fundamental rights and freedoms may be restricted.[16,17] Such a decision is normally made by a two-thirds majority of the Croatian Parliament or, if the Croatian Parliament is unable to convene, at the proposal of the government and with the countersignature of the Prime Minister, by the President of the Republic (Art. 17/1). When introducing protective measures, Croatia also did not file an application pursuant to Article 15 of the European Convention on Human Rights providing for a derogation from the obligations under the Convention in time of war or other public emergency threatening the life of the nation.

In the Croatian legal order, the adoption of measures to protect the health of its population in the circumstances of an epidemic is based, on the one hand, on the official proclamation, made on 11 March 2020 by the Minster of Health, for the entire territory of the Republic of Croatia about the existence of COVID-19.[18] Pursuant to Article 1 of the Act on the Protection of Citizens against Infectious Diseases,[19] the COVID-19 epidemic is considered to be an infectious disease whose prevention and suppression is of interest for the Republic of Croatia. Therefore, the Minister of Health and the Civil Protection Headquarters of the Republic of Croatia[20] are authorised to order special safety measures to protect the population from the pandemic. Such measures may differ: from organising a quarantine and self-isolation; to a prohibition against travelling or movement of people; to restrictions or prohibitions on circulation of certain types of goods and products; to the prohibition on using particular facilities, equipment, and means of transport.[21] The Civil Protection Headquarters of the Republic of Croatia and its members have adopted numerous decisions to prevent the infection from spreading in specified segments of society, business entities, and educational and healthcare institutions.[22]

16 Arts. 17/2,3 of the Constitution laid down that, in such cases, 'the extent of such restrictions must be adequate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, national or social origin. Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or unusual treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion.'

17 See Bodul and Nakić, 2020a, p. 2.

18 See the Decision on the Proclamation of the COVID-19 epidemic caused by SARS-CoV-2. This Decision was rendered based on Art. 2, para. 4 of the Act on the Protection of the Population from Infectious Diseases and Art. 197 of the Healthcare Act.

19 Official Gazette/*Narodne novine* (OG) 79/07, 113/08, 43/09, 130/17, 114/18, 47/20

20 If an epidemic of an infectious disease is involved, it is proclaimed by the World Health Organization to be a pandemic

21 See Art. 47 Act on the Protection of Citizens against Infectious Diseases

22 See decisions of the Croatian Civil Protection Headquarters

On the other hand, the adoption of protective measures is based on the new concept of '*special circumstances*' (*posebne okolnosti*) introduced in the Croatian legal order particularly because of the introduction of the measures against the pandemic. These are the circumstances which, because of the urgent need to protect the population's health, require the adoption of special decisions and instructions by competent authorities and sometimes even an intervention into private law relations to protect people's health and lives. All these protective measures are taken on the basis of amended, new, and separate laws adopted because of the pandemic, and they establish the existence of such '*special circumstances'* as their basis. However, the restrictions on fundamental rights regulated by protective measures adopted on the basis of separate laws because of '*special circumstances'* are not based on Article 17 of the Constitution because Croatia has not proclaimed a state of emergency. Special regulations which, because of '*special circumstances*', provided for restrictions of fundamental rights are based on Article 16 of the Constitution laying down that fundamental rights and freedoms, among other things, may be restricted for the protection of people's health but that they, in each individual case, must be proportionate to the nature of the need for such a restriction. Therefore, protective measures may be subject to constitutional law review in regard to the legitimate goal of the measure, its intensity, and justification of the restriction of citizens' fundamental rights and freedoms.[23]

The concept of '*special circumstances'* was introduced to provide for a special and justified legal basis for various measures to prevent the COVID-19 epidemic in line with the Constitution both at the public law level and in private law relations. Already in March 2020, the Civil Protection System Act of 2015[24] was amended by a new Article 22a which defines *'special circumstances'* and the powers of the Civil Protection Headquarters of the Republic of Croatia to make decisions and give instructions to protect the lives and health of people, their property, economic activities, and the environment, and to harmonise the actions of legal persons and citizens.[25] Subsequently, the same

23 The Constitutional Court of the Republic of Croatia analysed the alignment of some measures with the Constitution and law from the aspect of the justification and proportionality of these measures which restrict some fundamental rights. The Constitutional Court held that the decision of the Civil Protection Headquarters on the working hours and the work of shops banning them from working on Sundays from 27/4/2020 to 26/5/2020 was contrary to Art. 16 of the Constitution which lays down that any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case. The Constitutional Court also held that it was a justified restriction but that it was not in line with the principle of proportionality. See: Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-II-2379/2020.

24 Act on Amendments to the System of Civil Protection Act, OG 31/20

25 The provision of Art. 22a. of the System of Civil Protection Act on the powers of the Civil Protection Headquarters of the Republic of Croatia to take measures in special circumstances has been challenged for allegedly being contrary to the provisions of the Constitution, of the European Convention on Human Rights, and of the Charter of Fundamental Rights of the European Union. That provision is also challenged *inter alia* because the legislator, when laying it down, failed to act in accordance with Art. 17 of the Constitution on the proclamation of a state of emergency by the decision of the Croatian Parliament. The Constitutional Court rejected all applications for the institution of the proceedings for the assessment of constitutionality. See Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-I-1372/2020 et al.

concept of the development of protective measures because of '*special circumstances'* was extended to other separate acts, including those applied to private law relations.

'Special circumstances' are defined in all acts in the same way, regardless of whether those acts lay down the powers of public bodies introducing protective measures[26] or provide for private law relations.[27] *'Special circumstances'* are defined very generally, so that these rules are also applicable to other situations beyond the COVID-19 epidemic. *'Special circumstances*' imply *'an event, or a particular situation which could not have been foreseen or prevented, and which constitutes a danger for the citizens' lives and health, for their property of higher value, or which causes a significant damage to the environment, to economic activities, or sustains major economic damage*.' There is no doubt that such a definition of *'special circumstances'* also encompasses those caused by COVID-19 when, in conformity with Article 16 of the Constitution, the measures restricting fundamental rights and freedoms to protect people's health can also be taken.

In private law relations, by express stipulation of the impact of the special circumstances caused by COVID-19 on the parties' rights and obligations, the concept of '*special circumstances*' applies to a relatively small number of private law areas. These are private law relations in which the legislature held that by the general application of private law provisions, a speedy and appropriate protection of the parties could not be ensured because numerous legal relations were affected by the COVID-19 crisis, or because these specific legal relations are otherwise also governed by special rules on the parties' rights and obligations. An express intervention was necessary because the COVID-19 crisis could put the parties into a very difficult social and/or economic position whereby some of their fundamental rights might be violated. Specific regulation of the consequences of the epidemic by some public interests is connected with the fight against recession. This epidemic has had a strong impact on the private law relations in the economic sphere and in segments that are of crucial importance for Croatia (such as tourism and passenger transport). The impact of special circumstances caused by COVID-19 has thus been separately regulated only for travel package arrangements on which tourist services are mostly based, as well as for enforcement and bankruptcy proceedings. The legislature was of the opinion that through the application of the provisions of the Provision of Tourism Services Act on the protection of the parties to travel package contracts adjusted to the EU law[28] and by the subsidiary application of the provisions of the Obligations Act[29] on the cancellation of a contract for nonfulfillment,

26 See Art. 22a. System of Civil Protection Act,OG 82/115, 118/18, 31/20; Art. 12, p.12, Art. 57a Trade Act, OG 87/08, 96/08, 116/08, 116/08, 76/09, 114/11, 68/13, 30/14, 32/19, 98/19, 32/20

27 See Art. 25a Act on Execution of Enforcement over Monetary Assets, OG 68/18, 2/20, 46/20, 47/20; Art. 2. Act on Intervention Measures in Enforcement and Insolvency Proceedings during the Special Circumstances, OG 53/20, Art. 7 p. 24 Act on the Provision of Tourism Services, OG 130/17, 25/19, 98/19, 42/20.

28 The provisions of the Croatian Act on the Provision of Tourism Services are harmonised Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on travel package and linked travel arrangements (Art. 2 of the Act on the Provision of Tourism Services).

29 OG 35/05, 41/08, 125/11, 78/15, 29/18.

or its cancellation or modification for changed conditions or the like, the epidemic made it impossible to ensure the proper protection of the parties. The legislature also held that through the application of the general provisions of the law on enforcement on the protection of debtors (e.g. postponed enforcement, exclusion of particular things from enforcement, restriction of seizing a person's salary, and the like), it was not possible to ensure the protection of a large number of debtors affected by the epidemic because of numerous enforcement proceedings.[30]

These specific circumstances caused by COVID-19 have had a negative impact on the Croatian economy and on the tourist sector in particular. Since tourism is the main branch of Croatia's economy and constitutes a large share of its GDP,[31] the legislature expressly intervened in the contractual relations in the area of tourism precisely because of COVID-19.[32] The rights and obligations arising from travel package contracts have been dealt with first to prevent the organisers of package tours from insolvency or bankruptcy caused by mass cancellations of their contracts because of the pandemic. The amendments to the Provision of Tourism Services Act lay down a new traveller's right to terminate travel package contracts which should have been performed after 1 March 2020 and the issuance of vouchers for non-performed travel package contracts because of special circumstances caused by COVID-19.[33] However, to prevent the organiser's insolvency, the consumer's right to terminate the contract is suspended upon the expiry of 180 days following the cessation of special circumstances. The traveller's right to a full refund on any payment against the organiser in case of termination of the contract is also provided for, as is the postponement of the traveller's right to a full refund of any payment against the organiser if the traveller has terminated the contract. The organiser is bound to refund the payment only within 14 days upon the expiry of 180 days from the cessation of special circumstances. During the postponement period, the organiser is bound, instead of refunding the payment, to issue a traveller's voucher which can be used for another trip or for a previously paid travel package arrangement upon the expiry of 180 days from the cessation of special circumstances.[34] Through the postponement of the right to cancel the contract and the

30 See Bodul and Nakić, 2020a, p. 2.

31 See data on estimates for the Croatian economy in the context of the COVID-19 crisis in the World Bank Group, 2020, p 50.

32 Act on Amendment to the Act on the Provision of Tourism Services, OG 42/20.

33 The right to terminate a contract for special circumstances caused by COVID-19 exists in parallel with the right of the traveller and the organiser to terminate the contract for extraordinary circumstances (Art. 37/6 and Art. 38/2 Act on the Provision of Tourism Services), aligned with the provisions of the Package Travel Directive for unavoidable and extraordinary circumstances, Art. 12 paras 2, 3 (b).
In addition, general provisions of the contract law referred to in the Obligations Act, Art. 369 apply also to travel package contracts on the termination of contract in case of change of circumstances (*clausula rebus sic stantibus*).
OG 42/20 (in force from 8/4/2020).

34 See the new Art. 38a of the Act on the Provision of Tourism Services on the right to terminate a travel package contract and the issuing of vouchers because of special circumstances caused by COVID-19.

obligation of refunding the payments, a possibility is left to the organisers of the travel, when specific circumstances cease to exist, to stabilise their business's finances and reorganise the provisions of tourist services. On the other hand, travellers are given a guarantee that the invested money under a travel package contract will be reimbursed or used for another travel package in the future.

In the area of insolvency law, because of special circumstances caused by COVID-19, all enforcement and bankruptcy proceedings are suspended. The suspension is regulated by the measures that became effective *ex lege* through the entry into force of separate acts regardless of the decision made by the debtor or creditor, in other words, without the debtor's application and the creditor's agreement. Based on the Act on Amendments to the Act on Execution of Enforcement over Monetary Assets,[35] debtors' accounts which had been blocked because of enforcement of various claims were unblocked. In other words, because of special circumstances that arose due to COVID-19, the enforcement of monetary debts on citizens' accounts was stayed. The blockages of debtors-natural persons included craftsmen and individual tradesmen. In addition, through the entry into force of the Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances,[36] all other enforcement proceedings, such as wage garnishment and bankruptcy proceedings, were temporarily suspended.[37] The suspension of enforcement applied to all debtors (natural persons, private and public legal persons) and creditors (natural persons, private and public legal persons), both domestic and foreign, for all their debts and credits regardless of the legal basis of their existence (with some exceptions), and enforcement over any objects or things (movables, immovables, rights). Such a broadly determined area of the suspension of enforcement was explained by the necessity to alleviate the position of natural persons and business entities, to protect the lives and health of the parties in enforcement proceedings, and to prevent any economic damage.[38]

Another important measure regarding debts of natural and legal persons was a provision that no legal interest would accrue during special circumstances.[39] The cessation of accrual of interest was also very broadly interpreted. No interest accrued on any debts regardless of whether the debtor was a natural or a legal person and regardless of

35 OG 47/20 (in force from 18/4/2020). The Act on Execution of Enforcement over Monetary Assets is amended by Art. 25a on the acting of the Financial Agency in special circumstances in terms of the execution of enforcement over monetary assets of debtors – natural persons.

36 OG 53/20 (in force from 18/7/2020).

37 See Art. 3/1, 4/1, 6/1 Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances. Art. 6 expressly provides that the reasons for bankruptcy arising during a special circumstances period are not a condition for filing a bankruptcy petition.

38 See Point II of the Proposal for the Act on Intervention Measures in Enforcement and Insolvency Proceedings during special circumstances, 2020.

39 See 25b. Act on Execution of Enforcement over Monetary Assets, OG 68/18, 2/20, 46/20, 47/20; Art. 7 Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

whether the enforcement proceedings had commenced.[40,41] This temporary suspension of enforcement and interest charges on arrears lasted from 18 April to 18 October 2020.

The consequence of the suspension of enforcement proceedings was an automatic unblocking of 97% of blocked citizens' accounts for a total of 1,089,620 enforcement titles and a total amount of 3,2 billion € (principal + interest).[42] When the unblocking because of special circumstances took place (18 April 2020), 6.6% of Croatian citizens' accounts were blocked, in other words, those of every 17th citizen, or the accounts of 7% of working-age persons in Croatia, in other words, every 14th working-age person. All those people were, after unblocking, again able to freely access the monetary assets in their bank accounts. The suspension of all other enforcement proceedings also cancelled any *online* public auctions of selling flats and other immovables in enforcement proceedings, thus including evictions from immovables which could be up for auction. In short, by suspending the enforcement over debtors' assets, in terms of the use of the object of enforcement (monetary assets, immovables, and the like), the previous situation was restored that had been in place before the institution of enforcement. Debtors, whose monetary assets were unblocked, were in a particularly favourable situation. They were able to spend their money how they wanted, and they could pay their bills and debts that had accumulated during those specific circumstances. The act under which the monetary assets were unblocked did not restrict in any way the debtor's ability to dispose of the monetary assets in his or her accounts during specific circumstances to keep them for the creditors whose enforcement proceedings had been stopped because of special circumstances.

NUMBER OF (UN)BLOCKED ACCOUNTS 18.4.2020

UNBLOCKED ACCOUNTS	BLOCKED ACCOUNTS	SUSPENDED ENFORCEMENT TITLES	SUSPENDED DEBT PRINCIPAL	SUSPENDED DEBT INTEREST
244.865 DEBTORS NATURAL PERSONS	8.015 DEBTORS NATURAL PERSONS	1.089.620	2,30 billion €	0,90 billion €
97%	3%			

6.6% of Croatia's population had blocked accounts on 18 April 2020.

Table 2 The effects of the suspension of enforcement on bank accounts (debtors-natural persons).[43]

40 See Opinion of the Ministry of Finance 2020.

41 The time limits referred to in separate acts were also not running. See Art. 25a/7 Act on Execution of Enforcement over Monetary Assets. These are the periods of blockades provided for by the Act on Execution of Enforcement over Monetary Assets, the time limits provided for in the Bankruptcy Act (OG 71/15, 104/17) for the applications to open bankrupty proceedings, and the like. However, this provision does not provide for staying limitation periods provided for by the Obligations Act because this Act is not considered to be a separate act according to Art. 25a/7 Act on Execution and Enforcement over Monetary Assets. See Opinion of the Ministry of Finance.

42 Data taken from the publication of the Financial Agency, 2020.

43 Data taken from the publication of the Financial Agency, 2020.

In other areas of Croatian private law, no special private law measures were taken to restrict or change the rights of the parties because of special circumstances, whereas other countries have intervened in private law relations because of the pandemic (e.g. residential lease contracts, consumer credit contracts). In all other private law areas, the legislature left it to the parties, in the circumstances caused by the pandemic, to adjust their private law relations in conformity with the principle of private autonomy and freedom of contract (e.g. by voluntary reprogramming of debts, lowering leases, changing lease contracts for business premises, amending labour contracts and the like). In some cases, the state's assistance was offered in the form of special subsidies to fulfil, among other things, the obligations arising from various types of contracts (e.g. state subsidies to legal persons-entrepreneurs), through recommendations to negotiate a moratorium or reprogramming of credit obligations, or by changing the rules on the supervision of banks, so they do not institute foreclosures or activate collateral instruments against debtors.[44] For example, based on the recommendations of the Croatian National Bank, credit institutions, by their internal rules, developed the conditions for negotiating with debtors on voluntary repayment or restructuring of loan programmes. On the other hand, in some contracts, such as residential lease contracts, there was no need for any specific stipulation of the rights of lessees because the use of residential immovable, under lease contracts, is not a widespread practice in Croatia, or because the protection of lessees against the cancellation of a lease contract, or increased rent, is already stipulated elsewhere.[45]

4. Fair balance between the restriction of fundamental rights in private law relations because of protective measures caused by the epidemiological situation

The intervention measures to protect the life and health of people and to eliminate and alleviate economic imbalances and reduce possible damages to the country's economy because of the epidemiological situation have had an impact on the exercise and protection of the fundamental rights of the parties in private law relations. These measures introduced in private law relations restricted the realisation of some subjective private rights (e.g. the postponement of exercising the right to cancellation of a contract for non-payment, moratorium on paying the obligations arising from a loan or a lease contract, no charging of interest, staying forced payments of claims, lower rent, prohibition of eviction, and the like). In some cases, there were restrictions on particular fundamental rights in private law relations, particularly the so-called fundamental economic rights such as the freedom to choose an occupation and the right to engage in work, freedom to conduct a business and freedom to enter into contracts, the right to

44 See the information published by the Croatian National Bank, 2020.

45 According to the census of 2011, only 5.7% of all flats in Croatia were occupied on the basis of a lease agreement. See the publication of the Croatian Bureau of Statistics, 2017, pp. 18 and 32.

property,[46] and the like. There were cases in which, because of intervention measures applied to the relations involving private law subjects, a conflict occurred between their mutually opposed fundamental rights, which are normally protected and exercised in such private law relations. A conflict happens when different fundamental rights of individual parties in a private law situation are recognised (e.g. freedom to conduct business on the part of a creditor/lessor/credit institution, and, on the other side, the right to a home on the part of a debtor/lessee/mortgagor). There were also cases in which a conflict arose between the same fundamental rights recognised for both parties in a private law relationship. Indeed, in all such situations, because of intervention measures aimed at protecting people's health, or protecting a fundamental right of one party, the other party's fundamental right was restricted. Such interventions intended to protect the parties' fundamental rights in their private law relations were legitimate if all the prerequisites for their implementation, stipulated in the national law, and in the commitments made under international treaties, had been met.[47] The protective measures restricting the fundamental rights of the parties in private law relations, to be allowed, had to be implemented in accordance with the principle of proportionality. Every measure had to have a legitimate goal, and it had to be appropriate and necessary to achieve its goal (e.g. protection of health in the circumstances of the pandemic). In addition, any introduced measure had to achieve a fair balance between its legitimate goal and the restriction of a person's fundamental right in such a way as to avoid any excessive burden on an individual and not to destroy the very essence of the respective right (the so-called 'proportionality' in the narrower sense).[48]

In private law relations, the criterion for assessing whether a fair balance has been achieved is determined by the equal status of the parties who have conflicting fundamental rights. Therefore, it is necessary to establish, on the one hand, whether the restrictions of individual fundamental rights of the conflicting parties are justified by a public interest because of which a measure has been imposed (e.g. the protection of life and health). On the other hand, it is then important to assess whether the restrictions of individual fundamental rights in a particular private law relationship are well balanced. The impact of an intervention measure aimed at the protection of health and alleviation of economic disruptions caused by the pandemic lead to a change in the balance between the rights and obligations of the parties in private law relations which they have established in conformity with the principle of private autonomy and freedom of contract or which is established by a law providing for that particular type

46 See Articles 15–17 of the Charter of Fundamental Rights of the European Union. Protocol No.1, Art. 1 of the European Convention on Human Rights.

47 In the documents of the Council of Europe, the necessary preconditions for the legitimacy of measures for the protection of health because of the pandemic are the following: the rule of law (the principle of legality); limited duration of the measure; limited personal and substantial scope of the measure, i.e. the principle of necessity; and judicial control of measures. See Council of Europe, 2020, pp. 3–4.

48 See Bagić, 2016, pp. 67–68; Collins, 2014, p. 49; Bodul and Nakić, 2020b, pp. 2–4. See Art. 52/1 Charter of Fundamental Rights of the European Union.

of private law relationship. Therefore, besides the assessment whether a fair balance has been established between public interest because of which the measure is imposed and the fundamental right of a party (the protection of health → right to property or freedom to conduct business), it is necessary to do a specific balancing test to verify whether a balance has been achieved between the conflicting fundamental rights of the parties. Such a balancing test is particularly important when no fundamental right of either party takes precedence over a fundamental right of the other party (e.g. freedom to conduct business ↔ right to property). The balancing test must be carried out at two levels: first, in the correlation between public interest for which the measure has been imposed and every fundamental right of both parties and, second, between their mutually conflicting fundamental rights. Only then can it be established whether, in the context of the public interest involved, the fundamental rights of the parties exclude or restrict one another; whether such mutual restriction is justified, necessary, and proportional; and whether, through the protective measure, it imposes an excessive restriction or burden on one of the parties. It finally results in a situation in which the proportionality test is not conducted only in relation to the public interest achieved by the measure. It is important to apply the proportionality test in relation to the restriction of every individual fundamental right in regard to the public interest but also in regard to the fundamental rights of the other party. The concept of the proportionality test, which implies that only one party has fundamental rights affected by a measure imposed in the public interest, would not be appropriate in the context of private law relations. Indeed, it is necessary to conduct several parallel proportionality tests in regard to every fundamental right exercised within a private law relationship (the so-called double-proportionality test)[49] and then compare the seriousness and the intensity of the restriction of fundamental rights.

The criteria to assess whether, through a public law measure protecting people's health, an appropriate balance is achieved in the context of private law relations are very complex. Attention must be paid to whether, in terms of all fundamental rights exercised within a private law relationship, all prerequisites for justification, necessity, and proportionality of that measure are achieved, and a just balance is established between them in bearing the risk and burden caused by the pandemic. In that regard, what is particularly sensitive is the assessment of the impact of the measures by which, within private law relations, a fundamental right of one party is ultimately protected by restricting, at the same time, a fundamental right of the other party. To make an assessment, it will often be important to determine how the intervention measure affected the content and the manner of exercising the already acquired rights in a private law relationship and whether the core of the fundamental rights of all parties is preserved. Sometimes it will be necessary to assess how the prerequisites for the implementation of the intervention measure have been established; whether the area of implementation of the measure is reduced to the private law relationship where

49 For the same see also Collins, 2014, pp. 49–50.

it is necessary to intervene to protect people's health; whether the legislature, when developing an intervention measure, also provided for some new rights and obligations of the parties to consolidate or to alleviate the restriction of a fundamental right of one of the parties as the consequence of an intervention measure. It is important to know how the personal area of the application of the measure is organised, what its duration is, and whether some exceptions from its application are prescribed, as well as whether the implementation of a measure or an exemption is at the disposition of one of the parties, whether the measure has been applied *ex lege*, or whether the party must opt for its implementation. It may also be important to know whether a party to a private law relationship, because of an excessive burden due to some other measure, has been compensated for its loss in this particular relationship (e.g. the loss of interest in arrears by a state subsidy given to entrepreneurs because of the loss of income). It may also be important to know whether, because of an excessive burden imposed by a measure, a party to a private law relationship has been relieved of the loss by some other measure (e.g. compensation for the loss of the accrued interest by a subsidy granted to entrepreneurs because of their losses). At the same time, to preserve the core feature of private rights, it is necessary to preserve the parties' decision-making freedom, their equality and disposition at the time of establishment, realisation, and termination of their rights and obligations. Finally, it is also important to ensure the corresponding social justice dimension in private law relations affected by specific circumstances caused by the pandemic.

In the context of private law relations, the balancing between various fundamental rights affected by protective measures against the pandemic at the national level was carried out in various ways. The main goal has been, in the situation caused by the pandemic, to adjust the private law relations to the newly existing circumstances in such a way that the risks and burdens caused by the pandemic are equally shared between the parties (owners and lessees, creditors and debtors, employers and employees), so that neither party bears an excessive burden or loss. As a rule, the main idea has been to preserve the status quo in private law relations. The priority has been to maintain the already established private law relations with the contracted content of their rights and obligations. Therefore, the emphasis was laid on only short-term postponement of the fulfilment of obligations and/or short-term postponements of forced repayment of debts. In the context of a proportionality test, such measures may be considered to be less restrictive and less aggravating than the measures that would finally lead to a cessation of a contract, to the maturity of the entire debt, or to a reduction of contractual obligations or some other interventions in the context of the rights and obligations.[50] From the national measures imposed to mitigate the negative consequences of the pandemic arises that the various circumstances have

50 It is emphasised in theory that because of a long-term benefit and costs, a moratorium is a less agressive instrument of intervention into a valid contract than its cancellation or reducing the debt. On the other hand, it is also emphasised that these are measures to preserve liquidity and to make short-term financing possible. See Ganuza, Gómez Pomar, 2020.

influenced national legislators when trying to balance the fundamental rights of private law entities. Sometimes the type of a private law relationship, or the reason why the parties have established a particular private law relationship, is crucial, as well as the circumstances and problems affecting the fulfilment of their obligations. This has been decisive when deciding which fundamental right will be given priority. For example, because of a very obvious social component and the need to protect the right to a home of a lessee and his or her family, national legislators have given priority to the protection of residential lease contracts over the lessor's right to property. On the other hand, in the case of contracts on leasing business premises, the rules on any change of contractual relations caused by the pandemic have been more restrictive to balance the rights of lessors and lessees in a different way.[51] In some legal orders, no measures to intervene in the lease contracts on business premises have been imposed, but it was left to the parties to agree on possible amendments to their contracts. [52] On the other hand, when dealing with residential lease contracts, some kind of a balance was achieved between the conflicting fundamental rights of the parties through an express provision that a moratorium on the cancellation of a lease contract was not absolutely recognised but was only recognised on the ground of a failure to pay rent because of financial problems caused by the pandemic (with a different solution regarding burden of proof to supply evidence justifying non-payment.)[53] In the same way, in the case of residential lease contracts, there were no measures to write off a debt accrued by not paying the rent but only the obligation to repay the outstanding amount based on an express stipulation.[54] National legislators have had a similar approach when alleviating the fulfilment of obligations arising from a loan contract. To balance the rights and obligations of the parties to the contract and the fundamental rights of the parties, a moratorium on the repayment of a loan, a stay of the application of the statutes of limitation, or a moratorium on enforcement proceedings were enacted, as less burdensome measures, as opposed to a cancellation of the contract for non-payment, smaller instalments, or debt forgiveness. Sometimes, such moratoria were also conditioned by the circumstance that a difficult debtor's situation was caused by the pandemic (which meant unemployment was also caused by the pandemic).[55] In some cases, before referring to special circumstances, the parties were invited to negotiate and to try to

51 In Spanish law, a moratorium on lease contracts is provided for only a particular category of lessees, i.e. for self-employed tenants and SMEs and only if the pandemic has had a negative impact on their business (business activity was suspended because of government measures; because of the pandemic, income fell by 75%). See Gómez-Ligüerre, Milà-Rafel, 2020.

52 In Austrian, Swiss, and German law, no special measures are prescribed for a lease agreement for business premises. It is left to the parties to apply the general provisions of a lease agreement because of the circumstances caused by the pandemic. See Ofner, 2020, p. 109,112; Schmid, 2020, p. 115; Wolf, Minnig, 2020, pp. 124–126.

53 For Austrian law, see Ofner, 2020, p. 107. For German law, see Schmid, 2020, p. 114; Schmidt-Kessel, Möllnitz, 2020. For Slovak law, see Gajdošová, 2020. For Russian law, see Ekaterina Dmitrikova et al., 2020.

54 See Schmid, C. U. (2020) 'Corona und Mietrecht in Deutschland', 114.

55 For Russian law, see Dmitrikova et al., 2020. For Lithuanian law, see Mikelėnas, 2020.

change their private law relations.[56] Whether in every individual case such balancing did achieve a fair balance in the protection of the conflicting fundamental rights in private law relations cannot be judged only on the basis of the content of a concrete intervention measure but also in connection with other measures taken to protect people's health whose application affected the legal, economic, and social position of the parties in a particular private law relationship.

In principle, the Croatian legislature has had a similar approach when balancing the conflicting fundamental rights in private law relations to which the adopted protective measures applied because of special circumstances caused by the pandemic. The legislature in Croatia was guided by the provision of Article 16/2 of the Constitution, pursuant to which any restriction of freedom or right must be proportionate to the nature of the need for a restriction in every single case, and Article 50/2 of the Constitution providing that '*free enterprise and proprietary rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health*.' In addition, the case law of the Constitutional Court has established some very important criteria for the implementation of a proportionality test, and within it also a balancing test in the framework of private law relations. As a rule, the Court holds that the restrictions to a party's fundamental right for an unlimited period of time, or those that place an excessive burden on only one party to protect and exercise the fundamental rights of the other party in private law relations, are excessive.[57]

In some separate regulations on intervention measures, the Croatian legislature has tried to find a balance between the parties' rights and obligations in two ways. On the one hand, for some private law relations, because of special circumstances

56 For example, because of the pandemic, a debtor lost his job and could no longer fulfil his obligations arising from a contract. For Romanian law, see Alunaru and Bojin, 2020.

57 See, e.g., Decision of the Constitutional Court of the Republic of Croatia (1999) No. U-I-673/1996 et al. in which the Constitutional Court said that a measure, by which a protected lessee was recognised for an unlimited period of time of pre-emption if the owner wanted to sell a flat returned to him in the process of denationalisation, is unproportional. See Bagić, 2016, pp. 95–96.
See, e.g., Decision of the Constitutional Court of the Republic of Croatia (1998) No. U-I-762/1996 et al. in which the Constitutional Court held that the restrictions imposed on flat owners in the Residential Lease Act regarding the cancellation of the lease agreement of a protected lessee's restrictions of ownership, because they bind the owner to ensure a corresponding flat for the protected lessee under the same conditions (favourable rent, unlimited duration of the lease, limited grounds for cancelling the lease agreement), were a heavy burden for the owners who, because of special regulations adopted in the process of transformation of the tenancy right on socially owned flats, cannot possess or occupy their flats.
See Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-I-3242/2018 et al. in which the Court interpreted the provisions of the amended Residential Lease Act on the termination of protected lease contracts by 1 September 2023 and a gradual increase of the rent as not in line with the principle of proportionality. The Court held that there was no appropriate balance between the fundamental right to ownership and the right to a home because the state had transferred the whole financial burden to the protected lessees who were required to solve this complex relationship between lessees and owners.

caused by COVID-19, new rights and obligations of the parties are laid down to achieve a new balance because of the pandemic. For example, in travel package arrangements, a balance in terms of the protection of the right to property and the right to freedom ought to be established in a way that counterbalances the right of a traveller to terminate the contract (and thus to protect the organiser from insolvency) in the form of a voucher received from the organiser of the travel. Such a voucher is a guarantee for the payment whose reimbursement is also postponed (upon the expiry of 180 days from the cessation of the special circumstances). Possible problems connected with the establishment of a fair balance between the traveller's fundamental rights and the organiser's rights (right to property ⟷ freedom to conduct business) may, however, arise because of the restriction of the traveller's right to choose the method of reimbursement for the paid package. Namely, the traveller is not given an option of requesting a monetary reimbursement or some other form of reimbursement, but his only possibility of protecting his financial interest is to accept a voucher.[58]

In other cases, the Croatian legislature has envisaged *ex lege* postponement of exercising a person's rights without intervening in the very content of private law relations (e.g. postponement of enforcement, unblocking the debtor's accounts, postponement of enforcement proceedings). The legislature has opted for a very simple method of postponing enforcement. The stay of enforcement happens automatically without it being necessary to decide, in every single case, on a moratorium or on the justification of a suspension. Such intervention measures are taken regardless of whether the creditor and/or debtor is a natural or a legal person and regardless of the legal relationship from which a debt ensues (a consumer contract, a commercial contract, any other contract, or the like). The legislature was also of the opinion that in special circumstances, the protection of a debtor from forced repayment of debt was a public interest[59] and that creditors must bear a greater risk and burden as a result of special circumstances caused by the pandemic. The legislature has also tried to find a balance between creditors' rights and the restrictions they face, in succeeding with their claims by expressly stipulating the exemptions from temporary suspension of enforcement for particular claims to protect some creditors (child or spousal support, unpaid wages, interim measures under criminal procedural law, and urgent proceedings). It is also expressly provided that in other cases and under special circumstances, the court may decide, when the circumstances of a case dictate, to conduct enforcement proceedings.[60] During the period of suspension of enforcement proceedings, creditors were able to institute enforcement proceedings for the payment of their claims to preserve

58 The European Commission, because of such stipulation of the rights of travellers in special circumstances, instituted infringement proceedings against Croatia for the violation of Article 12(4) of the Package Travel Directive. The problem was the exclusion of the traveller's right to choose whether to request money for his cancelled trip or some other form of refund which was contrary to EU law. See European Commission, 2020.

59 See Bodul and Nakić, 2020b, p. 3.

60 See Art.3/2,3. Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

priority, or cancel the period of limitation for their claims. Regarding the suspension of bankruptcy proceedings, *ex lege* postponement is 'eased' by the recognition of the debtor's right to institute bankruptcy proceedings alone.[61] In this connection, one viewpoint in the literature holds that in terms of the postponement of enforcement and bankruptcy proceedings, all the preconditions for such intervention measures, to be considered as legitimate and proportionate, had been fulfilled.[62]

Although it is indisputable that the temporary measures have alleviated the position of debtors and have fulfilled the requirements for social justice in special circumstances, Croatian law has not exhausted all the possibilities to establish a fair balance between the parties' fundamental rights. A justification existed for the introduction of some additional exemptions from suspensions of enforcement to achieve an even better balance between the fundamental rights of creditors and debtors in cases of forced repayment of claims and to equate the approach of all debtors. It would, on the one hand, be useful if all separate measures on the postponement of enforcement were based on the same criteria. The Act on Amendments to the Enforcement Act prescribes the suspension of enforcement on accounts by unblocking only the debtors' accounts (as natural persons). There are no provisions on unblocking the accounts of debtors who are legal persons. To the extent that it was possible under the general regulations, the monetary assets of legal persons continued to be blocked.[63] On the other hand, the Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances provides for postponing enforcement for all debtors, both natural and legal persons. Such an approach resulted in a situation in which debtors-legal persons are treated differently, depending on whether enforcement of their accounts has been instituted or enforcement over some other kind of assets. A question arises here whether it was justified to differentiate between the position of creditors and debtors-legal persons depending on which part of the debtor's property had been subject to enforcement proceedings before the pandemic. In addition, no special preconditions existed in any separate act for the postponement of enforcement, except for what was generally provided, that enforcement may be postponed because of special circumstances caused by the pandemic. The approach to the postponement of enforcement is not individualised in any way in terms of whether special circumstances or some other circumstances have had any negative impact on labour law, business, or the financial position of a debtor. The postponement of enforcement became effective *ex lege* and for all. However, the Court had the possibility to execute enforcement if it assessed it as necessary. There were no provisions in the separate act laying down clear and objective criteria when the execution of enforcement would be considered as necessary. Such an exemption from the postponement of enforcement, although its

61 See Art. 6/2. Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

62 See Bodul and Nakić, 2020b, pp. 2–4.

63 The legal persons were protected to such an extent that no bankruptcy proceedings could be instituted except at the request of the insolvent legal persons.

aim may well be to achieve fair balance in special circumstances, between the interests of debtors and creditors, could turn into arbitrary action by the Court. Namely, the separate act does not expressly provide for any legal remedies that would be available to the parties in case enforcement proceedings continue in terms of providing efficient and fast protection in the special circumstances of the pandemic. A question arises whether it was justified to postpone, without any reservation, all enforcement proceedings for the payment of claims regardless of who the debtor was and what the reasons are for the financial problems of the debtor. For instance, enforcement proceedings were postponed against debtors, both natural and legal persons who were not even affected by the special circumstances caused by the pandemic. Finally, no account was taken of the fact that on the creditor's side, there were creditors – natural persons – for whom it was very important to have their claims paid to be able to maintain their financial stability in such special circumstances of the pandemic. The fact that there were such creditors on the other side was completely neglected. It seems that a selective approach to provide for the suspension of enforcement depending on who is the debtor or who is the creditor, along with the stipulation of special conditions for such suspension, would be socially more just; it would constitute a lesser burden for creditors in terms of their risks at the time of the pandemic; and it would be less restrictive of their rights. Indeed, such an approach would require a different organisation and action by the courts to deal with enforcement proceedings, make decisions on the postponement of enforcement, and assess the preconditions for enforcement in every individual case. However, in these special circumstances caused by the pandemic, the Croatian legislature opined that the public interest for the protection of debtors in the context of the current situation required fast and efficient instruments for their protection in enforcement proceedings.

5. Conclusion

Special circumstances and the epidemiological situation caused by the COVID-19 global pandemic have revealed a series of questions connected with the protection of fundamental rights in all spheres of life. When adopting measures to protect people's health, national legislators have come across various challenges. One of the most difficult challenges has been to maintain an appropriate balance between public interests aimed at the protection of people's health and the restriction of fundamental rights of individuals that were inevitable during the imposition of various protective measures. The seriousness and the scope of the pandemic called for urgent protection measures and emphasised their role in facilitating citizens' fundamental rights in private law relations. It was possible to achieve this only on the basis of separate and urgent laws to alleviate the consequences of the pandemic. The general private law rules were

inappropriate for such an urgent and fast adjustment of private law relations to these special circumstances caused by the pandemic.[64]

A targeted intervention by separate laws in individual private law relations, in which the parties were very much affected by this epidemiological crisis, turned out to be a successful method of overcoming the problem. However, this was also a very challenging task for every legislator. A decision had to be made in which private law relations to intervene and in what way. A fair balance had to be achieved between mutual restrictions of the parties' fundamental rights recognised in particular private law relations. The experience acquired is very valuable, and it may have a significant impact on further development of private law even in the aftermath of this pandemic. On the one hand, it was obvious that when stipulating private law relations, it was very important to ensure a corresponding protection of the parties' fundamental rights. The circumstances caused by the pandemic have increased the awareness of how it is necessary, when laying down private law relations (not only at the time of crisis), to take account of fundamental rights, as well. On the other hand, it is well known that when dealing with private law relations, the balancing test is much more demanding and complex. Because of the nature of private law relations, a different approach is necessary to balance the conflicting fundamental rights of the parties. To implement a balancing test, it is very important to take into consideration the equality of the parties involved and that their legal relations are based on private autonomy and freedom of contract. These are extremely important determinants for a balancing test. Balancing the protection of fundamental rights in private law relations also calls for particular sensitivity in terms of the content and the scope of the parties' private autonomy. Therefore, the balancing test should also be conducted with respect to the scope and intensity of the restriction of private autonomy aimed at the protection of fundamental rights. The stipulation of fundamental rights within private law relations must not destroy the essence of subjective private rights and the basic values protected in private law relationships. These are the equality of the parties, freedom of contract, and autonomy. Possible restrictions of the parties' private autonomy because of the protection of fundamental rights must also be justified, necessary, and proportionate.

Although in the circumstances of the pandemic, the requirement for a specific balance in the stipulation of fundamental rights in private law relations has been particularly expressed, such an approach to the protection of fundamental rights is very much needed in the usual circumstances, as well. It is to be expected that the national legislators will apply their dramatic experience of implementing *ad hoc* intervention measures in these special circumstances also in the future, to further enhance and redefine the protection of fundamental rights in private law relations.

