CENTRAL EUROPEAN JOURNAL OF
COMPARATIVE LAW

CENTRAL EUROPEAN JOURNAL OF COMPARATIVE LAW

VOLUME III ▪ 2022 ▪ 1

FERENC MÁDL
INSTITUTE OF COMPARATIVE LAW

Central European Journal of Comparative Law
HU ISSN 2732–0707 (Print)
HU ISSN 2732–1460 (Online)
DOI prefix: 10.47078

Publisher:
Ferenc Mádl Institute of Comparative Law
1123 Budapest (Hungary), Alkotás u. 55-61.
E-mail: mfi@mfi.gov.hu
Prof. Dr. *Szilágyi* János Ede, Head of the Institute, Ferenc Mádl Institute of Comparative Law
E-mail: comparativelaw@mfi.gov.hu

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PAWEŁ A. BLAJER[1]

The Regulation on Cross-Border Land Acquisition in Poland[2]

ABSTRACT: *The aim of this article is to present those regulations of Polish law that have the most significant impact on the phenomenon of cross-border land acquisition in Poland. This issue is currently one of the most intensively discussed questions, both at a political and a strictly theoretical level, primarily in the context of land grabbing. Without exaggeration, this problem has a decisive impact on the current shape of real estate trading in Poland.*

The implementation of the assumed research goal is carried out by the analysis of the basic protective instruments contained in the Act on the acquisition of real estate by foreigners, as well as in the Acts relating to the transactions concerning agricultural and forest land, i.e. in the Act on shaping the agricultural system and in the Act on forests. As a result of the research carried out in the article, it was indicated that today – in view of the diminishing importance of traditional protective instruments specified in the Act on the acquisition of real estate by foreigners – the most significant influence on the phenomenon of cross-border land acquisition in Poland have legal acts relating to the transactions concerning agricultural and forest land, which is the result of broadly defined definitions of "agricultural real estate" and "forestry land". In practice, these acts also significantly affect the acquisition of real estate located in cities, as well as real estate whose agricultural and forestry functions are more than questionable. The system of protection against uncontrolled purchase of real estate by foreigners in Poland, provided for in the above-mentioned legal acts, is relatively tight and comprehensive, and even complicated, which obviously influences the increased investment risk when acquiring real estate in Poland.

KEYWORDS: land acquisition, land grabbing, cross-border land transactions, foreigner, agricultural real estate, forestry land.

1 Assistant Professor, Department of Agricultural Law, Faculty of Law and Administration, Jagiellonian University in Kraków, pawel.blajer@uj.edu.pl.

2 It is a publication written as part of the project No. 2021/41/B/HS5/01258 financed by the National Science Centre, Poland.

https://doi.org/10.47078/2022.1.9-39

I. Introduction

The issue of proper regulation of the acquisition of a real estate by foreigners in Poland is currently one of the most intensively discussed issues, both at the political and strictly theoretical level, primarily in the context of the so-called *land grabbing*[3] phenomenon. It is no exaggeration to say that this problem has a decisive influence on Poland's current shape of real estate trade. Traditionally, this phenomenon was subject to public control under the Act of March 24, 1920, on foreigners' acquisition of realestate (AAREF)[4]. However, the significance of this legal act from the viewpoint of its restrictive function has significantly diminished since May 1, 2016.This was when the 12-year protection period for purchasing Polish agricultural and forestry land by foreigners coming from the states—parties to the Agreement on the European Economic Area (EEA) and the Swiss Confederation[5]—ended. Consequently, these foreigners became participants in Poland's agricultural and forestry real estate trade on the same terms as Polish citizens and organizational units with their registered office in Poland. In this circumstance, it was perceived that after May 1, 2016, agricultural and forest land in Poland would be subject to the increased interest of purchasers from other European Union countries, especially those where the prices of agricultural land are much higher than in Poland and where strong legal barriers are preventing the acquisition of agricultural land by foreigners. The result of these concerns was a profound correction of the general rules of trading in agricultural and forest land in Poland, brought about by two amendments to the Act of April 11, 2003,on shaping the agricultural system (ASAS)[6] and the Act of September 28, 1991, on forests (AF)[7], which in both cases came into force on April 30, 2016 [8]. Their undisguised aim was to strengthen the protection of agricultural and forest land in Poland against speculative purchases by foreigners who do not guarantee the use of the acquired land in accordance with the social interest[9].

This study aims to present the regulations of Polish law that have the most significant impact on the cross-border acquisition of land in Poland by analyzing the basic protective instruments contained in the AAREF, ASAS, and AF. In the course of

3 More widely: Pastuszko 2017, pp. 147–156 and the literature cited therein.
4 Journal of Laws 2017, item 2278.
5 This period was established in paragraph 4.2 of Annex XII to the Act of Accession of the Republic of Poland to the European Union, signed in Athens on April 16, 2003, Journal of Laws 2004, No. 90, item. 864.
6 Journal of Laws 2020, item 1655, as amended.
7 Journal of Laws 2021, item 1275 as amended.
8 These changes were introduced, respectively, by the Act of April 14, 2016, on the suspension of the sale of properties of the Agricultural Property Stock of the State Treasury and on the amendment of certain acts (i.e., Journal of Laws 2018, item 868, as amended) and the Act of April 13, 2016 on the amendment of the Act on Forests (Journal of Laws 2016, item 586).
9 Cf. Justification to the Act on the suspension of the sale of properties of the Agricultural Property Stock of the State Treasury and on the amendment of certain acts.

further considerations, the widely discussed in Polish literature issue of compliance of these regulations with the Constitution of the Republic of Poland was omitted, particularly in the context of constitutionally guaranteed protection of property rights and freedom of economic activity and compliance with the principles of the European Union law. These issues, although extremely interesting, exceed the scope of this study and deserve a separate in-depth analysis. Thus, conclusions are drawn regarding the current regulation of cross-border acquisition of real estate in Poland and, more broadly, with regard to the shape of the real estate market in Poland.

II. Act on Acquisition of Real Estate by Foreigners (AAREF) and its current impact on cross-border land acquisition in Poland

■ *1. Concept of 'foreigner'*

To determine the scope of the Polish regulation limiting the acquisition of a real estate by foreigners, the notion of a foreigner as defined in the AAREF is of fundamental importance. Under Article 1.2 of this Act, a foreigner within the meaning of the Act is:

1) A natural person who does not have Polish citizenship, in other words, a foreigner within the meaning of the Act, is stateless person, but not a person who holds citizenship in a foreign country, if apart from that, this person also holds Polish citizenship. The only criterion for determining whether a given natural person is a foreigner within the meaning of the Act is the fact that he holds Polish citizenship. Polish nationality alone, Polish origin, or residence in the territory of the Republic of Poland does not allow us to conclude that a given person is not a foreigner within the meaning of the Act if these circumstances are not accompanied by Polish citizenship.
2) Legal persons established abroad the concept of a legal person include commercial companies with legal personality and cooperatives, associations, foundations, churches, and religious associations[10] if they have legal personality under the country's law where the organizational unit has its seat. The only criterion for determining whether a given legal person is a foreigner within the meaning of the Act is that its registered office is located outside the territory of the Republic of Poland.
3) A company of persons referred to in point 1 or 2 above, without legal personality, established abroad, created under the laws of foreign countries; it is, therefore, the foreign law that determines whether a given organizational unit is a company and whether it may acquire real estate effectively. The literature also indicates that this provision should also be applied by analogy to organized

10 Wereśniak-Masri, 2021.

entities other than companies (associations, trusts, funds), which do not have legal personality and which are able—in accordance with the law of their state of the seat—to acquire real estate effectively [11].

4) A legal person and a commercial partnership without legal personality having its registered office in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies listed in 1, 2, and 3 above. The Act specifies in detail when a legal person or a commercial partnership without a legal personality entitled to acquire real estate is considered to be controlled by foreigners. This involves the following circumstances (Article 1, paragraph 3 of the AAREF):
   - When a foreigner or foreigners hold directly or indirectly more than 50% of votes at the meeting of partners or the general meeting of a commercial company, also as a pledgee, usufructuary, or based on agreements with other persons.
   - When a foreigner or foreigners are entitled to appoint or dismiss the majority of the management board members of another capital company (dependent company) or a cooperative (dependent cooperative), based on agreements with other persons.
   - When the foreigner or foreigners are entitled to appoint or dismiss the majority of the supervisory board members of another capital company (dependent company) or a cooperative (dependent cooperative), based on of agreements with other persons.
   - If the foreigner or foreigners hold directly or indirectly the most in the dependent partnership or at the general meeting of the dependent cooperative, also based on agreements with other persons.

The literature also notes that the issue of what should be regarded as direct or indirect control in entities other than commercial companies' partnerships and cooperatives is not regulated in the Act. It applies to legal entities with the participation of foreigners, with their registered office in the territory of the Republic of Poland, such as associations and foundations. Therefore, it is proposed that, by way of analogy, the provisions of Articles 1, 2, and 4 of the AAREF be applied in this case. This means that a foreigner is, for example, an association in which foreigners directly or indirectly hold more than 50% of votes at the general meeting or have an influence on appointing the majority of members of the management board or the supervisory board (or bodies performing such functions)[12].

A foreigner within the meaning of the Act is also a European company (*Societas Europea-SE*), a *European Economic Interest Grouping* (EEIG), a European cooperative

11 Wereśniak-Masri, 2021.
12 Wereśniak-Masri, 2021.

society (*Societas Cooperativa Europaea,* SCE), as well as a foreign country acquiring real estate in Poland[13].

However, even though the cited definition – contained in Article 1.2 of the AAREF – does not differentiate between foreigners according to any specific criteria; it is clear from further provisions of the AAREF that it provides for a completely different regime regarding the acquisition of real estate in Poland depending on whether a foreigner is a citizen or an entrepreneur of a state—a party to the Agreement on the European Economic Area[14] and the Swiss Confederation, or whether he is a citizen or has registered office in another state (Article. 8.2 of the AAREF).

■ *2. Acquisition of real estate in Poland by foreigners who are citizens or established in countries outside the European Economic Area and the Swiss Confederation*

Regarding foreigners who are citizens of, or have their registered office in, countries outside the European Economic Area and the Swiss Confederation (as a country associated with the European Union), the principle expressed in Article 1.1 of the AAREF is applicable. According to the principle, the acquisition of real estate located in Poland by such a foreigner requires permission. The concept of "acquisition of real estate," as defined in Article 1.4 of the AAREF needs to be analyzed to present this principle properly. Following the said provision, the acquisition of real estate within the meaning of the Act is an acquisition of ownership rights to real estate or the right of perpetual usufruct[15]. Consequently, the Act does not apply to the acquisition by foreigners of any limited rights *in rem*, entitling them to use another person's real property, such as usufruct or easements (both land and personal easements). The AAREF also does not regulate the lease of real estate located in Poland by foreigners; it does not introduce any restrictions in this respect.

The scope of objects, the acquisition of which is subject to restrictions provided for in the AAREF, is extended by Article 3e of this Act. According to this provision, the acquisition by a foreigner shares or stocks in a commercial company with its registered office on the territory of the Republic of Poland and any other legal transaction regarding shares or stocks, if as a result of such transaction the company which is the owner or perpetual usufructuary of real estate on the territory of the Republic of Poland becomes a controlled company, also requires the permission of the minister competent for internal affairs. In addition, such permission is required for the acquisition

13 Szymański, 2021, p. 880.

14 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Croatia, Iceland, Liechtenstein, Norway.

15 The right of perpetual usufruct is a real right specific to Polish civil law (Articles 232-243 of the Civil Code) concerning real estate, one of the three types of rights in rem, next to ownership and limited rights in rem. It consists in handing over for use a piece of land owned by the State Treasury, local government units, or an association of such units to a natural or legal person for a specified period – as a rule 99 years (exceptionally shorter, but no less than 40 years).

by a foreigner of shares or stocks in a commercial company with its registered office in the Republic of Poland, which is the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland, if this company is a controlled company and the shares or stocks are acquired by a foreigner who had not been a shareholder or stockholder of the company before[16].

In that case, it follows from the said regulation that not every acquisition of shares or stocks in a company with its registered office in Poland and owning real estate requires permission. This obligation does not apply; for example, if a foreigner acquires shares or stocks in a company in such a number, it does not lead to the company becoming a foreigner. Permission is also not required when the shares or stocks in a company that is already a foreigner are purchased by a foreigner who is its shareholder or shareholder. Permission is also not required if the company is not the owner or perpetual usufructuary of real estate or if the real estate owned by the company is located outside the borders of the Republic of Poland[17].

Another issue that needs to be clarified here is the scope of legal events leading to acquiring the above-described objects regulated by the AAREF. Pursuant to Article 1. 4 of the Act, it refers to "any" legal event, i.e., acquisition not only by way of a legal transaction, including in particular a contract, but also acquisition by way of a court ruling, administrative decision, or by force of law (acquisitive prescription, inheritance).Article 7 of the Act contains a modest list of events resulting in the acquisition of real estate (or shares in a commercial law company)to which the restrictions arising from the Act will not apply. These events include the following:

- Transformation of a commercial company[18]
- acquiring real estate (and shares or stocks in a commercial company owning or perpetually usufruct real estate in the territory of the Republic of Poland) by inheritance by persons entitled to statutory inheritance. Suppose the law applicable to the inheritance does not provide for a statutory inheritance; Polish law shall apply to assess whether the acquirer of the real estate is a person entitled to statutory inheritance. The provision of Article 7.3-3a of the AAREF further specifies that if a foreigner who has acquired real estate forming part of the inheritance based on a will, and does not belong to the circle of heirs entitled to the statutory inheritance–fails to obtain permission pursuant to an application filed within two years from the day on which the inheritance was opened, the ownership right to the real estate or the right of perpetual usufruct is acquired by persons who would be appointed to the inheritance by operation of law. In the case of acquisition through a legacy (specific bequest), failure to obtain permission by a foreigner based on an application filed within

16 Dudarski, 2009, p. 35; Hartwich, 2010, p. 26.
17 Wereśniak-Masri, 2021.
18 Chyb, 2010.

the same time limit results in entering the real estate (shares or stocks) to the inheritance[19].

The rule is expressed in Article 1.1 of the AAREF stipulates that the acquisition of the above-described objects, based on the indicated legal events, by a foreigner who is a citizen or resident of a state outside the European Economic Area and the Swiss Confederation requires "permission." The permission referred to in this provision is issued, by way of an administrative decision, by a relatively high-level government administrative body—the Minister responsible for internal affairs. This decision may be issued if:

- The Minister of Defense will not object,
- In the case of agricultural real estate, if no objection is raised by the Minister competent for rural development[20].

In addition, the refusal to grant permission is made by the administrative decision of the Minister responsible for internal affairs. In the case of refusal to grant permission for the acquisition of real estate, a foreigner has the right to apply for reconsideration of the case to the same authority that issued the refusal (Article 127.3 of the Code of Administrative Proceedings) and if the refusal is upheld, then court-administrative proceedings[21].

The permission itself is issued at the request of the foreigner. This means that it cannot be issued *ex officio* or at the request of the seller of the real estate, provided that:

1. A foreigner's real estate acquisition does not pose a threat to state defense, security, or public order. and it is not precluded by considerations of social policy and public health.
2. The foreigner demonstrates that circumstances are confirming his ties with the Republic of Poland. These circumstances include, in particular, (but not exclusively):
   - Possession of Polish nationality or Polish origin
   - marrying citizens of the Republic of Poland
   - Possession of a temporary or permanent residence permit;
   - membership in the managing body of entrepreneurs—legal persons and commercial companies with registered office in the territory of the Republic of Poland;
   - Economic or agricultural activity in the territory of the Republic of Poland, in accordance with the provisions of Polish law.

19 Pazdan, 2000, p. 10; Hartwich 2012.

20 The objection referred to in this provision shall be expressed, by a decision, within 14 days from the delivery date of the address of the Minister responsible for internal affairs.

21 Regulated by the provisions of the Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws 2019, item 2325 as amended).

The control exercised by the minister competent for internal affairs following the provisions of the Act is preventive, which means that a foreigner should obtain permission to acquire real estate before the acquisition. However, it is not possible to grant a permit *ex-post*, that is, after the acquisition. If the acquisition of a real estate by a foreigner took place in violation of the provisions of the Act, it was invalid. Consequently, a legal transaction leading to the acquisition has no legal effect and cannot be validated (Article 6.1 of the AAREF). This regulation, understandable in relation to legal transactions, raises several doubts in the case where acquisition of the real estate by a foreigner occurs based on other legal events, for example, based on a court ruling or an administrative decision, or by force of law[22].

From the perspective of Poland's real estate trade practice, exemptions from the obligation to obtain permission provided for in Article 8.1 of the AAREF are of significant importance. These include the following cases:

- purchase of a dwelling (apartment)
- acquisition of commercial premises with garage use or a share in such premises, if this is related to meeting the housing needs of the purchaser; acquisition of real estate with other uses already requires permission;
- acquisition of the real estate by a foreigner residing in the Republic of Poland for at least five years after the granting of a permanent residence permit or a residence permit for a long-term EU resident;
- acquisition by a foreigner married to a Polish citizen and residing in the Republic of Poland for at least two years after granting a permanent residence permit of real estate, which, due to the acquisition, will constitute the spouses' statutory community.
- acquisition of the real estate by a foreigner, if on the date of acquisition he is entitled to statutory succession within the meaning of Polish law after the transferor of the real estate, and the transferor has been the owner or perpetual usufructuary of the real estate for at least five years.
- acquisition by a company controlled by foreigners, for its statutory purposes, of undeveloped real estate, the total area of which does not exceed 0.4 ha in urban areas throughout the country;
- acquisition of the real estate by a foreigner, who is a bank and at the same time a mortgage creditor, by way of taking over the real estate due to an unsuccessful auction in enforcement proceedings;
- acquisition by a bank, which is a legal person controlled by foreigners of shares or stocks in a company, in connection with the bank's pursuit of claims arising out of banking activities.

In the market practice, the first of the aforementioned exemptions concerning the acquisition of a dwelling constitutes a significant convenience for foreigners from

22 Szewczyk, 2012.

outside the European Economic Area, investing their funds on the residential market in Poland.

However, it has to be stressed that the aforementioned exemptions do not apply if the real estate to be purchased is located in a border zone or constitutes agricultural real estate exceeding 1 ha (Article 8.3 of the AAREF). In such cases, there is a return to the general rule that the acquisition of a real estate by a foreigner who is a citizen or resident of countries outside the European Economic Area and the Swiss Confederation requires permission. According to the statistical data, the most frequently stated reason for invalidation of contracts on acquisition of a real estate by foreigners was the acquisition of real estate located in the border zone without permission[23].

■ *3. Acquisition of real estate in Poland by foreigners who are citizens or entrepreneurs of countries – parties to the Agreement on the European Economic Area or the Swiss Confederation*

De lege lata acquisition of real estate located in Poland by foreigners who are citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or the Swiss Confederation—does not require, as a rule, the permission of the Minister responsible for internal affairs, regardless of the type, area and location of the real estate (Article 8.2a of the AAREF)[24]. In other words, the aforementioned entities acquire real estate in Poland in the same way as Polish citizens. In particular, it should be emphasized that the so-called transition periods provided for in the AAREF, during which foreigners being citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or Swiss Confederation were obliged to obtain permission for the purchase of a real estate have expired. These periods were negotiated by the Republic of Poland in the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, and the adjustments to the Treaties on which the European Union was founded[25]. They were concerned with the following acquisitions:

23 Report of the Minister responsible for internal affairs on the implementation in 2019 of the Act of 24.3.1920 on foreigner's acquisition of the real estate by foreigners (Parliament print No. 292).

24 Some doubts arise only as to whether this exemption should also apply to organizational units with their seat in the territory of a state – party to the Agreement on the European Economic Area – which are not entrepreneurs (e.g., foundations or associations).However, the prevailing view in the literature is that this exemption may be applied in this case. Wereśniak-Masri, 2021.

25 OJ EU L of 2003. No 236, p. 33 as amended, Annexes V-XIV

1) An agricultural and forestry real estate, for 12 years from the date of accession of the Republic of Poland to the European Union (the deadline expired on 1 May 2016)[26];
2) A second home for five years from the date of accession of the Republic of Poland to the European Union (the deadline expired on May 1, 2009), whereby the acquisition of a second home was understood as the acquisition by a foreigner, who is a citizen of a state—a party to the Agreement on the European Economic Area or the Swiss Confederation (i.e., a natural person) of real estate intended for residential development or recreational and leisure purposes, which will not constitute a permanent residence of the foreigner[27].

Thus, currently, the mentioned categories of real estate, including in particular agricultural and forestry real estate, are acquired by a significant group of foreigners–all citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or the Swiss Confederation—under the same conditions as Polish citizens. Moreover, the way the exemption from the obligation to obtain permission is formulated makes it relatively easy for foreigners formally covered by the obligation to obtain permission, foreigners from outside the European Economic Area or the Swiss Confederation, to purchase real estate in Poland. It is sufficient for such foreigners to establish a company with its registered office in one of the countries—parties to the Agreement on the European Economic Area or the Swiss Confederation (including the Republic of Poland)—for the company to acquire real estate in Poland without the need to obtain permission from the minister responsible for internal affairs. Consequently, the practical significance of the regulations contained in the AAREF has significantly diminished; at present, therefore, the core of the regulations affecting cross-border acquisition of real estate located in Poland is to be found in other legal acts, particularly in the ASAF and in the AF[28]. The AAREF itself directly indicates that it is the first

26 With regard to agricultural real estate, the AAREF introduced exemptions from the obligation to obtain permission, within a transitional period, in the case of real estate leased by a foreigner for a specified period (3 or 7 years, depending on the voivodeship) from the date of conclusion of a written agreement with a definite date and running an agricultural activity on this real estate – provided the foreigner was legally residing on the territory of the Republic of Poland (Article . 8.2a item 1). Borkowski 2007, p. 35-58.

27 With regard to the acquisition of a second home, the need to obtain a permit was eliminated if the purchaser has legally, uninterruptedly resided in the Republic of Poland for at least 4 years or the acquisition was made to carry out business activity consisting in the provision of tourist services (Article .8.2a item 2).

28 However, the obligations imposed on notaries as set out in article 8a.1 of the AAREF are still of significance in the notarial practice. According to the provision, a notary sends, within 7 days from the drafting date, to a Minister responsible for internal affairs, *inter alia*, an excerpt from the notarial deed and a copy of an agreement with notarially authenticated signatures, by virtue of which a foreigner purchased real estate situated within the territory of the Republic of Poland or acquired shares, stocks or all rights and obligations in a commercial company which is the owner or perpetual usufructuary of real estate situated within the territory of the Republic of Poland. This obligation also applies if permission for acquiring these items is not required, e.g., because the foreigner is a citizen of a country – party to the Agreement on

of the mentioned acts that should be considered when purchasing agricultural real estate by foreigners (Article 1a.6).

III. The Act on Shaping the Agricultural System (ASAS) and the Act on Forests (AF) and their current impact on cross-border land acquisition in Poland

■ *1. Concept of 'agricultural real estate' and 'forest land'*

A characteristic feature of both the ASAS and the AF is that they define the subject of their regulation very broadly; in both cases, the notion of agricultural real estate and the notion of forest land have been defined with the use of undefined and generally formulated criteria. This situation is of considerable practical significance, given that it is precisely these two concepts that constitute the starting point for a special trading regime relating to agricultural land and forest land characterized by increased public control.

The definition of "agricultural real estate," as a subject of separate legal regulation, is provided in Article 2.1 of the ASAS. It states that the term "agricultural real estate" should be understood as agricultural real estate within the meaning of the Civil Code, excluding real estate located in the areas designated in the spatial development plans for purposes other than agriculture. It is assumed in the Polish agrarian literature that classifying a given real estate as agricultural real estate is a two-stage process: first, it has to be established whether the given real estate is agricultural real estate under the Polish Civil Code and the next stage is to check whether the area where the given real estate is located covered by a spatial development plan and in case of a positive answer—what are the provisions of the plan with regard to the given real estate[29]. Notably, to qualify the given real estate as agricultural from the viewpoint of the aforementioned definition, neither its area nor the fact that it is located within the administrative city borders is of any significance.

The definition of agricultural real estate at the level of the Polish Civil Code is provided in Article 46^1 of this Act. In accordance with its content, agricultural real estate is –or may be used for conducting productive activity in agriculture within the scope of plant and animal production, not excluding horticultural, fruit, and fish production. From the wording of this provision, it may be concluded that the agricultural

the European Economic Area. Failure to comply with this obligation is sanctioned by severe disciplinary responsibility of the notary, even if the notification to the minister is made only for statistical purposes. The notification itself triggers control proceedings in the Ministry of Internal Affairs, due to which, if it is found that the acquisition of real estate was made contrary to the provisions of the act, the invalidity of the acquisition is declared by the court at the request of the minister responsible for internal affairs or also at the request of the executive body of local government competent for the location of the real estate.

29 Wojciechowski, 2019, p. 164.

real estate within the meaning of the Civil Code is the real estate used for carrying out productive activity in agriculture and the real estate that may be intended for such activity in the future.[30] In this context, "productive activity in agriculture" should be treated as a kind of qualified agricultural activity, assuming the existence of "purposeful and organized human activity aimed at agricultural production."[31]In contrast, the literature stresses that the basic criterion for distinguishing agricultural real estate is the physical and chemical (agronomic) properties of the topsoil layer. This allows agricultural products to be obtained after applying appropriate agrotechnical procedures. Thus, it refers to the agronomic features of the land that make it physically possible to produce agricultural products[32]. Suppose real estate is not currently used for agricultural purposes; it should be examined whether recultivation procedures would make it possible to restore it to a state in which it would be suitable for conducting agricultural activities. The criterion for reasonable expenditures should be applied in this context. It has to be examined whether, if real estate was adapted for agricultural use, the economic results achieved would justify the expenditure incurred[33].

The above doctrine corresponds with theses arising from the case-law of Polish courts, where the notion of agricultural real estate is broadly interpreted. Pursuant to the ruling of the Supreme Court of January 28, 1999, III CKN 140/98, LEX No 50652, the decisive factor for recognizing the real estate as agricultural is the intended use of the land and not how the land is actually used. The purpose of land does not change when it is excluded from agricultural use, even for a longer period, either due to legal transactions (lease, tenancy, lending) or certain facts (machinery storage, separation of playgrounds), provided that the land does not permanently lose its agricultural properties in both cases. It does not lose them when they can be restored using treatment, for example, recultivation. Thus, the real estate that served the needs of industrial production for years may have agricultural character—'subjected to recultivation procedures, it may be restored to its original purpose, or at least it may be used for industrial-agricultural purposes'. Thus, even if for some time, real estate was developed differently and used for commercial, service, or production purposes not related to agricultural production, as long as there is a potential possibility of using it for agricultural production activities with regard to plant and animal production–it cannot be denied agricultural character.

Finally, significant doubts arise in the Polish literature and jurisdiction over the issue of the so-called mixed real estate, that is, real estate, which, apart from the land suitable for agricultural use, also includes land that has another type of use. This problem results from the definition of agricultural real estate in Article 46[1]of the Civil Code and is only adjusted when the whole real estate can be developed uniformly. In this respect, it is possible to adopt two different solutions:

30 Lobos-Kotowska and Stanko, 2019.
31 Judgment of the Supreme Court of 14 November 2001, II CKN 440/01, OSNC 2002/7-8, item 99.
32 Lichorowicz, 2001, p. 88
33 Czech, 2020.

1. Determination of the dominant (leading) function of the real estate. Consequently, if after establishing the dominant function of the real estate, it turns out that this function is not agricultural, the whole real estate cannot be classified as agricultural [34].
2. Treating real estate in its entirety as agricultural. This view is considered to be dominant in practice, as it is most consistent with the principle of certainty of trade.

Consequently, the legal definition of agricultural real estate contained in the ASAS can be precise only in cases a spatial development plan covers the whole area of a given real estate. So it is possible to go to the second step in legal identification of land for specific regulations on agricultural land transactions. However, this possibility is currently only about 1/3 of the area of the Republic of Poland. Moreover, in a particular case, the designation of a given real estate in the spatial development plan may also cause doubts regarding its agricultural qualification. This results from the fact that many a time, the content of the plan is not unambiguous. Its provisions provide, for example, next to the basic non-agricultural designation, for an agricultural designation as an admissible or supplementary[35]. A consequence of the above described broad and imprecise nature of the definition of agricultural real estate included in the ASAS is the "precautionary" approach dominating the practice of trade. It assumes resolving any possible doubts as to the nature of the real estate in favor of recognizing it as agricultural and subjecting it to the regulation of the ASAS[36] . This approach contributes to expanding the scope of public law control over real estate trade in Poland.

The broad definition of agricultural real estate in the ASAS is accompanied by a spacious definition of the "forest land" in the AF. In this case, the text of the Act is more precise, as it is based on formal criteria and relatively easy to verify based on appropriate documents[37]. According to art 37a of the AF, subject to public control is the circulation of land:

1) designated as forest in the cadastre of real estate or,
2) intended for afforestation as specified in the spatial development plan or the decision on conditions of development and land use, or
3) covered by a simplified forest management plan as defined in Article 3 of the AF, i.e., land with a continuous surface of at least 0.10 ha, covered with forest

34 Truszkiewicz, 2017, pp. 58–59; Marciniuk, 2017, p. 101; Wojciechowski, 2019, p. 157.

35 According to the view prevailing in the practice of a trade, issuance of the so-called decision on land development conditions for a given land, which, under Article 4.2 of the Act of 27 March 2003 on spatial planning and development (Journal of Laws 2021, item 741), is a surrogate of the spatial development plan in areas not covered by it, does not result in the loss of the agricultural character of the real estate. Truszkiewicz 2016, 141.

36 The "precaution" described above is also a consequence of a severe sanction in case of making wrong findings and qualifying the given real estate as non-agricultural when it should be subject to ASAS. This sanction (here we have to go back to the original wording) expropriation (Article 9 of the ASAS).

37 However, it is worth noting that land without a single tree can function as forest land in light of strictly formal criteria.

vegetation—trees, shrubs, and undergrowth—or temporarily deprived of it, designated for forest production or constituting a natural reserve or being part of a national park or entered in the register of historical monuments. Land related to forest management, occupied for forest management buildings and structures, water reclamation facilities, forest zoning lines, forest roads, areas under power lines, forest nurseries, timber storage areas and used for forest parking lots and tourist facilities.

■ *2. Administrative control of transactions concerning agricultural real estate with an area of at least 1 ha.*

From the perspective of cross-border real estate acquisition in Poland, it is worth underlining that—*de lege lata*—within the framework of public law regulation of trade in relation to agricultural real estate with the area of at least 1 ha, instruments of administrative nature predominate. Theoretically, the purchaser of such real estate can only be an individual farmer (Article 2a.1 of the ASAS), excluding the situation when the purchase is made by entities and under conditions specified in Article. 2a.3 or based on the consent of the General Director of the National Agricultural Support Center (NASC) (Article 2a.4 of the ASAS). However, the rule resulting from the above provisions of the ASAS should be interpreted slightly differently: the purchaser of agricultural real estate within the meaning of ASAS may be any entity, provided that it obtains the consent of the General Director of the NASC. Individual farmers and purchasers referred to in Article 2a.3 of the ASAS are exempt from the obligation to obtain the consent of the General Director of the NASC. This statement enables us to emphasize the meaning of administrative control instruments exercised by the NASC within the trade framework in agricultural real estate of an area of at least 1 ha, regardless of its location. Instruments of public control, in this case, resemble tools known from the AAREF; in particular, this remark concerns the following circumstances:

- Permission for the purchase of the real estate by a foreigner issued by the Minister responsible for internal affairs is replaced with the consent for purchasing agricultural real estate issued by the General Director of the NASC. However, if a foreigner coming from outside the European Economic Area and the Swiss Confederation intends to purchase an agricultural real estate, he must obtain permission issued by the Minister responsible for internal affairs and a consent issued by the General Director of the NASC.
- The obligation to obtain consent for the acquisition of agricultural real estate covers,in principle, all events leading to the acquisition of agricultural real estate with an area of at least 1 ha (Article 2.7 of the ASAS) and the right of perpetual usufruct of such real estate (Article 2c of the ASAS Estate), that is, acquisition based on a legal transaction, court ruling, administrative decision and by operation of law, with exceptions arising from Article 2a.1 and 2.3 of this Act.

Consent for the acquisition of agricultural real estate of an area of 1 ha or more shall be issued by the General Director of the NASC through an administrative decision. The Minister in charge of rural development is a higher-level authority, as defined by the Code of Administrative Procedure provisions, in matters concerning the issuance of the said consent (Article 2a.5 of the ASAS). The parties to the administrative proceedings concerning the granting of consent are the transferor and the purchaser of agricultural real estate. Within the framework of administrative proceedings initiated, in the vast majority of cases, upon request of the transferor (and not the purchaser) of agricultural real estate—which is a specificity of Polish regulations–the authority conducting these proceedings retains a wide scope of discretion regarding its granting. In particular, the authority should verify whether the prerequisites for granting consent were met, that is, whether the transferor proved that there was no possibility of transferring the real estate to a person having the status of the so-called individual farmer. Following Article 2a.4b of the ASAS, the transferor should prove that no individual farmer responded to the announcement of the intention to sell placed in the teleinformatic system, maintained by the NASC based on of Article 2a.4a of the ASAS–by the transferor or by a territorial branch of the NASC appropriate for the location of the agricultural real estate[38]. Moreover, before issuing the consent, the authority should collect from the purchaser a commitment to conduct agricultural activity on the purchased real estate, sanctioned by the possibility of the NASC to apply to the court for declaring that the real estate has been purchased by the State Treasury (expropriation).

The requirement to obtain NASC's consent to purchase agricultural real estate with an area of at least 1 ha is waived for natural persons meeting the criteria comprising the definition of an individual farmer. Pursuant to Article 6 of ASAS, an individual farmer is a natural person who is the owner, perpetual usufructuary, or leaseholder of agricultural real estate with a total area of agricultural land not exceeding 300 ha, possessing agricultural qualifications, and for at least five years residing in the municipality in the area of which one of the agricultural real estate constituting an agricultural farm is located and personally running the farm during that period.

Traditionally, the literature distinguishes four criteria for the individualization of an individual farmer[39], which deserve to be discussed in more detail here:

1. Area criterion. An individual farmer is defined as an owner a perpetual usufructuary or agricultural real estate leaseholder whose total area does not exceed 300 ha. This criterion is supplemented by a parallel area criterion relating to a family farm run by an individual farmer. A family farm is deemed an agricultural farm whose total area of agricultural land does not exceed 300 ha (Article 5.1 of the ASAS).

38 https://erolnik.gov.pl/#/
39 Blajer, 2009, p. 212.

2. Agricultural qualification criterion. The ASAS distinguishes two categories of agricultural qualifications that an individual farmer should possess. These are the theoretical and practical qualifications[40].

The mere possession by an individual of theoretical qualifications as defined in Article 6.2 of the ASAS should be considered sufficient to satisfy the criterion of agricultural qualifications. Theoretical qualifications mean agricultural education: (a) basic vocational, (b) secondary vocational, or (c) higher. However, suppose a natural person does not have a theoretical agricultural qualification to become an individual farmer. In that case, they must prove a practical qualification, which the ASAS defines as the length of service in agriculture. The provisions of Article 6.3-3a of the ASAS indicate that the term length of service in agriculture should be understood as, among others, one of the following circumstances: 1) being subject to the social insurance of farmers, 2) conducting agricultural activity on an agricultural farm with a surface area of not less than 1 ha constituting its ownership, subject of perpetual usufruct, subject of the lease; 3) employment in an agricultural farm under an employment contract; and4) performance of work related to agricultural activity as a member of an agricultural production cooperative.

3. Residence criterion. Pursuant to Article 6.1 of the ASAS, an individual farmer should reside for at least five years in the municipality where one of the agricultural real estate constituting an agricultural farm is located. In the context of this regulation, particular attention should be paid to the fact that notion of residence in Article 6.1 of ASAS is not identical to the notion of residence defined in Article 25 of the Civil Code; the proof of residence is a certificate of registration for permanent residence.

Pursuant to the current provisions of the ASAS, it is possible to add to the required 5-year period of residence as well as the residence time in another municipality immediately preceding the change of residence if, in this municipality, one of the agricultural real estate's constituting the farm of the individual farmer is or was located (Article 6.1a of the ASAS). Consequently, within the required 5-year period, the farmer may change his permanent residence as long as he maintains his residence in the municipality where one of the agricultural real estate that forms his farm is or was located during the whole period.

4. The Criterion of personal running on an agricultural farm: Following the definition included in Article 6.1 of the ASAS, an individual farmer should personally run an agricultural farm for at least five years. In turn, following Article 6.2 of the ASAS, a natural person, is considered to run an agricultural farm personally if: a) they work on this farm, and b) they take all decisions regarding the agricultural activity in this farm.

40 Blajer, 2009, p. 251.

The quoted wording of the criterion of running the agricultural farm on a personal basis raises many doubts, primarily due to the imprecision of the terms used and the vagueness of the obligation to work on agricultural farms. The legislator does not specify the capacity of a farmer to perform work on his farm. Given the above, the signaled doubts concern the following issues: 1. Does the work of an individual farmer on a farm presuppose that he should not take up employment elsewhere or, on the contrary, is he in no way constrained in his ability to provide work outside of agriculture? 2. should work on a farm be understood as a farmer's continuous activity directly involved in agricultural production, limited to physical work directly related to the production of agricultural products, or does work on a farm carried out only occasionally, seasonally, or limited exclusively to administrative and managerial tasks suffice to meet that requirement?

Regarding the first of the outlined problems, it must be stated that the lack of explicit resolution of the issue of admissibility of the farmer's work outside the farm by the legislator supports the position that individual farmer may provide minimal work on a farm, drawing most of his income from the activity of a different character (e.g., widely understood economic activity) and devoting the majority of his working time to this non-agricultural activity. As far as the second of the indicated issues is concerned, farmers do not need to be engaged exclusively in agricultural activities. The definition of an individual farmer in the ASAS does not formulate the requirement that work is performed by them "directly on agricultural production". In contrast, as far as the issue of constancy of the farmer's work in the farm is concerned, an opinion has to be supported that personal work in the farm should not have casual, seasonal, occasional, or hobby character[41].

The ASAS specifies in detail how all the aforementioned criteria are documented. Therefore, the evidence confirming the status of an individual farmer includes the relevant official documents (certificates of residence, diplomas from the relevant schools) and declarations regarding the number of owned farmlands and personal running of the farm. It should also be stressed that submitting an untrue declaration within the above scope implies criminal liability (Article 7.5a of the ASAS) and sanction of invalidity of purchasing agricultural real estate (Article 9.1 of the ASAS). The mentioned sanctions seem to be too severe in the context of the imprecise wording of the criterion of the personal running of an agricultural farm, being, for this reason, a subject of frequent interpretation in the judicature literature.

When analyzing the situation when an individual farmer purchases agricultural real estate, one should pay attention to two more significant circumstances in the practice of trade. Pursuant to Article 2a.2 of the ASAS, the area of the purchased agricultural real estate and the area of the agricultural real estate constituting a family farm of the purchaser cannot exceed the area of 300 ha of agricultural land determined following Article 5. 2 and 3 of the ASAS. The sanction for exceeding this standard

41 More widely: Blajer, 2020.

area is the invalidity of purchasing agricultural real estate. However, following Article 2a.3a of the ASAS, if the purchased agricultural real estate becomes a part of joint marital property, it is sufficient if the requirements specified in the Act concerning the purchaser of agricultural real estate are met by one of the spouses. Suppose the spouses are bound by a system other than the community of property or the purchase is made from their personal property, both spouses should have this status to benefit from preferences for an individual farmer provided for in the ASAS.

In the context of the cross-border acquisition of real estate located in Poland, it should be noted that the ASAS does not introduce the criterion of Polish citizenship for individual farmers. In other words, an individual farmer may also be a natural person who is a citizen of a country—a party to the Agreement on the European Economic Area or the Swiss Confederation—or even a person who is a citizen of another state[42]. Moreover, no provision of the Act requires individual farmers to reside in a municipality located in Poland. Therefore, it is argued in the literature that also a person residing and managing an agricultural farm fully or partially outside the Republic of Poland may effectively prove their status as an individual farmer provided that they submit evidence. The evidence should confirm the fulfillment of the listed criteria, which may be deemed "equivalent" to the documents provided for in the ASAS[43]. However, the practical significance of this doctrinal view is more than limited due to problems with documents identification and functioning notions in other legal orders which would be "equivalent" to the documents and notions provided for in the ASAS (such as certificate of permanent residence, the notion of agricultural real estate, the notion of family farm.).

In addition to individual farmers, the purchasers are exempt from the obligation to obtain the consent of the General Director of the NASC for the purchase of an agricultural real estate with an area of at least 1 ha defined in Article 2a.3 of the ASAS. The catalog of these entities includes, among others, a close relative of the transferor, a local government unit, the State Treasury or NASC acting on its behalf, the so-called religious and church legal persons, a purchaser in execution, and bankruptcy proceedings. The most important practical meaning among the listed exemptions is the situation in which the purchaser is a close relative of the transferor. In the current legal state, the definition of a close relative includes, in addition to descendants, ascendants, siblings, children of siblings, spouses, adoptees, and adopted persons, and siblings of parents and stepchildren (Article 2.6 of the ASAS). In this case, the citizenship of the close relative is irrelevant from the viewpoint of rationing provided in the ASAS. Moreover, despite the lack of an unambiguous extension of this definition to the close relatives of the spouses (particularly to the son-in-law and daughter-in-law), it should be concluded that the general rule of Article 2a.3a of the ASAS applies to them. It states that if the purchased agricultural real estate becomes a part of joint marital property,

42 Górecki, 2017, pp. 40–41.
43 Górecki, 2017, pp. 44–46.

it is sufficient if the requirements specified in the Act concerning the purchaser of agricultural real estate are met by one of the spouses.

■ *2. The right of pre-emption and the so-called right to purchase arising from the ASAS and the AF*

In the case of agricultural real estate within the meaning of the ASAS, the right of pre-emption vested in the NASC is the basic instrument of public control of the sale of real estate with an area between 0,30 ha and 0,9999 ha[44]- regardless of its location. It is worth emphasizing that trade in this real estate category is not subject to administrative control (Article2a.3.1a of the ASAS). Their purchaser does not have to have the consent of the General Director of NASC to purchase them, and the rule is resulting from Article 2a.1 of the ASAS, formally reserving the possibility of purchasing agricultural real estate for individual farmers, does not apply to him. In other words, the purchaser of such estate does not have to meet any criteria of an individual or obtain administrative consent in accordance with the ASAS.

However, it does not mean that the sale of agricultural real estate between 0,3 ha and 0,9999 ha is not subject to any regulation. However, its instruments have changed; instead of administrative control, the legislator refers, in a wider scope than before, to the civil law instrument, that is, the pre-emption right vested in NASC. Thus, if the sale contract subject is identified as agricultural real estate with an area between 0,30 ha and 0,9999 ha (regardless of its location), the contract should be concluded under the condition that the NASC does not exercise its pre-emption right under Article3.4 of the ASAS. Pursuant to the content of Article599 § 2 of the Civil Code and Article 9.1 of the ASAS, the sale conducted unconditionally is invalid. Thus, the most characteristic element of the content of the contract of sale of agricultural real estate limited by the right of pre-emption of NASC is the condition precedent that the NASC does not exercise its pre-emption right under Article3.4. Consequently, followingArticle157 of the Civil Code, the sale contract is exclusively obligatory and not real. After the conclusion of the sale contract, the obliged party (the seller) should immediately, inform the NASC, who has one month to exercise the pre-emption right (Article598 of the Civil Code). This deadline is met if, before its expiry, the NASC makes a declaration in the form of a notarial deed about exercising the pre-emption right and then publishes it on the NASC website. The obliged party is deemed to have become familiar with the content of the declaration of the NASC about exercising the pre-emption right at the moment of its publication on the NASC website (Article 3.10-11 of the ASAS). Moreover, Article3.8 and 9 of the ASAS indicate that if the price of the sold real estate grossly deviates from its market value, NASC may—within 14 days from the date of submission of the declaration on exercising the pre-emption right–apply to the court to establish the price of that real estate. The court determines the price corresponding to agricultural real estate market value.

44 The lower limit of 0,30 ha results from the content of Art. 1a.1b of the ASAS, which states that applying the Act's provisions to agricultural real estate of less than 0,3 ha is excluded.

Expiry of the time limit for exercising the pre-emption right or an earlier declaration by the NASC about giving up exercising that right allows the parties to the conditional sale contract to conclude another contract–a purely real contract resulting in a definitive transfer of ownership to the buyer. As in the case of a conditional sale contract, the form of a notarial deed is required for its validity.

The scope of applying the right of pre-emption vested in the NASC is undoubtedly influenced by the exclusions provided for in Article3.5 and Article 3.7. The catalog of exclusions is very broad, but only some are of great practical importance. They include, in particular, the situation when the buyer is 1): a local government unit or the State Treasury; 2) a close relative of the seller; 3) an individual farmer to enlarge a family farm; however, up to the area of 300 ha of agricultural land, and the agricultural real estate being purchased is located in the municipality in which the purchaser resides or in a bordering municipality. In this respect, meeting the criteria comprising the definition of an individual farmer is significant for the trade-in agricultural real estate with an area from 0,30 ha to 0,9999 ha. Although the possibility of acquiring such agricultural real estate does not depend on the status of an individual farmer, the status enables acquisition of the real estate without pre-emption right of NASC if the criterion of the place of location of the real estate is met[45].

The right of pre-emption vested in NASC may also become effective in the sale of agricultural real estate with an area of at least 1 ha; however, in such a case, it is essentially supplementary in relation to the above-described instruments of administrative nature. It results from the content and scope of exclusions from applying the provisions concerning the pre-emption right vested in NASC, provided for in Article 3.5 and Article 3.7 of the ASAS. In particular, the meaning of Article 3.5 item 2 of the ASAS should be emphasized. According to these regulations the pre-emption right does not apply to NASC if the purchase of agricultural real estate is subject to the consent of the General Director of NASC, referred to in Article 2a.4 of the ASAS. Another important exclusion is provided for in Article3.7 of the ASAS. It indicates that the right of pre-emption is not vested in the NASC when the buyer is an individual farmer intended to extend a family farm and the purchased real estate is located in the municipality where the individual farmer resides or in a bordering that municipality.

A correct reconstruction of a situation when NASC is entitled to a pre-emption right in the sale of agricultural real estate with an area of at least 1 ha requires comparing and contrasting the provisions of Article 3.5 and 3.7 of the ASAS with the regulations of Article2a.1 of the ASAS and particularly Article 2a.3 of this Act which defines cases when the purchase of agricultural real estate does not require the consent of the General Director of NASC. The analysis of these provisions allows for indicating, *inter alia*, the following situations where the sale contract of agricultural real estate should be conditional because of the pre-emption right of the NASC: 1) where the buyer is an individual farmer, but the agricultural real estate to be purchased is not located in the

45 Blajer and Gonet, 2020.

municipality where the buyer resides or in a municipality bordering that municipality; 2) where the buyer is a religious legal person, but the seller is not a legal person of the same church or religious association, and 3) where the agricultural real estate to be sold is located in a mining area.

The Polish construction of the right of pre-emption provides that it may be exercised by the entitled person only if the current owner concludes a sale contract. However, it is obvious that in practice, not only a sale contract constitutes an instrument for purchasing agricultural real estate. Other contracts, such as donation contracts, exchange contracts, *datio in solutums,* and contributions to a commercial company, also lead to the same effect. These contracts are also subject to public control by the NASC, although they take slightly different forms than in the case of the sales contract.

Similar to the case of the sale contract, with regard to other contracts in the market leading to the acquisition of agricultural real estate, the criterion of the area is important. A separate regime of public control functions with regard to real estate with an area of at least 1 ha on the one hand and real estate with an area from 0.3000 ha to 0.9999 ha. In relation to the first category, the rule is that the purchaser of those objects may only be an individual farmer (Article 2a.1 of the ASAS), excluding when the purchase is made by entities and under conditions specified in Article 2a.3 of the ASAS, or based on the consent of the General Director of NASC, expressed by way of an administrative decision (Article 2a.4 of the ASAS). Therefore, administrative control instruments exercised by the NASC within the framework of trade in agricultural real estate of at least 1 ha in area, regardless of their location, are of fundamental importance in this case as well.

Consequently, the so-called right to purchase an agricultural real estate of at least 1 ha, arising from Article4 of the ASAS and formally vested in NASC, has a relatively modest practical meaning. This results from the content and scope of exemptions from the right of acquisition provided for in Article 4.4 of the ASAS. In particular, the importance of Article.4.4 item 2a of the ASAS should be emphasized. According to this regulation the right to purchase is not vested in NASC if the acquisition of agricultural real estate is made with the consent of the General Director of the NASC. Another important exemption is provided for in Article4.4.1Which states that the right to purchase is not vested in the NASC if the purchaser is an individual farmer for the enlargement of a family farm and the purchased real estate is located in the municipality where the individual farmer resides or in a municipality bordering that municipality.

Consequently, the number of cases in which the NASC has the right to purchase an agricultural real estate with an area of at least 1 ha is modest and covers the following situations:

1) where the purchaser is an individual farmer, but the agricultural real estate being purchased is not located in the municipality where the purchaser resides or in a municipality bordering that municipality; 2) where the purchaser is a religious

legal person, but the transferor is not a legal person of the same church or religious association; 3) where the agricultural real estate is purchased located in a mining area, and 4) where the purchaser is a local government unit. Therefore, it is not difficult to conclude that the practical meaning of the aforementioned situations, in which NASC has the right to purchase in case of conclusion of a contract other than sale leading to purchase of agricultural real estate with an area of at least 1 ha, is more than limited.

In the case of contracts leading to the purchase of agricultural real estate with an area between 0,3000 ha and 0,9999 ha, the right to purchase vested in the NASC resulting from Article4.1 of the ASAS should be treated as a public control fundamental instrument. The purchaser of such real estate does not have to have the consent of the General Director of the NASC to acquire it, and it is not necessary to have the status of an individual farmer.

The contract limited by the right to purchase of NASC, despite the order to adequately apply the provisions of the Civil Code regarding the pre-emption right (Article3.5 of the ASAS) is unconditional. Its content should not include the condition that NASC does not exercise its right to purchase. This contract unconditionally transfers the agricultural real estate ownership to the purchaser, who becomes the owner. Consequently, according to the content of Article 4.5 item 1) letter a) of the ASAS, the purchaser of the real estate is obliged to notify the NASC about its right to purchase. The statutory regulations thus treat the purchaser of the real estate as its owner to whom the NASC should make a declaration about exercising the right to purchase[46]. However, the construction of the right to purchase in a manner not fully explained in the literature and judicature makes the validity of the contract (and thus its real effect) conditional on subsequent notification of the right to purchase the NASC.

The purchaser's notification of the right to purchase to the NASC – the lack of which is sanctioned by the contract's invalidity – marks the beginning of the one-month period for exercising this right. To meet this deadline, it is sufficient that the declaration in the form of a notarial deed about exercising the right to purchase is published on NASC's website before the deadline expires.

As soon as the right to purchase is exercised by the NASC, the agricultural real estate covered by that right becomes the State's Treasury property (Article8.1 of the ASAS). This effect occurs through unilateral legal action performed by the NASC[47]. Consequently, when exercising the right to purchase, the NASC declares will without becoming a party to any contract. Thus the problem of binding the NASC with any contract provisions constituting the basis for exercising the right to purchase does not arise. This circumstance does not change the fact that the State Treasury, when acquiring agricultural real estate based on a declaration by the NASC, acquires it together with the encumbrances already existing on it[48].

46 Blajer, 2017, p. 58.
47 Górecki, 2003, p. 16; Bieniek, 2009, p. 187.
48 Matys, 2005, p. 30.

There are numerous exceptions to the aforementioned rule, according to which in the case of conclusion of a contract other than sale that leads to purchase of an agricultural real estate with an area from 0,3 ha to 0,9999 ha, the NASC on behalf of the State Treasury has the right to purchase. However, among the exceptions provided for in Article 4.4 of the ASAS, only two situations are of practical importance, that is, the case when: 1) due to transferring the ownership of agricultural real estate, a family farm is enlarged, but up to an area of no more than 300 ha of agricultural land, and the agricultural real estate being acquired is located in the municipality where the purchaser resides or in a municipality bordering on that municipality; 2) the purchaser is a close relative of the transferor within the meaning of Article 2.6 of the ASAS.

The NASC's right to purchase also constitutes the basic instrument of public control over the real estate trade in the case of divisions—both contractual and judicial (i.e., abolition of co-ownership, division of inheritance, and division of common property between former spouses). With reference to this category of legal events, the legislator generally resigned from the administrative control provided for in Article 2a of the ASAS; thus, the purchaser of agricultural real estate on their basis does not have to have either the consent to purchase expressed in the mode of Article 2a.4 of the ASAS by the General Director of NASC or the status of an individual farmer. However, these events generate the right to purchase of the NASC. The real estate purchaser (in the case of contractual divisions) or the court (in the case of judicial divisions) is obliged to notify the possibility of exercising this right[49].

The right of pre-emption and the so-called right to purchase are the basic public law control instruments in the case of forest land transactions; the AF does not introduce any administrative instruments of control similar to the consent to purchase provided in Article 2a.4 of the ASAS. Consequently, pursuant to Article37a.1 of the AF, in the event of a sale by a natural person, a legal person, or an organizational unit without legal personality, to which legal capacity is granted by law, of forest land that does not constitute State Treasury property, the State Treasury, represented by the State Forests[50], has a pre-emption right to acquire such land. However, if the acquisition of such land takes place due to: 1) conclusion of a contract other than a sale contract, or 2) a unilateral legal action–the State Forests representing the State Treasury may make a declaration on the purchase of such land against payment of a pecuniary equivalent (right to purchase). The scope of exceptions from these regulations is very modest. It mainly includes cases where the purchaser is the transferor's spouse or direct relatives, a person related to the transferor by adoption, custody, or guardianship, and a local government unit, as well as cases where an agricultural farm is sold within the meaning of the ASAS.