64 See also Alpa, 2020.

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Foreign Investment Control Regime in Slovenia – One Step Over the Edge

ABSTRACT: *After a relatively liberal period for foreign direct investment in the Republic of Slovenia, the enactment of the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic in May 2020 ushered in a significant change. It is not entirely clear why the government, while drafting the bill, decided to place the regulation of control over foreign direct investment under the intervention measures law, which addresses the consequences of the epidemic. A substantive analysis of the new arrangements for screening and controlling foreign direct investment reveals that the legislation was not carefully drafted. The definition of basic concepts and validity of the unique system for persons from the EU member states are already controversial. The Act is awkwardly drafted in terms of specifying a direct capital investment in the form of acquiring a share in a company with its registered office in the Republic of Slovenia. The conditions and procedure for revoking the consent authorising foreign direct investment are poorly regulated. Additionally, interpreting the Act to mean that the revocation of foreign direct investment can also be applied to foreign investments made before it came into force, that is, with a retroactive effect, is extremely controversial.*

KEYWORDS: foreign investments, free movement of capital, real estate, notification of foreign investment, merger, acquisition.

1. Legal Grounds for Monitoring and Control of Foreign Direct Investment

After a relatively liberal period for foreign direct investment in the Republic of Slovenia, a significant change took place with the enactment of the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic (*Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19*

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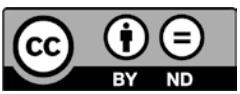

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– ZIUOOPE).[2] Chapter Eleven of the Act (Articles 69 to 75) is entitled 'Screening of Foreign Direct Investment.' While drafting the bill, the government decided to place the regulation of control over foreign direct investment under the intervention measures law, which addresses the consequences of the epidemic. The reasons for doing so are unclear and cannot be deduced from the explanatory note of the bill either.[3] However, one can reasonably assume that the government took the European Commission's guidelines into account while drafting the bill[4] and the coming into force of the EU Regulation 2019/452.[5] COVID-19 emergencies increase the risk of acquisition attempts in certain fields of activity (such as the production of medical or protective equipment) and the fields of research and production of vaccines and medicines. Therefore, the European Commission rightly emphasises that such foreign direct investment could adversely affect the EU's ability to respond to its citizens' health needs.[6]

ZIUOOPE was adopted by the National Assembly of the Republic of Slovenia on 29 May 2020 and came into force on 31 May 2020. The purpose and effects of the Act not only extend to harmonising the Slovenian legal order with the requirements of Regulation 2019/452, but the adopted measures operate much more broadly and apply to all types of foreign direct investment. These are not only screening, monitoring, and recording measures. The Act provides a legal basis for the exercise of state control over foreign direct investment and, as a last resort, the possibility of prohibiting foreign direct investment or eliminating its effects. As we will see below, some legal measures are nomotechnically very poorly designed, leading to diverging interpretations. In general, it is unclear in which cases the measures should be applied. However, some measures are also substantively controversial and may not pass the Constitutional Court's substantive review to assess the conformity of these measures with the Constitution. Including the foreign direct investment regime in the intervention legislation to eliminate the consequences of the epidemic has another interesting repercussion. The validity of measures for monitoring and controlling foreign direct investment is limited in time. Article 75 of the Act stipulates that the provisions shall be valid until 30 June 2023. This implies that a system law regulating this area is likely to be adopted

2 Official Journal of the Republic of Slovenia, No. 80/20.

3 Some other EU Member States also amended their respective legal regimes for controlling foreign investment during the epidemic or in a package of measures to limit the effects of its consequences. However, this was mostly not about establishing a control mechanism. It was about extending or defining public policy in greater details, which also extended to pharmaceutical products and protective equipment. For more, see: List of screening mechanisms notified by Member States; https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf. The same is true for some other countries that tightened control mechanisms for foreign direct investment, such as: Australia, Canada, China, India, Japan, and the USA.

4 Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation); https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

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

6 Guidance.

by the said deadline. We can only hope that the legislator would carefully prepare and adopt a more imaginative system of measures instead of waiting until the expiration of the deadline and then extending the current regulation quickly and without particular expert discussion.

2. Control of Foreign Direct Investment (FDI) under the New Law (ZIUOOPE)

■ *2.1. The Application of ZIUOOPE*

The introductory provisions of the Act define foreign investors and foreign direct investment. Both definitions are limited to this Act and have no meaning beyond it.

The definition of a foreign investor is unnecessarily complicated and lengthy. A foreign investor is a citizen of a member state of the European Union, a country of the European Economic Area, the Swiss Confederation, a third country, or a legal person established in a Member State of the European Union, a country of the European Economic Area, the Swiss Confederation, or a third country who intends to execute direct foreign investment in the Republic of Slovenia, or has already done so.[7] Instead of this statement, the legislator could have simply stated that a foreign investor is a natural person who is not a citizen of the Republic of Slovenia and every legal person who is not established within the Republic of Slovenia. This definition also transcends the scope of Regulation 2019/452, which applies only to foreigners from third countries and does not affect direct investment by foreigners from the Member States.[8] Therefore, the Act also interferes with the right to free movement of capital under Article 63 TFEU.[9] This is not an isolated case. Some other member states also apply individual control measures to foreign direct investment, which apply to all foreigners.[10] The right to free movement of capital is not unlimited, as Article 65 (1) (b) TFEU is devoid of prejudice regarding member states' right to take measures that are justified on grounds of public policy or security.[11] Only time will reveal whether the substance of the measures of the Slovenian law falls within this framework. However, one of the relevant indicators will also be the practice of competent authorities in enforcing the measures.

The second definition clarifies the notion of foreign direct investment. Foreign direct investment is an investment made by a foreign investor, the purpose of which is to establish or maintain permanent and direct links between a foreign investor and an

7 Article 69 of ZIUOOPE.
8 Point 3 of Article 2 of Regulation 2019/425.
9 See Klobučar, 2020.
10 See, for example, the rules in France, where monitoring and control measures also apply to all foreigners and even to French nationals who have the status of a foreigner under tax rules (Code monétaire et financier, Livre Ier, Titre V: les relations finanères avec l 'étranger, Article L.151-1).
11 See in more details, Esplugues, 2018, pp. 12–13; Zwartkruis and de Jong, 2019, p. 12.

economic entity established in the Republic of Slovenia by acquiring at least 10% participation in capital or voting rights.[12] The first part of this definition fully corresponds to the definition in Article 2 (1) of Regulation 2019/452. The establishment of permanent and direct connections between a foreign investor and a domestic economic entity is essential for foreign direct investment. Such a definition indicates that foreign direct investment is primarily an investment in a domestic legal entity engaged in economic activities. In Slovenia, these are companies organised on the basis of the Companies Act and are listed in the court register. However, they can also be other legal entities performing an economic activity. In the second part, the provision of Article 70 of the Act provides more detailed clarification than Regulation 2019/452 regarding the meaning of establishing a permanent connection. The permanence of the connection is determined by participation in the capital of the domestic company or by acquiring voting rights on another legal basis. The participation threshold is set relatively low at 10%. This again is not an isolated case if we compare the Slovenian system with some foreign ones.[13] Irrespective of the low participation threshold, the purpose of the Slovenian law must also be interpreted in such a way that foreign portfolio investments are not covered by special regulations.[14] The Act expressly emphasises that an essential element of foreign direct investment is the establishment of a permanent connection between a foreign investor and a domestic economic entity. Regulation 2019/452 also does not apply to portfolio investments.[15] However, we can expect that portfolio investors will also report their investments in excess of the set threshold to avoid legal consequences. More than the low participation threshold for determining foreign direct investment, however, some other uses of this term in the Act are disturbing. The Act is remarkably inconsistent in this regard. This applies in particular to Article 71 (3) which deviates from both the primary definition of a foreign investor and the definition of foreign direct investment.

Article 71 (3) stipulates that the subject of a foreign direct investment application is also a situation in which a foreign investor or its subsidiary in the Republic of Slovenia acquires the right to dispose of land and real estate essential for critical infrastructure or land and real estate located in proximity to such infrastructure. The departure from the definition of foreign direct investment in terms of content is that foreign direct investment is also considered as the acquisition of property rights in real estate. As aforementioned, according to the basic definition, FDI is the establishment

12 Article 70 of ZIUOOPE.

13 The same 10% threshold is set by §§ 56 and 60a of the German *Außenwirtschaftsverordnung* for certain economic operators, while the 25% participation threshold applies to most economic operators.

14 In accordance with the established approach, a portfolio investment is considered to be the acquisition of a participation in an economic entity with the sole purpose of a financial investment and without the intention of influencing the management and supervision of the economic entity. See also the ECJ case-law in Cases C-282/4 and C-283/4 (*Commission v. The Netherlands*), para. 19.

15 Zwartkruis and de Jong, 2019, p. 12.

of a permanent nexus between a foreign investor and a domestic economic entity by which the investor acquires influence over the management and control of the domestic economic entity. With such an expansion, the Act transcends the scope of Regulation 2019/452, which does not cover investments in the acquisition of property rights.[16] However, the Act is also textually inconsistent. It uses terms that are not entirely consistent with those used in the general rules. The phrase 'right of disposal' is not clarified in the general rules but is more or less clear that in this case, the legislator has the acquisition of property rights in mind. Under Article 37 of the Law of Property Code, disposition is one of the rights constituting the content of a property right.[17] Another inconsistency is the cumulative use of 'real estate' and 'land,' which is utterly superfluous. The concept of real estate in Slovenian law is broader than the concept of land, and any land that is subject to legal transactions is also real estate.[18] According to the additional wording of Article 71 (3), only the acquisition of property rights on real estate based on a legal transaction is subject to regulation. Further, the Act does not cover all real estate. It covers only those that, due to their location or properties, are important for ensuring public order and safety. The Act only applies to real estate, which is essential to critical infrastructure or located in the vicinity of such infrastructure. The Act does not specify what is 'critical infrastructure.' However, this phrase is also used in connection with the grounds for refusing a foreign investment, referring to infrastructure in the fields of energy, transport, water, health, communications, media, data processing or storage, the aerospace sector, and defence, electoral or financial infrastructure.[19] This is a rather vague rule. In practice, will certainly create difficulties in assessing whether or not the acquisition of property rights is the subject of an application. Legal entities of Slovenian law, which are subsidiaries of a foreign natural or legal person, are likely to remain uncertain.

Article 71 (3) extends the circle of foreign investments to include indirect investments as well, that is, in this case, the investment of a subsidiary of a foreign investor. It should be considered that the acquisition of property rights by foreigners on real estate in the Republic of Slovenia is already limited by general regulations. Article 68 of the Constitution of the Republic of Slovenia stipulates that foreigners may acquire ownership rights to real estate only under the conditions provided by law or an international treaty. Currently, several special regulations apply, which are the basis for the acquisition of ownership rights of foreigners from some countries, such as EU and EFTA members as well as candidate countries for accession to the EU and the OECD member states.[20] If a special legal basis for the country is not established, foreigners from these countries cannot acquire ownership of real estate in the Republic of Slovenia through a legal transaction. Therefore, the extension of the validity of control

16 Ibidem, p. 13.
17 Juhart, Tratnik and Vrenčur, 2004, p. 218.
18 Article 18 of the Law of Property Code. See Juhart, Tratnik, and Vrenčur, 2004, p. 86.
19 Article 72 (3) of ZIUOOPE.
20 See in more details, Šumah, 2017, p. 17; Kramberger Škerl and Vlahek, 2016, p. 28.

measures to subsidiaries of foreign investors is understandable. The use of the term 'subsidiary' is inconsistent. It is not explained in greater details either in this Act or in the general law of companies. As per case law, a subsidiary is a company that is controlled by the parent company.[21] A controlled undertaking is primarily a company owned by the parent company or one that is related to the parent company through an intercompany agreement.[22] Therefore, these are cases where the investment is made by a company established under Slovenian law with its registered office in the Republic of Slovenia and is a subsidiary of a legal person holding the status of a foreigner under Article 69 of the Act.

■ *2.2. Obligation to Notify About Foreign Direct Investment*

The basic measure of control over foreign direct investment introduced by law is the obligation to notify the Ministry of Economy about foreign direct investment. The purpose of such an obligation is twofold. The Republic of Slovenia thus fulfils the obligation of member states to notify the Commission and the other member states under Regulation 2019/452 of all foreign direct investment in their territory, which is regulated by this regulation. This establishes a cooperation mechanism between the member states and the Commission. At the same time, a database, being set up at the competent ministry, enables the screening of foreign direct investment, verification of its compliance with the interests of public order and security, and acts as the basis for imposing the envisaged measures to secure these interests.

Although the Act defines foreign direct investment in Article 70, the first three paragraphs of Article 71 set out the situations involving the obligation to notify. The obligation is defined by two criteria. The first criterion relates to the connection between the activity of the undertaking in which the foreign direct investment is obtained or the purpose of the immovable property and the state's interest in protecting its interests in the field of security and public order. The second criterion lists the forms in which foreign direct investment is made. Both criteria must be met at the same time. The obligation to notify exists in the case of foreign direct investment in one form referred to in Article 71 (1–3), and it relates to the economic sector referred to in Article 72 (3).

The subject of the notification is not all foreign direct investment, but only what is related to the performance of critical economic activities. These are set out in Article 72 (3), which specifies the grounds for deciding whether foreign direct investment presents a threat to security and public order. The Act seeks to identify those undertakings that perform economic activity in areas where the entry of a foreign investor into the capital and management structure could present such a threat. In this section, the Act reiterates verbatim the definitions from Article 4 (1) of Regulation 2019/452. The subject of the notification is, therefore, foreign direct investment in undertakings engaged in economic activities related to: (a) critical infrastructure, whether physical or virtual, including infrastructure in the fields of energy, transport, water, health,

21 Decision of the Supreme Court of the Republic of Slovenia III Ips 30/2017.

22 Ivanjko, Kocbek, and Prelič, 2009, p. 966.

communications, media, data processing or storage, the aerospace sector, and defence, electoral or financial infrastructure and sensitive facilities as well as land and real estate, which are essential for the use of such infrastructure or land and real estate located in the vicinity of such infrastructure; (b) critical technologies and dual-use items as defined in Article 2 (1) of Regulation 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace and defence technology, energy storage technology, quantum and nuclear technology, nanotechnology and biotechnology, and health, medical and pharmaceutical technology; (c) the supply of critical resources, including energy or raw materials, food security, medical and protective equipment; (d) access to or control of sensitive information, including personal data; (e) freedom and pluralism of the media; (f) projects or programmes in the interest of the European Union as defined in Annex I to Regulation 2019/452.

The Act is inconsistent regarding the obligation to notify about foreign direct investment because the wording of its Article 72 (3) contains the phrase 'in particular,' which indicates that the list of economic activities is not exhaustive. However, such a way of listing could mean that it should be notified about in other areas as well. This is all the more so because some economic activities that are mostly related to security are not listed. This is especially true of the production of weapons and military equipment. In the Republic of Slovenia, this aspect is regulated by the Defence Act.[23] Article 78 of the Defence Act provides that the economic activity of arms and equipment may be performed only by a company that obtains the government's consent. However, the Act does not regulate the situation wherein the ownership structure in a company acquires such consent changes. In terms of substance, foreign direct investment in this area should undoubtedly be notified, and the question is whether the legal obligation to notify can be interpreted broadly. The legislator should not have allowed such inconsistencies.

In the first criterion, the Act, almost verbatim, took into account the Regulation 2019/452 text. However, the second criterion refers to the form of FDI. Again, these provisions involve a whole series of inconsistencies and ambiguities, which will undoubtedly cause difficulties in the Act's application. Article 71 (1) obliges to notify about direct investment in the form of a merger or acquisition. In this case, the notification must be by either the foreign investor or the target company no later than 15 days from the conclusion of the merger agreement or from the publication of the takeover bid. The Act refers only to merger agreements[24] or takeover bids. This could mean that only transactions involving the merger or publication of a takeover bid are subject to notification and screening. With such a plain textual interpretation, transactions of purchase of business shares or stocks between two parties would remain outside the

23 Official Gazette of the Republic of Slovenia, Nos. 103/04 – official consolidated text and 95/15.

24 Under the Companies Act (Article 580), a merger is only a merger by acquisition by one company of another company or the merger of two independent companies. Therefore, only the merger agreement and the agreement on merger by acquisition can be considered merger agreements.

new regime, which is the most common form of creating an investment in another company. Given the general definition of foreign direct investment and a few other hints in the text of the Act, such a restriction is unlikely and is more the result of vague wording.[25] The entire regulation loses its purpose if it was limited to mergers and acquisitions only and excluded the acquisition of blocks of shares and business stakes in limited-liability companies. Therefore, we can conclude that all contracts for acquiring stakes in a company active in one of the critical economic sectors must be notified about if at least 10% shareholding or sharing of voting rights is acquired in the company.

Article 71 (2) covers the establishment of new economic entities in Slovenia by foreign investors. The Act refers to the definition of 'initial investment' in European state aid law, which does not seem entirely applicable because the definition is not limited to the establishment of new entities: an investment in tangible and intangible assets related to the setting up of a new establishment, extension of the capacity of an existing establishment, diversification of the output of an establishment into products not previously produced in the establishment or a fundamental change in the overall production process of an existing establishment. In this case, the deadline for notifying is no later than 15 days from the establishment of the company in the Republic of Slovenia. Here too, the wording is inconsistent. The person liable to notify about the establishment of a new company is either a foreign investor or a subsidiary. Since the concept of a subsidiary lacks detailed clarification, the question arises again as to whether the legislator had in mind a newly established company in which a foreign investor holds more than 10% or only a new company that is a subsidiary of a foreign investor. It makes sense that even in this case, the notification can be made by both a foreign investor and a company that has been newly established.[26]

However, Article 71 (3) extends the concept of foreign direct investment to the acquisition of property rights in real estate (see above). In this case too, the deadline for notification is no later than 15 days from the conclusion of the contract on the acquisition of property rights. The notification must be made by the transferee. This may be a foreign investor or subsidiary subject to the obligation to notify.

With regard to the notification deadline, it should be added that all deadlines for notification are set from the date of execution of the legal transaction, which results in the realisation of foreign investment. Such a statutory provision presents no obstacles to the notification of the intended foreign direct investment. The economic interest of the foreign investor must be considered in the sense that he does not want to take risks by performing a transaction that could later be prohibited. Since the competent authority may also subsequently prohibit or cancel a foreign direct investment with the effect of nullity, there are risks and significant legal consequences involved.

The notification must, in most cases, be made by a foreign investor or a domestic target company. Given the scope of the information required in the notification, it is

25 Majzelj and Pipan Nahtigal, 2020.
26 Majzelj and Pipan Nahtigal, 2020.

undoubtedly more appropriate for it to be provided by a foreign investor or to provide the domestic company with relevant information so that it can fill in the application. The notification must be made in Slovenian. Article 71 (4) stipulates the contents of notification, which must include: (a) name, surname, residence or company name, and registered office of the foreign investor and the target or acquired company; (b) annual turnover of the foreign investor and the target or acquired company, (c) total number of employees of the foreign investor and the target or acquired company, (d) trading code of the securities of the foreign investor and the target or acquired company, (e) ownership structure of the foreign investor and the target or acquired company, including information on the ultimate investor and equity participation; (f) value and source of financing of foreign direct investment, (g) products, services, and business activities of the foreign investor as well as the target or acquired company (NACE economic activity classification); (h) countries in which the foreign investor and the target or the acquired company carry on relevant business activities, (i) date on which the foreign direct investment is expected to be completed or when it was completed, (j) contract by which a foreign investor acquires ownership of the real estate.[27]

The Ministry of Economy is obliged to prepare the notification form and make it available.[28] The set of data that the application form must contain corresponds with the data from Article 9 (2) of Regulation 2019/452, allowing the Ministry to fulfil its obligations to inform the other member states and the Commission as a contact point under Article 11 of the Regulation.

Article 81 outlines the legal consequences of the failure to notify. Considered a minor offence, it prescribes a fine for the failure to notify within the set deadline. The notification must be based on Article 71. This provision has several inconsistencies, and I believe that the strict rules of the minor offence procedure will make it difficult to impose fines. Here, the Act again stipulates only merger agreements and takeover bids, the incorporation of new companies, and real estate acquisition agreements as the subject of notification. It is beyond reasonable explanation as to why contracts on the acquisition of a business share in a limited-liability company and contracts on the acquisition of a qualified block of shares in a joint-stock company are excluded. These are undoubtedly the most common forms of FDI, and it is certainly not the Act's purpose to limit the notification to certain forms of execution of a transaction only. If the obligation to notify can be broadly interpreted, referring to the general definition of foreign direct investment, which means the establishment of a permanent capital or management connection between a foreign investor and a domestic company, such

27 It is unclear why the Act stipulates only the obligation to submit a contract for the acquisition of ownership of real estate and not a contract for the acquisition of a share, a contract of incorporation, a takeover bid or a merger contract.

28 Article 71 (8) of the ZIUOOPE.

interpretation in the field of minor offences law is legally incorrect.[29] The next inconsistency is the uncertainty of the person obligated to notify, and the question is whether to take action against a foreign investor or a domestic company. Fines for failing to notify depend on the size of the company committing the minor offence. The basic fine ranges from EUR 100,000 to EUR 250,000. This increases to EUR 200,000 to EUR 500,000 if a minor offence is committed by an undertaking considered as a medium-sized or large company under the law governing companies.[30] A fine is also prescribed for the person responsible for such a company, who is fined from EUR 2,000 to EUR 10,000.

■ *2.3. Screening of Foreign Direct Investment*

Screening of foreign direct investment is the procedure allowing assessment, investigation, authorisation, condition, prohibit or unwind foreign direct investments in the field of activity from paragraph 3 of this article.[31] The concept of screening is copied verbatim from point 3 of Article 2 of Regulation 2019/452. On this basis, the competent authority, the Ministry of Economy, has extensive decision-making power. Nevertheless, there are considerable ambiguities and inconsistencies. The first form of decision that can be issued is the authorisation of foreign direct investment. The competent authority will issue such a decision if it considers that the planned FDI does not threaten security or public order. Such a decision enables the intended investment to materialise. To reduce the foreign investor's risk, we can expect that in transactions of acquisition of shares in companies, obtaining the authorisation decision will be recorded as one of the conditions for its implementation. However, if the investor applies for a decision after the transaction, the decision averts the risk of the investment to be declared inadmissible, and its effects must be eliminated.

Another possible form is a prohibition decision issued by the competent authority in the opposite scenario when it views foreign direct investment as a threat to security and public order.[32] In making that assessment, the competent authority shall first take into account the nature and importance of the economic activity pursued by the undertaking to which the notification relates. The obligation to notify is vast, and indeed, not all companies engaged in activities in this field are important enough for a foreigner's participation to pose a threat to security and public order. It is mainly a matter of considering the market share of this company in the Slovenian market, product substitutability or service substitution. Furthermore, the volume of foreign direct investment is probably also an essential element. Minority participation rates are likely to be judged differently from majority decision-making or even full ownership.

29 'In punitive law (the field of criminal offences and minor offences), it is vital to respect the principle of legality and thus specificity in minor offences substantive law, the purpose of which is to prevent arbitrary application of state sanctions in cases that would not be specified in advance.' Judgment by the Celje Higher Court PRp 117/2017.

30 Article 55 of the Companies Act.

31 Article 72 (1) of the ZIUOOPE.

32 Article 72 (4) of the ZIUOOPE.

Finally, the Act also establishes special criteria for prohibition.[33] The criteria refer to the foreign investor and literally taken from Regulation 2019/452.[34] In assessing security threats and public policy, the competent authority may consider: (a) whether foreign investors are directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; (b) whether the foreign investor has already been involved in activities affecting security or public order in a member state; (c) whether a severe risk exists that the foreign investor engages in illegal or criminal activities.

The legal consequence of the decision to prohibit foreign direct investment is very strict, posing a high risk to foreign investors in legal transactions. The decision on prohibition implies that the legal transaction, the consequence of which is the establishment of the position of foreign direct investment, is null and void or there are other legal consequences with similar effects. If foreign direct investment is implemented through a contract, such a contract will be void. The Act mentions the nullity of the merger agreement and that of the real estate acquisition agreement. The annulment of other contracts establishing foreign direct investment, namely contracts for the acquisition of a share in a company must be added here. The public offer for the purchase of all shares under the Takeovers Act is also without legal effect.[35] For takeover procedures, the Slovenian Securities Market Agency advises that a decision on the authorisation of a foreign direct investment be obtained before the offer is published.[36]

However, it is unclear what legal consequences of other forms of decisions may be handed down by the competent authority in the screening procedure.[37] The competent authority may determine the conditions for the implementation of foreign direct investment, which can be understood as a kind of conditional authorisation. However, the Act remains silent on what conditions can be set. Such arrangements present competent authority with a wide range of possibilities to find appropriate conditions. I believe, however, only conditions that ensure public interest in the field of security and public order are justified. Undoubtedly, a nexus must exist between the purpose of the Act and the substance of the imposed condition. In the absence of such a nexus, the condition is, in my view, inadmissible. The Act also does not specify the effect of the decision stating conditions. We can conclude that it is a matter of authorising a foreign direct investment and simultaneously the obligation of a foreign investor to fulfil the conditions. However, the Act does not stipulate anything about the procedure for supervising the fulfilment of the conditions and the legal consequences that could follow in such a case.

33 Article 72 (4) of the ZIUOOPE.

34 Article 4 (2) of Regulation 2019/452.

35 Official Gazette of the Republic of Slovenia, Nos. 79/06, 67/07 – ZTFI, 1/08, 68/08, 35/11 – ORZ-Pre75, 10/12, 38/12, 56/13, 63/13 – ZS-K, 25/14 and 75/15.

36 See https://www.a-tvp.si/novica/prevzemna-ponudba-v-povezavi-z-obveznostjo-priglasanja-neposrednih-tujih-nalozb-po-ziuoope.

37 Majzelj and Pipan Nahtigal, 2020.

The decision to unwind is also scarcely and poorly regulated. In particular, it is not specified when such a decision should be delivered at all. It can certainly be delivered in cases where a foreign investor does not fulfil the conditions set for him. However, it is not specified whether the decision to authorise FDI can also be revoked. In doing so, it is certainly important to consider what circumstances and facts can be considered. However, whether these circumstances are only the ones that already existed at the time the authorisation decision was delivered or could also be circumstances that emerged later remains ambiguous. Nothing about the time limits within which the decision may be revoked and the manner in which the competent authority shall act before delivering the decision is specified either. The Act merely stipulates that a decision to revoke has the same legal consequences as a decision to prohibit. This implies the nullity or ineffectiveness of legal acts by which a foreign direct investment was made. With such a severe legal consequence, it is unacceptable for the legislator not to regulate these issues in more detail.

The Act also regulates the competence of the competent authority if the obligation to notify has not been fulfilled, and it is a foreign direct investment that meets the criteria referred to in Article 72 (3). Such a situation may arise mainly due to vaguely defined criteria, which do not cover all economic activities that could pose a threat to security and public order. A deliberate omission of notification can also occur. The competent authority may also act based on the information at its disposal. It may perform a screening procedure and issue an appropriate decision. It must do so no later than five years from the date on which the notification period begins.[38] After the expiration of this period, no action can be taken against a foreign investor on these grounds. I believe that such an arrangement is not in dispute if it relates to a foreign direct investment made after adopting the Act. Certainly, it may be controversial that the competent authority can perform a screening of foreign direct investment that has already been made before the adoption. The Act does not stipulate this. However, we can conclude such a position from the government's explanatory note during the legislative procedure.[39] The provision of Article 72 (2) sets out the criteria that justify the Act's retroactive effect. On this basis, the authors mention that investments made before the adoption of the Act may also be subject to screening.[40] Such an interpretation of the Act, which has no perfectly clear basis in the text, must be vehemently rejected. Even the arguments justifying retroactivity are not compelling.

■ *2.4. The Decision-making Process*

The decision-making process for the screening of foreign direct investment also has some specific features, although the rules of general administrative procedures apply

38 Article 72 (4) of the ZIUOOPE.

39 See https://www.iusinfo.si/AppendixExtSlo/PDZ/PORODZ2020M05D21N21_2_1.PDF.

40 Majzelj and Pipan Nahtigal, 2020; Klobučar, 2020.

to this procedure as well.[41] Screening is first performed by a commission appointed by the Ministry of Economy comprising 3 to 10 members. The Act is not clear whether this is a commission appointed on a permanent or temporary or *ad hoc* basis. At least three members are selected from among the employees of the Ministry, while other members can be appointed from other state bodies, local communities, and even private law entities. There are no special rules on the way the commission operates and decides. It is expressly stipulated that its members must make a written statement of lack of interest with the foreign investor and the target company and a statement that they will protect all data, facts, and circumstances with which they become acquainted when performing the commission's tasks.[42] When screening the notification of foreign direct investment, the commission may invite the foreign investor to provide a written or oral explanatory statement or additional clarification and to provide appropriate accompanying evidence.[43] It may also request other state bodies, local communities, and holders of public authority to state their respective opinions.

The commission shall conclude its work by issuing an opinion on whether foreign direct investment should be authorised, set the conditions for its implementation, prohibited or revoked. It shall forward this opinion to the Minister of Economy, who shall be responsible for delivering the decision. The minister is not bound by the proposal of the commission and may deliver a decision using his discretion. The decision shall be delivered within two months from the date of notification. The time limit is instructive because there is no presumption that the notification is considered approved if the decision is not delivered within this time limit.[44]

The minister's decision can be appealed against. The government decides on the appeal. The rules of general administrative procedures apply to the appeal procedure and the decision of the government on the appeal. Judicial protection in an administrative dispute is provided against the decision of the government on an appeal.

■ *2.5. Establishment of a Contact Point*

Regulation 2019/425 obliges member states to establish contact points for its implementation.[45] The Regulation sets out a mechanism at the level of the EU to coordinate the screening of foreign investment that could affect the security and public order of the member states. This mechanism establishes the obligation to exchange information between the member states and European Commission (hereinafter, the Commission) as well as the possibility for the Commission and the member states to communicate their comments and opinions on the transaction within 15 months of the completion of foreign investment.[46] The decision as to whether a particular investment should be

41 Official Gazette of the Republic of Slovenia, Nos. 24/06, 105/06 – ZUS-1, 126/07, 65/08, 8/10 and 82/13.
42 Article 73 (6) of ZIUOOPE.
43 Article 75 (5) of ZIUOOPE.
44 Majzelj and Pipan Nahtigal, 2020.
45 Article 11 of Regulation 2019/425.
46 See Articles 6, 7 and 8 of Regulation 2019/452.

authorised remains within the discretion of the member state in which the investment is made. The Regulation only provides for the possibility for the other member states to voice their concerns to the host country of foreign direct investment if this investment has broader effects. The purpose of the Regulation is to enable action to be taken to protect the vital interests of the member states and the Union as a whole in the face of threats arising from the growing number of acquisitions of EU companies by non-EU investors.[47]

Articles 71 (5–7) of the Act regulate the legal acts and procedures required of Slovenia as a member state by Regulation 2019/452. Article 71 (6) provides for the establishment of a special contact point at the Ministry of the Economy, but the details are not specified. We can conclude that this is part of the activities of the Ministry, which also includes cooperation with the other member states if a direct investment in a legal entity from another member state could compromise the security and public order of the Republic of Slovenia. Regarding the implementation of obligations under the Regulation, the question may arise as to what information Slovenia is obliged to communicate with the mutual information system, as provided for in Article 6 (1) of the Regulation. It stipulates the obligation for the member states to notify the Commission and the other member states of any foreign direct investment in their territory that is undergoing the screening. This obligation can be understood as an obligation to provide information only on those investments that meet the criteria set out in the Regulation. I believe this obligation cannot be extended to a broader definition of foreign investment, as defined by Slovenian law. These are mainly investments by foreigners coming from the member states and investments aimed at acquiring property rights in real estate. Legal provisions are further important from the perspective of the use and protection of the confidentiality of data obtained by the Ministry in notification procedures. Article 71 (5) of the Act provides the basis for the use of all collected data from the notification or data that were provided upon request in the procedure, for the purposes of the Act and the Regulation. This also applies to confidential information for which all appropriate protection mechanisms must be provided.

Conclusion

A substantive analysis of the new arrangements for screening and controlling foreign direct investment indicates that the legislation was not carefully drafted. The speed of the legislative process was probably influenced by several factors. On the one hand, account should be taken of the coming into force of Regulation 2019/452 and the corresponding adjustments it requires. On the other hand, there are fears that in times of pandemic and economic crisis, some undesirable activities may occur that require the government to be able to act. The necessity of prompt adoption and exceptional

47 For more detail see Sahin, 2020, p. 192.

circumstances, however, does not justify the numerous shortcomings and inconsistencies in the Act. The legislator simply should not allow itself to propose and adopt such a sketchy normative act.

The definition of basic concepts and the validity of the unique system for persons from the EU member states are controversial. If we combine this with the fact that the subject of screening and control is already an investment encompassing a 10% participation in the target company, the compliance of the regulation with the right to free movement of capital as one of the main pillars of EU legislation can be questioned. On the other hand, we can expect that a vast number of foreign investments to meet the conditions of notification.

The obligation to notify is unclear. It applies to all foreign direct investments that could pose a threat to the security and public order of the Republic of Slovenia. Critical economic activities are listed as examples only. Therefore, it is not entirely clear which target company notification is required. Foreign investors who want to avoid legal risks are likely to choose to make a notification in doubt. This situation is further complicated in terms of real estate. Here, it suffices that the real estate is in proximity to a critical facility. The concept of proximity can, again, be interpreted differently. This is probably not just an adjoining real estate, but real estate at a reasonable distance. The regulation covers a broad range of real estate and reporting agents, as the latter are all legal entities in the Republic of Slovenia in which foreigners have more than 10% participation. We can expect that public notaries in the process of verifying the signature on contracts will also require the submission of authorisation.

The Act is very awkwardly drafted in the part specifying a direct capital investment in the form of acquiring a share in a company with its registered office in the Republic of Slovenia. The so-called 'share deal' is the most widespread form of foreign direct investment. In this context, the text of the Act only mentions mergers and acquisitions of public limited companies. The drafter forgot to mention the most common form of contractual acquisition of a business share or block of shares.

The conditions and procedure for revoking the consent by which foreign direct investment is authorised are very poorly regulated. It is only clear that revocation entails the nullity consequence. However, it is not even possible to predict how the previously established effects of foreign investment will be eliminated. It is hard to imagine that later, in two or three years, the effect of the takeover bid would be reversed in such a way that shareholders would get their shares back and return payments to the acquirer. It would certainly be more appropriate for the Act to impose on a foreign investor an obligation to dispose of the excess of part of its participation, as provided, for example, in the law governing banks.

Finally, let me reiterate that the interpretation of the Act to mean that the revocation of foreign direct investment can also be applied to foreign investments made before it came into force, that is, with a retroactive effect, is extremely controversial. Such an interpretation would, in my view, be a step over the edge. Hence, it must be vehemently rejected.

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The COVID Crisis as a Sample Tube with Contemporary Legal Phenomena

ABSTRACT: *A superficial view of lawmakers' reaction to the current pandemic crisis is that we are witnessing an aberration and a concentration of bad practices. This paper presents a partially opposite thesis that the response of legal systems to this situation is not surprising and an accumulation of several phenomena very characteristic of the contemporary evolution of law. The restriction of personal freedoms, often imposed by means far from the theoretical scope of sources of law described by demo-liberal constitutions, combined with the broad scope and curious details of the extraordinary regulations complete the general trend towards the juridisation of almost every aspect of human activities. Today, the law serves as the dominant tool of creating social and economic order, taking the fields once occupied by other (and now almost extinct) normative systems and at the same time, displacing them. Thus, the more law exists in the everyday circulation, the more demand it creates for further and even more casuistic legal regulation. In this reality, this is the only tool that can be applied in extraordinary circumstances. In addition, the applied legislative techniques are not new. The Polish act known commonly and semi-officially as the 'anti-crisis shield' is a typical 'complex act' aimed at dealing with a particular matter thoroughly through the use of all traditional methods of regulation: civilian, administrative, and penal mixed together in a single text of law. Thus, this regulation also constitutes a perfect (and perhaps the most striking) example of the phenomenon of decodification, especially in the field of private law, since it deals with particular contractual and tort issues as if there were no relevant regulations in the Civil Code, which should (at least theoretically) constitute the core of the private law system.*

KEYWORDS: COVID-19, legislation, juridification, inflation of law, decodification.

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1. Introduction

The on-going COVID-19 pandemic occupies a distinctive role in the social sciences discourse, including jurisprudence. This phenomenon is understandable, but also difficult to clearly pin down and precisely describe. Note that lawyers analysing legislative actions undertaken by governments in connection with the pandemic or attempting to explain the legal practice of the time often submit that we dealing with phenomena that in the best case scenario, are extraordinary and deviate from the norm commonly accepted in the contemporary legal theory of the liberal-democratic West and from the practice prior to the onset of the pandemic. That said, in this paper, we contend with reference to various examples that although the practice of the creation and enforcement of law during the COVID-19 pandemic are not compatible with the theoretical, liberal standards, they do not in principle markedly differ from the practices observable hitherto. The time of crisis that we are currently dealing with serves merely as a magnifying glass or the titular sample tube that captures our attention. It could be surmised that in extraordinary times, facts pertaining to contemporary law more easily reach our consciousness than in more 'standard' times when certain phenomena are more 'dispersed' and not as conspicuous.

The examples we draw on in this paper are derived from the current legal practice of Poland and other European states. They are subsumed under three general phenomena, which in our view are the most vital and typical for the contemporary legal reality in states in the West, especially those within the civil legal tradition. The fundamental phenomenon here is the increasingly widening and deepened juridification of various spheres of public and private lives, coupled with a constant expansion of the catalogue of actual sources law and a direct consequence thereof, steady decodification, particularly in the field of private law.

2. Law in the practice of the executive and judiciary

The time of the pandemic has been one of extensive—albeit often chaotic, inconsequential, and meandering—organisational activity on the part of public authorities. This applies not only to legislative efforts but also to the activities of the executive and judicial branches of government.

As evinced by the experiences of the last months, not only in Poland, new challenges have culminated in the introduction of previously unknown practices and rules of operation of public offices and courts both 'on the outside' (in relation to enquirers and customers as well as parties to on-going disputes) and 'on the inside'. In the beginning stages of the lockdown, the day-to-day operations of certain public authorities were suspended. These restrictions were subsequently relaxed, remote (online, with the use of distance means of communication) and partially remote modes of work and

rotational work (workers on stand-by duty or division into groups who performed their tasks interchangeably) were ushered in, and new rules governing contact with enquirers were put in place (e.g. service of hard copy official correspondence by sanitary services who disinfected the mail). Many of these solutions did not have a clear legal basis, and decisions on the implementation thereof were made on the spur of the moment with reference to the life experience and intuition of heads of public offices or officials. Only thereafter (in Poland this was at the end of March 2020, i.e. approximately two weeks after the pronouncement of the pandemic state of emergency that brought about severe restrictions of rights and freedoms for citizens and businesses) did parliament officially approve of some of these practices by amending the law, which envisaged the *ex lege* suspension of court time limits in certain cases including in respect of tax and customs inspections, and fiscal and judicial-administrative proceedings. (Under the law, during the pandemic state, certain court time limits in an enumerated class of cases shall not commence, while those already commenced shall be suspended for the duration of the state.) In general, for more than two months, public authorities at large (including local government and the majority of non-government organisations) entered a 'state of hibernation', disposing only of the most urgent matters. Even though the ultimate effect of this situation remains to be seen, it can already be forecast that what amounted to an actual 'freeze' of authorities disposing of court disputes and administrative proceedings shall bring about such a backlog of cases that the 'wave' so created will not only contribute to the lengthening of time necessary to deal with enquiries in the future, but may also turn into a real threat to the realisation of individual rights by public administration and impede the constitutional right to a fair trial (due process) (which entails the right to have one's matter considered by a court within a reasonable time).