49 Blajer, 2019a, p. 29.

50 The 'State Forests' National Forest Holding (Państwowe Gospodarstwo Leśne "Lasy Państwowe") is a state organizational unit without legal personality, unlike NASC; according to Art. 4 of the AF, it manages forests owned by the State Treasury.

The practical importance of these regulations is very important because of the broad definition of forest land. and the lack of any area limitations and the severe sanction of invalidity if the sale contract was concluded unconditionally or the State Forests were not notified about the possibility of exercising their right to purchase[51].

In the context of the cross-border acquisition of real estate in Poland, it should be emphasized that exercising both rights by the NASC and the State Forests depends entirely on the autonomous and discretionary decisions of both institutions. No legal prerequisites for exercising both the right to purchase and pre-emption have been formulated. There is also no way of challenging declarations on exercising the pre-emption right or the right of purchase–these rights are of a civil law nature. Therefore the reasons and justification for exercising them are not subject to administrative or judicial control. The law in force in Poland does not impose any obligations on the NASC or State Forests regarding the management of real estate acquired due to exercising the right of pre-emption or right to purchase, in particular their distribution among farmers.

■ *4. Obligations of purchaser of agricultural real estate*

The ASAS introduces two controversial and widely discussed obligations of the purchaser of agricultural real estate (the AF does not provide for this solution). These obligations are imposed on each purchaser of agricultural real estate with an area of at least 0,3 ha. That is, an obligation to run an agricultural farm that includes purchased agricultural real estate for at least 5 years from the date of purchase, and in case of a natural person–to run this farm personally (Article 2b.1 of the ASAS). A prohibition to dispose of the purchased real estate or let it be held by other persons within the same 5-year period (Article 2b.2 of the ASAS). These obligations may be repealed only following consent by the NASC, as provided for in Article 2b.3 of the ASAS, in cases justified by an important interest of the purchaser of agricultural real estate or public interest. These regulations can be undoubtedly regarded as the core of the current trading model in agricultural real estate in Poland, given the extremely severe sanctions for non-compliance with the aforementioned obligations. The invalidity of the sale or transfer to a third party of an agricultural real estate in case of violation of the obligation specified in Article 2b.2of the ASAS or expropriation–in case of violation of the obligation specified in Article 2b.1 of the ASAS[52].

The fundamental interpretation problem is the issue of proper determination of the scope of "the obligation to run an agricultural farm" imposed on the purchaser of agricultural real estate. The definition of the notion of "running an agricultural farm personally" is contained in Article 6.2 item 1 of the ASAS, according to which a natural person is deemed to run an agricultural farm in person if they work on this farm

51 It is also worth noting that in the case where the right of pre-emption for forest land is granted by law to several entities, the State Forests prioritize exercising their right of pre-emption. More on both institutions: Truszkiewicz, 2021, pp. 881–895.

52 Blajer, 2021, p. 35.

and take all decisions concerning agricultural activity in this farm, provides little guidance in this respect. The content of this definition has been relativized only to natural persons, while the obligation of running an agricultural farm has a universal character. It also refers to other categories of purchasers of agricultural real estate, such as legal persons.

In the agrarian literature, it is noted that the obligation to run an agricultural farm that includes the purchased real estate and in case of a natural person— the obligation to run such farm personally—should be included in the categories of the obligation to run an agricultural activity[53]. Pursuant to Article 2.3 of the ASAS, running an agricultural activity should be considered a productive activity in agriculture within the scope of plant or animal production, including horticultural, fruit, and fish production[54]. In contrast, it should be stressed that the legislator refers to running an agricultural farm, which has a slightly different meaning in the Polish tradition. While the criterion of running an agricultural activity emphasizes only the features and attributes of the conducted activity, the criterion of running an agricultural farm consider running the administration of an agricultural farm. The meaning of this notion is best expressed by the phrase, which means 'carrying out the occupation of a farmer on an agricultural farm and thus managing it[55]. Consequently, following the content of Article 2b.1 of the ASAS, a purchaser of agricultural real estate, who is a natural person, should for 5 years perform the occupation of a farmer in an agricultural farm. He should work in it and take all decisions concerning the performance of agricultural activities related to plant or animal production, including horticultural, fruit, and fish production[56].This statement, however, does not allow the determination of what constitutes running an agricultural farm by a purchaser being an organizational unit (e.g., legal person), although formally, this obligation also refers to this category of purchasers. In the ASAS, there are no indications of what would mean "carrying out the occupation of farmer" by organizational units.

The difficulty in defining precisely the scope of the obligation to run an agricultural farm acquires particular significance in the context of the interpretation direction dominant in the practice of a trade. Assuming that, as a matter of principle, each case of purchasing agricultural real estate of at least 0,30 ha, due to which the purchaser becomes the owner of agricultural real estate with a total area of at least 1 hectare, generates on his side the "obligation to run an agricultural farm." This obligation also arises if the purchaser of the agricultural real estate has not hitherto had anything to do with agriculture. All that matters is that following the acquisition,

53 Łobos-Kotowska and Stanko, 2019.

54 The fact that the agricultural activity is to have the character of a qualified 'productive' activity is of significance, which means that, e.g., keeping the land only in good agricultural condition by setting it aside does not constitute conducting an agricultural activity within the meaning of the ASAS.

55 Blajer, 2009, p. 225.

56 Suchoń, 2019, p. 105.

he is—or becomes—the owner of an agricultural real estate or several agricultural real estates with a total area of at least 1 ha[57].

Practical consequences of these regulations assume particular importance in the context of sanctions for failure to start or for cessation of running an agricultural farm or, in case of a natural person, personally running an agricultural farm that includes the acquired agricultural real estate within the 5-year period referred to in Article 2b.1 of the ASAS. In the light of Article 9.3 of the aforementioned Act, the NASC could then apply to the court for the acquisition of the real estate by the State Treasury against payment of a price corresponding to its market value. Failure to fulfill this vaguely worded obligation exposes the purchaser to the loss of the purchased real estate, or at least lengthy and costly court proceedings, the outcome of which remains difficult to predict.

Further doubts arise with regard to the meaning of the obligations laid down in Article 2b of the ASAS for family transactions concerning agricultural real estate. According to the prevailing interpretation, relatives of the transferor who have purchased agricultural real estate are fully subject to the obligations laid down in Article 2b.1 and 2 of the ASAS, which means that these persons–within the five-year period following the purchase–may further dispose the purchased agricultural real estate only with the consent of the NASC referred to in Article2b.3 of the ASAS or to entities and in situations specified in Article 2b.4 of the ASAS. The acceptance of this interpretation leads to significant practical effects. This is because each acquisition (e.g., as a donation) by a close relative of an agricultural real estate of at least 0,30 ha, where this person is already the owner (or perpetual usufructuary) of agricultural real estate of at least 1 ha, or due to the acquisition, he becomes the owner of real estate of such an area, can result in the application of sanctions from Article 9.3 of the ASAS if the NASC decides that the purchaser does not meet the obligation resulting from Article 2b.1 of the ASAS. To address this problem in more graphic terms, a division of a farm made by a farmer between descendants in the conditions described above may lead to the farm being taken over by the NASC acting on behalf of the State Treasury and, consequently, to the loss of family property.

Another aspect of the interpretation of Article 2b of the ASAS prevailing in practice, which deserves to be presented here, is the view that both obligations of real estate purchasers persist if the real estate loses its agricultural character during the 5-year period following the acquisition. In other words, despite the subsequent entry into force of the spatial development plan in which the real estate was designed for purposes other than agriculture, the acquirer of agricultural real estate is still bound by the general obligation to run the agricultural farm in which the acquired real estate is a part under the threat of losing its ownership. Moreover, he has the prohibition to transfer the real estate to third parties. Therefore, these obligations

57 The standard of 1 ha results here from the fact that following the definition contained in Art. 2.2 of the ASAS, such is the minimum area of an agricultural farm within the meaning of the Act.

continue to exist although the competent public administration body has decided that real estate is no longer needed for agricultural purposes. The interpretation of Article 2b of the ASAS prevailing in the practice of trade aims at preserving the restrictions resulting from this provision also with regard to the real estate separated from the purchased agricultural real estate of an area smaller than 0,30 hectare, i.e., real estate to which, following the explicit wording of Article .1a.1of the ASAS, the provisions of this Act do not apply. The justification of this thesis is sought in the assumption that actions of a strictly technical nature (e.g., geodetic division of real estate) should not negate the obligation to run a (personal) agricultural farm resulting from Article 2b.1 of the ASAS[58].

In the context of cross-border real estate acquisition in Poland, the regulation described above deserves special attention. A potential purchaser must consider that the acquisition of agricultural real estate in Poland is associated with certain obligations, the non-compliance with which, in turn, may ultimately lead to the deprivation of ownership of the real estate.

■ *5. Public law control of personal changes in commercial companies and partnerships which are owners or perpetual usufructuaries of agricultural real estate*

A characteristic regulation of the ASAS (not introduced in the AF) is the public control of personal changes in commercial companies. The scope of this control is even broader than in the AAREF; it also extends to partnerships. Pursuant to Article 3a of the ASAS the NASC, on behalf of the State Treasury, has a pre-emption right to purchase shares and stocks in a limited liability company and in a joint-stock company that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha[59]. This right is subject to the provisions of the ASAS and the Civil Code regarding the pre-emption right with regard to real estate, with the reservation that the deadline for submitting a declaration on exercising the pre-emption right is two months, counting from the date of receipt by NASC of a notification from the company whose shares constitute the subject of the conditional sale contract. The scope of exemptions from the pre-emption right is relatively modest. This right does not exist, inter alia, in the case of disposal of shares in companies whose shares are admitted to organized trading (in particular stock exchange trading), shares for the benefit of a close relative, and shares by the State Treasury.

This regulation is supplemented by the provision of Article4.6 of the ASAS, according to which the NASC has the so-called right to purchase in the case when shares and stocks in a commercial law company that is the owner or perpetual usufructuary of an agricultural real estate with an area of at least 5 ha or of an agricultural

58 Blajer, 2019b, pp. 123–124.

59 Byczko, 2017, pp. 236–247; Bieluk, 2021, pp. 59–68; Muszalska, 2020, pp. 63–86; Grykiel, 2016, pp. 628–629.

real estate with a total area of at least 5 ha are acquired pursuant to events other than a sale contract. This right is also vested in NASC in the case of a share capital increase in a capital company. As a rule, it is excluded only if the purchaser of shares is: 1) a close relative of the transferor and 2) the State Treasury.

Infringement of the pre-emption right or right to purchase of the NASC in the aforementioned cases invalidates the acquisition of shares (Article9.1 of the ASAS). Moreover, in both cases, prior to the acquisition of shares, the NASC has a very controversial right to inspect books and documents of this company and request information about encumbrances and liabilities not included in the books and documents.

Article 3b of the ASAS supplements the regulation concerning capital companies, referring to partnership changes (general partnership, professional partnership, limited partnership, and limited joint-stock partnership). According to its content, in case of change of a partner or accession of a new partner to a partnership that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha, the NASC on behalf of the State Treasury may make a declaration on purchasing such real estate for a price corresponding to its market value. Consequently, in the aforementioned case, the right to purchase in the NASC is directed to the real estate, the subject of ownership or perpetual usufruct of such a partnership. This real estate may be lost due to changes in the composition of its partners. Exemptions from this form of the right to purchase are very limited; they concern only the situation when instead of the previous partner, a close relative becomes a partner or a close relative of any of the partners becomes a new partner.

IV. Summary

The analyses in this study make it possible to indicate that nowadays—due to the decreased significance of the traditional protection instruments laid down in the AAREF—the most significant impact on the phenomenon of cross-border acquisition of real estate in Poland is exerted by the acts formally referring to the trade-in agricultural and forestry land, which results from the extremely broad definitions of "agricultural real estate" and "forestry land. "In practice, these acts also significantly impact trade in urban real estate and real estate whose agricultural and forest functions are more than doubtful.

The above considerations have also shown that the protection system against the uncontrolled acquisition of a real estate by foreigners in Poland is relatively tight and comprehensive. It also covers personal changes in companies and partnerships that are owners and perpetual usufructuaries of agricultural real estate. However, it is also complicated, which impacts the increased investment risk when acquiring real estate in Poland. The breach of absolutely binding regulations is accompanied by severe civil sanctions, in the form of invalidity of the acquisition, and in certain cases,

even criminal sanctions (e.g. submitting false declarations on the basis of which the agricultural real estate is acquired). The control of trade exercised by the NASC in the first place, but also to some extent by the State Forests, is discretionary; extensive use of civil law instruments of control excludes, for example, the possibility of verifying decisions made by the aforementioned institutions in the administrative course of proceedings. Given the provisions of the ASAS, the control of the NASC extends to the very stage of acquiring the real estate and to the 5-year period after the acquisition, during which the purchaser may be effectively deprived of the real estate if they fail to perform obligations resulting from Article 2b of the ASAS..

Therefore, the currently binding regulations of the ASAS and the AF constitute an important factor that must be considered when purchasing real estate in Poland and in the cross-border context. In addition to their strictly protective function against uncontrolled purchases by foreigners, which cannot be questioned, these regulations also contribute to an increase in investment risk, both in the internal and cross-border aspects.

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FEDERICA CRISTANI[1]

Concluding International Investment-Related Agreements with Non-EU Countries: Roles of the EU and Its Member States

ABSTRACT: *The 2009 Lisbon Treaty has added an important exclusive competence for the European Union (EU) in the common commercial policy area, namely, foreign direct investment, thus making it a crucial actor in international investment protection. This has a huge impact on shaping international investment policy in Europe and has raised important questions, especially regarding the legal consequences of the EU's exclusive competence in the negotiation process of international investment agreements (IIAs) with third countries. This article explores the role of the EU and its member states in negotiating and concluding IIAs with third countries. In the first part, the article illustrates when individual member states are authorized to conclude a new bilateral investment treaty with a third country, with a focus on the EU´s Regulation No 1219/2012 and its implementation. In the second part, the article questions what it means for the EU and its member states to conclude investment mixed agreements with third countries, how the negotiation processes are conducted, and what is the impact of the division of competences between the EU and its member states. The final part of the article shows the current issues of ius standi and financial responsibility in investment dispute settlement involving foreign investors, with a focus on the EU´s Regulation No 912/2014 and the negotiation processes of the EU with third countries.*

KEYWORDS: International investment agreements, European Union, Bilateral investment agreements, European Union exclusive competence, Foreign direct investment.

1 Senior Researcher, Centre for International Law – Institute of International Relations in Prague, the Czech Republic, cristani@iir.cz, ORCID: 0000–0003-0301–0960.

https://doi.org/10.47078/2022.1.41-56

1. Designing a new European Union investment policy after Lisbon: An introductory overview

The Lisbon Treaty, in force since December 1, 2009, has added an important exclusive competence for the European Union (EU) in the common commercial policy (CCP) area, namely, foreign direct investment (FDI), thus making the EU a crucial actor in international investment protection. According to Article 206 of the Treaty on the Functioning of the European Union (TFEU), dealing with CCP, "the Union shall contribute, in the common interest, to … *the progressive abolition of restrictions on … foreign direct investment* […]" (emphasis added).[2]

This has had a huge impact on the shaping of international investment policy in Europe, and in 2010, the European Commission issued a landmark Communication,[3] stating that the EU must develop an international investment policy to increase its competitiveness and contribute to the objectives of smart, sustainable, and inclusive growth. However, although a number of regulations and policy documents on investment protection have been adopted by EU institutions since the implementation of the Lisbon Treaty, to date, the EU has not defined a clear investment policy.[4] This has caused legal uncertainty in a number of issues, especially with regard to the legal consequences of the EU's exclusive competence on the implementation of intra-EU bilateral investment agreements (BITs), which were in force in 2009 and afterwards, and on the negotiation process of international investment agreements (IIAs) with third countries.

In the aftermath of the Lisbon Treaty, the question of termination of BITs between member states (intra-EU BITs) has been highly debated.[5] While it is beyond the scope of this chapter to enter into the details of the debate, the milestone judgment that the Court of Justice of the European Union (CJEU) issued on March 6, 2018 in the Achmea case is worth recalling,[6] where the Court found that "the arbitration clause in the [intra-EU The Netherlands-Slovakia] BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law."[7] This judgement was followed by declarations of EU member states (MSs) in January 2019[8] and by the Agreement for

2 Article 206 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

3 European Commission Towards a Comprehensive European International Investment Policy, COM (2010), July 7, 2010, 343 final.

4 Calamita, 2012, p. 301.

5 For a general overview, see Dimopoulos, 2011, pp. 63–93; Kokott and Sobotta, 2016, pp. 3–19; Nagy, 2018, pp. 981–1016.

6 B.V. Achmea, Case No C-284/16, Judgment CJEU, Slovak Republic v (March 6, 2018).

7 CJEU, Press Release No 26/18 (March 6, 2018), Available at: https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Achmea-ruling-ECJ.pdf (Accessed: 19.10.2021).

8 Declaration of the representatives of the governments of the member states on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, January 15, 2019, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (19.10.2021).

the termination of intra-EU bilateral investment treaties signed by 23 EU MSs on May 5, 2020.[9] Overall, it took a decade for MSs to find an agreement on the termination of intra-EU BITs.

In contrast, when it comes to negotiating IIAs with non-EU countries, the EU has become the principal actor involved in relevant negotiations.[10] After the implementation of the Lisbon Treaty, the EU launched several negotiations on IIAs with third countries,[11] including Australia, Canada, China, Vietnam, Singapore, and China.

Moreover, both the EU and its MSs are parties to the Energy Charter Treaty (ECT),[12] which can be considered both an intra-EU and extra-EU investment agreement.[13] It should be recalled that the European Commission and EU MSs are currently involved in the modernization process of the ECT,[14] which raises several questions, especially with respect to a possible reform of the dispute settlement mechanism.[15]

The following paragraphs explore the role of the EU and its MSs in negotiating and concluding international investment(-related) agreements with third countries. In this respect, the above-mentioned debate on the modernization of the ECT will not be considered; instead, the focus will be on bilateral relationships between the EU and its MSs on the one hand and third countries on the other, with respect to the conclusion of investment(-related) agreements.

2. Negotiating with non-EU third countries: When can MSs (still) conclude IIAs?

Before analyzing the division of roles between the EU and its MSs in negotiating IIAs with third countries, the exact scope of the new exclusive competence of the EU in FDI should be assessed. Indeed, the addition of the words "foreign direct investment" in Article 207 of the TFEU triggered a strong debate regarding the scope of the new competence. In particular, it raised questions such as whether portfolio investments are also covered by the competence and the concomitant issue of whether the new treaties will be concluded as mixed agreements.[16]

9 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, May 5, 2020, https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en (19.10.2021).

10 We can briefly mention that IIAs can take the form of classic bilateral investment treaties (BITs) or BIT-like investment chapters in free trade agreements (FTAs).

11 See: Reinisch, 2014, pp. 111–157; Basedow, 2021, p. 643.

12 Energy Charter Treaty, Adopted December 17, 1994, in force UNTS (April 16, 1998), 2080, p. 95.

13 See: Quirico, 2021, p. 297.

14 Energy Charter Treaty, Modernisation of the Treaty (2021), Available at: https://www.energychartertreaty.org/modernisation-of-the-treaty (Accessed: 19.10.2021).

15 European Commission Overview of FTA and Other Trade Negotiations (October 2021), Available at: https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (Accessed: 19.10.2021).

16 Bungenberg, Griebel and Hindelang, 2011; Titi, 2015, pp. 639–661.

The Court of Justice of the European Union (CJEU) had the opportunity to clarify this issue in Opinion 2/15 of May 16, 2017. Indeed, after the EU and Singapore completed negotiations for a comprehensive free trade agreement (FTA),[17] the Commission deposited a request for an advisory opinion from the CJEU, with the following questions:

> Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union's exclusive competence? Which provisions of the agreement fall within the Union's shared competence? Is there any provision of an agreement that falls within the exclusive competence of the Member States?[18]

The CJEU affirmed that the EU and its MSs share competences in concluding international investment agreements with non-EU countries when they include provisions on portfolio foreign investment, investor-state dispute settlement, and state-to-state dispute settlement related to provisions regarding portfolio investment.[19] Although the opinion was restricted to the competence to conclude the EU-Singapore FTA, it has been crucial in defining the overall division of horizontal and vertical competences between the EU and its MSs in the field of trade and investment protection and in determining how negotiations and conclusions of new IIAs should be conducted.

In this respect, it should be recalled that MSs have always been extremely active in concluding IIAs with third countries. Before 2009, they had concluded around 1,500 IIAs, which amounted to almost half of the 3,400 IIAs in force worldwide.[20] After the implementation of the Lisbon Treaty, all these agreements continued to be valid under public international law, but questions arose regarding their relationship with EU law and with the new EU exclusive competence over FDI. In this respect, in 2012, the European Commission submitted a proposal for a regulation on transitional arrangements for existing BITs of member states with third countries,[21] which finally came into force on January 9, 2013.[22]

17 For the text of the draft agreement of 17 October 2014, see: http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore (19.10.2021).

18 See Request for an Opinion submitted by the European Commission pursuant to Article 218(11) TFEU, Opinion 2/15, July 10, 2015, https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN (19.10.2021).

19 See CJEU, Opinion 2/15, Opinion pursuant to Article 218(11) TFEU – Free Trade Agreement between the European Union and the Republic of Singapore, ECLI:EU:C:2017:376, para. 305; for a comment, see the study commissioned by the European Parliament, EU investment protection after Opinion 2/15: Questions of competence and coherence. PE 603.476 (March 2019), http://www.europarl.europa.eu/thinktank (19.10.2021).

20 Basedow, 2021, p. 643.

21 European Commission Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries COM (2010), July 7, 2010, 344 final.

22 Regulation No 1219/2012 of the European Parliament and of the Council of December 12, 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries OJ L 351/40 (2012).

According to the regulation, all BITs concluded by MSs will remain in force, while they will be progressively replaced by IIAs concluded by the EU with the same non-EU counterparts. Moreover, the regulation has established an authorization mechanism, according to which the Commission can authorize, under certain circumstances, MSs to open formal negotiations with a third country to amend or conclude a (new) BIT.[23] In particular, MSs shall (1) notify the Commission of all BITs which they wish to maintain – this process is referred to as "grandfathering" – and (2) request authorization from the European Commission to open negotiations or sign a (new) BIT.[24]

Articles 7–11 of the regulation illustrate the procedure under which MSs can be authorized to enter into negotiations with a third country to amend an existing BIT or conclude a new one; Article 12 is instead dedicated to BITs that had been signed after the implementation of the Lisbon Treaty and before that of the regulation (i.e., between December 1, 2009, and January 9, 2013).

Generally, the Commission cannot grant authorization if the EU has already started IIA-related negotiations with the same third country.

Following the regulation, MSs gave notice of 1,360 pre-Lisbon bilateral investment agreements which they wished to maintain or get authorization for.[25] In accordance with Article 4 of the regulation, the Commission publishes an updated and consolidated list of all BITs that have been signed and concluded by MSs.[26]

To date, the Commission has received around 300 requests from MSs to authorize the opening of formal negotiations on new BITs or amendments to existing agreements,[27] most of which came from the Czech Republic, Hungary, Italy, Lithuania, Malta, Portugal, Romania, the Slovak Republic, and Spain, to conclude BITs with Iran, Kazakhstan, Nigeria, Saudi Arabia, Qatar, and the United Arab Emirates.[28]

Regulation 1219/2012 foresees that eventually, all BITs concluded by MSs would be replaced by EU IIAs, but it does not provide for a specific time. However, the ultimate replacement of all existing MSs' BITs with EU agreements will take time, and the

23 Article 9 of Regulation No (1219/2012).

24 Schacherer, 2016.

25 European Commission Report to the European Parliament and the Council on the Application of Regulation (EU) No 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, April 6, 2020 COM (2020), 134 final, p. 3.

26 During the reporting period, the respective annual lists were published on June 5, 2014 (OJ C 169), April 24, 2015 (OJ C 135), April 27, 2016 (OJ C 149), May 11, 2017 (OJ C 147), and April 27, 2018 (OJ C 149).

27 From February 18, 2020, the Commission has been publishing all its Implementing Decisions on authorizations granted to MSs for BITs. See the official website at https://ec.europa.eu/info/publications/commission-implementing-decisions-eu-equivalence-covid-19-certificates-issued-non-eu-countries_cs (19.10.2021).

28 European Commission Report to the European Parliament and the Council on the Application of Regulation (EU) No 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, April 6, 2020 COM (2020), 134 final, p. 6.

high number of authorizations granted shows that MSs are willing to remain active in negotiating new BITs.[29]

3. IIAs between the EU and third countries: Who is negotiating?

The EU may start negotiations for the conclusion of international treaties on investment, in the form of FTAs with chapters on investment protection, or in the form of BITs. Article 207 TFEU provides that "for the negotiation and conclusion of agreements in the fields of [...] foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."[30]

As already recalled, the CJEU has clarified that the EU and its MSs share competences in concluding international investment agreements with non-EU countries if they do not exclusively cover FDI, as well as on portfolio foreign investment protection provisions and the relevant dispute settlement mechanisms. Indeed, since 2009, the EU has negotiated IIAs in the form of "mixed" agreements, where EU and MSs constitute one party of the agreement, and the relevant third country represents the other counter-party. In particular, there is a tendency to divide the negotiation process of trade-related agreements, in matters where the EU enjoys exclusive competence (which are concluded only by the EU), from the negotiation process of investment agreements, which are concluded as mixed agreements.

Regarding the negotiation process, when the Council gives a green light to start the negotiations,[31] the Commission starts to negotiate with the third country. When the negotiation process is concluded, the Commission sends the text of the agreement for signature to the Council and Parliament. The agreement should then be ratified by the Council, as well as by all MSs, according to their own national procedures.[32] It should be briefly recalled that, under international law, an EU mixed agreement does not affect the scope of international obligations for the EU and its MSs, which are internationally bound by all obligations included in the agreement and not just by "those for which they have the treaty-making or implementing competences under EU law."[33]

Since the implementation of the Lisbon Treaty, the Commission has concluded the negotiations of four agreements covering investment protection, namely the

29 Schacherer, 2016.

30 See: Bungenberg and Herrmann, 2013; Reinisch, 2014, pp. 111–157; Titi, 2015, pp. 639–661.

31 Adopting a decision on the basis of Articles 207(3) and 218(2) of the TFEU.

32 European Parliament A Guide to EU Procedures for the Conclusion of International Trade Agreements Briefing (October 2016), Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593489/EPRS_BRI(2016)593489_EN.pdf (Accessed: 19.10.2021).

33 See: Stegmann, 2019, p. 44; Neframi, 2002, p. 200.

Comprehensive Trade and Economic Agreement (CETA) with Canada,[34] the Global Agreement with Mexico,[35] the Investment Protection Agreement with Singapore,[36] and the Investment Protection Agreement with Vietnam,[37] which have not yet been implemented.[38] Upon implementation, these agreements replace 57 BITs concluded by the MSs. Investment negotiations at the EU level are currently ongoing with several third countries such as China, Chile, Indonesia, Japan, and Tunisia.[39]

The text of the EU IIA negotiated thus far resembles traditional IIAs concluded by MSs. They contain typical obligations regarding, for instance, non-expropriation and fair and equitable treatment and provide for international tribunals that have jurisdiction on the violation of investors' rights, in the context of investor-state disputes. However, they also present some innovative aspects: CETA, for instance, replaces ISDS with an investment court system (ICS), which should reduce conflicts of interest among arbitrators, notably by ensuring the permanent character of the tribunal.[40]

One of the major novelties of IIAs being concluded as mixed agreements by the EU and its MSs is that the EU–and not only MSs–may be involved in investment-related disputes. It follows that a foreign investor may be involved in investment arbitration not only against an EU MS, but also against the EU. In other words, it would be possible to have investor-state arbitrations as well as investor-EU arbitrations.[41] In this respect, one

34 The EU concluded negotiations with Canada for a Comprehensive Trade and Economic Agreement (CETA) in August 2014; it entered into force provisionally in 2017, implying that most of the agreement is now applicable. All national (and in some cases regional) parliaments in EU countries need to approve CETA before it can take full effect. See Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/34.

35 Negotiations between the EU and Mexico started in May 2016, and both sides reached an agreement, in principle, on the trade part in April 2018. As regards the investment protection part, article 5 of Chapter 19 on investment dispute resolution follows Regulation 912/2014. See EU-Mexico Global Agreement, as agreed in principle, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (18.10.2021).

36 European Union and Singapore signed a Free Trade Agreement and an Investment Protection Agreement on October 19, 2018; the Free Trade Agreement entered into force on November 21, 2019, while the Investment Protection Agreement will enter into force after it has been ratified by all MSs according to their own national procedures. See Investment Protection Agreement between the European Union and its Members, of the one part, and the Republic of Singapore, of the other part, http://trade.ec.europa.eu/ doclib/press/index.cfm?id=961 (10. 19. 2021).

37 The EU and Vietnam signed a Trade Agreement and an Investment Protection Agreement on June 30, 2019; the Free Trade Agreement entered into force on August 1, 2020, while the Investment Protection Agreement will need to be ratified by all EU MSs (eight Member States have ratified it as of October 1, 2021). See EU-Vietnam Investment Protection Agreement, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (19.10.2021).

38 CETA and the Singapore Investment Protection Agreement are still in the process of ratification by Member States. The European Parliament gave its consent to the EU-Vietnam Investment Protection Agreement on February 12, 2020, and the Agreement is still subject to ratification by Member States. The text of the modernized EU-Mexico Association Agreement is close to finalization.

39 For the full list, see: https://trade.ec.europa.eu/doclib/html/118238.htm (19.10.2021).

40 Article 8.29 of CETA. See: Gatti, 2020, p. 94.

41 See: Dimopoulos, 2014, pp. 1671–1720.

question arises regarding who should be the respondent in an investor-state/EU dispute settlement and bear the financial consequences of such disputes.

■ *3.1. Who should be the respondent in an investment-related dispute? The EU as a new "litigator" and the question of financial responsibility*

With the EU as a new party in IIAs, together with its MSs, it must be assessed who–the EU or one of its MSs–should be the proper defendant in a case brought by a foreign investor under the relevant IIA.[42]

Usually, investor-state arbitrations occur within the framework of the 1965 International Convention for the Settlement of Investment Disputes between states and nationals of other states (ICSID Convention). However, the EU cannot become a party to the ICSID Convention, since the Convention currently does not foresee accession by an international organization. Whether (and how) the ICSID Convention could be changed in this respect remains an open question.[43]

Nevertheless, the European Commission is likely to intervene as *amicus curiae*–as a "non-disputing party" under Rule 37, paragraph 2 of the ICSID Rules of Procedure–to protect EU interest in the proper interpretation and application of EU law in ICSID arbitration cases brought against an MS.

Indeed, there are several arbitral proceedings of foreign investors against EU MSs based on BITs between EU MSs and/or concerning substantive legal problems related to EU law in which the Commission has filed *amicus curiae* briefs.[44] Among others, we can recall that the Commission sought to intervene in the *Iberdrola v. Guatemala* case, an ICSID proceeding under the Spain-Guatemala BIT.[45] In its application, the Commission claimed to have a "systemic interest" in the interpretation of investment treaties concluded by EU MSs. However, the *ad hoc* annulment committee rejected this request.[46] Moreover, the Commission requested to intervene as a non-disputing party in the ICSID *AES v. Hungary* case, without success,[47] and in the *Electrabel v. Hungary* case, with success,[48] and succeeded in intervening in a series of international arbitrations

42 See: Hoffmeister, 2012, p. 81.

43 See: Burgstaller, 2012, p. 207.

44 Eastern Sugar being the best-known example in this regard (Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case 088/2004, UNCITRAL ad hoc Arbitration).

45 Iberdrola Energía S.A. v. Republic of Guatemala ICSID Case No. ARB/09/5.

46 See Iberdrola Energía S.A. v. Republic of Guatemala ICSID Case No. ARB/09/5, Decision on Annulment (January 13, 2015), Para. 25.

47 AES Summit Generation Limited and AES-Tisza Ero¨mu¨Kft v. Republic of Hungary, ICSID Case ARB/07/22. The arbitral tribunal ruled that the EU could, at least in principle, intervene in the arbitration; however, it denied access to the parties' submissions. For a comment, see: Hoffmeister, 2012, p. 92.

48 Even though the arbitral tribunal dismissed the case, it affirmed that ECT should be interpreted, if possible, in harmony with EU law, in that welcoming the Commissions submissions as amicus curiae. See Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, paras. 1.18 and 4.130.

involving the Czech Republic against investors in the PV power sector arbitrated under the UNCITRAL procedural rules.[49]

A peculiar *amicus* petition was filed in the *Micula v. Romania* case,[50] where the Commission submitted that the applicable Sweden-Romania BIT should be interpreted considering EU law–in light of EU state aid regulation–as otherwise, the award would be unenforceable in the EU. After the award was issued, the Commission sent a letter to Romania on May 26, 2014, informing it of the decision to issue a suspension injunction obliging Romania to suspend any action that may lead to the enforcement of the pending part of the award.[51] For the first time, the Commission's role evolved from its mere participation as *amicus curiae* to an active stance against the enforcement of an ICSID award.

Only time will tell us whether the EU will maintain its increasingly active presence as a non-disputing party and the effect of these interventions in investor-state proceedings.[52]

It should also be noted that the EU is already a party to the Energy Charter Treaty (ECT), which includes an elaborate investor-state dispute settlement regime. It is apparent from the statement made by the EU in relation to the ECT that the EU can become a party to an investment arbitration proceeding if that proceeding pertains to issues for which it bears the competence.[53]

Thus, what about the dispute settlement mechanisms envisaged in the investment-related agreements that the Commission is negotiating or that have already been concluded? In addition to the issue of *ius standi,* the allocation of the financial responsibility connected to investment arbitration–namely, managing the financial consequences of such disputes–should be addressed.

49 Antaris Solar GmbH and others v. Czech Repulic PCA Case No (2014), 01, Award C.W. Europe Investments Ltd v. Czech Republic PCA Case No (May 2, 2018), I, pp. 2014–2022, Award Voltaic Network GmbH v. Czech Republic PCA Case No (May 15, 2019), pp. 2014–2020, Award Photovoltaik Knopf Betriebs-GmbH v. Czech Republic PCA Case No (May 15, 2019), pp. 2014–2021, Award (May 15, 2019) and WA Investments-Europa Nova Limited v Czech Republic PCA Case No 2014–2019, Award (May 15, 2019).

50 Ioan Micula, S.C. Viorel Micula European Food SA, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania ICSID Case No. ARB/05/20.

51 European Commission State Aid SA (2014)/C) – Romania Implementation of Arbitral award Micula v Romania of December 11, 2013, 38517, C (2014) 6848 final, October 1, 2014, para. 5.

52 For a comment see, among others, González-Bueno and Lozanoon, 2015.

53 European Communities (Statement sent by Council and Commission on November 17, 1997), Energy Charter Secretariat, Transparency Document Policies, Practices and Conditions of Contracting Parties Listed in Annex ID not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage as Provided by Contracting Parties (in accordance with Article 26(3)(b)(ii) of the Energy Charter Treaty). However, the statement makes it clear that "[t]he Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice."

Preliminarily, the competence allocation in external relations between the EU and its member states must be considered as *res inter alios acta* for third States. But it is quite an important issue within the European framework, and one may wonder whether it may relieve a defendant MS from the financial burden derived from their liability.[54]

The Commission has proposed a Regulation of the European Parliament and the Council *to establish a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party* on June 21, 2012 (Draft Regulation).[55] The relevant Regulation (No 912/2014) was finally adopted on July 23, 2014,[56] and came into force on September 17, 2014.[57]

The Commission has stressed in the Draft Regulation that the external responsibility of the EU must be determined "on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty."[58] This was clarified in Regulation 912/2014, in which Preamble n. 3 affirms that:

> [i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will, in principle, be responsible for defending any claims alleging a violation of rules included in an agreement that fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.

The Regulation is built upon three main principles: (1) the overall operation of the allocation of financial responsibility must be "budget neutral" regarding the EU, implying that the EU should only bear the costs triggered by acts of its institutions; (2) a third-country investor should not be disadvantaged by the need to manage the financial responsibility within the EU; and (3) the mechanism must respect the fundamental principles governing the EU's external action as established by the Treaties and the case law of the ECJ, in particular, that of the unity of external representation and sincere co-operation.

54 See: Tietje, 2009.

55 Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party, COM (2012), June 21, 2012, 335 final.

56 Published in the Official Journal of the European Union on August 28, 2014.

57 Article 25 of Regulation No 912/2014. For a general analysis of the Regulation, see: Dimopoulos, 2014, p. 1671; Baetens, Kreijen and Varga, 2014, p. 1203.

58 Explanatory Memorandum of the European Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is a Party COM (2012), June 21, 2012, 335 final, p. 4.

Regulation 912/2014 provides for the criteria to determine, on the one hand, the financial responsibility between the EU and the member state and, on the other, the *ius standi* before investor-State/EU dispute settlement tribunals.

Article 3 of Regulation 912/2014 links financial responsibility to the question of who– the EU or a member state–undertakes the conduct resulting in the foreign investor's claim.[59] This implies that when the measures concerned are taken by EU institutions, financial responsibility should rest with the EU institutions;[60] *vice versa*, when the measures complained of are taken by a member state of the EU, financial responsibility should rest with that member state.[61]

When the actions of the member state are "required" by the law of the EU, financial responsibility lies with the EU.[62] Here, the member state transposes an EU legislative act into its domestic regime.[63]

After determining the criteria for apportionment of financial responsibility, Chapter III of the Regulation provides the criteria to determine who should act as a respondent in an arbitral dispute (*ius standi*). Similar to financial responsibility, where the EU has afforded the treatment, it will act as the respondent in the claim.[64] Likewise, the member state acts as the respondent where it has afforded the treatment.[65]

Interestingly, and different from the rules of EU as a respondent before WTO dispute settlement organs, the Regulation in question does not provide for the possibility of joint responsibility of the EU and its MSs; rather, it adopts an "either/or" approach in determining the respondent status and allocating financial responsibility.

One might discuss whether the internal distribution of financial responsibility as a result of the Regulation is convincing and in line with Article 207(6) TFEU, which expressly provides that the competences of the EU

> ...in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization.

Indeed, it is likely that the international responsibility of the EU regarding an investment agreement touches upon the internal competence of the member state.[66]

59 See: Kleinheisterkamp, 2014, p. 458.
60 Article 3, paragraph 1, letter a of the Regulation.
61 Article 3, paragraph 1, letter b of the Regulation.
62 Article 3, paragraph 1, letter c of the Regulation.
63 Opinion of Advocate General Geelhoed in the ECJ, Michael Hölterhoff v Ulrich Freiesleben, Case C-2/00, ECR I-04187 (2002), para. 31.
64 Article 4 of the Regulation.
65 According to Article 5 of the Regulation. Article 9, paragraph 1, letter b leaves the possibility that a member State may turn down responsibility by not reacting within 30 days after receiving the notice of initiation of the arbitral proceedings.
66 Tietje, Sipiorski and Töpfer, 2012.

Thus, for example, although the EU may conclude an international investment agreement that applies to investment in the area of education,[67] the organization of domestic education remains a regulatory competence of MSs.[68] In the event of a claim brought by a foreign investor in the education sector against certain legislative measures adopted by the member state, either the member state or the commission could act as the respondent. Moreover, if the arbitral tribunal rules that the investment agreement has been violated, it also has the authority to rule on both the financial compensation and the conformity of the member state's law on education with the relevant investment treaty. Therefore, an investment agreement concluded by the EU may also affect the internal competence of member states.[69]

The issues dealt with by the financial responsibility Regulation 912/2014 seem to be mostly technical. However, by including rules on the conduct of investor-state dispute settlement procedures, the proposal anticipates and indirectly frames the rights that future EU investment agreements can grant to non-EU investors. Generally, foreign investors must accept that they cannot choose whom to bring their claims.[70]

However, the Regulation is neither sufficient nor appropriate for guaranteeing legal certainty regarding the involvement of the EU in future investor-EU/member state(s) arbitrations.

Thus far, the IIAs negotiated and/or concluded by the EU include specific provisions for the allocation of financial responsibility between the EU and its member states.

Indeed, the EU-Singapore Investment Protection Agreement, EU-Vietnam Investment Protection Agreement, EU-Mexico Global Agreement, and CETA follow Regulation 912/2014 when it comes to regulating the *ius standi* question in investor-state dispute settlement mechanisms,[71] but do not mention the relevant financial responsibility.

67 This may be subject to the requirement of unanimity decision in the Council according to Article 207, paragraph 4 TFEU. The example is from Tietje, Sipiorski and Töpfer, 2012.

68 Article 165, paragraph 4 TFEU: "In order to contribute to the achievement of the objectives referred to in this Article: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States." See also Article 6 TFEU: "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member States. The areas of such action shall, at European level, be: [...] (e) education, vocational training, youth and sport [...]" and Article 2, paragraph 5 TFEU: "In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."

69 Tietje, Sipiorski and Töpfer, 2012.

70 Kleinheisterkamp, 2014, p. 459.

71 Article 3.5 of the EU-Singapore Investment Protection Agreement, Article 8.21 of CETA. Article 3.32 of the EU-Vietnam Investment Protection Agreement and Article 5 of Chapter 19 of the EU-Mexico Global Agreement.

Accordingly, only the provisions of the EU Regulation will apply to determine who should "pay" in case of investor-EU/member state(s) arbitration. Given the lack of an EU investment policy dealing with substantial treatment of both EU and non-EU investors, it would be much safer to pause ongoing negotiations with important trading partners, such as China, and first work on the substantial framework for FDI protection. Thus, it would be possible to ensure the highest possible degree of legal certainty for EU and non-EU investors.

An–albeit weak–effort in this regard can be found in the Regulation on Financial Responsibility. According to preamble 4,

> Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, *but not a higher level of protection*. Union agreements should ensure that the Union's legislative powers and right to regulate are respected and safeguarded (emphasis added).

This would avoid discrimination between foreign and EU investors, making the framework for managing financial responsibility subject to the interpretative safeguard that future EU investment agreements cannot provide more protection to foreign investors than what EU investors are granted under the current EU law. Thus, this is a politically attractive solution. However, it is unclear how ongoing negotiations will address these legal problems.

With the conclusion of the new IIAs by the EU with third countries and the subsequent flow of arbitrations, it will be intriguing to see how the system developed by the Regulation effectively works in practice.[72]

4. Concluding IIAs with non-EU Countries: Some concluding remarks

As noted in the previous paragraphs, the new exclusive competence of the EU over FDI has drastically changed how IIAs negotiate with third countries.

First, hereafter, IIAs that involve MSs–except for those cases where individual MSs are authorized to conclude a new BIT with a third country, according to the provisions included in Regulation No 1219/2012–will have mixed agreements of the EU, where both the EU and MSs are bound by relevant international obligations. Second, the EU would also tend to be sued in investment dispute settlement, which brings along the issues of *ius standi* and financial responsibility. Thus far, only four investment

72 Baetens, Kreijen and Varga, 2014, pp. 1203–1260.

agreements have been concluded by the EU,[73] and none of them have (fully) been implemented. Accordingly, there has been no occasion for the EU to be involved in investment-related disputes. Should this happen, it would be interesting to see how EU institutions and MSs would address the above mentioned questions, especially with respect to the financial burden of investment dispute settlement.

73 Trade and investment negotiations have been launched with Malaysia, Philippines, Myanmar, India, Australia, Chile. Moreover, negotiations continue for an Investment Protection Agreement. See European Commission, Overview of FTA and other Trade Negotiations, October 2021, https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (19.10.2012). It is also worth recalling that on December 30, 2020, the EU and China concluded, in principle, the negotiations on the Comprehensive Agreement on Investment (CAI). Both sides agreed to continue the negotiations on investment protection and investment dispute settlement, to be completed within two years of the signature of the agreement (Article 3 of Section VI of CAI). However, on May 20, 2021, the European Parliament voted to suspend ratification efforts of CAI with China, following Beijing's sanctions of five European officials. See IISD, 2021.

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DALIBOR ĐUKIĆ[1]

Christian Values in the Constitutions of Serbia and Greece—A Comparative Overview

ABSTRACT: *Christian values are the foundation of modern European societies. Suffice it to say that the most important European philosophers and cultural movements have originated from Christian environments. The constitutional history and tradition of the majority of the European countries are proof of the strong influence of Christianity and Christian churches on the creation and constitutional organisation of the modern European states. The subject matter of this work is a comparative analysis of the current Constitution of the Republic of Serbia and the Constitution of Greece, with the aim of identifying the Christian values comprised in their constitutional provisions. This work has two fundamental hypotheses. The first one is that the constitutions of both these countries comprise a substantial number of constitutional norms with Christian origins and foundations. The second hypothesis is that the Constitution of Greece comprises more provisions that demonstrate close connections between the state and Christianity. This is a consequence of the fact that in Greece, there have been no interruptions in the continuity of the constitutional tradition, unlike the case with Serbia during the communist rule.*

KEYWORDS: Christian values, Constitution of Serbia, Constitution of Greece, state-religion relations, constitutional principles.

1. Introduction

Discussions about the contemporary constitutional nature of secular states rarely consider the contribution of religion and religious organisations to the development of the fundamental constitutional principles. Despite the close connections between the constitutional tradition of the majority of the European countries and religion, the prevailing perspective in most cases is that the contemporary constitutions and their principles are the result of the French revolution, liberalism, and secularism. This

1 Assistant Professor, Faculty of Law, University of Belgrade, Serbia, dalibor.djukic@ius.bg.ac.rs.

https://doi.org/10.47078/2022.1.57-74

perspective disregards the fact that all the above mentioned movements originated from the Christian milieux and in societies wherein the Christian churches played a dominant role. Although the French revolution was characterised by an anticlerical attitude, one cannot claim that all its consequences and all the accomplishments of that event preserved such character. Therefore, it would be beneficial to consider the extent to which modern constitutions are based on Christian values, as well as whether certain values claimed *a priori* to be the result of anti-religious and anti-clerical movements are actually values that have been promoted by Christianity for centuries in European societies, and are still being promoted.

The subject matter of this work is an analysis of two constitutions: the 2006 Constitution of the Republic of Serbia and the 1975 Constitution of Greece, inclusive of all the amendments. The Constitutions of the above mentioned states have been chosen for comparative analysis for multiple reasons. First, these states have different constitutional traditions and histories. The Constitution of the Kingdom of Serbia and the Constitution of the Kingdom of Greece did not differ significantly in the 19th century because they had originated from the same models. However, the constitutional histories of Serbia and Greece differed significantly in the 20th century. Serbia became a part of Yugoslavia, which was a multi-ethnic and multi-confessional state. After World War II, it became a communist state, and during this period, the Church was mentioned in the Constitution only negatively. Thus, a discontinuity occurred in the constitutional history of Serbia during the 20th century. The non-existence of any explicit mentions of Christianity and Christian values in the Serbian Constitution was a consequence of historical circumstances and it is the heritage of the socialist constitutional tradition.

The Constitutions of Serbia and Greece differ in respect of the proclaimed constitutional model of the relationship between the state and the Church. Serbian constitution-makers adopted the model in which the state and the Church are separate entities. On the other hand, the Greek Constitution specifies that the Orthodox religion is 'the predominant religion' in Greece. Although not representing a classical model of the 'state Church' that exists in Denmark and England, constitutional proclamation of the predominant religion has certain legal consequences. This work will focus on an analysis of the extent to which different constitutional models of the relationships between the state and the Church are impacting the existence of Christian values in constitutional texts.

The Greek Constitution comprises provisions that are a consequence of the special legal position of individual entities of the Church. The Constitution thus regulates the legal regime of Mount Athos. Since it is a unique phenomenon in the European continent, it is to be expected that the Serbian constitution-makers would not regulate any part of the Serbian territory, any church, or any state entity in a similar manner.

The main hypothesis of the work is that the Constitutions of both states include constitutional norms that originate from Christian values. Although it can safely be said that the constitution-makers did not intend to bestow constitutional character upon individual Christian values, it does not have any impact on the significance of the fact

that the basic principles of contemporary constitutionalism are compatible with the Christian dogma and values that Christianity has promoted for centuries in Christian societies. In order to achieve the objective of this work, the comparative method will be used first, followed by the historical, dogmatic, and descriptive-analytical methods.

2. Preamble

The Constitution of the Republic of Serbia was adopted in 2006.[2] The main reasons for its adoption include the democratic changes in 2000 and the change of the Serbian statehood as Serbia became a sovereign and independent state on the same year.[3] Another reason the constitution was adopted was that the constitution-makers wished to point out that the territory of Kosovo and Metohija was an integral part of the territory of the Republic of Serbia.[4] The Greek Constitution was also a post-revolution constitution from 1975. The seven-year dictatorship of the colonels ended in 1974. The new constitution established a presidential parliamentary democracy.[5] Although the constitution was adopted with a simple majority of votes, it gained broad support over time from the political forces in Greece.[6] The constitution was amended several times, and the last revision occurred in 2019.[7]

Although a vast majority of state constitutions begin with a preamble, legal science has long ignored it. It was the question of the place of Christian values in the Constitution of the European Union that spurred interest among researchers regarding this subject matter.[8] One of the common characteristics of the Constitutions of Greece and Serbia is that both have preambles. Concerning the formal characteristics of both preambles, it can be said that they are among the shorter constitutional preambles,[9] and that both lack any particular title.[10] The most important difference between them is the formal position of the preamble in the constitutional text. The Preamble of the Greek Constitution is positioned after the title of the constitution and is an integral part of it. Despite this, the predominant view in Greek scientific texts is that the preamble is of a declarative character.[11] The Preamble of the Serbian Constitution precedes the

2 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006.
3 Marković, 2006, p. 7.
4 Marković, 2006, p. 7.
5 Parliamentary democracy is a notion that is broader than that of 'parliamentary government', and it includes the participation of the majority of citizens in controlling the exercising of the ruling power in its entirety. Pejić, 2016, p. 69.
6 Constitutional History.
7 Published in the Official Government Gazette of the Hellenic Republic, No. A' 211/24.12.2019.
8 Bačić, 2013, p. 7.
9 Simić, 2020a, 188. The Preamble of the Greek Constitution is among the shortest preambles in the world. It comprises only 10 words. Kutlešić, 2010, p. 64.
10 In some constitutions, the preamble has its own specific title (such as 'The Preamble'). This is mainly the case with the African countries. Radovanović, 2020, pp. 100–101.
11 Papadopoulou, 2015, p. 41.

title of the legal act itself (Constitution). The classical constitutional theory generally holds that preambles that are positioned before the title of the legal act do not have a legally binding effect since they are not integral parts of the constitution.[12] However, more recent theoretical approaches, which take into account the case law of the constitutional courts and the relevance of the contents of the preamble from constitutional and legal aspects, do not analyse its legal nature solely from the aspect of its formal characteristics. This is the reason an attitude supporting the normative function and binding legal effect of the Preamble of the Constitution of the Republic of Serbia has prevailed in recent scientific texts.[13] Hence, another common characteristic of the two preambles is that consensus is lacking in the constitutional theory about their legal nature.

It was stated in the Preamble of the Greek Constitution that the constitution was adopted 'In the name of the Holy and Consubstantial and Indivisible Trinity'.[14] This is not the only mention of the Holy Trinity in the Greek Constitution. Art. 33, which regulates the text of the oath taken by the President of the Republic, as well as Art. 59, which prescribes the text of the oath taken by the parliamentary deputies, also mentions the Holy Trinity. Although the doctrine of the Holy Trinity is fundamentally common to all Christians, the Greek constitution-makers identify it with only the Orthodox denomination.[15] This is evident from the provisions of Art. 59 of the Constitution, which proposes a different text for the oath to be taken by deputies not of the Orthodox denomination. The fact that the supreme legal act in Greece was adopted 'In the name of the Holy Trinity' is indicative of the close relations between the Greek state and Christianity, despite the lack of consent in the relevant literature concerning whether the preamble has any legal effect.

The Preamble of the Serbian Constitution is somewhat longer and is seemingly free from any religious dimensions. The constitution-maker refers to the state traditions of the Serbian people and equality among citizens and ethnic communities in the preamble in order to then focus on the main topic of the preamble, namely, the constitutional and legal position of Kosovo and Metohija. It is pointed out in the preamble that the Province of Kosovo and Metohija is a part of the territory of the Republic of Serbia and that certain constitutional obligations of all the state authorities arise from such a position of the province.[16] Thus, the preamble includes both declarative and prescriptive elements: the declarative ones include the references to state tradition and equality among the citizens, and the prescriptive ones include the provisions serving to confirm that Kosovo is a part of the Republic of Serbia and introducing the 'obligation of all the state authorities to represent and protect the Serbian state interests in Kosovo and Metohija in all the domestic and foreign political relations'.[17] Despite the initial

12 Marković, 2015, p. 43.
13 Simović, 2020, p. 191.
14 Constitution of Greece, preamble.
15 Papastathis and Maghioros, 2015, p. 345.
16 Constitution of Serbia, preamble.
17 Simović, 2020b, p. 30.

impression that the preamble does not include any religious elements, it should be stressed here that Kosovo and Metohija, along with their territorial dimension, have an exceptionally important spiritual dimension for the Serbian people, as it is a territory that is a symbol of Serbia's Christian and traditional values.[18]

The preambles predominantly include mentions of the purpose and objectives of the principal part of the constitution in question.[19] In that sense, the facts that the constitution was adopted in Greece in the name of the Holy Trinity and that the Serbian preamble introduced the obligation to protect the state interests in Kosovo and Metohija are indicative of the inspiration for the basic objectives and purpose of the constitutions being found in specific Christian values. In the Greek Constitution, the connection with Christianity is direct and obvious, while in the Serbian Constitution, it is indirect and concealed.

3. Constitutional model of the relationship between the state and the church in Greece

In Art. 3, the Greek Constitution stipulates that the Eastern Orthodox Church of Christ has the status of 'The prevailing religion in Greece'.[20] Many theoretical works have been dedicated to the implied meaning of the term 'prevailing religion'.[21] When the different attitudes are taken into account, it can be concluded that there are at least four different theoretical approaches. Some authors are of the opinion that the term 'prevailing religion' implies the official religion in the state, i.e. the state church.[22] Authors that conclude that the term implies the state religion share a similar opinion.[23] Nevertheless, the 'prevailing religion' enjoys special care and protection by the state and it has a unique legal position. However, the authors that promote this opinion point out that the existence of a state or official religion by no means implies that the rights of the members of other denominations are reduced or limited, or that the constitutional principle of equality of all denominations is violated, since all the fundamental rights are guaranteed to all the religious organisations, irrespective of their constitutional and legal status.[24]

Contrary to that interpretation is the opinion that by the term 'prevailing religion', the constitution-maker implies the religion of the vast majority of the population

18 Čizmar, 2010, p. 113.
19 Mikić, 2014, p. 434.
20 Constitution of Greece, Art. 3.
21 A similar term was used in the 1869 Constitution of the Principality of Serbia, according to which the Eastern Orthodox religion was the 'predominant religion' in Serbia. Mrđenović, 1988, p. 76.
22 Παπαστάθης, 2007, p. 57.
23 Πουλής, 1982, pp. 965–971. It is an interesting fact that the term 'state religion' was used in the Constitutions of the Kingdom of Serbia. Mrđenović, 1988, p. 107 and p. 147.
24 Παπαστάθης, 2007, pp. 57–60.

of Greece.[25] Despite the arguments opposing this opinion that contend that the constitution does not include statistical data on the population of Greece,[26] it predominates the more recent literature. The fact that the vast majority of the citizens of Greece belong to the Orthodox religion has certain legal consequences, including the special constitutional and legal position of the prevailing religion. That opinion is corroborated by the historical interpretation of this constitutional norm, since the general rapporteur of the parliamentary majority claimed during the discussions on the adoption of a new Constitution that the term 'prevailing religion' denoted the religion accepted by the vast majority of the Greek people.[27]

Additionally, some attitudes fall midway between the two above mentioned extremes. According to these attitudes, the term 'prevailing religion' implies that all religions are equal, and that the Orthodox religion is only the first among them (*prima inter pares*). According to this perspective, the Orthodox Church, towing to its historical connections with the state, as well as its civilisational role in the development of the Greek state, has an honorary place among all the denominations in the country.[28] Such an interpretation is incompatible with other constitutional provisions, which introduce privileges for the Orthodox Church in Greece, which are not solely of an honorary nature.

Another approach attempting to reconcile the constitutional and legal position of the Orthodox Church and the principle of equality of all religious organisations is the theory of the two circles representing two different areas of regulation. The first circle includes the regulation of the legal relationship between the state and religious organisations, and the second circle includes the protection of the rights proclaimed by the Constitution. Although differentiation between the 'prevailing religion' and other religions is permitted in the first circle, in the second circle, the introduction of any differentiation or the mirroring of differences from the first circle in the second circle is not permitted.[29] The problem with such an interpretation is that it indicates an unnatural division between the legal position of the religious organisations and their rights, as well as between the legal position of religious organisations and the right to freedom of consciousness and religion.

The Constitution of Greece, in addition to proclaiming the Orthodox religion as the prevailing one, enters to an extent into the field of its autonomy and internal organisation. The constitution dictates that it is autocephalous, i.e. independent of all other Orthodox Churches.[30] At the same time, according to the constitution, the Orthodox Church of Greece is obliged to maintain unity with the Ecumenical Patriarchate of Constantinople and all other Orthodox Churches. Concerning the internal organisation of the Greek Church, the constitution lays down the management of the 'Holy Synod of

25 Τρωιάνος, 2003, p. 112.
26 Παπαστάθης, 2007, p. 56.
27 *Πρακτικά των συνεδριάσεων των υποεπιτροπών της επι του Συντάγματος 1975 Κοινοβουλευτικής Επιτροπής,* 1975, p. 402.
28 Κυριαζόπουλος, 1999, pp. 91–92.
29 Τσάτσος, 1993, p. 608.
30 Parasnath and Maghioros, 2015, pp. 350–353.

serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928'.[31] The 1850 Tome is an act based on which the Church of Greece was granted its autocephaly status, and owing to the Patriarchal and Synodal Act of 4 September 1928, the territories of the northern Greece were placed under the governance of the autocephalous Church of Greece.[32] Since the jurisdiction of the Orthodox Church of Greece does not cover the entire territory of Greece,[33] the constitution prescribes that the existence of other ecclesiastical regimes is not contrary to the constitution.[34] Although the constitution does not regulate the field of autonomy of the Orthodox Church of Greece, making references to the internal ecclesiastical regulations still leaves some space for the protection of ecclesiastical self-government.

Finally, it can be concluded that the relationship of the state and the Orthodox Church in Greece is regulated in an imprecise manner, to grant potential for different interpretations. This so-called 'rubber norm' permits extensive interpretations and arbitrary application. That is why these relations are fluid and changeable, and they can hardly be categorised in any constitutional model of the relationships between the state and the church.[35]

The Constitution of Greece regulates the position of other churches and religious communities in Art. 13, which guarantees inviolability of the freedom of consciousness and enjoyment of personal and civil rights irrespective of religious affiliation. The constitution protects the freedom of consciousness as an absolute right.[36] The Constitution of Greece introduces the category of 'known denominations' for religions that do not have the status of the 'prevailing religion'. It is not specified in the constitution which religious organisations comprise the known religions. That subject matter has been regulated by the Law on Organization of the Legal Form of Religious Communities and their organizations in Greece since 2014, and it prescribes the following: 'Every religion and doctrine for the exercise of public worship of which an authorization to establish and operate a church or worship place is into force, is presumed to be a known religion'.[37] According to the constitution, all known religions are free and enjoy freedom of expression of religious beliefs. As opposed to the freedom of consciousness, freedom of expression of religious beliefs must be limited. The Greek Constitution restricts the freedom of expression of religious beliefs by public order, public morality, and express prohibition of proselytism.

31 Constitution of Greece, Art. 3.
32 It is about the so-called New Lands which continue to belong to the Ecumenical Patriarchate from the spiritual point of view. Papastathis and Maghioros, 2015, p. 353.
33 Τρωιάνος, 1984, pp. 463–539.
34 Constitution of Greece, Art. 3, sec. 2.
35 Κονιδάρης, 2000, p. 98.
36 Papastathis and Maghioros, 2015, p. 368.
37 Law on Organization of the Legal Form of Religious Communities and their organizations in Greece, Art. 17.

4. Constitutional model of the relationship between state and church in Serbia

The Serbian constitution-makers chose the system of dissociation of the state and the Church. The Constitution of the Republic of Serbia stipulates in Arts. 11 and 44 that churches and religious communities are separate from the state.[38] Debates in Serbian literature have revolved about the type of dissociation of the state and churches and religious communities. On one side are the authors who maintain that the constitution introduced a system of strict separation of the state and the church,[39] and on the other side are those who believe that the type of separation of the state and religious organisations is not determined by the constitution and that the system of cooperative separation has already been rooted in Serbian legislation.[40] This dilemma was resolved by the Constitutional Court of the Republic of Serbia, which explicitly concluded in two judgements that the system of strict separation had not been applied in Serbia, and that the system of cooperative separation of the church and state was being applied instead.[41]

When speaking about the legal position of churches and religious communities, as well as in general about the position of religion in the legal order, the provision of the constitution that prescribes that the secular character of the state is one of the constitutional principles is of particular importance.[42] The question here is whether the secular character of the state means that there shall be no space in the public sphere for religion and that cooperation between the state and religious organisations is not possible because it would violate one of the constitutional principles. The practice in secular states, as well as the multitude of doctrinal attitudes,[43] clearly indicates that the secular character of the state is not an obstacle for the implementation of various levels of cooperation between the state and religious organisations. Bearing in mind the above, it can be claimed that the Constitution of the Republic of Serbia does not restrict cooperation between the state and churches and religious communities, although the establishment of their institutional unity is prohibited.

38 Constitution of the Republic of Serbia, Art. 11 and 44.

39 Draškić, 2013, pp. 38–39; Marinković, 2011, p. 379; Milošević, 2020, p. 180.

40 Avramović, 2011, pp. 298–299; Đurić, 2013, p. 45; Rajić Ćalić, 2019, p. 743; Đurić and Trnavac, 2018, p. 98.

41 Decisions of the Constitutional Court of the Republic of Serbia IUz- 455/2011 and IUo-175/2012.

42 Constitution of the Republic of Serbia, Art. 11.

43 András Sajó asserts that 'Secularism is a somewhat unfortunate term for use in constitutional theory. It is overloaded—it refers to different, albeit interrelated, concepts in different languages and according to different disciplines'. Sajó, 2008, p. 608.

5. Constitutional protection of Christian values in the constitution of Greece

The Constitution of Greece comprises a series of provisions that protect the ultimate Christian values and the reputation of Christian Churches and all other religious organisations. Art. 3 of the Constitution of Greece, which has been mentioned above, includes a regulation governing the protection of the text of the Holy Scripture: 'The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited'.[44] The Holy Scripture has exceptional importance for Christian spirituality and identity as the source of Christian doctrine.[45] Constitutional and legal protection is enjoyed only by the 'official translation' of the Holy Scripture. Since the Holy Scripture is available in its original form in archaic Greek (*koine*), its translation into the Modern Greek language is subject to approval by the Greek Church and the Great Church of Christ in Constantinople. This does not mean that unofficial or private editions of these translations of the Holy Scripture may not be published. Nevertheless, constitutional protection of the official text of the Bible is indicative of the importance that Christianity and its system of values in the Greek Constitution.

The Constitution of Greece guarantees freedom of the press, and prescribes limitations of such freedom as well. One of the limitations is established in Art. 14, paragraph 3, which stipulates that the press can be curtailed following a publication in case of 'an offence against the Christian or any other known religion'.[46] Concerning education, the Greek constitution-makers prescribe that its objective is, among other things, 'the development of national and religious consciousness'.[47] Since the vast majority of the population is of the Orthodox religion, it is clear that the development of religious consciousness must be to some extent related to Christianity, while the rights of members of other religions are not reduced. Ownership right of some specific property types, such as mines, caves, archaeological sites, lakes, abandoned spaces, etc., is regulated by Art. 18 of the constitution, as is the ban on expropriation of agricultural land that is under the ownership of three monasteries under the jurisdiction of the Ecumenical Patriarchate, as well as any property of the Patriarchates of Alexandria, Antiocheia, and Jerusalem and the Holy Monastery of Mount Sinai.[48] Thus, special care

44 Constitution of Greece, Art. 3, sec. 3.

45 Christian spirituality can be generally described as a set of beliefs, values, and way of life that reflects the teachings of the Bible and the way in which Christians express their faith. Baah-Odoom, 2016, p. 2414. For additional information, see Childs, 1993, pp. 3–6. Dunn et al., 2010.

46 Constitution of Greece, Art. 14, sec. 3.

47 Constitution of Greece, Art. 16, sec. 2.

48 In the text of the constitution, these monasteries are mentioned individually: the Monasteries of Aghia Anastasia Pharmacolytria in Chalkidiki, Vlatadhes in Thessaloniki, and Ioannis the Evangelist Theologos in Patmos. Constitution of Greece, Art. 18, sec. 8.

has been demonstrated for the property of the Orthodox churches, the seats of which are not located in the territory of Greece.

The Constitution also prescribes the text of the oath to be taken by the President of the Republic and the deputies in the Greek Parliament. In both cases, the oath is taken 'in the name of the Holy and Consubstantial and Indivisible Trinity'.[49] The Constitution of Greece envisages that the heterodox deputies may adjust the oath to their religions or beliefs. Such an option, however, has not been envisaged in the case of the oath to be taken by the President of the Republic. It could be claimed that the constitution-makers preferred an Orthodox Christian as the President of the Republic.[50] The Constitution of Greece also prescribes additional protection of the freedom of consciousness as well as of the legal position of religious organisations by envisaging that the proposals of the laws relating to the issues regulated by Art. 3 (the prevailing religion) and Art. 13 of the constitution (freedom of consciousness and freedom of religion) would be discussed exclusively in parliamentary plenum.[51] Another mechanism of additional protection was established by the constitutional provision according to which any revision of the constitution whereby Art. 13, paragraph 1 of the constitution—which protects the freedom of consciousness—would be amended was prohibited.

Art. 105 of the Constitution of Greece also relates to Christian values. In itself, this article substantially represents the constitution.[52] It comprises a series of provisions regulating the position of Mount Athos, which is, according to the constitution, a self-governing territory of the Greek state. The constitution recognises the existing legal regime and relinquishes the governance of Mount Athos to monastic institutions. Few tasks, such as protecting security and public order and exercising judicial powers, remain under the purview of the Greek state.[53]

6. Constitutional protection of Christian values in the constitution of Serbia

The Serbian Constitution does not include a substantial number of provisions that could be directly linked to Christian values. This is a consequence of the current Serbian Constitution originating from the tradition of socialist constitutionality.[54] It would be unfair to say that there had been no deviation from it. The term 'church' has been used in the 2006 Serbian Constitution in a positive sense, unlike the case with the 1946 FPRY Constitution, wherein it has been used only negatively. Specifically, the term 'religious community' was consistently used in that constitution to refer to

49 Constitution of Greece, Art. 33, sec. 2 and Art. 59, sec. 2.
50 Παπαστάθης, 2007, p. 56.
51 Constitution of Greece, Art. 72, sec. 1.
52 For information on the constitution in the material sense, see Goldoni and Wilkinson, 2018, pp. 567-597.
53 Νικόπουλος, 2017, p. 155.
54 Marković, 2006, p. 6.

religious organisations, and the term 'church' was used only in three occasions, when prescribing that the state and school are separate from the church and prohibiting any abuses of the church for political purposes.[55] Not a single constitution adopted after that one contained the word 'church'.[56] Although these constitutional regulations pertained equally to churches and religious communities, it indicated that the term 'church' was used solely in a negative context.[57] However, in the 2006 Serbian Constitution, the term 'religious communities' was replaced by 'churches and religious communities' to ensure that the special significance of Christianity was indeed recognised, since the church is a special form of a religious society that is characteristic of Christianity as a religion.[58]

The 2006 Constitution of the Republic of Serbia has no provisions comprising any religious elements. An exception to this could be Art. 7, which regulates the state coat of arms, flag, and anthem. The constitution prescribes that the state anthem is 'Bože pravde' ('God of Justice'), which begins by addressing God.[59] This is the only instance in which God is mentioned in the text of the Constitution. The fact that the state anthem includes an invocation of God is indicative of the close connection of the state and national identity to religion. In addition to the above mentioned, it should be pointed out that other state symbols have a religious basis, such as the two-headed eagle and the cross with four fire strikers.

Provisions indicating that the constitution-makers adopted and accepted certain Christian values can be found in the Constitution of the Republic of Serbia. However, since these are universal values, and one can positively claim that they were not introduced into the constitution owing to their significance in Christianity, but rather other political and historical circumstances, it should be pointed out that the purpose of this work is not to examine the origins of these values or the reasons behind their incorporation into the Serbian Constitution. The issue of whether the constitution-makers protected a universal value because it originated from Christian teachings or because it was an achievement of a great cultural and educational movement, an achievement of a revolution, or an international obligation undertaken by the state is not of any key significance for the topic of this work. The objective of this work is to point out that the constitutional provisions protect certain values that can be demonstrated to be related to Christianity and its teaching.

The first article of the constitution prescribes that the Republic of Serbia is a state 'based on affiliation to European principles and values'.[60] European values undoubtedly include values with religious origins. This is also confirmed by the Treaty

55 Constitution of the Federal People's Republic of Yugoslavia, Arts. 25 and 38.
56 Radulović, 2014, pp. 7–8.
57 This is particularly obvious in Art. 25 of the Constitution of the Federal People's Republic of Yugoslavia, from which it could be concluded that only churches could be abused for political purposes. In addition, at the time when this constitution was in force, connections of the state and schools with the church were considered a negative phenomenon.
58 Troicki, 2011, pp. 30–31.
59 Constitution of the Republic of Serbia, Art. 7.
60 Constitution of the Republic of Serbia, Art. 1.

of Lisbon; its preamble mentions the universal values inspired, among other things, by European religious heritage.[61] Even the authors that point out the secular character of contemporary Europe cannot disregard the fact that the secular and the religious identities have mixed in Europe.[62] The constitution has, thus, implicitly prescribed that the Republic of Serbia is based on religious values as well, on condition that they represent general European values as well.

The Constitution of the Republic of Serbia guarantees equality of women and men,[63] which is a Christian value that has gained universal significance in modern times. According to Christian teachings, the human being is 'one being in two forms', the male and the female one.[64] Despite the frequent objections to Christianity due to women's position in certain Christian churches, the actual contribution of Christianity to the improvement of the position of women in the past is often disregarded. Suffice it to mention that it is the only religion that preached that woman was the crown of the creation of the world.[65] As early as in the second half of the second century, Justin Martyr developed the concept of the gender equality of men and women in his works, which was a complete novelty for the age in which he lived.[66]

The Constitution of the Republic of Serbia prescribes universal equality of people before the constitution and the law.[67] Equality of all people according to their nature is also one of the values discussed by the great Christian teachers, such as Gregory of Nyssa.[68] In addition, in the majority of Christian churches, the ideas of equity and equality are included in their documents on the concept of human rights.[69] The Constitution of the Republic of Serbia protects human dignity by prescribing its inviolability and the universal obligation to respect and protect it.[70] The biblical narrative of the concept of human dignity and the texts of the patristic tradition were clearly demonstrating that the Christian concept of human dignity does not differ from the contemporary concept of human rights.[71] The constitutional norm regulating conscientious objection, i.e. prescribing that nobody shall be obliged to fulfil the obligations that include the use of arms if that is contrary to their faith, is also related to Christian values.[72]

The constitutional provisions regulating the right to enter into marriage are of special importance. The Serbian Constitution recognises only the marriage that is

61 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, preamble. A special problem is the (often ideological) denial of the significance of Eastern Christianity in the formation of modern Europe. Βενιζέλος, 2005, p. 28.
62 Casanova, 2006 p. 66.
63 Constitution of the Republic of Serbia, Art. 15.
64 Bulović, 2021.
65 Bailey, 1970, p. 43.
66 Devrnja, 2014, p. 165.
67 Constitution of the Republic of Serbia, Art. 21.
68 Devrnja, 2014, p. 181.
69 Lutheran World Federation, 1977; Pontifical Commission «Iustitia et Pax», 2011, pp. 27–28. The Russian Orthodox Church's Basic Teaching on Human Dignity, Freedom, and Rights.
70 Constitution of the Republic of Serbia, Art. 23.
71 Božović, 2020, p. 71.
72 Constitution of the Republic of Serbia, Art. 45.

concluded before a state authority based on the free will of a man and a woman.[73] Hence, the constitution-makers excluded the possibility of recognising the validity of a marriage concluded according to the rules of religious organisations. Thus, the position of religious persons was made more complicated, since they were forced to have two weddings, if they wished their marriage to be recognised by the state. Additionally, the constitution-makers made the introduction of same-sex marriage impossible, as it would be contrary to the Christian understanding of marriage.[74] Marriage is, as a lifetime union of two persons of different sexes, also defined in the regulations of the Serbian Orthodox Church.[75] Thus, the constitution is protecting marriage in the form in which that institution was developed in Christianity and in accordance with Christian values.

It should be finally pointed out that the Constitution of the Republic of Serbia specifically protects the freedom of religion. Art. 202 of the constitution stipulates that the freedom of conscience and freedom of religion are among the human and minority rights that shall be upheld even in the regime of an emergency or the state of war.

7. Conclusions

This work analysed the Constitutions of Serbia and Greece with the aim of identifying the Christian values that are standardised, adopted, and protected by these constitutions. The first conclusion is that the Greek Constitution comprises more provisions that explicitly mention the Orthodox Church or some elements of its teaching. On the other hand, the Constitution of the Republic of Serbia does not contain a single provision that includes an explicit mention of Christianity or any element of its teaching. The Greek constitution-makers maintained the connection to the Greek constitutional tradition in this field, while the Serbian constitution-makers relied more on the socialist constitutional tradition, with a minimum deviation from it when regulating the issues of the protection of the freedom of religion.

The presence of a specific religion or elements of religious teaching in a constitutional text depends on the constitutional model of the relationship of the state and religion as well. In Greece, the constitution-makers opted for the system of the 'prevailing religion', in which special rights, privileges, and constitutional and legal position were recognised to one religious organisation. In order to regulate such a position of one religion, it was necessary to regulate the relationship of the Greek state and church more comprehensively, and hence, the text of the constitution comprises the constitutional norms that include both some individual elements of the dogma of the Greek Orthodox Church and its internal organisation. On the other hand, the Serbian constitution-makers opted for the system in which the state and the churches

73 Constitution of the Republic of Serbia, Art. 62.
74 Aničić, 2015, pp. 97–99.
75 Marital Rules of the Serbian Orthodox Church, Art. 1.

and religious communities were separated, and hence, the regulation of the relations of the state and any specific religious organisation was not needed. This is one of the main reasons the Serbian Constitution does not include any norms or provisions mentioning any Christian church. It could be said that the Serbian Constitution completely ignores the contribution of the Church and of the religion to contemporary Serbian statehood and the identity of the citizens of the Republic of Serbia.

The analyses of the constitutional provisions of the Greek and Serbian Constitutions differ in that the work includes an analysis of the Christian values and elements of Christian teaching that are explicitly mentioned in the Greek Constitution, while in the case of the Serbian Constitution, the analysis comprises connecting the constitutional norms that are *a priori* not of a Christian character to the teachings and history of Christianity. Thus, the Christian roots of the contemporary concept of human rights, which are protected by the Constitution of the Republic of Serbia, have been pointed out. It could be strongly advised that the future efforts of the academic community be focused on research of connections of the contemporary concept of human rights and their Christian roots. Such research works are also significant from the aspect of contemporary constitutionalism, since they can provide a new and fresh perspective on the values behind the constitutional norms of the European constitutions of the new century. Such research works should contribute to avoiding of the misconception of ascribing the protection of human rights solely to the anticlerical movements developed in the western part of the European continent, while completely ignoring that a similar concept of human rights was promoted by Christianity as early as in the beginning of the first millennium of the new era.

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SZILÁRD GÁSPÁR-SZILÁGYI[1]

Does Brexit Mean Brexit? The Enforcement of Intra-EU Investment Awards in the Post-Brexit Era

ABSTRACT: *This article uses an analytical approach in order to dissect the major legal issues concerning the enforcement of intra-EU awards post-Brexit. The outcomes of the enforcement cases will depend on the country where enforcement is sought (EU Member States, the UK, and other third countries), the applicable legal regime pursuant to which enforcement is sought (the New York Convention or the ICSID Convention), various temporal factors (whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transition period), and whether the intra-EU cases are based on intra-EU BITs or the ECT, or both. Due to this complexity, there is no easy answer as to how the various issues arising from the post-Brexit enforcement of intra-EU awards should be solved. This is most unfortunate as it creates uncertainty for investors, host States, and national courts of enforcement alike.*

KEYWORDS: Intra-EU arbitration, ISDS, enforcement and recognition, Brexit, BITs, ECT, Micula v. Romania.

1. Introduction

Following the Lisbon amendments to art. 207 TFEU, the EU has become an active player in international investment law. However, the EU's new competences over foreign direct investment have resulted in a decade long process of trials and errors, as well as complex legal questions.[2] A lot of this complexity stems from the different categories into which EU and Member State bilateral investment treaties (BITs) and

1 Lecturer in EU and International Economic Law, Birmingham University School of Law, gaas87@yahoo.co.uk.
I would like to thank Dr. John Cotter (Keele University), Dr. Maxim Usynin (Copenhagen University), and the anonymous reviewer for their valuable comments. I would also like to thank the editors of the Central European Journal of Comparative Law and the members of the Ferenc Mádl Institute of Comparative Law for the opportunity to collaborate on this project.

2 For an overview until 2018 *see* Gáspár-Szilágyi, 2018c.

https://doi.org/10.47078/2022.1.75-95

other investment agreements can be classified, as well as the relationship between investment treaty arbitration (ITA) and the autonomy of the EU legal order.[3]

This tangled legal landscape has resulted in a number of important developments in a short amount of time. First, the EU adopted the Grandfathering Regulation of 2012[4] in order to safeguard the continued existence and conclusion of Member State BITs with third countries. Then, in *Opinion 2/15*[5] – on the conclusion of the EU-Singapore Free Trade Agreement – the Court of Justice of the EU (Court of Justice/CJEU) clarified the competences the EU and its Member States have over the new generation EU trade agreements. This was followed by *Achmea*[6] in 2018, which came as a shock to many investors, the CJEU having concluded that provisions on investor-state dispute settlement (ISDS) found in intra-EU agreements, such as the provisions under the Netherlands-Czech Republic and Slovakia BIT, are incompatible with EU law. Following this seminal case, most – but not all – EU Member States signed an agreement to terminate their intra-EU BITs.[7] Nevertheless, investment tribunals whose jurisdiction had been challenged on the grounds of *Achmea* proceeded to side-line the CJEU's arguments, upholding their jurisdiction.[8]

This was followed by *Opinion 1/17*[9] in which the Court of Justice decided that the EU's Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law. Furthermore, the EU Commission is pursuing the creation of a Multilateral Investment Court[10] and the EU has adopted a regulation on the screening of third country investments into sensitive sectors of the economy.[11]

The adventure, however, is not over as exemplified by two, very recent judgments of the Court of Justice. First, on 2 September 2021 the Grand Chamber in *Moldova v. Komstroy LLC*,[12] a case which involved an extra-EU BIT and not an intra-EU BIT, has

3 *See* Contartese and Andenas, 2019; Gáspár-Szilágyi, 2018b; Melikyan, 2021; Gáspár-Szilágyi, 2021; Öberg, 2020.

4 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351/40. For a commentary *see* Lavranos, 2013.

5 CJEU, Opinion 2/15, *EU-Singapore FTA* [2017] EU:C:2017:376.

6 CJEU, *Slowakische Republik v. Achmea BV* [2018] EU:C:2018:158. For commentaries *see* Öberg, 2020; Scheu and Nikolov, 2020; Contartese and Andenas, 2019; Gáspár-Szilágyi and Usynin, 2019.

7 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (2020), OJ 169/1. 23 out of the 27 EU Member States have signed the agreement. For a commentary *see* Lavranos 2020.

8 *See* Gáspár-Szilágyi and Usynin, 2019, pp. 35–45.

9 CJEU, Opinion 1/17, *CETA Investment Court System* [2019] EU:C:2019:341. For a commentary *see* Gordon, 2020.

10 *See* UNCITRAL, 2021.

11 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 OJ 79/1. For a very extensive commentary *see* Hindelang and Moberg, 2021.

12 CJEU, C-741/19, *Republic of Moldova v. Komstroy LLC* [2021] EU:C:2021:655. For a commentary *see* Fouchard and Thieffry, 2021.

more or less sealed the fate of the Energy Charter Treaty (ECT) in an intra-EU setting.[13] Then, on 26 October 2021 the Grand Chamber, building on its *Achmea* judgment, held in *Poland v. PL Holdings*[14] that national legislation, which would permit the circumvention of *Achmea*, by allowing a Member State to conclude with an investor an *ad hoc* arbitration agreement that is identical in terms to an arbitration clause in an intra-EU BIT, is also precluded by arts. 267 and 344 TFEU. If the above legal hurdles were not enough, the effects of Brexit on the enforcement of intra-EU investment awards also poses significant challenges. This article will focus on this latter issue.

As is well known, Brexit has resulted, is resulting, and will result in numerous practical and legal hurdles. Among these, one can mention the issues surrounding the Northern Ireland Protocol, the impact on trade-flows between the EU and the UK, the status of EU and UK citizens,[15] and the disentangling of international agreements to which the UK was a party to via its EU membership.[16] One issue, however, which has been neglected during the Brexit negotiations, in the Withdrawal Agreement, and in the new Trade and Cooperation Agreement (TCA) is the status of arbitral awards delivered under intra-EU BITs and their enforcement following Brexit. I have alluded to this problem three years ago,[17] and some practitioners and academics have touched upon some of the issues arising from this legally very complex situation.[18] Therefore, my purpose here is to go one step further, and discuss in detail the impact of Brexit on the enforcement of intra-EU investment awards.

The question is not just theoretically intriguing, but also practically very relevant for the UK, the EU, Hungary, and investors. According to the newest data available on the UNCTAD Investment Policy Hub, BITs concluded by the UK have been relied on in 91 investment treaty arbitrations, of which 90 were brought by UK investors against other states.[19] Of these cases, a total of 23 are cases against EU Member States, including Spain, Hungary, Latvia, Romania, the Czech Republic, Italy, and Poland. Several of them are still pending, such as a number of cases against Spain (the Spanish Solar cases)[20] and the highly disputed case of *Gabriel Resources v. Romania*.[21] Very recently, the

13 For an older analysis on the effects of *Achmea* on the ECT *see* Arif, 2019.

14 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875; AG Kokott, *Opinion in Case C-109/20, Republic of Poland v. PL Holding Sàrl* [2021] EU:C:2021:321; for a commentary of the AG's Opinion, *see* de Boeck, 2021.

15 CJEU, Case C-709/20, *CG v. Department for Communities in Northern Ireland* [2021] ECLI:EU:C:2021:602. For a commentary *see*, Garner, 2021.

16 *See* Wessel, 2018.

17 Gáspár-Szilágyi, 2018a.

18 *See* Stanič, 2021; Lavranos, 2021, pp. 5-8; Florou, 2019.

19 Investment Policy Hub, 2021.

20 *FREIF Eurowind v. Spain,* SCC Case No. 2017/060, pending; *Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH v. Kingdom of Spain*, ICSID Case No. ARB/16/17, pending.

21 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, pending. The case is heavily disputed in Romania as the project would involve the demolition of a historic village and the creation of a cyanide lake to help with the extraction of gold.

arbitral tribunal in the *Magyar Farming*[22] case concluded that Hungary had breached the expropriation provisions of the UK-Hungary BIT of 1986. Since the case was commenced in 2017 and the award was rendered in 2019, prior to the end of the Brexit transitional period, when the UK was still bound by its EU law obligations, the enforcement of the award will raise several legal questions.

In light of the above, in this article I will follow an analytical approach to dissect the major legal issues concerning the enforcement of intra-EU awards post-Brexit. I believe that in this case it is better to take an analytical approach and not a normative one, since there are no clear legal answers[23] to some of the legal issues raised; the outcomes to some of the questions depend on several variables that I will discuss in this paper.

Following the Introduction, in Part 2, I will provide a brief overview of the two enforcement regimes of arbitral awards in international investment law, highlighting the effects the *Achmea* judgment had and has on the enforcement of intra-EU awards. Then, in Part 3, I will look at whether the UK's Withdrawal Agreement, the 2018 UK Withdrawal Act, and the new TCA provide us with any guidance on this issue. Part 4 develops the analytical part of this article and discusses several categories of variables that can influence the outcomes of enforcement proceedings. These variables are (a) whether the enforcement of intra-EU awards is sought in the UK, in the EU, or in a third country; (b) whether enforcement is sought pursuant to the New York Convention or the ICSID Convention, as the two different legal regimes affect whether a national court can refuse the enforcement of an award;[24] (c) whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transitional period on 31 December 2020; and (d) whether the case was rendered under an intra-EU BIT or the ECT. The last part of the article is reserved for concluding remarks.

2. A few words about the enforcement of investment awards

International investment law is often praised (and criticized by opponents of the system) for having one of the best enforcement mechanisms of any system of international law.[25] When it comes to the enforcement of ITA awards there are several points of a general nature that need to be highlighted and several which are specific to the post-*Achmea* reality.

22 *Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary,* ICSID Case No. ARB/17/27.

23 Scheu and Nikolov also argue that there is no simple 'yes-or-no' rule to the enforcement of intra-EU awards after *Achmea, see* Scheu and Nikolov 2020, p. 274.

24 In this paper I will focus on enforcement proceedings and not set-aside proceedings. The latter raises an interesting theoretical question. There is a chance that a non-ICSID, intra-EU award would be set aside by the national court of an EU Member State citing the award's incompatibility with EU law under *Achmea,* but a UK court might still go ahead and enforce the award in the UK.

25 Choukroune and Nedumpara, 2022, pp. 622–623. One of the most outspoken critics is Gus van Harten. For a critique of the investment law system, *see* van Harten, 2013.

Looking at some of the more general points, as is well known, ITA is a de-centralized system in which *ad hoc* tribunals are set up for each individual case. There are several international rules, and conventions, which govern the setting-up of arbitral tribunals, the conduct of proceedings, and the enforcement of the awards. Among these one could name the ICSID Convention, the ICSID Arbitration and Additional Facility Rules, or the UNCITRAL Arbitration Rules. The cases are most often conducted under the auspices of an arbitral institution, such as the Centre for the Settlement of Investment Disputes in Washington, the Stockholm Chamber of Commerce (SCC) or the Permanent Court of Arbitration (PCA). The most important difference in ITA is between ICSID and non-ICSID cases. This difference becomes especially important at the enforcement stage, when the ICSID Convention governs the enforcement of ICSID awards, but the enforcement of non-ICSID awards will be carried out pursuant to the New York Convention. [26]

In case of ICSID arbitrations, the ICSID Convention governs the enforcement of awards. Pursuant to art. 53(1) of the ICSID Convention, the arbitral award is binding on the contracting parties and shall not be subject to any form of appeal or review, except those provided for in the Convention. Furthermore, art. 54(1) of the Convention obliges the contracting parties to recognize the awards as binding and to enforce the pecuniary obligations, as if the awards were a final judgment of their courts. In other words, under the ICSID Convention national courts *cannot* review awards rendered pursuant to the ICSID Convention and must enforce them as final judgments of their own courts. In case one of the disputing parties is not satisfied with an award they can launch ICSID Annulment Proceedings under the limited grounds found in art. 52 of the Convention. On the other hand, in the case of non-ICSID arbitrations, an investor will seek recognition and enforcement pursuant to the New York Convention. Art. V of the New York Convention allows the courts where enforcement is sought to review the arbitral awards under a limited list of grounds, which mainly pertain to the validity of the arbitration agreement, the arbitrability of the issue (art. V.2(a) New York Convention), and fundamental issues affecting the conduct of the arbitral proceedings. Para. 2(b) of art. V also allows the local courts to refuse enforcement if the recognition or enforcement of the award would go counter to the public policy of the country where enforcement is sought.

Thus, in the simplest of terms, ICSID awards cannot be reviewed by the national courts where enforcement is sought, whilst non-ICSID awards can be reviewed by them under a limited set of grounds. However, things are not as simple as they seem.

Firstly, academic literature[27] and national court cases dealing with the enforcement of ITA awards make a difference between the enforcement or recognition of the award, on the one hand, and the actual *execution* of the award, on the other.[28] The first situation refers to the local courts' recognition of ITA awards as their own. This in most

26 Sornarajah, 2021, pp. 379–415; Choukroune and Nedumpara, 2022, pp. 595–643.
27 Bjorklund et. al., 2021; Bohmer, 2016, pp. 240 and 246.
28 *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157, NSD 601 and 602 of 2019.

cases is not problematic. However, the execution of the award, the actual freezing of the assets of another sovereign state within the territory of the executing country, is not a straightforward matter. For example, in the recent *Eiser v. Spain*[29] case before the Federal Court of Australia, in which the investor sought the enforcement of an award against Spain in Australia, the Australian court argued that the Australian Foreign States Immunities Act did not cover the recognition and enforcement of the award. Therefore, the intra-EU ICSID award could be enforced. Nevertheless, the Act *did* provide Spain with immunity from execution.[30] Thus, Spain's accounts could not be frozen. This difference between recognition/enforcement and execution is very problematic for the execution of ICSID awards when the laws of the place of enforcement make such a difference and include provisions on foreign state immunity. Furthermore, we do not yet possess any comprehensive data on the amounts of damages the investors actually manage to recover from the losing states.[31]

Secondly, even if the ICSID obligations are binding on 26 out of the 27 EU Member States (except Poland, which is not a party to the ICSID Convention), the enforcement of intra-EU ICSID awards will be met by the competing EU obligations of the Member States. As is well known, the CJEU held in *Achmea* that ITA provisions found in intra-EU BITs are precluded by arts. 267 and 344 TFEU. Thus, Member States cannot enforce such awards in the EU, creating a conflict between their international investment law obligations and their EU law ones. For example, in a more recent case before the Constitutional Court of Romania, the Romanian Court decided that the country's EU obligations prevailed over the competing international obligations under the ICSID Convention.[32]

The effects of *Achmea*, however, are not restricted to the investor-State arbitration clauses of intra-EU BITs. As mentioned in the Introduction, in the very recent *Moldova v. Komstroy* case the Grand Chamber has sealed the fate of the ECT's application to intra-EU disputes. Even though the preliminary reference to the Court of Justice from the Paris Court of Appeals concerned the interpretation of the term 'investment' under the ECT in an extra-EU case where the seat of arbitration was in an EU country, the Grand Chamber held in para. 41 of the judgment that 'it cannot be inferred that [art. 26(2)(c) of the ECT, providing for ISDS] also applies to a dispute between an operator from one Member State and another Member State.' In other words, the ISDS provisions of the ECT would not apply in an intra-EU setting.

29 Ibid. I would like to thank Dr. Maxim Usynin for pointing out that in the 1980s the Paris Cour d'Appel denied the execution of four awards, with the seat of arbitration in France.

30 For a commentary see Gáspár-Szilágyi and Usynin, 2020, pp. 298–301.

31 In the upcoming years a research project at the PluriCourts Centre of Excellence, University of Oslo will look at the issue of compliance in international investment disputes. *See* PluriCourts, *New research project at PluriCourts: 'Compliance Politics in International Investment Disputes'* [Online]. Available at: https://www.jus.uio.no/pluricourts/english/news-and-events/news/2021/240621-new-project-copiid.html (Accessed: 28 July 2021).

32 Constitutional Court of Romania (*Curtea Constituțională a României*), Decision No 887 of 15 December 2015 ('Micula and European Foods').

In another very recent case, *Poland v. PL Holdings,* the Grand Chamber was faced with a reference from the Supreme Court of Sweden concerning the compatibility with EU law of an *ad hoc* arbitration agreement between a Member State and an investor from another Member State, the terms of which would be identical to the arbitration provisions of an intra-EU BIT. The Grand Chamber concluded, following its earlier reasoning in *Achmea*, that arts. 344 and 267 TFEU preclude national legislation allowing for such *ad hoc* arbitration, as otherwise the effects of *Achmea* could be easily circumvented.[33] We will return to these issues in Part 4.2 of the article. For now, it is important to understand that from the perspective of the CJEU the following are incompatible with EU law: investor-state arbitration clauses found in intra-EU BITs, the ISDS provisions of the ECT, and even *ad hoc* arbitration agreements between EU Member States and investors from other EU Member States that contain clauses identical to those found in intra-EU BITs.

As mentioned in the Introduction, the enforcement of intra-EU awards is not only a theoretical discussion, but it is a question with far reaching practical implications. For example, the *Magyar Farming* award, decided against Hungary under the ICSID Convention, will need to be enforced at one point in time if the Hungarian authorities do not comply with the award. Furthermore, there are several pending intra-EU BIT and ECT cases against Spain and Italy that involve UK investors.[34] It is also highly likely that following Brexit, and with the newest developments in *Komstroy* and *PL Holdings*, forum shopping will increase. EU investors with investments in other EU states will try to restructure their investments in such a way as to benefit from BITs concluded between the UK and EU Member States, which are now extra-EU BITs, and to benefit from the ECT in an extra-EU setting. This could then result in an increase of cases brought by UK investors against EU Member States.

3. Nothing in the Withdrawal Agreement or the new Trade Agreement?

The UK's relationship with the EU is governed by two sets of international agreements. First, there is the Withdrawal Agreement (WA), in which the terms of the 'divorce' between the two parties were laid down. Second, there is the Trade and Cooperation Agreement (TCA), in which the conditions for the 'new relationship' were included. Neither of the agreements include any provisions on intra-EU BITs or the enforcement of awards rendered under them.[35] Nonetheless, there are some provisions, which are important for our discussion in Part 4.

33 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875, para. 47.

34 *See* fn. 19 above.

35 There are some provisions of the TCA that refer to investment protection standards after the end of the transition period. *See* Schwedt et al., 2021.

■ *1. The Withdrawal Agreement and the UK Withdrawal Act 2018*

There are some provisions of the WA and of the 2018 UK Withdrawal Act transposing the WA into the UK legal system (UK Withdrawal Act[36]), which are potentially important for our discussion. However, the reader should be aware that some of the provisions of the WA and of the UK Withdrawal Act discussed in this section are not as clear cut as they might seem, and they raise separate issues of their own.

Disentangling the four-and-a-half-decade long relationship between the UK and the EU is not an easy task. Art. 4(1) of the WA provides that the provisions of the WA and of EU law made applicable by it ('retained law' under the UK Withdrawal Agreement) shall produce the same legal effects as they do in the EU and its Member States, allowing individuals to rely on them directly if they meet the conditions for direct effect. Art. 4(2) of the WA then obliges the UK to 'ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to *disapply* [emphasis added] inconsistent or incompatible domestic provisions, through domestic primary legislation'. One could call the latter provision the primacy or supremacy clause of the WA. Being a dualist country, the UK implemented the WA through the Withdrawal Act of 2018, which in sec. 5 (read together with sec. 25.4(a) of the 2020 Withdrawal Act) specifies that supremacy will only apply to law enacted before the 'exit day' (31 December 2021, 11 p.m.),[37] but not to law enacted afterwards. What exactly is meant by 'supremacy' in the UK Withdrawal Acts is beyond the scope of this article.[38] What matters is that the *Achmea* judgment meets the temporal requirement of the WA and of the Withdrawal Act as it was delivered before the end of the transition period. However, does the CJEU's judgment form part of the 'retained' EU law that has primacy over conflicting UK laws?

This question is mainly answered in the UK Withdrawal Act of 2018 with the caveat that there is ongoing academic discussion on the exact boundaries of what EU laws are part of the 'retained law'.[39] Whilst CJEU case-law delivered before the end of the transitional period is part of the retained law, sec. 6(4) of the 2018 Withdrawal Act mentions that the UK Supreme Court is *not* bound by any retained EU case-law.[40] This is quite important, as it means that the UK Supreme Court (UKSC) can diverge from the CJEU's application and interpretation of EU law delivered prior to the end of the transitional period, making part of the WA's and the Withdrawal Act's supremacy clause meaningless. In other words, under the UK Withdrawal Act the UKSC can depart for example from the *Achmea* judgment in an enforcement case involving an award based on an intra-EU BIT. As we shall see in Part 4.1, in 2020 the UKSC did not mention *Achmea* when it decided that the *Micula* award against Romania should be enforced.

36 There is also the UK Withdrawal Act of 2020, which complements the 2018 Withdrawal Act. Available at https://www.legislation.gov.uk/ukpga/2020/1/contents (Accessed: 28 July 2021).

37 sec. 20(1) of the 2018 Withdrawal Act.

38 *See* Kilford, 2021.

39 *See* Williams, 2020.

40 The text of the 2018 Withdrawal Act is available at https://www.legislation.gov.uk/ukpga/2018/16/ (Accessed: 28 July 2021).

The WA also includes provisions on the legal treatment of CJEU cases involving the UK and preliminary references from UK courts or tribunals, which commenced or were made during the transitional period or soon after. Art. 86 of the WA provides that the CJEU shall continue to have jurisdiction in cases brought against or by the UK before the end of the transitional period of 31 December 2020[41] and shall continue to have jurisdiction to give preliminary rulings on requests from UK courts and tribunals made before the end of that period. In other words, the CJEU has jurisdiction for example over a preliminary reference made by a UK court concerning the enforcement of an intra-EU award, provided it was made prior to the end of the transitional period.[42] An example of the application of art. 86 of the WA in practice is the recently decided CJEU case of *CG v. The Department of Communities in Northern Ireland,*[43] in which the CJEU was asked to decide on whether a pre-settled EU citizen in Norther Ireland could receive social benefits.

Art. 87 of the WA also allows the Commission to bring infringement proceedings pursuant to art. 258 TFEU against the UK, up to 4 years after the end of the transition period, for breaches of the EU Treaties or certain parts of the WA. Very importantly, pursuant to art. 89 of the WA, judgments and orders of the CJEU handed down before the end of the transitional period as well as those handed down after the end of that period in proceedings brought under the afore-mentioned arts. 86 and 87 shall have binding force in the UK. Furthermore, pursuant to art. 4(5) of the WA, the UK judicial and administrative authorities 'shall have due regard' to the relevant CJEU cases handed down after the end of the transitional period when applying and interpreting the WA. However, as argued by Stanič, some of these provisions have been watered down in the internal UK acts transposing the WA into UK law.[44]

■ *2. The Trade and Cooperation Agreement*

The TCA between the EU and the UK entered into force on 31 May 2021.[45] The agreement includes a chapter on services and investment (Title II, Chapter 1) and one on investment liberalization (Title II, Chapter 1). These chapters provide definitions of various terms, such as 'investor' and 'investment', and include provisions on national treatment and MFN treatment. However, they do not include investor-state dispute settlement and fall short of provisions regularly included in BITs.

The TCA is also silent on intra-EU BITs and the enforcement of intra-EU awards. Art. 2(1) of the TCA allows the contracting parties to conclude future bilateral agreements in order to supplement the TCA's existing chapters covering investments. Whether this would include anything on intra-EU BITs is to be seen. Furthermore, the

41 *See* art. 126 of the Withdrawal Agreement (WA).

42 The author is not aware of UK courts making such preliminary references on the question of enforcement of intra-EU awards.

43 *See* CJEU, Case C-709/20, *CG v Department for Communities in Northern Ireland* [2021] ECLI:EU:C:2021:602, paras. 48 and 49.

44 Stanič, 2021.

45 European Commission, 2021a.

TCA in art. 8 also sets up – among others – a Trade Specialized Committee for Services, Investment, and Digital Trade to address matters relating to services, investment, and digital trade arising *under* the agreement. This means, that it is unlikely that this specialized committee would be competent to address matters relating to the enforcement of intra-EU arbitral awards, as these are not matters covered by the TCA.

In conclusion, both the WA and the TCA, as well as the 2018 UK Withdrawal Act, are silent on the enforcement of intra-EU arbitral awards. However, art. 86 of the WA could have resulted in the CJEU deciding on a preliminary reference from a UK court concerning the enforcement of intra-EU arbitral awards. Furthermore, it is important to note that under the UK Withdrawal Act, the UK Supreme Court is not bound by retained CJEU case-law, which allows it to depart from *Achmea*.

4. A Matrix of issues

As mentioned in the Introduction, an analytical approach is to be favoured over a normative one. It is hard to say how some of the issues arising from the enforcement of intra-EU arbitral awards should be decided, since there are a handful of variables that can influence their outcome. We can group these variables into several categories, based on the questions we ask (*see* Figure 1).

No.	Variable	Possibilities	
1.	Country of Enforcement	a.	In the UK
		b.	In an EU Member State
		b.	In a third country
2.	Enforcement Regime	a.	ICSID Convention
		b.	New York Convention
3.	Temporal	a.	Before end of transition period
		b.	After end of transition period
4.	ECT	a.	Intra-EU
		b.	Extra-EU

Fig. 1. The multiple variables affecting the enforcement of intra-EU awards

Firstly, in which country is the investor seeking the enforcement of an intra-EU award? Are they seeking enforcement in the UK, an EU Member State, or in a third country? We should name this the *country of enforcement variable.* Secondly, under which legal regime is the investor seeking the enforcement of the intra-EU award? Pursuant to the ICSID Convention or the New York Convention? We can call this the *enforcement regime variable*.

Thirdly, there is also a *temporal variable*. For the purposes of this article, I will simplify this variable as it can have further ramifications, which will side-line

the main objective of the article to provide an analytical map for the enforcement of intra-EU awards post-Brexit. ITA proceedings on average last for approx. 4 years[46] and have several key moments: the moment the investor brings the claim, the moment the tribunal decides on its jurisdiction (either in the main award or in a separate award on jurisdiction if they decide to bifurcate the case), and the moment the final award is delivered. As mentioned in the Introduction, there are several pending investment arbitrations that were initiated under BITs concluded between the UK and EU Member States. Some of these cases were brought before the end of the Brexit transitional period, when the BITs under which the arbitrations were initiated were still intra-EU BITs. This poses serious questions concerning the jurisdiction of these tribunals since the proceedings were technically brought under intra-EU BITs, but a fundamental change of circumstances occurred (Brexit), making them extra-EU BITs. Even if the arbitral tribunals were to uphold their jurisdiction, EU Member State courts could possibly deny the future enforcement of the resulting awards if they were to consider that the cases were brought under intra-EU BITs, making their enforcement run counter to *Achmea*. For the purposes of this article, whether the arbitration was commenced before or after the 'exit day' is the most important temporal variable.[47] I also acknowledge that ITA tribunals have in rare cases denied jurisdiction, even after the jurisdiction stage was concluded, when the parties brought arguments that affected the very existence of the BITs in question.[48]

Fourthly, after *Komstroy* the Court of Justice will not allow the enforcement of ECT awards in an intra-EU setting. One could call this the *ECT variable*. The following sections are organised according to the country of enforcement variable and for each section, we will discuss the other variables as well.

■ *1. Enforcing intra-EU awards in the UK*

To say that the legal rules surrounding the enforcement of intra-EU arbitral awards in the UK post-Brexit are tangled is an understatement. With reference to the discussion in Part 3, let us first untangle the rules and discuss how they *should* apply. Then let us turn to the 2020 enforcement case of the infamous *Micula* award before the UK Supreme Court (UKSC)[49] and see how the rules were actually applied in the UK.

46 Sinclair, 2009. He concluded that the 115 ICSID cases he analysed took on average 3.63 years to conclude; Kim, 2014. Kim's analysis has concluded that ITA cases on average took 4.1 years to conclude.

47 I would like to thank Dr. Maxim Usynin for the extensive conversations we had over this matter, which helped me discuss the temporal variable in a more accessible way to the reader.

48 *See* for example *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award (28 Oct 2019) in which Mozambique argued several years after the initiation of the arbitral proceedings that in fact the South Africa-Mozambique BIT never entered into force because Mozambique failed to notify South Africa that it had ratified the BIT. A frustrated arbitral tribunal in the end declined its jurisdiction. For a commentary *see* Gáspár-Szilágyi and Usynin, 2021, pp. 286–289.

49 *Micula and others v. Romania,* [2020] UKSC 5, 19 February 2020, Available at: https://www.supremecourt.uk/cases/uksc-2018–0177.html (Accessed: 28 July 2021). For a commentary *see* Florou 2019, pp. 84–87.

As mentioned in Part 3, the CJEU's case-law prior to the end of the transitional period forms part of the 'retained law' in the UK, which under the WA and the Withdrawal Act has supremacy over conflicting UK laws. However, sec. 6(4) of the UK Withdrawal Act mentions that the UKSC is not bound by the retained CJEU case-law. This is important as under UK law the Supreme Court can diverge from *Achmea*, but under the Withdrawal Agreement any UK rules that are in conflict with retained EU law should be disapplied. In other words, from the perspective of the WA *Achmea* should be followed by UK courts, but from the perspective of the UK Withdrawal Act, the Supreme Court can depart from *Achmea*.

Even if we were to follow the rules of the WA and not the UK Withdrawal Act, there is nothing in the WA on the post-Brexit enforcement of intra-EU awards. Thus, one would need to be careful in how certain temporal aspects are factored in. Firstly, was the intra-EU arbitration initiated *before* or *after* the transitional period? Secondly, is/was the *enforcement* of the intra-EU award sought before a UK court *before* or *after* the end of the transitional period?

After the end of the transitional period the UK is no longer an EU Member State. Thus, any arbitrations that were initiated under a UK-EU Member State BIT following this date would not constitute intra-EU arbitrations and the enforcement of the resulting awards should be allowed under both the ICSID and NY Conventions. On the other hand, if the arbitration commenced *before* the end of the transitional period, then it should be considered an intra-EU arbitration. Thus, *Achmea* should be binding, and the enforcement should be stopped. Then again, in this second scenario, there is still the question of when the enforcement is sought? If the arbitration started prior to the end of the transitional period, but enforcement is sought *after* the end of the period, *Achmea* should still function as retained EU law. If the arbitration was initiated prior to the end of the transitional period and the enforcement was sought *before* the end of that period, then *Achmea* was still part of the UK's EU law obligations. In other words, in the *Micula* case – an arbitration that was initiated and concluded well before the end of the transitional period and its enforcement was sought prior to the end of that period – the UK Supreme Court should have given priority to the *Achmea* judgment and not enforce the award. However, this is not what happened.

In a unanimous decision, the UKSC decided on 19 February 2020 that the *Micula v. Romania* intra-EU arbitral award *will* be enforced in the UK. The Supreme Court argued that the UK became a signatory to the ICSID Convention prior to the UK's EU membership and that there was no conflict between the UK's ICSID obligations and EU law under art. 351 TFEU.[50] Furthermore, it held that arts. 53 and 54 of the ICSID Convention imposed on the UK obligations which it owed to all ICSID members, not just EU Member States. The Court of Appeal in this case decided to stay the enforcement of the *Micula* award as there was an EU Commission Decision forbidding its enforcement due to the damages representing illegal state aid and because the case before the EU's

50 *Micula and others v. Romania,* [2020] UKSC 5, para. 97 and beyond.