It is underscored that the Polish 'COVID legislation'[3] was not limited to regulating the operations of government outlets during the pandemic and related due process issues, but an attempt was made (which tendered partially positive results) to legislate in a manner so that agents possessed with rights and freedoms do not endure negative effects of the disease or the freeze of the operations of public authorities. For example, in accordance with the new Polish provisions, if by virtue of being quarantined or medicated because of COVID-19, a driver-car owner fails to perform a mandatory vehicle check-up, the validity of the previous check-up was extended until seven days of the expiration of the medication period or quarantine (Germany adopted analogous laws). In addition, taxpayers saw the deadline for the settlement of personal income tax declaration duly extended. (For years, it was the rule in Poland that personal income tax declarations were to be filed by the end of April every year. In 2020, this deadline was extended until 31 May).

3 The main Polish legislative act aimed to deal with the COVID-19 crisis was adopted on 2 March 2020 and is popularly known as the 'Anti-Crisis shield'. Its full and official title is: ustawa z dnia 2 marca 2020 o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz. U. z 2020 r., poz. 1842).

While many actions taken by legislators and public authorities during the time of COVID have been not only a product of concern for the safety of officials or comfort of public administration, but also considered the rights and freedoms of citizens and businesses and protection of the legal system as known hitherto, the conduct of the government—especially the activity of the legislative branch—has given rise to social controversies and critical voices from the legal community. In question here is not only the sense of certain decisions (e.g. the Polish government, in the name of the need to isolate and reduce the number of infected persons, promulgated the temporary closure of forests, which was rigorously enforced by the police and other state forces), but also the modes and forms of law-making.

3. Legislative practice

Above all, the reality of 'grappling with the COVID pandemic' has increased the dynamics of operations of central government authorities, in particular from the legislative and executive branches. This has been the case in respect of the parliament (which in Poland comprises two chambers: lower (Sejm) and higher (Senate)), which engages in law-making (legislative) activity within its competence to enact laws. For example, executive authorities (e.g. Cabinet ministers) have recently promulgated numerous regulations (new ones and amendments of those already in force but considered in need of updates). In addition, legislative enactments of other kinds have also been important. These dynamics have made it so that the time between the appearance of an idea to legislatively intervene to the promulgation of a law in the official journal (Journal of Laws) and its entry into force has been radically shortened. Instances of the 'creation and entry into force of laws in real time' have been observed whereby a high-ranking official during a press conference would orally expound on a previously unknown draft law along with a brief statement of its reasons, and then sign 'live' (before journalists, television cameras, and thousands of viewers) such a regulation into law, which is then within hours promulgated in the official journal and enters into force on the same day. This practice—evidently partly justified on account of the COVID pandemic—defies the principles of good legislation consisting of *inter alia*, rational legislative planning, convincing reasons for a given draft law, comprehensive analysis of a regulation's consequences, consultations with stakeholders and non-governmental organisations, and compliance with *vacatio legis* time periods (thus ensuring that a new law shall not come into force on the date of its promulgation and that persons subjected thereto have an opportunity to acquaint themselves with it and adjust accordingly to its requirements)[4]. In contrast, the COVID reality has generated a situation where an unexpected decision of a politician becomes a source of universally applicable law, and as such, is immediately enforced. In fact, the familiar timetable of legislative works has

4 OECD, 1994, p. 12.

become fiction as the consultation process has been replaced by unilateral statements from decision-makers, and media stories (TV programmes, Internet news, or radio broadcasts) have often become a more reliable source of information about binding law than the official Journal of Laws.

In general, under 'normal conditions', the pace of law-making and the governments' ability to immediately impose its decisions on the governed should be a cause for concern, deserving of criticism, and approached with suspicion. (The pace of legislative activity usually generates the risk of insufficiently thought-through decisions, disregard of public consultations, absence of opportunities to hear expert opinions, ignorance of opposition voices, etc., i.e. numerous factors relevant from the perspective of the rationality of law-making.) However, in extraordinary situations such as the SARS-CoV-2 pandemic, we are compelled to accept (or at least partially justify) this 'expedited' manner of proceeding and at times compromise in other ways that would be off-limits in an 'ordinary situation'.

The pace of proceeding has engendered other consequences for the quality and form of legislation. A symbolic example of the peculiarity of the 'COVID legislation' has been the 'pandemic special laws', namely legal acts that aspired to the status of 'comprehensive regulations' of the entirety of matters affected by the pandemic. Such laws (enacted not only in Poland and other continental European states, but also in Anglo-Saxon countries[5]), previously unplanned, purported to regulate a wide range of issues of both a public and private character, which were yet to be the subject of the legislator's attention and entirely unregulated. The scope of the laws encompassed provisions in respect of rules of the organisation and operation of the healthcare system (including the organisation of hospitals and medical institutions, new rules on financing, and the rights and obligations of doctors and other healthcare employees), social services, national and higher education, the police and other law enforcement agencies, the objectives and mode of operation of local government and professional associations, non-governmental organisations and corporations (e.g. an option for collective corporate bodies to adopt resolutions online), courts and public offices, undertaking business activity (restrictions imposed on businesses in various industries including catering, tourism and entertainment, hairdressing and beauty, food production, transport), further performance of incurred obligations (e.g. the possibility to have repayment of loans deferred), changes to labour law (introduction of so-called telework), public law obligations (taxes, customs, other levies), social security (subsidies, grants, exemptions, loans), and individuals' personal obligations (e.g. mandatory disinfection of hands, covering the mouth and nose in public places, rules governing behaviour in public use spaces, prohibition on organising gatherings and demonstrations). The 'COVID special laws' conflated provisions pertaining to the operations of confectioneries and gyms with laws laying down rules governing the organisation of funerals, and political rights (postponement of parliamentary elections or change of the electoral procedure from

5 For instance, see the relevant English legislation: *An Act to make provision in connection with coronavirus; and for connected purposes*, more widely known as the *Coronavirus Act 2020*.

voting in person to voting by mail) with laws angled against speculators. Consequently, their legislative construction must have been equally peculiar as the special laws were very complex, overly detailed, replete with *leges speciales*, purported to amend at once dozens or hundreds of acts, and difficult to understand without having recourse to the context of the entire legal system. Therefore, a meaningful perusal of these acts was a challenge both for laymen and experienced lawyers well versed in applying law. Their wording suggests that the drafting process involved persons without any legislative experience or basic awareness of legal terminology. (Considering the pace of legislative works, it cannot be ruled out that many drafts were authored by persons without competence in legal drafting techniques.) One may therefore risk the hypothesis that—in the case of the 'COVID special laws'—work under time pressure and without knowledge of economic realities led to the drafting of laws essentially constituting a real-life socio-economic experiment. Not only in Poland was the aftermath such that parliament had to on numerous occasions (often within days) amend the 'special laws' by means of... adopting another 'COVID special law'.

It is worth emphasising that the internal cohesion of the 'COVID special laws' and their coherence with the legal system at large has given rise to justified doubts. An analysis of the particular provisions prompts the question regarding whether lawmakers purported to apply analogous solutions to similar situations. For example, why were hairdressing salons closed but beauty parlours could stay open. Why were gyms permitted to operate but swimming pools were not, and why were fashion stores in malls closed, but boutiques of comparable scale and profile situated outside such malls were allowed to stay open? These regulations evoked critical voices as to their compatibility with the constitutional principle of equality under the law and non-discrimination by public authorities (and the principle of fair competition among businesses), and some have floated the suspicion that the legislative decisions could have been influenced by lobbies.

Further, having followed legislative activity, between April and June, one may broadly generalise that the efforts were both expeditious and unconventional to the extent that certain fundamental questions have been prompted, for example: 'Exactly what rules/laws are currently in force?' 'Since when have they been in force?' 'What is the source of law?' 'Is there any (and if so, what?) legal basis for the government intervention?' Doubts must have arisen where in an effort to curb the number of new COVID cases, new restrictions were implemented whose 'legal basis' was found in an internal regulation, 'direction', 'recommendation', or 'good practice' (formally, merely a legally non-binding suggestion of government officials). At other times, a government representative made a statement at a press conference or bills that have not come into force (as they had not been promulgated in the Journal of Laws). One could surmise that in recent weeks, the line between what is binding and what is not has been blurred, as has that between sources of universally applicable and internal law, what is within the boundaries of law, and what is illegal. A 'factual deconstruction' of the legal system has

in this way been completed: a legal system that has traditionally been perceived as a unified, coherent, closed, hierarchical, rational, and orderly system of legal norms[6].

4. Rights of individuals at a time of crisis

Note that the government reaction to COVID and regulations enacted in connection with the pandemic have increased the presence of the state in the private sphere of individuals (natural persons and businesses). While the imperative of acting 'in an extraordinary situation/in a state of necessity'—that is, the need to mitigate losses and prevent new infections—is understandable, it is hardly contestable that the government is active in the lives of its citizens, local communities, and market relation to a greater extent than even last year. Implications of this activity are easily observable. Examples include the obligation to wear face masks, draw up declarations on one's health condition, prohibitions and restrictions of movement (closed borders, stay-at-home orders, closure of public and private buildings such as malls), obligation to furnish reasons for leaving the house upon government demand, curtailment of private property guarantees (permissibility of confiscations or use 'for public purposes'), and interference with contractual relations. Also important are potential or real violations of privacy rights (collection by the government of information and data concerning gatherings, family, and romantic lives of virus carriers; verification by state services of compliance with self-quarantine rules), encroachment on the right to information and freedom of speech (censorship of certain content in the public sphere), and exercise of the right of freedom of religion (restrictions imposed on certain religious practices and closure of churches). This has ushered in a peculiar brand of 'statism' in respect of spheres previously free from state intervention, including personal, private, family, and socio-economic lives, which espoused relations moulded spontaneously and conditioned by local culture, customs, and habits. Another consequence of the above is that the previously used private law method of regulation of these relations (entailing principles such as freedom of contract, party autonomy, or *volenti non fit iniuria*) has been replaced with a public law method (whose rationale is 'hard' regulation and the provision for state force as a means to ensure its enforcement).

It appears that the contemporary restrictions levied on the private sphere and constitutional freedoms are only a preface to regulations to be enacted in connection with a future economic crisis (which is to be anticipated after the conclusion of the COVID pandemic). With reference to the experiences of European and Anglo-Saxon states of the first months of the pandemic, one may posit that decision-makers' thought processes have been dominated by interventionist concepts that found expression (contained in the 'COVID special laws') in provisions envisaging state compensation and welfare for the victims of lockdown (especially businesses, employers, and employees)

6 Teubner, 1997, p. 768.

in the form of exemptions, deferments, and direct payments: forgivable, interest-free loans, helping grants, and sometimes even cheques, vouchers, or cash. Although it is difficult to roundly criticise the concept of state aid and its form, in the context of the on-going pandemic and global economic crisis one must conjure up thoughts of the Great Depression and proposals of John Maynard Keynes and his disciples[7].

Finally, by enacting new regulations—in the face of difficulties with their enforcement (the sanitary restrictions imposed on businesses and natural persons, attaching *inter alia* to freedom of movement, undertaking business activity, and obligations to wear face masks or socially distance have met with resistance from citizens and in an ostentatious form, from so-called COVID sceptics, not only in Poland)—legislators uniquely often appended thereto criminal provisions that allowed for disciplining (through financial and custodial sanctions) those reluctant to comply. This issue goes beyond the scope of this paper, but serves as a starting point for an interesting analysis in the field of the sociology of law of how the absence of mass social approval for a new regulation (insufficient legitimacy of law) adversely affects its effectiveness, thus that the government then subsequently strives to 'push it through' by criminal sanctions[8].

To sum up the above remarks, the 'COVID legislation' has the following characteristics: (a) previously unseen pace of the legislative process; (b) absence of legislative planning: taking *ad hoc* intuitive law-making decisions; (c) disregard for the *vacatio legis* requirement in respect of new law and adoption of retroactive solutions (in defiance of the principle of *Lex retro non agit*); (d) lack of transparency and dubious rationality of the decision process (incoherent communications relayed by decision-makers or absence of information on the reasons for a given regulation, difficulty with attribution of responsibility to a particular minister for a given provision of the 'COVID special laws'); (e) absence of the consultation process or a fiction thereof (e.g. adoption of new rules governing the undertaking of business activity by restaurateurs without consulting the industry); (f) surge in activity of interest groups and lobbies, which capitalising on the chaos and pace of legislative works, attempted to 'tailor bespoke regulations for themselves' directed against their market competitors; (g) subpar formal and legislative quality of the new laws and deficiencies in the legislative technique (imprecise terminology, legal definitions incoherent with the current wording of the law and previous laws, loopholes, internal contradictions, and the overall excessive size, complexity and unclear layout of the 'COVID special laws'); (h) disruption of previous classifications of sources of law (e.g. divisions into codes, other acts, supra-act laws; divisions into universally applicable laws and so-called internal law. In practice, the line between 'hard' and 'soft' law has also been blurred. Furthermore, a host of issues regulated hitherto in local law—legal acts enacted by local government agencies—have been 'transferred' to state-level legislation, and field agencies have adopted their own solutions, often separate from and at odds with laws enacted by the central government.);

7 For instance: Rezza Baqaee and Farhi, 2020; McKee and Stuckler, 2020.

8 On this topic, see *inter alia*: Tyler, 1990; Bottoms and Tankebe, 2012.

and(i) a sizable number of criminal provisions (envisaging severe sanctions even in the case of lack of intent).

Can the aforementioned problems with the COVID legislation be considered only temporary, 'an accident at work' caused by the unusual circumstances of the pandemic? Unfortunately, the abovementioned phenomena are neither transitional nor local. The pathologies around the enactment and enforcement of law, which have intensified and revealed them with double force during the pandemic, have attached to the legislation of liberal-democratic societies for years. An exhaustive description of these is not possible here; however, they should be identified.

5. Inflation of law as a general phenomenon

The notion of inflation of law (legislative inflation), although used in both the academic literature and opinion writing, is rarely defined and as such, understood differently. However, it seems that under the umbrella of this wide category—which is rightly so connected with the undesirable economic phenomenon of loss by money of purchasing power—there is a string of negative trends: juridification of public life, a tendency to fastidiously regulate every aspect of human activity, excessive specificity and casuistry of provisions, coherence within a legal system as a result of lack of consistency of the legislator and haphazard legislative changes, fast-paced changes in legal wording due to amendments, lawmakers' 'verbosity' evinced by inserting into laws (acts) provisions that are superfluous, and difficulties in obtaining knowledge about the law and its effective enforcement.

Simply put, inflation of law in contemporary liberal-democratic societies has both a quantitative (excessive number of legal provisions/increase in the quantity of legal acts currently in force) and qualitative (expansion of the scope of legal regulation by subjecting to legislation spheres of public life previously unregulated, overzealous ambition of the legislator to regulate everything) dimension. Commentators pinpoint that two inter-connected, albeit contradictory, tendencies are simultaneously at play here: an ever-increasing number of binding provisions/acts and a decrease in their substantive and technical quality. 'Legislative production in the (post)modern society has reached critical quantitative limits. The causes of legislative inflation are multiple both in number and in nature. (...) Thus it can be asked whether the overproduction of legislation is due to its decreasing quality in so far as the defects of bad legislation are compensated by introducing a new legislative intervention, resulting in an ever accelerating growth of legal systems'[9].

Naturally, there are many reasons for quantitative and qualitative regulatory increases; therefore, inflation of law cannot be explained simply by the incompetence of lawmakers. One may also point to the necessity of implementation of EU law (which

9 Eng, 2002, p. 65.

is also often over-regulated and of low quality from the perspective of legislative technique)[10], expanding state interventionism, evolution and inflation of human rights (an increasingly broader catalogue of human rights necessitates the introduction of guaranteeing procedures and institutions), technological development, changes in public and economic lives, issues where regulation is necessary (e.g. in fields such as biotechnology, environmental protection), errors in the legislative process, and the activity of interest groups (which often treat regulation as an opportunity to attack their competitors).

Inflation of law and general over-regulation engender such complications that experienced lawyers often struggle to answer questions about the current state of the law. One must concur with the observation that 'there is no doubt that the law has always been complicated. It is a frequently heard complaint these days that we suffer from legislative inflation and that legal procedures are interminable and uncertain. But Leibniz wrote as early as 1678 that it "is not possible to know the law without a very large library", while Bentham in an open letter to the American citizens said: "Everywhere the common law has set foot, security has disappeared". At that time, we may say that the law was only complicated, while today we are obliged to talk about its complexity'[11].

However, aligned with the positivist legal tradition and rule of law within its liberal meaning—legal provisions that have been cast in words and promulgated in the official journal were to serve as a safeguard of individual rights and freedoms—it was predicted as early as 100 years ago that the phenomena of 'inflation', 'flooding', or 'over-production' of law (especially when coinciding with often-changing legal landscape) would likely pose a risk for businesspersons whose activity would wind up increasingly more regulated and the maxim of *Ignorantia iuris non excusat* would acquire a new ironic meaning in this context[12].

Other problems are connected with inflation of law, such as the deterioration of legislative technique in contemporary regulations, a slump in the coherence and transparency of the legal system, activity of pressure groups and lobbies that exert their clout against the government to ensure the passing of regulations that benefit themselves, difficulty with establishing the wording of law currently in force, and the

10 This is confirmed by EU legal documents, for example, the so-called Mandelkern Report, 2001.

11 Ost and van den Kerchove, 1999, p. 146.

12 'During a short address, which I had the honor of delivering at the Commencement Luncheon of Columbia in June 1904, I referred briefly to the growing tendency in this country to multiply the written law, and as a necessary corollary, the unwritten law as well. It was suggested that this ever-increasing volume of crude and undigested enactments was injurious to commerce and needlessly vexatious and burdensome to every professional and business man (...) While the law mills are in operation, no man who has money invested in a business venture feels secure. He may awake any morning to find that a bill has been introduced, which if passed, will turn his capital to ashes. He feels that he is sleeping over a mine of legislative dynamite, which ignorance, stupidity, or malice may explode and destroy the patient toil of year'. Coxe, 1906, p. 102.

frequency of changes of the legal system. All these pathologies emerged at the time of COVID.

6. Juridification of public life

While the phenomenon of juridification of public life is correlated with inflation of law, it stresses not only the quantitative-qualitative aspect of legal provisions, but also the sphere of regulation. To simplify, inflation of law is more related to legislative technique (and to administrative law and legal theory), while juridification is primarily within the orbit of interest of legal sociologists[13]. When discussing juridification of life (or to use the term coined by J. Habermas[14], *colonisation of life by means of law*), it is argued that legal regulation is omnipresent. The concern is there are no more 'private' spheres free from legislative interference: 'Juridification' is another such pathological form, when law comes to invade more areas of social life, turning citizens into clients of bureaucracies with what Foucault might call 'normalising effects' (...). If properly designed and robustly executed, democratic institutions are supposed to ensure that the law does not take this pathological form but is subject to the deliberation of citizens, who thus author the laws to which they are subject[15].

Zygmunt Ziembiński, an eminent legal theorist after the Second World War, correctly emphasised that this issue is relevant not only in the Polish context, but also worldwide[16]. The phenomenon may largely be explained by the realisation of the doctrine of state interventionism and expansion of functions of a contemporary welfare state[17], and by perception of rights as claims leveraged against the government[18]. This situation must engender a growth in bureaucracy, statism of private relations and the private sphere, replacement of private law regulation with public law solutions, and the uprooting by law of other norms that regulate public life (e.g. religious, moral, ethical, and customary norms)[19]. It is stressed that juridification is a danger to human freedom and privacy, and represents a response to human needs and expectations: the perception of a legal system and the state as a guardian, father, and patron[20].

13 Turska, 1987, p. 166.
14 'In his Theory of Communicative Action, Habermas diagnosed certain forms of legal intervention (of "juridification" or "legalisation") as a mode of "colonisation", of undue assimilation of the lifeworld to the structure of the economic and administrative system. (...) The idea is that there are certain forms of social relationship or certain forms of social relationship or certain forms of social life and certain types of conflict that are not amenable to legal regulation'. Peters, 1996, p. 125.
15 Stanford Encyclopedia of Philosophy: Jürgen Habermas.
16 Ziembiński, 1987, p. 66.
17 Teubner, 1988, p. 3; Deflem, 2013, p. 81.
18 Wallop, 1994, p. 47.
19 Blichner and Molander, 2005.
20 Zacher, 1987, p. 411; Frank, 1949, p. 18..

Although these phenomena have appreciated in strength (and will likely intensify as the pandemic and economic realities worsen) in connection with the COVID pandemic, they tally with a string of events and tendencies that have long been present. A radical dissonance is thus created between constitutional principles (including the rule of law, good government), recommendations of international organisations, and political declarations regarding good legislation[21] and expert opinions on one hand, and practice on the other.

7. 'General' decodification and decodification at a time of crisis

Juridification and deconstruction of the accepted order of sources of law is accompanied by another phenomenon. The decodification of private law is not a novel observation: the origins of its constitutive elements and consequences appeared many decades ago. It should also be noted that civil codes have never in principle achieved the objective of being comprehensive and complete. Notwithstanding, only in the last half century has decodification gained pace and unsurprisingly, been named relatively recently[22]. It is currently a popular subject in the legal scholarship[23]. For the purposes of this analysis, we define decodification as a phenomenon or group of phenomena leading to a situation where in formally codified private law systems, civil codes are gradually losing their completeness and coherence, and consequently, their status as sources of private law deteriorates. This coincides with the entire system of private law losing its axiological (and logical) cohesion, and the traditional values of a liberal, bourgeois civil law, which 19th-century commentators considered permanent and incontrovertible, are now on the back foot.

A myriad of observable instances of decodification are evident in contemporary legal systems in Europe; however, from the perspective of this paper, the focus is on the fact that since time immemorial, many legislators have been striving to stay on top of dynamic changes in socio-economic relations and new issues emerging on the market because of the 'production' of an increasingly larger number of special (specific) laws. Comprehensiveness, historically an assumption underlying civil codes, was coupled with the stability of their regulations thanks to appropriate flexibility of provisions, the prevalence of general clauses in some states (e.g. Switzerland), and delegation of factual adjustments of the law to courts. However, the dynamics of the 20th century falsified these assumptions, and even civil law institutions, which are typically not subject to fundamental changes, are often regulated in special acts. The most fitting example in this context is the separate ownership of premises, which despite its fundamental importance for the economy and fact that it is an emanation of a legal notion that is the crux of the entire private law, has in many states long been regulated in special acts. The predominant cause for this is that separate ownership of premises is regulated

21 OECD, 1994, p. 12.
22 Irti, 1979.
23 Murillo, 2001; Rivera, 2013; Rudnicki, 2017; Su, Longchamps de Bérier and Grzebyk, 2019.

together with mutual relations between owners-neighbours and the constitution of their associations, issues that would not readily fit within civil codes. Therefore, legislators have opted for a new 'comprehensive' method of legislation whereby all regulations pertaining to a given issue are grouped in one act, instead of the historical idea centred on codification that dictated that all regulations private in character shall be codified. More laws are drawn up in this manner, thus encompassing all three traditional methods of regulation: civil (private), administrative, and criminal. The Polish legal system is largely based on such laws, which lay down various easily qualifiable provisions as within the realm of private law, but situated among public law regulations.

The production of special (specific) regulations in the EU Member States is evidently further fostered by the duty to implement directives, especially those regulating consumer protection. In this regard, divergent viewpoints among legislators are discernible as they sometimes—Germany being the prime example—attempt to incorporate new consumer laws into civil codes. On other occasions, directives are transposed into domestic law through the enactment of new special acts. In Poland, notwithstanding the endorsement of the German model, a host of regulations implementing consumer directives is contained within special laws, and some have been placed within the civil code. Finally, it is emphasised that consumer regulations are an exquisite example of the abandonment of traditional civil law values and dismantlement of the system's axiological cohesion. In truth, this is not a new phenomenon. It started more than a century ago with the emergence of special laws protecting the first commonly recognised weaker party to legal relations, namely a worker. Soon thereafter, the catalogue of protected agents was expanded to cover tenants of premises and ultimately, with the ascension of consumer protection (every one of us is a consumer in a large majority of contracts we enter into), the *coup de grace* levelled against the concept of equality of parties to private law relations is also observed, one which is still theoretically declared and upheld.

The abovementioned phenomena mean that European legislators have developed a habit of introducing changes into civil law not only by amending the code, but also by drafting special laws (acts) and ceasing to concern themselves with the axiological cohesion of the legal system. It is therefore unsurprising that in a crisis situation, they proceed in line with that habit, hastily enacting and bringing into force a host of extraordinary regulations—located outside the code—within the scope of strictly understood civil law. These provisions pertain particularly to contractual relations, both in business-to-business (B2B) and business-to-consumer (B2C) configurations, and may be found in the COVID special laws passed in states such as Belgium[24], Germany[25], France[26], and Poland[27].

24 *Loi relative au crédit à la consommation, visant à aider les emprunteurs à faire face à la crise provoquée par le coronavirus*, 27 Mai 2020.

25 *Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz-und Strafverfahrensrechtvom 27.März2020*, BGBl. I S.569.

26 *Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période*.

27 See supra note 1.

One cannot fail to notice a paradox here. The civil codes of the states listed above do contain provisions that embody the *rebus sic stantibus* clause, which is supposed to serve as a remedy in situations like those brought about by the COVID-19 pandemic. In other words, the codifiers theoretically ensured[28] that civil law is equipped with devices applicable in the event of an unforeseeable change of legal relations and circumstances surrounding the performance of contracts, and the power to modify contractual relations has been delegated to the courts. However, contemporary lawmakers have proceeded as if they have completely forgotten about the existence of these clauses, instead opting for piecemeal, interventionist private law solutions, setting out in the COVID special laws in a highly casuistic fashion that contractual relations shall be subject to whatever type of modifications. This lack of trust towards well-established code clauses is not surprising. The legislator is striving, especially within a democratic system, to adapt regulations as expeditiously as possible and impress the public. These objectives would not be attained by waiting until new judicial constructions of the *rebus sic stantibus* clause adjusted to the times of COVID are proffered. In Poland, the 'lack of trust' between the legislative and executive branches of government on one hand, and the judiciary on the other, mean that permanent delays in civil dispute resolutions and lack of consistent jurisprudence standard disputes between businesses and consumers are not conducive towards according a larger margin of discretion to the courts. The final consideration is even more relevant in this regard, since as noted above, a significant percentage of the special laws enacted in 2020 in Poland, France, and Germany pertained to consumers[29].

It cannot be overlooked that the crisis situation compels the legislator to suddenly show moderation in the pursuit of protecting consumer interests and to undertake efforts, at least temporary ones, to balance these interests with those of businesses facing the dangers posed by the crisis. This is best showcased by the aforementioned provision under which consumers must accept vouchers instead of refunds for tickets to mass events that have been cancelled or laws laying down—as in Poland—long, 180 day statutory periods for the refund of a price paid by the consumer. At this time, one cannot expressly conclude whether these regulations presage an intention to better balance the interests of consumers and businesses, or whether they shall be abandoned after discharging its function as an anti-crisis instrument. Regardless, the field of consumer protection constitutes that part of private law to which the most attention of contemporary legislators is devoted, both on a daily basis and at times of crisis.

28 Noteworthy, however, is that German codifiers initially did not include the *rebus sic stantibus* clause in the BGB. It found its way into German law only to the application of a *contra legem* construction by the courts, and was introduced into the code only in 1985 (Zimmermann, 1990, p. 374, pp. 581-582). This fact also represents an interesting aspect of decodification, for in this case, a consistent body of case law turned out to be a source of law more important than the code.

29 Alderman et al., 2020, p. 437–450.

8. Summary

The examples above, which draw on the practice of enactment and enforcement of law during the COVID-19 pandemic, appear egregious compared with the general and still 'holding' legal theory of the liberal-democratic West. They defy generally accepted truths that dictate that law is a coherent system based on clear legislation whose principal product is an axiologically coherent code. Further, they challenge the government's mantras concerning the need to ensure legal security, meticulous enactment, and the consistent enforcement of law and concern for human and citizen rights. However, if these 'academic' theories are replaced with more complex propositions—including empirical observations—pertaining to the character of contemporary law and essence of its processes, the severity of these examples is mitigated. Indeed, from that perspective, they become representative of the abovementioned phenomena such as inflation of law, juridification of public life, and decodification. The crisis context merely amplifies these phenomena, and they may be hardly discernible in normal times.

For these reasons, it is difficult for us to concur with the alarmist contentions put forward in speeches and in legal and political opinion journalism that a 'new quality' is emerging, one that poses a risk to legal systems. The COVID-19 pandemic is the titular sample tube that exposes much more vividly phenomena that have long been ascertained and explained. Therefore, a more forward-looking question is probably in order, namely whether the current situation will become a catalyst for changes in legal scholarship, making way for a mental breakthrough, and bid farewell to the positivist axioms so characteristic of democratic liberalism. Legal theorists and historians capable of analysing our current intellectual struggles with the pandemic from an appropriate perspective will be best placed to answer this question.

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Safeguarding Croatian Strategic Industries Within the Scope of the EU Foreign Direct Investment Regime

ABSTRACT: *A European Union (EU)-wide screening regime entered into force in October 2020, marking the turning point in the Member States' investment relations with third countries, most notably, the emerging economies of the Far East. Most Central and Eastern European (CEE) states have recently embraced novel screening solutions; some legislative proposals are still pending in a few states. These regulatory changes are the result of the socio-economic turmoil caused by the COVID-19 epidemic, which threatens a major fire sale of resources that are deemed critical for the Member States' national security and public order. In this paper, the authors examine the existing screening mechanisms regarding foreign direct investment (FDI) in five EU countries: Austria, Germany, Hungary, Slovenia, and Poland. Given the apparent lack of comprehensive FDI screening mechanisms in Croatia, the authors consider that the findings of this comparative analysis could help Croatian legislator establish a comprehensive legal regime for FDI pouring into Croatian strategic industries. This paper argues that Croatia should introduce novel screening mechanisms along the lines of the Germanic legal tradition, most notably, the CEE and the German foreign trade and payments law. The authors suggest potential solutions de lege ferenda that would fit the scope and objectives of the screening regulation. Following the introduction, the second section of the paper glances through FDI screening mechanisms in four CEE countries. In the third section, the paper revisits the existing Croatian legislation on FDI control. The fourth section considers possible amendments thereof within the context of the German foreign trade and payments law. The fifth section summarises and concludes the paper.*

KEYWORDS: European Union, Foreign Direct Investment, Regulation (EU) 2019/452, Screening Mechanisms, CEE countries, Croatia, Foreign Trade and Payments Act.

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1. Introduction

Before the adoption of the Treaty on the Functioning of the European Union (TFEU),[3] regulation of foreign direct investment (FDI) coming into the European Union (EU) belonged to the shared competences of the EU and its Member States.[4] TFEU introduced a significant change in the division of powers. The regulation of FDI has become an exclusive competence of the EU, within a broader area of common commercial policy.[5] Therefore, the EU has sole authority to adopt legally binding acts regulating all aspects of FDI,[6] including the permission of FDI inflows into the EU.[7] Over the last ten years, the EU has witnessed a continuous influx of investment (most notably, a significant increase in Chinese FDI) into strategically important European companies.[8] As such investments are often the result of state-controlled enterprises, the EU had to conduct prompt and comprehensive legal action to protect critical industrial sectors against investments that could threaten Member States' national security.[9] Following a fierce debate,[10] in March

3 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 1-344. Herein referred to as TFEU.

4 Moskvan, 2017, p. 244. FDI was considered a type of capital movement. Esplugues, 2018, p. 6. According to the Explanatory Note to the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, pp. 5–18) FDI covers 'investments of all kinds by natural persons or commercial, industrial, or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom (or the undertaking to which) the capital is made available, in order to carry on an economic activity. Such understanding was confirmed by the EU Court of Justice (hereinafter referred to as CJEU), which stressed that shareholding that enables the shareholder 'to participate effectively in the management of that company or in its control' should be understood as direct investment. See Opinion 2/18 of the Court (Full Court) of 16 May 2017, EU:C:2017:376, para. 80; Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C- 446/04, EU:C:2006:774, paras. 181 and 182.

5 Art. 207, para. 1 in conjunction with art. 3 (e) TFEU.

6 Art. 2, para. 1 TFEU. See also Esplugues, 2018, p. 11.

7 Opinion 2/18, para. 87.

8 Commission Staff Working Document on Foreign Investment in the EU. Following up on the Commission Communication 'Welcoming Foreign Direct Investment while Protecting Essential Interests' on 13 September 2017, Brussels, 13.3.2019, SWD (2019) 108 final, p. 2. Hereinafter referred to as SWD Foreign Investment. US and Canada are leading investors in the EU, both in terms of control over EU's large companies' and their assets. They are followed by European Free Trade Agreement countries (hereinafter referred to as EFTA) and Offshore Financial Centres. China, Hong Kong, and Macao are emerging investors into the EU. Russia, however, lags behind, especially in terms of controlling assets. Ibid., pp. 10-11.

9 Esplugues, 2018, pp. 17-18; Berin, 2019, p. 715; Kao, 2019, p. 174; Gadocha, 2020, p. 37.

10 The leading advocates of the common European FDI control were Germany, France, and Italy. Southern EU Member States (e.g. Portugal, Spain, and Greece) felt reluctant to support such initiative, as they received vast Chinese financial aid during the 2008 financial crisis. See more in Esplugues, 2018, pp. 15-18; Kao, 2019, p. 178; Zwartkruis and de Jong, 2020, pp. 4-5.

2019, the EU issued the Regulation 2019/452 establishing a framework for the screening of FDI into the Union.[11]

In spite of the title and scope, the Regulation (EU) 2019/452 neither outlines an EU-wide legal framework for the establishment of national screening mechanisms for FDI,[12] nor imposes legally binding screening mechanisms on Member States.[13] It allows Member States to decide whether to introduce, maintain, or amend screening mechanisms or leave inward capital flows free of any public scrutiny.[14] The Regulation (EU) 2019/452, however, imposes an obligation on the Member States and the Commission to establish information and cooperation mechanisms in the event that FDI affects more than one Member State, irrespective of the fact that FDI may not be subject to screening in the recipient Member State.[15] As the Regulation (EU) 2019/452 does not prejudice the application of TFEU provisions on the free movement of capital,[16] Member States' screening mechanisms should meet the well-established requirements of justified restrictions on capital inflows[17] (i.e., principles of proportionality, non-discrimination,[18] non-protectionism, and legal certainty).[19] Screening and cooperation mechanisms may only be imposed on the basis of security and public order,[20] leaving

11 OJ L 79I, 21.3.2019, pp. 1-14. Hereinafter referred to as Regulation (EU) 2019/452. The fact that the screening regulation was enacted under the EU's exclusive competence makes it, as some argue, an EU 'weapon' in trade talks with the USA and China, forcing two countries to introduce reciprocity in trade relations with the European counterpart. Schill, 2019, p. 21; Zwartkruis and de Jong, 2020, p. 16; Gadocha, 2020, p. 38.

12 Dimitropoulos, 2020, p. 24. Art. 2, para. 1 Regulation (EU) 2019/452 defines FDI as 'an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments that enable effective participation in the management or control of a company carrying out an economic activity.'

13 Esplugues, 2018, p. 19; Kao, 2019, p. 182; Dimitropoulos, 2020, p. 24; Gadocha, 2020, p. 38.

14 Art. 3, para. 1 Regulation (EU) 2019/452.

15 Ibid., arts. 6-7. Dimitropoulos, 2020, p. 24.

16 Arg. ex recitals 4 and 10 Regulation (EU) 2019/452. See Ruohong and Kociubiński, 2019, p. 5; Gadocha, 2020, p. 58.

17 Art. 65, para 3. TFEU. Zwartkruis and de Jong, 2020, p. 8.

18 The CJEU provided for a possibility for a Member State to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not, on the other hand, constitute a valid justification for a restriction on capital movements between Member States. See case Test Claimants, para. 171. However, a Member State that subjects an FDI to the screening mechanism shall not discriminate among third countries (Regulation (EU) 2019/452, art. 3 para. 2). Zwartkruis and de Jong, 2020, p. 17.

19 Berin, 2019, p. 709. A rather loose language of the Regulation (EU) 2019/452, alongside high level of regulatory discretion on the Member States' side, may jeopardise full attainment of these principles. For the critical review of the proposal of the screening regulation, which also holds true for the final text, see Berin, 2019, pp. 721-727.

20 Arg. ex recital 18 and arts. 1 and 3 Regulation (EU) 2019/452. Dimitropoulos, 2020, p. 32.

other grounds for justified restriction of inward FDI within the general scope of Article 65, para 1. TFEU,[21] and CJEU case law.

Western European countries established their screening mechanisms years ago,[22] while significant regulatory activity has taken place only recently in Central and Eastern European (CEE) countries. CEE countries had almost no mechanisms for screening FDI.[23] However, in the aftermath of the economic turmoil caused by the COVID-19 epidemic, which has threatened critical European industries (most notably, the health infrastructure),[24] the majority of CEE countries have decided to establish comprehensive solutions to control FDI.[25] Unfortunately, Croatia has not followed suit. While the Croatian Government introduced a by-law implementing the Regulation (EU) 2019/452,[26] its text merely contains provisions on the establishment of a national point of contact and inter-ministerial cooperation.[27] The underlying objective of the EU legal framework was to induce Member States to introduce a full-fledged screening mechanism, as a legal shield against economic risks caused by the epidemic.[28] However, the framework was not given due consideration, making the Croatian solution a truncated piece of legislation. Given this regulatory loophole, this study analyses the existing Croatian legislation to identify whether Croatia already has available means for controlling inward FDI.[29] The study argues that Croatia should introduce screening mechanisms along the lines of the Germanic legal tradition, most notably, the CEE and German FDI law. The authors

21 Member States can restrict capital movements, so as to address policy aims regarding different taxpayers, to prevent infringement of national laws (in particular, tax and financial laws), and to collect statistical and administrative information.

22 Spain, France, Romania, and the Netherlands have had screening systems in place since the late 1990s and early 2000s, respectively. Member States, such as Germany, Italy, Denmark, Austria, Portugal, and Finland, set out their screening mechanisms during the last financial crisis (in 2011, 2012, and 2013, respectively). For the full list of screening mechanisms notified by Member States see https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf, last updated on 4 November 2020 (Accessed: 18 November 2020).

23 See https://knowledge.schoenherr.eu/pg/foreign-direct-investment-screening/ (Accessed: 1 October 2020).

24 Communication from the Commission: Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), Brussels, 25.3.2020, C(2020) 1981 final, p. 1. Hereinafter referred to as Communication. The Commission asked Member States to be particularly careful to avoid that the health crisis caused by the COVID-19 outbreak results in a 'sell-off of Europe's business and industrial actors, including SMEs'. See ibid., Annex, p. 1.

25 The following CEE countries have notified the Commission about their screening mechanisms (state on 4 November 2020): Hungary, Latvia, Lithuania, Austria, Slovenia, and Poland.

26 Government Ordinance on the Implementation of the Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 on the establishing a framework for the screening of foreign direct investments into the Union. Hereinafter referred to as Ordinance.

27 Ibid., art. 3.

28 Communication, p. 2.

29 Until a Member State establishes a complete screening mechanism, it should use other available means to deal with FDI cases that could create a risk to public order and security in the EU, including risks to the health sector and supply of key inputs (e.g., medical products). Communication, p. 2.

suggest potential solutions *de lege ferenda* that would fit the scope and objectives of the Regulation (EU) 2019/452. Following the introduction, the second section of the study glances through FDI screening mechanisms in four CEE countries to find a 'common core' of the CEE FDI regulation. The third section revisits the existing Croatian legislation on FDI control. The fourth section considers possible amendments based on the CEE law and its German role model. The fifth section summarises and concludes the study.

2. FDI screening mechanisms in CEE countries

The following section provides a brief overview of national screening legislation in four CEE countries: Hungary,[30] Slovenia,[31] Austria,[32] and Poland.[33] At the time of writing, these four countries are the only CEE countries that have introduced FDI control mechanisms in light of the Regulation (EU) 2019/452.[34] This makes their legislative solutions a good reference point for regional comparative studies and, arguably, a valuable benchmark for drafting processes in remaining CEE countries. Moreover, Croatia and the CEE countries share a basis in Germanic legal tradition, making CEE solutions a suitable model for further reflections about Croatian screening legislation. From a macroeconomic point of view, three neighbouring CEE countries (Austria, Hungary, and Slovenia) are ranked among the top nine EU-domiciled investors into Croatia; Austria is the leading investor.[35] Poland holds a rather high place (23rd) on the list. Companies with their seats in those jurisdictions, including companies with a third-country ultimate beneficial owner,[36] significantly contribute to the strategic sectors of the Croatian

30 Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, Official Gazette, Nr. 157/2018 (hereinafter referred to as Act LVII) and Act LVIII of 2020 on the Transitional Rules related to the End of the State of Danger and Pandemic Preparedness, Official Gazette, Nr. 144/2020 (hereinafter referred to as Act LVIII).