General Court concerning the validity of the Commission Decision was under appeal before the Court of Justice. The Supreme Court, however, did not agree with this conclusion, citing the UK's obligations under arts. 53 and 54 of the ICSID Convention and held that the EU Treaties did not have any relevant effect.[51]

However, the UKSC's judgment is questionable in light of *Achmea*. The judgment did not take proper account of the UK's diverging EU and international law obligations under art. 351 TFEU prior to the end of the transition period. Whilst art. 351 TFEU allows for the continued existence of international agreements concluded by Member States prior to their accession to the EU (as is the UK's case with the ICSID Convention), Member States must ensure that there are no incompatibilities between those agreements and EU law. Following *Achmea* we know that there is such an incompatibility between investor-state arbitration provisions found in intra-EU BITs and the autonomy of the EU legal order. Thus, awards rendered pursuant to intra-EU BITs cannot be enforced within the EU legal order. This means that the ICSID obligation pursuant to which such an intra-EU award should be enforced could not trump the primacy of this EU obligation within the EU legal order. However, the UKSC did not see it this way.

It is interesting to note that nowhere in its judgment does the UKSC mention the existence of *Achmea* and the conflict between intra-EU BITs and EU law, which is very problematic. This cannot be ascribed to the UKSC not knowing about *Achmea,* since *Achmea* was delivered in 2018 whilst the appeal before the UKSC was registered a year later in 2019. However, it might be due to the lower courts not discussing *Achmea*, as the original enforcement cases before the lower courts – that were subsequently appealed – were brought prior to the delivery of the *Achmea* judgment. Nevertheless, it is somewhat perplexing that none of the disputing parties brought up the *Achmea* issue when the Court of Appeals case was appealed to the UKSC. Given how the UKSC concluded that there is no conflict between the EU obligations and the international obligations of Member States; and given how UKSC judgments have the value of precedent, it is most likely that in the UK all intra-EU awards will be enforced pursuant to the ICSID Convention, regardless of when the arbitration was initiated or when the enforcement of the award is sought.

However, there is still the question of enforcement pursuant to the New York Convention, to which the UK became a party (1975) after its accession to the European Communities (1973). Stanič argues that because of this, the UKSC's argument in *Micula* cannot be applied by analogy to the enforcement of intra-EU (both the ECT and BIT) awards under the New York Convention and there is considerable room for uncertainty.[52] However, I would argue that if the intra-EU arbitration started prior to the end of the transitional period, *Achmea* would need to prevail because the UK at that time was still a member of the EU. Then again, in light of the UKSC's judgment in *Micula*, it is doubtful whether UK courts would impede the enforcement of intra-EU awards under the New York Convention, arguing that *Achmea* formed part of the country's

51 *Micula and others v. Romania,* [2020] UKSC 5, paras. 86-87.
52 Stanič, 2021.

public policy pursuant to *Eco Swiss* (see Part 4.2). On the other hand, if the arbitration commenced after the transitional period, then at that moment in time the UK is not an EU member anymore and the enforcement of the intra-EU, non-ICSID award, should be carried out.

Lastly, there is the issue of forum shopping and a potential restructuring of intra-EU investments so as to benefit from the protections offered by BITs concluded by the UK with EU Member States. Pursuant to Brexit, the previous intra-EU BITs between the UK and 12 EU Member States[53] will operate as extra-EU BITs, even if the Commission has very recently sent a Reasoned Opinion to the UK to terminate its BITs with EU Member States. The Commission argues that in 2019 the UK declared that it would terminate them. However, the UK never signed the termination agreement.[54] Furthermore, following *Komstroy*, many EU firms wishing to benefit from the protections of the ECT might also want to restructure their operations in order to benefit from the UK's now extra-EU membership to the ECT. Such investment restructurings would raise concerns of forum shopping. For example, questions of jurisdiction *rationae temporis* would arise, if the restructuring occurred before or after the contested State measures, as well as questions of abuse of process.[55] The detailed analysis of such issues is beyond the scope of this article.

■ *2. Enforcing the awards in EU Member States*

Enforcing intra-EU awards in EU Member States should be quite straightforward: *Achmea* precludes their enforcement. Furthermore, as we have seen, *Komstroy* precludes the enforcement of ECT awards in an intra-EU setting and *PL Holdings* even precludes the enforcement of awards based on *ad hoc* arbitration agreements between Member States and an EU investor, if those clauses are identical to ISDS clauses found in intra-EU BITs. However, there are some problematic areas.

Firstly, if we look at the *enforcement regime* variable, two situations need to be distinguished as they will affect the legal reasoning national courts can use. In the 26 EU Member States that are contracting parties to the ICSID Convention, if investors are seeking the enforcement of an intra-EU award rendered under the ICSID Convention, the national courts are faced with two competing obligations. On the one hand, there is their international obligation to enforce ICSID awards as if they were final judgments of their own. On the other hand, there are also the competing EU law obligations of these Member States within the EU legal order.

Many of the newer EU Member States have contracted into their EU law obligations after they had become parties to the ICSID Convention and to the now intra-EU BITs. From the perspective of EU law, under art. 351 TFEU such pre-accession agreements are not affected by EU law, provided they are compatible with it. Otherwise, the

53 With Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia. *See* Schwedt et al., 2021.

54 European Commission, 2021b.

55 *See* Wehland, 2020.

Member States must do everything possible to remove such incompatibilities, even by terminating the agreements.[56] In *Achmea* the CJEU held that such an incompatibility existed.[57] We have seen that 22 Member States are taking steps to terminate their intra-EU BITs to remove the incompatibilities, and that the Romanian Constitutional Court gave priority to the country's EU law obligations over its ICSID obligations. Thus, national courts will need to base their reasoning on art. 351 TFEU, the primacy of EU law over existing, conflicting international obligations, and the *Achmea* judgment in order not to face potential infringement proceedings. Nevertheless, in *PL Holdings* the Svea Court of Appeal was not willing to apply *Achmea* to *ad hoc* arbitration agreements.[58] Furthermore, in the *Micula* case, given the numerous enforcement cases launched by the investors, the Romanian authorities in the end decided to pay the damages to the investors, even though they are technically precluded to do so by EU law.[59]

In case the enforcement is sought under the New York Convention, then national courts would not have to resort to art. 351 TFEU and the primacy of EU law over national law. Art. V.1 of the Convention includes the public policy exception,[60] under which national courts could refuse to enforce the non-ICSID intra-EU awards. Following the CJEU's judgment in *Eco Swiss,* a strong argument can be made that Member State public policy also includes their EU law obligations.[61]

Secondly, there is also the *temporal variable.* This is important for cases brought under a UK-EU Member State BIT. In such a case, if the investor initiated the arbitration before the end of the transition period, an EU national court could argue that the UK was still bound by its EU law obligations, among which are those pursuant to *Achmea.* Thus, an arbitration that was initiated before the end of the transitional period pursuant to a UK-EU Member State BIT could not be enforced in an EU Member State. However, if the arbitration was brought under a UK-EU Member State BIT after the end of the transitional period, the resulting award should not be considered an intra-EU award anymore.

Thirdly, there is also the issue of whether the award was rendered pursuant to an intra-EU BIT or the ECT. Sometimes, they can be rendered under both, but those situations should be assimilated to those in which the award is rendered pursuant to only an intra-EU BIT. After *Komstroy* we can safely assume that the above-mentioned arguments for the enforcement of intra-EU awards can also be used for the enforcement of intra-EU ECT awards.

56 CJEU, Joined Cases 209 to 213/84, *Criminal Proceedings Against Lucas Asjes and Others* [1986] ECLI:EU:C:1986:188; CJEU, Case C-62/98, *Commission v. Portugal* [2000] ECLI:EU:C:2000:358.

57 CJEU judgments in most cases clarify the law retroactively.

58 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875, paras. 29-30.

59 Costea, 2019.

60 *See also* Scheu and Nikolov, 2020, p. 270.

61 CJEU, Case C-126/97, *Eco Swiss v. Benetton International NV* [1999] ECLI:EU:C:1999:269. For a more detailed discussion of the possible impediments under Article V of the New York Convention, *see* Stanič, 2021.

■ *3. Enforcing the awards in third states*

The enforcement of intra-EU awards in third states, whether awards rendered pursuant to UK-EU Member State BITs or pursuant to present intra-EU BITs, whether the arbitrations started before or after the end of the UK's transitional period, and whether the ECT was involved, might be a more straightforward matter. So far, we have some evidence from US courts when it comes to the enforcement of intra-EU awards.[62] Furthermore, as previously mentioned, there is also the difficulty of enforcing such awards if local state immunity laws exist (as seen in the Australian enforcement case) that allow for the enforcement of the awards but preclude their execution.

If enforcement is sought in an ICSID country for an ICSID award, then the case should be fairly clear. Under the ICSID Convention national courts *cannot* review ICSID awards and must treat them as final. Third country courts are not bound by EU law, and they should carry out their obligations pursuant to the ICSID Convention. Even in such a clear case, the actual enforcement cases in practice are not always straight forward as exemplified by some of the recent enforcement cases in the US in which the losing EU Member States and the Commission brought EU-law based arguments against the enforcement of ICSID awards.[63]

On the other hand, if enforcement is sought under the New York Convention, there is some room for the third country courts to review the intra-EU award. As mentioned in Part 2, there are several grounds under which the courts where enforcement is sought could refuse to recognise and enforce the award. Art.V.1(a) of the New York Convention mentions the invalidity of the agreement 'under the law to which the parties have subjected it' or under 'the law of the country where the award was made'. As to the first ground, the applicable law to an investor-state arbitration will often depend on the exact wording of the underlying BIT and whether this includes only the BIT, or other domestic and international rules applicable between the parties. As we have noted in a different article,[64] most ITA tribunals view EU law not as domestic law, but international law applicable between the parties and depending on the wording of the underlying BIT, EU law is treated either as law or fact. However, so far, no ITA tribunal has declined its jurisdiction following objections based on EU law and it is doubtful that a domestic court of enforcement outside of the EU will find that the underlying agreement to arbitrate is invalid pursuant to EU law objections. Looking at the second situation, the invalidity of the agreement under the law of the country where the award was made, if the arbitral tribunal had its seat in an EU Member State, then normally *Achmea* should preclude the existence of the agreement to arbitrate. However, if the seat of arbitration was outside of the EU, it is doubtful whether *Achmea* will matter to a non-EU court.

62 *See* USDC for the District of Columbia, *Novenegia II v. Kingdom of Spain* Civil Action No. 1:18-cv-1148 in which the investor is seeking to confirm an arbitral award against Spain; US District Court for the District of Columbia, *Viorel Micula v. The Government of Romania*, Civil No 1:14-cv-00600, Decision on the Claimant's Motion to confirm the ICSID Award.

63 Ibid.

64 Gáspár-Szilágyi and Usynin, 2019, pp. 33–42.

There are two more grounds of refusal under art. V.2 of the New York Convention that could possibly be used by an EU Member State challenging the recognition and enforcement of an intra-EU award in a third country: (a) the subject matter of the difference is not capable of being settled via arbitration (lack of arbitrability), and (b) recognition and enforcement would go against the enforcing country's public policy. As regards the lack of arbitrability, once again it will depend on how the third country court views *Achmea* and the role of EU law in the arbitration. Since the intra-EU BITs are yet to be terminated and not all Member States are willing to terminate them, it is once again doubtful that a third country court would conclude that a validly concluded international investment agreement did not give rise to a valid dispute which can be subject to arbitration. Concerning the public policy ground of refusal, as mentioned, this can most likely be used before EU Member States courts pursuant to *Eco Swiss*. However, in non-EU countries there does not seem to be any public policy ground upon which an intra-EU award could be challenged. As seen with the Australian enforcement case of *Eiser v. Spain*, EU Member States might not have to pay damages if they are immune from execution under the third country's national laws.

In conclusion, the enforcement and recognition of intra-EU awards in third countries (excluding EU Member States and the UK) will most probably move forward under both the ICSID and New York Conventions. However, the presence of national sovereign immunity rules in the country of enforcement might shield EU Member States from the execution of their assets.

5. Conclusions

The purpose of this article was to highlight and discuss the various issues surrounding the enforcement of intra-EU arbitral awards in the post-*Achmea* and post-Brexit world. Instead of a normative approach, I preferred to use an analytical approach, due to the complexity of the topic and the multiple variables involved. Because of this complexity there is no clear answer as to how the various issues should be solved. The outcomes of the enforcement cases will depend on the country where enforcement is sought (EU Member States, the UK, or other third countries), on the legal regime pursuant to which enforcement is sought (the New York Convention or the ICSID Convention), various temporal factors (whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transition period), and whether we are dealing with intra-EU cases pursuant to intra-EU BITs or the ECT.

This tangled outcome is most unfortunate as it creates uncertainty for both investors and host States. Furthermore, it puts courts in the countries of enforcement in the difficult position of deciding whether they should honour their own international obligations pursuant to the ICSID and the New York Conventions, or whether they should take into account the 'internal' EU law obligations of EU Member States. The *Micula* case is a prime example of how the outcome will differ depending on where

enforcement is sought. The Romanian Constitutional Court gave priority to Romania's EU law obligations over its ICSID obligations; the EU General Court's judgment (under appeal) was not favourable to the Commission's decision on qualifying the damages as stated aid; the Romanian Government after years of protracted enforcement cases on several continents decided to pay the damages to the investors; and the UK Supreme Court decided that Romania's international obligations had to be carried out and found no conflict between the UK's ICSID and EU law obligations.

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VERONIKA KOROM[1]

Intra-EU BITs in Light of the *Achmea* Decision

ABSTRACT: *In its Achmea decision rendered in March 2018, the Court of Justice of the European Union declared that arbitration clauses contained in intra-EU bilateral investment treaties are incompatible with EU law. The Court's judgment brought to an end the decade long legal battle between the Member States and the European Commission over the EU law compatibility of these treaties. In response to Achmea, the majority of Member States have agreed to terminate their treaties in order to eliminate the EU law incompatibility identified by the Court. At the same time, the political battle over the need for the special protection of cross-border investments in the EU continues. This paper looks back at the political and legal controversy that was sparked by intra-EU bilateral investment treaties and culminated in the Court's Achmea judgment, and briefly discusses the practical consequences of Achmea for intra-EU investment protection.*

KEYWORDS: Intra-EU BITs, Achmea, investment protection, investment arbitration, termination of intra-EU BITs.

Introduction

The existence of bilateral investment treaties between Member States of the EU ("intra-EU BITs") and the growing number of arbitration proceedings brought by EU investors against EU Member States on the basis of these treaties have given rise to a political and legal battle over their compatibility with EU law and the need for such treaties on the EU Internal Market. For over a decade, Member States have been divided on these issues. On the one hand, the capital-importing, "new" Member States (who were frequent respondents in intra-EU BIT arbitrations) viewed these treaties as incompatible with EU law and called for their termination. On the other, the capital-exporting, "old" Member States maintained that intra-EU BITs were not only compatible with EU law but in fact necessary to give special assurances and protections to cross-border

1 Assistant Professor, ESSEC Business School, Paris, France, veronika.korom@essec.edu.

https://doi.org/10.47078/2022.1.97-117

investments in the EU that were not provided for under EU law. The European Commission ("Commission") embarked on a crusade against intra-EU BITs but remained unable to forge a political consensus among Member States regarding the need to terminate these treaties. Meanwhile, EU investors brought over 100 arbitrations against EU Member States on the basis of intra-EU BITs. In these proceedings, the respondent Member States, often with the assistance of the Commission, argued that although the treaties had not been terminated, they had been rendered invalid or inapplicable as a result of the respondent States' accession to the EU. These arguments were rejected by all intra-EU BIT tribunals, however. It was against this background that the Court of Justice of the European Union ("CJEU" or "Court") handed down its 2018 *Achmea* judgment, in which it found that arbitration clauses contained in intra-EU BITs are incompatible with EU law. The *Achmea* judgment gave new impetus to the Commission to force all EU Member States to finally terminate their intra-EU BITs. Yet, the termination process has been considerably slower than expected. Today, almost four years after *Achmea*, and two years after the adoption by 23 Member States of the 'Agreement for the termination of intra-EU bilateral investment treaties' ("Termination Treaty"), the Termination Treaty's ratification process has still not been completed. Pending the final termination of all intra-EU BITs, this article provides an overview of the political and legal controversy that was sparked by these treaties and culminated in the Court's *Achmea* judgment, as well as the of the practical consequences of the *Achmea* judgment for intra-EU BITs.

1. Intra-EU BITs

In the following sections, we first present the origin of intra-EU BITs (1.1). We then discuss the political battle between the Member States and the Commission over the need to terminate or maintain them (1.2) and the legal battle fought before arbitral tribunals over their validity and applicability in arbitration proceedings pending their termination (1.3).

■ *1.1. The origin of intra-EU BITs*

BITs are international treaties signed by two states to ensure the protection of their citizens' investments in each other's territory and to allow for the settlement of disputes arising in connection with these investments through investor–state arbitration. The policy rationale behind BITs is that guaranteeing the protection of foreign investments and allowing for the settlement of investment disputes before an independent international tribunal (rather than domestic courts) increases foreign investment flows between the two signatories of the BIT.[2] Since the 1960s, European States have concluded a significant number of BITs, mainly with countries in the Southern

2 Sornarajah, 2017, p. 204. Today, the role and usefulness of BITs in promoting foreign investment is increasingly questioned; see e.g. UNCTAD, 2009b.

Hemisphere that were of economic interest to their domestic companies.[3] To date, some 2,825 BITs have been concluded worldwide, 1,200 of which were concluded by European States.[4]

The six founding States of the EU did not conclude BITs with each other, and BITs between European States remained an isolated phenomenon until the late 1980s and early 1990s.[5] Only Germany had concluded a BIT with Greece and Portugal before they joined the EU in 1981 and 1986, respectively.[6] It was not until the collapse of the Communist regime in Central and Eastern Europe that a large number of BITs were concluded between the Western and the newly independent States of Eastern Europe. The IMF and the World Bank supported the conclusion of BITs as a mechanism for attracting foreign investment and facilitating the transition from a planned to a market economy.[7] The conclusion of BITs was also specifically encouraged within the framework of the "Europe Agreements" signed between the EU and its Member States and the Central and Eastern European States, which applied for EU membership after their independence in the early 1990s. The Europe Agreements provided that the EU Member States and the candidate states would cooperate in the "promotion and protection of investments" and that their cooperation would take the form of concluding, where appropriate, "agreements between Member States and [the candidate State] on investment promotion and protection".[8]

In line with the recommendations of the Europe Agreements, the candidate States built an extensive network of BITs with EU Member States in order to attract EU capital and went on to conclude BITs among themselves. For the "old" EU Member States, it was of interest to conclude BITs with the Central and Eastern European countries to protect their investors in this "new" region of Europe. Bearing witness to the successful reconstruction of their economies, thanks in part to the inflow of foreign investment from Western Europe, the candidate States of Central and Eastern Europe acceded to the EU in three successive waves of enlargement in 2004, 2007 and 2013.

At the time of the EU enlargements, the Commission was mainly concerned with BITs that the Central and Eastern European countries had signed with third

3 In fact, the very first BIT was entered into by Germany and Pakistan. Today, Germany is the country with the largest network of BITs (with 117 BITs in force). See UNCTAD Investment Policy Hub, International Investment Agreements Navigator.

4 Id.

5 For the sake of simplicity, we refer to the European Economic Community, the European Community and the European Union as the "EU".

6 See BIT between Germany and Greece of 27 March 1961 and BIT between Germany and Portugal of 16 September 1980.

7 Wierzbowski and Gubrynowicz, 2009, p. 544.

8 See e.g. the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ L 347, 31.12.1993 p. 2-266, Article 72; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ L 348, 31.12.1993, p. 2-266, Article 73.

countries and reviewed them thoroughly as to their compatibility with EU law.[9] The Commission suggested that BITs signed with the "old" EU Member States and among candidate States would become obsolete following EU accession but did not require that they be amended or terminated.[10] The provisions of the BITs themselves did not provide that the agreements would be affected by EU accession in any way. Therefore, the nearly 200 BITs signed among the States of Western and of Central and Eastern Europe remained fully in force following the EU accession of the latter, becoming "intra-EU BITs".[11]

■ *1.2. The political battle over the need to terminate or maintain intra-EU BITs*

The possibility of EU investors using intra-EU BITs to initiate investment arbitration proceedings against EU Member States was first brought to the attention of the Member States and the Commission by the Czech Deputy Minister of Finance in the context of the *Eastern Sugar* arbitration.[12] As part of the Czech Republic's defence strategy, the Czech Deputy Minister of Finance addressed a letter to the Commission concerning the compatibility of intra-EU BITs with EU law and the effect of EU accession on these treaties. In particular, the Czech Deputy Minister of Finance asked for clarity on when, exactly, the Netherlands–Czechoslovakia BIT was to be regarded as ceasing to apply as a consequence of the Czech Republic's accession to the EU, whether any form was necessary to render effective the substitution of intra-BITs by EU law (such as the formal termination of intra-EU BITs by the Member States) and, if termination was necessary, when such termination would take effect.[13]

The questions raised by the Czech Republic left the EU Member States divided for over a decade.

9 Eastern Sugar B.V. v. Czech Republic (SCC Case No. 088/2004), Partial Decision, 27 March 2007 ("Eastern Sugar"), para. 119. In 2006, the Commission brought Sweden and Austria, and later also Finland, to the CJEU for failing to eliminate the so-called "transfer clauses" in their BITs with non-European countries. The CJEU found that Sweden, Austria and Finland had breached their obligations under Article 307 EC Treaty by failing to take appropriate steps to eliminate the incompatibilities between their pre-accession agreements and the TFEU; see Commission v Austria (Case C-205/06), Commission v Sweden (Case C-249/06), and Commission v. Finland (Case C-118/07).

10 See the annual reports of the Economic and Financial Committee of the European Union, which did not address the issue of intra-EU BITs until after 2006, e.g., 2006 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 4 January 2007, p. 7. See also Letter from Mr Jörn Sack, expert of the Legal Services of the European Commission, quoted in Eureko B.V. v. The Slovak Republic (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 ("Eureko"), para. 90.

11 The network of BITs between Member States and accession states was not complete, as out of the 300 or so possible treaties between the then 28 Member States, only about 200 have actually been concluded; see Gaillard, 2011, p. 199.

12 See Letter from Mr. Schaub, EC, DG Internal Market and Services, in response to the letter from the Deputy Minister of Finance of the Czech Republic, quoted in Eastern Sugar, para. 119. The Germany–Greece BIT and the Germany–Portugal BIT never served as a basis for investment claims.

13 Eastern Sugar, para. 119.

The Commission, which in the 1990s had urged newly independent Central and Eastern European States applying for EU accession to enter into BITs with the "old" Member States, and which did not require the termination of these treaties upon the enlargements of the EU, quickly took sides against intra-EU BITs, becoming a driving force for their termination.

The Commission identified a number of legal concerns arising from the continued existence of intra-EU BITs. It considered that intra-EU BITs (i) lead to discriminatory treatment between EU investors from different Member States and between Member States, (ii) violate the principle of mutual trust and (iii) encourage forum shopping. It also considered that they (iv) violate the CJEU's exclusive competence to interpret EU law insofar as they give rise to a parallel jurisprudence through arbitration procedures that could result in situations where EU law is ignored, circumvented or wrongly applied without the possibility of review by the CJEU.[14]

Despite these concerns, the Commission initially accepted that "the effective prevalence of the EU acquis does not entail … the automatic termination of the concerned BITs" and that in order "to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves".[15] The Commission therefore invited Member States to review the need for their intra-EU BITs and to terminate them.[16] It added that extra reassurances such as those provided by intra-EU BITs were no longer necessary in the EU as EU law provides sufficient protection guarantees to all cross-border investments in the EU Internal Market.[17]

Only a minority of Member States followed the Commission's invitation to terminate their treaties voluntarily, however. The Czech Republic, which was the most frequent respondent in intra-EU BIT arbitrations, was one of the first Member States to initiate formal termination procedures for its 23 intra-EU BITs.[18] Further, Ireland, Italy and

14 Eastern Sugar, para. 119; Eureko, paras. 183-185; European Commission Observations, European American Investment Bank AG v Slovak Republic (PCA Case No. 2010-17), 13 October 2011; 2007 Annual EFC Report, paras. 14-15; 2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 17 December 2008, para. 17; 2009 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 10 December 2009 ("2009 Annual EFC Report"), paras. 16-18; 2010 Annual EFC Report, para. 22; 2011 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 13 December 2011 ("2011 Annual EFC Report"), para. 22; Press Release, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties, 18 June 2015; European Commission, Inception Impact Assessment on the Prevention and Amicable Resolution of Investment Disputes Within the Single Market, FISMA B1, 25 July 2017.

15 Eastern Sugar, para. 109.

16 See e.g. 2007 Annual EFC Report, p. 4.

17 Eastern Sugar, para. 126; 2007 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 8 January 2008 ("2007 Annual EFC Report"), para. 14; 2010 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 14 December 2010 ("2010 Annual EFC Report"), para. 22.

18 Eastern Sugar, para. 127; See UNCTAD, 2009a, p. 5; Peterson, 2009; Peterson, 2011. Shortly after its accession to the EU, Slovakia, another frequent respondent in intra-EU BIT arbitrations, launched invitations to commence discussions on the validity of its intra-EU BITs, see Eureko, paras. 165-166.

Denmark proceeded to terminate their intra-EU BITs in response to the Commission's invitation.[19] Interestingly, although many of the Central and Eastern European States facing arbitration claims were also of the view that intra-EU BITs had become inapplicable as a result of their accession to the EU,[20] they were initially reluctant to begin treaty termination proceedings for fear of sending the wrong message to the EU investor community.

The capital-exporting "old" Member States whose investors had heavily invested in Central and Eastern Europe did not share the Commission's concerns about arbitration risks and the discriminatory treatment of investors. They preferred to keep their intra-EU BITs to maintain the protection they guaranteed, which according to them was otherwise unavailable under EU law.[21] The Netherlands government, for example, expressed the view that intra-EU BITs were unaffected by EU law and remained fully in force, noting that casting doubt on the legal validity of existing intra-EU BITs is unnecessarily harmful and undermines the rights and legitimate expectations of EU investors who relied on them.[22] Similarly, the German government took the view that intra-EU BITs were not terminated or superseded by EU law and that intra-EU BITs and EU law do not guarantee equivalent investment protection.[23] Faced with the opposition of the influential, "old" Member States, the Commission set up informal expert groups and conducted bilateral meetings to convince them to terminate their intra-EU BITs voluntarily.[24] The Commission also revised its earlier position; rather than accepting that intra-EU BITs remained in force and would have to be terminated in accordance with their provisions, it now maintained that these treaties were incompatible with EU law and were therefore automatically terminated or invalidated as a result of EU accession.[25]

The "old" Member States resisted the Commission's efforts, however, and were willing to envisage the termination of intra-EU BITs only on the condition that they were replaced by a new, pragmatic and efficient mechanism for the settlement of intra-EU

19 Hepburn and Peterson, 2015; Dahlquist and Peterson, 2016; European Commission, Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015.

20 2011 Annual EFC Report, para. 23.

21 2007 Annual EFC Report, paras. 14-15; 2009 Annual EFC Report, paras. 16-17; 2010 Annual EFC Report, para. 23.

22 Eureko, paras. 155-163.

23 Letter from Mr. Tillmann Rudolf Braun, M.P.A., International Investment, Federal Ministry for Economics and Technology, Republic of Germany, 15 January 2007, quoted in Rupert Joseph Binder v. Czech Republic (UNCITAL), Award on Jurisdiction, 6 June 2007, para. 61.

24 Eureko, para. 197; 2013 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 17 December 2013, p. 2 ("2013 Annual EFC Report").

25 See e.g. 2011 Annual EFC Report, para. 22; 2012 Annual EFC Report to the Commission and the Council on the Movement of Capital and Freedom of Payments, 15 January 2013; 2014 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 25 March 2015 ("2014 Annual EFC Report"), para. 22; Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013, para. 102; Commission amicus submission in the Micula annulment proceedings, Ioan Micula, Viorel Micula and Others v Romania (ICSID Case No. ARB/05/20), Decision on Annulment, 26 February 2016 ("Micula Annulment"), paras. 330-335.

investment disputes.[26] The Commission was apparently unwilling or unable to meaningfully engage with the Member States' request for a replacement regime for intra-EU investment protection. This led to a political deadlock over the fate of intra-EU BITs.

In the hope of overcoming this political impasse, the Commission stepped up the pressure. It first threatened Member States with infringement proceedings if they continued to refuse to terminate their intra-EU BITs and subsequently delivered on this threat.[27] In the summer of 2015, it launched infringement proceedings against five Member States whose intra-EU BITs had given rise to the most discussed and most controversial intra-EU BIT arbitrations – namely the Netherlands, Austria, Sweden, Slovakia and Romania – and commenced pilot proceedings against 20 other Member States.[28] The initiation of infringement proceedings still failed to bring about the large-scale termination of intra-EU BITs demanded by the Commission, however. Instead, the Member States voiced concern over the Commission's methods and reiterated their demand that an EU-wide replacement regime be put in place simultaneously with the termination of the treaties. Sweden, for example, noted that the termination of intra-EU BITs would have to take place in a coordinated way, ensuring predictability, foreseeability and transparency, and should be followed by the establishment of an EU-wide regime that would guarantee the continued protection of intra-EU investments.[29] Sweden's position was echoed in the so-called Non-Paper submitted by Austria, Finland, France, Germany and the Netherlands to the European Council's Trade Policy Committee in 2016 in connection with the forced termination of intra-EU BITs. As a possible compromise, the Non-Paper proposed the conclusion of an agreement among all Member States on the phasing out of existing intra-EU BITs that would at the same time offer appropriate new guarantees, as a matter of both substantive and procedural protection, to EU investors investing in the EU Internal Market.[30]

The Commission again refused to meaningfully engage with the Member States' request. Instead, it continued its crusade against intra-EU BITs and pursued infringement proceedings to show that it would not back down until all intra-EU BITs had finally been terminated. In September 2016, it issued a reasoned opinion to put Austria, the Netherlands, Romania, Slovakia and Sweden on notice that it would bring them before the CJEU if they refused to terminate their treaties.[31] In light of these developments,

26 See e.g. 2013 Annual EFC Report, p. 2; 2014 Annual EFC Report, para. 22; 2016 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 23 March 2017, pp. 2, 15.

27 Eureko, para. 182.

28 Press Release, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties, 18 June 2015.

29 Sweden, Ministry of Foreign Affairs, Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), 19 October 2015.

30 Intra-EU Investment Treaties, Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016.

31 Lukic and Grill, 2016.

Romania and Poland launched proceedings for the termination of their intra-EU BITs in 2016 and 2017.[32] Yet until the Court handed down its judgment in the *Achmea* case, declaring once and for all that intra-EU BITs were incompatible with EU law, the majority of Member States continued to refuse to terminate their treaties, taking the view that intra-EU BITs were not only *not* contrary to EU law but indeed necessary for the adequate protection of intra-EU investments.

■ *1.3. The legal battle over the validity and applicability of intra-EU BITs*

In parallel with the political battle between the Member States and the Commission over the fate of intra-EU BITs, another battle opened up over the validity and applicability of intra-EU BITs, this time before arbitral tribunals constituted on the basis of intra-EU BITs to hear EU investors' claims against EU Member States.

As a result of the significant flow of West–East investment in the EU in the 1990s and 2000s,[33] intra-EU BITs were increasingly invoked in investment disputes between EU investors and the new Member States. Between 2004 and 2018, over 100 investment arbitrations were brought on the basis of intra-EU BITs, mainly (although not exclusively) against Member States of Central and Eastern Europe.[34] In many of these arbitrations, the respondent Member States argued that, although the intra-EU BITs had not been terminated or denounced by their signatories, they were no longer valid or had ceased to apply as a result of the accession of the two signatory States to the EU. As a consequence, tribunals lacked jurisdiction to hear arbitration claims on the basis of these treaties. This "EU law objection to jurisdiction" was essentially composed of public international law arguments on the one hand and EU law arguments on the other.

The international law branch of this argument was based on the Vienna Convention on the Law of Treaties ("VCLT") and the premise that intra-EU BITs and the EU Treaties relate to the "same subject matter" and are incompatible with each other. From there, respondent States argued that as a result of their accession to the EU, the BITs were automatically terminated by operation of Article 59 VCLT. In the alternative, even if a BIT could not be considered terminated, its dispute resolution clause, which formed the basis of the tribunals' jurisdiction, was no longer valid by virtue of Article 30(3) VCLT.[35]

32 Lavranos, 2016; Jones, 2017; Analysis of Bilateral Investment Treaties, Ministry of Treasury of the Republic of Poland, 25 February 2016; Orecki, 2017a; Orecki, 2017b; Latvia to terminate bilateral investment treaties with Poland, Czech Republic at EU request, the Baltic Times, 2 February 2018.

33 The rapid increase in the number of BITs concluded between Member States and candidate countries over the last twenty years has been followed by an acceleration of investment flows closely linking the economies of Western and Eastern Europe. See International Monetary Fund, 2011,pp. 90-92; Internal Market Scoreboard, No. 18, December 2008, p. 29; Hussain andIstatkov, 2009.

34 See UNCTAD, 2018; UNCTAD, 2021; The ICSID Caseload, Statistics Special Focus – European Union, April 2017.

35 See e.g. Eureko, paras. 65-77, 86-96, 109-119, 127-128; Jan Oostergetel and Theodora Laurentius v. Slovakia (ad hoc), Decision on Jurisdiction, 30 April 2010 ("Oostergetel"), paras. 65-67; Anglia Auto Accessories Ltd. v. Czech Republic, (SCC Case No. V 2014/181), Final Award, 10 March 2017 ("Anglia Auto"), paras. 98-102, 119-124.

The EU law branch of the EU law objection to jurisdiction was based on the premise that intra-EU BITs are incompatible with EU law, in particular with the principles of equal treatment and mutual trust, and that their arbitration clause violates the exclusive jurisdiction of the CJEU to interpret EU law. Given these incompatibilities, and given the principle of primacy of EU law, the provisions of the BIT can no longer be applied, and their arbitration clause cannot give rise to a valid agreement to arbitrate.[36]

The first States to raise the EU law objection to jurisdiction were the Czech Republic and Slovakia. Most of the other respondent States, such as Poland, Hungary, Romania and Croatia, raised this objection only once the *Achmea* case had been referred to the CJEU[37] or the CJEU had handed down its judgment.[38] The likely reason for this was, as noted above in respect to treaty termination, that these States did not want to give investors the impression that they were reneging on their international obligations, in particular given that arbitral tribunals had consistently rejected the EU law objection to jurisdiction.

Recognizing that its efforts to convince Member States to terminate their intra-EU BITs were not meeting with success, the Commission tried to convince arbitral tribunals to reject any claims brought by EU investors on the basis of these treaties, even in the absence of the express denunciation of intra-EU BITs by their signatories. Positioning itself as the "guardian of the EU Treaties … entrusted with ensuring and overseeing the proper application of EU law",[39] the Commission intervened as a non-disputing party (*amicus curiae*) in a number of intra-EU BIT cases in support of the respondent Member State's claim of lack of jurisdiction. In fact, the Commission intervened and argued for a lack of jurisdiction even in cases where the respondent State either did not raise the objection itself or specifically argued that it did not consider the applicable intra-EU BIT to have been superseded or terminated as a result of EU accession.[40]

Arbitral tribunals have consistently rejected the EU law objection to their jurisdiction, however. They found that intra-EU BITs and the EU Treaties did not relate to the "same subject matter" and were in fact complementary rather than incompatible,

36 See e.g. Eureko, paras. 132-138; WNC Factoring Ltd v. Czech Republic (PCA Case No. 2014-34), Award, 22 February 2017 ("WNC Factoring"), paras. 66-68.

37 See e.g. PL Holdings S.a.r.l. v. Poland (SCC Case No. 2014/163), Partial Award, 28 June 2017, para. 53; Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland (ICSID Case No. ADHOC/15/1), Partial Award on Jurisdiction, 4 March 2020 ("Strabag"), para. 1.47.

38 See e.g. UP and C.D. Holding Internationale v. Hungary (ICSID Case No. ARB/13/35), Award, 9 October 2018 ("UP v. Hungary"), paras. 89-91.

39 United States Court of Appeals for the Second Circuit 4 February 2016, Case 15-3109-cv, Brief for Amicus Curiae by the Commission of the European Union in Support of Defendant-Appellant before the US Court of Appeals, p. 7.

40 See e.g. Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic (PCA Case No. 2014-03), Final Award, 11 October 2017, para. 249; Electrabel S.A. v. Republic of Hungary (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.54.

such that intra-EU BITs were not terminated or invalidated by operation of the VCLT. They also found that EU law did not supersede the provisions of the BITs or render them inapplicable.[41]

Having failed to persuade intra-EU BIT tribunals of the merits of the EU law objection to jurisdiction, the Commission intervened as *amicus curiae* in annulment proceedings to obtain the reversal of intra-EU BIT awards.[42] Further, it threatened that if EU investors were to bring intra-EU BIT arbitrations, the Commission would render their awards unenforceable.[43] It delivered on this threat by intervening in various enforcement proceedings in the EU and overseas,[44] and by using and abusing its State aid powers to effectively block the payment of intra-EU BIT awards.[45] Yet, not even its increasingly aggressive stance against intra-EU BIT arbitration sufficed to discourage EU investors from pursuing intra-EU BIT arbitrations or to convince tribunals to accept the EU law objection to jurisdiction. It likewise failed to persuade Member States to finally agree to terminate their intra-EU BITs.

2. The *Achmea* Decision

It was in the midst of this turmoil that the issue of the EU law compatibility of intra-EU BITs came before the CJEU in March 2016. At long last, the Court was given the opportunity to take a position on the question that had divided Member States and kept tribunals busy for over a decade. Unsurprisingly, the Court's conclusion regarding the EU law compatibility of intra-EU BITs was the exact opposite of that reached by arbitral tribunals constituted on the basis of intra-EU BITs. Below, we will first discuss the factual background to the *Achmea* ruling (2.1) and then present the Court's ruling (2.2). We will conclude this section with a brief overview of the consequences of the *Achmea* ruling for intra-EU BITs (2.3).

41 See e.g. Eureko, paras. 217-292; Oostergetel, paras. 72-109; Anglia Auto, paras. 113-118, 126-128; WNC Factoring, paras. 294-311.

42 See e.g. Micula Annulment, paras. 53-64; UP and C.D. Holding Internationale v. Hungary (ICSID Case No. ARB/13/35), Decision on Annulment, 11 August 2021, paras. 18, 38, 40.

43 Peterson, 2014.

44 The Commission intervened as *amicus curiae*, for example, in the Micula enforcement proceedings in the UK, Belgium and the USA. It also intervened in the proceedings for the enforcement of the Eiser award in the USA; see United States District Court for the District of Columbia, Civil Action No. 1:18-cv-1686, Eiser Infrastructure Limited and Energia Solar Luxembourg S.A R.L. v. Kingdom of Spain, Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, 13 March 2019.

45 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 (OJ 2015 L 232, p. 43); Cases T-624/15, T-694/15 and T-704/15, Ioan Micula et all v. Commission, Judgment, 18 June 2019, in which the General Court found that the Commission retroactively applied its State aid powers to events predating Romania's EU accession and annulled Commission Decision 2015/1470. See also Press Release, State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain, 19 July 2021.

2.1. The factual background to the Achmea *ruling*

In 2004, at the time of its accession to the European Union, Slovakia opened its health insurance market to private investors, as a result of which several foreign operators invested in Slovakia.[46] In 2006–2007, however, Slovakia partially reversed this privatisation by imposing, *inter alia*, a ban on the distribution of insurance companies' profits to shareholders, the examination of insurance companies' budgets and new solvency requirements.[47] These measures gave rise to three investment arbitrations against Slovakia on the basis of intra-EU BITs: HICEE BV v. Slovakia (Netherlands–Slovakia BIT), EURAM v. Slovakia (Austria–Slovakia BIT) and Achmea v. Slovakia (Netherlands–Slovakia BIT). Whereas the first two cases were dismissed at the jurisdictional stage, the *Achmea* arbitration proceeded to a final award. In this case, Achmea (previously Eureko), a Dutch private insurance company, claimed that the new measures imposed by the Slovak government in the course of 2006 destroyed the value of its investment in Slovakia.[48] Before starting the arbitration procedure, Achmea filed a complaint with the European Commission over Slovakia's measures, which led to the opening of an infringement procedure against Slovakia.[49] Subsequently, noting that its influence on the progress and direction of the complaint procedure was limited and that its damages could not be redressed via the EU mechanism, in October 2008 Achmea filed an investment claim against Slovakia on the basis of the Netherlands–Slovakia BIT before an UNCITRAL arbitral tribunal seated in Frankfurt-am-Main (Germany).[50] In the arbitration proceedings, Slovakia objected to the tribunal's jurisdiction on the grounds that its accession to the EU deprived the tribunal, on the basis of international law, EU law, Slovak law and German law, of its jurisdiction to hear Achmea's claims.[51] Slovakia argued in particular that the BIT's arbitration clause violated the CJEU's exclusive competence to interpret EU law laid down in Articles 267 and 344 TFEU and gives rise to nationality-based discrimination in breach of Article 18 TFEU.[52] Slovakia further submitted that it follows from the autonomy, supremacy and direct effect of EU law that EU law takes precedence over the BIT.[53] Invited by the tribunal to participate in the arbitration proceedings as *amicus curiae*, the Commission echoed Slovakia's arguments.[54] In its Award on Jurisdiction, Arbitrability and Suspension issued in 2010, the tribunal dismissed all of Slovakia's and the Commission's jurisdictional arguments. It found that investor–state arbitration was not incompatible but rather complementary to EU law

46 Eureko, para. 52.
47 Eureko, para. 54.
48 Eureko, paras. 7, 53.
49 Eureko, para. 55. In her Opinion issued in the PL Holdings case, AG Kokott noted that infringement proceedings are "relatively cumbersome" and cannot ensure the full effectiveness of EU law; see Opinion of AG Kokott delivered on 22 April 2021, Republic of Poland v. PL Holdings Sàrl (Case C-109/20), para. 60.
50 Eureko, para. 56.
51 Eureko, paras. 9, 19, 58.
52 Eureko, paras. 109-119.
53 Eureko, paras. 135-138.
54 Eureko, paras. 176-196.

and that there was no rule of EU law that prohibited investor–state arbitration.[55] The tribunal also noted that the "argument that the ECJ has an 'interpretative monopoly' and that the tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different".[56] The tribunal went on to issue a Final Award in 2012, awarding Achmea 22.1 million EUR in compensation for Slovakia's violations of the BIT.[57] Slovakia challenged both the Award on Jurisdiction, Arbitrability and Suspension and the Final Award before the German courts on the grounds that the arbitration clause of the Netherlands–Slovakia BIT was incompatible with EU law and that the tribunal therefore lacked jurisdiction to entertain Achmea's claim. In May 2012, the Frankfurt Higher Regional Court dismissed Slovakia's challenge and ruled that because the Netherlands–Slovakia BIT had not been invalidated by Slovakia's EU accession, Achmea was entitled to initiate arbitration proceedings on the basis of the treaty.[58] Slovakia subsequently appealed the Higher Regional Court's decision to the German Federal Court of Justice ("BGH"). Although the BGH did not share Slovakia's doubts regarding the compatibility of intra-EU BITs with EU law and the tribunal's lack of jurisdiction,[59] in March 2016 it agreed to refer three questions relating to the compatibility of arbitration clauses contained in intra-EU BITs with Articles 18, 267 and 344 TFEU to the CJEU for a preliminary ruling.[60]

■ *2.2. The CJEU's* Achmea *ruling*

On 6 March 2018, the CJEU, sitting in the Grand Chamber formation, rendered its judgment in the *Achmea* case. In the proceedings before the CJEU, an unusually high number of EU Member States intervened to make observations. The intervening Member States were divided along the battle lines outlined above: the first group, consisting of the capital-importing, "new" Member States and Italy and Spain, which had each been respondents in a large number of intra-EU arbitrations, argued that the Court should find that the arbitration clauses contained in intra-EU BITs are incompatible with the TFEU, while the second group, consisting of capital-exporting, "old" Member States, made submissions to the opposite effect.[61] Advocate General Wathelet delivered his Opinion in September 2017 and, siding with the latter group,

55 Eureko, paras. 246-263.

56 Eureko, para. 282.

57 Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic (PCA Case No. 2008-13), Final Award, 7 December 2012, para. 352.

58 OLG Frankfurt am Main, Case No. 26 SchH 11/10, Judgment dated 10 May 2012; BGH, Case No. III ZB 37/12, Judgment dated 19 September 2013; OLG Frankfurt am Main, Case No. 26 Sch 3/13, Judgment dated 18 December 2014.

59 Case C-284/16, Slowakische Republik v. Achmea BV, Judgment of 6 March 2018 ("Achmea Judgment"), paras. 14-23.

60 BGH, Case No. SchiedsVZ 2016/328, Decision, 3 March 2016.

61 Opinion of AG Wathelet delivered on 19 September 2017, , Slowakische Republik v. Achmea BV (Case C-284/16) ("Walthelet Opinion"), paras. 34-38.

recommended that the Court answer the BGH's questions by confirming that EU law does not conflict with the investor–state dispute settlement mechanisms contained in intra-EU BITs.[62] In its judgment, the Court disregarded the AG Opinion in its entirety, and concluded that investor–State arbitration provisions contained in intra-EU BITs are precluded by EU law.

The CJEU based its reasoning on the principle of autonomy of EU law and on the system of judicial protection instituted by Article 19 TEU and Articles 267 and 344 TFEU to preserve this autonomy by ensuring consistency and unity in the interpretation of EU law. The CJEU pointed out that an international agreement cannot affect the allocation of powers fixed by the EU Treaties. It recalled that the autonomy of EU law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law, characterised in particular by its independent source, namely the EU Treaties, its primacy and its direct effect. The Court went on to state that EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded. It also noted that that premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected.

The Court then recalled that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. It also stated that that system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the EU Treaties.

Responding to the BGH's first and second question, the CJEU applied a three-step analysis to ascertain whether investor–State dispute settlement mechanisms contained in intra-EU BITs were likely to upset the preservation of the autonomy of EU law. First, the CJEU recalled the dual nature of EU law, which forms part of international law and the national law of Member States, and found that a tribunal constituted pursuant to the arbitration clause of an intra-EU BIT may be called upon to interpret or apply EU law (whether as international law or as national law) to rule on possible violations of the BIT.[63] Second, it found that an intra-EU BIT tribunal could not be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and was therefore not entitled to make a reference to the Court for a preliminary ruling to ensure the full effectiveness of EU law.[64] The Court noted in particular that the exceptional nature of the tribunal's jurisdiction (compared with that of the courts of the Member State

62 Wathelet Opinion, para. 273.
63 Achmea Judgment, paras. 39–42.
64 Id., paras. 43–49.

signatories of the BIT) was one of the principal reasons for the existence of the BIT's arbitration clause.[65]

Third, the CJEU noted that the resulting intra-EU BIT arbitral award was subject to limited judicial review by the competent national courts, allowing only for a review of the validity of the arbitration agreement and the consistency of the recognition or enforcement of the arbitral award with public policy. In the Court's view, this was insufficient to ensure that the questions of EU law that the tribunal had to address in its award could be submitted to the Court by means of a preliminary ruling. In this regard, the CJEU distinguished between investment arbitration, which is derived from a treaty by which the Member States agree to remove disputes about the application or interpretation of EU law from the jurisdiction of their own courts, and commercial arbitration, which originates in the freely expressed wishes of the parties. It found that with the latter, the courts of the Member States are justified in conducting a limited review of awards.[66]

On the basis of the above, the CJEU concluded that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".[67]

Exercising judicial restraint, the CJEU did not address the third question referred to it by the BGH regarding the compatibility of intra-EU BITs' arbitration clauses with Article 18 TFEU.

■ *2.3. The consequences of the* Achmea *ruling for intra-EU BITs*

Without much surprise, in its *Achmea* ruling, the Court confirmed the supremacy of EU law over intra-EU BITs and their arbitration clauses. The Court also made clear that its findings are not limited to the Netherlands–Slovakia BIT, but apply to arbitration clauses contained in all intra-EU BITs, irrespective of whether the clause directs the arbitral tribunal to apply EU law as part of the applicable law and irrespective of whether the tribunal in fact applies EU law in rendering its award.[68] While largely in line with the CJEU's earlier case law, the *Achmea* ruling was nevertheless heavily criticised by the international arbitration community for being politically motivated and weakly reasoned.[69]

65 Id., para. 45.
66 Id., paras. 50–57.
67 Id., paras. 58–60.
68 Id., para. 62 ("Articles 267 and 344 TFEU must be interpreted as precluding a provision in *an* international agreement concluded between Member States, *such as* Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic…"); Korom, 2018, p. 2007.
69 See e.g. Gaillard, 2018, pp. 616-630.

Be that as it may, the *Achmea* ruling put to bed the much-debated question of the EU law compatibility of arbitration clauses contained in intra-EU BITs. *Achmea* thus gave new impetus to the Commission in its battle with the Member States over the fate of intra-EU BITs, although the disagreement on the termination of these treaties and the need for a replacement regime continued for the years to come.

In a Communication issued in July 2018, the Commission publicly declared that it follows from *Achmea* that all arbitration clauses in intra-EU BITs are inapplicable and tribunals lack jurisdiction due to the absence of a valid agreement to arbitrate.[70] It also stated that Member States will have to formally terminate their treaties to comply with the Court's judgment. Responding to the Member States' calls for a replacement regime to protect intra-EU investments, the Commission noted in its Communication that EU law (i.e. the fundamental freedoms and the Charter of Fundamental Rights of the European Union) provides for adequate safeguards, thus suggesting that there is no need for any new measures.

In the meantime, ignoring the Court's findings in *Achmea* as well as the Commission's interpretation of those findings in its Communication, EU investors continued to bring new intra-EU BIT claims,[71] and intra-EU BIT tribunals continued to confirm their jurisdiction and issue compensation awards in favour of EU investors.[72]

Therefore, in January 2019, the Member States adopted political declarations to inform the investor community that in the aftermath of *Achmea* no new intra-EU investment arbitration proceeding should be initiated.[73] In these declarations, the Member States also announced that they would terminate their intra-EU BITs in order to preclude the application of arbitration clauses that the CJEU had deemed incompatible with EU law. Although for the purposes of eliminating the EU law incompatibility identified by the Court it would have sufficed for Member States to cancel the arbitration clauses of their treaties while allowing intra-EU BIT investment disputes to be taken to national courts, Member States agreed to abandon their treaties altogether, likely in

70 Communication from the Commission to the European Parliament and the Council on Protection of intra-EU investment, COM(2018) 547 final, 19 July 2018. This Communication was adopted as the result of the "Inception Impact Assessment on Prevention and amicable resolution of investment disputes within the single market" and the "Roadmap on Interpretative Communication on the existing EU standards for the treatment of cross-border intra-EU investments" launched by the Commission in July 2017.

71 See e.g. Oļegs Roščins v. Republic of Lithuania (ICSID Case No. ARB/18/37), brought under the Latvia-Lithuania BIT and registered at ICSID on 16 October 2018; Société Générale S.A. v. Republic of Croatia (ICSID Case No. ARB/19/33), brought under the France-Croatia BIT and registered at ICSID on 20 December 2019.

72 See e.g. Strabag; UP v. Hungary.

73 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, 15 January 2019; Declaration of the representatives of the Governments of Finland, Luxembourg, Malta, Slovenia and Sweden on the enforcement of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, 15 January 2019; Declaration of the representative of the Government of Hungary on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, 16 January 2019.

response to pressure from the Commission. At the same time, in their declarations, the Member States expressed their determination to intensify discussions with the Commission with the aim of better ensuring the complete, strong and effective protection of intra-EU investments.

In a press statement issued in October 2019, the Commission announced that the 28 Member States had reached an agreement on a plurilateral treaty for the termination of intra-EU BITs.[74] Therefore, it came somewhat as a surprise that the Termination Treaty, finally adopted on 5 May 2020, was signed by only 23 out of the then 28 Member States.[75] Five Member States – Austria, Finland, Ireland, Sweden, and the UK – did not sign the Termination Treaty, although they had all signed up to the political declarations announcing the Member States' determination to give effect to the *Achmea* judgment by terminating their treaties.

A possible explanation for this change of heart may lie in the Termination Treaty's 'transitional provisions' relating to ongoing arbitrations, which would have adversely impacted investors from Austria, Sweden, and the UK who were pursuing high-profile and high-stakes intra-EU BIT arbitrations at the time.[76] Indeed, in addition to terminating some 130 intra-EU BITs (and their survival clauses), the Termination Treaty puts EU investors pursuing intra-EU BIT arbitrations on notice that they will not be able to enforce their award.[77] As regards ongoing proceedings commenced before the *Achmea* judgment, the Termination Treaty encourages investors to refer their disputes either to State courts or to a facilitator in the framework of a settlement procedure set up by the Treaty (called structured dialogue).[78] Given the continuing concerns over the independence of the judiciary in several Member States,[79] and the entirely voluntary nature of the structured dialogue procedure, which, in addition, is available only in cases where the Member State measure giving rise to the dispute is or has been found to be contrary to EU law,[80] neither of the proposed alternative dispute resolution solutions seem entirely satisfactory (tellingly, there have thus far been no reported cases where

74 Lavranos, 2019.

75 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169, 29.5.2020, p. 1–41. For a short commentary see Korom, 2020, pp. 1687–1689.

76 See e.g. Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary (ICSID Case No. ARB/17/27); Erste Group Bank AG and others v. Republic of Croatia (ICSID Case No. ARB/17/49); Ioan Micula, Viorel Micula and others v. Romania [II] (ICSID Case No. ARB/14/29).

77 Termination Treaty, Article 7.

78 Termination Treaty, Articles 8-10.

79 EU Justice Scoreboard 2021, 8 July 2021.

80 See e.g. the 2012 changes adopted by Hungary in relation to the food voucher market, which resulted in proceedings against Hungary both for the violation of the TFEU and the France-Hungary BIT, see European Commission v. Hungary (Case C-179/14), Judgment of 23 February 2016; UP v. Hungary; Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20); Edenred S.A. v. Hungary (ICSID Case No. ARB/13/21). In contrast, in the *Achmea* case, the Commission closed the infringement proceedings against Slovakia without finding a violation of EU law – while the *Achmea* tribunal found a violation of the BIT and issued a 22.1 million EUR compensation award in favor of the Dutch investor.

an investor abandoned its arbitration to pursue the 'structured dialogue' instead). As regards ongoing proceedings commenced after *Achmea*, the Termination Treaty simply considers them null and void by declaring that arbitration clauses in intra-EU BITs cannot serve as a valid legal basis for such proceedings.[81] The Termination Treaty's 'transitional provisions' thus give the termination of intra-EU BITs a de facto retroactive effect (likely in order to make up for the Member States' inability to come to a political consensus sooner) which goes against the VCLT.[82] Moreover, they create an unjust discrimination between EU investors depending on the timing of their arbitration. Investors who commenced arbitrations over unlawful Member State measures and obtained final awards before the *Achmea* judgment remain unaffected by the Termination Treaty and can keep the compensation awarded to them.[83] Conversely, investors whose proceedings were pending at the time of the *Achmea* judgment or were commenced thereafter – either because the unlawful State measures were adopted later in time, or the investor waited longer to start arbitration proceedings or the tribunal was slower to render its award – fall under the Termination Treaty's 'transitional provisions' and will likely be unable to enforce their awards. This differentiation between investors is also entirely inconsistent with the Termination Treaty's own provision according to which "Arbitration Clauses are contrary to the EU Treaties and thus inapplicable.... as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union"[84] and which should in principle deprive all intra-EU arbitrations of their legal basis, irrespective of whether they have already been concluded or are ongoing.

Another, at least partial, explanation for the five Member States' refusal to sign up to the Termination Treaty might have been the Commission's reluctance to work on a replacement regime for the protection of intra-EU investments. In the Preamble to the Termination Treaty, the Member States recalled that discussions would have to be led "without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union". In response, the Commission launched a public consultation with stakeholders at the end of May 2020 to assess the existing framework of investment protection in European law.[85] In light of the feedback received from stakeholders, the Commission undertook in its Capital Markets Union Action Plan published in September 2020 to take steps aiming at "enhancing the rules protecting intra-EU investment, enhancing dispute resolution mechanisms at a national and/or EU level, and consolidating information on investor rights and opportunities in a single access point and stakeholder engagement mechanisms to prevent

81 Id., Article 5.
82 See Articles 28 and 70(1)(b) VCLT.
83 Termination Treaty, Article 6.
84 Termination Treaty, Article 4.
85 European Commission, Inception Impact Assessment, Investment protection and facilitation framework, 26 May 2020; The consultation on intra-EU investment protection: an opportunity that should not be missed, GAR, 8 July 2020.

problems and resolve disputes amicably" by the second quarter of 2021.[86] By the time of the publication of this paper, however, no action has been taken by the Commission, and it remains unclear whether and if so when any tangible new measures will be proposed to enhance intra-EU investment protection.

While the Commission has remained slow to progress talks on a replacement regime for intra-EU BITs, it was very quick to move against the Member States that refused to sign the Termination Treaty. Less than 2 weeks after the adoption of the Termination Treaty, the Commission sent letters of formal notice to Finland and the UK for failing to sign the Termination Treaty or otherwise terminate their intra-EU BITs.[87] In the case of the UK, the Commission was obviously concerned that the UK would leave the EU without terminating its 12 BITs with Central and Eastern European States and Malta, and that following Brexit EU investors could rely on these treaties as a potential structuring solution for their intra-EU investments.[88] Therefore, in October 2020, the Commission issued a reasoned opinion and threatened to refer the matter to the CJEU if the UK failed to terminate its intra-EU BITs voluntarily.[89] The UK left the EU on 31 January 2021, however, without its intra-EU BITs being formally terminated which have since been used by UK investors to bring new arbitration proceedings against EU Member States.[90]

As regards the 23 Member States that did sign the Termination Treaty, the ratification process has been particularly slow in the majority of these States, with the result that over 1,5 years after its adoption, the Termination Treaty has still not entered into force in respect to all of its signatories. For this reason, the Commission has again resorted to the infringement mechanism to put pressure on recalcitrant Member States. In December 2021, it brought new infringement proceedings against Austria and Sweden who did not sign the Termination Treaty (and who also did not otherwise terminate their intra-EU BITs), and against Belgium, Luxembourg, Portugal, Romania and Italy who did sign it but have failed to ratify it.[91] From the reservations submitted by Luxemburg and Portugal to the Termination Treaty, it would seem that one explanation for this could be that the Commission has not put forward any concrete

86 European Commission, Communication, A Capital Markets Union for people and businesses-new action plan, COM(2020) 590 final, 24 September 2020.

87 See European Commission, Press Corner, May infringement package: key decisions, 14 May 2020. To recall, the Commission launched infringement proceedings in 2015 against Austria and Sweden, which were still ongoing, and Ireland had terminated its intra-EU BIT with the Czech Republic previously.

88 McCloskey, 2021.

89 See European Commission, Press Corner, October infringements package: key decisions, 30 October 2020.

90 The UK's intra-EU BITs have since been used by investors for new investment claims against EU Member States, see Christopher Jock Murdoch MacKenzie v. Hungary (ICSID Case No. ARB/21/66), brought under the UK-Hungary BIT and registered at ICSID on 23 December 2021.

91 See European Commission, Press Corner, December infringements package: key decisions, 2 December 2021; Ballantyne, 2021.

plans for ensuring the effective protection of intra-EU investments in the absence of intra-EU BITs.[92]

The question of the need for an EU law compliant replacement regime will likely continue to occupy the political agenda for the years to come. In the meantime, the Termination Treaty has finally ended intra-EU BIT arbitration in those Member States that have ratified the Treaty,[93] and there is no doubt that the Commission will continue to push for the termination of BITs in all EU Member States in the months to come. Thus, at long last, the Commission and those Member States who did not want investment protection via intra-EU BITs on the Internal Market will have prevailed in this decade long political and legal battle. But whether this is a win in the long run for the EU and intra-EU investment flows remains to be seen.

92 See reservations of Luxembourg, Portugal, Netherlands and Lithuania to the Termination Treaty available on the website on the European Council.

93 One of the last intra-EU BIT arbitrations (brought under the Hungary-Croatia BIT) was the case OTP Bank Plc v. Republic of Croatia (ICSID Case No. ARB/20/43), which was launched just a few days before the entry into force of the Termination Treaty in respect to both Hungary and Croatia.

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DAWID KOSTECKI[1]

Axiology of the Constitution of the Republic of Poland of 2 April 1997: Some Reflections

ABSTRACT: *The fact that almost a quarter of a century has passed since the adoption of the Polish Constitution contributes to a reflection on its axiology. This article prompts the reinterpretation of the critical value that can be 'decoded' from the Basic Law. It seems that authors of the supreme law of the Republic of Poland were initially guided by slightly different ideals; however, broad case law has become a test of the timelessness and timeliness of the Constitution of 2 April 1997. From this perspective, the question of grounds for an amendment of the basic law is highly current and pertinent. However, this question seems secondary to an attempt to decode the constitutional values forming the foundation of the Polish legal system. In light of the above reflections, have the values pursued by authors of the Constitution become real, or have they just become a redundant ornament in the legal erudition devoid of any practical value? The search for answers should be embedded in an appropriate context or the will of the historical legislator. However, the author believes that the interpretation of a legal text should keep pace with the times; this is why a dynamic interpretation is extremely relevant.*

KEYWORDS: constitutional law, axiology, Christian values, philosophy of law, Polish Constitution.

1. Introductory remarks

A lot is being said about the Christian values and roots of the European culture in public debate, especially in the European forum. This rhetoric is enjoyed by conservatives who refer to the foundations of the European culture: Greek philosophical thought, Roman law, and the Christian religion. The other ideological extreme comprises left-liberal trends aiming for a special understanding of freedom, equality, and tolerance.

1 Department of Theory and Philosophy of Law, Catholic University in Lublin, Poland, kostecki.dawid@gmail.com, ORCID: 0000–0002-8132-997X.

https://doi.org/10.47078/2022.1.119-135

The adopted reasoning frequently results in an annihilation of values in public life and grants control to minorities: ethnic, racial, or sexual.

The contemporary civilisational war is being fought on many levels: political, social, mediatic, and legal. From the perspective of social sciences, it is worthwhile to remember the Latin maxim '*ubi societas, ibi ius*', which reduces the clash of civilisations to the fundamental question, namely, who is human being, and who will human being be in the future? Reflection on the law and its five dimensions of creation, validity, interpretation, application, and compliance can be a valuable resource while decoding political, social, worldview-related, and even philosophical changes. When analysing the issues of values in the law, one has to be aware of the genetic precedence of value over the entire legal system, while the axiological research sphere has to be considered both when it comes to law making and its effect, i.e. the legal system, and when it comes to law application and enforcement.[2]

The passage of almost a quarter of a century since the adoption of the Polish basic law offers a valid excuse to reify the constitutional axiology, which is increasingly becoming the subject of a political dispute rather than the common national *acquis communautaire*.[3] This is why it appears reasonable to ask whether values contained in the Polish Constitution only need to be read in an appropriate context or if a cross-party consensus is necessary along with the engagement of the 'sovereign' to rewrite the Polish constitution. This question is secondary to an attempt to decode the constitutional values comprising the foundation of the Polish legal system. In light of the above reflections, have the values pursued by authors of the constitution become real, or have they just become a redundant ornament in the legal erudition devoid of any practical value?

It will be possible to answer the questions presented above within the context of the adoption of a specific research framework. At the very beginning of these reflections, one needs to resolve the fundamental dilemma of the meta-axiological nature that oscillates around two opposite concepts of axiological cognitivism and axiological non-cognitivism (acognitivism).[4] The first of these concepts assumes that evaluations, standards, and values have cognitive qualities. In other words, it is possible to understand values. Cognitivism ascribes logical value to moral judgements.[5] In turn, non-cognitivism entails the negation of objectively established values. According to representatives of this trend, values are neither true nor false. To retain scholarly integrity, one needs to accentuate that rulings and jurisprudence relating

2 Leszczyński, 2004, pp. 48–61; Wróblewski, 1973, passim.

3 In this case, we are not speaking about the achievements of the European community; rather, we are referring to the metaphorical take on the achievements of Polish law-making.

4 David Hume, who formulated the thesis about the impossibility of the logical transfer from sentences about facts (what is) to sentences about values and duties (what should be) in his *Treatise of human nature*, is considered the founder of this trend. The related literature calls it the naturalistic fallacy.

5 Dziedziak, 2015, s. 80.

to the Polish Constitution demonstrate the existence of universal and common values.[6]

By referring to the famous comparison of the relationship between law and morality as the 'Cape Horn' of the philosophy of the law, it is possible to state firmly that axiological reflection is the 'Cape Horn' of the state legal order.[7] The only thing to be done is cite the words of a renowned theorist of the law, M. Mahlmann: 'one who wants to talk about law meaningfully cannot remain silent about morality'.[8] This is particularly pertinent when it comes to values in the law that constitute an inherent part of both the law and the morality. In other words, it is not possible to separate the law from values, as the law is their basic carrier in the political and social systems of all contemporary states, not only democratic ones.[9]

2. Constitution – sources of the term

The Polish constitutionalism tradition is more than 200 years old. The 3 May Constitution is said to be the first one in Europe and the second one worldwide, following the Constitution of the United States of America. However, considering the way in which principal rules are determined in a state, it is surely true from the modern perspective that such attempts have been made since antiquity.

Cicero, who used the term *constitutio* in his works, *De republica* and *De legibus*, had in mind a certain morphological structure and set of operational rules defining the organisation and functioning of the state at various levels of power, which comprised not only of legal standards but also – or perhaps in particular – time-honoured customs.[10] The fact that attempts to create a certain 'backbone of the law', defined as a legal order, have been made since ancient times demonstrates the importance of the subject and its rich tradition, the beginnings of which can be found in antiquity.

The term 'constitution' comes from Latin and it is reflected in the following terms: *constitution* – a system or an organisation; *constituere* – arrange or establish; *concipere* – express or announce; *constare* – to stand heavily or to be certain and known; and *constans* – a constant, unchanging phenomenon.[11]

In the most general terms, the constitution in a strict formal and legal sense is a legal act adopted and amended according to a special procedure, functioning as the universally applicable basic law and the highest legal power. In other words, it is basic and superior to other normative acts, regulating matters such as the indication of the sovereign or the entity from which authority originates; forms of public

6 See: CT award of 11 May 2005, K 18/04, OTK-A 2005, No. 5, item 49; Dziedziak, 2015; Piechowiak, 2012; Piechowiak, 2020.
7 Jhering, 1997; Jhering, 1999.
8 Mahlmann, 2010, p. 15.
9 Ruszkowski, 2021, p. 107.
10 Zajadło, 2019, p. 166.
11 Długosz-Kurczabowa, 2005, p. 235; see: Sondel, 2005, p. 189, 211, 212.

government; basic rules of the state system, freedoms, rights and obligations of an individual (person and citizen), and means of their legal protection; the system of public authority agencies (state, local), their structure, competencies, and functions; and rules of legislative enactment including, in particular, the position and mode of change of the constitution itself.[12]

The RP Constitution of 2 April 1997 has to be treated as an act that defines more precisely the legal bases for the reborn state, an act with a symbolic dimension that confirms the possibility of the sovereign and democratic determination of the fate of Poland.[13]

3. Preamble

Preambles are found in legal acts that are of particular importance to the legal system, acts that are of particular legal, political, social, and international significance; as a rule, these are constitutions, constitutional acts, international agreements, and, less frequently, ordinary legislation.[14]

The introduction to the supreme law of the Republic of Poland is not just an announcement of the statement of reasons for the adoption of the Constitution or a ceremonial formula devoid of legal significance. K. Complak aptly described it by stating that

> 'the preamble is not a foreword but rather the afterword whose adoption has opened the path to the enactment of the entire Constitution of the RP. This fragment is the point of reference, a bracket that binds and, in particular, in the light of the content it discusses, the foundation on which the order of our state is based'.[15]

The preamble is a section wherein the legislator indicates, in particular, the values legitimising the legal order and the constitution itself.[16] In this manner, the preamble constitutionalises the constitution itself in the legal sense within the context of the culture in which the specific legal system operates.

Additionally, the preamble makes it possible to decode the hierarchy of individual constitutional values and to determine the relations between individual values. In the case of the Polish constitution, the system-creation function is also realised in the article section by art. 1 of the constitution – the principle of the common good demands the identification of constitutional values as values that define more precisely

12 Dudek, 2005, p. 5.
13 Garlicki, 2010, p. 95.
14 See: e.g. the Act of 17 May 1989 on the guarantees of the freedom of conscience and faith (consolidated text in Dz. U. of 2017, item 1153 as amended); the Act of 16 November 2016 on the National Tax Administration (consolidated text in Dz. U. of 2019, item 768).
15 Complak, 2007, p. 27.
16 Piechowiak, 2020, p. 27.

the sum total of social life conditions supporting the development of all members of a political community.[17]

4. Sovereignty

The first words of the preamble, 'Having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate', indicate the historical context of liberation from the Soviet Union and the possibility of self-determination. The year 1989 is symbolic and, from the legal perspective, related to the 'December Amendment'.[18] The name change and the reintroduction of the crowned white eagle in Poland's emblem did not transform Poland into a sovereign state in themselves. It is worth remembering that Soviet troops were stationed in Poland until 1993. However, the said turning point is symbolic and it marks the beginning of the democratisation process. The proof of a certain axiological ambivalence can be found, on the one hand, in the 'referral to the best traditions of the First and Second Republic', and, on the other hand, in the lack of referral to the times experienced by the People's Republic that – as one can only guess – were defined as 'the bitter experience of times when basic human freedoms and rights were being violated in our Homeland'. The lack of an unambiguous referral to that period of the People's Republic was due to the conciliatory nature of the preamble that, as its authors assumed, was supposed to unite rather than divide. Any rigorous formulations in that area could be met with objections of post-communist circles.

However, this does not alter the fact that sovereignty relating to the state is the value one can read in the first words of the preamble. The state sovereignty is also mentioned as first among the values to be safeguarded by the President of the Republic of Poland[19]; art. 126 of the Constitution of the RP provides: 'The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory'.[20]

Following this, the authors of the preamble defined on whose behalf they act.

> 'We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty as well as those not sharing such faith but respecting those universal values as arising from other sources'.

17 Piechowiak, 2020, p. 12.

18 The December amendment changed the content of the first chapter of the Constitution of the People's Republic of Poland. The name of the state was changed to the 'Republic of Poland' and articles referring to the leading role of the party and friendship with the Soviet Union were deleted. In legislative terms, it marked the beginning of democratic changes. *Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej* (Dz.U. of 1989, No. 75, item 444).

19 Piechowiak, 2020, p. 50.

20 The Constitution of 2 April 1997 (Dz. U. of 1997, No. 78, item 483 as amended).

The legislator indicates that the nation is the sovereign. The Constitutional Tribunal attempted to detail this concept further by stating that 'the constitution uses the concept of the Nation in the political rather than ethnic meaning and in the understanding of constitutional standards based on the formulation of the preamble to the Constitution stating "We, the Polish Nation — all citizens of the Republic", the concept of the Nation means the community comprising of citizens of the Republic of Poland'.[21] Therefore, the prerequisite for membership to the constitutional subject of the authority, i.e. the Nation, is holding a Polish citizenship.[22] However, this is not a definitive settlement, as, in another section, the legislator used language stressing community ties to 'our compatriots dispersed throughout the world'. Therefore, although the nation mentioned in the preamble has to be considered primarily in its political sense, indirectly, its cultural dimension also needs to be considered.

5. 'Substitutive' *Invocatio Dei*

The referral to God in the preamble is not a classic *Invocatio Dei*[23] as, in fact, it does not constitute a call to God, but only a mention of the name of God. The portion of the preamble mentioning 'those who believe in God (...) as well as those not sharing such faith' is proof of an emphasis on the ideological pluralism. The legislator corroborates this fact further in the section mentioning 'responsibility before God or our own consciences'.

Therefore, it is not possible to state that individual ideological positions are subjected to evaluation, even though the name of God being mentioned first is evidence of the priority given to religious beliefs. According to M. Piechowiak, 'these declarations express the rejection of the possibility to establish atheism as the state ideology (which was the case under the previous regime) along with the possibility to establish a state religion; they also express the recognition of religious freedom'.[24] This topic is detailed further in art. 25 of the Constitution of the RP, which sets out the principle of impartiality of public authorities in the area of religious, ideological, and philosophical beliefs (section 2); the principle of autonomy, independence, and cooperation in relations between the state and churches and religious associations (section 3); and the principle of the equal rights of churches and religious associations (section 1). Religious freedom mentioned in the preamble is the *explicite* referral to glorious times of the Republic of Poland called the model example of religious tolerance in Europe: 'the state without stakes'.

However, one needs to remember that the principle of the state's religious impartiality regarding religious, ideological, and philosophical beliefs entails the guarantee

21 CT award of 31 May 2004 r., K 15/04 (OTK-A 2004, No. 5, item 47).
22 Kryszeń and Prokop, 2017, p. 69.
23 The Constitution of 3 May included the *Invocatio Dei* 'In the name of God, One in the Holy Trinity'.
24 Piechowiak, 2020, p. 56.

of ideological freedoms and no interference from public authority agencies. It would be a mistake to interpret this provision in terms of the axiological neutrality of the state. W. Łączkowski aptly draws attention to the indicated aspect of this issue:

> '(...) when the state declaring its impartiality rejects or even neglects the existing, historically ingrained ethical order, it thus creates a new value system. There can be no neutrality or impartiality. Cases of the legalization of abortion, euthanasia, the adoption of children by homosexual couples, the removal of crosses from public areas are not religiously, ideologically and philosophically neutral and, therefore, compromises the religion that has been the foundation of the culture of many nations for ages'.[25]

This is why art. 25 section 2 of the Constitution of the RP has to be read in conjunction with the portion of the preamble referring to the 'culture rooted in the Christian heritage of the Nation and in universal human values'. From this perspective, one can avoid potential interpretational misunderstandings and, at the same time, demonstrate the bankruptcy of extreme positivist ideas that separate the legal standards from morality. The Polish Constitution corroborates its respect for and attachment to Christian achievements of the Latin civilisation from the very beginning.

In the context of the reflections presented above, it is also worthwhile to interpret the cited snippet 'recognizing our responsibility before God or our own consciences' that *prima facie* can suggest two separate and inseparable types of responsibility. According to the common usage of the function word 'or', religious people only recognise their responsibility before God, while disbelievers recognise their own consciences.[26] However, J. Krukowski aptly remarks that 'it has to be accepted, however, that the "or" function word has the function of a connector rather than a separator here. It is because believers have the sense of responsibility before God and their own conscience'.[27]

6. Natural law and determinants of the Constitution of the Republic of Poland

Finally, the referral to supra-positive sources of the codified law, i.e. the natural law, is of key importance from the perspective of this reflection. The legislator refers to four universal values: truth, justice, goodness, and beauty. Three of these four timeless values, i.e. truth, goodness, and beauty, belong to the canon of basic perfections. In Plato's philosophy, they are objectives pursued by three basic parts of the soul symbolised by three parts of the state: the sapient, volitional, and lustful parts correspond to

25 Łączkowski, 2003, p. 119.
26 Dziedziak, 2015, p. 83.
27 Krukowski, 2000, p. 109; Stefaniuk, 2009, p. 283.

the ruled, the defenders, and the producers.[28] In turn, Aristotle links truth, goodness, and beauty to three areas of cognition: theoretical, practical, and poietic (productive).[29] In medieval philosophy, *verum*, *bonum*, and *pulchrum* were defined as transcendentals.[30] Subsequent tradition assigned these values to specific forms of spiritual culture: science strives for truth, morality strives for goodness, and art strives for beauty.

In the course of the work on the constitution, justice as a principle of social life was rightly added to the abovementioned three values.[31] One could say that 'each human being requires justice for themselves from their fellows and are aware that they owe them justice as well'.[32] Justice applies to another human being. In the antique tradition, this value was considered the perfection of man, his most eminent *arete* (bravery, virtue). Roman jurist Ulpian maintained that justice is a constant and unchangeable will to give everyone their due.[33] Justice finds its expression in the golden rule: what you do not want done to yourself, do not do to another. Justice in a positive form can be found in the evangelical message: 'Do to others whatever you would have them do to you'.[34]

Among contemporary authors, J. Rawls emphasised its importance when he stated

> 'As truth in knowledge systems, justice is the first virtue of social institutions. An untrue theory, even if highly economical and elegant, has to be rejected or revised; the same is true for laws and social institutions, however efficient and well organised, they have to be reformed or abolished if they are unjust'.[35]

There is no doubt that the legislator did not refer to this value by accident. As the objective of the law is the common good – as stated in art. 1 of the constitution – its implementation can only occur against the background of justice. A certain minimum of social life order can be found in justice. Metaphorically, justice without the law would only be possible if judges were sorcerers and people were saints.[36]

The adoption of universal values by the authors of the Constitution of the Republic of Poland is evidence of their cognitivist approach. The meaning of the word 'universal' denotes something common and pan-human. Universal values are not transitory or

28 Piechowiak, 2020, p. 57.
29 Arystoteles, 1025b
30 See: Maryniarczyk, 2008, pp. 540–542.
31 Dziedziak, 2015, p. 84.
32 Kość, 2005, p. 177.
33 Ulpianus, Digesta I, 1, 10. Iustitia est constans et perpetua voluntas ius suum ciuque tribuendi. Aristotle distinguished two forms of justice: conventional justice (*iustitia commutativa*), i.e. to give everyone their due, and distributional justice (*iustiitia distributiva*), i.e. treat equally what is essentially equal, treat unequally what is essentially unequal.
34 Pismo Święte Starego i Nowego Testamentu, 2013, p. 1061; Matthew 7:12.
35 Rawls, 1994, p. 13.
36 Tokarczyk, 2005, p. 237.

ephemeral, but timeless (supra-historical). Person does not establish universal values, but can get to know them.[37] Additionally, the significance of these values was reiterated by the Constitutional Tribunal in the expression 'universal constitutional values'.[38] One has to agree with the apt statement made by P. Winczorek, who pointed out that 'authors of the constitution consciously adopted the natural law concept of basic freedoms and rights. They considered that neither the sovereign, i.e. the Nation, nor its institution, i.e. the state, are called to establish them, they can only declare them. (...) Such intentions do not have to be read directly in the text of the constitution; they are clearly expressed in the constitutional discussion of the National Assembly by its participants such as deputies, senators, and experts of the Constitutional Committee'.[39]

7. Common good

When searching for the intellectual tradition of primary importance for the interpretation of the common good category, one needs to reach for the tradition of the classical philosophy from Plato and Aristotle to Thomas Aquinas, on which the Catholic social science is based.[40] This category has historical connotations and tangible repercussions for the entire constitutional order in Poland. The history of Polish constitutionalism can combine 'common weal' and the 'common good'. The first term was mentioned in art. 1 section 1 of the April constitution: 'The Polish state is the common weal of all its citizens'.[41] The above constitutional provision sets an axiological perspective characteristic of the statist approach wherein national interest defined in modern terms is the central concept. The primacy of the state over the national community typical of the April constitution resulted in the rejection of natural human rights as a relevant feature of the constitutional order. This solidarist formula was a move away from the concept of the nation as a subject of the supreme authority, treating the state as a 'union of individuals established to take care of the good of such individuals but as a whole that in itself constitutes the good and, therefore, has an independent non-individual value'.[42]

The currently applicable constitution points out in art. 1 that 'The Republic of Poland shall be the common good of its citizens'. The reflection on the choice of words turns out to be of key importance as the concept of the common good is related to the classical paradigm of thought, which is completely different from the statist one. In this way, the legislator took the side of human rights, indicating the servient nature of the state with respect to the individual. There is a strong case in favour of this attitude based on grammar rules that specify that placing an adjective after a noun signals the

37 See: Dziedziak, 2015, p. 89.
38 CT award of 11 May 2005, K 18/04, OTK-A 2005, No. 5, item 49.
39 Winczorek, 1999, p. 137.
40 Piechowiak, 2012, p. 49.
41 See: Rostocki, 2002, p. 75.
42 Komarnicki, 1937, p. 184.

presence of an idiomatic expression.[43] Additionally, one has to consider the legislator's will, noted at meetings of the Constitutional Committees.[44]

The category of the common good is based on the conditions of Catholic social science. The approach proposed in the post-conciliar documents *Gaudium et Spes* and in the encyclical by John XXIII, *Pacem in terris*, defines the common good as 'the sum of those conditions of social life thanks to which individuals, families, and associations can attain their own perfection more comprehensively and in an easier way. In particular, this involves the respect for natural human rights and obligations'.[45] The principle of the common good should be read in conjunction with the entire Constitution of the Republic of Poland, including its preamble, and in consideration of the variety of ideological traditions underlying the concept of the 'common good'.[46]

8. Dignity

The concept of human dignity is present in all concepts of an individualist understanding of the status of an individual and, in contemporary times, it can be considered the basis and axiological starting point for such concepts.[47] This category has philosophical, anthropological, ethical, social, and legal dimensions. From the perspective of the philosophy of the law, there are two trends that systematise the concept of dignity. The first of them relates to personalist philosophy rooted in the thought of Aquinas, and the Enlightenment one relates to I. Kant, the philosopher from Königsberg.[48] Lech Garlicki wrote:

> 'Each constitution adopts certain basic principles serving both as an axiological keystone for detailed provisions and as a tool either allowing one to find content that the authors forgot to include in the constitution or to remove the content that should not have been included in it. The 1997 Constitution considered human dignity such a principle'.[49]

Therefore, a question arises: if dignity is the spiritual foundation of basic human rights, why has the Polish legislator included it only in art. 30?[50]

43 Piechowiak, 2020, p. 74–75.

44 This is what Tadeusz Mazowiecki said about the preamble at the meeting of the Constitutional Commission of the National Assembly on 11 December 1996: 'I think that this text emphasises most important matters, in particular, that the Polish state is our common good, that it is not a state ruling the citizen but a state that serves the citizen and this is how it should be modelled further on'. Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego 1997, No. 42, p. 40.

45 https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html, (Accessed: 21 November 2021). Jan XXIII, 1963.

46 Słup, 2017, p. 224.

47 Garlicki, 2019, p. 106.

48 See: Mazurek, 2001; Potrzeszcz, 2013, pp. 273–299; Piechowiak, 2011a, pp. 3–20.

49 Garlicki, 2002, p. 62.

50 Cf. Schambeck, 2001, p. 119.

From the perspective of the systematics of the constitution, the German legislator was much more consistent, including the principle of dignity as the basis of the constitutional order, in art. 1 section 1: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority'.[51] This seeming inconsistence of the Polish legislator should be interpreted as the placement of the two most important values, the common good and dignity, as the first articles in chapters I and II of the constitution. As a consequence of this approach, dignity is read within the context of the common good. The common good as the sum total of social life conditions promoting individual development cannot be precise without consideration of who the individual is, and dignity is its most important and first characteristic from the axiological perspective.[52] It has to be concluded that the common good makes it possible to place dignity in a wider axiological context even though the position of dignity in that context is determined by its specific features recognised in art. 30.[53]

The category of dignity appears in the introduction to the constitution as a call for the application of the constitution with 'respect to the inherent dignity of the person'.[54] Its full potential is developed in art. 30 of the constitution, which defines dignity as an inherent and inalienable aspect of persons, constituting the source of freedoms and rights of persons and citizens. The legislator equipped dignity with the aspect of inalienability and established the duty of respect for and protection of human dignity for all public authorities.

Dignity is the only feature to which the legislator ascribed the aspect of inviolability in the normative rather than descriptive sense.[55] It entails that the actual lack of possibility to deprive someone of dignity or to diminish it is the source of rights, as dignity cannot be graded. Every human being is entitled to dignity. The autonomy of dignity was accentuated by I. Kant, who stated that 'in a state of goals, everything has a *price* or *dignity.* Whatever has a *price* can be replaced by something else as its equivalent and whatever exceeds any given price and, therefore, does not allow for an equivalent, has dignity'.[56] As a consequence of the above comparison, dignity is not gradable. Therefore, it would be unacceptable to differentiate or grade dignity depending on the race, nationality, citizenship, education, or gender; in this sense, the principle of dignity is the starting point of the equality principle.[57] Dignity is subject to absolute protection; it is the only right to which it would not be possible to apply the proportionality principle.[58] The prohibition to objectify human beings was expressed

51 See: Chmaj, 2008, pp. 33–34.
52 Piechowiak, 2011b, p. 122.
53 Piechowiak, 2012, p. 352.
54 The Constitution of 2 April 1997 (Dz. U. of 1997, No. 78, item 483 as amended).
55 The meaning is different in art. 30, in particular, in the descriptive sense; when characterising certain states of affairs, the Constitution of the Republic of Poland also mentions the inviolability of the territory (art. 5, art. 126.2), inviolability of borders (art. 26.1), and inviolability of dwelling (art. 50, art. 233.3 referring to art. 50); see: Piechowiak, 2011b, p. 115.
56 Kant, 2013, p. 51.
57 Garlicki, 2019, p. 107.
58 Award of 5 March 2003, file sign K 7/01, OTK ZU No. 3/A/2003, item 1.

in I. Kant's categorical imperative: 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end'.[59]

The Constitutional Tribunal endorsed the recognition of dignity as a supra-constitutional value central to the constitutional axiology in its ruling of 23 March 1999:

> 'The Constitution in the totality of its provisions expresses a certain objective value system whose realization should be supported by the process of interpretation and application of individual constitutional provisions. Provisions relating to the individual rights and freedoms included, in particular, in chapter II of the constitution, play the central role in the determination of this value system. The principle of the natural and non-transferable human dignity occupies the central position among these provisions.'[60]

9. Significance of key constitutional principles

As in other legal systems, both national and supra-national, their inclusion in the principles of the law is the basic tool for the positivising of values.[61] Principles with the status of key constitutional principles form the backbone of the entire state system and provide the legal basis for the basic moral values whose protection is among the fundamental obligations of the contemporary state.[62] This is where the commonly accepted stance of the doctrine that 'it is the constitution – maybe more than other normative acts (e.g. the Criminal Code) – has to be «axiologically versatile»'.[63] The axiological charge of the Polish Constitution is extensive and multidimensional. The greatest axiological potential (understood as the possibility to distinguish many values) among all the key principles can be found in the one expressed in art. 2 of the constitution, i.e. the principle of the democratic rule of law. It results from its treatment as the principles' principle (*Mutterregeln*). The Constitutional Tribunal derived from it a range of other principles that should be complied with in a democratic rule of law: the principle of protection of the citizens' trust in the state, the prohibition of the retroactive effects of the law, the principle of proper legislation, the *vacatio legis* principle, the principle of protection of acquired rights, the principle of the certainty of the law, the *ne bis in idem* prohibition, the proportionality principle, and the principle of social justice.[64] From the perspective of value transmission, a democratic rule of law safeguards legal safety.[65]

59 Kant, 2013, p. 46.
60 File sign K 2/98, OTK ZU 1999, No. 3. S. 219 et seq.
61 Kordela, 2006, pp. 41–42; Bałaban, 1999, p. 120.
62 Kordela, 2021, p. 64.
63 Winczorek, 1996, p. 76.
64 See: Garlicki, 2019, pp. 76–80.
65 See: Potrzeszcz, 2013.

The catalogue of principles mentioned here, common good, dignity, and democratic rule of law, constitutes the axiological foundation from which further principles and values can be derived. Legal principles of the constitution and the state system (in a wide sense) are

> '[...] the way to express values of the law previously adopted by the constitutional authority, a method to transpose and transfer values from the axiological and moral sphere to the area of the positive law with the use of instruments of the legal language'.[66]

10. Final thoughts

The Polish constitution contains many values even in its preamble: sovereignty, common good, justice, and dignity. They are not only declarations; their normativisation takes place in the body of the basic law: common good (art. 1), sovereignty (art. 126), justice (art. 2), and dignity (art. 30). The individual key principles of the constitution safeguard values, but the principle of the common good is the most important one (art. 1). It constitutes the pillar of the Polish constitutional order. Undoubtedly, the Polish basic law contains an axiological compromise whose clear indication is the indirect referral to God ('Both those who believe in God as the source of truth, justice, good, and beauty, as well as those not sharing such faith') rather than the classic *Invocatio Dei*. An enigmatic way of settle account with the communist past is a serious shortcoming of the preamble ('Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland'). From the current perspective, the introduction to the constitution seems to be highly flawed. However, considering the circumstances in which the basic law was created, one has to conclude that it performs its axiological function to a great extent despite its terminological weaknesses. There is no doubt that the doctrine and the generally consistent judicial practice of the Constitutional Tribunal in that area contribute to the *status quo.*

The principle of non-transferable and natural dignity correlated to the principle of common good plays the key role in the value transfer process. Both principles have a natural law dimension. The reception of ideas sourced from Catholic social science combined with a 'culture rooted in the Christian heritage of the Nation' seems to be a sufficient safety buffer protecting from the secularisation offensive.

On the other hand, it is worthwhile to consider the application of the actual *Invocatio Dei* similar to the one used in Ireland[67] ('In the name of the Most Holy Trinity'), Greece[68] ('In the name of the Holy and Consubstantial and Indivisible Trinity'), or

66 Dudek, 2009, p. 21.
67 The Constitution of Ireland of 1 July 1937 r., translated by Grabowska, 2006.
68 http://libr.sejm.gov.pl/tek01/txt/konst/grecja.html (Accessed: 21 November 2021).

Hungary[69] ('God bless the Hungarians! – the National Confession of Faith'), which would make it possible to establish unambiguously and clearly the Christian roots of the Republic of Poland.

The principle of the natural and non-transferable human dignity is an apt solution applied by the legislator; however, it could be *implicite* implicitly rooted in the referral to the natural law. Such a solution could foster the discovery of human rights rather than the discretionary creation of human rights. To this end, one would need the 'constitutional moment', i.e. the situation in which society expects the legislator to provide a new basic law.

The reflections presented above are of a preparatory and indicative nature. The in-depth axiological reflection that this article strives to encourage should precede any potential amendment of constitutional regulations. Action milestones can be identified in this manner: 'Where are we?' and 'Where are we heading?' Subsequently, the clearly presented world of values will enable the sovereign to verify the actions taken by politicians and law practitioners who frequently use complicated and multi-level regulations to relativise rather than build the world of universal values.

69 The Basic Law of Hungary of 18 April 2011, translated by Snopek, 2012.

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BÁLINT KOVÁCS[1]

Watch for the Ripples, Not Just the Splash: How the EU Position on Investment Arbitration Has Affected the Enforcement of Awards

ABSTRACT: *The European Commission's attempts to end intra-European Union (EU) investment arbitration, and the decisively helping hand lent by the Court of Justice of the European Union (CJEU) have produced massive splashes, rightfully attracting much attention. However, the ripples after the several splashes have had limited effects. This paper briefly outlines the splashes and goes on to analyze the ripples: investment tribunals retaining jurisdiction and issues around recognition and enforcement within and outside the EU. Although the judgments of the CJEU have had limited effects outside the EU, they have made it more difficult to enforce intra-EU awards within the EU and sometimes also outside of it. The study also examines some of the tools used by the EU to effectively shut the door on intra-EU investment arbitration, which mostly burden its Member States, such as infringement proceedings and decisions on unlawful state aid.*

KEYWORDS: recognition, enforcement, execution, Achmea, Komstroy, PL Holdings, intra-EU investment arbitration.

Observing the evolution of the relationship between European Union (EU) law and international investment arbitration, we see that there have been moments in the last five years that constitute massive steps toward sealing the fate of intra-EU investment arbitration once and for all. The first part of this paper presents some of the more important moments, which could be regarded as enormous splashes. Splash*es*, as several actions were needed so that the ripples were felt within the system and the position of the EU was actually felt. At first, the ripples seemed to have little effect on international investment arbitration. The ripples have definitely been felt in the

1 Researcher, Ferenc Mádl Institute of Comparative Law, Budapest, Hungary; PhD Candidate, University of Debrecen, Géza Marton Doctoral School of Legal Studies, balint1kovacs@gmail.com. The author is indebted to Prof. Dr. Csongor István Nagy, Dr. Szilárd Gáspár-Szilágyi, and Daniela-Olivia Ghicăjanu for their comments and suggestions. All errors remain the author's own.

https://doi.org/10.47078/2022.1.137-160

procedure for the recognition and enforcement of the arbitral awards, which is the focus of this study.

Due to the fact that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) have their own particularities regarding the recognition and enforcement of arbitral awards, the aim of this study is to examine some of the effects that the EU's *attitude* toward these procedures has had. It should be noted that the splashes posed by some of the developments in EU law, although with limited effects on the jurisdiction of arbitral tribunals, have had serious effects on recognition and enforcement. The aim of this study is to explore the ripples these splashes have produced regarding the procedures in the above international agreements. The paper first turns to the splashes, which many regard as the most important moments in this long-drawn-out and tumultuous relationship between EU law and intra-EU international investment arbitration. The second part examines the ways in which these splashes have been ignored by investment arbitration tribunals and some of the reasons why they continued to retain jurisdiction. In the third part, the matters of recognition and enforcement are considered, with a focus on enforcement within the EU and outside of it, addressing the specifics posited by the provisions of the ICSID Convention and the New York Convention. The fourth part of the paper addresses some of the tools the EU has turned to for persuading not only the international community and third countries' courts, but also its own Member States (MS) to have the ripples wash away all remaining effects of intra-EU investment arbitration. The paper ends with some of the author's afterthoughts on the topic.

1. The splashes: principal moments in intra-EU investment arbitration

The matter of EU law and intra-EU investor-state arbitration has a number of aspects to it, which have been discussed at length in the legal literature, as shown in the sources utilized in this study. One important factor in this conflict is the enlargement of the EU in 2004, 2007, and 2013. These states had been encouraged to enter into bilateral investment treaties (BITs) prior to their accession, which resulted in a large number of BITs becoming intra-EU BITs.[2] Further, the Treaty of Lisbon extended exclusive EU competence to foreign direct investment.[3] This, although formally not linked to intra-EU BITs, brought with it an appetite for the EU to clarify its stance in the matter of resolution of intra-EU investment disputes via arbitration based on international

2 See Nagy, 2019, p. 2. Korom, 2020, pp. 56–59.

3 It must be noted that even before this transfer of competence, EU MS had an obligation to align their BITs with EU law, as the following cases demonstrate: ECJ Case C-118/07 (Commission v Finland) [2009] ECR I-1301, I-1335 and I-10889; ECJ Case C-205/06 (Commission v Austria) [2009] ECR I-1301; ECJ Case C-249/06 (Commission v Sweden) [2009] ECR I-1335.

investment agreements. The European Commission (Commission) entered the picture first, by intervening before investment arbitration tribunals as *amicus curiae*, in an attempt to persuade arbitrators to refuse to establish jurisdiction. Despite the failure of these attempts, the Commission continues to *lobby* arbitral tribunals with its arguments. Moreover, the Commission attempted to police the EU MS as to their own attitudes toward intra-EU investment arbitration. Nonetheless, these attempts were not that successful at the early stages, as will be shown below. The Court of Justice of the European Union (CJEU) brought heavy blows to the system via its judgments, which constituted the basis for more action from the part of the Commission. These will also be presented succinctly. In searching for the proper way to address the matter of intra-EU investment arbitration, with help from the CJEU and MS, the Commission now seems to be finding its voice. This voice, nonetheless, appears to be loud enough only regarding MS, for the time being.

In a number of investor-state dispute settlement (ISDS) cases between the EU MS and investors from other EU MS, respondents have argued that through the membership, EU law actually replaced intra-EU BITs. Arbitral tribunals, however, did not budge. It is noteworthy that during the period of accession to the EU some of the EU MS, or future EU MS had been asked to bring their BITs into line with EU law, which also extended to what would become intra-EU BITs (such as the Romania–Czech Republic BIT, around 2008, and Romania–Slovakia BIT, around 2005). However, at the time these amendments happened, the Commission did not have a strong opinion regarding the incompatibility of these treaties with EU law, a position which took some years to crystallize. It was around this time that the Commission started getting involved as *amicus curiae* supporting the EU MS in their ISDS cases.

In *Micula*, one of the most notorious cases in which the Commission intervened,[4] the procedure was based on the Sweden–Romania BIT.[5] The case was filed in October 2005, prior to Romania's accession to the EU. The ICSID Tribunal established jurisdiction, finding the claimants' position admissible in September 2008. Pursuant to this, the Commission intervened in 2009 via an *amicus curiae* brief, stating that the state aid scheme established by the respondent (Romania), of which the claimants were beneficiaries (and the premature withdrawal of which constituted the basis of the claim), was incompatible with the Community rules on regional aid. At this point, the Commission—one might argue in hindsight—seemed to be testing how much investment arbitration tribunals were willing to defer to EU law. In 2013, the Tribunal awarded the claimants compensation; the claimants sought the enforcement of the award in 2014. However, the Commission intervened via a Decision and prohibited

4 There was another case in which the European Commission had formulated its opinion as *amicus curiae* within an investor-state arbitration proceeding along the lines of the primacy of EU law and its interpretation by the European Court of Justice, while also touching on the matter of the termination of intra-EU BITs. See: Partial Award in Eastern Sugar B.V. v The Czech Republic, SCC Case No. 088/2004.

5 See: Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20.

Romania from executing the award and ordered it to recover the compensation that it had already paid pursuant to the award.[6] By the time the Decision ran its course from the initiation of procedures related to it in March 2014, until the adoption of the Decision itself in March 2015, Romania had in part implemented the arbitral award, by means of offset. During this time, Romania also filed an application for the annulment of the arbitral award before an ICSID annulment committee, while the claimants pursued the execution of the award in front of the courts of the host state, other EU MS, and third countries. The Decision on state aid was a major intervention from the Commission in reasserting EU law to the detriment of investment arbitration. Nevertheless, its position on the matter had limited effects. Subsequently, the Decision was also annulled by the General Court of the EU in 2019,[7] allowing for the enforcement of the Award to continue.[8]

Although the splash was significant, the ripples had limited effects. However, the above case was only one of the fronts on which the Commission intervened. There came other opportunities for other institutions to intervene and reassert the position of EU law, which ran in parallel with the above case. The CJEU stepped in firmly trying to find the appropriate language and means to reinforce the position of EU law preached tirelessly by the Commission to no avail. The case known as *Achmea* brought the opportunity for the CJEU to set out in more detail what was going to happen to intra-EU investment arbitration.

The *Achmea* case saw a previous intervention from the Commission. In Eureko (later Achmea) v. Slovakia—relying on observations submitted in the *Eastern Sugar* case—the Commission made a submission in the investment arbitration case[9] stating that intra-EU BITs constituted an "anomaly within the EU internal market",[10] arguing that "a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law."[11] The position of the Commission converged with that of many MS, who had put forward similar arguments in some of the cases filed against them: arbitration clauses in intra-EU investment agreements are not compatible with EU law, because such clauses could have an adverse effect on the integrity of EU law, violating some of its core elements such as the principle of mutual trust and

6 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013.

7 Judgment of the General Court of 18 June 2019 – ECLI:EU:T:2019:423 – in cases T-624/15, T-694/15 and T-704/15. The annulment was mainly due to the finding that Romania had granted the state aid (incentives) before its accession to the EU and before it became bound by EU rules on state aid.

8 This annulment is now itself under review in an appeal pending before the CJEU, under number C-638/19.

9 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).

10 See Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, Achmea BV v The Slovak Republic, para. 177.

11 Id. para. 180.

the principle of the autonomy of EU law.[12] However, the arguments of the Commission did not affect the tribunal and ultimately had no bearing on the award itself. In the meantime, to get all states in line, the Commission also launched infringement proceedings against some MS to abolish their intra-EU BITs, and called on all MS to terminate theirs.[13]

For this position to finally have some effect, the CJEU stepped in (via a request for a preliminary ruling by the German Federal Court of Justice) with a judgment in a case where 16 MS and the Commission intervened. The CJEU judgment essentially stated that arbitration clauses within intra-EU BITs are contrary to EU law.[14] This finally prompted genuine EU-wide action. A Communication was published where the Commission addressed the European Parliament and the Council concerning the protection of intra-EU investment[15] and laid out the arguments against intra-EU investment arbitration in a clearer manner. It is noteworthy that—already at this point—the Commission was stating that national courts were "under the obligation to annul any arbitral award rendered on [the basis of intra-EU BITs] and to refuse to enforce [them]." Most EU MS "officially" joined the Commission in its point of view via a declaration, basically restating the essence of the decision in *Achmea*: "[a]n arbitral tribunal established on the basis of investor-state arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty."[16] However, a massive splash in its own right, the ripples of the *Achmea* judgment were not impressive, as investment arbitration tribunals kept ignoring it.[17] This is no surprise, as the above arguments can hardly be regarded as persuasive in the realm of international law.

The judgment was followed by the Agreement for the Termination of *Bilateral Investment Treaties* between the EU MS (Termination Agreement),[18] which in large part ended discussions on the limits of the applicability of the CJEU judgment in *Achmea*.

12 Id. para. 185.

13 Commission asks Member States to terminate their intra-EU bilateral investment treaties, European Commission Press Release, Brussels, 18 June 2015.

14 Judgment of the Court (Grand Chamber) of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtsh of — Germany) — Slowakische Republik v Achmea BV, Case C-284/16.

15 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment – COM/2018/547 final.

16 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection. https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (Accessed 16.01.2022.)
There were two other declarations, one made by five MS and the other by Hungary, both on January 16, 2019, which had a different approach as to the applicability of *Achmea* to the ECT.

17 See Gáspár-Szilágyi and Usynin, 2019.

18 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union – SN/4656/2019/INIT. The Agreement was not signed by Austria, Finland, Sweden, and Ireland. The Communication (see *supra* fn.13) already stated that "pursuant to the principle of legal certainty, [MS] are bound to formally terminate their intra-EU BITs."

To ensure that the MS are able to definitively terminate *any legal effects* of these BITs[19] as soon as possible, the Termination Agreement also provides a means of settling the remaining (pending) cases through "structured dialogue."[20]

Even though the *Achmea* judgment appeared to effectively bury intra-EU ISDS, tribunals constituted after the above moments in time did not regard it as impeding them from upholding their jurisdiction. As was argued from the outset, this was "a political judgment, which must be read from the perspective of European Union law,"[21] and its legal effects were highly limited. Undoubtedly, the judgment was more effective in toeing the line within the EU when it came to intra-EU investment arbitration. A large number of pending cases and cases started after the above steps had occurred as a consequence of *Achmea*. Counsels successfully argued in front of tribunals for considering their case, presenting a situation different from that *of Achmea*.[22] Requests for annulment and set-aside proceedings with arguments based on *Achmea* have not been successful either, with counsels managing to persuade arbitrators of the limits of the judgment, bogging it down in its specificities. It now appears that a battle is under way between investment arbitration tribunals and the EU, where tribunals keep deciding on their competence, establishing jurisdiction and settling disputes, while the EU—through the CJEU—scrambles to narrow their jurisdiction. One of the more urgent matters for the EU has to do with the fact that the Termination Agreement only extended to BITs, with no effects on multilateral treaties such as the Energy Charter Treaty (ECT). This constitutes an especially acute problem, as a fairly large number of intra-EU investment arbitration cases are conducted under the ECT. While the Commission and most MS considered *Achmea* to be applicable to the ECT, arbitral tribunals did not agree with this position. The Termination Agreement does not reflect this initial stance of the EU, probably due to the business interests of the MS, and contains express provisions leaving out the ECT, as a matter to be dealt with later.

The position on the ECT intra-EU arbitration required reinforcing. The CJEU was activated once again to close this gap. This happened through the judgment in *Komstroy v Moldova*.[23] In a case having nothing to do with intra-EU investment arbitration, the Grand Chamber extended *Achmea* to the ECT.[24] Even though the CJEU considered the

19 "The Commission has decided to open infringement proceedings against Austria, Sweden, Belgium, Luxembourg, Portugal, Romania and Italy for failing to effectively remove from their legal orders the intra-EU Bilateral Investment Treaties (BITs) to which they are contracting parties, so that they cease to produce any legal effects." – December 2021 infringements package: key decisions – Press release from the European Commission https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (Accessed 16.01.2022.)

20 Article 9 of the Termination Agreement.

21 Hess, 2018, p. 5.

22 On the narrow interpretation of the judgment see: Hindelang, 2018; Nagy, 2018, pp. 981–1016.

23 Judgment of the Court (Grand Chamber) of 2 September 2021. Republic of Moldova v Komstroy LLC – C-741/19.

24 In all fairness, the Commission via its Communication (see *supra* fn. 13) already laid out arguments for the relevance of *Achmea* to Article 26 of the ECT.

fact that the EU ratified the ECT, which made it a part of EU law, it stated—*obiter dicta*—that the resolution of intra-EU disputes through arbitration would not be compatible with primary EU law. It remains to be seen what the concrete tool will be through which *Komstroy* will gain applicability, as happened in the case of *Achmea* through the Termination Agreement. Until then, the ripples of this splash will continue to have limited effects before arbitral tribunals.

The latest judgment in this "series" was in the case of *Poland v PL Holdings Sarl*, regarded as "another nail in the coffin of intra-EU investor-state arbitration."[25] In *PL Holdings,* the Court held that invalid treaty arbitration clauses could not be circumvented by *ad hoc* agreements of arbitration.[26] This decision ultimately buttresses the judgment in *Achmea,* making it impossible for parties to a dispute to circumvent treaty-based arbitration clauses, which are now incompatible with EU law, with an *ad hoc* arbitration agreement. Although narrow on the looks of it, mainly due to the specifics of the case, it must be noted that the CJEU also reiterated the fact that "Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law."[27]

The above judgments have many interesting aspects to it, which will not be analyzed in detail, but are undoubtedly important for their applicability and consideration by courts and tribunals. What is key here is that the judgments of the CJEU are binding and must be applied by MS courts, as they are a part of EU law pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). Further, the Treaty on European Union (TEU) under Article 4(3) prescribes a duty of sincere cooperation, in accordance with which MS courts must assist in carrying out the tasks of the EU. Even though the *Komstroy* judgment in and of itself might not be enough to stop further intra-EU cases based on the ECT[28]—as we have seen after *Achmea*—and further action is required as to its certainty and applicability in front of investment arbitration tribunals, pursuant to their obligation of sincere cooperation, EU MS courts will probably resist the recognition and enforcement of these arbitral awards (even though the question of intra-EU ECT arbitration was addressed as *obiter dicta*). Nevertheless, through these judgments, the CJEU has reasserted its status as the ultimate judge on the matter of interpretation and application of EU law. Ultimately, in the EU's view, all these decisions are meant to guarantee the autonomy of EU law and to counter any possibility of its primacy being undermined. In the view of arbitral tribunals, however, the EU's position is not that convincing.

25 Dózsa, 2021.

26 Judgment in Case C-109/20, Republiken Polen v PL Holdings Sàrl, paras. 47, 65.

27 Id., para. 52.

28 We have already seen examples of this, where arbitral tribunals have rejected reconsidering jurisdictional objections based on Komstroy. See Charlotin, 2021a; Charlotin 2021b. The articles discuss the following cases: Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23; and Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45. In this respect, see also Odermatt, 2021.