31 Act on Intervention Measures to Mitigate and Eliminate the Consequences of the COVID-19 Epidemic, Official Gazette, 80/20. Hereinafter referred to as the COVID-19 Epidemic Act.

32 Investment Control Act, Federal Gazette, Nr. 87/2020. Hereinafter referred to ICA.

33 Act of 24 July 2015, on Control of Certain Investments, Official Gazette, 117/2020, as amended by the Act of 19 June 2020 on Subsidies on Interest on Bank Loans Granted to Entrepreneurs Affected by COVID-19 and on the Simplified Procedure for the Approval of Arrangements in Connection with COVID-19 ('Anti-Crisis Shield Act'), Official Gazette, 1086/2020. Hereinafter referred to as CCI.

34 For Czech Republic see https://www.cliffordchance.com/briefings/2020/06/new-czech-foreign-investment-screening-regime.html) (Accessed: 1 October 2020). For Romania see https://knowledge.schoenherr.eu/pg/foreign-direct-investment-screening/ (Accessed: 1 October 2020).

35 See Table U5, Net investments, Net incurrence of liabilities (by country), last modified on July 10, 2020. Available at https://www.hnb.hr/en/statistics/statistical-data/rest-of-the-world/foreign-direct-investments (Accessed: 1 October 2020).

36 E.g. Sberbank Croatia d.d. is part of Sberbank Europe AG, an Austrian-based company fully owned by state-owned Sberbank Russia, the largest Russian bank. See more at https://www.sberbank.at/ (Accessed: 1 October 2020). In July 2018 Sberbank and VTB, another Russian state-owned bank, acquired significant shareholdings in Agrokor (a Croatian leading company in agricultural, food and retail sectors) through debt-equity swap. See SWD Foreign Investment, p. 54.

economy, including financial services, wholesale, real estate, retail, manufacturing of petroleum-based products, and manufacturing of pharmaceuticals.[37] As deeper analysis goes beyond the aim and scope of this paper, the following overview shall only provide an outline of national screening mechanisms: types of investment undergoing screening, financial thresholds and grounds for screening, targeted sectors, procedural steps, and sanctions. Following the comparative analysis, key remarks on the FDI CEE regulation will be given.

■ *2.1. Investments covered*

Screening mechanisms refer primarily to long-term investments made by third-country entities (i.e., natural persons or legal entities with their residence/seat outside the EU, the European Economic Area (EEA), and Switzerland), that invest capital into undertakings in the recipient Member State.[38] Also, Member States have introduced an anti-circumvention clause. The clause aims to encompass investments made by local investors or investors from another EU Member State, EEA state, or Switzerland, whose ultimate owner is an entity or resident of a third country.[39] Screening mechanisms cover both greenfield (i.e., establishment of new economic entities and branches, expanding existing economic entities, diversification of production portfolio)[40] and brownfield (acquisition of share or bond ownership, significant assets, voting rights, dominant influence, proprietary rights, status changes)[41] investments.

■ *2.2. Thresholds*

The minimum threshold usually equals or exceeds 10 percent of the shareholding in the target company.[42] This follows the National Account methodology, where the same

37 See Table U6, Net investments, Net incurrence of liabilities (by activity), last modified on July 10, 2020. Available at https://www.hnb.hr/en/statistics/statistical-data/rest-of-the-world/foreign-direct-investments (Accessed: 1 October 2020).

38 Art. 1, para. 1., subpara. 1 (a) Act LVII; Art. 85, para. 276, subpara. 2 (b) Act LVIII; art. 69 COVID-19 Epidemic Act; §1, point 2 ICA; art. 12a, para. 1, subpara. 1 (a) CCI in conjunction with art. 12c, para. 1, subpara. 5 and art. 14c CCI.

39 Art. 1, para. 1. subpara. 1 (b) Act LVII; Art. 85, para. 276, subpara. 2 Act LVIII; Art. 69 in conjunction with art. 71, para. 4, subpara. 5 COVID-19 Epidemic Act; Art. 12c, para. 6 CCI. Yet, it seems that Austria has not introduced a similar rule, as FDI has to involve at least one foreign investor, i.e., a natural person without EU, EEA, or Swiss citizenship, or a legal person having its seat or central administration outside the EU, EEA, or Switzerland. See §1, para. 6 ICA.

40 Art. 1, para. 2. Act LVII; Art. 71, para. 1 COVID-19 Epidemic Act.

41 Art. 1, para. 2. Act LVII; Art. 85, para. 277, subpara. 1 Act LVIII; Art. 70 and 71, para. 3 COVID-19 Epidemic Act; §1, point 3 ICA; art. 12c, para. 1, subpara. 1 (a)-(c) and para. 8 CCI.

42 There are, however, transaction considered less significant, and hence exempted from the screening procedures. This usually refers to interests below 20 percent threshold (in Poland, art, 12c, para. 1, subpara. 1 CCI), or start-ups having less than 10 employees, annual turnover or balance sheet total less than 2 million euros (in Austria, §2, subpara. 2 ICA). Nonetheless, even investments not undergoing screening shall be subject to cooperation and information scheme. See art. 7 Regulation (EU) 2019/452.

level of shareholding qualifies as FDI.[43] However, not all countries apply the 'ten (plus)' percent shareholding in the same fashion. Austria takes 10, 25, and, 50 percent of the share of voting rights for investments in six sensitive areas (i.e., defence, critical energetics, critical IT infrastructure, water, data collection, and medical infrastructure);[44] other, less sensitive areas remain subject to a 25 or 50 percent threshold.[45] In Hungary, under Act LVII of the general screening regime, all companies are subject to a '25 (plus)' percent threshold.[46] However, the 'ten (plus)' percent threshold will trigger screening for Hungarian public limited companies.[47] Irrespective of the threshold, Hungary will initiate the screening procedure when an investor seeks to acquire dominant influence over the target company.[48] On the other hand, within the provisional, 'counter-pandemic' regime under Act LVIII, all investments meeting the 'ten (plus)' percent threshold (and one million euros) are subject to screening,[49] while the 25 percent threshold is reserved for cases when more than one foreign investor acquires the target company.[50] Likewise, in Slovenia, all FDI resulting in 'ten (plus)' interest in nominal capital or voting rights is subject to screening under the provisional, counter-pandemic regime.[51] In Poland, however, the triggering threshold has been set as a combination of the percentage of significant participation in the target company[52] and the annual turnover thereof.[53]

■ *2.3. Grounds for screening*

The wording of the Regulation (EU) 2019/452 differs from the wording of art. 65, para. 1 (b) of the TFEU. The Regulation (EU) 2019/452 employs concepts of 'security' and 'public order.' The TFEU concept of security implies the existence of 'a genuine and sufficiently serious threat to a fundamental interest of society', which 'must not be misapplied so as, in fact, to serve purely economic ends'.[54] The concept of public order, on the other

43 SWD Foreign Investment, p. 68. Shareholding amounting less is considered an investment for pure financial gains, and hence qualified as portfolio investment. Ibid.

44 §4, subpara. 1 in conjunction with Annex, pt. 1 ICA.

45 Ibid., §4, subpara. 2.

46 Art. 2, para. 2, subpara. 1 (a) Act LVII. If the individual acquisition does not exceed 25 percent threshold, but the overall percentage of foreign ownership would exceed that percentage following the individual acquisition, the mandatory screening procedure should take place. Ibid., art. 2, para. 2 subpara. 2(a).

47 Ibid., art. 2, para. 2, subpara. 1 (a).

48 Ibid. For the definition of dominant influence see section 8:2, para. 2 (a)-(b) of the Act V on the Civil Code of the Republic of Hungary, Official Gazette, 31/2013, available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf (Accessed: 11 October 2020).

49 Art. 85, para. 277, subpara. 2 (b) Act LVIII.

50 Ibid., art. 85, para. 277, subpara. 3. Moreover, 15, 20, or 50 percent apply irrespective of the value of the investment. Ibid.

51 Art. 70 COVID-19 Epidemic Act.

52 20 percent and 40 percent, respectively, of the total voting rights, target entity's share capital, or profit shall be deemed a significant participation. Art. 12c, para. 5, subpara. 2 CCI.

53 Within Poland, the turnover from sales and services must exceed the equivalent of 10,000,000 euros in any of the two preceding financial years.

54 C-54/99, Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister, EU:C:2000:124, para. 17, and case law cited therein.

hand, implies securing a continuous supply and maintenance of essential goods and services.[55]

It seems that TFEU concepts refer to the protection of non-economic and non-military interests.[56] As the Regulation (EU) 2019/452 aims to protect Member States' security,[57] the notion of security could be interpreted to encompass 'national security' and related non-economic concepts as well. Indeed, the CEE countries refer to national 'security interest',[58] 'state interest', public security or public policy',[59] 'state security',[60] 'public order',[61] 'security and public order',[62] or 'public health'[63].' However, it is left entirely to the Member States to assign true meaning to these vague terms. As originally proposed by the advocates of the common EU FDI control,[64] the concept of security could include both national defence and economic security. Such an interpretation has received criticism,[65] as it might encourage national bodies to legitimise market protections– a notorious foe of free trade and capital movement. However, the proposed interpretation has merit and is supported by the recent statement from the highest ranks of EU politics, in which the concept of 'economic security' has become a top priority under the umbrella of 'strategic autonomy'.[66]

■ *2.4. Sectors*

The mandatory notification procedure concerns investments in economic activities and entities that are considered strategically important for maintaining national security interests, e.g., production of defence equipment, dual use products, intelligence devices, financial and payment services, energy (electricity, natural gas, and water supply), informational-communications technology, media pluralism, data processing or storage, land infrastructure, and food technology.[67]

55 C- 72/83, Campus Oil Limited and others v Minister for Industry and Energy and others, EU:C:1984:256, para. 35. See also Esplugues, 2018, p. 14.
56 Dimitropoulos, 2020, p. 15.
57 Arg. ex art. 1, paras. 1-2; art. 3, para. 1; art. 6, paras. 1-3; art. 7, paras. 1-3 Regulation (EU) 2019/452.
58 Art. 3, para. 6, subpara. 3 Act LVII.
59 Art. 85, para. 283, subpara. 1 (b) Act LVIII; art. 12j, para. 1, subpara. 3 CCI.
60 Art. 72, para. 1 COVID-19 Epidemic Act.
61 Ibid.
62 §3, subpara. 1 ICA.
63 Art. 12j, para. 1, subpara. 3 CCI.
64 Dimitropoulos, 2020, p. 36.
65 Zuokui, 2018, p. 164; Zwartkruis and de Jong, 2020, p. 16.
66 Strategic autonomy for Europe – the aim of our generation – speech by President Charles Michel to the Bruegel think tank, paras. 25-26, available at https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/l-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/ (Accessed: 1 October 2020).
67 Art. 2, para. 2., subpara. 4 Act LVII; Art. 85, para. 276, subpara. 3 Act LVIII; Art. 72, para. 3 COVID-19 Epidemic Act; Annex to ICA, pts. 1-2; art. 12d, para. 2 CCI.

■ *2.5. Procedure, outcomes, and remedies*

CEE states have introduced mandatory, *ex ante* approval from government bodies, usually ministries of economics or finance.[68] The submission of notification is due before[69] or after the signing of the contract or publication of the takeover bid.[70] The responsibility for filing the application rests with the foreign investor,[71] its local subsidiary,[72] or the target company.[73] Authorities are allowed to initiate the procedure on their own (*ex officio*).[74] Moreover, in Slovenia and Poland, the competent authority may revise a particular foreign investment up to five years after the respective legal transaction has concluded.[75] The screening procedures usually take two months.[76] Rather long time frames for the assessment might be particularly cumbersome for pending investors in CEE countries that have introduced a standstill clause, forcing the investor to refrain from performing any actions until after the timeframe allowed for the clearance decision has lapsed.[77] Unless the competent authority finds a threat to national security or policy interests, it shall provide clearance (acknowledgement).[78] In line with the possibilities set out by the Regulation (EU) 2019/452, Slovenia and Austria provide for conditional clearance[79] (i.e., a decision mandating mitigating measures (structural[80] or behavioural[81]) on a foreign investor, so as to remove the negative

68 Save for Hungarian general screening procedure, which is administered before the Ministry of Interior, and Poland, where the screening procedure is administered by President of the Office of Competition and Consumer Protection.

69 Art. 12f, para. 5 CCI.

70 Art. 3, para. 3. of the Government Decree 246/2018. (XII. 17.) on the Implementation of Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, National Gazzette, 157/2018 (hereinafter referred to as Decree 246/2018); Art. 85, para. 277, subpara. 1 Act LVIII; Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 3 ICA; art. 12d, paras. 2-3 CCI.

71 Art. 2, para. 2 subpara. 5 Art LVII; Art. 85, para. 278, subpara. 3 Act LVIII; Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 1 ICA; art. 12e, para. 1 CCI.

72 Art. 71, para. 2-3 COVID-19 Epidemic Act; art. 12f, para. 3 CCI.

73 Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 2 ICA; art. 12f, para. 4 CCI.

74 Art. 5, para. 9 subpara. 2 Act LVII; Art. 85, para. 278, subpara. 1 Act LVIII; arg. ex. art. 72, para. 1 COVID-19 Epidemic Act; §8 ICA; art. 12e, para. 2 CCI.

75 Art. 72, para. 2 COVID-19 Epidemic Act; art. 12e, para. 2 CCI.

76 Art. 3 para. 6, subpara. 4 Act LVII; art. 74, para. 2 COVID-19 Epidemic Act; §7, subpara. 3, point 1 ICA. According to the Hungarian provisional regime this timeframe is significantly shorter – 30 days (in exceptional cases, 45 days). See Art. 85, para. 283, subpara. 2-3 Act LVIII. In Austria and Poland, the procedure is two-phased. First, preliminary assessment takes a month (for Poland see art. 12h, para. 5 CCI; for Austria §7, subpara. 2 ICA). If the competent authority finds reasons justifying more detailed assessment from the point of view of public security/order, it shall initiate further examination proceedings and bring the prohibition/clearance decision within 120 calendar days in the case of Poland (art. 12h, para. 8 CCI) and two months in the case of Austria (§7, subpara. 3 ICA).

77 Art. 5, para. 8 subparas. 1-3 Act LVII; Art. 85 para. 290, subpara. 1 Act LVIII; art. 12h, para. 11 CCI.

78 Art. 3, para. 6 subpara. 4 Act LVII; Art. 74, para. 1 COVID-19 Epidemic Act; art. 12j, para. 1, subpara. 3 CCI.

79 Art. 74, para. 1 COVID-19 Epidemic Act; §7, subpara. 3, point 2 (a) ICA.

80 E.g. dissolving a branch office or transferring a sensitive part of the economic activity to an entity controlled by the recipient state.

81 E.g. making a promise not to discontinue operating a vital economic activity, at least awhile.

implications of the proposed transaction on the protected interests of the recipient state). Foreign investors and the target companies should have the option to seek remedies against prohibiting decisions (refusal) by national authorities.[82] Decisions brought before national authorities are subject to appeal before local courts. If the court finds the prohibiting decision unlawful on procedural or substantive grounds, it shall dismiss the decision and mandate reopening of the case before the responsible authority.[83]

■ *2.6. Sanctions*

In case of breach of the mandatory screening requirements, the CEE countries provide for administrative sanctions (fines),[84] civil sanctions (*ex lege* nullification of the unreported transaction),[85] and criminal sanctions (imprisonment).[86] However, in Slovenia and Austria, nullification of the unreported transaction would not occur *ex lege et ex tunc*, but rather following an *ex post* prohibiting decision declaring the executed FDI harmful to the protected interest of the recipient state (*ex lege sed sub conditione pendente*).[87]

■ *2.7. Remarks*

CEE countries' solutions are the closest regarding target investments, protected interests, and sectors. The focus is on brownfield investments, showing CEE countries' primary interest in safeguarding vulnerable domestic economic entities from being sold in the aftermath of the economic shock caused by the COVID-19 epidemic. The more sensitive the protected sectors (or less resilient to the epidemic), the lower the threshold required to trigger the notification procedure.

While the screening mechanisms share many commonalities, which may be considered the 'core' of the CEE FDI regulation, more refined analysis demonstrates that the mechanisms differ in implementation. CEE countries have used the vague nature of the Regulation (EU) 2019/452 to set national screening mechanisms in line with their national priorities and perceived threats. Although all CEE countries decided to set general screening instruments (acts), not all countries took the same approach regarding the duration of the screening regime. Hungary has a two-tier system, comprised of a general (permanent) and provisional ('counter-pandemic') screening system, which will cease to be in effect as of 1 January 2021. Poland faces a similar

82 Art. 3, para. 5 Regulation (EU) 2019/452.

83 Art. 3, para 6, subpara. 8 Act LVII; Art. 85, para. 285 Act LVIII; art. 12h, para. 10 CCI. Austrian and Slovenian acts do not refer to any remedial scheme; hence, the general judicial control should apply.

84 Art. 3, para. 6, subpara. 8 Act LVII; art. 85, para. 287 Act LVIII; art. 81 COVID-19 Epidemic Act, §25, para. 3 and §26, paras. 1-2 ICA; art. 16a, para. 1 CCI.

85 Art. 6, para. 10, subpara. 1 Act LVII; art. 85, para. 291, subpara. 1 Act LVIII; art. 12k, para. 1 CCI.

86 §25, paras. 1-2 ICA; art. 16a, para. 1 CCI.

87 Arg. ex art. 72, para. 1 COVID-19 Epidemic Act; §8, subpara. 5 in conjunction with §27 ICA.

situation, in which the 'Anti-Crisis Shield Act', amending the CCI, should cease to apply following the official proclamation of the end of the epidemic. Likewise, the Slovenian 'anti-COVID' package shall remain in force until 30 June 2023, leaving the future of the Slovenian FDI screening unclear thereafter. Austria has established a one-tier screening system; however, as of 31 December 2022 the research and development of critical medical products and equipment shall be removed from the list of sensitive areas currently covered by Annex I of the ICA. Regarding the content, there is a very close resemblance between the Slovenian and Austrian provisions and their two screening systems. Hungary and Poland have developed more elaborate screening systems, with the Polish systems diverging from other CEE solutions in terms of thresholds, competent authority, moment of due notification, strictness, and length of the final assessment. There are noticeable differences regarding the procedural aspects of the screening. While all CEE countries seek prior approval for the planned transaction, each country differs significantly in the structure and length of the procedure (one-phase/two-phase assessment), degree of procedural sternness (approval/disapproval/conditional, approval/standstill requirement, or absence thereof), and gravity of civil sanctions (immediate/conditional nullification). The line of division may be drawn between the Eastern countries (Poland and Hungary) on one hand and Central countries (Austria and Slovenia) on the other.

Although Germany does not strictly belong to the CEE list,[88] its regulatory screening framework is important in the context of the previous CEE analysis and the following analysis of Croatian FDI screening rules. Germany is one of the Western European countries whose FDI screening mechanisms date back to the early the 2000s and some forms, even earlier.[89] In accordance with the Regulation (EU) 2019/452, the latest amendments of the German FDI regulatory framework have only supplemented the existing rules.[90] It may be inferred that the German solutions served as a legislative model for many of the CEE countries' FDI screening rules.[91] As Croatia holds a place within the CEE region and traditionally relies on the German legal system, it is natural that Croatia would follow the other CEE countries' legislative approach and base its own screening rules on Germany's.

88 See https://stats.oecd.org/glossary/detail.asp?ID=303; https://op.europa.eu/en/web/eu-vocabularies/th-concept/-/resource/eurovoc/5781 (Accessed: 21 October 2020).

89 Theiselmann, 2009, pp. 1495–1496. More on the legislative history of the German regulatory framework, see Schladebach and Becker, 2019, p. 1077.

90 Foreign Trade and Payments Ordinance of 2 August 2013 (Federal Law Gazette I p. 2865), as last amended by Article 1 of the Ordinance of 10 July 2020 (Federal Law Gazette I p. 1637) and Foreign Trade and Payments Act of 6 June 2013 (Federal Law Gazette I p. 1482), as last amended by Article 1 of the Act of 10 July 2020 (Federal Law Gazette I p. 1637).

91 This can be noticed by merely comparing the highly resembling legal structure of FDI screening rules in Germany and the CEE countries, for example, regarding the determination of the thresholds, grounds for screening, and covered sectors.

3. FDI screening in Croatia *de lege lata*

Croatia is doing its best to adhere to the deadlines imposed for the transposition of EU legislation into its legal system. As the case with the Regulation (EU) 2019/452 will demonstrate, such transpositions are mostly based on the 'copy and paste' of abstract rules of EU legislation. Such a legislative approach normally results in various degrees of legal uncertainty. The uncertainty arises from the broad wording of EU legislation, which is intended to enable each Member State to preserve the purpose of EU legislation and adapt that legislation to the peculiarities of each national legal system.[92] Preferably, abstract EU rules should be transposed from the outset into concrete national rules that are applicable in practice, and do not result in a high degree of legal uncertainty. Unfortunately, the current lacklustre approach leaves too much to the imagination and, subsequently, to the later amendments of the transposed EU legislation.

Once the EU passed the Regulation (EU) 2019/452 in 2019, the regulation found its place in the Croatian legislator's proposal for the harmonisation of the Croatian legislation with the Community *acquis* during 2020. The initial plan for transposition of the Regulation (EU) 2019/452 into a legal act (law) was due in the first half of 2020.[93] The announcement of the implementation through a specific act resulted in a reasonable expectation that such transposition will be in line with German or CEE countries' FDI screening legislation already in place, as those countries' rules often serve as legislative models to replicate. Due to a very unfortunate series of events caused by the epidemic and the earthquake, it should come as no surprise that the transposition of the Regulation (EU) 2019/452 did not occur as planned. However, no one expected that instead of an extensive legal act (law), the Government of Croatia would ultimately implement the Regulation (EU) 2019/452 through ordinance (bylaw).

The Ordinance was passed by the Croatian Government on 24 September 2020, and it took effect in early October. It has only seven articles and is based on the government's legislative authority to enact ordinances for the transposition of the Community *acquis,* when such transposition can be achieved without the participation of the legislator.

The content of the Ordinance comes down to the establishment of a national contact point within the Ministry in charge of economic affairs and sustainable development. This point of contact is in charge of coordination and cooperation with the authorised contact points of other Member States and the Commission.[94] As provided by the Regulation (EU) 2019/452, this point of contact can also request the delivery of information from the foreign investor.[95] When another Member State or Commission

92 E.g., the first iteration of the Croatian Capital Market Act (2008) was plagued with many obscurities and issues. It presented a significant change in regulation of the capital markets comparing to previous legislation. Only the Capital Market Act from 2018 managed to rectify some of recognised issues, but many problems persist.

93 The Plan proposal for the harmonisation of Croatian legislation with the Community acquis during 2020, Croatian Parliament, Class 022-03/19-01/246, 31 December 2019, p. 2.

94 Art. 4, paras. 1 and 2 Ordinance.

95 Ibid., art. 4, para. 3; arts. 7 and 9 the Regulation (EU) 2019/452.

requests information about the FDI taking place in Croatia that may affect their security or public order, it may ask Croatian authorities to provide certain information about the FDI (e.g., the ownership structure of the foreign investor, the approximate value of the FDI, the business of the foreign investor, etc.). The competent Ministry, as the point of contact, can then request the foreign investor to deliver this information within seven days from receipt of the request.[96] The Ordinance, however, does not mention or require that the point of contact (or other administrative authority) will conduct FDI screening, as suggested by the Regulation (EU) 2019/452. This conclusion comes from the fact that the Ordinance does not refer to the cooperation mechanism in relation to FDI screening and does not contain any concrete screening mechanism.[97] The purpose of the Ordinance is solely to establish a point of contact. Thus, the Ordinance complies with the minimum transposition requirement of the Regulation (EU) 2019/452 (i.e., to establish a service centre that will handle requests from other Member States).[98]

It seems that the Croatian legislator did not take advantage of the opportunity to establish a screening mechanism regarding FDIs likely to affect security or public order. The main reason behind this decision remains unclear. It might be that the Croatian legislator was reluctant to negatively influence the inflow of potential (and much needed) FDI by imposing additional administrative burdens upon investors. Moreover, maybe the Croatian legislator concluded that it is unlikely that FDIs in domestic undertakings could affect national security or public order. Ultimately, maybe it was easier to comply with the minimum transposition requirement for now and leave the establishment of FDI screening mechanism for later consideration.

None of these reasons can be justified. Screening mechanisms could have been implemented in a way that would not have adversely affected the inflow of FDI into the Croatian economy.[99] However, Croatia willingly deprived itself of introducing a possible non-intrusive FDI screening mechanism intended to protect national security

96 Art. 4., paras. 3 and 4 Ordinance.

97 E.g., pursuant to arts. 3 and 6 Regulation (EU) 2019/452. For more on this specific national screening regulation see Ch. 2 above.

98 Art. 11 Regulation (EU) 2019/452. Regarding the minimum transposition requirement see Lippert, 2019, p. 1540.

99 Concerning the need to avoid any measure that could prolong or in other way administratively burden foreign investments, the screening mechanism could have been established at a 'discretionary' basis. For example, this could have been achieved by enabling the FDI review to be initiated *ex officio* only within a specific period from the time the responsible authority became aware of the conclusion of the acquisition agreement or the FDI in an industry of strategic importance. Concerning the second reason, the national security or public order could be affected in many ways. The fact that Croatia is a sole or majority owner of some of the essential national infrastructure and assuming that it will not sell such infrastructure (e.g., the national energy production and distribution company, oil pipeline system company, national TV and radio broadcasting company), cannot ensure that FDI will not affect national security or public order. The FDI can take place in the private sector (e.g., by taking over of a privately owned domestic media company, weapons manufacturer, or a pharmaceutical company). Ultimately, possible postponement of the establishment of screening mechanisms cannot be accepted, as such mechanisms could have been established in way that would enable the responsible administrative authority to review FDI in specific sectors that are likely to cause concern if it deemed it necessary, all pursuant to the fleshed-out rules.

and public order. Moreover, there is no mechanism in place for other Member States or the Commission to inform Croatia of a potentially dangerous FDI that might affect security and public order, not only in Croatia, but also in other Member States.[100]

It is worth noting that Croatian law is familiar with forms of FDI screening in sector-specific national legislation. This generally relates to the regulation of credit lending institutions, voluntary and obligatory pension funds, stock exchanges, investment companies, central clearing depository companies, and the central clearing counterparties. The established screening mechanism in these cases generally follows the same approach. Namely, every acquisition of shares in these companies amounting to or above a determined threshold (10, 20, 30, or 50 percent of voting rights or capital share) requires prior approval from the competent authority (e.g., the Croatian National Bank for credit institutions, or the Croatian Financial Services Supervisory Agency for stock exchanges).[101] Approval of the intended transaction is given if the review demonstrates that the prescribed conditions are met. The purpose of such conditions is to ensure that the change in the shareholder structure is not detrimental to the orderly operation of the target company's business activities, or its compliance with the imposed regulatory duties and obligations.[102] Upon application for the approval of the intended transactions, the competent authority must respond to the transaction within a set time (usually within 60 days of receipt of the proper application).[103] If there

100 In this regard, the Regulation (EU) 2019/452 provides that the Member State shall give due consideration to the comments of the other Member States and the opinion of the Commission. Art. 7, para. 7 Regulation (EU) 2019/452.

101 Art. 24, para. 3 Credit Institutions Act, Official Gazzete, Nos. 159/2013, 19/2015, 102/2015, 15/2018, 70/2019, 47/2020; art. 79, para. 1 Voluntary Pension Funds Act, Official Gazzete, Nos. 19/2014, 29/2018, 115/2018; art. 20, para. 1 Obligatory Pension Funds Act, Official Gazzete, Nos. 19/2014, 93/2015, 102/2015, 64/2018, 115/2018, 58/2020 (there are no thresholds, every acquisition must be notified to the competent authority for approval); art. 12, para. 1 Capital Market Act, Official Gazzete, Nos. 65/2018, 17/2020 (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012, which introduces qualifying threshold of only 10 percent of the capital or voting rights), ibid., art. 641, paras. 1 and 3 (central clearing depository company).

102 Arts. 25, para. 2 and 28, para. 1 Credit Institutions Act (special emphasis is given to the non-existence of conviction for various criminal offences); art. 84, para. 1 Voluntary Pension Funds Act; art. 21, para. 2 Obligatory Pension Funds Act; art. 21, para. 1 Capital Market Act (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012), ibid., art. 648, para. 1 (central clearing depository company).

103 Art. 26, para. 4 Credit Institutions Act; art. 82, para. 1 Voluntary Pension Funds Act; art. 22, para. 1 Obligatory Pension Funds Act (it should also be noted that art. 24, para. 2 provides that the competent authority will refuse to issue approval to start conducting fund business activities if the rules of a third country with which the fund is closely related make the performance of supervision aggravating or impossible, e.g. where the rules of the third country enable delivery of required information only upon court order or entirely prohibit such delivery); art. 18, para. 3 Capital Market Act (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012), ibid., art. 646, para. 2 (central clearing depository company).

is a breach of rules and acquisition is executed without prior approval by the competent authority, the acquired shares will have to be divested within a certain period, during which the acquirer of such shares cannot act upon any voting rights derived from such shares (in some cases, the transactions conducted are considered null and void).[104]

Besides the screening mechanisms in place to ensure efficient and orderly operation of related industries, Croatian law establishes non-sector-specific screening mechanisms in the Competition Act's assessment procedure for compatibility of concentrations with competition rules. Every concentration of undertakings that would significantly impede effective competition in the market shall be forbidden.[105] Parties to the proposed concentration must notify the responsible authorities.[106] That authority will consider the effects of the proposed concentration on competition and possible limitations on access to the related market.[107] Ultimately, within a set timeframe, the proposed concentration will either be declared compatible, conditionally compatible, or incompatible.[108] In cases where the concentration has been conducted contrary to these rules, the authority can order the parties to transfer or divest the acquired shares; it can also prohibit or restrict the exercise of voting rights related to the shares in question. It can mandate a dissolution of the joint venture or any other form of control that resulted from the incompatible (prohibited) concentration.[109] Like the previous sector-specific screening mechanisms, these rules do not protect national security and public order. They are aimed at preventing all forms of restriction or distortion of competition. [110]

Moreover, Croatian law is familiar with screening mechanisms for specific state-owned companies that underwent privatisation but are still considered to be of special interest to the nation. This is the case with the national oil company, INA d.d., which was partially acquired by the Hungarian national oil company Mol Nyrt. currently holding 49,1 percent of the overall share capital. This legislation requires that every intention to acquire a qualified share in the company (25 and 50 percent of total shares with voting rights) shall be notified to the Ministry responsible for the energy industry.[111] Following notification, the competent Ministry gives an opinion to the Croatian Government, which may approve or disapprove such acquisition.[112] The Government

104 Art. 30, paras. 1 and 7 Credit Institutions Act; art. 85, paras. 1 and 2 Voluntary Pension Funds Act; art. 20 para. 1 Obligatory Pension Funds Act (however, the transactions relating to the acquisition of related shares are null and void); art. 23, paras. 1 and 4 Capital Market Act (investment company); ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules); ibid., art. 649, paras. 1 and 2 (central clearing depository company).

105 Art. 16 Competition Act, Official Gazzete, Nos. 79/2009, 80/2013.

106 Ibid., art. 17, para. 1.

107 Ibid., art. 21, para. 2.

108 Ibid., art. 22, paras. 2-7.

109 Ibid., art. 24, para. 2.

110 Ibid., art. 2.

111 Art. 10, para. 1 INA Privatisation Act, Official Gazzete, Nos. 32/2002, 21/2019.

112 Ibid., art. 10, paras. 3-6.

can deny the request if it considers the acquisition a serious threat to public safety, to the security, reliability, and regular supply of energy, and/or to the safety of the energy supply infrastructure.[113] The review is conducted on the basis of objective and non-discriminating standards.[114] If these rules are breached, the acquisition of related shares shall be null and void.[115] This rare, company-specific act aims to safeguard the regular oil supply and related company infrastructure. Hence, this fits into the general notion of protection of national security and public order, as determined by the case law of the CJEU[116] and the Regulation (EU) 2019/452.

Although the aforementioned examples do not aim to safeguard national security and public order in a comprehensive manner, as envisaged by the Regulation (EU) 2019/452, these rules demonstrate that the Croatian legislator is familiar with some forms of screening. Since the Ordinance lacks specificity, the following section elaborates on the need and outlines possible content for the prospective Croatian FDI screening mechanism, as proposed by the Regulation (EU) 2019/452.

4. FDI screening in Croatia – regulatory prospects

Considering the compatibility of a preponderant part of the Croatian legal system with the German legal system, implementation of the FDI screening mechanisms in Croatia *de lege ferenda* should, arguably, follow the experiences of other CEE countries and establish the national FDI screening legislation along the lines of the German FDI screening regulatory concept.[117]

■ *4.1. Personal scope of application (subjects covered)*

The legal framework established by the German Foreign Trade and Payments Act, and the accompanying German Foreign Trade and Payments Ordinance, generally applies to domestic companies across all sectors. Every legal entity with its registered office

113 Ibid., art. 10, para. 7.
114 Ibid., art. 10, para. 13.
115 Ibid., art. 10, para. 16.
116 Campus Oil, para 35.
117 This compatibility of the two legal systems and the following conclusion is not based solely on the fact that both legal systems belong to the Germanic legal tradition. German law served as a legal role model and inspiration for many crucial pieces of Croatian legislation (e.g., the Companies Act, the Insolvency Act, and significant parts of the Obligations Act). The Croatian legal system's reliance on German solutions is the only reasonable solution, especially since rich and long-standing jurisprudence of German courts already had the opportunity to decide legal issues that have not yet emerged in Croatia, thus contributing to further development of the established piece of legislation. This means that current German laws are a result of years of development by both German courts and the German legislature. In any case, German laws are the result of methodical and substantive approach in law-making by the German legislature. In addition, the German legal literature is extensive and abundant; thus, it can serve as a guide, with a corresponding level of caution and critique, in dealing with recognised legal issues before the competent Croatian authorities (e.g., administrative authorities, courts, the legislature).

or place of management in Germany is considered a domestic company. Branches of foreign legal entities managed in Germany and with their own bookkeeping, separate from the foreign parent company, are also included.[118] This means that even non-EU companies can be considered target companies if they have some form of permanent establishment in Germany. The economic or shareholder size of the target company is irrelevant.

The screening of the cross-sector industry covers any acquisition of a German company by investors outside the EU or the EFTA.[119] On the other hand, screening of sector-specific industry covers any acquisition of a German company by foreign investors (EU or non-EU).[120] It is irrelevant if the investor is a foreign company, a sovereign wealth fund, a private person, or some other entity.[121] Natural persons are considered non-EU investors if they do not have their permanent residence or ordinarily residence in the Member State.[122] Moreover, even investments conducted by domestic persons may be subject to review by the competent authority.[123]

The future Croatian regulatory framework should foremost determine the scope of application of the screening legislation. The approach taken by the German regulatory framework provides solid guidelines. Any domestic company or a branch of a foreign company managed in Croatia should be designated as a potential target company, subject to examination by the competent authority. Assuming the domestic economic policy objective to attract FDI,[124] the screening should be limited to acquisitions initiated by non-EU/EFTA investors, regardless of the strategic industry covered by the target company. This screening should include acquisitions by both natural and legal persons, irrespective of their legal form. Considering the current lack of a scrutiny mechanism, this would advance the current legislation and, if needed, future amendments could further develop such scrutiny mechanisms for specific industries. As such a regulatory framework could interfere with the private law (by nullifying the contract), it will have to be established in the form of a legal act (law), which could be further supplemented by a more detailed by-law (i.e., the Government's or competent ministry's ordinance). However, such an act should not apply retroactively to investments that have already taken place. Otherwise, the legislator and the Government could retroactively review previously executed transactions by lowering the triggering threshold, or by adding new sectors to the list of industries already subject to review.[125]

118 Ego in Goette, Habersack and Kalss, 2017, Rn. 722-723.
119 Art. 55, para. 1 Foreign Trade and Payments Ordinance; Ego in Goette, Habersack and Kalss, 2017, Rn. 721; Besen and Slobodenjuk, 2020, p. 442.
120 Art. 60, para. 1 Foreign Trade and Payments Ordinance; Ego in Goette, Habersack and Kalss, 2017, Rn. 721; Besen and Slobodenjuk, 2020, p. 442.
121 Ego in Goette, Habersack and Kalss, 2017, Rn. 721.
122 Ibid., Rn. 723.
123 For more on this see the following subchapter 4.2.
124 See ch. 3 above.
125 In this regard from the perspective of German law see Annweiler, 2019, pp. 530-531.

■ *4.2. Material scope of application (grounds and FDI thresholds triggering the screening)*

The German regulatory framework differentiates between the cross-sector industry and sector-specific industry examination. Cross-sector examination generally follows the Regulation (EU) 2019/452 guidelines, while the framework for sector-specific companies establishes even more rigorous screening rules than for cross-sector companies. Only investments that pose a threat to the German public order or security are covered, irrespective of whether it concerns a cross-sector or sector-specific industry.[126] The term 'public order' or 'security' replaced the previous term 'actual and sufficiently severe threat'.[127] Moreover, the protection refers to other Member States' and EU-wide interests, in accordance with the Regulation (EU) 2019/452.[128] For this purpose, German legislation has established a national point of contact within the designated authority.[129] The term 'threat' to public order or security is further specified by listing industries that are particularly important in this regard.[130]

Acquisition of a cross-sector company may be considered a threat to public order or security. This refers particularly to companies operating critical infrastructure related to information technology security, development, and modification of software used for operating such infrastructure in specific sectors (energy, water, information and telecommunications, financial and insurance, healthcare, transport, and food industries), production of technical equipment used for implementing statutory measures in order to monitor telecommunications, including knowledge about said technology, and holding specific licenses for telematics infrastructure components or services. Moreover, a threat may arise with regard to the significant media industry companies that contribute to shaping public opinion.[131] On the other hand, acquisition of a sector-specific company may be considered a threat to public order or security, particularly where the company manufactures or develops certain weapons, engines, or parts for tanks or other armoured vehicles, information technology products[132] with security functions to process classified state information or IT security infrastructure; also companies that manufacture or dispose of these kinds of technology would be of interest.[133]

Domestic companies operating critical infrastructure are also subject to review; this includes those providing service of specific relevance for the national security (cross-sector) or operating in a specifically sensitive security industry, such as the manufacture of weapons of war or the development of military technology (sector-specific).

126 Arts. 55, para. 1 and 60 para. 1 Foreign Trade and Payments Ordinance.
127 Bierwagen and von Wistinghausen, 2020, p. 1989.
128 Art. 4, para. 1., subparas 4 and 4a; art. 5, para. 2 Foreign Trade and Payments Act; Bierwagen and von Wistinghausen, 2020, p. 1989.
129 Art. 13, para. 2., subara 2 e) Foreign Trade and Payments Act.
130 Besen and Slobodenjuk, 2020, p. 442.
131 Art. 55, para. 1 Foreign Trade and Payments Ordinance.
132 Hereinafter referred to as IT.
133 Art. 60, para. 1 Foreign Trade and Payments Ordinance.