2. Retaining jurisdiction

Despite the above judgments and the text of the Termination Agreement, the present situation does prolong some of the uncertainties, putting potential claimants in the position of having to gamble with their cases. The Commission is continually putting pressure on its MS to proceed with the termination of the BITs and also that of their effects. Due to the situation that transpired in the Micula case, it seems that Romania and Sweden are in the spotlight for not ceasing *all of the legal effects produced by the BIT*.[29]

As briefly detailed above, after *Achmea*, there have been several steps leading to the Termination Agreement, which effectively narrowed the applicability of *Achmea* exclusively to intra-EU BITs. A similar agreement of the EU MS is expected pursuant to *Komstroy*, where the situation is even more complicated because the EU is itself a signatory to the ECT.[30] This fact makes the matter more complicated, requiring an added dose of creativity and possibly leaving more room for carve-outs—which have also been a part of the Termination Agreement—for MS looking to protect their own investors, considering the large number of ongoing ECT cases. It is also worth keeping an eye out for what the ongoing negotiations around the ECT might bring, as that might also contain a solution as previewed by *Komstroy*.

There is a non-negligible number of investment arbitration proceedings pending before arbitral tribunals, initiated prior to *Achmea* and even after, where the intra-EU objections have been dismissed. There are dozens of cases in which *Achmea* was invoked in annulment proceedings, and arbitral tribunals rejected its applicability. These cases and the various arguments invoking *Achmea* will not be presented herein; however, it is worth mentioning one of the main reasons for which the *Achmea* judgment has not had an impact in front of the arbitral tribunals.[31] The rationale put forward by the tribunal in *Electrabel v. Hungary*, as highlighted in *Eskosol v. Italy*, seems to be stating something obvious. In this case, it was retained that

29 Commission urges Austria, Sweden, Belgium, Luxembourg, Portugal, Romania, and Italy to terminate Bilateral Investment Treaties (BITs) with other EU Member States – December 2021 infringement package: key decisions. The Commission is also planning more severe action against Sweden, threatening to refer the case against it to the CJEU.

30 See for example the Award in the following case, where the tribunal had to express an opinion on both the EU membership in the ECT and the applicability of *Achmea*: ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and Infraclass Energie 5 GmbH & CO. KG v. Italian Republic, ICSID Case No. ARB/16/5. Paras. 295 and 336.

31 It must also be observed that there are cases in which respondents addressed national courts in attempts to obtain anti-arbitration rulings. See the successful attempt in Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d. v. Republic of Croatia (II) (under UNCITRAL rules), and the attempts in Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22 and RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4 all in front of German courts, relying on Article 1032(2) of the German Code of Civil Procedure. See also Bohmer, 2021.

> "a tribunal that 'has been seized as an international tribunal by a Request for Arbitration … under the ECT and the ICSID Convention' is required accordingly to apply the ECT and 'applicable rules and principles of international law,' because it 'is placed in a public international law context and not a national or regional context."[32]

This is one of the reasons why statements from the EU MS, judgments of the CJEU, and arguments from the Commission have not been successful in dismissing intra-EU cases in front of arbitral tribunals.

In many investment arbitration cases, respondents have argued that tribunals do not have jurisdiction in intra-EU cases due to their obligation to settle disputes through awards that can be recognized and enforced. In this sense, respondent EU MS, in compliance with EU law, claim that due to the fact that intra-EU investment arbitration is considered incompatible with EU law, enforcing awards rendered pursuant to such procedures would have them violate EU law. This effectively makes the awards unenforceable in these respondents' perspective. This argument has not been effective either;[33] however, it sends a message to claimants that respondent MS will not comply with such awards. This is one ripple that successful claimants invariably have to tackle. The foundation for the argument is that arbitral tribunals have a duty to ensure that their awards would be enforceable, which means tribunals should refuse to exercise jurisdiction in case they are unable to produce an enforceable award.[34] This argument is only partially applicable, as these awards must also be recognized and enforced by other contracting states, not just the EU MS. It has not either been sufficient in convincing arbitral tribunals to reject jurisdiction. Both the New York Convention and the ICSID Convention provide solid rules on recognition and enforcement. Nevertheless, this procedure tends to become quite cumbersome whenever the obliged party does not comply in good faith.

As has been shown, the decisions of the CJEU in the cases of *Achmea* and *Komstroy*—which seemed to demolish treaty-based intra-EU ISDS, and the *PL Holdings* decision, extending *Achmea* to ad hoc arbitration agreements—have had limited effects

32 See the Decision on Termination Request and Intra-EU Objection in Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, para. 180.

33 For example, in the Award in the Micula case (ICSID Case No. ARB/05/20): "The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters." See para. 340.

34 For example, in the Decision on the Intra-EU Jurisdictional Objection, in Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, para. 102. Also in the Decision on the Achmea Issue in Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, the Tribunal recognized that it does have a duty to render an enforceable award; however, it concluded that "[t]he enforceability of this decision is a separate matter which does not impinge upon the Tribunal's jurisdiction." See para. 230. In Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, the Tribunal found that the claimant's concerns were "unfounded in relation to award recognition and hypothetical in relation to award enforcement." See para. 339.

outside the EU, allowing cases to proceed. Although these decisions have, in a sense, sealed the fate of classic intra-EU ISDS, the latter is not over yet.

As tribunals continue to retain jurisdiction in new cases and *Achmea*-based arguments have proven insufficient in annulment proceedings, recognition and enforcement of awards is now front and center. The EU MS now find themselves in a position where complying with one set of rules (EU law) mandates non-compliance with other international treaties to which they are a party. Therefore, in the case of successful awards, the issue becomes where and how will these awards be recognized and enforced. There will be a relatively large number of intra-EU cases in which the party seeking recognition and enforcement will face difficulties; therefore, the question is what options will remain for them. The following sections will explore some of the questions related to enforcement in light of the conundrum faced by the EU MS.

3. Recognition and enforcement

Considering the general principles underpinning the functioning of public international law, as briefly addressed above, treaties ratified must be respected and applied in good faith (*pacta sunt servanda*). Pursuant to this, outside the EU, the EU's position seems to matter little. EU law is viewed as a system parallel to other systems established by international treaties on equal footing.[35] Any award handed down by an arbitral tribunal must be considered valid, as long as it was handed down on the basis of valid treaties, respecting all relevant legal provisions.

Considering the position of the EU and the general prohibition affecting the EU MS in complying with the awards, the location chosen for enforcement—within or outside the EU—becomes a highly important factor. Those seeking recognition and enforcement will be interested in testing out different jurisdictions to improve the chances of success in the face of the EU MS' refusal to comply. The complicated situation comes with added difficulty, which also means extra costs for claimants. In the following sections, some of the questions surrounding recognition and enforcement in the current legal climate, both within and outside the EU, are presented.

■ *3.1. Enforcement within the EU*

Within the EU, the greatest impediment for enforcement of intra-EU investment arbitration awards stems from the general stance of the Commission and that of the MS, which is also reflected in the CJEU judgments, which have been briefly presented above. The matter of recognition and enforcement has been addressed in some detail within the Termination Agreement concluded after *Achmea*, which contains provisions applicable to this procedure.

35 As argued by the tribunal in *Eskosol*, which also made use of a graphic illustration to convey the structure of public international law. See Decision on Termination Request and Intra-EU Objection in Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, para. 181.

The Termination Agreement puts ISDS proceedings in three different categories: *Concluded Arbitration Proceedings*, *Pending Arbitration Proceedings,* and *New Arbitration Proceedings*.[36] Regarding *Concluded Arbitration Proceedings*, it states that these shall not be affected and *shall not be reopened*, in case the award was *duly executed prior to March 6, 2018*, or set aside or annulled before the entry into force of the Termination Agreement. This means that awards that have not been executed will fall into the next category. In the case of *Pending* and *New Arbitration Proceedings,* Contracting Parties to the Termination Agreement have to make a case within judicial proceedings that national courts refrain from recognizing and enforcing the arbitral awards. Thus, pursuant to the Termination Agreement, the EU MS have the obligation to not recognize and to not comply with arbitral awards, and to make a case against their recognition and enforcement by any court, including courts in third countries.[37] It is important to note that this only applies to arbitral awards rendered pursuant to intra-EU BITs, which constitute the subject matter of the Termination Agreement, regardless of the rules governing the proceedings. The Termination Agreement does not apply to the ECT. Nevertheless, considering that the CJEU judgments have to be applied by EU MS courts, those seeking recognition and enforcement have faced many difficulties after the *Achmea* judgment, regardless of the Termination Agreement, and are presently facing such difficulties as a result of the *Komstroy* judgment.

However, it is noteworthy that in the period between the handing down of the *Achmea* judgment by the CJEU and the conclusion of the Termination Agreement, there have been successful enforcement proceedings within the EU. This maybe an exceptional case, but it is still relevant that in the *Micula saga*, the Romanian government issued a decision to pay out on the award in December 2019, despite the *Achmea* judgment of the CJEU. In this case, enforcement proceedings have commenced in the UK, where the Supreme Court, overruling the Court of Appeal, decided to lift the stay on enforcement regarding the arbitral award, even though the CJEU General Court's Decision on Annulment[38] is under appeal.[39] The Court stated that the UK had an obligation toward all signatory states to enforce the award.[40] The Court also stated that a possible infringement proceeding against it should not preclude it from implementing its obligations pursuant to the ICSID Convention, to which it was a signatory before becoming an EU MS.[41] In a blow to EU institutions, the Court referenced Article 64 of the ICSID Convention and stated that all disputes regarding the interpretation of the Convention should be addressed by the International Court of Justice (ICJ) and not the

36 Article 1 paragraph (4), (5) and (6) of the Termination Agreement defines these categories.
37 Article 7 of the Termination Agreement.
38 European Food and Others v. Commission, Judgment ECLI:EU:T:2019:423 – https://curia.europa.eu/juris/document/document.jsf?docid=215106&doclang=EN
39 Judgment in Micula and others (Respondents/Cross-Appellants) v. Romania (Appellant/Cross-Respondent), 19 February 2020. https://www.supremecourt.uk/cases/docs/uksc-2018–0177-judgment.pdf(Accessed 16.01.2022.)
40 Id., para. 116.
41 Id., para. 116.

CJEU.[42] It must be noted that the UK was still a member of the EU at this time, formally still bound by EU law (until December 31, 2020).[43] However, with one foot out the door, on track to finalizing Brexit, this was also a great opportunity to make a statement regarding its position and take a jab at the EU.

Despite the *Achmea* judgment, it was also reported that courts in Romania[44] and Belgium have allowed for the enforcement to proceed, albeit with caveats in the latter case, and the Micula claimants managed to seize shares owned by the Romanian state[45] and freeze accounts of Romanian state-owned entities such as the Romanian air traffic controller.[46] This seems to be what prompted the Romanian government to give in and decide to pay up the award, despite the EU's opposition.[47]

The above situation regarding ICSID awards has been expected by some scholars, deeming that there are no effective grounds for challenging the awards in front of MS courts in such cases.[48] The author acknowledges that there remain limited but nonetheless effective grounds in the case of non-ICSID awards, where the matter of public policy must be considered.[49] The arguments for refusal of recognition and enforcement under the grounds provided by the New York Convention pertaining to the invalidity of the arbitration agreement [Article V(1)(a)] and violation of public policy [Article V(2)(b)] have been previously considered.[50] As intra-EU BITs have been (or are in the midst of being) terminated pursuant to the Termination Agreement, such arguments might now be considered vis-à-vis *Komstroy* and intra-EU ECT awards.

In the case of ICSID awards, the EU MS will have to face a situation that does not give them much choice: in case they disregard EU law, there are possibilities for sanctions (infringement procedure); however, if they disregard their obligations under the ICSID Convention, they will not have to face any effective sanctions. Furthermore, the EU MS will be able to invoke the primacy of EU law in excusing their non-compliance,

42 Id., para. 110.

43 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – 2019/C 384 I/01.

44 In the Opinion of Advocate General Szpunar delivered on July 1, 2021 (Case C-638/19 P Commission v European Food and Others), Achmea does not apply to the Micula case as it arose and the proceedings were initiated prior to Romania's accession to the EU. However, the Opinion leaves room for maneuver regarding the issue of state-aid.

45 'Micula Brothers Manage To Seize 67 M Shares Owned By The State At Nuclearelectrica' – Romania Journal, 4 December 2019.https://www.romaniajournal.ro/business/micula-brothers-manage-to-seize-67-m-shares-owned-by-the-state-at-nuclearelectrica/(Accessed 16.01.2022.)

46 'Romanian Gov't To Pay EUR 278 M In The Micula Brothers Case After Romatsa's Accounts Frozen' – Romania Journal, 13 December 2019. https://www.romaniajournal.ro/society-people/romanian-govt-to-pay-eur-278-m-in-the-micula-brothers-case-after-romatsas-accounts-frozen/(Accessed 16.01.2022.)

47 It is not exactly clear if the award has been paid in totality as Romania claims, or if there is still outstanding debt following the award as ongoing enforcement procedures in the United Kingdom and the United States suggest.

48 Gáspár-Szilágyi, 2018, p. 372.

49 Ibid.

50 See Káposznyák, 2020, pp. 69–90.

thus avoiding a damaged international reputation. With this, the EU has effectively undermined the legitimacy of intra-EU investment arbitration.

■ *3.2. Enforcement outside the EU*

As successful claimants have to seek enforcement outside the EU, the existence of EU MS assets in third countries such as the United Kingdom, the United States, Switzerland, and Australia now becomes a crucial calculation that has to be made by investors. Due to the legal situation certainly heading toward unenforceability on all fronts, and not just intra-EU BIT-based ISDS, investors have to know for sure not only that they can rely on third countries to enforce arbitral awards, but also that the respondent states have assets in such countries.

The most widely ratified treaties that ensure trust in international investment arbitration are the New York Convention and the ICSID Convention. The efficiency of the recognition and enforcement procedure (one better than the other) makes them essential parts of this ecosystem. Due to the differences in their regulation, these treaties will be analyzed separately.

3.2.1. Enforcement under the ICSID Convention

The enforcement system in ICSID presents a system that is detached from national courts. The Convention does not provide a means for challenging or reviewing the awards handed down under it, making it possible for parties to engage only in a special system of annulment, whereby an ad hoc committee is given authority to discuss some of the limited grounds of annulment that can be invoked under it.[51]

During the drafting of the ICSID Convention, regarding Articles 53–55, which are most important to our topic, questions had arisen as to the fact that every country has a different regulation and interpretation of *sovereign immunity*, which would imply differences in the enforceability of ICSID awards. The main purpose of these provisions is to ensure that awards rendered under the procedural rules of the ICSID Convention are recognized in all Contracting States in accordance with their own legislation—as a final judgment of their own domestic courts—and that the Convention respects the domestic legislation of Contracting States regarding enforcement.[52] Deference to the domestic legislation of the Contracting States makes execution complicated, which is why Article 55 of the Convention was called its Achilles' heel.[53]

Pursuing this purpose, the regulation in the ICSID Convention mandates the recognition and enforcement[54] of ICSID awards in Contracting States, without leaving much

51 Annulment proceedings may persuade national courts to stay enforcement proceedings until a final resolution is rendered. More recently, we have seen this in the case Infrared Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12), in front of United States District Court for the District of Columbia in Civil Action No. 20-817.

52 History of the ICSID Convention. Vol. II-2. 671, 1083.

53 Schreuer et. al., 2009, p. 1154.

54 "[T]he entire award is to be recognized as binding. But only its pecuniary obligations are to be enforced." Schreuer et. al., 2009, p. 1136.

room for judicial review.[55] It has been noted that it is not permissible for the enforcing court to refuse enforcement on the grounds of public policy or non-compliance with any national or international law.[56] The reference to the national laws of the enforcing State in Article 54(3) regarding the execution of an ICSID award is limited to laws of a procedural nature, as established by its drafting history and content.[57] In any case, however little wiggle room is left there, it does not mean that respondents did (and will) not try to oppose enforcement by invoking the EU position on intra-EU ISDS. Annulment proceedings relying on the Termination Agreement and the retroactive termination of intra-EU BITs have not managed to convince ad hoc annulment committees of the fact that ICSID jurisdiction had been affected.[58] Although the likelihood of success in annulment proceedings is dim, successful claimants are faced with the difficulties of having to execute awards against states unwilling to comply in good faith.

The *Micula saga* provided an important case in which the US courts had to consider the effects on enforcement of the *Achmea* judgment. In May 2020, the US Court of Appeals for the DC Circuit affirmed the decision of the Federal District Court of Washington DC (rendered in September 2019) that enforcement proceedings had to go forward. The court in this case reiterated that a "federal court is 'not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award'." It noted that the court "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award."[59]

This decision of the US courts finds interesting—however, not surprising—answers to some of the questions about the applicability of *Achmea* and the relevance of EU law stance on international investment arbitration. Nevertheless, the decision of the US courts allowing for the enforcement of the award in the *Micula case* despite *Achmea* does not mean that, for other cases, the matter is now cut-and-dry. The analysis of the US courts' decision in this matter of enforcement has already been done in the scientific literature.[60] What is noteworthy is that this decision looks at the specifics of the *Micula case* and also relies on the fact that much of the case has to do with matters pre-accession to the EU, as opposed to the matters decided on in the case regarding *Achmea*. The judgment of the General Court of the CJEU, which annulled the Commission's Decision on state aid, finding that the incentive scheme set up by Romania was not in violation of EU state aid rules, also had a bearing on the US courts' decision. The US courts have been much more cautious than the UK courts. The above decisions essentially leave room for the consideration of *Achmea* by the US courts in cases

55 Brenninkmeijer–Gélinas, 2021, p. 437.
56 Schreuer et. al., 2009, pp. 1140–1141.
57 Id., 1149.
58 See for example: UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary, ICSID Case No. ARB/13/35, Decision on Annulment.
59 Memorandum Opinion of the United States District Court for the District of Columbia, in Case No. 17-cv-02332 (APM), Ioan Micula, et al. v Government of Romania. p. 14.
60 For a succinct review of the main arguments, see: Yanos and Ramos-Mrosovsky, 2021.

where the timeline of events is similar to that in the case of *Achmea*. In this sense, seeking enforcement in front of the US courts will require arguments distinguishing the particular case from *Achmea*.[61]

In another ICSID case—*Antin v. Spain*[62]—requests for enforcement have been made both in the US and Australia. In the latter country, the courts have given the *go-ahead*[63] for enforcement.[64] Successful claimants are seeking enforcement in third countries and will continue to do so, even when they face a state that is not willing to proceed with execution in good faith, as they can still count on courts to apply the ICSID Convention. As a rule, under the ICSID Convention, courts will proceed to enforce an award in case the authenticated award[65] is presented and the award meets all the requirements for execution that a final judgment of a local court has to meet. This essentially means that there is no room left to consider the arguments of EU law in cases of enforcement of ICSID awards.

3.2.2. Enforcement under the New York Convention

The New York Convention accords limited non-merits grounds for the judicial review of awards rendered at a foreign seat. Nevertheless, these grounds for judicial review are substantially broader than those available in the case of ICSID awards. Under Article III of the Convention, arbitral awards must be recognized as binding and enforced by all courts of state members of the Convention. Enforcement can only be refused on the grounds listed in Article V.

Under the New York Convention, the enforcing court has extensive scope in rehearing the questions pertaining to the arbitration agreement's validity.[66] This effectively means that national legislation and the practice of different courts can result in the same award being interpreted and reheard in a myriad of different ways, making this quite the gamble for the party seeking enforcement.[67] Since the Termination Agreement has been concluded, national courts outside the EU will consider the fact that intra-EU

61 As put forward also in Yanos and Ramos-Mrosovsky, 2021.

62 *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31*.

63 See Judgment of the Federal Court of Australia [2021] FCAFC 112, of 25 June 2021.

64 As noted by Martin Jarrett: Investment-Treaty Arbitration after Achmea. https://www.youtube.com/watch?v=oxr579pgMTw (Accessed 16.01.2022.).

65 As defined by Article 53(2) of the ICSID Convention.

66 In this regard, it has been noted that "the enforcing court is required to investigate fully (a) whether the arbitration panel has correctly ascertained the applicable law governing the arbitration award's existence, validity, and effectiveness; (b) secondly the enforcing court must determine whether the test derived from that applicable law has been correctly formulated; (c) thirdly, the enforcing court must then decide for itself whether that test, when meticulously applied to the facts of the case, establishes that the relevant putative party was truly a party to the arbitration agreement; and at this third stage it is not enough merely to rubber-stamp the arbitration tribunal's analysis, because it is possible for the party resisting enforcement to show that there was in fact no proper factual support for the conclusion drawn by the arbitral panel." Andrews, 2012, pp. 244–245.

67 This is illustrated well in the doctrine. See Andrews, 2012, pp. 261–262.

BITs have been terminated in accordance with the standards of international law, and, thus, there is now no arbitration agreement underlying an award they might have to consider. However, there are cases that have been brought and adjudicated under intra-EU BITs that were still in force, which means that the parties will have to contend with a variety of solutions, as the validity of the arbitration agreement will be analyzed in accordance with the law applicable to it (mainly the law of the seat of arbitration). As enforcement may be sought in front of any contracting state, a set-aside proceeding successful in front of one state's courts will not necessarily matter in front of the courts of another state.[68] This leaves much room for investors seeking enforcement and every jurisdiction where enforcement also means more costs for the investor.

In the case of this study the set-aside arguments related to the arbitrability of a particular claim, namely the validity of the arbitration agreements, and substantive grounds such as the violation of public policy, are the main arguments to be considered. The perpetually evolving concept of public policy is analyzed in accordance with national law and national interes; thus, enforcement may be refused in case the fundamental principles of the legal system in which enforcement is sought can be considered to have been breached in a particular case.

After *Achmea*, it was noted that during the process of recognition and enforcement, domestic courts could make use of the provisions pertaining to the invalidity of the arbitration agreement and that of the violation of public policy stipulated in the New York Convention to refuse enforcement.[69] The question is how effectively these provisions of the New York Convention can be invoked in front of courts in third countries where the recognition and enforcement of intra-EU awards might be sought. In analyzing whether Article. V(1)(a) of the Convention is applicable when arguing that there was no valid consent to arbitration, the analysis will have to be done through the lens of the law of the seat of arbitration. The public policy exception contained in Article V(2)(b) of the New York Convention may also be considered as an argument for refusing recognition and enforcement. As in the case of *Achmea*, it can also be argued in the case of *Komstroy* that Article 344 TFEU and the autonomy of the EU and its legal order must be considered as essential characteristics of the EU and its law, making these a part of EU public policy.[70] Nevertheless, the outcome is not certain in any case. The obligation of non-EU MS courts to consider EU public policy is a matter of *international comity* (or *comitas gentium*); it does not bind these courts in any case, and they can only choose to consider it.

The reliance on national systems of law for securing recognition and enforcement under the New York Convention is only made worse by the fact that there is no effective sanction for non-compliance with the provisions of the Convention.

68 See the judgment of the US District Court for the Southern District of New York in Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production; or the UK Supreme Court in Dallah Real Estate & Tourism Holding Co v. Pakistan (2010) [2010] UKSC 46; [2010] 3 WLR 1472, in Andrews, 2012, pp. 261–262.

69 See Káposznyák, 2020, pp. 69–90. This was also argued in Korom, 2020, pp. 68–69.

70 Case C-741/19, Republic of Moldova v. Komstroy LLC, paragraph 43. See also Kaposznyák, id.

4. Attempts by the EU to shut the door

As has been noted in scholarly literature, there are mechanisms within the EU to rectify the cases of enforcement of arbitral awards that are incompatible with EU law. The EU is trying to use these to keep the EU MS in line. However, these might also have effects in third countries, as will be discussed below.

The possibility of the Commission launching infringement proceedings pursuant to Article 258 TFEU[71] is one of the more obvious possibilities. This is evidently limited to the EU MS and does not affect third countries. Although exceptional, the infringement proceedings might be useful in intra-EU ECT cases where, despite the *Komstroy* judgment, there is no agreement to settle the extent of application of that decision till date. Thus, successful claimants might also have a window of opportunity to enforce their awards within the EU. In such cases, the EU will have the possibility to launch infringement proceedings to force the MS to recover any payments that have been made. Infringement proceedings may also be compounded with decisions regarding state aid.

Browsing through the ECT cases, we see that several of them have been initiated as a result of the EU MS withdrawing or making changes to incentive regimes in the renewable energy sector. Such is the case of Spain, which has seen a fairly large number of arbitral proceedings initiated against it in the last decade. Many of these cases are intra-EU ECT-based arbitration cases. In such cases, a decision of the Commission on state aid could make enforcement even more cumbersome outside of the EU.

The argument of state aid has been used and abused. It is important to note that there is a distinction between state aid and compensation for damages, as AG Szpunar noted in his July 1, 2021 opinion. Although the arguments proposed by AGs have not been widely embraced by the CJEU regarding the aforementioned cases, the arguments proposed by the AG might be useful for those seeking recognition and enforcement of intra-EU awards in third countries.

It should also be noted that, although ultimately, the US courts allowed for enforcement proceedings to continue in the *Micula* case, one of the most important factors in the suspension of enforcement was the EU stance on state aid. This was also enough to preclude courts in Sweden from enforcing the award.[72] Arguments concerning this have also been used in other cases to convince courts in third countries to refuse recognition and enforcement. This argument has been used even in cases where the issue underlying the dispute did not involve state aid declared incompatible with EU law. In this sense, it is noteworthy that in the case *Infrastructure Services*

71 Gáspár-Szilágyi, 2021, pp. 683–684. The author argues that the uniform application of EU law outside and even within the EU is a *fiction*, however noting that there are mechanisms within the EU to stop the enforcement of awards that misapply and misinterpret EU law, and are able, thus, to affect its uniformity and effectiveness.

72 Bermann, 2020, p. 322.

Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, pursuant to the award, the Commission launched an investigation into the aid scheme from which the investors benefited, to preclude the enforcement of the arbitral award.[73] Due to the changes to the renewable energy subsidy scheme applied by Spain and other EU MS, through which they effectively breached their obligations to ensure fair and equitable treatment to foreign investments (at least from an international investment law perspective), the results of an investigation by the Commission into these schemes will have an important impact. Declaring the previous schemes incompatible with EU state aid rules, the affected EU MS will be asked to take back the amounts paid as compensation on the basis of these arbitral awards. Investors will have to make their calculations and see if it is still worth the risk of going into investment arbitration proceedings in such scenarios, as enforcement will continue to be a massive challenge. The extra costs generated by these complications will definitely be a deterrent.

When making such calculations, investors will surely note that the procedures for recovering the money once paid are even more cumbersome. It takes a lot of time to investigate cases of state aid, and the decision of the Commission can be contested with genuine chances of success (as shown by the case of Romania in the *Micula saga*). It is only after the decision is confirmed that the Commission can order the MS to recover the payments made (or executed). In case of non-compliance, the intervention of the Court of Justice will be sought, which further prolongs the process. A judgment still does not guarantee that the MS will be able to recover the unlawful and incompatible state aid. As time passes, the probability of recovering it reduces massively. In case of failure to recover the unlawful state aid, the CJEU may impose penalties on the MS.[74] It ultimately seems that if successful investors manage to proceed with the enforcement, the burden is borne by the MS, which will see further costs piled up in case of non-compliance with recovering the "state aid." It seems that even if more arbitral awards are classified as state aid, this will also be a very long road to walk.

In any case, trust in the international investment arbitration system will be waning in the EU, as the legitimacy of the system has been undermined making enforcement ever more difficult. This effect might not show in the short term, but will effectively contribute to shutting the door on intra-EU investment arbitration, even before we see other, comparable dispute resolution mechanisms enacted.

73 See State Aid — Spain — State aid SA.54155 (2021/NN) — Arbitration award to Antin — Spain — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union Text with EEA relevance – C/2021/5405. Official Journal of the European Union, 05.11.2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.450.01.0005.01.ENG&toc=OJ%3AC%3A2021%3A450%3ATOC (Accessed 16.01.2022.).

74 Although not an investment arbitration case, the Judgment in Case C-51/20 Commission v. Greece, illustrates well the difficulties faced by Member States when they do not properly engage in recovering unlawful state aid.

5. Afterthoughts

Seeing the difficulties faced by investors with enforcement, it is obvious why ICSID might remain the preferred avenue for arbitration, especially considering its operation as a self-contained system. However, risks still exist in the case of ICSID awards. It remains to be seen on a case-by-case basis how much non-MS courts will be willing to tackle some of the issues that have come up, apply Article 54 of the ICSID Convention, or choose to defer to EU courts as a matter of international comity.

Looking from the EU's perspective, we see that the issues around the incompatibility of investment arbitration and EU law have been argued since the *Eastern Sugar* arbitration. One does not need to be a *seer* to predict that issues around enforcement may also arise, as the legitimacy of the system in intra-EU cases has been constantly chipped at. The CJEU judgments that have produced these huge splashes, which are the easily observable inflection points of the EU's change of attitude, essentially stem from the interpretation of the existing EU law. Not that hockey legend Wayne Gretzky's famous saying has ever constituted some sort of principle or guidance in investment arbitration; however, paraphrasing it seems fitting in that claimants rather prefer to *skate to where the puck has been*. Although the stance of the Commission has been well known for years and has repeatedly been made clear, EU investors still insist on using investment arbitration, as arbitral tribunals are still retaining jurisdiction; this is despite all the difficulties that successful claimants will ultimately face during recognition and enforcement. The answer to why investors are still willing to risk it can be found in the EU legal regime itself, which does not in any case accord superior protection to intra-EU investors. This attitude of the EU, which seeks to dismantle intra-EU investment arbitration without providing for a viable, comparable, or at least an imperfect substitute, has been criticized as a step that actually holds back the European project.[75] Although the stammering of the CJEU still makes it possible for investors to *skate to where the puck has been* as regards ISDS, its fate is sealed. The lack of a comparable intra-EU system will prompt new investors to *go treaty-shopping* and seek protection by structuring their investments through third countries. It can also be expected that existing ones will seek to restructure their investments to obtain the level of protection they would be comfortable with.

It remains to be seen how much the investors will seek to use the *structured dialogue* regulated in the Termination Agreement. In the present situation, it seems like a sensible option that they should try to pursue. However, this does not exclude enforcement proceedings, as these might also be of use as leverage during negotiations under the structured dialogue. As the CJEU judgments and the Termination Agreement have made such a huge splash, with their ripples being felt, especially in the field of recognition and enforcement, structured dialogue might deserve more attention. It

75 Nagy, 2018, p. 983.

might be the quicker and easier way toward the payment of the awards. It might also lead to new diplomatic channels for enforcement, and lobbying and political pressure in this process to gain more importance.

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GRZEGORZ PASTUSZKO[1]

Protection of Families in National Constitutions, in Particular in the Polish Constitution

ABSTRACT: *This article aims to present the family's legal status in light of constitutional solutions in force in selected European countries, with particular emphasis on Polish regulations. The author aims to present a wide range of regulations functioning in Europe, and at the same time, highlight the similarities and differences between individual countries. An important element of this study is the consideration of Polish legislation, which is to familiarize readers with basic information on the legal situation of Polish families and at the same time show them where the regulations in force in the Republic of Poland fit into European standards, and in which they are original. The article covers the following issues: the constitutional protection of the family, way of understanding the role of the family in society and the state, problem of the constitutional definition of the family, definition of marriage, exercise of parental authority, and legal status of children.*

KEYWORDS: legal status of family, marriage, children, parenthood.

I. In European culture, the family is viewed as one of the foundations of social life. For this reason, it is permanently rooted in the laws of all European countries, which aim to define the normative framework for its operation and to provide legal protection. Importantly, in the vast majority of cases, the basic provisions regulating the family's legal status are found in the texts of the constitutions. Establishing them at such a level, European legislators create a starting point for more complex and detailed solutions contained in lower-level acts; at the same time, they treat the family as a particularly important phenomenon from the perspective of the functioning of the state and society. Undoubtedly, this approach can be considered a widely used standard in Europe.

The Polish legislator also uses the concept of a regulation devoted to the family in the constitution. The solutions adopted in this matter are expressions of respect for the institution of the family in the national social order and, at the same time, reflect

1 Assistant Professor, Institute of Legal Sciences, University of Rzeszów, Poland, grzegorz.pastuszko@onet.pl, ORCID: 0000–0002-1494–6409.

https://doi.org/10.47078/2022.1.161-175

the previously indicated pan-European tendencies in the field of shaping constitutional provisions. They are also a manifestation of striving to provide a basic social unit with legal protection. The fact that the legislator attaches great importance to this is evidenced by the scope and multifaceted nature of established regulations. The family theme manifests itself in many contexts under the binding law and is strongly exposed to various places in the normative text[2]. The regulations themselves are characterized by clear originality combined with certain normative schemes established in Europe. To see it fully, it seems reasonable to present the constitutional concept of family protection in Poland against a broader comparative background, including functioning solutions in other European countries. It can be assumed that such a cognitive perspective creates an opportunity to show the reader with full sharpness what is unique in this concept and in line with the regulatory standards existing today. This consitutes the research purpose of this study.

II. The constitutional provisions governing the legal status of the family in force in modern European countries differ in many elements (if they exist at all under a given constitution; such provisions do not exist in the Constitution of France[3], Denmark,[4] and the Netherlands[5]). The distinctions that come into play here mainly concern the content, scope of the standardization, and manner of its presentation. In this respect, a spectrum of possible models of normative solutions emerged. Their comparative legal review allows us to see the specificity and, in part, the template nature of Polish regulations.

III. Most constitutions unequivocally cover the family with legal protection expressed by the active role of the state in this area (this is not done by the continuation of Romania[6] and Luxembourg, for example[7]). In this way, they create a normative basis for pro-family policy, understood as a long-term system of goals and legal solutions to support families[8]. In Poland, a relevant clause is contained in Art. 18 of the Basic Law, which stipulates that the family, marriage, motherhood, and parenthood, are under the protection and care of the Republic of Poland. Additionally, a regulation that manifests the need for the state to provide support to the family, including mothers with children, is Art. 71 sec. 1 and 2 of the Constitution. According to it, the state in its social and economic policy considers the family's welfare, which, if it is in a difficult financial and social situation, has many children and is incomplete—has the right to special assistance from public authorities. It should be emphasized that all these solutions create a normative platform for conducting a broad-based pro-family policy, reflected

2 Garlicki, 2016, p. 489.
3 France's Constitution of 1958 with Amendments through 2008.
4 Denmark's Constitution of 1953.
5 Netherlands's Constitution of 1814 with Amendments through 2008.
6 Romania's Constitution of 1991 with Amendments through 2003.
7 Luxembourg's Constitution of 1868 with Amendments through 2009.
8 Durasiewicz, 2009, p. 57.

in various statutory instruments. An example is a wide range of family benefits to support their economic conditions of functioning, which consists of several different forms of family benefits (including the famous 500 plus program)[9] and running organizational units of social assistance[10]. Similar constitutional provisions are in force in Slovakia[11], where the legislator, apart from declaring the family's protection, emphasizes the need to support pregnant mothers and parents bringing up children. This is due specifically to Art. 41 para. 1–2 and 5 of the Slovak Constitution, which states that marriage, parenthood, and family are under the protection of the law, pregnant women shall be entitled to special treatment, terms of employment, and working conditions, and parents taking care of their children shall have the right to assistance provided by the State. The constitutional provisions adopted in the Czech Republic[12], which emphasize the same elements of state protection, are very similar. Art. 32 sec. 1-3 states the law protects parenthhood and the family and that pregnant women are guaranteed special care, protection in labor relations, and suitable work conditions. Parents who are raising children have the right to assistance from the state. This list includes the Spanish regulation[13], which distinguishes between areas requiring protection by the state and, at the same time, emphasizes special care for children. As stated in the constitution, Art. 39 sec. 1 i 2, the public authorities shall ensure the family's social, economic, and legal protection. In contrast, they shall ensure full protection of children, who are equal before the law, irrespective of the mothers' parentage and marital status. Going further, it is worth indicating the German regulations[14], including a short declaration and the areas of state protection listed in turn. Under Art. 6 sec. 1–2, 4-5 of the constitution, marriage, and the family are under the special protection of the state order. The care and upbringing of children is a natural right of parents and their primary responsibility. Their activities are supervised by the state community, which is additionally obliged to care for and protect mothers. For children born out of wedlock, the same conditions for physical and spiritual development should be created by law, and the same social position as children born into marriage should be guaranteed. The Hungarian regulation[15] is original in this group, explaining the need for state involvement in this area and, at the same time, encouraging the conduct of an active demographic policy as Art. L para. 1–3 konstytucji, Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision. The family is the basis of the survival of the nation and should also encourage the

9 Family allowance – 2004; Extras for the family gym – 2004; Care allowance – 2004; Benefit care – 2004; Benefits from the fund alimony – 2004; Disposable you birth torso the baby – 2006; Addition to benefits; care – 2013–2014; The special caring bow – 2013; Benefit parental – 2016 Benefit from the program Family of 500 plus – 2016; Benefit from the program Good start – 2018; Durasiewicz, 2014, pp. 113–115.

10 Durasiewicz, 2009, p. 57 and next.

11 Slovakia's Constitution of 1992 with Amendments through 2014.

12 Czech Republic's Constitution of 1993 with Amendments through 2002.

13 Spain's Constitution of 1978 with Amendments through 2011.

14 Germany's Constitution of 1949 with Amendments through 2014.

15 Hungary's Constitution of 2011 with Amendments through 2013.

commitment to have children (a cardinal Act shall regulate the protection of families). The Lithuanian constitution[16] is characterized by a certain difference, proposing a solution focusing on state aid directed only to families bringing up children while laying down certain guarantees for mothers. In contrast, under Art. 39, the state shall take care of families that raise and bring up children at home and render them support according to the procedure established by law. On the other hand, shall provide to working mothers a paid leave before and after childbirth and favored working conditions and other concessions. The originality can be attributed to the Irish constitution[17], which, when formulating a commitment to protect the family, also emphasizes the need to protect it from unspecified attacks while highlighting the social guarantees for mothers. The provision containing the solution is Art. 41, declaring that the state: guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the state; recognize that by her life within the home, women give to the state a support without which the common good cannot be achieved, and therefore endeavors to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home; pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack. The standard in force in Slovenia[18] has a slightly different content and is much more economical in terms of the text. Art. 53 states that the state shall protect the family, motherhood, fatherhood, children, and young people and provide proper conditions for effecting such protection. The situation is similar in Finland[19], where the legislator also uses a formula that is limited in its content. The local constitution in Art. 19 provides that the public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health, and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children to ensure the wellbeing and personal development of the children. Finally, Lativa has concise regulation concerning the family's protection by the state. It is about Art. 110 of the Constitution. The state shall protect and support marriage and provide special support to children with disabilities, children left without parental care, or who have suffered from violence. The most extensive regulation is the Portuguese constitution[20]. In this case, the legislator expresses special care for the good of the family, delineating an extensive catalog of spheres of pro-family activity of the state. Therefore, according to Art. 67, ut. Family 1–2, as a fundamental element in society, shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfillment. To protect the family, the state should particularly be charged with promoting the social

16 Lithuania's Constitution of 1992 with Amendments through 2006.
17 Ireland's Constitution of 1937 with Amendments through 2015.
18 Slovenia's Constitution of 1991 with Amendments through 2013.
19 Finland's Constitution of 1999 with Amendments through 2011.
20 Portugal's Constitution of 1976 with Amendments through 2005.

and economic independence of family units, promoting the creation of, and guaranteeing access to, a national network of crèches and other social facilities designed to support the family, together with a policy for the elderly; cooperating with parents in relation to their children's education; with respect for individual freedom, guaranteeing the right to family planning to promote the information and access to the methods and means required, and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned; regulating assisted conception in such a way as to safeguard the dignity of the human person; regulating taxes and social benefits in line with family costs; after first consulting the associations that represent the family, drawing up and implementing a global and integrated family policy; by concerting the various sectoral policies, promoting the reconciliation of professional and family life.

IV. Some European constitutions manifest their relationship to the institution of the family. They do it through expressis verbis declarations, emphasizing the importance of this institution in the functioning of society or nation (some constitutions speak of society, others speak of the nation). Formulations of this type, showing a strong axiological character, manifest unequivocally the legislator's conviction that the family is among the most significant constitutional values. It should be noted that there are no such provisions in Polish basic law. However, their lack does not mean that the legislator depreciates the family in any way. As it can be assumed, he uses the concept of the family intuitively, treating it as an existing term, defined by tradition and customs[21], which have placed the discussed institution at the center of the country's social life for centuries. Therefore, it is difficult to doubt that the constitution perceives the family differently. This is evidenced by the jurisprudence of the Constitutional Tribunal, which requires one to be guided by "the awareness of the value of the family in social life and the importance of this basic unit for the existence and functioning of the nation"[22]

An example of the declaration mentioned above is provided by the Estonian constitution[23], whose Art. 27 states directly about the family as a factor "fundamental to the preservation and growth of the nation and as the basis of society." A similar example is the Hungarian constitution, recognized in Art. L for "the basis of the survival of the nation." In this case, the adopted regulation is supplemented by a call contained in the preamble, which states that the authors of the constitution "(..) hold that the family and the nation constitute the principal framework of our coexistence and that our fundamental cohesive values are fidelity, faith, and love." In the Greek constitution[24], which is yet another example, the legislator sees the family (including marriage, motherhood, and childhood) as the "cornerstone of the preservation and the advancement of the

21 Winczorek, 2008, p. 58.
22 Judgment of the Constitutional Tribunal of May 8, 2001, file ref. Act P 15/00; see Garlicki, 2016, pp. 490–491.
23 Estonia's Constitution of 1992 with Amendments through 2015.
24 Greece's Constitution of 1975 with Amendments through 2008.

Nation." (Art. 21) In turn, in the Lithuanian constitution, it is referred to as the "basis of society and the State" (Art. 38). The same is true of the Portuguese constitution, which states that the family is a "fundamental element in society" (Art. 67 (1)). It is also true of the Latvian constitution[25], which places the family among the "foundations of a cohesive society" (an excerpt of this is included in the preamble to the act in question). Against this background, an example of a regulation contained in the Irish constitution is presented in an interesting and original way. The one in Art. 41 1 1 ° declares that "the state recognizes the family as the natural primary and fundamental unit group of society and a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

V. An analysis of the texts of European constitutions leads to the conclusion that virtually none of them uses the legal definition of the term family. Some only indicate the constituent elements of this concept (in particular marriage, parents, children). However, by creating only an interpretative plane, it does not give a clear answer to which links qualify for recognition as a family and which do not. In the traditional sense, family relationships go beyond the sphere of the functioning of a married couple and their children. In this respect, certain doubts may arise, the removal of which requires an analysis of the normative text and the cultural conditions of a given country. In Poland, the problem of the lack of a definition of the family has been noticed many times in the literature on constitutional law. The voices made here suggest that the spouses are the family, their children (if any), and the single parent with the child. Moreover, the concept of family can also be extended to intergenerational relations based on blood ties and relations of adoption. In addition, it can be extended to cohabitation with children and foster families and families based on adoption[26]. However, it is debatable whether the family consists of childless marriages[27].

The lack of a definition of the family in European constitutions is often accompanied by a lack of explanation of the institution of marriage (there are also constitutions that do not use this term at all, such as the constitution of Estonia or the Czech Republic). Only some constitutions break out of this pattern, introducing clarifications formulated normative directives in this respect. The latter's content varies and depends on the individual preferences of the individual constituents. Among them, there is a discernible group of solutions that define marriage as a relationship between a woman and a man, resulting in the state's obligation to protect heterosexual marriages. It should be noted that this is the type of regulation that we deal with under the Polish constitution. Art. 18 clearly states that a marriage is under the protection and care of the Republic of Poland if it is based on the relationship between a woman and a man. From this formulation, it can be concluded that, in principle, there is no legal possibility for the term marriage to define relationships formed by persons of the same sex. Constitutional regulation

25 Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016.
26 Banaszak, 2009, p. 119.
27 Tuleja, 2019, p. 81; Winczorek, 2008, p. 54.

creates a blockade for such legislative activities, thus establishing a legal prohibition[28]. In contrast, it is not clear whether, based on the existing constitutional solutions, it is permissible to introduce other forms of factual relationships between two natural persons under statutes (there is no such institution in the Polish legal system; the Sejm opposed an attempt to introduce it in the past). There is a polemic against the background of this dilemma among Polish lawyers, from which two contradictory positions emerge. Supporters of the view on the constitutionality of the so-called partnerships emphasize, *inter alia*, that the evangelical institutionalization of interpersonal relations of this type could find constitutional support in Art. 31 sec. 1 and Art. 47 of the Basic Law, because "these provisions impose the obligation of the state to guarantee to every person the right to free development and the possibility of pursuing private life." In contrast, opponents refer to legal obstacles in Article 18 of the Basic Law. Bogusław Banaszak briefly states that this regulation "(...) implies the prohibition of all kinds of actions by public authorities to create regulations for such unions that would equate them or make them legally similar to marriage, both in terms of determining the scope of rights and obligations of persons who are in such a relationship and in the matter of its conclusion or dissolution."[29] In contrast, Witold Borysiak notes that this prohibition means that there is no possibility of creating relationships that would be stylized as marriage, not only in terms of the name but also the essential features of this institution. As the author emphasizes, "If the legislator creates a legal institution of a partnership between two persons of the same sex, which is to respond, due to its legal registration of the institution of marriage, then it ignores the purpose of Article 18." The reasoning that a departure from one of the essential structural elements of marriage makes the article inapplicable to such an institution as a model for controlling that regulation is erroneous. When adopting such a view, the circumvention of the purpose for which Art. 18, it would be possible by simply naming the relationship differently than marriage (such as solidarity pact, registered partnership.) and referring its regulation to the provisions on marriage or their duplication (...)'[30].

Notably, the acceptance of the institution of a partnership relationship leads some to conclude that its establishment in the Polish legal order is a constitutional obligation of the state authorities. Such a view is formulated by Mirosław Wyrzykowski, whose opinion, by guaranteeing and protecting dignity, freedom, equality, and privacy, obliges the ordinary legislator to institutionalize partnerships[31]. However, this view is opposed by Dariusz Dudek, who adopts the opposite interpretation of the norms of the constitution. According to him, the "assumed" state "recognition" of the indicated normative "necessity" is not supported by any argument relating either to state policy or reliable public opinion polls. Therefore, regulating the situation ("matter") of persons

28 Tuleja, 2019, p. 80; Winczorek, 2008, p. 115. Otherwise see: Łętowska and Woleński, 2013, p. 29; Jezusek, 2015, pp. 74–76.

29 Banaszak, 2014, p. 80.

30 Borysiak, 2016, p. 485.

31 Wyrzykowski, 2012, p. 233.

living in extra-marital relationships, although it may be purposeful or necessary, is not necessary to implement the norms of the Polish Constitution (...). »It is devoid of any real and legal basis'[32].

Apart from Poland, the directive defining marriage as a union between a man and a woman also appears in the constitutions of Bulgaria[33], Latvia, and Hungary. In the first case, the issue is governed by Art. 46 sec. 1–2 explicitly states that matrimony shall be a free union between a man and a woman, noting that only a civil marriage shall be legal and that spouses shall have equal rights and obligations in matrimony and the family. The legislator does not provide more details on the institution of marriage, limiting itself to the stipulation that the form of a marriage, the conditions and procedure for its conclusion and termination, and all private and material relations between the spouses shall be established by law. In the second case, the characteristics of marriage indicated here are determined by Art. 110, explicitly stating that it is a union between a man and a woman. This provision, containing such a clear normative solution, clearly obliges the state to protect and care for marriage. It is thus evident that such a relationship enjoys a special privilege under the constitution[34]. In contrast, in the third case, marriage is understood traditionally is mentioned in Art. L us. 1 of the constitution. According to it, Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decisions.

To complete the above argument, it is worth adding that, in Hungary, the existence of legally recognized partnerships of homosexual couples is allowed (this is the result of the law passed in 2007, before the adoption of the present constitution). In Bulgaria and Latvia, such a possibility does not exist, making both countries similar to Poland and Lithuania, Slovakia, and Romania[35].

However, the majority of legislators refrains from precisely indicating the gender of the parties entering marriage and is limited to a general mention of the spouses. Such a solution, which gives the concept of marriage clear flexibility, extends the scope of the regulatory freedom of the ordinary legislator and removes, at least in the normative dimension, an obstacle to the establishment of the institution of marriage for homosexuals. An example of a constitution referring to this concept is the constitution of Portugal, which in Art. 36 1-3 proclaims that everyone shall possess the right to marry in terms of full equality, stating that the law shall regulate the requirements for and the effects of marriage and its dissolution by death or divorce, regardless

32 Dudek, 2012, pp. 172–174.

33 Bulgaria's Constitution of 1991 with Amendments through 2015.

34 An interesting fact is that it was introduced in 2005 to prevent the creation of an institution of marriage for homosexual couples; L. Sheeter (2006) *Latvia defies the EU over gay rights*, „BBC News Riga," http://news.bbc.co.uk/2/hi/europe/5084832.stm (available: 01.12.2021).

35 It is worth noting that in Latvia, Lithuania, Slovakia, and Romania (Poland has already been mentioned earlier), there have been attempts to create some form of civil partnership for homosexual persons through statutory provisions. By no means, however, were these attempts to produce any result.

of the form in which it was entered into. Spouses shall possess equal rights and duties in relation to their civil and political capacity and the maintenance and education of their children. Another example is the Romanian Constitution declaring briefly in this matter in Art. 48 sec. 1, in which the family is based on a freely consented marriage by the spouses, their full equality, and the rights and duties of the parents to raise, educate, and instruct their children. The solution is provided for in the Portuguese Constitution in Art. 36 sec. 1-3, assuming marriage is based on the equality of each spouse, and adding that the institution itself and the legal rights and obligations flowing from marriage, the legal rights and obligations within the family, together with the legal rights and obligations arising because of relationships outside marriage, shall be determined by statute.

The issue in question is regulated somewhat differently in Cyprus, where the legislator reserves in Art. 22 sec. 1 of the Constitution that any person reaching nubile age is free to marry and find a family according to the law relating to marriage, applicable to such persons under the provisions of this Constitution. The Italian Constitution also deals with the problem differently, which in Art. 29 states that marriage is based on the moral and legal equality of the spouses within limits laid down by law to guarantee the unity of the family. However, the Irish regulation is particularly interesting, as the only one in the circle of analogous European solutions stipulates expressis verbis that marriage may be contracted in accordance with law by two persons without distinction with respect to their sex. Moreover, this is not its only original element, as it also provides a framework for a divorce between spouses. Art. 41 sec. 3 pt 1 ° states that a court designated by law may grant a dissolution of marriage only when it is certified that there is no reasonable prospect of a reconciliation between the spouses. Such provision as the court considers proper regarding the existing circumstances will be made to the spouses, children of either or both of them, and to any other person prescribed by law, and any further conditions prescribed by law are complied with.

VI. When regulating the functioning of the family, the constitutions of European countries generally refer to the legal situation of children in a broad sense. The solutions in this matter concern various aspects of this issue, with the issue of parental responsibility and the resulting legal possibilities and obligations of action being of key importance. In the case of the Polish constitution, these are provisions that create guarantees for parents and impose certain obligations on the state. It is specifically Art. 53 section 3, which states that parents have the right to provide their children with moral and religious education and teaching following their convictions and Art. 72 sec. 1, which states that parents have the freedom to choose schools other than the public for their children. The regulation of Art. 72 sec. 1 formulates a declaration on ensuring the protection of children's rights, also in the context of family life. According to it, everyone has the right to demand that public authorities protect a child against violence, cruelty, exploitation, and demoralization. The same provision in para. 2 and 3 also stipulates that a child deprived of parental care has the right to the care and

assistance of public authorities. In the course of establishing children, public authorities and persons responsible for the child are obliged to hear and, as far as possible, take into account the child's opinion. The Italian constitution[36] contains similar regulations, although there are also some differences. The latter includes, in particular, a strong emphasis on paternity (the legislator creates a statutory delegation in this respect). According to Art. 30, it is the parents' duty and right to support, raise, and educate their children, even if born out of wedlock. In the case of parents' incapacity, the law provides for the fulfillment of their duties. The law ensures that such legal and social protection measures are compatible with the rights of the legitimate family members to any children born out of wedlock. The law establishes rules and constraints for the determination of paternity. In turn, according to Art. 31, the Republic assists the formation of the family and the fulfillment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic also protects mothers, children, and young people by adopting the necessary provisions. Appropriate regulations in this regard are also contained in the Portuguese Constitution. An interesting solution in their case is that explicit guarantees cover married spouses and parents (i.e., people who have not married or divorced). Art. 26 sec. 4 and 5 determines this construction, stating that both spouses and parents shall possess equal rights and duties in relation to the maintenance and education of their children. In addition, this provision creates a rule whereby children born outside wedlock shall not be the object of any discrimination for that reason. Neither the law nor official departments or services may employ discriminatory terms in relation to their filiation. Children shall not be separated from their parents, save when the latter do not fulfill their fundamental duties towards them, and then always by judicial order. Another regulation determining the legal situation in the family is Art. 67 sec. 2 point c of the Constitution, stating that to protect the family, the state shall particularly be charged with cooperating with parents in relation to their children's education. Another regulation is Art. 68 devoted entirely to fatherhood and motherhood. Given their irreplaceable role in relation to their children, particularly concerning children's education, fathers and mothers shall possess the right to protection by society and the state, together with the guarantee of their professional fulfillment and participation in civic life. Moreover, motherhood and fatherhood shall constitute eminent social values, and women shall possess the right to special protection during pregnancy and following childbirth. Female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privileges. Finally, the law shall regulate the grant to mothers and fathers for an adequate period of leave from work, in accordance with the interests of the child and the needs of the family unit. The last important regulation in the matter under discussion is Art. 69, sec. 1 and 2 of the Constitution. It proclaims that considering their integral development, children shall possess the right to protection by society and the state, especially from all forms of abandonment,

36 Italy's Constitution of 1947 with Amendments through 2012.

discrimination, and oppression, and from the abusive exercise of authority in the family or any other institution. The state shall ensure special protection for children who are orphaned, abandoned, or deprived of a normal family environment in any way. When looking for further examples, one can refer to the Romanian constitution. In this case, legal regulations are much shorter. It includes Art. 48, which provides that parents are entitled to rights and obligations to raise, educate, and instruct their children and that children born outside marriage enjoy equal rights as those born in marriage. It also includes Art. 49, which establishes that children and youth will enjoy special protection and assistance in implementing their rights. The state shall grant benefits for children and provide aid for the care of sick or children with disabilities. Other forms of social protection for children and youth shall be determined by law. Another example is the Slovak constitution, which is also text-saving. In Art. 42 sec. 3-6 we read that equal rights shall be guaranteed to both children born of legitimate matrimony and those born out of lawful wedlock, and that child care and upbringing shall be the right of parents; children shall have the right to parental care and upbringing. Next, we also read that parents taking care of their children shall have the right to assistance provided by the state and that pregnant women shall be entitled to special treatment, terms of employment, and working conditions.

The issue that requires separate reflection in these considerations is the regulations on adopting children, which appear in some European constitutions. At this point, it is worth mentioning them in the context of the problem of adoption by homosexual couples, which, as we know, has been legalized in many European countries. Before beginning our discussion on this subject, it should first be noted that the adoption problem does not arise within the framework of the solutions of the Polish constitution. The constitution-maker resigns from this element, which leaves free space for regulations at the oral level. In the current legal state, the issue of adoption is regulated by the Act of February 25, 1964–Family and Guardianship Code[37]. The provisions contained in this act allow only for adoption by a natural person (Art. 114) and by persons who are married (Art. 115) but in no case authorize any other relationships to do so, including same-sex relationships. As it may be assumed, such a legal construction complies with the constitutional provisions, which in Art. 18 very clearly defines the family model preferred and protected by the state[38], while in Art. 72, it is necessary to be guided by the child's best interests[39].

37 Act of February 25, 1964 – Family and Guardianship Code, Journal of Laws No. 2020 item 1359.

38 The doctrine formulates a view according to which the adoption of children by homosexual couples would be in contradiction with the family model defined in Art. 18 of the Basic Law; see Holewińska-Łapińska, 2011, p. 528. This direction of thinking can also be related to the Constitutional Tribunal statement, which in the judgment of April 12, 2011, indicated that "protection of the family carried out by public authorities must take into account the vision of the family adopted in the Constitution as a permanent relationship between a man and a woman focused on motherhood and responsible parenthood." Judgment of the Constitutional Tribunal of April 12, 2011, file ref. no. SK 62/08.

39 Pietrzykowski, 2018.

Moreover, it is fully in line with the case-law of adoption already established in Poland. As an example, we can quote the statement of the Supreme Court, which in one of its rulings stated:

> 'Because for the proper development of a child, especially a small one, it is advisable that it should be brought up by the father and mother, i.e., by a man and a woman, who is the most advantageous for the adopted child. The situation is when they are jointly adopted by the spouses (joint adoption of a child by non-married persons is not an option) or when it is adopted by the spouse of one of the parents. In such cases, the decision to adopt creates conditions that fully correspond to family conditions, and, as a rule, it can be said that the decision to adopt is in the best interest of the child and is made for the child's benefit unless the adopters do not have the appropriate subjective qualifications to raise the child'[40].

On the sidelines of these considerations, as part of curiosity, it can be mentioned that there were proposals to tighten the adoption regulations adopted in Poland in the past. In 2020, the President submitted a draft constitution to the Sejm, which expresses verbis, excluding the right to adopt children by same-sex couples living together[41]. In 2021, at the initiative of the Ministry of Justice, there was a proposal for legislative changes going essentially in the same direction[42]. None of these ideas, however, gained support from the Polish parliament.

As for the other European constitutions, it should be noted that the regulation on adoption appears in only two cases. This clearly shows that most legislators, like the Polish legislator, prefer to leave these issues in the sphere of legislative activity of the ordinary legislator. Particular attention is paid to regulations established in the legal order of Ireland. Its characteristic feature is a relatively wide scope of regulation and a

40 Decision of the Supreme Court of 25 October 1983. III CRN 234/83.

41 According to the presented proposal to Art. 72 wanted to add a paragraph 7a, which reads as follows: "You can adopt a child only for its good. Only spouses can adopt them together. Adoption is forbidden by a person living together with a person of the same sex."; draft amendment of 6 July 2020, https://www.prezydent.pl/storage/file/core_files/2021/8/5/4bad51aa665957e2cd12ec241e17eab5/s22c-6e20070613530.pdf, (Accessed: 08.12.2021).

42 As stated in the press release: "The amendment to the Act – Family and Guardianship Code introduces an unequivocal ban on the adoption of a child by a man or woman who is cohabiting with a person of the same sex. The draft clearly states that the welfare of the adopted child is ensured when it is for marriage. Only in exceptional circumstances, when there is no other way to provide a family environment, will an unmarried person adopt a child.
Provisions governing the conduct of the adoption interview will be introduced to the Act on supporting the family and the foster care system. The adoption center will be required to carefully analyze the candidate's situation for adopting a child. (...) In turn, the Act – Code of Civil Procedure will introduce a provision that will introduce an obligatory promise for persons applying for adoption of a child that they will tell the court the truth and nothing but the truth. There is a risk of criminal liability for giving false statements "; *Gwarancja adopcji zgodnej z prawami dziecka, oficjalna strona Rady Ministrów,* https://www.gov.pl/web/sprawiedliwosc/gwarancja-adopcji-zgodnej-z-prawami-dziecka (access: 08.12.2021).

broader normative context of the application, related to the unequivocal recognition of marriage by persons of the same sex (as mentioned earlier). It can be assumed that in this state of affairs, there is a bond between the constitution and the provisions of the Children and Family Relationship Act 2015[43], which allows for married, civilly partners, or co-habiting couples, to apply to adopt a child jointly. According to the regulation in question, taking the form of a constitutional delegation, provisions shall be made by law for the adoption of any child where the parents have failed for such a period as may be prescribed by law in their duty towards the child and where the best interests of the child so require 'Provision shall be made by law that in the resolution of all proceedings: brought by the State, as guardian of the common good, to prevent the safety and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration'(Art. 42A). The regulations relating to the institution of adoption are also included in the Portuguese Constitution. In this case, we are also dealing with statutory delegation, although it is generally defined. It is introduced specifically by Art. 26 sec. 7, proclaiming that adoption shall be regulated and protected by law, which shall lay down swift forms of completion of the requirements.

VII. The above findings clearly show that in contemporary Europe, the exceptions include countries whose constitutions do not regulate the family's status. The conclusion is that, in principle, such provisions constitute a standard and are considered to be a legally significant element of the constitutional legal order. These findings also show that individual legislators make extensive use of discretionary power regarding the content and scope of the created regulations. This results in different legislative ideas and different emphases. However, the wealth of solutions we deal with here does not mean that it is impossible to identify regulatory tendencies that characterize all, or at least some, constitutions. Such tendencies are present and concern several elements. First, the concept of imposing on the state obligations related to the conduct of pro-family policy is accepted everywhere. Second, in some cases, the predilection is visible to emphasize in the constitutional provisions the role of the family as the basic social unit that determines the functioning of the state and nation. Third, there is a visible division into constitutions that make up the traditional family model. The marriage union is perceived as a relationship between a woman and a man, and constitutions are open to the modern model, where same-sex marriage is allowed. Fourth, striving to guarantee the rights of parents and children was found in many constitutions.

Separate arrangements are concerned with the legal regulations adopted in Poland. The broad comparative background outlined in this study allows us to state that the Polish constitution is original does not shy away from European standards. It is certainly distinguished by a relatively broad regulation and far-reaching care for the family to be covered by legal protection at various levels of the functioning of this

43 Children and Family Relationship Act 2015, No. 9 of 2015.

institution. A characteristic feature is also the attachment to the traditional concept of the family, understood as an institution based on the relationship between a woman and a man, established to raise children (not many legislators in Europe prefer this concept). In contrast, the manifestation of standardization is the definition of the legal framework of pro-family policy, combined with the indication of its elements. This shows that we are contending with a carefully formulated regulation, referring to social needs, and at the same time placing the family—as is usually the case in Europe—at the forefront of values considered constitutionally important.

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LÉNÁRD SÁNDOR[1]

The Constitutional Dilemmas of Terminating Intra-EU BITs

ABSTRACT: *The adoption of the agreement for the termination of intra-EU bilateral investment treaties in 2020 is a big step forward in the long saga of these investment treaties. This agreement aims to overcome every point of discord between the investment agreements and the EU legal order by terminating both intra-EU bilateral investment treaties and the pending dispute settlement procedures that arose from them. In light of the landmark 2018 Achmea judgement, the agreement asserts that the key role should be given to the Court of Justice of the European Union in this area. This is a great endeavour since almost one-fifth of the investment arbitrations worldwide came from disputes within the European Union.*

However, it does not seem that the agreement will have the final say since constitutional questions were raised concerning its application. In this spirit, this article briefly outlines the legal and constitutional dilemmas intra-EU bilateral investment treaties pose in the European Union. Then, it outlines the contours and major provisions of the termination agreement, especially with regard to the pending arbitration proceedings. In light of a concrete case brought before the Hungarian Constitutional Court, the article explores the constitutional dilemmas raised by the termination agreement. It highlights three major questions: the international legal aspects, the question pertaining to the European judicial dialogue, and the constitutional principle of non-retroactivity. The article takes into account the major theoretical aspects of each of these dilemmas.

KEYWORDS: International investment agreements (IIAs), European Union (EU), intra-EU bilateral investment treaties (intra-EU BITs), Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Agreement).

1 Researcher, National University of Public Service in Budapest, Hungary, sandor.lenard@uninke.hu.

https://doi.org/10.47078/2022.1.177-193

1. Introduction

As previous articles have pointed out in detail, the compatibility of bilateral investment treaties concluded between Member States of the European Union (hereinafter, intra-EU BITs) with the Founding Treaties and with the law of the European Union (hereinafter, EU law) has increasingly come into questions in recent decades. Since the eastward enlargement of the European integration in the early 2000s, various stakeholders and countries have adopted different positions on whether intra-EU BITs can be reconciled with the requirements of EU law, especially with the principle of non-discrimination as well as that of the autonomy of the EU legal order.[2] This on-going debate has reached a major turning point with the adoption of the landmark decision of the Court of Justice of the European Union (hereinafter, CJEU) in the Slovak Republik v. Achmea BV [C-284/16] (hereinafter, the Achmea decision).[3] In this judgement, the CJEU declared that the dispute-settlement mechanism (hereinafter, ISDS) of intra-EU BITs is contrary to the principle of the autonomy of the EU legal order.[4] This landmark judgement first led to a declaration of its legal consequences in January 2019, in which Member States committed to terminate their existing intra-EU BITs.[5] This declaration became the basis of the subsequently concluded agreement for the termination of intra-EU bilateral investment treaties (hereinafter, Termination Agreement) in which Member States agreed to terminate intra-EU BITs as well as pending arbitration procedures that have their legal basis in these intra-EU BITs.[6] The termination agreement was designed to implement the legal consequences of the Achmea decision. Despite the long-standing debate along with efforts to reach a reassuring solution on this issue, recently arising constitutional cases show that the dilemma of intra-EU BITs continues to linger.

This paper first seeks to explore the background and the regulatory concept, as well as the major provisions, of the international agreement that aims to terminate intra-EU BITs and pending ISDS (part 2). Then, it outlines a particular constitutional case stemming from this termination agreement (part 3). Through the lenses of this specific case, the article also seeks to analyse the actual and potential constitutional and European legal dilemmas the case raises in general. It contemplates the theoretical arguments and explores the potential way forward (part 4). Finally, as a conclusion, it

2 While the institutions of the European Union, especially the European Commission and the CJEU, along with Central and European countries are in favour of terminating intra-EU BITs, investors and generally large capital-exporting countries are in favour of retaining these treaties.

3 The landmark Achmea decision of the CJEU is available here: https://bit.ly/3rdL0kI (Accessed: 15 September 2021).

4 See paras. 58–60 of the Achmea decision.

5 The declaration of January 2019 is available here: https://bit.ly/33ticMT (Accessed: 15 September 2021).

6 The agreement for the termination of intra-EU BITs is available here: https://bit.ly/33ticMT (Accessed: 15 September 2021).

outlines the major lessons learned through this legal dilemma, which is unique to the European integration (part 5).

2. The Termination Agreement

The roots of the phenomenon of intra-EU BITs predate the change of regimes in the Central European countries, i.e. this phenomenon existed well before the time they became BITs within the European Union, namely, true 'intra-EU' BITs. As previous studies have highlighted, these BITs were the first international legal instruments that provided liberalisation and protection for the eastward capital flow from Member States of the then European Economic Community towards the Central European countries that were still under Soviet domination but had begun to liberalise their planned economies and markets. It should also be noted that although the international investment agreements (hereinafter; IIAs) were not originally designed to govern economic relations among European countries,[7] international financial institutions, including the European Commission, encouraged the individual states to conclude these types of international treaties.[8] Owing to the eastward enlargement of the European Union in 2004, 2007, and 2013, these IIAs became 'intra-EU' BITs, and implementation of their ISDS began between investors residing in EU Member States and other EU Member States.[9] Detailed analyses of the relevant intra-EU BITs cases show that the overwhelming majority of them were triggered after the enlargement of the European Union, mostlyagainst the newly joined Central European Member States.[10]

The consequences of the intra-EU BITs phenomenon are at least twofold. On the one hand, two parallel systems designed to protect capital flow began to operate simultaneously, since both the intra-EU BITs and fundamental parts of the Founding Treaties of the European Union were created to facilitate and safeguard the free

7 The IIAs were designed to govern economic relations between developed and developing countries generally severing colonial ties. See, for example, Sándor, 2019, pp. 459–469.

8 It is important to emphasise that the European Commission—in the spirit of the 'Washington consensus', together with the World Bank and the International Monetary Fund—urged Member States to conclude such BITs with the Central European countries instead of expanding and using the common commercial policy of the European Community to do so.

9 At the beginning of 2020, there were 188 intra-EU ISDS, which was one fifth of the total number of ISDS. See IIA Issues Note International Investment Agreements, July 2020, available here: https://bit.ly/3fmMPWY (Accessed: 10 October 2021). This trend seems to have continued last year as well (in 2020–2021); see IIA Issues Note International Investment Agreements, September 2020, available here: https://bit.ly/31T5d6G (Accessed: 10 October 2020).

10 Central European countries are respondent States in more than half the total intra-EU BITs, and 95% of the investment procedures were based on IIAs that were concluded during the change of regime. The overwhelming majority of ISDS were initiated after their accession to the EU. See IIA Issues Note International Investment Agreements, July 2020, available here: https://bit.ly/3fmMPWY (Accessed: 10 October 2021).

movement of capital as well as the freedom of establishment.[11] These requirements are also considered to be the preconditions of the single market that is the primary objective of the European integration. On the other hand, intra-EU BITs—especially the arbitration awards based on these treaties—might interfere with significant policies of the European Union, such as the common commercial policy, competition policy, or common agricultural policy. Furthermore, these treaties might not be compatible with the logic of the single market since they do not treat investors equally.[12] Based on these considerations, although the European Commission encouraged individual Members States to conclude such BITs before the eastward enlargement, it changed course and began to urge Member States to terminate them after their accession to the European integration, which also shows the inconsistency of its policy position in this particular question.[13]

These tensions culminated in the abovementioned Achmea decision. Although multiple questions, including the incompatibility of the intra-EU BITs regime with the single market, were raised in this particular case, the CJEU only addressed the issue concerning the autonomy of the EU legal order. In the aftermath of this milestone judgement, the European Commission, in its communication, repeatedly reminded Member States of their legal obligation to terminate intra-EU BITs, since these treaties are incompatible with EU law for several reasons.[14] Furthermore, the Commission sent a formal notice of infringement procedure to several Member States including Finland and Austria for failing to take steps to terminate intra-EU BITs.[15] Additionally, Member States adopted a declaration in January 2019 on the legal consequences of the Achmea decision, in which all Member States committed to terminate intra-EU BITs.[16]

In light of the CJEU's Achmea decision as well as of the communication from the European Commission, the vast majority of the Member States signed the Termination Agreement in May 2020, which, despite being in the form of an international treaty, *de facto* implemented obligations existing under EU law.[17] Both the Preamble and Art. 4 of the Termination Agreement acknowledge that since the arbitration clauses of the BITs

11 See Art. 49 and Art. 63 of the TFEU.

12 Article 18 of the TFEU prohibits discrimination against EU investors based on their nationality. Furthermore, see the interview with Professor Markus Krajewski on the challenges of intra-EU BITs, available here: https://bit.ly/3zXBkyB (Accessed: 10 October 2021).

13 The European Commission even launched infringement procedures against several Member States. https://bit.ly/3fo6BS5 (Accessed: 10 October 2021).

14 According to the clearly detailed position of the European Commission, the basis of incompatibility is much broader than what the Achmea decision declared, since intra-EU BITs are tantamount to a violation of the fundamental requirements that constitute the single market. The Communication COM(2018) 547 is available here: https://bit.ly/3FoOhCM (Accessed: 5 October 2021).

15 See https://bit.ly/3noUfgL (Accessed: 10 October 2021).

16 The declaration is available here: https://bit.ly/3KaRSIr (Accessed: 5 October 2021).

17 However, Austria, Ireland, Finland, Sweden, and the United Kingdom (which exited the EU on 31 January 2020) did not sign the Termination Agreement. In addition, even though the Termination Agreement is ambitious, one of its greatest shortcomings is that it does not cover the Energy Charter Treaty.

are contrary to EU law, Member States have an obligation to ensure their legal orders conform to the requirements of EU law.[18] Interestingly, the final provisions of the Termination Agreement, whereby the Secretary-General of the Council of the European Union acts as the depositary of this agreement, also underline its overall objective to implement the obligation of EU law.[19] Additionally, in the course of the 'structured dialogue', as set out in Art. 9 of the Termination Agreement, the facilitator shall take due account of the case law of the CJEU as well as the decisions and guidance of the European Commission.[20] Consequently, as set out in Arts. 2 and 3, in compliance with EU law, the ultimate objective of the Termination Agreement is to terminate intra-EU BITs, the possible legal effects of their sunset clauses, and the arbitration procedures for which these intra-EU BITs serve as a legal basis.[21]

To this end, the Termination Agreement classifies the intra-EU BITs according to the stages of the arbitration proceedings that are based on them. Hence, Art. 5 of the Termination Agreement declares that new arbitration proceedings cannot be based on the arbitration clauses of intra-EU BITs. In contrast, Art. 6 provides that concluded arbitration proceedings will not be affected by the terminations of intra-EU BITs, and hence, the Termination Agreement cannot serve as a cause or title to reopen or reinitiate these proceedings. Furthermore, the Termination Agreement does not cover amicable agreements that are subject to arbitration proceedings initiated prior to 6 March 2018, which is the date of the Achmea decision. These provisions aim to prevent the non-retroactive (*ex post facto*) effects of the Termination Agreement. However, the Termination Agreement also aims to settle pending arbitration proceedings with a complex set of provisions laid out in Arts. 7–10.

In the case of pending arbitration proceedings, Contracting Parties to intra-EU BITs shall inform arbitral tribunals about the legal consequences of the Achmea decision. If they are parties to judicial proceedings concerning arbitral awards, they shall request the competent national courts to set the arbitral award aside, annul it, or refrain from recognising and enforcing it. As of July 2018, there were 83 pending

18 According to the Preamble of the Termination Agreement, '(…) considering that, in compliance with the obligation of Member States to bring their legal orders in conformity with Union law, they must draw the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C-284/16 Achmea' and 'considering that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union (…)'. In addition to the Preamble, Art. 4 of the Termination Agreement declares that the 'Arbitration Clauses are contrary to the EU Treaties and thus inapplicable' and 'cannot serve as legal basis for Arbitration Proceeding'.

19 See Art. 11 of the Termination Agreement.

20 See para. 10 of Art. 9 of the Termination Agreement.

21 Sunset clauses in BITs remain operative for a certain period even in the case of and after the termination of BITs and thus secure protection in favour of investments that are made prior to the termination of BITs.

cases before intra-EU ISDS tribunals.[22] Arts. 9 and 10 of the Termination Agreement set up a transitional regime in cases in which 'an investor is party to Pending Arbitration Proceedings and has not challenged before the competent national court the measure that is subject to the dispute'. However, if the arbitration award issued before the Termination Agreement was enforced did not find violation of the intra-EU BIT, the transitional measure shall not apply. In light of these provisions, the ultimate goal of the Termination Agreement is to ensure the pending intra-EU BITs procedures are discontinued or settled.

To this end, the Termination Agreement lays down a transitional regime in the form of a 'structured dialogue' in Art. 9, and as an ultimate guarantee, also allows access to national courts in Art. 10. Apart from the structured dialogue, Art. 8 also allows the Contracting Party and the investor to agree on any amicable resolution that complies with the EU legal order. The investor party to a pending arbitration or a Contracting State concerned in the procedure can initiate the 'structured dialogue', provided the arbitration procedure is suspended. However, if there is already an award, the investor could choose to avoid pursuing enforcement, or its enforcement could be suspended. A further requirement is that the dialogue shall be initiated within six months of the termination of the relevant intra-EU BIT.[23] In addition, if either the CJEU or a national court finds that the contested state measure violates EU law, the 'structured dialogue' shall be initiated as well.[24]

The main goal of the 'structured dialogue' is to provide an impartial and confidential framework for the settlement procedure, which is overseen by a facilitator designated by mutual agreement of the investor and the State concerned. The facilitator shall possess in-depth knowledge of EU law and shall not be a national of either the home or the host State of the investment. Furthermore, the European Commission might also provide guidance on the relevant issues related to EU law, and the jurisprudence of the CJEU and national courts also have to be taken into due account. If an agreement is reached in the framework of the 'structured dialogue', its terms are legally binding and must include an obligation whereby the investor is obliged to withdraw the pending ISDS or enforcement proceeding, refrain from pursuing further proceedings, and waive all rights and claims related to the measure(s) subject to the agreement. Therefore, one of the major conditions of reaching a legally binding agreement is to renounce all the advantages the ISDS of the intra-EU BIT could otherwise provide.

In case the 'structured dialogue' does not or could not lead to an agreement, the investors are granted the right to bring pending ISDS claims before national courts that also serve as EU domestic courts.[25] The Termination Agreement only guarantees

22 See Fact Sheet on Intra-European Union Investor-State Arbitration Cases, available here: https://bit.ly/3norXmG (Accessed: 10 October 2021).

23 Art. 9 para. 2 of the Termination Agreement.

24 Art. 9 para. 3 of the Termination Agreement.

25 See Art. 10 of the Termination Agreement.

already available judicial remedies in the national legal system and hence does not create any new remedy. Access to national courts is a condition of renouncing the guarantees and advantages the ISDS procedures could offer and committing not to undertake any further ISDS dispute. Furthermore, this avenue can be used to make a claim based on national and EU law. In other words, the intra-BIT's provisions can no longer serve as the law governing the dispute. To facilitate access to national courts, the Termination Agreement provides derogation from time limits for bringing actions before national courts.

In sum, the Termination Agreement chose a quite radical path to ensure intra-EU investment arbitration conforms to the requirements of the EU legal order. Instead of widening, for example, the interpretational horizon of ISDS tribunals by emphasising the integration rule of the Vienna Convention on the Law of Treaties,[26] or creating a channel of dialogue between the CJEU and intra-EU ISDS, it terminates intra-EU BITs altogether. While the Termination Agreement does not cover concluded agreements, the arbitration clauses of the terminated intra-EU BITs can no longer serve as a legal basis for new arbitration proceedings. The sunset clauses do not remain to protect previously made investments, either. With regard to the pending intra-EU arbitration proceedings, the Termination Agreement offers two alternative avenues: the framework of the 'structured dialogue' and access to national courts. Some elements of the 'structured dialogue', such as confidentiality, resemble the characteristics of the ISDS procedure, while access to national courts is secured under a broader time limit. However, overall, what the Termination Agreement offers is precisely what the ISDS originally aimed to prevent by externalising and isolating the disputes that arise from the contested state measures.[27] In exchange for providing domestic enforceability, the Termination Agreement ties the investment disputes to EU and national law. This, of course, decreases the leeway of the investor to be able to file for a successful claim, since ISDS would have evaluated the claim only in light of the relevant intra-EU BIT, offering a rather one-sided set of guarantees to the investor. Consequently, channelling the pending arbitration procedures to alternative avenues and terminating the sunset clauses have detrimental effects on the rights of the investors who have already made investments. That might have constitutional implications, especially in terms of the prohibition of retroactive (*ex post facto*) regulation or acquired rights and settled expectation. In the following section, these constitutional dilemmas are examined in light of one specific case that has so far arisen.

26 According to the systemic integration enshrined in Art. 31 para. (3) (c) of the Vienna Convention on the Law of Treaties, in the course of the treaty interpretation, 'There shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties'.

27 Owing to the lack of trust in the legal and court systems of the host countries, the logic of IIAs was to circumvent them both by tying the disputes to international law and using an international venue instead of the domestic courts.

3. An upcoming constitutional case and the dilemmas it raises

Constitutional aspects in relation to the Termination Agreement of some intra-EU investment cases have already arisen, and many more are expected to arise in the near future. For example, in the case of the Republic of Poland v. PL Holdings S.à r.l., Swedish courts granted PL Holdings the enforcement of an intra-EU ISDS award that was issued after the Achmea decision. However, the Supreme Court of Sweden requested a preliminary ruling from the CJEU on the validity of the Belgium-Luxembourg Economic Union-Poland BIT.[28]

One particularly interesting case, however, has recently arisen before the Constitutional Court of Hungary.[29] The constitutional case has its roots in the investment dispute between the French company Sodexo Pass International SAS and Hungary.[30] Sodexo Pass International SAS made investments in the social vouchers market in Hungary. The claim of Sodexo Pass International SAS was based on the BIT concluded by France and Hungary in 1986.[31] Sodexo Pass initiated the arbitration procedure before the International Centre for Settlement of Investment Disputes (hereinafter, ICSID) in 2014 because of the enactment of a legislation in 2011 granting the Hungarian Government a monopoly over the prepaid corporate vouchers industry, which thus restructured this social voucher market. The French company alleged that as the new legislation introduced a State-run voucher system with conditions more favourable than those granted to private operators, based on the intra-EU BIT, it amounted to an indirect expropriation with regard to their investment in the social voucher market.

The ICSID tribunal sided with the French investor company in its award rendered on 28 January 2019, which was after the date of the Achmea decision. The arbitration panel declared that the introduced reforms in Hungary amounted to an indirect expropriation, as set out in Art. 5 para. 2 of the intra-EU BIT between France and Hungary.[32] Therefore, owing to the declared breaches of the investment treaty, Hungary was obliged to pay more than €70 million as compensation to Sodexo Pass International SAS.[33] In accordance with Art. 52 para. 1 of the ICSID Convention, Hungary requested the annulment of the award and a stay of the enforcement before the Secretary-General. However, in the annulment procedure, the ICSID upheld the judgement, which is in favour of the French investor company, in May 2021.[34]

28 See https://bit.ly/3fnPDTI (Accessed: 20 October 2021). See also the Advocate General opinion: https://bit.ly/3K8r23l (Accessed: 20 October 2021).

29 See https://bit.ly/3tl1cmZ (Accessed: 20 October 2021).

30 See, for example: https://bit.ly/3Fwc0kM (Accessed: 20 October 2021).

31 The BIT concluded by France and Hungary was promulgated in Hungary by the Regulation of Ministerial Council no. 59/1987. (XI. 29). Available here: https://bit.ly/3Fwc0kM (Accessed: 10 October 2021).

32 Para. 362 of the ICSID award, available here: https://bit.ly/3tl1cmZ (Accessed: 20 October 2021).

33 Para. 519 of the ICSID award.

34 The annulment proceeding is registered under case no. ARB/14/20. See https://bit.ly/3twUYAi (Accessed: 20 October 2021).

In the meantime, according to Arts. 53 and 54 of the ICSID Convention, Sodexo Pass International SAS sought enforcement before the regular national courts of Hungary in 2019. The Hungarian courts denied the French claimant's request for enforcement in both instances. In its 2020 decision, the first instance court, the Municipal Court of Budapest, referred to the legal consequences of the Achmea decision of the CJEU as the ultimate reason for the denial of the enforcement of the ICSID award.[35] In addition, the Budapest Court of Appeal, as the second instance court, relied on the Termination Agreement as the basis for denying the enforcement.[36] Sodexo Pass International SAS initiated a constitutional complaint procedure in the fall of 2020 against this decision, both before the Curia, which is the Supreme Court of Hungary, and the Constitutional Court. The Constitutional Court has suspended its own procedure until the Curia renders its final decisions in the case.[37]

Regardless of the outcomes of the on-going procedure before the Curia, the claimant company raised abstract and theoretically sound constitutional dilemmas with regard to the relation between the Termination Agreement and the constitutional guarantees enshrined both in national constitutions like the Fundamental Law of Hungary and in the EU legal order. These dilemmas have wider implications with regard to the nature of rights conferred upon investors by BITs as well as the deeper questions of the compatibility of obligations stemming from intra-EU BITs with EU law and the obligation to which national courts of Member States should comply. Accordingly, the main argument of the claimant company is that regarding the pending arbitration procedure, the Termination Agreement in general and their judicial interpretation in the concrete case are in contrast with the principle of non-retroactive (*ex post facto*) legislation. In principle, the Hungarian Fundamental Law—as do other national constitutions in Europe and EU law—prohibits the adoption of *ex post facto* laws. In the jurisprudence of the Hungarian Constitutional Court, the requirement of Art. B) of the Fundamental Law, which declares Hungary as an independent, democratic rule-of-law State, implicitly contains the principle of the settled expectation of the law, which, in principle, prohibits retroactive regulation.

In the reading of the claimant investor company, the Termination Agreement deprived them of substantive rights that are provided in the intra-EU BITs and procedural rights that are guaranteed by the ICSID Convention. These are a set of rights that would allow the investor to ‚externalise' the investment dispute with the host state by tying it to various international standards, such as indirect expropriation or fair and equitable treatment, and by providing a venue that is isolated from the court system of the host state.[38] Furthermore, as the so-called ‚sunset clauses' provide, those alleged rights shall be in effect for a longer time span—in the concrete case, 20 years after the BIT is terminated. However, the Termination Agreement prevents these rights to be

35 See decision no. 32.Vh.400.043/2020/6 of the Budapest Municipal Court.
36 See, decision no. 2201-3.Pkf.25.414./2020/4. of the Budapest Court of Appeal.
37 See decision no. 3209/2021. (V. 19.) of the Constitutional Court of Hungary.
38 See Sornarajah, 2010, pp. 281–284.

exercised in pending arbitration procedures and therefore, it violates the principle of non-retroactivity. The constitutional complaint in the concrete case raises three broad questions. First, looking at the Termination Agreement as a whole, could it violate the principle of non-retroactivity? Second, if the Termination Agreement *de facto* implements EU legal obligation, what are its constitutional implications? Last but not least, what is its relevance with regard to the investors' constitutional right that the intra-EU BITs are inter-state international treaties? The following section will take a closer look at these dilemmas and examine those questions systematically, starting with the last one.

4. Arguments to be considered and the potential way forward

The first broad and rather theoretical question is whether intra-EU BITs and IIAs in general confer individual rights upon investors that are protected in the same way as rights under constitutions or under domestic law are. In the concrete dilemma, this question can be phrased as whether the same standard applies to rights guaranteed under the constitution and rights that arise out of inter-state treaties. What constitutionally protected expectations could an individual investor rely on under IIAs? What constitutional leeway could the Contracting States have in changing the terms of the treaties? From a formalistic point of view, IIAs provide investors with both substantive and procedural rights that circumvent the domestic court system and, to a great extent, the domestic legal system as well.[39] However, a profound understanding of the history of IIAs and the characteristics of international law would certainly lead to a more nuanced answer than a formalistic approach would.

The rapidly evolving IIA landscape has its roots in diplomatic protection,[40] and hence, it forms an integral part of international public law. Therefore, similar to other areas of international law, the investment law regime also rests on the consensus and cooperation of Contracting States that are creating the law, but are also bound by it. For this reason, these inter-state treaties primarily reflect the interests of States by establishing mutual rights and obligations with respect to the standard of treatment vis-à-vis each of their investors. The underlying assumption behind those treaties has been that investment inflow would ultimately result in an increase of macroeconomic development in host countries and that international legal protection increases investment inflow. Therefore, according to this theoretical assumption, there is a strong correlation between the legal protection of investments and macroeconomic development, which is the ultimate goal of this international treaty system. In light of this consideration,

39 A recent effort to ease this characteristic of IIAs is the decision of the Constitutional Court of Columbia. This Court declared that IIAs could only be deemed constitutional if their provisions and their interpretations by the ISDS tribunals are in harmony with the Columbian constitution. The judgement is available here: https://bit.ly/33sbcjo (Accessed: 20 October 2021). An analysis of the decision is available here: https://bit.ly/3K5YHL7 (Accessed: 20 October 2021).

40 See Sornarajah, 2015, pp. 89–94.

the legal protection was designed to be an ancillary part of those treaties. However, it has long been questioned whether these inter-state treaties allow investors to file arbitration claims directly against States without individualised consensus between the investor and the State on the arbitration.[41] This practice was first recognised by an arbitration tribunal in the case between Asia Agricultural Products Ltd v. Sri Lanka[42] in 1990, at a time when the number of IIAs exploded owing to the collapse of command-and-control economic systems as well as the rise of the concept of the ‚Washington consensus'.[43] Although various States acknowledged this interpretation throughout the subsequent decade, recent academic discourse as well as international legislative proposals is increasingly calling it into question and the structure of international investment law is being reconsidered.[44]

In light of these brief historical and dogmatic considerations, it is obvious that a nuanced approach would be more appropriate in assessing whether and to what extent the various rights intra-EU BITs provide for investors are protected by national constitutions. In parallel, a more nuanced approach would be necessary to examine the constitutional leeway States can have to change the terms of or terminate BITs altogether. To what extent does the investment treaty system depend on the consensus of the Contracting States and the rights of the investors? This analysis becomes increasingly complex and challenging with regard to intra-EU BITs. Taking into consideration the eastward enlargement of the European integration as well as the subsequent direction of the development of EU law, EU-based investors should be aware of the weakening and increasingly questionable legal basis of intra-EU investment arbitration. As members of the European Union, the Contracting Parties of intra-EU BITs are no longer alone in exercising sovereign competences that concern the free movement of capital as well as the freedom of establishment. Instead, they exercise these competences jointly with other Member States, through the institutions of the European Union. Consequently, they can no longer autonomously act alone in this area since this belongs to either the exclusive or the shared competences of the European Union.[45] However, since these countries are now part of the same single market, the original consideration behind the conclusions of IIAs, namely, to contribute to macroeconomic development, does not seem to be valid any longer.[46] From this aspect, one interesting observation could be that had the European Community concluded investment treaties

41 See Paulsson, 1995.

42 The case is available here: https://bit.ly/3nklokT (Accessed 20 October 2021).

43 See Sornarajah, 2010, p. 66.

44 A clear example of the recent reform aspirations is the adoption of the United States-Mexico-Canada Agreement (USMCA) that replaced the North American Free Trade Agreement (NAFTA). The new treaty significantly reduced the possibility of initiating investor-State arbitration procedures.

45 See Art. 3 of the TFEU, which lists the exclusive competences of the European Union, and Art. 4 of the TFEU, which lists its shared competences.

46 The current academic research questions the direct relationship between IIAs and the increase of investment inflow. See, for example, Sornarajah, 2010, p. 66.

with the Central European countries, those treaties would have been terminated automatically at accession.

The considerations of this European aspect lead to the second legal dilemma: what are the constitutional implications if the Termination Agreement *de facto* implements EU legal obligations? As has been pointed out above, the ratification of the Termination Agreement was a result of a longer deliberation process of the European institutions, including the European Commission and the CJEU. These deliberations showed that intra-EU BITs restrict and negatively affect the effective enforcement of EU law. They contravene the principle of ‚level playing field' that is necessary for the single market, since these treaties discriminate among investors based on their place of incorporation or residence. On the other hand, their dispute settlement mechanisms do not guarantee the full observance—autonomy, consistent application, primacy, and direct applicability—of EU law since they are not channelled in the system of European judicial dialogue, as they are not considered to be a court or tribunal of a Member State in the reading of Art. 267 of the Treaty on the Functioning of the European Union (TFEU). The autonomy of the EU legal order, as it is recognised in Art. 344 of the TFEU, can only be guaranteed through institutionalised dialogue under the CJEU and by the proper allocation of powers. In light of the Achmea decision as well as the Communication from the European Commission, Member States decided to adopt an international treaty that aims to better protect the achievements of the single market and restore judicial dialogue in the European judicial area.[47] This is of particular relevance from the perspective of constitutional review since courts need to take into account that the Termination Agreement has a dual nature: on the one hand, it is an international treaty, but on the other hand, it might also contain EU legal obligation. This is of great importance since constitutional courts have different obligations and may have different competences with regard to the review of international treaty law and EU law. The standard of constitutional (or judicial) review—according to the constitutions of Member State might also be different in the case of international treaty and EU law as it differs based on whether the review is of international law or EU law. Consequently, the requirements of EU law cannot be ignored in the course of the constitutional review of the Termination Agreement.

As has been recognised, for example, in the case law of the German Constitutional Court, it is of central importance from the perspective of the success of the European integration and the effective enforcement of EU law that this field of law shall be applied uniformly throughout the Member States.[48] In accordance with Art. 267 of the TFEU, the key guarantee of this uniform application is judicial dialogue. Thus, all courts—including constitutional courts of the Member States are obliged to engage in a dialogue with the CJEU. This requirement stems from the fundamental principle

47 In Hungary, decision no. 148/2018. (XII. 17.) of the Prime Minister gave the green light for the preparation of an agreement that would terminate BITs. See Korom and Sándor, 2019.

48 See BVerfG, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14, para. 37.

of sincere cooperation,[49] which extends to cooperation and mutual respect between courts and tribunals of the Member States as well as to the courts of the European Union.[50] At the same time, the requirement of raising preliminary questions and thus engaging in a respectful judicial dialogue appears in national constitutions as well as in the case law of national constitutional courts.[51] For example, the case law of the Hungarian Constitutional Court indicates that judicial (constitutional) dialogue plays a paramount role in the European Union, and hence, the Court is committed to pursue this judicial dialogue,[52] as some significant cases have already shown in practice.[53] In the reading of the Constitutional Court, neither the ‚*sui generis*' nature of EU law nor the constitutional law of Member States can be guaranteed without proper judicial (constitutional) dialogue.[54] Therefore, the adequate resolution of conflicts between EU law and national constitutions depends on comprehensive multilevel cooperation of all courts in the European Union. Considering the role of judicial dialogue as well as the nature of the Termination Agreement—as it stems from EU legal obligation, its national constitutional basis is the same as that of EU law—it seems that national constitutional courts, based on the abovementioned principles and case law, cannot exercise constitutional review independently without engaging in a European judicial (constitutional) dialogue with the CJEU.

With regard to the concrete case, it would be worth highlighting the potential review power of constitutional courts over EU law; it underscores and supports the abovementioned conclusion. In principle, the Hungarian Constitutional Court is rather reserved in its case law vis-à-vis EU law, as it does not consider the constitutional question of the compatibility of domestic law with EU law.[55] However, following the footsteps of the German Constitutional Court, it also established the theoretical grounds of the review of EU law based on national constitutions. Safeguarding fundamental rights, sovereignty, and constitutional identity serves as the primary grounds for the constitutional review of EU law.[56] Since the Termination Agreement is specifically designed to protect the core values and objective of the European cooperation, namely, the autonomy of EU law along with the role the CJEU plays in it, as well as the competitive single market built on a ‚level playing field', it is unlikely that either sovereignty or

49 According to Art. 4 para. 3 of the Treaty on European Union, '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

50 See Nanteuil, 2017, p. 460; Chronowski, 2019, para. 29.

51 See Grabenwarte et al., 2021, pp. 43–62.

52 See para. 33 of decision no. 22/2016. (XII. 5.) of the Hungarian Constitutional Court as well as para. 49 of decision no. 2/2019. (III. 5.) of the Hungarian Constitutional Court.

53 See, for example, decision no. 3198/2018. (VI. 21.), decision no. 3199/2018. (VI. 21.), decision no. 3200/2018. (VI. 21.), and decision no. 3220/2018. (VII. 2.) of the Hungarian Constitutional Court.

54 See para 18 of decision no. 3241/2019. (X. 17.) of the Constitutional Court and para. 33 of decision no. 26/2020 (XII. 2.) of the Constitutional Court.

55 See Chronowski, 2019, paras. 21–22.

56 See Chronowski, 2019, para. 26; see also decision no. 22/2016. (XII. 5.) of the Hungarian Constitutional Court.

identity control will be relevant. Although a review based on fundamental rights (such as the principle of non-retroactivity) could be an issue in question, as the case law of the Hungarian Constitutional Court well indicates,[57] the question can be resolved in the framework of a judicial dialogue based on sincere cooperation with the CJEU.[58]

Last but not least, the third dilemma is whether the impugned Termination Agreement is indeed contrary to the principle of non-retroactive (*ex post facto*) legislation, in other words, whether it deprives investors of rights that are guaranteed under either the intra-EU BIT or the ICSID Convention in an unconstitutional way. Aside from its relevance to EU law, it seems necessary to explore the requirements stemming from the principle of non-retroactivity to find an appropriate solution for this issue. The Hungarian Constitutional Court has developed rich case law with regard to the principle of non-retroactive legislation, which is recognised as part of the rule of law clause of the Fundamental Law.[59] Even though the Court recognises the principle of non-retroactivity, it does not construe it as an absolute right that would shield all legal relations and acquired rights from any new regulations, intervention, or regulatory reforms.[60] Instead, a case-by-case balancing exercise is required on whether the changes in the law lead to a deprivation of rights that interferes in the settled expectation of the law in an unconstitutional way.[61] In the context of the relevant case law, one of the defining questions is whether the legislator provided straightforward and sufficiently grave or justifiable reasons for the regulatory intervention.[62] In addition, the Constitutional Court also differentiates between substantive and procedural law from this perspective, providing protection only for the former.[63]

In the concrete case, the claimant French investor listed the various rights (both substantive and procedural in nature) it was entitled to, based on both the intra-EU BIT and the ICSID Convention. Considering the relevant constitutional aspects, however, it is of importance that the Termination Agreement does not in fact simply deprive the investor parties in the intra-EU BITs, including the French claimant company, of their existing substantive and procedural rights. Instead, it fundamentally transforms the way the rights of the investors can be exercised with regard to a measure contested in pending arbitration proceedings. To conform to the requirements of EU law, the Termination Agreement opens two new avenues for the investors: on one hand, it invites a ‚structured dialogue', and on the other hand, it provides access to national courts, which leaves open the prospect of remedy and compensation. At the same time,

57 Para. 20 of decision no. 2/2019. of the Hungarian Constitutional Court declares that it has no competence to annul EU law since EU law does not constitute part of the Hungarian legal system.

58 See Chronowski, 2019, para. 26.

59 See, for example, decision no. 1/2016. (I. 29.) of the Hungarian Constitutional Court.

60 See, for example, decision no. 24/2019. (VII. 23.) and decision no. 3244/2014. (X. 3.) of the Hungarian Constitutional Court.

61 See, for example, decision no. 3061/2017. (III. 31.) of the Hungarian Constitutional Court.

62 See, for example, decision no. 24/2019. (VII. 23.) of the Hungarian Constitutional Court.

63 See, decision no. 3024/2015. (II. 9.) and decision no. 3314/2017. (XI. 30.) of the Hungarian Constitutional Court.

intra-EU investors increasingly run the risk that favourable ISDS awards would not be enforced in the end, as they are not compatible with EU law.[64]

In light of these considerations, the violation of the principle of non-retroactivity (*ex post facto*) cannot be established automatically. Instead, the question shall be put into context and evaluated against the backdrop of these alternative channels of remedy. According to the case law of the Hungarian Constitutional Court, this requires a constitutional balancing exercise whereby the extent of the limitations of the existing rights of investors shall be considered in light of the objectives of the Termination Agreement.[65] In the course of this complex balancing exercise, the long-term and pending (not closed) nature of the legal (investor-State) relation also ought to be considered, which may offer more leeway for legislative interventions. Furthermore, since the principle of non-retroactivity is closely related to the requirement of settled expectation, the foreseeability of the overall regulatory transformation shall also be considered, and within this framework, the longstanding gradual shifts in EU law cannot be avoided.

As this rather complex case is about unfold before the Hungarian Constitutional Court, it would be interesting to see whether similar constitutional cases also arise with regard to pending intra-EU investment arbitration across the European Union. Although it is hard to provide one single straightforward solution for the constitutional dilemma of the Termination Agreement, it seems certain that national judicial forums alone cannot address it and that true European judicial dialogue is unavoidable.

5. Concluding remarks

As the previous sections have shown, despite the adoption of the ambitious Termination Agreement, it is unlikely to have the final say in this area, and the controversies surrounding the intra-EU BITs will remain for at least a while. On one hand, the Termination Agreement left the Energy Charter unaffected. This is a significant shortcoming since almost half the intra-EU BITs originated from that treaty, which covers many European energy investments.[66] On the other hand, the constitutional dilemmas of the Termination Agreement, especially with regard to pending investment arbitrations, have also appeared on the horizon.

Based on the concrete case before the Hungarian Constitutional Court, the constitutional dilemma raises three larger questions. First, it urges us to rethink how strongly the rights guaranteed under intra-EU BITs as inter-state treaties relate to individual investors and the leeway State Parties have in modifying or terminating those treaties. Second, considering that the Termination Agreement is based on EU law obligations, how much leeway do national constitutional courts of Member States have in deciding such claims? Third, what constitutional aspects should be taken into account

64 See Fermeglia and Mistura, 2021.
65 See, for example, decision no. 3062/2012. (VII. 26.) of the Hungarian Constitutional Court.
66 See Fermeglia and Mistura, *op. cit*.

in assessing whether the Termination Agreement conforms to the non-retroactivity (*ex post facto* law) principle? Although simple answers cannot be given for this complex dilemma, European judicial dialogue seems to be unavoidable to address it adequately. It should be noted that had the European Community been authorised to conclude the investment agreements with Central European countries in the course of their regime changes, many of these problems could have been avoided. However, since the IIAs were not concluded in this manner, the intra-EU BITs dilemma is going to remain and haunt the Europe judicial area for a while.

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BALÁZS SCHANDA[1]

The Christian Roots of Hungary's Fundamental Law

ABSTRACT: *According to the statements made on the fifth anniversary of the Fundamental Law, the truly important question is what the chances are that the Fundamental Law will live to see its fiftieth anniversary.[2] In this regard, the defining content is important and not the form: Will the essence that defines the nature of the Fundamental Law withstand the test of time? The identity of the Fundamental Law is determined by its commitment and not the various technical legal details. The substantive question remains the same on the tenth anniversary: Is it possible to preserve a vision of man based upon the harmony between individual freedom and responsibility for the community; and the commitment to the identity of the state and nation, the matters of the state, and marriage and the institution of family?*

KEYWORDS: Hungary, Christianity, Fundamental Law, Christian roots.

1. The call for Christian heritage in the text of the Fundamental Law

1.1. "God bless Hungarians!"

The first line of the National Anthem, referred to by the *National Avowal*, is not an *invocatio Dei* in its traditional sense: the constitution is not created in the name of God (as in the case of the Swiss or Irish constitutions, for example). Something that requires an explanation for foreigners is quite clear to Hungarians even without the use of quotes: the reference preceding the written text of the constitution links all of the nation's members. Assuming healthy relations, the fact that the Anthem has an additional meaning for religious citizens does not mean it excludes anyone indifferent or even opposed to this added content. János Zlinszky's notion that "the addressee of the order cannot be instructed to act on the basis of the legal text"[3] is more ironic than anything else—and it also illustrates the limits of its normative nature. The first

1 Professor, Faculty of Law and Political Sciences, Pázmány Péter Catholic University in Budapest, Hungary; Judge, Constitutional Court of Hungary; schanda@mkab.hu.

2 Schanda, 2016, pp. 65–73.

3 Zlinszky, 2011, p. 27.

https://doi.org/10.47078/2022.1.195-202

sentence has a very important symbolic significance, although its legal significance is not as pronounced;[4] however, it is impossible to interpret the line without knowledge of the context. A reference to God cannot be a goal unto itself: it is recognition of the finite nature of power—in this case, constitutional power—which protects the people and not God (who hardly requires such protection). This is made especially clear in the text of the postamble (which is reminiscent of the Bonn Basic Law). The expression "... being aware of our responsibility before God and man..." does not mean that the state desires sacral legitimacy, but rather that it acknowledges its own limited nature and final responsibility that extends beyond law.

■ *1.2. The National Avowal*

The National Avowal is centered on the invocation of Saint Stephen and Christian Europe,[5] which is why it makes no reference to the period preceding statehood; that is, it considers the point of origin to be the foundation of the state—and not the Hungarian conquest of the Carpathian Basin. The last sentence of the first paragraph in the preamble expressly acknowledges the role of Christianity in preserving nationhood. This recognition does not qualify the role of Christianity as a religion or the role that Christian faith currently plays in society, but pertains to the determining role played by Christianity in the nation's history. There is no question that Christianity plays a role in preserving nationhood and that it is more than just a tradition—the tradition is deep-rooted and Christian faith is present even today. The National Avowal says much when it stops at the partial invocation of Christian traditions. This is a descriptive finding regarding a historical fact and not an obligation. Compared to other esteemed religious traditions, the constitutional legislator is merely recognizing a historical fact, and does so from the aspect of the nation as the legislating community: all it does is pay tribute to religious traditions; the recognition of non-religious traditions[6] is missing just as any mention of the role that religion plays today.

■ *1.3. The order to protect Christian culture*

The seventh amendment of the Fundamental Law decrees that Hungary's Christian culture shall be protected—and not Christian faith or religion. By decreeing the protection of Hungary's Christian culture, the legislator intends to ensure that Christianity—or, more precisely, Hungary's Christianity-based culture—is present not only as an element of the past but also as a value that is to be protected. Stemming from its nature, Christianity is a universal religion that has strived for inculturation ever since the beginnings. The Fundamental Law does not require the protection of Christianity, but rather the protection of a cultural reality created by faith over the course of generations in its transformation of individuals and leaven-like permeation of society.

4 Horkay Hörcher, 2012, p. 296.
5 In the word combination, Nóra Chronowski puts the word "Christian" in quotes: Chronowksi, 2012, p. 75; Tóth, 2013, pp. 3–6.
6 Jakab, 2011, p. 181.

However, constitutional protection is provided not to the faith but to the culture that it created, including the freedom to deny faith. A significant part of Hungarian society, including those who consider themselves Christian, fail to follow several moral commandments and traditions stemming from Christianity: the protection on freedom rooted in Christianity also extends to this freedom.

Culture primarily refers to the totality of the material and intellectual values created by humanity—the manifestation of the learning of a community or people. From an anthropological perspective, culture is the way of life of a community.[7] Threats to our culture can originate from various directions; as the wording of the Fundamental Law is quite general, it conveys a message of support for those striving to protect the cultural heritage, be it the protection of a cityscape, the maintenance of cultural traditions, or emphasizing the importance of teaching the Latin language. However, a general reference is also made to the whole of the Central European way of life, which includes everything from music education through dance schools to the evaluation and protection of partnerships, forms of behavior, and virtues. It would be impossible to define the entire scope of the content of our culture that we are to protect. Whether this culture can be deemed Christian or whether it would be more appropriate to talk about a Christian-rooted culture still needs clarification.

While the question as to what is reconcilable with the Christian faith is to be answered fundamentally by ecclesiastical communities and the heads of the Church, and is also a question of conscience, it is the job of the Constitutional Court to interpret the Fundamental Law. The wording of the Fundamental Law shows that the legislator targets the protection of present social practices and not the re-creation of Christian culture, even in cases where there is a gaping abyss between Christian ideals and the social practices. This is also indicated by the fact that it requires the protection of a given culture (Hungary's) and not of Christian culture. However, if the culture of Europe—and, thus, of Hungary—is Christian,[8] the protection of cultural self-identity can only mean the protection of Christian culture.

The role of faith in creating culture is an experience derived from history.[9] The culture that grew from Christianity can only be organically protected together with Christianity. Without living faith, the fruits of our predecessors' faith will be preserved for just a short while, maybe a generation or two. With its order to protect culture, the Fundamental Law protects the fruits of the faith of previous generations, and not the tree (Christian faith). The legislator has no influence on whether the tree is alive or if it is merely the skin—the visible shell of the fruit that we protect—that is ripped from the tree.

A peculiar question is whether the state can take action against those who voice Christian viewpoints based on theological principles or a moral basis in the interest of

7 Pusztai, 2003, p. 774.

8 Europe's identity is based on its Christian heritage. See: Weiler, 2006; Király, 2006; Pünkösty, 2014.

9 Török, 2016, p. 16.

protecting the given culture. If we identify "Christian culture" with today's predominant forms of behavior, it may be precisely the authentic Christian position that has to oppose the leading culture.[10] The protected sphere of freedom of religion includes the freedom of individuals, religious communities, and leaders to formulate positions on religious or moral issues; further, outsiders may not question the credibility of their positions, religious principles, and moral views. However, the question of whether the criticism is aimed at the renewal or destruction of the (fundamentally) Christian culture is quite important. In both cases, the freedom of criticism is protected by the right of free speech and, thus, of Christian culture. The state's role in protecting Christian heritage does not raise any worries precisely from the point where heritage has become culture.