This is a very wide field, which allows the responsible authority to act with a high level of discretion. However, there is also legal uncertainty, as it is unclear whether FDI into a domestic company is permissible, according to these rules.[134] During the review, special attention is being paid to situations where: (1) the investor is directly or indirectly controlled by a foreign government, including its agencies or armed forces; (2) the investor was involved in prior acquisitions that negatively affected the public order or security in Germany or another Member State; or (3) there is considerable risk that the acquirer (or its representative) was/is involved in criminal activities or administrative offences.[135]

The aforementioned list of target companies, classified by their business operations, is not exhaustive. Any acquisition of a German company can be subject to review.[136] The difference is in the thresholds that trigger such review. In case of the listed cross-sector companies (e.g., critical infrastructure related to IT security), the threshold is set at 10 percent of the voting rights in the target company, while in other German companies, the threshold is set at 25 percent of the voting rights.[137] The 10 percent threshold is not considered a double threshold, first being triggered at 10 and then at 25 percent. It only triggers once, at 10 percent.[138] The lower 10 percent threshold seems to be influenced by the statistical fact that listed public limited companies (*Aktiengesellschaften*) in Germany usually have an average of 55 percent of shareholders present at the annual shareholders' meeting.[139] This means that 25 percent of the voting rights acquired would normally imply a majority at the general meeting of shareholders. Presumably, in smaller limited liability companies, the situation might be different (*GmbH*). Furthermore, the 10 percent threshold complies with the Organisation for Economic Cooperation and Development, the International Monetary Fund, and the World Bank benchmark definition of long-term FDI.[140]

The threshold triggering the review for sector-specific companies (e.g., manufacturer of weapons or developer of military technology) is set at 10 percent of the voting rights in the target company.[141] The cross-sector and sector-specific investments purport direct and indirect acquisition (investment), alongside acquisitions by more investors acting in concert (i.e., based on the agreement on the joint exercise of voting

134 Annweiler, 2019, p. 531.
135 Arts. 55, para. 1b and 60, para. 1b Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 444.
136 Schuelken and Sichla, 2019, pp. 1406–1407.
137 Art. 56, para. 1 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
138 Annweiler, 2019, p. 531.
139 Schuelken and Sichla, 2019, pp. 1409. In addition, the lowering of the threshold to 10 percent was initiated because a Chinese fund wanted to acquire 20 percent of the German energy network operator. Since FDI screening could not be initiated because of the prior 25 percent threshold, the 20 percent had to be acquired by the Federal Government. See Schladebach and Becker, 2019, p. 1078.
140 Schladebach and Becker, 2019, p. 1078; Lippert, 2019, p. 1539.
141 Art. 60a, para. 1 Foreign Trade and Payments Ordinance.

rights).[142] Such investments also include acquisition of a determinable part of a domestic company or its essential operating resources, when such resources are necessary for the continuation of business activities of the company or a determinable part thereof.[143] This means that the covered investments include both share and asset deals. However, to trigger such screening review it is generally sufficient that the foreign investor takes control over a domestic company or a determinable part thereof.[144] Foremost, such anti-circumvention rules ensure enforcement of the FDI screening rules in cases where an investor intends to conceal its foreign origin behind a domestic company acting as a direct investor. While an individual investor may acquire fewer shares to escape the triggering threshold, several investors acting in concert may acquire a shareholding that normally would significantly exceed that threshold. Hence, the anti-circumvention rules prevent the bypass of a group of investors acting in concert with the intention to take over the target company.

The prospective Croatian legislation should stipulate that only investments that pose a threat to the public order or security of Croatia should be covered. However, this broad stipulation requires more specificity. This can be achieved by listing industries of strategic interest to Croatia and where such threats could emerge. It seems there is no need to differentiate between investments in sector-specific or cross-sector industries. All companies that operate critical public infrastructure (energy and water supply, information and telecommunications, healthcare, pharmaceutical, food, military, and media industries) should be covered. However, other forms of industry should also be covered (IT technology related to provision of public service, robotics and AI, biotechnology, cyber technology, etc.). A good example of such specification is provided under German law for the media industry (i.e., media industry that contributes to the formation of public opinion and has a particular topicality and breadth of impact). This should generally exclude smaller media outlets with limited circulation, such as local newspapers, TV, and radio stations or newspapers relating to topics which are of no significance for the national security (e.g., home improvement magazines). Included are all forms of media industries, irrespective of their form (TV, radio, newspaper or web-based media). The aim of such a specification is to prevent or reduce legal uncertainty regarding whether an investment in a certain company falls under the review. This should prevent unnecessary requests made to the responsible authority. In other words, the list of industry sectors subject to review should be as exhaustive and specific as possible.

The thresholds triggering review by the Croatian authority could be set pursuant to the German model. Namely, at least 25 percent of share capital or voting rights acquired for most of the listed industries and at least 10 percent of share capital or voting rights acquired for industries of particular strategic importance. Moreover,

142 Ibid., arts. 56, paras. 2 and 3 and 60a, paras. 2 and 3; Ego in Goette, Habersack and Kalss, 2017, Rn. 724.

143 Arts. 55, para. 1a and 60, para. 1a Foreign Trade and Payments Ordinance.

144 Lippert, 2019, p. 1539; Besen and Slobodenjuk, 2020, p. 444.

future rules should cover acquisition of assets or control over the target company up to the threshold value, which corresponds to the overall economic value of the company (e.g., acquisition of part of a company or unit that amounts to 25 or 10 percent of the overall economic value of the company). When estimating the economic value, the dynamic value of the acquired company's assets at the time of notification, should be used alongside the book value. The existing screening rules provided by other Croatian laws are insufficient, since the current triggering thresholds relate solely to the acquisition of a certain amount of share capital or voting rights.[145]

Anti-circumvention rules should also be included in prospective Croatian legislation. In other words, legislation should specify the means of possible indirect investment that would trigger the screening procedure. This means that ownership control over domestic companies is not necessarily the only type of investment covered (share deal). What matters is the establishment of *any form of control* over the target company. For example, this should include situations where the investor is acting in concert with other stakeholders, where joint exercise of voting rights is established, and asset deals where control of only one determinable part of the domestic company is acquired. Unlike German law, the triggering threshold should also include staged acquisitions of shares. This should prevent acquisition of the domestic company in several fractions, which, individually, do not trigger the review (e.g., under 10 percent) but would jointly surpass such threshold (e.g., over 10 percent).[146] The rules could provide that only acquisitions conducted within a certain period of time will be considered for the purposes of determining whether a regulatory threshold has been surpassed (e.g., up to five or more years since the latest acquisition). Causality should be established between the latest acquisition and previous acquisitions. Special attention should be paid to cases where the acquisition is being conducted directly or indirectly by a foreign government, or where the investor was already involved in acquisitions that negatively affected domestic or other Member State's public order or security.

■ ***4.3. Procedure (competence, obligatory notification, review process, and decision)***

Under German law, the Federal Ministry for Economic Affairs and Energy is designated as the competent authority for the screening procedure.[147] Notification to this authority is with regard to every investment in a domestic company belonging to the cross-sector listed industry (10 percent threshold), following the conclusion of the acquisition contract by the investor.[148] Although there is no obligation to report any other acquisition of a domestic company in the cross-sector industry (25 percent threshold), the responsible authority is authorised to conduct the FDI screening *ex officio*. It shall inform the investor about the commencement of the review within three months of becoming aware of

145 For more on this see ch. 3 above.

146 In this regard, from the perspective of German law see Ego in Goette, Habersack, and Kalss, 2017, Rn. 724.

147 Arts. 55, para. 1 and 60, para. 1 Foreign Trade and Payments Ordinance.

148 Ibid., art. 55, para. 4.

the investment (subjective time limit). However, no review can be conducted after five years following the conclusion of the acquisition contract (objective time limit), even if the authority only became aware of the investment after the expiration of that five year period.[149]

Upon request, the competent authority will issue a certificate of non-objection (clearance) to such acquisition if it finds that there is no threat to the domestic public order or security.[150] Such a certificate is deemed to be issued if the competent authority did not initiate the investigation upon expiration of the two-month period following notification of investment in the domestic company belonging to the cross-sector listed industry (10 percent threshold).[151] The subjective and objective time limits for commencement of the review by the responsible authority ensure legal certainty. The regulations regarding issuance of the certificate of non-objection emphasise this aim even further. If the investment review takes place, the competent authority may ask the investor to provide the competent authority with all the relevant documents for the review.[152] Once the documents have been provided, the respective investment can be prohibited only within the following four months.[153] This means that the competent authority is precluded from prohibiting the investment. Such an approach contributes to legal certainty, since the review process cannot be postponed indefinitely. The prohibiting decisions require approval from the entire federal government.[154]

FDI screening in the listed sector-specific industry companies follows the same procedure, with slight changes.[155] Investments in companies belonging to the listed sector-specific industry (military industry) must be notified to the competent authority.[156] It is presumed that the investment is approved if the competent authority does not initiate a review within three months of notification by the investor.[157] The competent authority can request submission of additional documents, and the prohibiting decision on the respective investment can be made only within the three months following receipt of all the requested documents.[158] This time limit ensures that the review will not drag along indefinitely. The Federal Ministry for Economic Affairs and Energy, as the responsible authority, can involve other federal ministries in the review process (e.g., Federal Ministry of Defence). A denial decision requires the agreement of several federal ministries.

The aforementioned German rules can serve as guidelines for drafting the procedural aspects of the prospective Croatian legislation. The Ministry in charge of

149 Ibid., art. 55, para. 3.
150 Art. 58, para. 1 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
151 Art. 58, para. 2 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
152 Art. 57 Foreign Trade and Payments Ordinance.
153 Ibid., art. 59, para. 1.
154 Ibid.
155 Annweiler, 2019, pp. 529-530.
156 Art. 60, para. 3 Foreign Trade and Payments Ordinance.
157 Ibid., art. 61.
158 Ibid., arts. 61 and 62, para. 1.

economic affairs and sustainable development should be designated as the competent authority. The Ministry should establish a special department that will conduct screening of notified and unnotified investments, alongside other necessary legal actions aimed at regulatory enforcement. Furthermore, some form of cooperation with other ministries should be established depending on the specific investment concerned (e.g., Ministries of Defence and Energy).

Unlike German rules, if the Croatian legislator opts for the suggested exhaustive list approach, all FDI under scrutiny should be subject to notification. Notification should follow the conclusion of the related acquisition contract. Such notification should be followed by a short time limit (e.g., 60 days from notification), within which the competent authority can initiate the review procedure of the notified investment. If the competent authority does not initiate the review procedure during that time limit, the investment shall be considered approved. If the competent authority, however, decides to instigate the review procedure, it should reach a decision within an additional time limit (e.g., four months). Nonetheless, such a time limit should commence only after all the relevant documents have been submitted by the investor to the responsible authority. If the investor fails to provide notification of the pending investment, the competent authority should be empowered to conduct FDI screening *ex officio* within a certain time period (e.g., 60 days) after becoming aware of the investment (subjective time limit). However, once a certain longer period has lapsed following the conclusion of the contract (e.g., five years), the competent authority should be precluded from initiating the screening procedure (objective time limit). Upon proposal by the competent authority, the Croatian Government should approve the final denial.

■ *4.4. Breach of the screening rules, prohibiting decision, and legal remedies*

In case of failure to notify the responsible authority (or any other breach of German FDI screening rules), the breaching transaction shall be null and void.[159] With regard to domestic companies, in the case of investments subject to prior notification (i.e., mandatory notification following the conclusion of the transaction contract), transactions cannot be executed until the authority approves the investment.[160] This refers to all companies pertaining to the listed sector-specific industries and listed cross-sector industries. This means that the related investor could not exercise any voting rights in the German company, grant any payment of dividends, or receive any company-related information that might endanger security or public order protected by these rules.[161] The exercise of the voting rights prohibition refers both to direct and indirect exercise of rights (e.g., by transferring shares to another person for this purpose, by concluding agreements that exercise voting rights and similar actions).[162] Intentional violation of such a prohibition is considered a criminal offence based on rules governing a violation

159 Art. 15, para. 1 Foreign Trade and Payments Act.
160 Ibid., art. 15, para. 3.
161 Bierwagen and von Wistinghausen, 2020, p. 1989; Besen and Slobodenjuk, 2020, p. 445.
162 Art. 15, para. 4, subpara. 1 Foreign Trade and Payments Act.

of merger control rules.[163] Acquisition is considered to be conducted under the dissolving condition, which is contingent upon the competent authority's prohibiting decision.[164] This means that the transaction is not only pending, but it will terminate, if the competent authority decides to prohibit the transaction. Once the competent authority reaches its prohibiting decision, it can expressly prohibit the exercise of the respective investor's voting rights, or appoint a trustee that will reverse the transaction in question. This reversal will be conducted at the expense of the investor.[165]

The future Croatian regulatory framework could easily adopt similar rules. Namely, the nullification of the acquisition transaction should be the result of a failure to notify the competent authority. However, such a transaction would be valid if a certain longer time period passed after the conclusion of the acquisition contract (e.g., five years). If notified, the transaction would be pending. It would become effective following approval by the Ministry or the lapse of the established timeframe for the Ministry's review. Until that moment, the investor should be precluded from exercising voting rights in the target company, granting any payment of dividends to anyone, or receiving any sensitive company-related information. If the Ministry ultimately decides to prohibit the pending acquisition, the transaction should terminate. Intentional violation of this prohibition could be established as a criminal offence. Naturally, in the case of prohibiting decisions, Croatian legislation should provide the foreign investor and any other person having legal interest in the transaction (e.g., a shareholder of the target company or the target company itself) the ability to seek legal remedy against the prohibiting decision. As the subject matter at hand concerns matters pertaining to commercial law, commercial courts rather than administrative courts should have sole jurisdiction to decide these cases.

5. Conclusion

Recent regulatory activity in the field of FDI screening has resulted in significant changes to the CEE legislation dealing with inward capital movements. The economic shock caused by the COVID-19 epidemic urged many of these changes and led to the establishment of reviewing standards for FDI pouring into critical resources whenever those investments might affect national security and public order of the recipient Member State. However, loose wording of the Regulation (EU) 2019/452, non-binding provisions on the introduction of national screening mechanisms, and lack of a truly EU-wide screening solution have enabled legislators to use this wide discretion to draft FDI laws according to their national priorities and perceived threats. The CEE country report has demonstrated the heterogeneity of national FDI laws. CEE countries' solutions share common elements with regard to target investments, protected interests,

163 Besen and Slobodenjuk, 2020, p. 445.
164 Art. 15, para. 2 Foreign Trade and Payments Act.
165 Art. 59, para. 3 Foreign Trade and Payments Ordinance.

and protected sectors; on the other hand, they demonstrate significant procedural differences, from rather lenient Central European solutions to more stern concepts employed by Eastern European countries.

Croatia is one of the CEE countries that has yet to introduce a comprehensive screening mechanism. The recent Croatian transposition of the Regulation (EU) 2019/452 resulted in the establishment of a national contact point that handles information requests from other Member States and the Commission. However, this transposition does not contain any FDI screening rules. Furthermore, the limited scope of the existing Croatian screening rules (e.g., in competition and capital market law) cannot serve the purposes established by the Regulation (EU) 2019/452. This legal state of affairs leaves Croatia vulnerable to hostile foreign acquisitions of strategic industries, especially those that are privately owned. Consequently, the Croatian legislator should strive to establish a screening mechanism that protects national security and public order. In establishing the FDI screening mechanism, Croatia should follow the German legislative concept. The prospective Croatian legislative model, however, does not need to be as comprehensive as the German one. The Croatian model should focus on the control of companies that operate critical public infrastructure, and those involved in the development of new technologies (especially technologies related to public infrastructure). The list of covered industries should be as exhaustive and specific as possible. In addition to clearly indicating the personal and material scope of the screening mechanism, future legislation should include various anti-circumvention rules that prevent loopholes or abuse of screening rules. To ensure legal certainty, the screening procedure should establish strict objective and subjective time limits for initiating and completing the screening procedure. Before the Croatian courts, investors and the parties involved should have legal recourse to challenge prohibiting decisions issued by the competent authority. Unfortunately, at this moment, there are no indications that the Croatian Government intends to establish such a screening mechanism.

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The Principle of the Primacy of EU Law in Light of the Case Law of the Constitutional Courts of Italy, Germany, France, and Austria

ABSTRACT: *This article examines the relationship among national constitutions, constitutional courts, and the primacy of Community Law in connection with four Member States (Germany, France, Italy, and Austria). It starts with the question of whether national constitutions contain a European Union (EU) clause and explicitly provide for the primacy of Community Law. It examines whether any constitutional restriction or reservation has been elaborated in the case law of constitutional courts, and the extent to which the constitutional courts examined can exercise control indirectly over cases of conformity of EU legislative acts with constitutions or cases of misuse of powers (ultra vires acts). The constitutions examined can be considered uniform in that they contain references to the individual Member States' relationships with the EU and create the possibility of restricting their competence or sovereignty. However, they do not declare the principle of the primacy of Community Law. As a consequence, the constitutional courts of Member States play a key role in the interpretation of the principle of the primacy of Community Law, including the formulation of constitutional requirements and counterbalances in connection with the enforcement of the principle. A reference to constitutional identity appears in the case law of recent decades, the elements of which are elaborated on and filled with more or less specific content by the constitutional courts on a case-by-case basis. In the event of a possible violation of constitutional identity or principles with unconditional effectiveness, some constitutional courts exclude the possibility of Community Law being invoked against the constitution of a Member State, but at least on a case-by-case basis, they maintain the possibility of inapplicability or of creating compatibility. In the latter respect, the article also addresses the limited nature of the powers of constitutional courts to examine the compatibility of EU Treaties and their amendments with the*

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constitution of a Member State (see ex-ante or ex-post review, procedural or substantive examination).

■ **KEYWORDS:** primacy of EU Law, Constitutional Court interpretation of the primacy of EU Law, restraints of constitutionality, *ultra vires* Community acts, constitutional identity, EU clause.

1. Introduction

The European Court of Justice (in current terminology, the Court of Justice of the European Union, hereinafter referred to as CJEU) declared the primacy of Community Law as early as in 1964 in Costa v ENEL.[5] In 1970, in Internationale Handelsgesellschaft,[6] it stated that Member States may not invoke their constitutional arrangements for the sake of selective or discriminatory interpretation of Community Law. Despite this, the question of the primacy of EU Law is raised repeatedly by bodies that are responsible for interpreting national constitutions, that is, in the cases before the constitutional courts of Member States. An excellent example of this is the decision dated 5 May 2020[7] of the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) in connection with the European Central Bank's (ECB) bond purchase programme, in which BVerfG banned the implementation of European Union (EU) law again, causing serious debates around its supremacy. Although 50 years have passed since the principle was first enshrined, the primacy of EU Law is still a problem before Member States' constitutional protection mechanisms. Thus, in our opinion, the actuality of this complex topic, which is so rightly popular among practitioners of Constitutional and EU Law, remains unquestionable.

5 Judgment of the Court of 15 July 1964. Flaminio Costa v ENEL (Case 6/64).

6 Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70).

7 BVerfG, 05.05.2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. The proceedings before the German Constitutional Court sought to examine the ECB's misuse of powers, in which the BVerfG initiated a preliminary ruling procedure before the CJEU based on its previous practice. Article 127 of the Treaty on the Functioning of the European Union defines the powers of the European Central Bank (ECB) with regard to monetary policy (ensuring price stability, supporting the general economic policy objectives of the Union). Whereas Member States are responsible for economic policy measures, the ECB is responsible for the monetary policy. In the preliminary ruling procedure, the CJEU limited its examination to the assessment of the ECB's manifest misuse of powers, whereas the German Federal Constitutional Court ruled that the ECB should have also demonstrated the proportionality of the measure adopted in the context of the bond purchase program, which, in the interpretation of BverfG, has not happened despite the ECB's wide discretion. Based on its previous case law, BVerfG confirmed the obligation to oppose EU acts implementing a constitutional identity or exceeding powers, and thus affirmed the inapplicability of the CJEU's decision.

This study aims to examine the application of the primacy of EU Law in the Member States, within the framework of which we undertake a comparative analysis of Italy, Germany, France, and Austria[8] regarding jurisdictional issues, the primacy of EU Law, and relevant case laws before their constitutional courts. First, we turn to the relationship between domestic and international law, specifically, the constitutions of the four identified Member States and international and EU Treaties. We also refer to the options available to the constitutional courts in case of a conflict of norms. Next, as the primacy of EU Law is not expressed explicitly by any of the constitutions of the Member States we examine, we present the constitutional interpretation of supremacy, in light of which we deal with constitutional limits influencing the absolute effectiveness of EU Law (with the protection of fundamental rights, the *ultra vires* Community acts and constitutional identity[9]). We also examine the scope of those legislative acts that can be subject to constitutional review and the issue of exceeding powers.

2. Relationship between the constitutions of Member States and international and EU Treaties, and the practice to be followed in the event of a conflict of norms

According to the CJEU, the Law of the EU is an autonomous and separate legal order that is different from classical international law, which must be applied within the law of the Member States without becoming a part of it.[10] However, in analysing the primacy of EU Law in Member States, we cannot go without referring to the relationship between domestic and international law. There are two reasons for this. One is that the relationship between domestic and international law has had an impact on the conceptualisation of Community Law as a sui generis legal order: as the Netherlands views the relationship between domestic and international law through the lens of monism, and the direct effect of the treaties was based on the Dutch Van Gend & Loos case[11], which provided a favourable basis for the European Court of Justice to establish the efficient enforcement of a relatively new legal order.[12] The second reason is that the founding treaties establishing the EU are international treaties within the meaning of

8 Throughout the study, the four Member States are examined in this order. Settlement criteria were chosen in light of the case law of the national constitutional courts, bearing in mind how easily the Member State's constitutional protection mechanism recognised the principle of primacy of EU law, that is, whether the Member State opposed the position of the EuB, and if yes, how pioneering the constitutional court judgments were when compared to the viewpoint of the CJEU. The latter is most characteristic of the Italian Constitutional Court, whereas it is least true of the Austrian Constitutional Court.

9 For a more detailed summary of the case law of the Member States' constitutional courts on the latter, see: Sulyok, 2014.

10 Jakab, 2007, p. 249.

11 Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (Case 26/62).

12 Chronowski, 2019, p. 10.

international law, in particular Article 2 (1)(a)[13] of the 1969 Vienna Convention[14], and it is therefore necessary to clarify in advance how they can be applied in the domestic law of the state and where they are, in principle, located in the hierarchy of norms.[15]

Under Article 10(1) of the Italian Constitution, adopted on 27 December 1947 and entered into force on 1 January 1948[16], the Italian legal system adapts to the generally recognised rules of international law. The Italian legislature incorporates international treaties containing international obligations into domestic law through a separate act, in which contracts take precedence over domestic law. However, neither the Italian Constitution nor the Act on the Constitutional Court[17] contains provisions addressing a conflict between the Constitution and the provisions of an international treaty. The Act on the Constitutional Court only allows it to examine the conflict between the Constitution and international treaties exclusively in the context of an ex-post review of the promulgating statute.

Article 25 of the Basic Law of the Federal Republic of Germany (Grundgesetz, GG)[18] lays down the principles of general adoption and primacy in relation to customary law and general principles of law,[19] whereas Article 59(2) provides that international treaties on issues regulated by federal legislation may be concluded with the express approval or assistance of the competent body of the federal legislature in the form of a federal law. The BVerfG's approach to international law is generally influenced by the perspective of '*Völkerrechtsfreundlichkeit*', that is, the BVerfG sees the relationship between domestic and public international law in a 'friendly' manner.[20] The GG, particularly under Paragraph 93, which regulates the powers of BVerfG, does not allow international treaties to be revised before they have been signed or ratified. The BVerfG stated in an early judgement that it does not have the power to carry out ex-ante control of international agreements.[21] Thus, constitutional concerns can only be addressed during the discussion of bills transposing international treaties before ratification, and

13 Article 2, 1. For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

14 Legislative Decree No. 12 of 1987 on promulgating the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

15 In Hungarian Law, international treaties promulgated by statute come under the Fundamental Law of Hungary, but rank above statutes. International treaties promulgated by government decree fall under statutes, but rank above government decrees. Trócsányi and Schanda, 2014, p. 111.

16 Costituzione della Repubblica Italiana (Gazzetta Ufficiale n. 298 del 27-12-1947), https://tinyurl.com/ya8w2mf7 (2020. 01. 06.).

17 Elenco delle leggi di revisione della Costituzione e di altre leggi costituzionali (1948–2003), https://tinyurl.com/yajdfj3h (2020. 01. 06.).

18 Grundgesetz für die Bundesrepublik Deutschland, https://tinyurl.com/hp9unzd (2020. 01. 29.).

19 Kovács, 2016, pp. 84–90.; Molnár, 2018, pp. 16–17.

20 Wolfrum, Hestermeyer and Vöneky, 2015, p. 4–5. in: https://tinyurl.com/vjoea75 (2020. 01. 28.).

21 BVerfG, 30.07.1952 – BvF 1/52.

the BVerfG can only examine international treaties that have already been ratified in the context of ex-post normative control from a procedural perspective.

In France, international treaties become a part of domestic law only after transposition. Therefore, the treaties establishing the European Economic Community (EEC) and the EU, as well as their amendments, can only be incorporated into French law after transposition. The relationship between domestic law and international treaties is governed by Articles 54 and 55 of the French Constitution[22]. It provides that treaties or agreements ratified in accordance with constitutional requirements take precedence over the statutes, but not the Constitution, after their promulgation under domestic law, if the treaty or agreement is also applied by the other party. However, the *Conseil Constitutionnel*, acting as the French Constitutional Court, has waived the condition of reciprocity in the case of EU Treaties.[23] Under Article 55 of the French Constitution, international treaties and agreements may be examined by the *Conseil Constitutionnel* only before they are concluded or promulgated on the initiative of the actors entitled to do so by the Constitution,[24] that is, on a non-binding basis. If the *Conseil Constitutionnel* finds a conflict between the Constitution and the obligation arising out of an international treaty, the ratification of the international treaty can only take place by amending the Constitution. Before ratifying the Maastricht Treaty, the Amsterdam and Lisbon Treaties and the European Constitutional Treaty, which were ultimately rejected in a referendum, the *Conseil Constitutionnel* declared their partial incompatibility with the Constitution in a constitutional review and thus deemed it necessary to amend the French Constitution in all four cases. Although in light of the *Conseil Constitutionnel*'s examination, the French Constitution is at the top of the hierarchy of norms, according to some assessments, by amending the Constitution and not the international treaty in the event of a conflict between an international treaty and the Constitution, we cannot speak of the primacy of the French Constitution over international treaties.[25]

The reception of the generally recognised rules of international law is provided for under Article 9 (1) of the Austrian Constitution (Bundes-Verfassungsgesetz, B-VG).[26] Austria's constitutional system is monistic, that is, the B-VG recognises the primacy of international law. According to the Austrian Constitution, no preliminary norm control can be initiated before concluding an international treaty. The constitutionality of international treaties shall be ensured by the legislature, if necessary, with a possible constitutional amendment before ratification. Under Paragraph 140/A (1) of the B-VG, the Austrian Constitutional Court may, in the context of an ex-post facto review, examine the conformity of an international treaty that has already been ratified in accordance with the Constitution. If an international treaty is declared unconstitutional

22 Constitution du 4 octobre 1958., https://tinyurl.hu/q6pw/ (2020. 01. 09.).

23 Cons. const. décision n° 98-400 DC du 20 mai 1998, in: Rideau, 2015, https://tinyurl.com/y7apsask (2020. 01. 09.).

24 At the initiative of the President of the Republic, the Prime Minister, the Speaker of the House of Representatives or the Senate, or 60 representatives or senators.

25 Bonnet, 2019.

26 Bundes-Verfassungsgesetz, BGBl. Nr. 1/1930, https://tinyurl.com/9octsbk (2020. 07. 10.).

by the Constitutional Court, neither the treaty nor the legislation implementing it shall apply, unless the Constitutional Court provides for an appropriate transitional period in its judgement in order to ensure consistency.[27]

3. The lack of constitutional provisions regarding the primacy of EU Law

Before discussing the results of our study, we draw the readers' attention to the peculiarity of the relationship between EU Law and the constitutions of the selected Member States, which *Nóra Chronowski* described as a 'constitutional law paradox'. The constitutions of the Member States analysed – and, in the case of Austria, the Federal Constitutional Act of 1994 on Accession to the EU[28] – authorise them to enter an international organisation whose sui generis legal order requires unconditional effectiveness over their domestic laws and constitutions.[29] This creates considerable tension in the interpretation of the constitutions of Member States. László Blutman pointed out that although the case law of the CJEU has remained unbroken since 1970 in terms of the principle of supremacy, the so-called 'priority dilemma' is insoluble as Member States' constitutional protection mechanisms have begun to seek soft solutions to offset the unconditional enforcement of EU Law.[30]

The constitutions of the countries we examined all contain some kind of integration clause, although the content and scope of each are quite different. Italy's accession to the EEC was based on Article 11 of its Constitution,[31] which originally functioned to allow the State to accede to the United Nations. The reference to Community Law and the different nature of Community Law from international agreements did not appear in the Italian Constitution until 2001, when Chapter V underwent a comprehensive amendment.[32] However, the provision does not contain an explicit EU clause and does not enshrine the primacy of Community Law over national law. Under Article 117 (1) of the Italian Constitution, law-making is exercised by the State and the regions in accordance with the Constitution and the restrictions imposed by the EU and other international obligations. Article 11 specifies that Italy participates in European integration by restricting its sovereignty. The Constitutional Court examines cases involving the conflict of competence between Member States and the EU, in the absence of express

27 This is a maximum of one year for international treaties and two years for treaties amending the EU founding treaties.

28 Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, BGBl. Nr. 744/1994, https://tinyurl.com/y7grrzp8 (2020. 07. 10.).

29 Chronowski, 2019, p. 2.

30 Blutman, 2017, p. 1.

31 Article 11 of the Italian Constitution: '[I]taly agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends'.

32 Legge costituzionale 18 ottobre 2001, n. 3, Modifiche al titolo V della parte seconda della Costituzione, https://tinyurl.com/y7fhls53 (2020. 01. 06.).

provisions of the Constitution based on Article 11 even after the 2001 constitutional amendment, and interprets the restriction of sovereignty referred to therein as a transfer of powers. As indicated above, Italy promulgates Community Law into its domestic law, so that the Constitutional Court can only examine the constitutionality of domestic laws transposing EU Law in indirect proceedings (*sindacato in via incidentale*).[33]

Unlike the Italian Constitution, the German GG has had an EU clause since 1993, the year when the Maastricht Treaty (Article 23) entered into force. However, the German legislature does not provide for the primacy of EU Law. Article 23 (1) of the GG clarifies that in order to achieve a united Europe, the Federation may transfer sovereignty to the EU by a law approved by the Federal Council (*Bundesrat*). The German Basic Law derives primacy of EU Law not from the sui generis nature of EU Law itself, but from the provisions of the law authorising the German State to delegate powers to a supranational body. The primacy of EU Law in Germany is bound by the German Constitution. Although the GG does not set limits on the delegation of powers, the text mentions democratic, rule of law, social, and federal principles, as well as the principle of subsidiarity and the level of legal protection provided as core values. The latter two requirements are highly emphasised in the case law of BVerfG.

Before 1992, the French Constitution did not contain any specific provision on the country's participation in European integration. After the decision[34] of the *Conseil Constitutionnel*, which only accepted the ratification of the Maastricht Treaty upon an amendment to the Constitution, the new Title XV was incorporated into the French Constitution,[35] which has since been amended several times. However, like the Italian and German constitutions, it does not provide for the primacy of EU Law. Nevertheless, as a consequence of France's participation in European integration, the Constitution clarifies that Member States exercise certain powers jointly.[36] In the absence of a clear provision on the primacy of EU Law, it has been a longstanding challenge for the French legislature to elaborate the primacy of EU Law in practice that is compatible with the French hierarchy of norms.

The primacy and direct effect of EU Law are not expressly provided for in the B-VG. Both these principles were adopted by the 1994 Act of Accession to the European Union and by the case law of the Constitutional Court following the country's accession

33 The essence of indirect proceedings is that in an ongoing proceeding, either party or the trial judge may initiate an ex-post review of constitutionality *ex officio*, if he or she has doubts about the constitutionality of applicable law. However, before referring the matter to the Constitutional Court, it should be declared that the question referred is relevant to the main proceedings and that the doubts are well founded.

34 Cons. const. décision n° 92-308 DC du 9 avril 1992, Maastricht I.

35 Loi constitutionnelle n° 92-554 du 25 juin 1992.

36 The link between the ratification of the Maastricht Treaty and the constitutional amendment emerged partly from the fact that the *Conseil Constitutionnel* described the EU as an international organisation endowed with legal personality and decision-making powers by delegation, and considered that Article 88 (1) of the Constitution allows this delegation of powers. Cons. const. décision n° 92-308 DC du 9 avril 1992, Maastricht I, cons. 13., as well as Cons. const. décision n° 2007-560 DC.

in 1995. Pursuant to Paragraph 9 (2) of B-VG, certain elements of state sovereignty may be transferred to another state or international organisation, but the case law of the Constitutional Court (*Verfassungsgerichtshof*) has not clarified what the phrase 'certain elements of sovereignty' means.[37] In any case, it is clear from the case law of the Constitutional Court[38] that Paragraph 9 (2) of the B-VG is not relevant to its relationship with the EU, given that the delegation of powers to the EU is provided for in the Act of Accession. The B-VG pays particular attention to maintaining the status quo in the federal system and in the division of competence between the Federation and the federal states (*Bundesländer*). The powers of federal states enjoy special protection against possible attempts to revoke them, either by the federal government or the EU, or as a result of an international treaty. Whereas the Federal Council (*Bundesrat*) can veto the deprivation of powers, the National Council (*Nationalrat*) may exercise a right of veto in the interest of the democratic rule of law as a particular value that needs to be protected. Articles 23/A–23/K of the Austrian Constitution also provide for the possibility of the national parliament having a say in EU decision-making.

4. The constitutional courts' interpretation of the primacy of EU Law in the absence of explicit constitutional provisions

Though the integration clauses in the constitutions of the Member States we examined allowed for the transfer or restriction of powers, it does not mean that these states have relinquished their national sovereignty. The echoes of national constitutional protection fora of Member States, and the case law of the Constitutional Courts have expressed concerns over the EU's attempts to assert its powers in more and more areas, sometimes under questionable powers. László Trócsányi emphasised that as no confrontation with the EU is in the interest of any Member State, it has been necessary to use a *modus vivendi* that is a gentle and simultaneously effective weapon against the EU.[39] Although Trócsányi used the latter metaphor in connection with constitutional identity, it was not the first *modus vivendi* in the arsenal of constitutional protection mechanisms in the Member States: the protection of fundamental rights and the issue of *ultra vires* Community acts are also popular benchmarks for counteracting EU Law.

The jurisprudence of the Italian Constitutional Court has come a long and controversial way in recognising the primacy of Community Law. In the context of the Member States examined, it is no exaggeration to say that this was the longest and most controversial one. Decisions of the Italian Constitutional Court rejecting the primacy of Community Law were a precedent for the CJEU, as the interpretation of these Italian

37 Although it would have had the opportunity to do so in many cases, the last was in connection with the ESM Treaty. Mayer, 2013, p. 394.

38 The judgments of the Austrian Constitutional Court: SV 2/12-18 of 16 March 2013 and SV1/2013-15 of 3 October 2013 on the review of constitutionality of the ESM Treaty and the fiscal compact.

39 Trócsányi, 2014, p. 72.

judgements provided a basis for elaborating the principle of the primacy of Community Law in Costa v ENEL. Despite the judgement of the CJEU declaring the primacy of Community Law in 1964, the Italian Constitutional Court did not acknowledge the principle of supremacy until the Frontini case in 1973,[40] which has not been questioned since then and has been placed under constitutional limits. The Italian Constitutional Court has also come a long way in ruling on the inapplicability of internal rules contrary to Community Law. In its initial case law, it was ruled that the Constitutional Court had the power to declare the unconstitutionality and inapplicability of internal rules that were contrary to Community Law; the court in the case in question could not decide on it. Following the 1976 ruling in the Simmenthal case[41] which declared the inapplicability of national laws contrary to Community Law, the Italian Constitutional Court ruled in the Granital case[42] only in 1984, which declared that courts shall disregard (*disapplicare*) an internal rule that is contrary to Community Law without initiating a constitutional review.

BVerfG is Europe's Constitutional Court with the most extensive powers, whose case law has played a major role in shaping Community Law and has had a significant impact[43] on both the CJEU and constitutional courts of other Member States. The BVerfG declared the primacy of Community Law in its 1971 *Lütticke* judgement,[44] in a pioneering way as the first one among the European constitutional courts, but it later withdrew from this dynamism to protect its constitution (see below).[45] The BVerfG may formulate its position on Community Law following a constitutional complaint and a judicial inquiry (ex-post constitutional review in a particular case).

In France, the recognition of the primacy of EU Law has taken place in a broader context, within the framework of the case law on the Member States' compliance with international obligations. Here, the ex-post control of compliance with international obligations is not carried out by the *Conseil Constitutionnel* (as under Article 54 of the Constitution, it only has the power to carry out ex-ante control), but by the ordinary courts (*juridictions judiciaires*)[46] and by their Supreme Court (*Cour de Cassation*), as well as in the case of administrative court proceedings by the Council of State (*Conseil d'État*). The *Conseil Constitutionnel* had the opportunity to clarify its position on the primacy of EU Law during the ex-ante control of implementing norms serving the

40 Sentenza 183/1973.

41 Judgment of the Court of 9 March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77).

42 Sentenza 170/1984.

43 Fazekas, 2009, p. 61.

44 BVerG, 09.06.1971 – 2 BvR 225/69.

45 The BVerfG stated that, in accordance with Article 24 of the GG, through the German statute ratifying the EEC Treaty, the rules of the EEC's autonomous legal order in the domestic legal system acquire effectiveness and have to be applied by the German courts. This way, the directly applicable provisions of Community Law take precedence over conflicting national laws, as only in this case can individual rights based on Community Law be guaranteed. Stipta, 2011, p. 300.

46 . Cons. const. décision n° 86-216 DC du 3 septembre 1986.

compliance with EU Law. The process of recognising the primacy of EU Law can be considered relatively slow and cumbersome because of the complexity of the French judicial system and rules of jurisdiction.[47] The recognition of the principle that an earlier international commitment takes precedence over later national legislation occurred relatively late in 1975 (*Conseil Constitutionnel*[48] and *Cour de Cassation*[49]) and in 1989[50] (*Conseil d'État*). The *Conseil Constitutionnel* interprets EU Law as a legal system that is integrated into domestic law but is distinct from the international legal order,[51] and the *Cour de Cassation* has also highlighted the special nature of the Community legal order. Owing to the primacy of EU Law, administrative and ordinary courts have accepted the obligation to interpret national laws in a manner that conforms to the EU, and if this is not possible, to disregard the conflicting norm and to replace it with the EU directive, if necessary.

The issue of a preliminary ruling procedure that may be initiated by the Austrian Constitutional Court on the interpretation or validity of EU Law is 'under-regulated' in Austrian Constitutional Law. The text of the Constitution does not mention it, and the Act on the Constitutional Court[52] provides for the rules of procedure only rather succinctly. Based on the case law of the Austrian Constitutional Court, it is not sufficiently clear when the Constitutional Court is obliged to refer a case to the CJEU.[53] However, a search of the website of the Constitutional Court[54] showed that the Austrian Constitutional Court has initiated preliminary ruling proceedings on four occasions[55] since its accession to the EU.

■ *4.1. Constitutional limits influencing the unconditional effectiveness of the primacy of EU Law*

4.1.1. Italy

The Italian Constitutional Court recognised the primacy of Community Law in the 1973 *Frontini* case, and pointed out that the restriction of sovereignty declared under Article 11 of the Constitution in order to accede to the EEC did not empower the EEC institutions with such unacceptable (*inammissibile*) power that would allow the fundamental

47 According to a speech by Jean-Marc Sauvé, Vice-President of *Conseil d'État* on 26 October 2016, France was the last EU Member State to commit to the primacy of EU law. See: https://tinyurl.hu/gTN3/ (2020. 01. 13.).

48 Cons. const. décision n° 75-54 DC du 15 janvier 1975, IVG.

49 C. Cass. Ch. mixte, 24 mai 1975, Direction générale des douanes et droits indirects/S.A.R.L. Weigel et Société des cafés Jacques Vabre, D. 1975.

50 C. E., Ass., 20 octobre 1989, Nicolo.

51 Cons. const. décision n° 2004-505 DC du 19 novembre 2004.

52 Verfassunsgerichtshofgesetz, BGBI Nr. 85/1953, https://tinyurl.com/ybqfvgn6 (2020. 07. 10.).

53 Ulrich Jedliczka: The Austrian Constitutional Court and the European Court of Justice, https://tinyurl.com/y8u3xu7z (2020. 07. 10.), 301. o.

54 See: https://tinyurl.com/t32e3z9 (2020. 02. 01.).

55 Cases: B 2251/97 and B 2594/97 (10.03.1999); KR 1–6/00 and KR 8/00 (12.12.2000); W I-14/99 (W I-14/99); G 47/12 (28.11.2012).

principles of Italian constitutional order and inalienable human rights to be violated. In its decisions following the *Frontini* judgement, in *Industrie Chimiche Italia Centrale*[56] in 1975, in *Granital* in 1984, and in *Fagd*[57] in 1989, the Constitutional Court gradually developed a system of counterweights (*controlimiti*) to maintain that Community norms shall not violate the foundations of Italian constitutional order and fundamental human rights. The latest decision in *Taricco*[58] (24/2017[59], 269/2017[60], 115/2018[61], 117/2019[62]) has brought several improvements, and introduced – inter alia – viewpoints concerning

56 Sentenza 232/1975.

57 Sentenza 232/1989.

58 Judgment of the Court (Grand Chamber) of 8 September 2015. Criminal proceedings against Ivo Taricco and Others (Case C-105/14). The case was preceded by criminal proceedings before the Italian *Tribunale di Cuneo* against VAT fraud and related offenses committed by Ivo Taricco and others in a criminal organisation. The court brought a preliminary ruling procedure before the CJEU on whether the Italian limitation rules infringe, inter alia, EU rules on the protection of competition and whether EU law requires the courts of Member States to waive certain national laws laying down limitation periods for criminal offenses in order to ensure the effective sanctioning of tax offenses. In a judgment dated 8 September 2015, the CJEU ruled that because of the limitation periods laid down in the Italian Penal Code, proceedings against serious VAT frauds can end with impunity because of the complex criminal proceedings, as these offenses usually lapse before the criminal sanction provided for by law can be imposed by a final court decision. The CJEU considered that such a situation can infringe the obligations imposed on Member States by Article 325 (1) and (2) TFEU and ruled that Italian courts should refrain from applying provisions of national law, if such national law prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union (the so-called 'Taricco' rule). At the request of the Court of Cassation and the Milan Court of Appeal, the Italian Constitutional Court made a reference to the CJEU for a preliminary ruling. According to the interpretation of the Constitutional Court, the non-application of national provisions laying down limitation periods for the sake of the application of EU law, as stated by the CJEU in *Taricco I*, violates a fundamental principle of the Italian Constitution, namely the legality of criminal law and thus the constitutional identity of the Italian Republic. According to the Constitutional Court, EU law is applicable only if it is compatible with the constitutional identity of a Member State. The Constitutional Court explained that the EU is a legal system based on pluralism, the unity of which lies in the inclusion of diversity, but that Member States do not have to give up their core values. The constitutional traditions of Member States have been incorporated into EU law, and EU law and CJEU judgments cannot be interpreted to mean that Member States have renounced their constitutional traditions. The Constitutional Court has not clarified the concept of fundamental values in previous judgments, but since this judgment, it has interpreted constitutional identity as a reserved area, as a kind of restriction (*controlimiti*) against primary and secondary Community norms. Later, the CJEU declared in *Taricco II* (C-42/17) that the 'Taricco' rule shall not apply in cases when that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision in the applicable law or because of the retroactive application of law imposing conditions of criminal liability stricter than those in force at the time of infringement. The Italian Constitutional Court in its two judgments after *Taricco II* (269/2017, 115/2018) maintained its position that the 'Taricco' rule is not applicable because it violates the constitutional principle of legal certainty. See the latter: Judgment of the Court of 5 December 2017. Criminal proceedings against MAS and MB (Case C-42/17).

59 Ordinanza 24/2017.

60 Sentenza 269/2017.

61 Sentenza 115/2018.

62 Ordinanza 117/2019.

the examination of constitutional identity. Although the CJEU ruled in *Taricco I* that national legislation laying down limitation periods shall be ignored for in order to give effect to EU Law, the Italian Constitutional Court held that the application of that principle would violate the legality of criminal legislation, a principle of the Italian Constitution and thus the constitutional identity of the Italian Republic.[63] According to the Constitutional Court, EU Law can only be applied if it is compatible with the constitutional identity of a Member State, and the Law of the EU and the judgements of the CJEU cannot be interpreted to make Member States give up their constitutional traditions. However, the Constitutional Court has not clarified thus far what may be considered the basic values of a Member State. It has developed the doctrine of '*controlimiti*' in its *Taricco* judgements: not only the fundamental order of the Constitution and protection of human rights, but also the constitutional identity that appears as such a consequence that may counterbalance the application of Community Law. Another innovation in *Taricco* was the introduction of the concept of the double preliminary ruling (*doppia pregiudizialità*). In this case, if an internal law violates both the Italian Constitution and EU standards, including the Charter of Fundamental Rights of the European Union, the constitutional review shall be carried out with the examination of directly applicable EU and national laws in parallel. This is necessary because of the interpretation of both national law and the rights enshrined in the Charter of Fundamental Rights in accordance with constitutional traditions. Thus, the Constitutional Court maintained the protection of fundamental rights even in the event of a violation of the rights guaranteed by the Charter of Fundamental Rights, without ruling out the possibility of initiating a preliminary ruling.

4.1.2. Germany

The BVerfG's initial approach, which harmonised with the case law of the CJEU, has been somewhat overshadowed by the question of the primacy of Community Law over the German Constitution: the BVerfG openly turned against the CJEU in 1974 with its famous *Solange I* judgement,[64] in which it ruled that Germany's procedural Community regulations are considered statutes and can therefore lawfully be subject to direct constitutional review, and consequently, the BVerfG may examine the compatibility of Community regulations with German GG from the perspective of fundamental rights. The BVerfG also stated that the fundamental rights provisions of GG have a special, inalienable (*unaufgebbar*) constitutional status, and stated, as a consequence of the '*solange*' formula, that in the event of a conflict between Community Law and a constitutional provision guaranteeing fundamental rights, the German constitutional

63 The concept of constitutional identity first appeared in order no. 24/2017 of the Italian Constitutional Court, in which it projected its attitude towards Community law and the CJEU. The Constitutional Court stated that the principle of legality in criminal law is one of the fundamental principles of Italian constitutionality, which guarantees the inviolable rights of individuals by providing for the clear definition of criminal laws and the prohibition of retroactive effects. Horváth, Pék, Szegedi and Szőke, i.p.

64 BVerfGE 37, 271 2 BvL 52/71 (1971).

provision shall remain in force until (*solange*) the Community institutions have eliminated the conflict in due process. As long as this legal certainty[65] does not arise in the future integration of the Community, the reservation under Article 24 of the GG shall apply. However, the BVerfG stated that it did not have the power to declare a Community regulation contrary to German Law invalid. Therefore, German courts would first have to refer the question to the CJEU for a preliminary ruling and then to the BVerfG. The BVerfG maintained that position for over a decade, but neither in *Solange I* nor in any other subsequent case did it declare a provision of Community Law inapplicable on account of a breach of a fundamental right.[66] In 1986, the BVerfG fine-tuned its previous position and, by limiting its power to directly examine the applicability of EU Law, it took a more lenient position on the protection of fundamental rights. In *Solange II*,[67] the BVerfG acknowledged that the Communities had committed themselves to a stronger legal protection mechanism. In light of these developments, as long as (*Solange*) the European Communities, in particular the CJEU grants a generally efficient fundamental rights protection mechanism that is essentially equal to the protection granted by *GG* against the powers of Communities, the BVerfG may not exercise the power to decide on the applicability of secondary Community legislation, and may not review that legislation in accordance with the fundamental rights standard laid down in the *GG*. Although the BVerfG did not cease its constitutional reservation on the primacy of Community Law, it left the review of secondary Community Law to the CJEU for the protection of fundamental rights. In 1992, in *Maastricht*,[68] the BVerfG reaffirmed the reservation made in *Solange II* from the perspective of European judicial cooperation, and pointed out that all acts of the EU institutions could imply constitutional interference in German Law. In the judgement, the BVerfG reaffirmed its competence to guarantee fundamental rights, even in contrast to the relevant competences of the EU, within the framework of cooperation between courts in which this task of protecting fundamental rights is, in principle, performed by the CJEU. However, it stated that, insofar as the CJEU would not be able to ensure an adequate level of protection of fundamental rights, the BVerfG could have the final say on the applicability of Community Law, because EU Law shall not apply against the fundamental principles of unconditional effectiveness laid down by the *GG*. Two years later, in 1994, the BVerfG maintained its power to review Community Law in *Banana market*,[69] but, in accordance with *Solange II,* it can only be applied under strict conditions, when the level of protection of fundamental rights in the EU decreases generally. As it is almost impossible to prove a reduction in the level of protection, it can be concluded that the reservation of the Constitutional Court against the primacy of Community Law exists in theory, but has no practical significance.

65 That is, fundamental rights protection of the Community level that is coherent with the fundamental rights guaranteed under GG.

66 Fazekas, 2009, p. 72.

67 BVerfGE 73, 339, 2 BvR 197/83 (1983).

68 BVerfGE 89, 155, 2 BvR 2134, 2159/92 (1992).

69 Judgment of the Court of 5 October 1994. – Federal Republic of Germany v Council of the European Union (Case C-280/93).

The BVerfG also paid particular attention to the inapplicability of *ultra vires* Community acts as a constitutional reservation. In *Maastricht*, the German Constitutional Court *expressis verbis* ruled that the EU does not have the right to *'Kompetenz-Kompetenz'* (competence to define competence), so it is still up to the Member States to decide the extent to which competence is transferred to the EU. If the EU wants to acquire new powers or the integration process deviates from the one determined by the Maastricht Treaty, these cases will no longer be covered by the power to ratify that treaty. The BVerfG sees the EU as a confederation of states (*Staatenverbund*) but not as a federal state, in which the EU institutions should place more emphasis on avoiding an overly broad interpretation of shared competence. In 2000, in *Alcan*[70] the BVerfG rejected a constitutional complaint alleging that a judgement of the CJEU had created such a new Community procedural rule regarding which it had no power, and therefore it constituted an *ultra vires* act, so it should not apply in the court proceedings against the complainant. Reflecting the statement of facts,[71] the BVerfG took the view that the CJEU had only contributed to the exercise of the Commission's powers and did not constitute a general rule of Community procedural law, it had only acted in a specific case. Owing to the European Commission's decision ordering repayment (and the principle of the primacy of Community Law), the German procedural provision excluding repayment because of time limits was therefore set aside. In its judgement on the constitutional review of the Lisbon Treaty (2009),[72] the BVerfG had to examine whether that treaty required a transfer of powers from Germany, the implementation of which would *de facto* transfer all German legislative powers to the EU, thus eliminating German sovereignty. Although the BVerfG did not consider the Lisbon Treaty contrary to the GG, it declared, in line with its resolution on the Maastricht Treaty, the lack of competence of the EU to define competence (*Kompetenz-Kompetenz*) in relation to the Lisbon Treaty. Referring to the confederational nature of the EU, the BVerfG also stated that the German Constitution did not authorise Germany to join a European federal state, and that EU Law was applicable in the country insofar as the EU made those rules within the limits of the powers conferred to it by Germany. The BVerfG thus supplemented the constitutional review of *ultra vires* acts with a review aspect, which refers to the unchangeable essence of German state sovereignty.[73] Contrary to the *Maastricht* and *Lisbon* judgements, in its 2019 judgement on the banking union[74] the

70 BVerfGE 2 BvR 1210/98 (1998).

71 In the present case, the Commission classified the financial aid granted by *Bundesland* to Alcan as prohibited state aid and ordered its repayment. The *Bundesland* government's decision ordering repayment was challenged by Alcan before court, because, under German procedural law, the time limit for ordering a possible repayment had expired, and thus, Alcan's legitimate expectation of keeping the aid was violated. The Federal Administrative Court requested a preliminary ruling from the CJEU. Following the ruling on the repayment of aid, the Federal Administrative Court dismissed the action. The complainant then turned to the BVerfG. See: Fazekas, 2009, p. 87.

72 BVerfGE 2 BvE 2/08 (2009).

73 Fazekas, 2010, pp. 13–21.

74 2 BvR 1685/14, 2 BvR 2631/14 (2019).

BVerfG found that, following a kind of '*Europarechtsfreundlichkeit*' (pro-European Law) approach, neither the limits on the delegation of powers, nor the constitutional identity had been violated. Although in its case law the BVerfG set limits on the transferability of powers, it did not take into account, as *László Szegedi* pointed out, that in many respects, the rules and practices have already transcended this or are likely to have to do so.[75] The test of misuse of powers is examined by the judgement of BVerfG in May 2020. According to the German Constitutional Court, the CJEU interpreted the principle of proportionality as meaning that the ECB can extend its powers beyond the areas necessary for the achievement of monetary objectives, in connection with which the BVerfG stated that the budgetary law governing substantial revenue and expenditure embodied a transfer limit.[76]

The role of the third *modus vivendi* of BVerfG in counterbalancing the primacy of EU Law is fulfilled by constitutional identity. Under the German Constitution, the inalienable elements of constitutional identity are democracy, rule of law, human dignity, and fundamental human rights, based on which the constitutional control of EU legislative instruments can be scrutinised. As *Endre Orbán* stated, the roots of constitutional identity had essentially begun to sprout in the jurisdiction of the German Constitutional Court in *Solange I*, when the BVerfG made a fundamental rights reservation in the case of the possible inadequacy of the EU fundamental rights system, emphasising the protection of GG's identity.[77] Later, the issue of constitutional identity resurfaced in its judgement on the constitutional review of the Treaty of Lisbon and in the judgement on the European arrest warrant.[78] In the former, the BVerfG defined constitutional identity as a barrier to further integration and drew up a means of reviewing secondary EU Law, and categorically distinguished between GG's and Germany's constitutional identities. In the latter, the German Constitutional Court refused to apply the European arrest warrant because doing so would infringe the right of human dignity of the person concerned, and the constitutional identity embodied under Article 79 (3) of the GG.[79] Although the German Constitutional Court did not substantiate the basic powers with a constitutional provision, it defined them (criminal substantive and procedural law, use of state power, fiscal decisions on revenue and expenditure, elements of the welfare state, cultural issues such as family law, and religious minority rights), regarding which a delegation of powers to the supranational level is not excluded, but it is not fortunate.

4.1.3. France

As neither the primacy of EU Law, nor the conditions and limits for its application are included in the French Constitution, the *Conseil Constitutionnel* has dealt with these

75 Szegedi, 2020, pp. 96–100.
76 Horváth, Pék, Szegedi and Szőke, i.p.
77 Orbán, 2018, p. 1.
78 2 BvR 2735/14 (2015).
79 Drinóczi, 2020, p. 6.

issues in recent decades. The *Conseil Constitutionnel* first referred to the Constitution's directly contrary provision in 2004 in its judgement on the compatibility of the European Constitutional Treaty with the French Constitution. This general reference was clarified later in 2007 in connection with the constitutional review of the Lisbon Treaty and was determined as the rules or principles that organically linked to France's constitutional identity.[80] This approach is based on Article 4 (2) of the Treaty of the European Union (TEU), which declares that the EU shall respect the Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government; thus, this obligation may also be invoked by the French legislature against the EU.[81] The principles and rules of the constitutional core have been hardly elaborated upon by the *Conseil Constitutionnel* so far (in connection with the draft of the European Constitutional Treaty, where it referred to secularism),[82] but before ratifying international treaties, the *Conseil Constitutionnel* examines whether the international obligation would violate the basic conditions required for exercising national sovereignty, or would question the rights and obligations guaranteed by the Constitution. If this is so, ratification can only take place after the Constitution has been amended.[83] The practical application of this constitutional test in relation to primary sources of law has recently taken place in the context of the EU fiscal compact,[84] when the *Conseil Constitutionnel* had to decide whether the compact entailed a further delegation of powers in favour of the EU over economic and budgetary policy. Finally, it noted that as this new treaty did not violate the basic conditions required for exercising national sovereignty, compliance could be ensured by organic statutes without a constitutional amendment.

Compared to the examination of the constitutionality of international agreements, the constitutional examination carried out following the statutes implementing EU directives into French law may be considered more interesting from the perspective of the primacy of EU Law. Within the framework of ex-ante reviews, the *Conseil Constitutionnel* has, in several cases, taken over the reference to rules or principles inherent in constitutional identity used in connection with the examination of international treaties, and has stated that the implementation of directives cannot infringe these principles unless it has been accepted.[85] The constitutional hardcore can therefore also be invoked as a barrier while implementing a directive.

80 Cons. const. décision n° 2007-560 DC.

81 However, we can see that, in practice, the French Constitution has so far complied with the EU treaties.

82 Cons. const. décision n° 2004-505 DC, cons. 18. Lásd: Anne Levade: Le Conseil constitutionnel et l'Union européenne. Cahiers du Conseil Constitutionnel, Hors série – Colloque du Cinquantenaire, 3 novembre 2009, https://tinyurl.hu/6BVT/ (2020. 03. 01.).

83 Cons. const. décision n° 2004-505 DC, décision n° 2007-560 DC, see: https://tinyurl.com/y8k2bvpv (2020. 03. 13.).

84 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

85 Cons. const. décision n° 2006-540 DC.

4.1.4. Austria

The Austrian Constitutional Court recognised the primacy of EU Law immediately after Austria's accession: the national constitutional protection mechanism already paved the way for its case law in 1995,[86] based on the recognition of the primacy of EU Law and, where appropriate, of its direct applicability. The Austrian Constitutional Court has consistently persisted with its direction, has not deviated from it, and has not changed its aspects in the decisions in the following years.[87]

The Austrian Constitutional Court has not invoked national identity[88] under Article 4 (2) TEU thus far, unlike the Italian, German, and French constitutional protection mechanisms. Nevertheless, in matters relating to the European Stability Mechanism (ESM) and fiscal sovereignty, where the ESM itself and the decision-making rules of ESM[89] have been incorporated into the Austrian Constitution, the federal system and the powers of *Bundesländer* have been defined as a value to be protected.

In its examination of the constitutional situation of the ESM Treaty and fiscal compact, the Austrian Constitutional Court had to find an answer to whether these two treaties are international or those amending EU founding treaties. This distinction was significant for the Constitutional Court because if it considers them domestic law as part of EU Law, it can examine their constitutionality together with domestic law. If they are classified as international treaties, it may even find them inapplicable under Article 140 of B-VG in case of unconstitutionality within the procedure of ex-post review. The Constitutional Court eventually classified both the ESM Treaty and its Interpretative Declaration,[90] and the fiscal compact as international treaties,[91] but did not require a constitutional amendment, as it also found that the delegation of powers required by the treaties did not undermine the state's fiscal sovereignty and is not contrary to the provisions of the B-VG.

■ *4.2. The laws that can be subject to constitutional review and the question of misuse of power*

The Italian Constitutional Court may review the constitutionality of national legislation transposing EU Law in the context of an ex-post review. In connection with the interpretation of the scope of the restriction of sovereignty contained in Article 11 of the Constitution, the Constitutional Court developed the abovementioned principle of '*controlimiti*', but in its practice so far (besides maintaining the areas of constitutional

86 The judgment of Austrian Constitutional Court: VfSlg.14.391 sz. (12 December 1995).

87 See the judgments of the Austrian Constitutional Court: VfSlg. 15.427 (24 February 1999), VfSlg. 15.450 (13 December 2001), VfSlg. 17.075 (3 December 2003) and VfSlg. 17.065 (28 November 2003).

88 Although constitutional and national identity are often used as synonyms, reality is very different: neither the grammatical interpretation of the wording of Article 4 (2) TEU, nor the case law of the CJEU supports such an interpretation. See Konstadinides, 2015, pp. 127–169.

89 Article 50/A of the Austrian Constitution.

90 Az ESM Szerződéshez fűzött nyilatkozat (Brüsszel, 2012. szeptember 27.).

91 See judgments of 3 October 2013 of SV2/2012-18 and SV1/2013-15.

identity, substantial core of the Italian Constitution, and basic principles of the constitutional order, etc.) it has not concluded the misuse of power by the EU, but by Italy. In *Granital* in 1984, the constitutional protection mechanism held that it was also entitled to review provisions of Italian law on whether they infringed compliance with the EEC Treaty, either with respect to the scheme of that treaty or its principles (*legge di rottura*), and if the legislature unduly exceeded state sovereignty in the legislation ensuring the enforcement of the EEC Treaty. The Italian Constitutional Court ruled that it can declare the unconstitutionality of unlawful statutes in such cases.[92]

Before the ratification of the fiscal compact in June 2012, by amending Article 81 of the Italian Constitution,[93] the Constitution – in line with the fiscal compact – enshrined the balance of budgetary revenue and expenditure (*pareggio di bilancio*), which linked the sustainability of general government deficits to compliance with the economic and financial rules of the EU. Thus, the budgetary balance required by an external (EU) obligation has been given a constitutional rank. However, the amendment raised significant constitutional issues as the 'constitutionalisation' of budgetary balance has become an element of the balance among constitutional rights. The amendment thus affected the principles of the constitutional order as well as Chapter I of the Constitution, which contains civil rights, and also raised the issue of the violation of the principle of social and democratic rule of law. Thus, ensuring the obligation of a budgetary balance may even change the basic principles of the Constitution, such as the right to social benefits or work.

In connection with the EU fiscal compact, the Italian Constitutional Court has dealt with Article 81 of the Constitution in several judgements.[94] Although the Constitutional Court did not provide clear guidelines on the concentration between social rights and economic and financial requirements, it developed the concept of constitutionally-oriented budgetary planning, according to which unavoidable constitutional rights shall also be guaranteed while establishing a budgetary balance. It also established the principle of a minimum level of social rights and the graduation of financial resources, which can guarantee fundamental rights even in the event of a lack of resources. In its subsequent judgements, the Constitutional Court, apart from the budgetary balance requirement under Article 81, first ruled that it may examine the legislature's discretionary right between the exercise of social rights and their financing, and second, declared the priority of social services regardless of their budgetary implications. The Constitutional Court maintained that the Constitution is a set of intertwined principles that prioritise the right of persons to work, health, and education while allocating budgetary resources. The Italian Constitutional Court ruled that constitutional rights take precedence over the budgetary balance required by an

92 Following the 2001 constitutional amendment, the adoption of such violating laws could, in theory, be ruled out under Article 117 [within the limits set by the European Union].

93 Legge Costituzionale 20 aprile 2012, n. 1.

94 Sentenza 88/2014, Sentenza 70/2015, Sentenza 275/2016.

external obligation, and further (other) budgetary expenditure can only be considered once the needs related to fundamental rights have been met.

Theoretically, the only situation in which the German Constitutional Court does not examine the constitutionality of an implementing internal act is if the Community Act (directive) in question leaves no room for manoeuvre by the legislature. In parallel, a constitutional review is allowed if the Member States have discretion in connection with the implementation. In practice, on the other hand, the BVerfG has examined, for example, the German legislation implementing the Tobacco Labelling Directive in light of the GG. It annulled the German statute implementing the Framework Decision on the European arrest warrant, as it found that the statute violated the GG's provision prohibiting the extradition of its own national. There is no such trust in the BVerfG in connection with Community Law vis-à-vis the former Pillar III.[95]

In France, as the *Conseil Constitutionnel* can only carry out a constitutional review, and cannot examine the compatibility of French laws with international treaties, the ordinary and administrative courts are entitled to handle the latter, and may refer a question concerning the interpretation and validity of EU Law in a specific dispute to the CJEU. The *Conseil Constitutionnel* ruled out the possibility of indirect control of primary EU legal sources in relation to French legislation adopted in order to comply with EU regulations, but also embarked on a dual examination of the implementation of directives. The *Conseil Constitutionnel* considers the implementation of EU directives a constitutional requirement under Article 88-1 of the French Constitution, so that if a directive is not implemented within the time limit or the implementing provisions ignore the aim of the directive, the reason for lawlessness can be declared vis-à-vis the French law in question. In a dispute, the unsuccessful implementation period may be referred to as a subsequent change in circumstances, based on which the annulment of the unlawful French law may be sought.[96] The *Conseil Constitutionnel* shall therefore examine, by teleological interpretation, whether the implementing legislation is manifestly contrary to the provisions or general objectives of the directive.[97] In the absence of such an obvious contradiction, the constitutionality of the implementing legislation shall not be examined.[98] However, if a contradiction is found, the *Conseil Constitutionnel* may not, even in this case, extend its examination of the compatibility of the Directive with the division of competences or the protection of fundamental rights, as this is the task of the CJEU. It shall not examine those articles of the implementing legislation that enable direct compatibility with the directive, either. However, in one example, the *Conseil Constitutionnel* found an implementing legislation contrary to an express provision of the French Constitution, although the

95 Fazekas, 2009, pp. 80–81.

96 Rideau: i.m.

97 Cons. Const. décision n° 2006-543 du 30 novembre 2006, lásd: Allocution de Hubert Haenel lors d'une Journée de travail à la Cour de justice de l'Union européenne, 7 février 2011, https://tinyurl.hu/DaSp/ (2020. 01. 13.).

98 See: https://tinyurl.com/y8k2bvpv (2020. 03. 13.).

measure contained therein was a necessary consequence of an unconditional and precise provision of a directive.[99]

Owing to the time limit under Article 66-1 of the Constitution, the *Conseil Constitutionnel* is practically unable to refer a question to the CJEU for a preliminary ruling in the contexts of an ex-ante review of a draft of an implementing law and the ex-post constitutional review introduced in 2008;[100] however, this was exemplified for the first time in 2013 under the urgency procedure.[101] Initiating a preliminary ruling procedure on the interpretation or validity of EU Law (thus, on the misuse of power) is, in practice, open to ordinary and administrative courts.

The Austrian Constitutional Court has the power to carry out an ex-post normative review procedure in the case of both international treaties and treaties amending the EU founding treaties, as a result of which it can declare these treaties unconstitutional and inapplicable.[102] However, in its practice so far, the Constitutional Court has interpreted the B-VG as creatively as possible to establish the constitutional conformity of both international treaties and treaties amending the EU founding treaties, which has led to criticism. The Austrian Constitutional Court also follows a permissible practice while examining the constitutionality of secondary sources of EU Law.

5. Summary

Our research shows that the Italian, German, and French legislatures transform international treaties into domestic law through separate legal acts. For the latter – as *Gábor Sulyok* pointed out – there is a practical argument: domestic law would not normally be able to handle the contractual norms with many peculiarities that are addressed to the states, whose source is international law, and whose regulatory style is coordinative. In contrast, the addressees of transformed norms are subjects of domestic law, whose source is domestic law, and whose regulatory style is subordinate in nature.[103] With the exception of France, the states in question only offer the possibility of a constitutional review in the framework of ex-post norm control following the ratification of international treaties and founding or amending treaties of the EU. Whereas the BVerfG can only examine procedural aspects in such cases, the Austrian Constitutional Court may, in principle, even declare international treaties inapplicable (although it has never done so in its previous case laws, as either a constitutional amendment or permissive interpretation has taken place). In contrast to Italian, German, and Austrian laws,

99 This case law has been developed further by the *Conseil Constitutionnel* in the direction of referring to rules or principles inherent in constitutional identity.

100 'Question prioritaire de constituionnalité', that is, preliminary question of constitutionality.

101 In connection with the European arrest warrant see: Cons. Const. décision n° 2013-314 QPC du 4 avril 2013, as well as Judgment of the Court (Second Chamber), 30 May 2013, Jeremy F. v Premier ministre (Case C-168/13 PPU).

102 B-VG, Chapter VII, Articles 137–148.

103 Sulyok, 2012, p. 26.

French law only allows a constitutional review before ratification, which has resulted in four constitutional amendments so far, from the Maastricht Treaty to the Lisbon Treaty, because of the partial incompatibility of EU Treaties with the Constitution.

The next question we examined was whether the Italian, German, French, and Austrian constitutions include provisions in connection with the EU, and if they do so, whether the primacy of EU Law is declared. Our research showed that the first question can be answered with a definite 'yes', whereas the transposition of EU-related provisions in the case of the three old Member States took place only in the context of the ratification of the Maastricht Treaty (in France in 1992, in Germany in 1993) and thereafter (in Italy in 2001), whereas Austria regulated its relations with the EU at the constitutional level before its accession in 1994. As mentioned in the introduction to Chapter 3, the structure and level of detail in the integration clauses are very different: in the case of Italy, for example, there is a precise list of exclusive and shared competences, the Austrian and French constitutions emphasise the involvement of national parliaments in EU decision-making, whereas GG lists the basic values that are to be protected item by item.

We also found that the Italian, German, French, and Austrian constitutions create the possibility of restricting national competence or sovereignty in order to participate in EU integration. Although the French Constitution uses the wording 'the joint exercise of powers with other Member States', on the lines of the wording in Article E (2)[104] of the Hungarian Fundamental Law,[105] the *Conseil Constitutionnel* interpreted the relevant provision of the Constitution as a delegation of powers. Restrictions on sovereignty are also permitted by the Italian Constitution; this has been interpreted by the Constitutional Court as a delegation of powers, and the GG and B-VG also enshrine the principle and possibility of delegation. Although each of the constitutions examined, like Article Q (3) of the Hungarian Fundamental Law,[106] provides for the recognition of the primacy of general principles and recognised rules of international law (although

104 Article E (2) of the Fundamental Law of Hungary states that: 'With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure'.

105 State power cannot renounce the constitutional identity that is only confirmed by the Basic Law but has not been established by it. In the case of Hungary, the basis of constitutional identity representing the fundamental value is the historical constitution, and among its elements, we can find fundamental human rights and the inalienable rights of the territorial unity, population, and state form and system of Hungary. The Hungarian Constitutional Court may, based on this, examine the misuse of power by the EU legislature or a possible violation of Hungary's sovereignty or statehood, as a result of which the EU legislative act would become inapplicable to Hungary.

106 Article Q (3) of the Fundamental Law of Hungary: 'Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws'.

France only recognises the primacy of appropriately ratified international treaties over the statutes, only in the case of application by the other party as well), the principle of the primacy of EU Law has not been declared by any of the constitutions we analysed. The primacy of EU Law is enshrined only in Austria in the Act of Accession to the EU. Thus, in the absence of a constitutional guarantee of the primacy of EU Law, the principle elaborated in 1964 in *Costa v ENEL* was adapted through the case law of constitutional courts of the Member States concerned and of the *Conseil Constitutionnel*, *Conseil d'État*, and *Cour de Cassation* in France.

In the absence of constitutional provisions on the supremacy of EU Law, it was up to the constitutional protection fora in the Member States to recognise the principle of primacy or to define the relationship with it. With the exception of Austria, which immediately incorporated the legal principle into its laws at the time of its accession in 1995, the other three states walked the long road towards recognising the primacy and specific nature of Community Law as distinct from international law. First, in 1971, the BVerfG, then in 1973 the Italian Constitutional Court, in 1975 the French *Conseil Constitutionnel*, and in 1989 the *Conseil d'État* recognised the primacy of earlier international treaties over later national legislation. In the case of Italy, the principle of disregarding national legislation contrary to EU Law was adopted by the legislature only in 1984.

However, in parallel with the acceptance of the primacy of EU Law, on the lines of the practice of the Hungarian Constitutional Court,[107] in all four countries, we found constraints and counterbalances that, in some cases, appear unequivocally in the constitutions, or, in other cases, can be deducted indirectly from the case law of constitutional courts, and to which the states can refer against the unconditional effectiveness of EU Law. According to our study, these restrictions appear either as a principle, a value to be protected, or in the context of the interpretation of constitutional identity. In the case of Germany, the GG lays down the core values (principles that require unconditional effectiveness by the Constitution), whose enforcement the BVerfG expressly observes, such as democracy, rule of law, social and federal principles, the principle of subsidiarity, and a high level of legal protection. Basic values have also been referred to in the judgements of the Italian Constitutional Court, but these have not been explained in detail thus far. In Austria, the protection of the constitutionally enshrined federal system and powers of *Bundesländer* are linked to constitutional identity. The French *Conseil d'État* specifically mentioned secularism and the mandate to exercise the basic requirements of national sovereignty among the rules inherent in constitutional identity. The practice of the Italian Constitutional

107 The primacy of Community law is not *expressis verbis* contained in the Hungarian Fundamental Law. The Hungarian Constitutional Court did not question the principle of the primacy of Community Law, but similar to the states examined, it formulated requirements that can also be interpreted as constitutional constraints, referring to the protection of fundamental rights, the possibility of the control of *ultra vires* acts, and constitutional identity (see footnote 101), and it stated that the joint exercise of competences by the Member States shall not violate Hungary's constitutional identity. The Constitutional Court may also examine the constitutionality of national legislation transposing an EU legislative act.

Court refers to the foundations of the Italian constitutional order and fundamental human rights. Since 2017, new concepts have been introduced in the interpretation of constitutional identity, such as the legality of criminal legislation, constitutionally-oriented budget planning, and the basic minimum of social rights.

In the context of the examination of legislation transposing secondary EU acts by the constitutional courts of the Member States, we find a dual approach based on whether the given source of law may be subject to a jurisdictional or constitutional review. Perhaps because the constitutions examined provide for the delegation of competences in favour of the EU, thus giving national sovereignty an interpretation that is partly subordinate to EU integration, the French, Italian, and Austrian constitutional courts cannot, in principle, examine the possible conflict of competence between national laws transposing secondary EU Law and national constitutions. Initiating a preliminary ruling procedure, which is an appropriate means of clarifying this, is either practically ruled out or rarely used by the constitutional courts. Only the BVerfG took a firm position in this regard, when it declared the lack of competence on part of the EU to determine competence (*Kompetenz-Kompetenz*). The German Constitutional Court maintains the possibility of a conditional examination of *ultra vires* Community acts, albeit only in the context of ensuring a high level of protection of fundamental rights enshrined in the GG. Thus, the BVerfG did not reserve the right to declare the EU regulations affected by the misuse of powers invalid, but in theory, reserved the right to declare them inapplicable in the event of an infringement of fundamental rights.

The fundamental question with regard to the constitutional examination of national legislation transposing secondary EU legal sources is whether the constitutional courts may indirectly extend the examination to the constitutionality of the secondary EU legal sources to be transposed. In the case law of the German Constitutional Court, it has already carried out a constitutional review disregarding the Community nature of a particular law, and has annulled the German statute implementing the Framework Decision on the European arrest warrant. In the case of Italy and France, in contrast, the case law of constitutional courts is less ambitious, as they shall not examine the 'full-compliance' provisions of national legislation implementing directives, but may examine the provisions that give legislators room for manoeuvre.

Despite the CJEU's strong and homogeneous approach to the primacy of EU Law, this is a highly divisive issue among Member States. It can be assumed that the German Constitutional Court's decision in May 2020 was not the last time that a Member State's constitutional protection mechanism will openly (or less openly) oppose the half-century old unbroken position of the CJEU.

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Rules on Home Office Work and Telework in Romania and in Hungary

ABSTRACT: *Pandemic crisis management requires new solutions that are not necessarily workable options in the traditional labour market. It is not about starting from scratch but about bringing to the fore legal institutions that have not been significant so far. This has had an unexpected effect on the labour law of Central European countries, as social partners fundamentally distrust atypical forms of work. This situation is also true for Romania and Hungary. In our study, we do not intend to present all forms, but only the two most important legal instruments in the labour market shaped by the pandemic; we analyse teleworking and home office work.*

KEYWORDS: home office, teleworking, pandemic, #stayhome, labour market challenges.

1. Introduction

Teleworking and home office work are special forms of work. The concepts came to the fore as a result of the pandemic. The novel coronavirus attacks two main elements of the economy. One of these is the use of human labour. The motto for spring 2020 campaigns was 'stay home if you can'. The pandemic also brought home the fact that a great many worked outside the workplace in the classical sense. If the virus stays with us for a while, depending on the level of infection, similar phases may reappear when the work needs to be moved to the employee's home. At the time of writing, we are at the beginning of the second wave in both Hungary and Romania. However, the current number of cases has so far not triggered austerity similar to that of the spring, but the spring trend may reappear.

It can already be seen that some companies do not even want to go back to the classic workplace model. Teleworking and home office work are suitable for them. This

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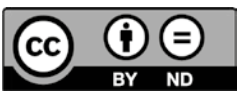

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phenomenon necessitates a reinterpretation of the concept of work, even in the short term. One of the first signs of this is that debate is already underway in Germany on an autumn bill that would enshrine the right to work from home into law. According to the draft, in the case of jobs that can also be performed from home, employees would have the right to choose whether they worked in the home office or in their regular workplace.[3] Similar changes are conceivable in Hungary, but the details of the legislative act planned for autumn of 2020 are not known, only some of its keywords.

In Romania, two further factors influence the future use of the home office. On the one hand, it is difficult to see exactly how labour law will evolve and whether there will be changes as in Germany, since Romania's municipal elections took place on 27 September 2020, and parliamentary elections will take place at the end of the year. These elections strongly influence current priorities and make future actions more uncertain. On the other hand, although the state of emergency of 16 March is no longer in effect, it was replaced by the state of danger with Government Resolution no. 24 of 14 May 2020, by which countless previous labour law measures have been maintained.

When transitioning from the state of emergency to the state of danger, as recommendations and not as binding legislative acts, the government has determined those measures that it considered necessary to maintain and along with which it has planned to take further measures in the future.[4] The third of the four main sets of proposals contains two points concerning the form of work. First, the government still justifies varied starting times for shifts for all companies with more than 50 employees, in order to avoid congestion in public transport and the workplace. However, importantly, for the subject of our study, it also proposes that all necessary measures be taken to ensure that at least some of the employees perform their work from their home offices in all private and public undertakings where possible.

Government communication still expresses this view and considers it necessary to maintain work from the home office. This position seems to be in line with predictions for the next autumn–winter period, when the pandemic can be predicted to worsen. At the same time, strong regulation and support for home office work is reflected in the case law that seems to be slowly crystallising, based on regulations made during the periods of state of emergency and of danger.[5]

3 Goldschmidt, 2020.; Heil plant bis Herbst Gesetz für Recht auf Homeoffice. See: https://tinyurl.com/y35l4u2n (03 May 2020).

4 See Măsuri de prevenire și control a răspândirii coronavirusului SARS-CoV-2, propuse pentru a intra în vigoare începând cu starea de alertă din 15 Mai 2020. See: https://www.mai.gov.ro/wp-content/uploads/2019/01/masuri-09_05-2.pdf.

5 Tribunalul Caraș-Severin, *Refuzul angajatorului de a permite salariatului să desfășoare munca la domiciliu sau telemunca pe perioada stării de urgență*, Pandectele Române nr. 3/2020. Tribunalul Caraș-Severin, secţia I civilă, sentinţa civilă nr. 293 din 30 aprilie 2020, www.sintact.ro. In that case, the plaintiff sought a declaration from the Tribunal that he was entitled to work in the home office, which his employer did not approve, even though the nature of the work fully allowed him to continue working from home instead of at the employer's premises. The Tribunal upheld the applicant's request, stating in its reasoning that in the context of the appearance and spread of the new coronavirus in Romania, which necessitated social distancing, teleworking and working from home should be considered a real means of addressing the situation.

Working from home is an interesting topic of research, since this form is a concept of relative long-standing in Central Europe, including in the Hungarian and Romanian regulations that we are examining. Teleworking has taken a regulated form as an atypical form of work in both countries as a result of accession to the European Union. In Hungary, Act I of 2012 on the Labour Code (hereinafter referred to as 'the Hungarian LC') regulates teleworking among atypical forms of work, while in Romania, a separate legal act was created for the legal instrument. Recently, the term 'home office' has started to appear in connection with teleworking. In Hungary, many people use the term 'home office' as a synonym for teleworking, not only in layman's terms but also in professional language. However, these two legal concepts are not the same. The difference lies in their function. Teleworking is an atypical form of work that presupposes the active use of tools of information and communications technology (ICT).[6] Teleworking is usually applied within a lasting legal relationship, and the employee typically – but not necessarily – works from home. Telework may also refer to an arrangement whereby the employee works from another location away from the usual workplace. Article 2 of the European Framework Agreement on Telework of 2002 stipulates not only the use of information technology as a requirement but also that it must be carried out away from the employer's premises on a regular basis. Work is carried out typically – but not necessarily – at the employee's home. Before we look at national rules and anomalies on teleworking, it is important to clarify the concepts.

Obviously, 'home office' means working from home. Sullivan (2003)[7] and Hodder (2020)[8] highlight the importance of distinguishing between teleworking and home working. An employee may use ICT tools while working from the home office, but that does not automatically make her/him a teleworker. All of these criteria must be placed in the conceptual framework of teleworking, homeworking, and outwork,[9] as well as housework/domestic work. Both home office work and teleworking have to be analysed. Home office work may overlap with teleworking. In the case of a home office, employees work from home, but the tools used are not specified. Within the context of the home office, employees may perform work using ICT tools, but this is not a requirement. The essence of home office work is that it happens in the employee's home but only on a temporary basis. In the case of teleworking and outwork, parties draw up a specific provision in the employment contract that the employee will perform his work by teleworking in whole or in part. However, in the case of the home office, we are not talking about a separate agreement. The employer can order home office work (working from home) within the available legal framework. Thus, work in the home office always

6 Sulivan, 2003, p. 159.; Bankó, 2018, p. 38.

7 Sulivan, 2003, p. 160.

8 Hodder, 2020.

9 According to Section 198 of the Hungarian LC, outworkers may be employed in jobs that can be performed independently, and renumeration is exclusively on the basis of the work done. The employment contract shall define the work performed by the employee, the place where the work is carried out, and the method and extent of covering expenses. The employee's home or another place designated by the parties shall be construed as the place of work.

presupposes dependent work, which can be ordered unilaterally by the employer, but teleworking and outwork are always independent work, which is based on a telework contract.

In Hungarian regulation, teleworking, outwork, and home office work are recognised as separate categories: (a) teleworking (an atypical form of work according to Sections 196–197 of the Hungarian LC); (b) outwork (an atypical form of work according to Sections 198–200 of the Hungarian LC, whereby work is carried out offline); and (c) home office work (a method of organising working time not regulated separately). Housework/domestic work is a form of work defined in Act LXXV of 2010 on simplified employment, which exclusively covers the following activities designed to ensure the conditions necessary for the daily life of the natural person and persons living with her/him in the household as well as of her/his close relatives: cleaning, cooking, washing, ironing, childcare, home teaching, home care and nursing, housekeeping, and gardening.

The use of these work arrangements was quite low. According to data from the Hungarian Central Statistical Office, in the first quarter of 2018, 3.7% of employees teleworked. The data indicate that it is a form of work used mainly for people with higher education. The Central Statistical Office points out that 23% of teleworkers work this way at the request of their employer, while the majority (55%) have the opportunity to do so because they enjoy full job independence. The Office also compared this with age-group ratios, from which it concluded that employees need to gain some work experience in order for their supervisor to trust them and approve of them working from home, and to have the necessary knowledge to work independently, without any help. The vast majority of teleworkers (89%) work from home, and only 11% work in, for example, a telehouse, a remote office, a public place (cafe, business centre), or with customers directly.[10] According to the methodology of the Central Statistical Office, work is carried out in the home office, when a person performs her/his work away from the employer's premises only temporarily. On this basis, in the first quarter of 2018, 96,000 employees performed their work this way. The ratios projected for 2019 will be proportional to the previous years, as can be predicted from Bankó (2016).[11] It can be seen that these ratios are not high. A common feature of Central European countries, as we will also see in the case of Romania, is that, in many respects, they have followed the same path of development in the field of labour law after the change of regime. This also means that the rate of atypical forms of work is not very high. Thus, both Hungary and Romania are at the tail end in this field, and this year's excessive proportions will not help too much either.

In Romania, the regulation of teleworking and home office work has developed in many respects along a path similar to the development of Hungarian law. Similarly, in connection with these two concepts, the use of the term 'home office' has appeared

10 Teleworking and home office. See: https://www.ksh.hu/docs/hun/xftp/idoszaki/munkerohelyz/tavmunka/index.html (20 August 2020).

11 Bankó, 2016, p. 50.

somewhat in need of clarification in public discourse, in literature, and in regulation, clearly coming to the fore in the changed circumstances of the recent period because of the pandemic. The only atypical forms of work regulated by Act 53 of 2003 of the Labour Code (hereinafter referred to as 'the Romanian LC') are those types of work that can be carried out from home, which can basically be characterised as the equivalent of the Hungarian concept of 'outwork'. The possibility of teleworking is relatively new in Romanian labour law: it was introduced in 2018 through Act 81 (hereinafter referred to as 'the Teleworking Act'). As a consequence, it is not included within the Romanian LC but in the above-mentioned specific act.

Partly because of their low practical use, Romanian literature has dealt relatively little with the issue of teleworking and homeworking, much less with the possible meaning of the term 'home office'. On the other hand, we can find important pieces of information for the interpretation of the examined concept under Romanian law in the regulations made during the period of the state of emergency and the state of danger as well as in the emerging case law. The first characteristic of the home office, as explained earlier, is its periodic nature. Without a change in the employee's duties (i.e. the work she/he shall carry out) or any other element of the employment relationship, at the employer's discretion (or even at the employee's request, as is clear from Romanian case law), work is temporarily conducted at a place other than the employer's premises, usually from home. Another important feature of working in a home office is that, depending on the situation, the employment relationship is covered by the rules of homeworking or teleworking. Referring to recent legislation, for example, the Court of Caraș Severin, in its earlier judgement, specifically emphasised that the employer was obliged to introduce working from home or teleworking during the period of emergency, if possible, and during that period, the employer was to apply the legal regulations related to the respective legal institution. These rules will be described later, but the following question arises: to what extent is it possible to comply with the regulation in its entirety in such an exceptional emergency situation, given, for example, the complexity of occupational safety obligations of employers? We believe that it is not possible to follow them according to the letter of the law in all cases, and in practice, this cannot and has not been realised.

Under Romanian labour law, home office work is therefore carried out on a temporary basis, as a general rule at the employer's sole discretion, but it is also acceptable to order it at the request of the employee, especially if the employer is unable to provide safe conditions at the usual workplace, and – obviously – if the tasks of the given job can be performed in this way. If an employee performs her/his duties from the home office, the provisions on homeworking and teleworking will prevail, as can be found in Sections 108–110 of the Romanian LC and in the provisions of Act 81 of 2018.

The main motivation for the creation of the Teleworking Act was clearly to achieve growth in this atypical form of employment. The explanatory memorandum to the Act also includes the statement that teleworking as a form of work benefits employers because of its flexibility but also benefits employees, who can thus more

easily reconcile their private lives with their working hours.[12] Without analysing these reasons in depth here and now, we would like to emphasise that in 2019, the only year the Act applied, the number of home workers in Romania doubled, which is cited as a clear success in government communication. However, the whole picture can be seen as significantly different considering that Romania is still the penultimate country in the European Union in terms of figures, and doubling means that the share of teleworkers has risen from 0.4% to 0.8% in one year.[13]

In 2020, however, the above-mentioned trends will change because of the COVID-19 pandemic: teleworking and home office work have come to the fore, albeit temporarily.[14] The mass application of legal institutions also brings to the fore issues that have been problematic points in the application of the law so far. In our study, we would like to draw attention to these problematic points by presenting the regulations of the two countries.

2. Rules on teleworking

Rules on teleworking constitute one paragraph in the Hungarian regulation. As mentioned above, this means a form of work whereby activities are performed on a regular basis at a place other than the employer's facilities, using computers, in which the end product is delivered electronically. The work is typically carried out at an employee's home.[15] In the case of teleworking, it is important to emphasise that the task to be performed by the employee falls within the scope of the employer's operations. It is of paramount importance because it makes the employee an integral part of the employer's organisation despite not being physically at the employer's premises. In this context, the regularity of the activity should also be mentioned. On this basis, it can be said that we are talking about two similar labour law instruments, those of Hungary and of Romania. After all, while in the Romanian regulation, working from home is the counterpart of teleworking, in the Hungarian regulation, it is the counterpart of outwork. Outwork is essentially any work at home that is not teleworking. The main difference lies in the technology used. If someone makes sweaters at home for their employer, they make them within an outwork agreement. However, if someone performs accounting tasks on their laptop under an agreement, the result of which work is required to be sent digitally to the employer, it is likely to be carried out within the framework of teleworking. The main difference between the Hungarian and Romanian regulations is that both telework and outwork are atypical forms of work covered by the

12 See also Georgescu, 2019.

13 See: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180620-1 (2020.08.20). At the same time, the average value of EU countries in terms of the proportion of teleworkers working from home was 5.3%.

14 Lipták, 2020, manuscript.

15 Bankó, Berke, and Kiss, 2017, p. 592.

Hungarian LC. In the Romanian LC, only home working is specified, and telework is a legal instrument regulated outside the Romanian LC in a separate act.

Telework is based on a separate agreement, similar to Romanian rules. If parties want the employment relationship to take place in the context of teleworking, this must be specifically mentioned in the contract. The pandemic changed this situation to the extent that the employer could unilaterally order telework after the declaration of the state of danger.[16] Once the state of danger is over, the original concept will prevail, but the legislator is already considering some changes to the regulation.

Compared to Romania, Hungarian regulation perhaps deals more with the formal conditions of employment, especially the rules that emphasise the use of tools. An important element of the current regulations is the use of tools. The basic question raised is who provides work equipment. Rights and obligations change when work is carried out with the employer's equipment, compared to when the employee uses his or her own equipment. In the case of previous regulations, in connection with the use of devices provided by the employer, the employer could determine their method of use. Employers' right of inspection could only extend to checking data related to work. From 2019, the rule regarding the computer equipment provided by the employer has been amended to the extent that instead of excluding the control of private life, the emphasis is on the fact that employees are allowed to use computers provided by the employer for the performance of work solely for reasons within the framework of the employment relationship. The prohibition on employer control of private life can be deduced from the Fundamental Law of Hungary and the Act on Civil Code. Pursuant to Section 11/A, subsection (4) of the Hungarian LC, employers may inspect the data stored on the transferred computer device during the inspection until they are able to decide whether the data are private. The new inspection rules are related to the GDPR.

General rules also apply in full to the relations of the parties, supplemented by a specific obligation to provide information. This ensures the relationship between the parties. As one element of this, the employer informs teleworkers about interoperability. This means that if there is a vacancy at the firm in a position that is not based on teleworking, the employee will be informed.

In Hungary, the rules on teleworking form a single paragraph in the Hungarian LC; in Romania, as we have seen, the legislator has dedicated a separate act to settle the rules on teleworking. In contrast, in the case of working from home, the Romanian LC is also limited to only three paragraphs. In order to properly interpret the rules applicable to working from home in the state of emergency and the state of danger, we need to know the main provisions for teleworking and working from home, as well as the problems they raise.

According to the definition in Article 2 of the Teleworking Act, telework is a form of work organisation in which the employee performs, on a voluntary and regular basis, the typical tasks of his position, occupation, or profession at least one day away

16 Gyulavári, 2020, pp. 1–3.

from the employer's premises using computing and communication equipment. This definition clarifies the most important features of telework according to the Romanian legislator's concept: (a) volunteering, which means that an employee cannot be placed in telework on the basis of a unilateral decision by the employer;[17] (b) regularity; and (c) the fact of working outside the employer's premises using computer tools.

Teleworking can therefore only take place with the consent of the parties, and an agreement to this effect is to be laid down in the individual employment contract. In order for the employer not to be able to put pressure on employees in this regard, the Act also specifically states that refusal to carry out work within the framework of telework cannot be considered a disciplinary offence and cannot be sanctioned by the employer. Other mandatory elements of the employment contract, as listed in Article 5 of the Act, are as follows: the determination of the place of work and the precise indication of how much time the employee spends at the employer's premises, the method of recording working time, the employer's powers of control, other obligations in connection with occupational health and safety, the distribution of costs incurred, the employer's obligation to provide information and to transport materials to the place of work, as well as the measures to facilitate the teleworker's integration into the work community.[18]

As a general rule, it is the employer's obligation to provide the necessary tools for teleworking. Similarly, their installation, inspection, and maintenance are the responsibility of employers. Employers are also responsible for providing information, training, and education related to occupational safety and health. With regard to the characteristics and circumstances of the workplace, employers must check the place of teleworking, keeping in mind the issues of occupational safety and health.

Although the Romanian regulation is much more detailed than the Hungarian, numerous questions remain that could not be answered so far in practice and that may be interesting in the context of the change of direction because of the pandemic. The first and perhaps most important question concerns the basic feature of teleworking: regularity. Based on the above definition, the question arises as to whether a form of work that is performed only one day a month at a place other than the employer's premises can be considered regular, considering that employees work at the employer's premises on all the other days of the month. In our opinion, it is doubtful whether the period prescribed by law is sufficient for us to really speak of teleworking. At the same time, it is necessary to point out here that the transition to a home office system ordered during the state of emergency means real telework, in the sense that the employee actually spends most of her/his working time – sometimes her/his entire working time – working from home. In this sense, teleworking as a result of coercive circumstances is closer to the real essence of the institution than its form as defined by law.

Another significant problem in the Romanian regulation is the legal determination of the place of work, as the often-stated flexibility of teleworking can be found in

17 Popescu, 2018.
18 Georgescu, 2018.

this very feature, in addition to the working time schedule. The Teleworking Act does not contain any specific provision as to what the place of work may be in such a case; it only states that it is necessary to specify it precisely in the individual employment contract. However, if we look at the additional provisions, we can clearly conclude that, in the case of teleworking, the work is essentially done at the employee's home. Thus, teleworking is not characterised by flexibility in this sense. The parties have a duty to determine the place of work in advance, disregarding any possible spontaneity that might otherwise arise from the use of computer technology, which would allow the employee to decide completely, even on the day of work, where to perform his duties that day. Furthermore, employers are responsible for ensuring that the place of work complies with occupational safety and health regulations, and employees are responsible for not changing the conditions approved by employers.[19] However, if we re-examine the rules of teleworking in the context of the transition to the home office system during the state of emergency, it is even clearer that the worker's home has become a possible place of work, especially during periods of temporarily ordered curfews.

In the case of working from home, the Romanian LC does not define the concept of work, but it does give a definition of the employee who works from home. Under Article 108, an employee who works from home is a person who performs the typical tasks corresponding to their job in their own home. In this case, as opposed to teleworking, the place of work is clearly determined. Under the conditions specified by the Romanian LC, the most significant difference between teleworking and working from home is regularity: within the framework of the latter, one activity takes place in its entirety and at all times in the employee's home. Additionally, an important distinguishing aspect is the nature of work, as working from home does not typically mean working with the help of computer technology but rather some kind of physical, manual work. This becomes clear from Article 109(c), which requires the employer to transport the raw materials to the employee's place of residence needed to carry out the activity and to bring away the finished product from there.

3. Home office

According to Government Decree no. 47/2020 on immediate measures needed to mitigate the impact of the coronavirus pandemic on the national economy (hereinafter referred to as 'Government Decree'), the Hungarian LC applied until 30 days after the end of the state of danger, with the exception that the employer could unilaterally order the employee to work from home and do telework. On the employer side, it simplified the application of legal instruments from a work organisation point of view. This was also remarkable because teleworking could always take place with an employment

19 Teleoaca, 2018.

contract that included a specific provision on teleworking. However, the home office clause could also be included as a clause in the normal employment contract, which created the legal basis for decisions made unilaterally by the employer even before the pandemic. Its limit was 44 working days, as indicated in Section 53 of the Hungarian LC, which is the annual maximum deviation from the employment contract.

As mentioned, similar to Romanian rules, there are no explicit labour law provisions about home offices in Hungarian labour law. Therefore, case law has developed relevant rules in this regard, primarily by determining the extent to which working from home differs from the legal instrument of telework specified in the Hungarian LC. According to the doctrine of Hungarian labour law, essential differences between the two legal institutions are as follows. (1) Teleworking is an atypical form of work specified in an employment contract. It is a special employment relationship based on the principle of flexicurity borrowed from European labour law.[20] In contrast, working from home may not necessarily be based solely on the agreement of the parties; that is, employers may unilaterally oblige employees to work from home. (2) In a specific telework contract, parties determine the place of work, while in the case of a home office, the employee is (usually) entitled to determine the place of work for herself/himself. The home office is less bound in this respect. It should be mentioned that this is possible because the place of work is not necessarily the same as the place of performance. (3) Teleworking takes place regularly, not at the employer's headquarters or premises. However, home office work typically involves just part of the working time. In the current situation, it should be noted that the order to work from home may be for a longer period, but it does not become final (it does not become an element of the employment contract), as opposed to teleworking. This also means that in the case of the home office, it is possible for the employer to treat the issue mainly as a factor of organising the working time, for example, by allowing the employee to work from home one day a week. However, in the absence of a contractual clause, this is not a final state, and the relationship does not become a self-contained atypical employment relationship.

It follows from the above that the employer may order working from home unilaterally, and within the meaning of Section 6(2)(b) of the Government Decree (since it does not contain a relevant condition), not only for a specified and limited period. This is based on the fact that this unilateral option by the employer does not arise from Section 53 of the Hungarian LC but from this rule of the Government Decree. It is also clear that the order to work from home is not necessarily aimed at having employees continuously work at home, but it can be for a fixed period of time, for example, by working at home for a week and at the employer's premises for the next week. This solution is suitable for reducing the risk of infection in the workplace. Of course, the home office work can also be based on an agreement between the parties. There is no specific rule as to whether the employer or the employee shall provide the necessary

20 Tóth, 2017, pp. 620–630.

work equipment for working from home; unless otherwise agreed, that obligation shall be incumbent on the employer. However, the agreement of the parties is not implemented in a separate contract for atypical work but in a normal employment contract. The agreement of the parties or the order of the employer is also relevant in terms of working time. Unless otherwise provided or agreed, working from home should also be performed in accordance with the working hours in the workplace. The employer may also allow an unbound work schedule for the duration of home office work or, at least, for a part of it, if the conditions for the independent organisation of work are met.

When ordering home office work based on an agreement or a unilateral decision of the employer, it is appropriate to lay down provisions that guarantee data security and the protection of business secrets. Opinion 2/2017 of the Data Protection Working Party on data processing at work is relevant for working from home pursuant to the Government Decree. According to the opinion, employers should also implement methods by which their own data on the device are securely transferred between that device and their network. In the case of working from home, data-processing rules of the Hungarian LC also apply: (a) employees shall be allowed to use computers provided by the employer to perform work solely for reasons within the framework of the employment relationship, unless there is an agreement to the contrary; (b) in conducting an inspection, the employer shall be entitled to inspect any information stored on the computer used for the performance of work that is related to the employment relationship; (c) for the purposes of the right of inspection provided for in the previous sentence, the data necessary for control of the prohibition or restriction should be considered to be related to the employment relationship; and (d) rules on the right of inspection of the employer shall also be applied if, by agreement between the parties, the employee uses his or her own computer to perform work under the employment relationship. The latter rule regulates a less strict right of control on the employer's side. In the case of teleworking, the inspection ends with the determination of the type of data; in the case of home office work, the scope of examination is wider. For the duration of the home office work, the employee is entitled to remuneration for working at the employer's premises under the employment contract.

In Romania, in order to prevent the further spread of the new type of coronavirus, a state of emergency was proclaimed by Presidential Decree No. 195 of 16 March 2020. After the first 30 days, this state was extended for another 30 days on April 15, and then it was replaced by the state of danger beginning on 18 May, pursuant to Government Resolution No. 394, which is still in effect at the time of writing. The plan to extend the period of the state of danger beyond 15 September has already been announced. The recent period has been extremely active from a legislative point of view, and although the coherence of the provisions may be questioned, a number of legal provisions were adopted whose labour law implications are worth researching and analysing.[21] If we focus solely on the spread of home office work, as we do in our present study, we can

21 Țop, 2020.

still draw forward-looking conclusions about flexible employment and flexible labour markets that have been emphasised in labour law in recent years.

Decree No. 195 of 2020 on the introduction of the state of emergency regulates the different areas of life in different chapters. Chapter IV deals with labour and social law measures. The home office was introduced by most companies based on Article 33. This provision was fully in line with the subsequently adopted rules on curfew. The transition to home office work was considered desirable by the legislation in all segments of the economy as far as possible. This general need is clearly reflected in the wording of Article 33: local and central public institutions and agencies, local authorities, state-owned enterprises, and all those in which the state or a territorial unit has a majority or is a sole shareholder, as well as cases in which private companies switch to working from home or teleworking based on the unilateral decision of the employer in the state of emergency, where it is possible.

In Act 55 of 2020 on measures to prevent and deal with the effects of the COVID-19 pandemic, a similar wording for the transition to home office work after the end of the state of emergency can be found, which, however, contains a significant difference from the previous ones. Article 17 of the Act provides that, during the state of danger, the employer, with the consent of the employee, may decide to continue the activity within the framework of teleworking or working from home, as well as to change the place of work or the employee's duties.

Several important conclusions can be drawn from the two above-mentioned normative texts as to how the Romanian legislator envisions the system of home office work. On the one hand, we must see that although Article 41(1) of the Romanian LC allows the employment contract to be amended in principle only by agreement of the parties, Article 48 allows the temporary change of the place of work by unilateral decision of the employer in case of *force majeure*, as a sanction, or if the measure is taken for the protection of the employer. The transition to home office work ordered unilaterally during the state of emergency does fit into the above-mentioned exception, since it is clearly ordered for the protection of the employee. As a result of the transition from the state of emergency to the state of danger, the main rule laid down in the Romanian LC, instead of the exception, shall be applied; that is, working from home can be ordered only where agreed upon.

Another important observation based on the quoted normative texts is that the legislator does not use the term 'home office' anywhere or any other general wording but refers specifically to the two options – teleworking and working from home – regulated in the Romanian LC and the Teleworking Act. The fundamental consequence of this, as case law emphasises, is that the rules applicable to the respective instrument shall be applied, as required by law. However, the question arises as to how this can be done in such a special situation, especially in the first phase during the state of emergency. It is enough to think of occupational safety and health measures, when the employer would be obliged to approve the place of teleworking from an occupational safety point

of view, since the employer is responsible for this. In all other areas, however, we must consider the provisions of the Romanian LC and the Teleworking Act to be valid.

4. Summary

It is also clear from the above that the COVID-19 pandemic poses new types of challenges to the labour market. The widespread use of teleworking and home office work has raised a number of hitherto unresolved issues that need to be addressed by the legislator. In both Romania and Hungary, there will be significant work for legislators and law enforcement. Rules are not detailed in either country. There are too many open questions. This is not related to the level of regulation but to the past and the social perception that approached these legal institutions with distrust. This is why these legal institutions do not have an elaborate practice. It is interesting that this is also true for teleworking that has been a part of Hungarian law for more than a decade and of Romanian law for a few years.

The current pandemic has also shown that these forms are new dimensions of employment and are much more than forms of mandatory legislative homework ticked off upon accession to the European Union. As we wrote, the virus stayed with us for a while. The impact on the labour market will be felt, and this will also benefit digital work, two forms of which are teleworking and home office work. It is up to the legislation of both countries to strengthen the rights of employees in the short term and, in fact, develop the rules in the spirit of flexicurity.

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Revamping Anti-Organised Crime Approaches in the Criminal Law System in Poland – A Presentation of Selected Institutions

ABSTRACT: *New types and shades of crime emerging today require that state authorities develop new defence mechanisms. The sophistication and ingenuity of criminals must be countered with an appropriate response of the state responsible for maintaining public order and safety. Therefore, states must build new institutions as effective tools for combating organised crimes. In Poland, the adequacy of the current institutions employed in the fight against organised crime is now being widely discussed. This study sets out to present the institutions of the informant witness, anonymous witness, and extended confiscation as examples of modern approaches for combating organised crime in Poland.*

KEYWORDS: combating organised crime in Poland, informant witness, anonymous witness, extended confiscation.

1. Introductory remarks

Organised crime is a specific type of criminal activity, and its reach is often global. Its operation is highly sophisticated, both in terms of structure and methods. It usually takes the form of activity of certain organised groups of people linked by close personal relationships, based on established enterprise objectives, methodology, and hierarchy. Operating together within such an organisation means being guided by absolute mutual compatibility and reliance, often with strict isolation from other groups. The key point is that members of this type of group form a closed whole and use increasingly advanced methods of operation. Thus, situations emerge where, on the one hand, a serried and advanced crime group is organised for criminal enterprise, and on the

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other hand, the state is obliged to either prevent the formation of such a group or, once one has formed, try to eliminate it. State authorities have an advantage as it is the state that has the exclusive power to initiate such legal regulations that would allow for combating organised crime effectively. Nonetheless, it is obviously very difficult for state authorities to be one step ahead of criminals. A certain reconnaissance and identification of the directions of activity and objectives that organised crime groups are formed for is therefore necessary, followed by a rapid and intensive response of the state in the form of effective legal regulations introduced into the legal system to combat this very complex criminal activity.

Recently, there has been a debate in Poland on the effectiveness of the existing institutions employed in the fight against organised crime. Currently, the most known and effective legal institutions enabling effective prosecution and combating organised crime include the institutions of the informant witness, anonymous witness, and extended confiscation.

This study sets out to present these institutions as examples of systemic revamp efforts in relation to the existing approaches to combat organised crime in Poland.

2. The concept of organised crime

In principle, there is no legal definition of organised crime in the Polish legal system. For the purposes of legal practice in Poland, attempts to provide this type of definition have been made based on both the jurisprudence of Polish courts and the doctrine of criminal law.

A dictionary definition most often assumes that an organised crime is a range of criminal activities that operate in many forms on an international and national scale, which cannot be strictly limited to the facts of a single offence.[2]

It is emphasised that the lack of a complete and uniform definition of organised crime is due to several independent factors. That the definition is missing, for instance, is due to 'the fact that we now live in an era of enormous and rapid social and economic changes. These are mainly spurred by the technological revolution and globalization processes. Consequently, criminal organizations constantly upgrade and flexibly adapt their structures to the transformations of the environment in which they operate. This brings about the diversity and transient nature of the forms of organized crime in the world'.[3]

Indeed, the nature, variability, and moving dynamics in the development of criminal activity make it impossible to define organised crime in a clear and restrictive manner.[4] What adds to this picture is the global scale of impact; in Poland, it is

2 Dictionary definition of 'organized crime'. In: Encyklopedia PWN (03/10/2020) Online: https://encyklopedia.pwn.pl/haslo/przestepczosc-zorganizowana;3963636.html

3 Kurowski, 2006, p. 26.

4 Pływaczewski, 2011, p. 23.

noted without doubt that 'organized crime is not a problem only in a selected country or part of the world. It is an international-scale problem, against which both national organizations and international organizations established solely for this purpose have been struggling for a long time'.[5]

However, it is not that the concept of organised crime remains undescribed. There have been several attempts to define this concept. In the Polish science of criminal law, there are several distinctive features of organised crime, such as activities carried out for profit accumulation or out of lust for power, activity of indefinite or long-term duration, division of roles, tasks or powers between group members, special hierarchy, discipline and internal control over members of a criminal group, use of violence or other means of intimidation, committing crimes of significant gravity, international-scale operation, money laundering, or even influencing government policy and law enforcement agencies.[6]

The above definition considerations related to organised crime are mostly outcomes of the criminal law doctrine. Nevertheless, the term can also be traced in the provisions of the Polish Penal Code currently in force. It contains a regulation in which it uses the term organised crime directly; however, it does not define it, thus, leaving a considerable margin for definition deliberation in the doctrine and jurisprudence. To be precise, it is the provision of Article 258 of the Penal Code, which specifies the offence of participation in an organised crime group or association. According to Article 258 of the Penal Code, any person who participates in an organised group or association with the aim of committing a crime or tax offence shall be liable to the penalty of imprisonment for a term of between 3 months and 5 years. If the group or association referred to in § 1 are armed or operate with the aim of committing a terrorist offence, the perpetrator shall be liable to the penalty of imprisonment for a term of between 6 months and 8 years. Any person who sets up a group or association specified in § 1, including those of an armed character, or heads such a group or association shall be liable to the penalty of imprisonment for a term of between 1 year and 10 years. Further, any person who sets up a group or association with the aim of committing a terrorist offence or heads such a group or association shall be liable to the penalty of imprisonment for a term of not less than 3 years.

As is clear from the above, Article 258 of the Penal Code provides for the criminalisation of running organised crime structures in various forms, that is, an organised crime group or association. From a historical perspective, the provision indicated above distinguishes two varieties of such structures: a crime association known to Polish criminal law from the 1932 Penal Code and an organised crime group, first introduced into the 1969 Penal Code in 1995.[7] The difference between a crime association and a crime group is highlighted. It is assumed that an organised group is a set of at least three persons, which creates its structure to commit offences, while a crime association

5 Karpiel, 2017, p. 20.
6 Pływaczewski, 1992, p. 25; Rau, 2002, pp. 44–45.
7 Michalska – Warias, 2013, p. 100.

is a group of numerous mutually linked persons with the aim of committing offences. An association further differs from an organised group in the manner of admission to the group.[8]

Meanwhile, the jurisprudence of Polish courts has clearly adopted a certain fair uniformity in deciding on an organised crime. *Inter alia*, it was indisputably assumed in Poland that 'a crime group must consist of at least three persons and should be organised in a certain way, while also having an established objective of repeatedly committing offences'.[9] It is emphasised in the jurisprudence that 'the concept of "being organized" encompasses the conditions of a basic internal organizational structure, even if with a low level of organization, including also durability, existing organizational ties under conspiracy, crime planning, endorsement of common objectives, perpetuity in meeting the group's needs, and coordinated *modus operandi*. Heading a group in a managerial role consists of directing the activities, giving orders and coordinating the activities of the group's members'.[10]

Therefore, Polish jurisprudence has adopted an approach in which an organised crime group must have the following attributes. First, an organised group must consist of a set of at least three persons. Second, there is an organisational component that is manifested in the allocation of tasks (roles) and coordination of activities of the members. It is not necessary that all members of an organised crime group should conspire on how to commit an offence or further be linked by bonds of mutual acquaintance. Third, there is a component of directing and discipline. An organised group must have a head, who does not have to be a permanent head or the one who originally organised the group. Fourth, the level of group organisation remains unspecified; a low level of organisation is therefore sufficient. Fifth, the group must have been organised before the commission of its planned criminal offences. The organisation components must be developed in advance and cannot be created *ad hoc* during the commission of an offence. Simultaneously, this factor distinguishes an organised crime group from complicity or co-perpetration, which, as an act accessory to the principal, may arise only during the commission of wrongdoing (accessory after the fact). Sixth, two components jointly are constitutive to an organised crime group, namely conspiracy and organisation. Therefore, conspiracy is a basic component of an organised group, but it does not exhaust its essence. Seventh, members of an organised group do not have to know each other personally or conspire together. It is sufficient for each group member to be aware of their activity within its organisational structure; Eight, the component of durability is required, consisting not only in the fact that the commission of wrongdoings is continuous but also that steady sources of income over a period of

8 Skała, 2004, p. 53.

9 Judgement of the Supreme Court of 20 December 2006, case ref. IV KK 300/06, OSNwSK 2006, no. 1, item 2551; Judgement of the Court of Appeal in Krakow of 19 December 2003, case ref. II AKa 257/03; Judgement of the Court of Appeal in Katowice of 16 July 2009, case ref. II AKa 150/09, KZS 2009, no. 9, item 67.

10 Judgement of the Court of Appeal in Wroclaw of 11 December 2019, case ref. II AKa 271/19, LEX No. 2772931

time are secured. Related to durability is the component of 'cohesiveness', meaning readiness to operate on a continuous basis'.[11]

Elsewhere, it is emphasised that 'an organised crime group may only be a set of perpetrators that organised themselves to commit criminal offences. The organisation of the group is understood to mean that it operates by established rules and has an internal structure: a vertical one, with a head directing its activities, or a horizontal one, usually with a permanent set of members in charge of coordinating the activities by established rules, with individual members performing specific functions within it. Participation in an organised crime group is an intentional offence,; therefore, the awareness of the existence of such a group is a prerequisite for being charged with membership in the same'.[12] However, the legislator has not specified the minimum period required to fulfil the qualification of participation in an organised group. Such a group may be formed with a view to committing a single criminal offence only.[13]

3. Anonymous witness

The institution of an anonymous witness is the first instrument of combating organised crime to be analysed in this study. With all Polish codifications of criminal procedures considered, it should be noted that only the Code of Criminal Procedure of 1997 introduced the institution of an anonymous witness by way of the Act of 6 July 1995 amending the Code of Criminal Procedure (Journal of Laws No. 89, item 444), which entered into force on 4 November 1995.

The justification for the introduction of the anonymous witness referred to the needs of an active criminal policy dedicated to combating organised crime.[14] It was substantiated enough for the legislator to introduce that institution earlier, ahead of the enactment of the 1997 Code of Criminal Procedure currently in force in Poland. The intensified activity of criminal groups was particularly prominent in Poland's political system transformation.[15] The uptrend in the numbers of criminal offences committed was manifested in the phenomenon of intimidation and even the elimination of witnesses to wrongdoing.

The growing criminality levels in social life led to a justified response from society, demanding that state authorities put in place a more radical penal policy against perpetrators.

Therefore, the postulate was raised to provide better protection for witnesses in criminal procedures.

11 Judgement of the Court of Appeal in Wroclaw of 14 June 2017, case ref. II AKa 52/17.
12 Judgement of the Court of Appeal in Krakow of 20 February 2019, case ref. II AKa 190/18.
13 Judgement of the Court of Appeal in Wroclaw of 22 November 2017, case ref. II AKa 341/17.
14 Wielec, 2014, pp. 165 – 174.
15 The number of crimes in 1990, compared to the previous year, increased by 61%, that is, from 547,589 to 883,340 [in:] Pływaczewski, 1996, pp. 356 – 357.

In general, a witness in the Polish criminal procedure is one of the most important sources of evidence for law enforcement agencies. The testimony of a witness is an invaluable help in the fact-finding process and plays a fundamental role in the pursuit of the truth, in line with the objective of the adjudicative process, that is, to know and establish substantive truth.[16] The introduction of the institution of an anonymous witness excited much controversy in Poland, as there had been no such institution in the Polish penal and procedural system before, hence understandable uncertainties. Opinions were circulated, which denied the usefulness of the institution of an *incognito* witness, pointing to the excessive cost of its application and violation of the cardinal rules of criminal procedures. Supporters of the anonymous witness treated it as the best available countermeasure to the powerlessness of law enforcement agencies, which were unprepared to carry out their statutory investigation and prosecution tasks in the new legal reality after the political system transformation in Poland.

Despite these reservations, the institution of an anonymous witness was introduced into the criminal law system. Currently, the basic legal regulations for the anonymous witness in Polish criminal procedure are the provisions of Article 184 of the Code of Criminal Procedure (hereinafter 'CCP') and Article 191 § 3 CCP.

The provision of Article 184 of the CCP sets out the foundations for the use of the anonymous witness. The main premise is a justified concern of danger to the life, health, liberty, or property of a substantial value of a witness or their next of kin. In such a case, the competent court, and in the preparatory proceedings, the prosecutor, may issue an order to keep secret the circumstances enabling the disclosure of the witness's identity, including personal data, if these are irrelevant to the resolution of the case. Proceedings in this respect take place without the appearance of the parties and are covered by secrecy as classified information with the 'secret' or 'top secret' clause. Where that order is issued, the circumstances related to the identification of an anonymous witness remain only for the attention of the court and the prosecutor, and where necessary, also for the police officer in charge of the investigation. The witness examination report may be made available to the accused or the defence counsel only in a manner that prevents the disclosure of these circumstances. An anonymous witness is interviewed by the public prosecutor as well as the court, which may order a judge designated from its panel to perform this task in a place and manner that prevents the disclosure of personal identification circumstances of the anonymous witness. The prosecutor, the accused, and their defence counsel have the right to participate in the questioning of the witness by the court or a designated judge. If the witness is interviewed with the use of technical devices that enable this activity to be performed remotely, the report of examination attended by technical specialists should indicate their forenames, surnames, area of expertise, and the type of activity performed. However, if it turns out that at the time when the anonymisation order was issued, there was no justified concern that the life, health, liberty, or property of a substantial

16 Murzynowski, 1976, p. 131.

value of the witness or their next of kin would be in danger, or that the witness had deliberately given false testimony or their identity had been disclosed, the prosecutor in the preparatory proceedings, or the court in court proceedings, may, at the request of the prosecutor, revoke this order. The witness examination report is then disclosed.

However, the anonymisation process is not obligatory, which means that the relevant authority in the trial should thoroughly assess the grounds for granting the status of an anonymous witness and refuse to grant the same if they are not confirmed.[17]

The regulation of the Code of Criminal Procedure is complemented by the Regulation of the Minister of Justice of 18 June 2003 on the proceedings for the confidentiality of the circumstances enabling the disclosure of the identity of a witness and the procedure for handling examination reports of that witness. [18]

This clarifies the technical issues related to the anonymisation of anonymous witness data. The Regulation specifies the manner and conditions for submitting an application for an order to keep secret the circumstances enabling the disclosure of the witness's identity, including personal data of the witness, examination of the witness for whom such an order has been issued, and the preparation, keeping, and disclosure of examination reports of that witness as well as the permissible manner of referring to their testimony in judicial decisions and pleadings.

There is no doubt that evidence from the testimony of an anonymous witness, as evidence of a specific nature, seriously restricts the principle of immediacy and the right to defence.[19] Any further restriction of these principles than that provided for in procedural law constitutes a flagrant breach of procedural law, which usually has a significant impact on the content of the judicial decision.[20] There is no dispute that the introduction of anonymity of the witness and the associated procedural limitations, by their nature, negatively affect the procedural guarantees that are overriding in criminal proceedings, as vested in the participants in the proceedings (e.g. suspects, accused).[21] Nevertheless, these conflicts of values should be considered justified and natural from the point of view of the specific nature of criminal proceedings.[22]

It is also worth noting that under the Polish Code of Criminal Procedure, there is an additional institution that is commonly known as 'the anonymous witness *sensu largo*'.[23] It is provided for in Article 191 of the CCP, according to which if there is a justified concern that violence or an unlawful threat would be used against the witness or their next of kin in connection with their activities, the witness may reserve the data concerning the place of residence for the sole attention of the prosecutor or the court. In that case, pleadings are delivered to the establishment where the witness is employed or to their other indicated address. The point is primarily about keeping

17 Łobacz, 2010, p. 294
18 Journal of Laws 2003.108.1024
19 Płachta, 1998, p. 110; Wiliński, 2003, p. 27.
20 Judgement of the Supreme Court of 23 September 2004, case ref. II KK 132/04
21 Gronowska, 1999), p. 255.
22 Wielec, 2017, p. 125.
23 Grzegorczyk and Tylman, 1997, p. 458

secret the data concerning the witness's place of residence, which remain solely accessible to the prosecutor or the court.

As for the testimony of an anonymous witness, the Polish judiciary emphasises that in view of the limited declaratory reliability and credibility of the accounts given by an anonymous witness, their testimony should be: a) limited to the absolute minimum necessary, that is, to proceedings in serious crimes and only to cases where there is a justified concern that the legal rights of the witness, which deserve protection no less than those protected by the proceedings, could be in danger; b) given to the court (a judge) under conditions enabling the accused (defence counsel) to control them through appropriate cross-examination questions, directly asked, though with the use of devices that prevent the identification of the witness (curtains, image, voice distorting devices, etc.), or through the court, including in writing; c) available to the parties, except for the data identifying the witness and the evidence that would allow the witness to be exposed; such data are omitted in open copies of the witness statements, with omissions duly marked; any further classification is not permitted; d) backed by other evidence so that the testimony is not the only evidence justifying the conviction; and e) especially carefully assessed in the context of the pre-sentencing evidence analysis.[24]

This is based on the jurisprudence of the Polish Supreme Court. It is confirmed by the judgement of the Supreme Court of 9 November 1999, under which the evidence from the testimony of an anonymous witness cannot be the sole (exclusive) or the dominant evidence of the perpetration of a specific person, which means that among the other evidence obtained in the case, there must also be some that directly proves the perpetration of that person.[25]

4. Informant witness

The purpose of the appointment as well as the structure and procedure for granting the status of an informant witness to a person holding essential information relevant to criminal proceedings are completely different.[26]

The difference between an anonymous witness and an informant witness lies in both subjective and objective components.[27]

An anonymous witness is an ordinary witness with an unusual form, who holds interesting information of significance for the criminal proceedings that they should disclose to the relevant authority in the trial but does not do so for fear of the consequences of charging specific persons through such information.

24 Judgement of the Court of Appeal in Krakow of 14 January 1999, case ref. II AKa 210/9, KZS 1999/2/28.

25 See judgement of the Supreme Court of 9 November 1999, case ref. II KKN 295/98, OSNKW 2000/1-2/12.

26 Ocieczek, 2016, p. 20 ff.

27 Karsznicki, 2013, p. 25.

On the other hand, an informant witness is an accomplice in wrongdoing, who, after considering their situation, decides to cooperate with law enforcement agencies. It is a peculiar contract between the state and the criminal under which an exchange transaction is concluded in the form of the state's commitment to protect such an accomplice and refrain from sanctioning them for their criminal history. In exchange, they provide state authorities with relevant information about the criminal acts they have knowledge about.

The institution of an informant witness is not regulated by the provisions of the Polish Code of Criminal Procedure. In the context of the notorious postulate for combating organised crime in the 1990s, the legislator in Poland, in a sense, copied this institution from other legal systems and introduced this institution under the Act on the informant witness of 25 June 1997.[28] Initially, it was a fixed-term act, that is, with a specified end date of its application, but subsequently, it was transformed into a permanent act.[29]

The informant witness as an institution comes from English systems. The roots of the informant witness (*King's evidence, Queen's evidence*) date back to the beginning of the medieval English trial.[30]

The essence of this type of special witness is that the state grants the perpetrator of an offence immunity or a reduction of the penalty in exchange for disclosing the identity of co-perpetrators of further crimes committed together in an organised group or providing evidence against co-perpetrators for the commission of offences they have been charged with.

The main assumption behind the institution of this type of witness is the fight against organised crime.[31] A person obtaining the status of an informant witness is (as opposed to an anonymous witness) an accomplice in criminal offences characteristic of organised crime. It is a party that is often a witness to a criminal act and simultaneously an active participant in it.

The provisions of the Act on the informant witness apply in cases involving a criminal or fiscal offence committed in an organised group or association with the aim of committing a criminal or fiscal offence.[32]

When defining the informant witness, it was assumed that it is a suspect who has been admitted to testify as such a witness. The Act on the informant witness also provides for the conditions for acquiring the status of an informant witness. The Act stipulates that evidence from an informant witness may be admitted if the following conditions have been met jointly: 1) until the indictment is presented to the court, the person, as a suspect, has given in their accounts to the authority conducting the proceedings information that may contribute to the disclosure of the circumstances

28 Journal of Laws 2007.36.232
29 Kiełtyka, Kurzępa, Ważny, 2013, p. 9.
30 Lach, 2001, p. 173 ff.
31 Grajewski, 1994, p. 15 ff.
32 Adamczyk, 2011, p. 81.

of the offence, identification of other perpetrators, detection or prevention of further offences; 2) the suspect has disclosed their assets and the assets of other perpetrators of a criminal or fiscal offence known to them; and 3) the suspect undertook to give exhaustive testimony to the court about those participating in the criminal or fiscal offence.

Furthermore, the Act sets out the exclusions to the application of its provisions. It is emphasised that the Act does not apply to a suspect who, in connection with participation in a criminal or fiscal offence, 1) attempted to commit or committed the crime of homicide or co-perpetrated such crime; 2) induced another person to commit a wrongdoing with a view to directing criminal proceedings against such person; or 3) headed an organised group or association with the aim of committing a criminal or fiscal offence.

The reward for cooperating with law enforcement agencies guarantees that the perpetrator granted the status of an informant witness will not be liable to a penalty for criminal or fiscal offences in which they participated and which they disclosed to law enforcement agencies in their capacity as an informant witness.

However, the status of an informant witness can be lost where, in the course of the proceedings, the person granted the status of an informant witness 1) gave a false testimony or concealed the truth as to the essential circumstances of the case or refused to testify before the court; 2) committed another criminal or fiscal offence, acting in an organised group or association with the aim of committing a criminal or fiscal offence; or 3) concealed criminal assets.

In the event of a threat to the life or health of an informant witness or their next of kin, they may be granted personal protection and obtain assistance in changing the place of stay or employment. In particular justified cases, they may be issued with documents enabling the use of personal data other than their own, including those giving entitlement to cross the state border as well as offered other forms of assistance, in particular, a surgical procedure to remove distinctive features of appearance or plastic surgery.

The admission of evidence from an informant witness in the fact-finding process requires that primarily two conditions be met jointly: first, submission, until the indictment is presented to the court, in their accounts to the authority conducting the proceedings of information that may contribute to the disclosure of the circumstances of the offence, identification of other perpetrators, detection or prevention of further offences; and second, undertaking to give exhaustive testimony to the court about those participating in the criminal or fiscal offence and any other circumstances of the commission of offences in an organised group or association with the aim of committing offences.[33]

33 Jasiński and Potakowski, 1998, p. 253 ff.

A person who has been granted the status of an informant witness is required to testify to all circumstances related to the commission of offences specified in the provisions of the Act on the informant witness.

The *ratio legis* of this institution consists precisely in the close cooperation of the witness with law enforcement agencies by providing credible testimony as to the offences specified in the Act, in exchange for forbearance of the legal sanctions for these offences. The duty of cooperation is absolute, as the person appearing as an informant witness will not be held criminally liable specifically for these offences. In exchange, they are obliged to testify. This absoluteness is so far-reaching that the informant witness will not have the right to refuse to testify, or the right to refrain from answering a question that may expose them or their next of kin to liability for a criminal or petty offence, nor the right to refuse to answer a question, where this would entail liability for a criminal or petty offence, nor the right to be questioned in closed court hearing due to the possibility of exposure to shame, or the right to request a release from legs testifying due to the next-of-kin relationship with the accused.[34] In the context of the above assumptions, it is clear that from the point of view of relevant authorities in the trial, the institution of an informant witness is an essential tool in combating crime, including organised crime, as it introduces an element of distrust into the criminal community, before offences have been committed, and prompts offenders to reveal the truth before their co-perpetrators do so.

An informant witness is not anonymous. However, it is undisputed that as for the circumstances beyond the statutory catalogue of offences permitting the use of the institution of an informant witness, the witness will be held criminally liable under applicable laws and regulations. In other cases, they should be treated as an ordinary trial witness who has certain obligations but also rights, including the right to refrain from answering a question that may expose them or their next of kin to liability for a criminal or petty offence.[35]

Nevertheless, it is signalled that 'one of the main problems related to the institution of an informant witness, raised both by the judiciary and journalists, is the assessment of the reliability and credibility of the testimony they give. We have often met with situations where independent courts, after many years of hearings with the participation of hundreds of witnesses (including informant witnesses), expressed negative opinions about the reliability and credibility of testimony given by informant witnesses'.[36]

34 Grzegorczyk, 2004.
35 Tarkowska, 2000, p. 104.
36 Ocieczek, 2013, p. 75.

5. Extended confiscation

Another instrument for counteracting organised crime is the extended confiscation introduced into the Polish legal system. It is a completely new institution introduced quite recently, in 2017, undoubtedly as an unorthodox legal solution under which the burden of proof of the legitimate origin of assets is transferred onto the accused. The legal basis of this institution in the Polish legal system is Article 44a of the Penal Code. According to Article 44a PC, in the event of a conviction for a criminal offence, the commission of which has given the perpetrator, even indirectly, a material profit of substantial value, the court may order the forfeiture of the enterprise owned by the perpetrator or its equivalent, if the enterprise was used as an accessory in the commission of the offence or concealment of the profit obtained from the same. In the event of a conviction for a criminal offence, the commission of which has given the perpetrator, even indirectly, a material benefit of substantial value, the court may order the forfeiture of a natural person's enterprise other than property of the perpetrator, or its equivalent, if the enterprise was used as an accessory in the commission of the offence or concealment of the profit obtained from the same, and its owner willed that the enterprise be used to commit the offence or conceal the profit obtained from the same, or, in anticipation of such a possibility, consented to the same. In the event of joint ownership, such forfeiture is ordered considering the will and awareness of each of the joint owners and within their limits. An option is also provided that the forfeiture is not ordered if this would be disproportionate to the gravity of the offence committed, the degree of culpability of the accused, or the motivation and behaviour of the owner of the enterprise. Similarly, the forfeiture is not ordered if the damage caused by the offence or the value of the concealed profit is not substantial in relation to the size of the enterprise's operations. The court may desist from ordering the forfeiture, also in other, especially justified cases, where it would be disproportionately painful for the enterprise owner.

This is a completely new institution, and no uniform lines of jurisprudence have been yet established in Poland. However, the introduction of extended confiscation is aimed at increasing the pain of sanctions for those committing the gravest economic or fiscal offences. Apart from, for example, suffering a penalty of imprisonment, the perpetrator will also lose the profits obtained from the offence.[37]

It should be noted at this point that in 2019, the above provisions were applied in 668 cases, and the seized property was worth over PLN 2.1 billion. This is a huge progress compared to that of the previous years. For example, in 2017, that is, the first year of application of the confiscation instrument, 237 orders were issued. According to the data of the Ministry of Justice, assets worth approximately PLN 189 million were seized based on these provisions. In 2018, in turn, there were 309 orders issued, and the seized assets were worth approximately PLN 294.5 million.

37 Zawłocki, 2018, p. 19; Wielec and Oręziak, 2018, p. 76.

6. Summary

There is no doubt that the fight against organised crime will never end. Similarly, a closed catalogue of ways and methods used by criminal groups in running it will never be identified. Still, the essence of the problem on the part of the legislator lies in the correct and early diagnosis of threats related to the emergence and operation of organised crime. The three institutions presented in this study are not the only tools to combat this type of crime in the Polish criminal law system. However, these institutions stand out the most. Despite many critical points arising from the legal structure of these institutions in the system of Polish law, their application clearly enjoys approval. They are helpful and quite effective instruments in the fight against all types of organised crimes.

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REVIEWS

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The Conclusions of the 'Dialogue on the future of Europe: How to build a more effective and genuinely strong Union?' Conference Organised by the Ferenc Mádl Institute of Comparative Law and the Ministry of Justice and the Process So Far in the EU Dialogue on the Future of Europe

ABSTRACT: *This article concludes the presentations made at and the main lessons drawn from the international conference held on 21 September 2020, within the framework of the pan-European dialogue on the future of Europe, co-organised by the Ferenc Mádl Institute and the Ministry of Justice. It also presents the EU context and background of the debate, the role of the EU institutions, and the evolution of their position. The event was attended by representatives of the EU, Hungarian politicians, and representatives from academia and civil society. With this event, Hungary officially launched a series of conferences on the future of Europe. The presentations in these conferences reflected the crises facing the Union, including the institutional challenges posed by the COVID-19 pandemic, and the effectiveness of the EU and its Member States' responses to them. The speakers considered the involvement of and consultation with citizens important to the process. In the context of disputes over competences between the EU and the Member States, some speakers drew attention to the spillover effect, and others called for the strengthening of the supervisory role of constitutional courts and the need for more effective involvement of national parliaments in subsidiarity control, with regard to the sovereignty of the Member States and the primacy of EU law. Critical remarks were made on the limited nature of civil society representation at the EU level. The article reflects on the main events on thinking about the future of Europe over the last four years, including the main initiatives and positions expressed by the European Commission, the European Parliament, the Heads of State and Government, citizens' consultations, and institutional competition in relation to the thematic and organisational issues of the EU-level conference. Whereas the European Commission*

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and European Parliament, which has an ambitious position and has already proposed concrete solutions to organisational and governance issues, were the first to formulate their vision, the position of the Council, representing the Member States, will not be established until June 2020. Thus, no joint declaration on part of the institutions has been adopted thus far and no conference has been hosted, either. In view of all this, the organisation of the international conference by the Ferenc Mádl Institute of Comparative Law and the Ministry of Justice can be considered timely and proactive.

■ **KEYWORDS:** conference on the future of Europe, position of EU institutions, primacy of EU law, constitutional review, subsidiarity test, participation of civil society.

The Ferenc Mádl Institute of Comparative Law (FMI) and the Ministry of Justice organised an international conference titled '*Conclusions after the coronavirus pandemic with regard to the Conference on the Future of Europe*', on 21 September 2020.[3] High-level EU and Member State politicians, and acknowledged representatives of academia and civil society participated in the conference. With this, Hungary officially launched a series of conferences on the future of Europe that reflected the impact of the pandemic in the way it was organised, wherein foreign speakers were able to follow the event online, and the audience watched the live broadcast on the website of the Hungarian Parliament, and later on social media platforms. The preparatory event for the international conference was held on 25 June 2020 by the FMI and the Ministry of Justice electronically in the form of a webinar.

The webinar on 25 June 2020, titled 'Discussion on the Conference on the Future of Europe: Perspectives of the Interinstitutional Agreement, Member States and Institutional Expectations'[4] aimed to facilitate discussions among Member States on the future of Europe and to prepare for an exchange of views among governments. It outlined the interests and aspects of the institutions participating in the series. The representatives of civil society were included to ensure balanced and diverse participation. The views expressed at the webinar reaffirmed the need for common thinking on the future of Europe, which is essential both to reduce the gap between the EU institutions and its citizens and to preserve the EU's credibility. However, the process should focus only on issues of strategic importance that can be addressed at the EU level, without reducing room for manoeuvre and power of the Member States.

A similar conclusion was arrived at by high-level European and Hungarian politicians who spoke at the international conference on 21 September, as well as representatives of academia and civil society. In addition to the necessity and actuality

3 For the program and synopsis of the conference, see https://tinyurl.com/y255wgsg [Accessed: 20 October 2020].

4 The webinar program can be accessed here: https://tinyurl.com/y4ep94gw [Accessed: 20 October 2020].

of the dialogue, speakers almost without exception highlighted issues of solidarity, subsidiarity, identity, and sovereignty in thinking about the future (see below for details). However, it has become clear that they think about the specific meaning of these concepts in many ways. Thinking about the causes of crises is also multi-polar, with responses shaped by the slogan 'unity in diversity', sometimes emphasising unity and sometimes speaking about diversity. Several speakers identified the *'spillover'* of the integration process as a basis for the political crisis in the EU, for which they outlined different solutions such as strengthening the role of the EU institutions or the stronger constitutional review of the misuse of powers by institutions in the Member States (see below for details). However, in addition to enforcing Member States' sovereignty through the judiciary, it is equally important to make the involvement of national parliaments scrutinising EU legislation in the subsidiarity test more effective, as the Commission has failed to address the substantive concerns expressed by national parliaments thus far. A similarly selective EU institutional practice has developed in relation to European Citizens' Initiatives, as the European Commission's filter does not allow certain sensitive issues to become a part of the EU agenda.

1. The context of the debate on the future of Europe

The intensified reflection on the future of Europe was triggered by the decisive British referendum on leaving the EU. The first response to this was in the form of an informal session of the European Council in September 2016 under the Slovak Presidency, without the United Kingdom. The so-called Bratislava Declaration and Roadmap[5] in addition to assessing the state of the EU at the time, seeks to *set out general principles for a common future*. The Heads of State and Government agreed on the need for more transparent decision-making at the EU level and to better serve the needs and expectations of EU citizens. The Bratislava Declaration and Roadmap provided for the *conclusion of this first phase* of the *period of reflection* by a declaration to be adopted on the 60th anniversary of the signing of the Treaty of Rome (25 March 1957). Before the Rome Summit, both the European Parliament and the European Commission set out their vision of Europe and conception for the future. On 16 February 2017, the European Parliament adopted an own-initiative report on the future of Europe,[6] calling for a federalist and centralised approach, in which subsidiarity, the protection of Member States' sovereignty, and the possibility of wider social control was completely marginalised or lacking (e.g. transformation of the Council into a so-called second chamber [Council of Nations], creation of an EU Finance Minister, etc.). On 1 March 2017, the European Commission presented conceptual material to identify the direction for future legislation, that is, the so-called White Paper outlining five possible directions for development for the

5 See: https://tinyurl.com/y3jvr4f5 [Accessed: 20 October 2020].
6 See: https://tinyurl.com/y4ljkufr [Accessed: 20 October 2020].

future of the EU to achieve by 2025.[7] In 2017, it published five additional materials for debates on topics such as the social dimension of the EU, defence policy, and the future of EU finances. However, the level of ambition in the Rome Declaration,[8] adopted by the EU Heads of State and Government on 25 March 2017, remained low. Although it set out specific objectives like strengthening a secure or social Europe, it advocated the unity of the EU and clarified the possibility of integration at different speeds and depths.

2. Launching citizens' consultations

Emmanuel Macron, the President of the French Republic, spoke at the Sorbonne University on 26 September 2017,[9] where, in addition to his proposals for the future of the EU such as the areas for action in *a sovereign, united, and democratic Europe*, he raised the idea of holding a *pan-European citizens' consultation*. The French initiative was discussed by the Heads of State and Government at their meeting in February 2018, who stated that the Member States would participate in the consultation on a voluntary basis and in keeping with their national rules and practices.[10] In addition to the citizens' consultations, the European Commission organised civil *dialogues*, but these were not carried out specifically in the context of the debate on the future of Europe, but in connection with the *'Year of Citizens'*, which began in 2013.[11] Dialogues on the future of the EU have been taking place since 2015 with EU Commissioners and

7 The five possible directions for development are: continuing the current reform process; an EU-focused on the internal market; enhanced cooperation among the prepared Member States in certain areas (cooperation for appropriate defense policy, justice, and home affairs, and tax policy and social issues). The Commission also raises the vision of an EU that does more and more effectively in each area. In this concept, rather the EU, than the Member States would select areas that require closer integration (e.g. security, migration, border management). According to the fifth concept, the federalist vision, 'everyone would do much more', that is, the Member States would agree on an additional division of competences and resources and on extended decision-making, the EU would represent the Member States in international fora and integration would deepen in some areas. The EU would have a common position on migration, tackle legal and illegal migration, and build partnerships with neighboring countries. The single market would also cover energy policy and the digital sector and services, and there would be greater coordination in the fiscal, tax, and social fields. See https://tinyurl.com/krcd6yw [Accessed: 20 October 2020].

8 See: https://tinyurl.com/y43e4gsw [Accessed: 20 October 2020].

9 See: https://tinyurl.com/y3mhuhkr [Accessed: 20 October 2020].

10 See: https://tinyurl.com/y5yhfmln and https://tinyurl.com/y2t6aqeh [Accessed: 20 October 2020].

11 The European Commission's progress report summarising the results of the citizens' consultation and dialogue is available at: https://tinyurl.com/y3qtjwj8 [Accessed: 20 October 2020]. The consultations took place between April and November 2018 and 26 countries participated. A total of 1,700 meetings took place. The content of the consultation shows that although most citizens have a positive view of the EU, there is no concrete vision in the EU – and smaller Member States see it as a problem when the interests of large Member States guide EU policies. Citizens expressed expectations from the EU to respect their national and cultural differences, and focused on subsidiarity regarding the EU's action.

officials, as well as leading politicians from Member States, but the process has become really active since the publication of the 2017 White Paper. The Commission launched an online consultation on 9 May 2018, for which the underlying questions were already compiled by the citizens themselves.[12] The Statistical Office of the European Union also conducted a special Eurobarometer survey on the issues examined in the online consultation.[13] The Commission's civil dialogues and online consultation continued until the informal meeting of the European Council in Sibiu on 9 May 2019,[14] and the European Commission's assessment of the process also served as a basis for the development of the Strategic Agenda 2019–2024, which sets the foundation for the future of the EU27.

3. Speeches by the Heads of State and Government in the European Parliament on the future of Europe

In the European Parliament, between 17 January 2018 and 17 April 2019, the Heads of State and Government of 20 Member States[15] set out their vision for the future of Europe. All Heads of State and Government paid close attention to identifying the challenges facing Europe, and set economic and social policy objectives as the direction for action in the future, mostly without formulating concrete measures. Most Heads of State and Government touched on the division of competences between the Member States and the EU, and although there were more Euro-realistic speeches, there were also highly ambitious proposals such as common European sovereignty,[16] social federalism,[17] and the need for a sovereign European society[18] and the goal of achieving ever closer integration. Angela Merkel repeatedly and vigorously referred to the need

12 See: https://tinyurl.com/y2dzruzs [Accessed: 20 October 2020] To compile the questions, the European Commission and the European Economic and Social Committee (using the expertise of an external organization) convened a two-day exchange of views in Brussels with a representative group of 96 people from different EU Member States with different perspectives on the EU and socio-economic backgrounds. During this event, the citizens compiled the 12 questions that formed the base of the online consultations.

13 Future of Europe – Special Eurobarometer 479., October-November 2018. Available at: https://tinyurl.com/y6lauolo [Accessed: 20 October 2020]. A total of 27,339 people from all 28 EU Member States participated in this poll. The results show that responding citizens would see the ideal future of the EU, in addition to the principle of equal pay for equal work, primarily in ensuring a high level of security and greater social security (guaranteed minimum pension, healthcare, and gender equality).

14 At the meeting, the Heads of State and Government did not respond explicitly to the previous exchange of views on the future of Europe, but made 10 general commitments on the future of the EU27, see: https://tinyurl.com/y3r7cjme [Accessed: 20 October 2020].

15 Speakers in order were the Heads of State and Government of Ireland, Croatia, Portugal, France, Belgium, Luxembourg, the Netherlands, Poland, Greece, Estonia, Romania, Germany, Denmark, Cyprus, Spain, Finland, Italy, Slovakia, Sweden, and Latvia. https://tinyurl.com/y3nnwrsw [Accessed: 20 October 2020].

16 See: https://tinyurl.com/y2cdz4rs [Accessed: 20 October 2020].

17 See: https://tinyurl.com/y6rl56rc [Accessed: 20 October 2020].

18 See: https://tinyurl.com/yxgu3v6z [Accessed: 20 October 2020].

to bring the EU closer to its citizens as well as the need to listen to the people.[19] The main challenges identified by the speakers included populism and Euro-scepticism, the threat of national egoism, climate change, cybersecurity, terrorism, and demographic change, and almost all leaders referred to the EU's democratic deficit and the need to regain citizens' trust. In addition to raising the role of national parliaments, the Heads of State and Government also proposed increasing the role and right of scrutiny of the European Parliament and giving it the power to initiate legislation.

4. Launching the idea of a conference at the European level

The idea of a pan-European conference on the future of Europe was raised by French President Emmanuel Macron in an open letter to the citizens of the EU on 4 March 2019 in line with the guiding principles of freedom, protection, and progress in the spirit of European renewal.[20] Based on the practice of previous consultations, it suggested setting up citizens' panels as a means of interviewing citizens. The new President of the European Commission had already embraced the initiative in his pre-election speech,[21] when she included the issue of holding a conference at the EU level on the essential activities of the Union, the institutions, and the future of the European project as part of his political mandate for the next five years. At the same time, she envisaged the launch of the two-year conference in 2020. On 22 January 2020, the European Commission published its concept for a conference on the future of Europe,[22] and in the European Parliament, the Conference of Presidents decided in October 2019 to set up a working group specifically dedicated to the conference, which developed the methodology of the conference by December 2019,[23] and the European Parliament launched the debate on 15 January 2020, and expressed its position in a resolution (see below).

In addition to the European Parliament and European Commission, the leaders of the Member States also sought to thematise the dialogue at the EU level, so that on 27 November 2019, Germany and France published a *'non-paper'*[24] in which, in addition to the results expected from the conference, a very specific agenda was set for the debate at

19 See: https://tinyurl.com/y4k5yphx [Accessed: 20 October 2020].

20 See: https://tinyurl.com/y5qgqxog [Accessed: 20 October 2020].

21 See: https://tinyurl.com/y6y5vlwp [Accessed: 20 October 2020]. Ursula von der Leyen appointed three Commissioners in a mandate letter regarding the Conference on the Future of Europe: Věra Jourova (responsible for representing the European Commission at the conference and addressing the issue of values and transparency within the conference), Maroš Šefčovič (responsible for inter-institutional relations and follow-up after the conference), and Dubravka Šuica (responsible for preparing the conference and management of the actual work of the Commission).

22 Shaping the Conference on the Future of Europe, COM(2020) 27 final. See: https://tinyurl.com/yyahtd8q [Accessed: 20 October 2020].

23 See: https://tinyurl.com/yyd6skqa and https://tinyurl.com/y3krk87j [Accessed: 20 October 2020].

24 See: https://tinyurl.com/y6j5sz6m [Accessed: 20 October 2020].

the EU level. As a first step in implementing the agenda, the Heads of State and Government discussed and supported the objectives of the conference at their meeting on 12 December 2019.[25] The European Council instructed the Croatian Presidency to draw up a Council position on the content, scope, composition, and functioning of the conference, based on a broad consultation with citizens. The General Affairs Council addressed the conference twice more during the Croatian Presidency, on 28 January 2020 and in an informal videoconference on 26 May 2020,[26] but the planned launch of an EU-level event in May 2020 failed because of the pandemic. During their meeting in January, the Heads of State and Government reaffirmed that the conference should focus on issues that best concern citizens and – beyond contributing to the objectives of the Commission's Strategic Agenda – also contribute to the medium- and long-term development of EU policies. There was a need to fully involve national parliaments in the process and to ensure a balance among the EU institutions. The Council, the European Commission, and the European Parliament will have to set out their standpoints in a joint declaration on the topics, organisation, structure, etc., of the conference. However, this has not taken place so far. The adoption of the joint declaration had to be preceded by the elaboration of institutional positions, which had already taken place for the Commission and Parliament in early 2020, and the Council adopted its position on 24 June 2020.[27] The Croatian Presidency has already included lessons to be learned from the COVID-19 pandemic, which was also addressed by the German Presidency[28] and, in terms of the division of competences between the EU and the Member States, by the President of the European Commission in her 2020 Annual Review of the State of the European Union.[29]

5. The European Parliament's vision for the European Union

On 13 February 2019, the plenary of the European Parliament adopted a resolution on the state of the debate on the future of Europe.[30] The European Parliament has clearly

25 See points 14-16 of the European Council conclusions: https://tinyurl.com/y4v73nfl [Accessed: 20 October 2020].

26 See the results of the negotiations: https://tinyurl.com/y4u8v5vr [Accessed: 20 October 2020].

27 See the presentation of the position: https://tinyurl.com/yx9btbft and https://tinyurl.com/y3f42x4c [Accessed: 20 October 2020].

28 See: https://tinyurl.com/y6z2rhs6 [Accessed: 20 October 2020].

29 'As a third step, it is clearer than ever that we need to discuss the issue of healthcare powers. I believe that this is a noble and urgent task for the conference on the future of Europe.' See: https://tinyurl.com/y5snhp9t [Accessed: 20 October 2020].

30 European Parliament resolution dated 13 February 2019 on the State of the Debate on the Future of Europe. The explanatory memorandum to the resolution states that the European Parliament's aim is to strengthen Europeanness and avoid the dangers of nationalism, which denies the greatness of the European project. Greater political transparency, a reformed European electoral law, a system of top candidates (*Spitzenkandidaten*), and the strengthening of European political parties through the adoption of a system of transnational electoral lists can help bring the European identity and the rapprochement of institutions and citizens closer together. https://tinyurl.com/y32nallo [Accessed: 20 October 2020].

seen an increase in political integration and cooperation as a means to address common challenges (such as the introduction of qualified majority voting in the Council, including, for example, the field of foreign and security policy, and the shared competence of budgetary and economic policies, which have hitherto fallen within the exclusive competence of the Member States and subject to unanimity). However, it did not rule out the possibility of a differentiated integration, either. In the spirit of institutional reform, the European Parliament proposed, among other things, the transformation of the Council into a legislative chamber, and envisaged giving itself the right of legislative initiative and strengthening its powers of scrutiny.

This position was also upheld by the European Parliament in its *Resolution dated 15 January 2020 on the European Parliament's Position*[31] *on the Conference on the Future of Europe*, proposing a commitment to reforms leading to an *'ever closer Union'*. The European Parliament sees the debate on the future of Europe as a *bottom-up exercise* and considers it necessary for the consultation to reach all levels of the EU and for citizens to be directly involved. Under the Parliament's proposal on the rules of procedure for participation, thematic civil and youth *agora* would be set up, as well as a system of coordinating, governing, and decision-making bodies to run the consultation. Civic agora would have the same fixed membership (200-300 people) selected based on the principle of *degressive proportionality*, where each thematic agora would have to strive for a consensus. However, if this is not possible, a minority position can be formulated.

6. Presentation of the results of the conference 'Dialogue on the future of Europe: How to build a more effective and genuinely strong Union?'

The first panel in the international conference was opened by *Judit Varga*, Minister of Justice, and *Dubravka Šuica*, Vice President of the European Commission. The panel also featured *Mark Speich*, Secretary of State for Federal, European, and International Affairs of the North Rhine-Westphalia, *Francois-Xavier Bellamy* MEP, *József Szájer* MEP, and *Antonio Tajani*, former President of the European Parliament, and the current Chair of the EP Committee on Constitutional Affairs.

Judit Varga also spoke about the necessity and actuality of the dialogue on the future of Europe, emphasising that although the pandemic has temporarily rearranged priorities, efforts to strengthen Europe remain relevant. She emphasised that the dialogue should start from self-reflection, consider the effects of the crises in Europe over the last 15 years, the economic crisis, the migration crisis, Brexit, and the COVID-19 pandemic, and draw lessons from the past. The Minister confirmed that Hungary, as it has been throughout the history of European integration, is now ready to exchange views on the principle of 'unity in diversity'. In her view, the epidemic has shown that

31 European Parliament resolution dated 15 January 2020 on the European Parliament's Position for the Conference on the Future of Europe. https://tinyurl.com/y427nvkh [Accessed: 20 October 2020].

Member States can deal with the crisis successfully and effectively, which highlights the importance of respecting the sovereignty and role of Member States in connecting citizens and institutions in the dialogue on the future of Europe. Hungary's proactive and committed attitude in this regard was confirmed by the organisation of this conference and the online discussion organised by the Ministry of Justice and the FMI on 25 June 2020, with the participation of Antonio Tajani, Karoline Edstadler, and Andreja Metelko-Zgombić.[32]

Dubravka Šuica spoke twice in the first panel discussion, first reflecting on the Minister's speech and then answering a question on the EU's most pressing problems in current times, and the kind of solutions that could be given in her opinion. She said that in building the future of Europe, the Commission sees the Member States, including Hungary, as a link. The Vice President, as the owner of a portfolio of democracy and demography, noted that the people of Europe feel left behind and therefore blame democracy, and that remedying this will require a change in mindset. One step in this direction is the conference on the future of Europe, which can help rebuild citizens' confidence in the EU by giving them a tangible opportunity to have their say. The Vice President, in addition to the inclusiveness and openness emphasised by the Minister, made it clear that, in her view, the conference and dialogue on the future of the EU could not be expropriated. The European Parliament, Commission, and Council, as equal partners, must establish a framework for dialogue, thus paving the way for a democracy based on debate and the formation of a vision for the future. The Vice President emphasised the importance of solidarity, which is enhanced by the loneliness and isolation experienced during the COVID-19 pandemic. In the context of the Commission's work, she highlighted a draft that is considered to be the key to a sustainable, long-term growth based on a green and digital switchover, and that helps by offering a way out of the crisis, as envisaged in the form of a publication of a Green Paper on ageing and a comprehensive EU strategy on children's rights. Among the most significant challenges, she highlighted demographic change and ageing societies, as well as loneliness as a defining phenomenon across Europe. The Vice President believed that responses to demographic change can help the green and digital transition and point the way to a fair and resilient society. The Vice President saw ageing societies as an opportunity to build a 'silver economy' and intergenerational solidarity to prepare young people for the future, although the problem varies across Member States in terms of living standards and social security. In addition to the solidarity that was emphasised throughout, she saw the catching up of the countryside as a key component, in which digital development is an effective tool.

According to *Mark Speich*, the COVID-19 pandemic and the ensuing economic crisis are the worst and most unpredictable crises in the history of European integration, in which the EU – although not fully unprepared for the pandemic – had proven

32 The online discussion on 25 June 2020 emphasized that the conference on the Future of Europe must be a transparent process involving institutions and Member States, and with realistic and concrete solutions.

weak as an institution. At the same time, decentralised targeted regional measures provided good solutions in terms of the direct and indirect effects of the crisis, underlining the need for a broader interpretation of subsidiarity, and instead of hierarchy and centralisation, the necessity of sound EU mechanisms and an inclusive interpretation of multilevel, networked governance. According to the Secretary of State for North Rhine-Westphalia, the dialogue on the future of Europe should strengthen active subsidiarity,[33] where regions, as key actors in crisis management and Member States as key policymakers, work closely to develop the legal framework for the most effective protective instruments. The Secretary of State emphasised the importance of complying with the rule of law criteria, which, in his view, is particularly important in a crisis. Exceptional measures should be necessary, proportionate, lawful, time-bound, and subject to judicial review, for which, in the Secretary of State's view, the Commission's rule of law report provided a good basis.

François-Xavier Bellamy said that the EU was weak in crisis management and saw the solution to this issue not in discussing institutional and regulatory issues, but rather in launching concrete strategies. In his view, the Conference on the Future of Europe must focus on strengthening the sovereignty of European citizens and the rule of law as an opportunity for decision-making within the institutions and not as a feeling of loss of control over decision-making power. He emphasised the principle of *'unity in diversity'* like *Judit Varga*, and noted that Europe comprises diverse Member States and has an independent EU that is not a superstate above the sovereignty of the Member States. According to *Bellamy,* the task of the EU in this framework is not to interfere in decision-making powers concerning migration, social, and family issues, but rather to strengthen the Member States in a global space through global dialogue.

In his speech, *József Szájer* emphasised that Europe only works well in a spirit of unity and cooperation, which is why the EU must build on mutual respect and commitment to equality, where the emphasis is on finding common ground and not stressing on differences. The MEP recalled that the EU had a 50-year history of success, and a weak face in the fight against the pandemic, as evidenced, inter alia, by the fact that the European Parliament, unlike national ones, which without exception continued to operate lawfully, was unable to establish legitimacy during the crisis. In his view, the rule of law invoked by the European Parliament primarily concerns the EU institutions, including the EP, which means that the European Parliament should seek the consent of the Member States before applying any procedural changes necessitated by the pandemic.

Antonio Tajani, former President of the European Parliament and current Chair of the Committee on Constitutional Affairs (AFCO) emphasised that the future of Europe lies in a less bureaucratic democracy with a view to developing coherent policies and strengthening the EU institutions, especially the EP, which must be achieved with subsidiarity and identity in mind. He called, inter alia, for further work on the Balkans

33 By referring to active subsidiarity, Mark Speich meant the transfer of local experience and information to the national and supranational levels.

and emphasised the need for a cooperative relationship with both the United States and Russia, particularly in the fight against illegal migration. Finally, the President summed up the need to continue working for the future of Europe and considered the current relationship between Italy and Hungary to be forward-looking.

László Trócsányi, Honorary President of the Ferenc Mádl Institute of Comparative Law, as part of the discussion leading the second panel in the international conference, drew attention to the need to accept the values and differences arising from the constitutional traditions and national cultures of the Member States and to the importance of dialogue on differences. At the same time, he recalled that the dialogue was significantly hampered by mistrust among the Member States and partly between the Member States and institutions.

Bertrand Mathieu, Professor at the Sorbonne University, Member of the Venice Commission, noted the mistrust between the EU institutions and the Member States as a result of the continuing expansion of the EU's competences which were previously linked to the Member States. In his view, the extension of powers is, on the one hand, a natural corollary of the development of the integration project and, on the other, a consequence of the legal interpretation practice of EU judicial forums. According to *Mathieu*, the influence of European political actors weakened in parallel with the strengthening of the judiciary, so the EU drifted into a power and political crisis because of the lack of clarification of competencies. Among the possible solutions, *Mathieu* suggested, among other things, strengthening policymaking at the EU level (see the European Parliament, elected as a bicameral legislature and from a transnational list, European Commission under greater control, with a precise definition of the rights of EU institutions).

The practice of the German Constitutional Court in interpreting constitutional identity was described by *Sven Simon*, a professor at the University of Marburg and Member of the European Parliament. Under the German Constitution, EU legislative acts may be subject to fundamental rights control in comparison with the inalienable elements of constitutional identity (democracy, rule of law, human dignity, and fundamental human rights), as the German Constitution derives the primacy of EU law from the provisions of German law authorising the delegation of powers to the Union. According to the German Constitutional Court, the transfer of powers over substantive and procedural criminal law, the use of state power, fiscal decisions on revenue and expenditure, elements of the welfare state, and cultural issues (e.g. family law, religious minority rights) are unfortunate, although not excluded from the possibility of revision with regard to their compatibility with EU law.

Marcel Szabó, Member of the Hungarian Constitutional Court and Professor at the Péter Pázmány Catholic University, described the case law interpreting the provision of the Constitutional Court concerning the joint exercise of powers under Article E) of the Hungarian Constitution, as the constitutional identity, which is rooted in the historical constitution and includes fundamental human rights and the inalienable right of the provision on the territorial unity, population, and state form and system of

Hungary. He noted that this constitutional identity cannot be renounced by state power. Based on this, the Hungarian Constitutional Court may judge the excess of competence by an EU legislator (as it did in its 2015 judgement on the so-called quota decision), and a possible infringement of Hungary's sovereignty or statehood and may declare the inapplicability of the EU act in Hungary.

Richárd Hörcsik, Chairman of the European Affairs Committee of the Hungarian Parliament, assessed Hungary's experience with the role of national parliaments in the subsidiarity test, and noted that one of the most striking limitations of the subsidiarity test is, on the one hand, the lack of uniform action by national parliaments, that is, the fact that national parliaments take different positions on national interests owing to the fundamentally political and non-legal nature of the procedure. On the other hand, so far, the European Commission has not taken subsidiarity concerns into account in the case of the number of supporting parliamentary chambers that would otherwise have made it necessary to launch the yellow card procedure. Instead, it decided to maintain its extant position. Third, the eight-week deadline for national parliaments to deliver opinions does not ensure effective parliamentary scrutiny of a large number of EU legislative acts in the absence of active governmental expert support.

Jean de Ruyt, former Belgian Permanent Representative and senior researcher at the Egmont Institute, suggested examining the issue of the balance of competences between the Member States and the EU institutions and further integration in the context of the dialogue on the future of Europe. In his assessment, the Union has always expanded its activities in the direction necessary for it to implement another policy and agreed upon by the Member States (see, for example, how the migration crisis necessitated the establishment of a common immigration policy), which necessarily means giving up the views of the minority Member States and winning the Union's overriding interests over national interests.

Tymoteusz Zych, Vice President of the Polish *Ordo Juris*, on behalf of civil society, proposed a return to the original meaning of civil action in which civilians are diverse and inclusive, both in an organisational aspect and in terms of the ideologies and values they represent, where bottom-up initiatives come from individuals who feel responsible for their community and have a regional and/or national identity, independent of lobbyists and large donors. In contrast, the current image of civilians in the EU institutions is selective and does not allow certain topics to be placed on the agenda of the EU institutions (for example, see the most successful European Citizens' Initiative so far, *'One of Us'* which aimed to protect human dignity and foetal life, and persecuted Christians). Thus, it does not even provide for the possibility of a genuine open dialogue. *Zych* did not consider the *'agora system'*, which was proposed during the Conference on the Future of Europe as capable of restoring the lack of civic confidence in the EU.

7. Appraisal of the actuality of the conference

From the overview provided above, it can be seen that both the common thinking on the future of Europe and the development of the concrete aspects of the pan-European conference on the future of Europe can be considered a lengthy process in which the interests and perspectives of the institutions, the Member States, and the citizens are spread over a very wide spectrum. The framework of the conference and the range of topics to be discussed have not been decided in advance. Thus, the organisation of the June 2020 webinar and the international conference on 21 September 2020 as well as the choice of topics responding to the lessons of the COVID-19 pandemic can be considered timely and proactive for the Hungarian government and academia. As stated in the speech of the President of the European Commission on 16 September 2020 (see above), maintaining the regulation of healthcare within the competence of Member States or raising it to the community level unlike now, can be one of the central issues of the European conference on the future of Europe.

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