■ *1.4. The issue of education based on Christian culture*

The Ninth Amendment to the Fundamental Law (December 22, 2020) added a new sentence to Article XVI (1). The effective provision now reads as follows:

> *"(1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary protects the right of children to identify as having the sex they are born with, and ensures an upbringing that is in line with Hungary's constitutional identity and Christian culture."*

According to the justification for the proposal, "The constitutional legislator had to clearly lay down the guarantees aimed at protecting the rights of children and future generations, such as mothers being created as women and fathers being created as men, and the right of the child to the identity of his/her sex at birth and to receive an education in line with values based on Hungary's constitutional identity and Christian culture. (...) In line with the above, the Proposal guarantees the child's right to receive an education in line with values based on Hungary's constitutional identity and Christian culture, thus laying down a solid foundation for all members of future generations to learn of and protect Hungary's Hungarian identity, sovereignty, and Christianity's role in preserving the nation."

The substantive change is not that Christian culture was set as an objective in education, but that the constitutional legislator linked a system of values to the Christian culture, that is, it defined an education based on values. Specifying educational goals at the constitutional level is not unprecedented. As a result of the catastrophic consequences of the National Socialist dictatorship, Christian churches in post-war West Germany experienced exceptional social expectations (even in 1965, 50% of the population were members of the Evangelical Church and 46% were members of the

10 A typical example of this type of dispute is the strong stance taken by Dr. András Veres, President of the Hungarian Catholic Bishops' Conference, against the expansion of the in vitro fertilization program after August 20, 2017.

Catholic Church[11]). The new German constitutional law, both at the federal and state levels, developed in this homogeneous social milieu. Under the Bonn Basic Law, education is the responsibility of the states, with the federal state providing supervision. The Basic Law decrees that denominational religious education qualifies as a regular subject (Article 7). To mention just one example, the constitution of Bavaria (1946) requires schools to not only convey knowledge, but also develop "the heart and the character." The paramount educational goals are defined as reverence of God; respect for religious beliefs and human dignity; self-composure; a sense of responsibility and a willingness to accept responsibility; readiness to help others; open-mindedness for everything that is true, good, and beautiful; and a sense of responsibility toward nature and the environment. Pupils must be educated in the spirit of democracy, to love their Bavarian homeland and the German people, and in a spirit of international reconciliation. Further, girls and boys must, in particular, be instructed in baby care, child upbringing, and housekeeping.[12]

An education in line with the values based on Christian culture has to be interpreted and applied in light of the natural right of parents to choose the upbringing to be given to their children (Article XVI (2)), the freedom of conscience and religion (Article VII (1)), and the prohibition of discrimination based on religion (Article XV (2)). With this provision, the Fundamental Law specifies a commitment to values in addition to cultural commitments, which continues to remain free of any commitment regarding religion, faith, or world view. In this regard, the following question arises: Does practice correspond to "Hungary's (...) values based on Christian culture" there, where there is a chasm between Christian faith and morals and the social practices prevailing in Hungary? If the state is not its own enemy, it can and does protect the culture that forms the basis of its existence, and it uses the system of public education to endeavor to pass it on to future generations.

2. A few questions on content

In addition to the expression of a commitment to values and the messages conveyed by symbols, certain priority issues may provide an answer to how the content of the Fundamental Law approaches that which stems from being called Christian.

■ *2.1. Protection of the institutions of marriage and family*

Commitment to the institution of marriage can be a strong example of values, which is a hotly disputed topic today. Regarding marriage, the provision pertaining to opposite sexes is exactly the repercussion of the emancipation of same-sex partnerships, which

11 By today, the membership of the two major churches has dropped to 52%, thanks to Muslim immigration, reunification, and "quitting." See: https://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/61565/kirche.

12 Constitution of the Free State of Bavaria, Article 131.

had previously never come up as an issue (Article L). In light of the Constitutional Court's 1995 decision pertaining to cohabitation, the declaration may seem superfluous as it specifies that only a man and woman can enter into marriage.[13] However, in the justification for the decision, the Constitutional Court mentions the institution of marriage that has developed "traditionally in our culture and law." This allows for the possibility of the Constitutional Court giving new meaning to the institution of marriage in light of the social and cultural changes at a later date (decades later). This shows that the legislator was driven by caution—a caution that protects a consensus reached today and, yet, threatened by the example of several other countries.[14] Whether the state is competent in using legal instruments to give preference to marriage as a way of life is a separate issue: Is it of any concern to the state how its citizens live their private lives? The protection of marriage as an institution is not justified only by traditions and not determined merely by demographic aspects (although it is true that the State requires the reproduction of its people, and married couples have more children than couples living in cohabitation). The fact that a man and woman enter into a lasting covenant and make their intent to form a family public is a constitutional value in itself. Marriage (as opposed to cohabitation) is not a private affair, but a behavioral pattern the state gives preference to even at the level of the constitution[15]—while giving everybody the freedom to live their lives as they see fit. A related question is regarding the obligation to show solidarity between generations, with which the legislator included a moral commandment in the operative part.

■ *2.2. The vision of man in the Fundamental Law—dignity and responsibility*

Including human dignity as a basic element of human existence, the inviolability of human dignity (Article II of the National Avowal) and personal responsibility (Article O) are equal to recording the Christian vision of man in the constitution in a manner that is inoffensive to anyone (few people reason against our own dignity—at most, they deny their own responsibility). Mentioning responsibility, therefore, serves to heighten dignity. At the same time, regarding "the life of the fetus," the legislator specified the commitment to the protection of life determined as the minimum in 1991, opting to refrain from expanding the term human.

■ *2.3. The command of social solidarity*

Emphasizing personal responsibility (Article O) also means doing away with excessive guardianship. However, the legislator does feel that we have a general duty to help "the vulnerable and the poor" (National Avowal). Even the terminology draws inspiration from the Bible. While social security is established as a state objective, the Fundamental Law specifies special protective measures (families, children, women, the elderly, and those living with disabilities: Article XV (5)) or support (maternity,

13 Constitutional Court Decision 14/1995 of 13 March.
14 Frivaldszky, 2011, pp. 58–64.
15 Varga, 2011, p. 49.

illness, invalidity, disability, widowhood, orphanage, and unemployment for reasons outside of one's control: Article XIX (1)) in several cases.

■ *2.4. The issue of subsidiarity*

Of the key elements of Catholic social education, the principle of subsidiarity is notably missing from the Fundamental Law, though the right of local communities to govern themselves and the protection of the independence of religious communities is institutionally connected. However, the principle of subsidiarity means more than mere protection of autonomy and recognition of the responsible dignity of a person. Just as the Catholic Church's social teachings once put it, "it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them."[16] It is important to note that the principle does not merely pertain to the effectiveness of organizations, but rather the dignity of communities, which is closely connected to emphasizing the responsibility mentioned above.

3. Live roots?

Is the Fundamental Law equal to the Christian heritage we have inherited? The Fundamental Law took on this challenge, but does not try to do the impossible. It reflects the given social values from which the law is not capable of deviating in serious issues over the long term. It is suitable for specifying a consensus by making threats apparent, but not for making a consensus where there is none. Legal items without a general agreement cannot be upheld over the long term. The real question in this regard is whether there is a general agreement behind the values laid down by the Fundamental Law, including those regarding national solidarity, the role of the family, whether marriage is an alliance between a man and a woman, and whether such general agreement can be maintained or renewed. These are not issues of protecting the constitution, but pertain to the relationships between generations, families, communities, education, and culture. Just as we can expect those who have better hearing to do more in preserving musical traditions than those who are tone deaf, sensitivity toward a nation's cultural heritage is also not distributed evenly. Those who are endowed with greater sensitivity bear greater responsibility: it is up to them to determine whether they can pass on inherited values to future generations.

16 Pope Pius XI (1931) Quadragesimo Anno, p. 79.

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FRANE STANIČIĆ[1]

Christian Values in the Constitutions of Croatia and Slovenia—A Comparative Overview

ABSTRACT: *This paper will strive to show that Christian values can be found in almost every constitution in the western world, although explicit invocations of Christian values are quite rare. There are constitutions that use invocatio dei and those that create state churches, but such constitutions represent a minority among constitutions. Croatia and Slovenia make good models for the purpose of this paper as they represent very similar and, at the same time, very different states with regard to the chosen model of state-church relations. The paper will show that, notwithstanding their different constitutional setup of state-church relations, Croatian and Slovene constitutions do not differ much with regard to the presence of Christian values in them.*

KEYWORDS: Christian values, constitutions, Croatia, Slovenia, universal good.

1. Introduction

The use of Christian values in constitutional texts is an issue that is not universally accepted or dismissed. Usually, it does not provoke much debate, as some states include explicit invocations of God and/or explicit Christian values in their constitutions, but most states do not. However, the making of the (failed) European Constitution was marked with a fierce debate on whether the Christian roots of Europe would be included in it. Eventually, the decision was in the negative, but it created an opportunity to discuss the topic of Christian values and their incidence in various constitutions. The purpose of this paper is twofold. First, to show that, notwithstanding the fact whether a constitution contains a special *invocatio dei* or mention of a specific religion, all constitutions contain certain Christian values, as they are universal. In addition, it will be shown that there is nothing 'wrong' in including Christian values in constitutions, even when they include *invocatio dei*, as it is not possible to breach state neutrality in such a

1 Associate Professor, Faculty of Law, University of Zagreb, Croatia, frane.stanicic@pravo.hr, ORCID: 0000–0001-8304–7901.

https://doi.org/10.47078/2022.1.203-220

manner. Second, I will compare the constitutions of two very similar and closely connected states—Croatia and Slovenia. Both states emerged from communist Yugoslavia, and both states were part of the same state community for centuries (from 1527 to 1991). Therefore, one would expect similar constitutional texts and choices. However, analysis will confirm whether this is indeed the case, as the two states chose different state-church models in 1990/1991 and very different approaches towards religion. The Croatian Constitution contains some provisions that are explicitly rooted in Christian values, but the Slovenian Constitution, at first glance, lacks such provisions. However, both constitutions contain numerous provisions that can be linked with Christian values, especially the social teachings of the Catholic Church. Therefore, the paper will also show whether the chosen constitutional model of state-church relations correlates with the presence of Christian values in the constitutional texts of both states.

2. The use of Christian values in constitutional texts

The mention of God or other elements of Christian faith are not unusual or unknown in the Western world. However, it is uncommon. Few states include *invocatio dei* in their constitutional texts.

■ *2.1. Mention of God or a specific church in constitutional texts*

If we consider the Constitution of the United States of America, it does not contain a reference to God, but the document that preceded it—the Declaration of Independence—contains a clear reference to God. It states, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'. Although the federal constitution does not contain any reference of God, the situation is quite different at the state level. Specifically, God or the divine is mentioned at least once in each of the 50 state constitutions and nearly 200 times overall, according to a Pew Research Center analysis.[2]

If we consider Europe and the constitutions of European states, the mention of God in constitutional texts, while not very common, is not rare either. The Constitution of the Federal Republic of Germany (Basic Law or *Grundsgesetz*) begins with a preamble stating, 'Conscious of their responsibility before God and man…', and the Federal President takes an oath upon taking office that ends with 'So help me God'. The

2 https://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/
See, for example, Arts. II and III of the Constitution of Massachusetts and other provisions of this state constitution (the word 'God' is referenced 11 times), the Preamble of the Constitution of the state of Georgia, which states: 'To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution'.

Constitution of the Republic of Ireland also starts with a preamble that is perhaps the most vivid incantation of Christian Values in all the constitutional texts the author of this paper has come across, as it states:

> 'In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
> We, the people of Éire,
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
> Do hereby adopt, enact, and give to ourselves this Constitution'.

Similarly, the 1997 Constitution of Poland contains a preamble that proclaims:

> 'We, the Polish Nation—all citizens of the Republic,
> Both those who believe in God as the source of truth, justice, good and beauty,
> As well as those not sharing such faith but respecting those universal values as arising from other sources…'

The newest among the European Constitutions—that of Hungary—also contains *invocatio dei* in its text, as it states:

> 'God bless the Hungarians';
> 'We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago'.
> 'We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country'.
> 'We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constituent power, hereby adopt this to be the first unified Fundamental Law of Hungary'.

In addition, the Constitution of Greece starts with a Christian preamble that states, 'In the name of the Holy and Consubstantial and Indivisible Trinity', and in Art. 3,

the Orthodox faith is established as the prevailing faith and any alteration to the Holy Scripture is prohibited. Art. 14 allows the press to be curtailed in cases of offence against the Christian or other faiths.

The Constitution of Denmark establishes the Evangelical Lutheran Church of Denmark as the state church in Art. 4, and God is mentioned in Art. 67. The Constitution of Malta establishes the Roman Catholic Apostolic Religion as the state religion. The Spanish Constitution specifically orders the state to cooperate with the Catholic Church and other confessions (Art. 16). The Constitution of Armenia establishes the Armenian Apostolic Holy Church as the national church (Art. 8.1.).

■ *2.2. Provisions important for religion*

Besides provisions that refer to God and/or church, some constitutions also contain provisions that affect religion and religious life in the state and the possibility to express religious and/or philosophical ideas. For example, the Constitution of Belgium prescribes that 'all pupils of school age have the right to moral or religious education at the community's expense' (Para. 3). The Maltese Constitution prescribes obligatory Catholic religious education in all state schools (Art. 2/3). Most constitutions contain provisions stipulating that public expression of religious and philosophical ideas is permitted and cannot be prohibited, except in cases prescribed by law. They also contain provisions prescribing the separation of state and church, but some with a more strict approach (France, Slovenia), and others with cooperation in mind (Germany, Spain, Italy, Croatia, Austria, etc.). The Polish Constitution contains a provision[3] defining marriage (as the union of man and woman) and prescribes that marriage, family, and motherhood/parenthood must be protected by the Republic. The Hungarian Constitution prescribes that Hungary 'shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children'. Moreover, it prescribes that 'Hungary shall encourage the commitment to have children'. It also has provisions that are not explicitly Christian, but are in accordance with the social teachings of the Church; hence, it can be said that they are Christian in origin.

3. Is there a need to introduce Christian values and/or God in constitutional texts?

The question of whether Christian values and/or God should be included in constitutional texts was perhaps most debated when the (failed) Constitution of the European Union was in draft (The Draft Treaty establishing a Constitution for Europe). After a lengthy debate, it was decided not to include a reference to God or Christian values

3 'Marriage, being a union of a man and a woman, as well as the family, motherhood, and parenthood, shall be placed under the protection and care of the Republic of Poland' (Art. 18).

in its preamble.[4] This was criticised, especially by the Catholic Church,[5] and by legal theorists such as Weiler, who said that such a solution meant the 'Christian deficit'[6] or an ideologically loaded 'thundering silence'.[7] He argued that a refusal to include Christian values in the European constitution reflects a particular ideological position. His arguments were considered such that they should ultimately be rejected by some authors,[8] and the 'expulsion' of God from the primary source of EU law is still debated. Weiler found that Christianity, conceived in the thin sense, is for many reasons not only an acceptable, but also an indispensable element of the European Constitutional project, and therefore cannot be eliminated from the historical heritage and the present identity of Europeans any more than one can remove the crosses from European cemeteries.[9] However, one must ask oneself, what is the function of a constitution? Cvijic and Zucca pose two very important questions—is the function of the constitution to create an ethical community or provide the basis for the creation of the ethical community, and second, even if one accepts that the constitution should create an ethical community, one must justify the argument that the identity of such a community and of its normative system derives from and must be grounded in the historical memory of the given community.[10] As Weiler puts it, 'Christian thought is part of Europe's heritage, both for believers and non-believers, Christians and non-Christians. A voice that one can dispute, undoubtedly; that can be discussed, of course; that one can reject, certainly. After all, we live in a democracy. But its absence impoverishes us all.'[11]

Every constitution has a minimum of three functions: constituting (the state and the institutions of government), legitimating (the exercise of pubic power), and limiting (state power to safeguard citizens).[12] However, those are the minimum functions of the constitution, and one can argue that the constitution is also to be regarded as a kind of a deposit that conserves and reflects the values, ideals, and symbols shared in a particular society. In a sense, it can be considered a mirror of the society for which

4 Cvijic and Zucca, 2004, p. 739.
The preamble contained, in its first two paragraphs, the following:
'Conscious that Europe is a continent that has brought forth civilization; that its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason;
Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law'.

5 Pope criticises EU for excluding God, https://www.reuters.com/article/us-eu-anniversary-pope-idUSL2421365520070324

6 Weiler, 2007, p. 145.

7 Weiler, 2003, according to Cvijic and Zucca, 2004, p. 740.

8 Cvijic and Zucca, 2004, p. 740.

9 Weiler, 2003, p. 48.

10 Cvijic and Zucca,2004, p. 742.

11 Weiler, 2007, p. 145.

12 Horsley, 2021, p. 2.

it has been created.[13] Therefore, as Europe is so strongly linked with Christianity, God should have been included in the constitution. Moreover, the state-church relations of today are different from those of the past as there is more understanding and common ground between the state and church(es). On the other hand, one could argue that the inclusion of Christian values in the European Constitution (or any other constitution) would mean the inclusion of Christian morals in the respective law system. However, it should be noted that Christian morals should be viewed as common ethical values that are, although derived from Christian roots, acceptable to the faithful that belong to other monotheistic religions and those who do not belong to any religious community. One should not view the inclusion of Christian values in the constitutional texts as a way to enforce Christian morals and/or dogma on others. Rather, it should be viewed as a symbolic way to emphasise the need to embrace certain ethical common ground that is acceptable to all. After all, is the essence of Christianity not love, piety, and tolerance? Of course, one can also argue that a secular state must be neutral and that it should not support nor impinge on any religion and that is the reason including Christian values in the constitution would represent a breach of state neutrality. It is obvious that there are arguments *pro et contra* regarding the inclusion of Christian values and/or God in constitutions. However, as it has been shown, there are states that have included Christian values and/or God in their constitutions, and there are those that are considered strictly secular (I would rather say secularised) and that, at first glance, do not include any Christian values and/or God in their constitutions. However, I would argue that there is no constitution in the world, or in the Western world at least, that does not have Christian values inherently embedded in it. What is equality in front of the law if not a Christian value? That all men are equal and created in the image of God? As Fletcher says, the principle of equality under law is best grounded in a holistic view of human dignity.[14] There are also some views that recognising God in the constitution of a modern liberal democracy benefits both religious and non-religious citizens by symbolising transcendent meaning and facilitating political solidarity.[15] Recognising God in a constitution does not necessarily impose a religious character, belief, or practice detrimental to non-religious citizens. Rather, recognition alludes to a shared heritage and tradition and acknowledges that religious individuals and groups are legitimately part of the modern democratic state and interact with it.[16] It is important to remind ourselves what the European Court of Human Rights said in its famous *Kokkinakis v. Greece* judgement (1993). It found that freedom of thought, conscience, and religion is 'one of the foundations of a democratic society. This freedom, in its religious dimension, is one of the most important elements that create the identity of believers and their conception of life, but it is also a precious tool of atheists, agnostics, sceptics and those who do not have any relation towards faith'. This is especially because of its

13 Cvijic and Zucca, 2004, p. 742.
14 Fletcher, 1999, p. 1608.
15 Deagon, 2019.
16 Deagon, 2019.

'mirror image' right that is not formally articulated anywhere —the right to be free from religion.[17]

Therefore, my first and foremost thesis is that every constitution in the western world enshrines some Christian values. My second thesis is that there is nothing 'wrong' with invoking God or including some other way of addressing the 'higher being' in constitutions and that such provisions in constitutions do not constitute a breach of state neutrality towards faith. The now famous *Lautsi v. Italy* judgement (2011) can be used with this regard as the Court stated that states 'have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony, and tolerance in a democratic society, particularly between opposing groups'. However, the Court also stated that 'There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed'. If such a display of an indisputably Christian symbol, which is present every day to all pupils and teachers, does not have an effect of proselytism, how could such a conclusion be derived from the use of the word 'God' in constitutions (no one reads the constitution every day, if ever)?

4. Christian values in the Constitution of the Republic of Croatia

The Constitution of the Republic of Croatia[18] entered into force in December 1990. It marked the beginning of Croatia's path to independence, which was proclaimed in 1991. Croatia was internationally recognised in January 1992, and it was a part of socialist (communist) Yugoslavia until 8 October 1991. This should be remembered when discussing the existence and scope of Christian values in the constitution. Of course, the constitution was the result of the first free election held in May 1990 and the fall of communism in Croatia.

The constitution does not contain any provisions in which God or any particular faith is mentioned. However, there are many provisions that are important for the freedom of religion and the understanding of the Croatian state-church model. In particular, one provision is strongly linked with Christian values regarding the definition of marriage.

■ *4.1. The Croatian constitutional state-church model*

In Croatia, the separation of state and church, in the spirit of Art. 41 of the Constitution, is often defined in the strictest ideological meaning of secularism, which originated in France, that is, in the constitutional designation of the French Republic as

17 Staničić, 2019, pp. 190–191.

18 *Ustav Republike Hrvatske*, Narodne novine, nos. 56/1990, 135/1997, 08/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, and 05/2014.

a secular (*laïque*) state. However, in our public space, there are such interpretations of Art. 41 of the constitution that emphasise only its second section, which stipulates the obligation of the state to assist and cooperate with religious communities, and the conclusion drawn from this is that the Republic of Croatia is not a secular state.[19] In the Constitution of the Republic of Croatia, the character of the Croatian state regarding the relationship between the state and the church is regulated in a more complex way than in the case of the French Constitution. To be specific, the subject of the regulation of Art. 1 Section 1 of the French Constitution is stipulated by Art. 1 Section 1,[20] Art. 14,[21] and Art. 41,[22] as well as Art. 40[23] in connection with Art. 17 Section 3[24] of the Constitution of the Republic of Croatia. The constitutional regulation of relations between the state and the church in the Republic of Croatia is further complicated by the provision of Art. 134[25] of the constitution because of the four treaties concluded between the Republic of Croatia and the Holy See.[26] It should be emphasised that it is undisputable that the Republic of Croatia is a secular state in which the principle of separation of state and church applies. However, what does the Republic of Croatia being a secular state mean? In each state, the question of church-state relations is important. The answer to the question of what the relationship between church and state is like also represents the determination of the status of religious communities in the territory of the state, as well as the establishment of freedom of religion as one of the fundamental human rights.[27] The constitutional text forms a whole, and hence, it should be interpreted in that manner. In this context, I am of the opinion that it is impossible to observe Art. 41 of the constitution separately from Art. 1 of the constitution, which defines the Republic of Croatia as a unitary and indivisible democratic and social state in which power originates from the people and belongs to the people as a community of free and equal citizens. In addition, I am of the opinion that Art. 41 of the

19 Staničić, 2019a, p. 9.

20 'The Republic of Croatia is a unitary and indivisible democratic and social state'.

21 'All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of... religion (...).
All persons shall be equal before the law'.

22 'All religious communities shall be equal before the law and separate from the state. Religious communities shall be free, in compliance with the law, to publicly conduct religious services, open schools, colleges or other institutions, and welfare and charitable organisations and to manage them, and they shall enjoy the protection and assistance of the state in their activities'.

23 'Freedom of conscience and religion and the freedom to demonstrate religious or other convictions shall be guaranteed'.

24 '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 (...) freedom of (...) religion'.

25 'International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law'.

26 Staničić, 2019a, p. 10.

27 Staničić, 2019a, pp. 16–17.

constitution should also be considered in conjunction with Art. 3 of the constitution, by which essential values of Croatian constitutional order are established, including equality and rule of law. In order to ensure that all citizens are equal (the basis for the existence of the Republic of Croatia as a democratic state), the state must be neutral towards all religions. In other words, it must enable everyone to enjoy equal rights. This also arises from the understanding of the principle of freedom of religion (Art. 40 of the constitution), which is also required by the state. For this reason, I believe it is indisputable that the principle of separation of state and church is a constitutional principle.[28] The constitution truly and completely stipulates the separation of the state and the church (Art. 41, para. 1). According to the basic Fox model, this would mean that the Republic of Croatia has a system of separation that represents state neutrality towards religion in which the state, at least officially, does not favour any religion, but does not restrict the presence of religion in the public sphere either. This is not Fox's other basic model of laicity, which states that not only does the state not support any religion, but it also limits the presence of religion in the public sphere.[29] However, para. 2, Art. 41 of the constitution shows that in the Republic of Croatia, neither of the above two basic Fox models is applied. If we look carefully at Art. 41, para. 2 of the constitution, we see that the constitution stipulates the obligation of the state to assist and protect religious communities in their activities. This fact clearly implies that the Republic of Croatia does not belong to the model of strict separation, that is, the separation model as developed in France, which many supporters of the thesis on the secular organisation of the Republic of Croatia use as the only valid model of secularity, equating secularism in its extreme ideological-political meaning with secularity.[30] Of course, at the same time, this does not mean that the state and the church are not and should not be separated since the constitution prescribes the separation of religious communities and the state. However, it is about separation in terms of the inability of religious communities to influence the organisation and functioning of the state and vice versa. Therefore, according to the constitutional order of the Republic of Croatia, the church interfering with the internal affairs of the state is not possible, just as it is not possible for the state to interfere with the internal affairs of the church. In all other aspects, mandatory cooperation from the state is possible and necessary.[31] In my view, two factors are discernible from the provision of Art. 41 of the constitution: first, in the Republic of Croatia, the state and the church are separate, and second, 'the duty and obligation of the state to protect religious communities and assist them in their activities has been established by the provision of Art. 41, para. 2 of the constitution. Accordingly, in the Republic of Croatia, a cooperative or concordat model of church-state relations is in force'.[32]

28 Staničić, 2019a, p. 23.
29 Staničić, 2019a, p. 24.
30 Staničić, 2019a, p. 24.
31 Staničić, 2019a, p. 24.
32 Sokol and Staničić, 2018, pp. 44–45.

■ *4.2. Provisions of the Croatian Constitution linked with Christian values*

If we consider the provisions of the Croatian Constitution, explicit invocations of God, provisions establishing the state religion, or special provisions that would explicitly endorse certain Christian values are not included. This is to be expected, considering that it was enacted in the still existent communist Yugoslavia and considering the sharp division in the Croatian public between the left and right and grudges from the past. With this in mind, the constitution was a compromise. However, one cannot neglect the many provisions that mirror certain Christian values. As stated above, some Christian values are universal, and every constitution contains such values. However, some parts of the constitution are undoubtedly Christian in origin, although it is not explicitly written down in it. For example, in the preamble, when discussing the historic origins of Croatian statehood, 'the independent medieval state of Croatia established in the ninth century' has been mentioned. The independence of the medieval Croatian state is heavily linked with the papal recognition of Croatia when Pope John VIII and *comes* Branimir exchanged letters and the pope addressed Branimir as *dux/comes Croatorum* in 879 and blessed him and 'the nation and land'. This letter was considered among Croatian historians as the first international recognition of Croatia.[33] Therefore, the mention of the 'independent medieval state' is strongly linked with Christianity and papacy, as Branimir became the pope's vassal. The second example of the clear depiction of Christian values is Art. 61/2[34], which defines marriage as a living union between a woman and a man. This provision was added to the constitution after the success of a referendum of a people's initiative in 2014. The people's initiative was obviously motivated by Christian values. The referendum on the constitutional definition of marriage as a union between a man and a woman, held in December 2013, was the first successful national referendum in Croatia initiated by a citizens' initiative. 'In the Name of the Family' (*U ime obitelji*) argued that the traditional values of Croatian society must be protected by enshrining the traditional, heteronormative definition of family.[35] After the referendum, for which the initiative collected 749,316 signatures (the required threshold was just above 400,000 signatures) in a two-week period in May 2013, the definition of marriage as the union of woman and man was entered into the constitution. The constitutional referendum was held on 1 December 2013, and 37.9% of eligible voters voted. The State Election Commission announced that 65.87% voted 'yes', 33.51% voted 'no', and 0.57% of the ballots were invalid.[36]

Additionally, the provision of Art. 47 allows for the conscientious objection of those who are not ready to participate in military duties in the Armed forces because

33 Goldstein, 1995, p. 267. Goldstein does not concur with this view.

34 'Marriage is a living union between a woman and a man'—Popular constitutional initiative of 1 December 2013, OG 5/14, Decision of the Constitutional Court No. SuP-O-1/2014 of 14 January 2014

35 Petričušić, Čehulić, and Čepo, 2017, p. 61.

36 Petričušić, Čehulić, and Čepo, 2017, p. 74. Although the sum does not add up to 100%, these are the official results of the referendum.

of their religious or moral views.[37] This provision is the only one in the constitution that deals with the topic of conscientious objection, and there are doubts regarding its reach. Some authors have found that it can be construed that this provision protects other conscientious objections, for example, in medical procedures.[38] The confirmation of such claims can be found in legislature allowing for conscientious objection in medicine, dental medicine, etc.

At first glance, there are no other provisions in the constitution that depict Christian values. However, when we consider the Compendium of the Social Doctrine of the Church (Compendium),[39] another thought comes to mind. This is that the Compendium 'intends to present in a complete and systematic manner, even if by means of an overview, the Church's social teaching, which is the fruit of careful Magisterial reflection and an expression of the Church's constant commitment in fidelity to the grace of salvation wrought in Christ and in loving concern for humanity's destiny'. It also 'offers a complete overview of the fundamental framework of the doctrinal corpus of Catholic social teaching'. When we go through the Compendium and compare it with the Croatian Constitution, we can find many similarities. This is, of course, true for most constitutions. For example, the Compendium calls for equal dignity of all people[40] and it stresses that 'also in relations between peoples and States, conditions of equality and parity are prerequisites for the authentic progress of the international community'. If we look at the constitution, we can see that in Art. 3, in which the fundamental values of the Croatian constitutional framework are prescribed, freedom, equal rights, national and gender equality,[41] peace-making, social justice, and respect for human rights[42] are listed. The link between Art. 3 and the Compendium is obvious, as the social teachings of the Church insist on equality, peace, and respect for human rights. Furthermore, the first article of the constitution describes Croatia as a social state,[43] and the Compendium states that 'the permanent principles of the Church's social doctrine … are the principles of: the dignity of the human person, which has already been dealt with in the preceding chapter, and which is the foundation of all the other principles and content of the Church's social doctrine; the common good;

37 See, especially, the *Bayatyan v. Armenia* judgement (2011) of the ECtHR on this issue.

38 Čizmić, 2016, p. 763.

39 https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html

40 'God shows no partiality' (Acts 10:34; cf. Rom 2:11; Gal 2:6; Eph 6:9), since all people have the same dignity as creatures made in his image and likeness.

41 Compendium: 'Woman is the complement of man, as man is the complement of woman: man and woman complete each other mutually, not only from a physical and psychological point of view, but also ontologically. It is only because of the duality of 'male' and 'female' that the 'human' being becomes a full reality'.

42 Compendium: 'The movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity. … Human rights are to be defended not only individually but also as a whole: protecting them only partially would imply a kind of failure to recognize them'.

43 'The Republic of Croatia is a unitary and indivisible democratic and social state'.

subsidiarity; and solidarity'. Art. 14 of the constitution is also indisputably linked with these teachings.[44]

Furthermore, it is obvious that the constitutional provision protecting human right to life is deeply Christian in its origin.[45] However, there are many disputes regarding its meaning (in the context of abortion—the problem of the definition of a 'human being'). This is also true for the constitutional provisions safeguarding family life (Art. 35) and family, which enjoys special protection of the state (Art. 61/1), and the provisions that obligate the state and all to protect maternity, children, and the young (Art. 62, Art. 64). Children are obliged to look after their elderly and incapacitated parents (Art. 64/4).

Lastly, one should also highlight one provision that is not contained in the constitution, but is perhaps the only one that specifically mentions God in the Croatian legal order. This is the provision of the Act on the Election of the President of the Republic of Croatia[46] (Art. 49/3). It prescribes the oath of the President, which ends with 'So help me God' (*Tako mi Bog pomogao*). This provision was not originally in the text, but President Tuđman inserted it in his first inauguration in 1992, and it was later inserted into the Act (in 1997). It was challenged in front of the Constitutional Court of the Republic of Croatia as unconstitutional (it was said that it endangers the secular character of the Republic of Croatia). The Court ruled that this was not the case, that the ending of the oath does not endanger atheists or agnostics, and that it does not endanger the secular character of the state.[47]

5. Christian values in the Constitution of the Republic of Slovenia

Following the country's secession from federal Yugoslavia, the 1991 Constitution of the newly independent Slovenia stipulated the freedom of religion and the continued separation of church and state. Certain provisions of the 1976 Act on Religious Communities were repealed, churches were granted the right to establish schools, and the (Catholic) Faculty of Theology was reintegrated into the University of Ljubljana.[48] It is important to mention that the Catholic Church strongly supported the establishment of independent Slovenia. Consequently, the Holy See was among the first states to internationally recognise Slovenia.[49]

44 'All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status.
All persons shall be equal before the law'.

45 'Each human being has the right to life.
There shall be no capital punishment in the Republic of Croatia' (Art. 21).

46 *Zakon o izboru Predsjednika Republike Hrvatske*, Narodne novine, nos. 22/1992, 42/1992, 71/1997, 69/2004, 99/2004, 44/2006, 24/2011, and 128/2014.

47 U-I-64500/2009 from 23 May 2017.

48 Črnič et al., 2013, p. 216.

49 Ivanc, 2015, p. 38.

■ *5.1. Slovene constitutional state-church model*[50]

The Slovenian model of relations between the state and the church is established by Art. 7 of the constitution.[51] According to Slovenian legal theory, the equality of religious communities has been, at least until the end of the first half of 2000, understood by the state as an 'undiscriminating affirmation of the whole religious field'.[52] The meaning of this is that different religious communities are equal before the law. It is said, by some, that the Slovene model of state-church relations can be called 'model of separation with simultaneous cooperation' (*model ločitve ob hkratnem sodelovanju*).[53] In other words, religious communities are separated from the system of separation of powers owing to Art. 3 of the constitution or from state institutions *stricto sensu*. However, because believers are citizens with the right to vote, the limitation for religious communities is derived from Art. 7: religious communities are not allowed to organise themselves as political parties or act within state institutions.[54] On the other hand, some feel that Slovenia follows the French model of *laicite*, and that the principle of separation establishes the secularism[55] of the state. This means that the state must not be tied to any church and that it cannot privilege, discriminate against, or opt for religiosity or non-religiosity.[56] Kaučić wrote that in Slovenian legal theory and practice, the principle of separation of state and religious communities is predominantly understood and interpreted in terms of consistent and strict separation modelled on states with a more pronounced separation of state and church. Such a position is not to be attributed to the constitutional order, but the legal and executive derivation of this constitutional principle, and in particular, the influence of the previous political system.[57]

Slovenian authors agree that Art. 7 of the constitution prescribes three principles that define the legal position of religious communities in Slovenia: the principle of separation, the principle of free action of religious communities, and the principle of equality of religious communities.[58] However, the Religious Freedom Act, in accordance with Art. 5 of the constitution, regulates the duty of the state to respect the identity of religious communities and maintain open and continuous dialogue with them while developing forms of permanent cooperation. The principle of separation does not prevent religious communities from pursuing activities freely in their sphere. If the activities of the state and religious communities collide, their competence should

50 I am using parts of my paper 'Religious symbols in the public sphere in the legal order in Slovenia' (ip.) in this subchapter.

51 Constitution of the Republic of Slovenia (Ustava Republike Slovenije), Uradni list RS, nos. 331/1991, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006, 47/2013, 47/2013, 75/2016, and 92/2021.

52 Črnič and Lesjak, 2003, p. 362; Dragoš, 2001, p. 41.

53 Avbelj, 2019, commentary of Art. 7.

54 Ibid.

55 Naglič uses the term '*laičnost*' or '*laicite*' in French. See in Naglič, 2017, p. 16.

56 Ibid.

57 Kaučić, 2002, p. 404.

58 Mihelič, 2015, 1, p. 132; Naglič, 2010, 4, pp. 491–492. See also in decision U-I-92/07.

be delimited according to the internal sovereignty of the state, which determines the limits without preventing religious communities from pursuing social activities.[59] Stres concluded that the separation of state and church does not require, in the spirit of European political culture, anything but that the authorities do not use religion for their own intentions and that religion does not attempt to abuse the state to achieve its own objectives.[60]

In 2007, Slovenia's parliament passed the Religious Freedom Act[61] with a majority of a single vote (46/90).[62] The impact of the Religious Freedom Act on the Slovenian model of state-church relations was huge, as it marked a sharp turn in practice and legislation. To be specific, prior to its enactment, Slovenia was rightly portrayed as a country that mirrored France in its *laicite* model of state-church relations, which strongly insists on state neutrality. After the enactment of the Religious Freedom Act in 2007, Slovenia underwent a huge change as it embraced, in reality, another model of state-church relations—the cooperation model in which state neutrality does not have the same significance as it did in the earlier model. Moreover, according to the Religious Freedom Act, the state is obliged to enter into relations with various religious communities. However, the state entered into various relations with religious communities even prior to the enactment of the Religious Freedom Act (three agreements in the early 2000s), which would suggest that the model of state-church relations in Slovenia was never really one of *laicite*.

■ *5.2. Provisions of the Slovene Constitution linked with Christian values*

Unlike the Croatian Constitution, the Slovene Constitution does not contain any provisions that are clearly linked with Christian values. There is no mention of past (Christian) times, and no definition of marriage like in the constitutions of Croatia, Malta, Hungary, and Poland. This is the consequence of a rather unique approach to state-church relations adopted by Slovenia in 1991. To be specific, the creators of the constitution opted for a rather strict separation model (which some compare with the French model of *laicite*). This is why it is not possible to expect any mention of Christian values in the Slovene Constitution. The only indirect mention of God is through the national anthem (*Zdravljica*),[63] in which God is mentioned.[64]

However, like in the Croatian Constitution, there are numerous provisions that can be linked with Christian (universal) values and the social teachings of the Catholic

59 Ivanc, 2015, p. 47.
60 Stres, 2010, p. 492.
61 Uradni list, nos. 14/07, 46/10, 40/12, and 100/13.
62 Lesjak and Lekić wrote that the Act was brought using votes of Italian and Hungarian minorities. See in 2013, p. 158.
63 A poem by the famous Slovene poet Franc Prešeren. However, only one part of the poem has been used as the national anthem, and that part does not contain a mention of God.
64 Ivanc, 2015, p. 41.

Church (especially the ones in the Compendium).[65] Slovenia is defined as a state governed by the rule of law, and as a social state (Art. 2), the constitution guarantees equality before the law (Art. 14/1)[66] and safeguards human life (Art. 17)[67]. One should also highlight the Compendium's prohibition of torture[68] and link it to the constitution ban[69] of torture (Art. 18). Like the Croatian and Hungarian Constitutions, the Slovene Constitution especially protects family, motherhood, fatherhood, children, and young people (Article 53)[70] and bans incitement to national, racial, religious, or other discrimination (Article 63).[71]

One provision should be especially highlighted as it clearly depicts a Christian value. This is Art. 46 (linked with Art. 123), which states: 'Conscientious objection shall be permissible in cases provided by law where this does not limit the rights and freedoms of others'. Unlike the Croatian Constitution, the Slovene Constitution protects the right to conscientious objection more broadly. This is somewhat surprising, considering the different constitutional setups of the two states. One would expect the opposite. It is obvious that this provision does not only include conscientious objection regarding military service, as this is prescribed by Art. 123. This means that the scope of Art. 46 is broader,[72] and that it encompasses the right to abortion as well[73]—meaning that the constitution allows for such an objection. This is a clear 'Christian value provision' because of which the Freedom of Religion Act of 2007 prescribes that the exercise of

65 Ivanc states that the interpretation and implementation of the right to freedom of conscience in Art. 41 are closely connected with the following constitutional rights and freedoms: the right to personal dignity and safety (Art. 34), the protection of the right to privacy and personality rights (Art. 35), the protection of personal data (Art. 38), the freedom of expression (Art. 39), the right of assembly and association (Art. 42), the right to conscientious objection (Arts. 46 and 123) and the rights and duties of parents (Art. 54). Ivanc, 2015, p. 42.

66 'In Slovenia 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'.

67 'Human life is inviolable. There is no capital punishment in Slovenia'.

68 'In carrying out investigations, the regulation against the use of torture, even in the case of serious crimes, must be strictly observed: "Christ's disciple refuses every recourse to such methods, which nothing could justify and in which the dignity of man is as much debased in his torturer as in the torturer's victim."[830] International juridical instruments concerning human rights correctly indicate a prohibition against torture as a principle which cannot be contravened under any circumstances'.

69 'No one may be subjected to torture or to inhuman or degrading punishment or treatment. The conducting of medical or other scientific experiments on any person without his free consent is prohibited'.

70 The Compendium especially highlights the fact that the family is the sanctuary of life and that the family founded on marriage is truly the sanctuary of life, 'the place in which life — the gift of God — can be properly welcomed and protected against the many attacks to which it is exposed, and can develop in accordance with what constitutes authentic human growth'.

71 The fact that all people are equal in front of God has already been discussed as a part of the Compendium.

72 Ivanc sees several areas in which conscientious objection is possible: conscientious objection and military service, work on religious holiday, medical treatment, parental care, and ritual slaughter and other religious food requirements. Ivanc, 2015, pp. 58–60.

73 Kristan, 1998.

religious freedom includes the right to refuse the fulfilment of obligations set by law that are in grave conflict with the religious conviction of a person.[74] This right may be limited only by a statute, if it is needed for the protection of other constitutionally protected values and if such limitation is able to pass a strict test of proportionality.[75]

6. Conclusion

As has been shown, Christian values embedded in constitutional texts are no rarity in the western world. Some constitutions use the technique of *invocatio dei*, while some use the creating of state churches, etc. However, the constitutions that clearly invoke Christian values are a minority. However, I feel that the set thesis that all constitutions have certain Christian values embedded in them is proved correct. Especially when comparing the social teachings of the Catholic Church and the constitutional provisions of different constitutions, one can clearly see that they align. This is, of course the result of the fact that many Christian values are universal. The Catholic Church promotes equality of men—this is depicted in constitutions as equality in front of the law. Additionally, the Church promotes the protection of an individual's human rights, prohibits torture, pleads for the protection of family, etc. All these aspects can be found in almost every constitution.

Croatia and Slovenia are two very similar, yet very different states. Both states were a part of the same state in the period from 1527 to 1991, were a part of the communist world, and emerged as independent states in 1991. However, in terms of the constitutional setup of state-church relations, they took very different paths. Croatia opted for very close relations with religious communities, especially the Catholic Church. Slovenia opted for a very strict state neutrality model that was often compared with the French model. However, the explicit mention of Christian values in the constitutions of both states is little, or almost absent. If we take the historical Preamble of the Croatian Constitution out of the equation, the only 'firm' provision that is clearly Christian in its origin is the definition of marriage, which was added into the constitution via referendum. On the other hand, Slovenia does not have any clear Christian-based provisions in its constitution, excluding the provision regarding the very broad protection of conscientious objectors. Of course, both constitutions contain numerous provisions that can be linked with Christian values, especially the social teachings of the Catholic Church. Therefore, the conclusion can be drawn that Croatia and Slovenia have very similar constitutions regarding the use of Christian values, although they follow very different constitutionally arranged models of state-church relations.

74 Ivanc, 2015, p. 57.
75 Ivanc, 2015, p. 61.

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ATTILA VARGA[1]

Christian Values and the Protection of the Family in the Romanian Constitution and the Case Law of the Romanian Constitutional Court

ABSTRACT: *The article starts from the hypothesis, which it seeks to prove, that legal systems, laws and especially constitutions are not value-neutral but rather defined by values. These values may be moral, political or religious. In Europe and the Western civilisation, a significant part of these values has been shaped by the Christian religion, culture, outlook on life and behaviour. As a narrower context, the article focuses on the moral and political values of the Romanian constitution, their Christian spirit and origin, and the related theoretical and constitutional interpretations. In the analysis, the author concentrates on human dignity, the free development of the human personality, and justice as the main values, as well as the fundamental rights related to them and the principles that define the organisation of the state. The influence of Christian values, thinking and perceptions can be seen in all of these. The author analyses in particular the Christian constitutional and civil law rules governing the family and the marriage on which it is based.*

KEYWORDS: constitution, constitutional case law, fundamental rights, Christian values, human dignity, justice, equal rights, separation of powers, rule of law.

> *"Each rule and each norm expresses a requirement to be fulfilled, i.e. a value: what complies with the norm is valuable, what doesn't comply is valueless in relation to the norm. (...) However, in pursuit of the correct or incorrect nature of positive law, this question cannot be answered through positive law itself. In this case a higher gauge is required; one that stands above the law to be judged. (...) And, since the characteristics of the empirical world are variable and temporal phenomena, if we are searching for eternal values and firm,*

1 Associate Professor, Department of Law, Sapientia Hungarian University of Transylvania, Romania; Constitutional Judge, Constitutional Court of Romania, vargaat@yahoo.com.

https://doi.org/10.47078/2022.1.221-240

absolute gauges of value, (...) those can only be found in the realm of ideas that lie beyond the boundaries of empirical existence."[2]

Gyula Moór[3]

1. A few thoughts on the status of inherent Christian normative value

In this idea the renowned Transylvanian jurist points out that the legal norm cannot be value-neutral but contains explicit and well definable inherent value. After all, it sets goals for human actions and prescribes behavioral patterns to be followed. And doing so, it draws a line between actions/behaviors that are valuable from a legal perspective, and those that are not. And this distinction creates an idea of value following a prior choice of values. Each norm is also a gauge for judging things. And the gauge of norms is value. This means, law inherently assumes both values and evaluation.

In Western and European civilization in particular, values, especially moral values are definitely related to the Christian religion, or are rooted in Christianity. This stands even if we consider the fact that a part of Europe considers religion in general, but particularly Christianity obsolete, rejecting or denying this system of values that has been passed on to them.

In constitutions, occasional references to Christian values are part of normative reality and can by no means be considered some nostalgic yearning for a long-gone era – as many try to make it appear to be. Instead – paradoxically – it actually appears in the laws and particularly in the constitution of each state as inherent value that should be implemented.

These two opposite phenomena or approaches imply an actual confrontation, conflict or battle between a reasonable, natural and proven System (of values) that has been working for centuries and is widely accepted by society, and a Relativity (of values) of a *nothing-is-what-it-is* nature, which is experimental, its outcomes are uncertain, and which lacks any foundation.

Let me highlight the view of a disappearing era through the thoughts of Milan Kundera. This is also a unique expression of the civilizational and cultural heritage of religious belief, nonbelief or Christianity, which may include both, and which has made Europe great, noble and respectable when this approach was still alive. "Over the course of the Modern Era, nonbelief ceased to be defiant and provocative, and belief, for its part, lost its previous missionary or intolerant certainty. The shock of Stalinism played the decisive role in this evolution: in its effort to erase Christian memory altogether, it made brutally clear that all of us-believers and nonbelievers, blasphemers and worshipers- belong to the same culture, rooted in the Christian past, without which

2 Püski, 1994, p. 241.

3 Gyula Moór (1888–1950) was born in Brașov; he graduated and did his doctorate at the University of Cluj-Napoca. He was a jurist, a professor, a member of the parliament and an interim president of the Hungarian Academy of Sciences. He died in Budapest.

we would be mere shadows without substance, debaters without a vocabulary, spiritually stateless."[4] The renowned Czech author considered himself an atheist, but he respected Christians and Christianity. The above thoughts are from his book *Testaments Betrayed*, and they express an evident truth that interests a lot of people nowadays, but even more try to deny it.

At the same time, Kundera's decisive existential recognition would be essential, especially for the leaders and opinion makers of today's European/Western world. Or at least, accepting the fact that the European identity, modus vivendi, thinking and behavior are all inseparable from the Christian spirit, values, culture and moral concept, in a sense Hungary's former Prime Minister *József Antall* put it in a famous sentence that has become a catchphrase by now: *"In Europe, even the atheists are Christian".* This cultural, civilizational value-determined "behavioral Christianity" appears excellently and powerfully in the below lines of Kundera: "I was raised an atheist and that suited me until the day when, in the darkest years of Communism, I saw Christians being bullied. On the instant, the provocative, zestful atheism of my early youth vanished like some juvenile brainlessness. I understood my believing friends and, carried away by solidarity and by emotion, I sometimes went along with them to mass. (...) I was sitting in church with the strange and happy sensation that my nonbelief and their belief were oddly close."[5]

Most of all, it is this *modus vivendi*, view, approach, mutual respect and tolerance between Christian believers and nonbelievers (which was shaped right by the end of the 20th century) what today's Western European official politics and ideology, lifestyle and worldview are trying to leave behind. Because in Europe, the Judeo-Christian religion is – and has been for centuries – not only a religious, but also a fundamentally social, moral, political and legal system of values, which served as a basis for individual and communal identity, and as such, it should not be denied but developed and passed on.

Denying (abandoning) the Christian roots and outlook on life may also be harmful because it means divorcing a decisive part – we might even say, foundation – of a European theosophical development process, which also renders a part of later modern thinking incomprehensible and uninterpretable; a part which might still be accepted today, and which still has some relevance to European civilizational values.

Paradoxical as it may be, in some European states (with rare exceptions), and even more in the public policies, ideological efforts and constrains of the European Union, the Christian spirit is totally absent. Still, in the constitutions of certain states (i.e. the text in which the social values of the given society are explicitly stated – whether in the preamble and/or in specific provisions) we can find statements, theoretical phrases or even regulations with reference to Christian values, symbols or views. Because, for European states the Christian religion and Christian churches – despite all the distortion, abuse or injustice that happened throughout history – carry, safeguard and express values that have proven to be viable, essential and indispensable. And,

4 Kundera, 2017, p. 15.
5 Ibid.

if a society is left without these religious and other values, it becomes a society that has lost its identity, lacks any points of reference, is divided against itself, lost and perplexed.

2. On the inherent moral value of the Constitution of Romania of Christian spirituality and Christian origins

For each state with a constitution that had been developed and accepted on its own, that document is in fact a catalog of the values of the given society, state, nation or political community, be it totally sufficient for some, while for others it may be too narrow or deficient.

Romania's current constitution was accepted in 1991 and amended in 2003. Basically it isn't a proof of an organic development process; it rather reflects a constraint and/or belief to adapt to the new, modern, commonly accepted trends that followed the radical (revolutionary) changes.

I believe this is important to highlight because the Christian spirit of the Romanian Constitution (if any) does not exclusively stem from the Eastern Orthodox[6] view, tenets or dogmas. In fact, the impact of Roman Catholic or even Protestant spiritual legacy and values prevail much stronger, or at least, certain elements thereof can be traced.

The reason is the phenomenon called constitutional transplants: both the original constituent body that created the new Romanian Constitution in 1990 – 1991 and the derived constituent body that amended it in 2003 definitely intended to adapt to and join the spiritual, cultural and political values of the Western civilization that had been defined by Christianity in many aspects back then.

Consequently, when we talk about inherent Christian moral values in the Romanian Constitution, that's not because the constituent body was led by Orthodox doctrines in wording the document, but because they wanted to adopt a European model (a model that was interwoven with western-type Christian values, among others) in which these values were (still) present and are (or may be) still present, and they could also identify with these values.

And this is of great significance in the Romanian constitutional law. In the Romanian constitutional technical literature, although pretty sporadically, we could recently find a few studies which aim to interpret or discover the Christian- or even Orthodox-rooted content in certain constitutional provisions.[7]

6 Based on the data of the 2011 population census, 99.79% of Romania's population reported to belong to some religious denomination, and more than 90% thereof reported to be Orthodox – more precisely, to belong to the Orthodox Church. Source: Institutul Național de Statistică din România (National Statistical Institute). Available at: www.insr.ro.

7 See also: Necula, 2020; Boari (ed.), 2018; Ionescu and Dumitrescu, 2017; Ardelean, 2011; Tănăsescu, 2009.

The inherent Christian value in constitutional texts is not obvious each time, not even for the constituent body. However, their choices and decisions are still conscious, and this also defines the validity thereof. Values are valid because they are chosen. And the act of choice itself inherently defines an intention of commitment; a belief or conviction that this choice of values conforms to the conviction of society, which grants it validation and legitimacy.

■ *2.1 The general provisions of the Constitution on core values*

The first Chapter of the Romanian Constitution defines general principles i.a. human dignity, the free development of human personality and justice as *core values*.[8]

2.1.1. Human dignity

According to the Christian concept – and there are definitely no significant denominational/dogmatic differences on this matter – the dignity of each human being stems from being created in God's image, after God's likeness. Due to their souls, as well as their intellectual, intentional and spiritual abilities, human beings are provided freedom, which is a privilege of being created in God's image.

According to the Catholic indoctrination, "Human life is sacred because from its beginning it involves 'the creative action of God', and it remains forever in a special relationship with the Creator". Furthermore, "God alone is the Lord of life from its beginning until its end: no one can, in any circumstance, claim for himself the right to destroy directly an innocent human being".[9] The Church condemns suicide, abortion and euthanasia actually on the basis of the sanctity of life.

From the standpoint of value theory and axiology, both human life and human dignity are considered absolute values (self-worth). These two notions belong together, as each human life is provided human dignity, and there is no human dignity without human life. This is a core value that should be recorded in writing in the constitution of any constitutional state.[10] In general, each country includes values in its constitution as core values and grants them legal protection, of which worth is supported by the common historical experience of humankind on one hand, and the specific traditions, cultural and civilizational heritage of the given nation or political community on the other hand.

Therefore, in the Romanian constitution human dignity is referred to as a core value, not a fundamental right. On the other hand, the analysis of the constitution by the Constitutional Court clearly stated that it's human dignity that serves as a basis for most fundamental rights. And the Constitutional Court stated in a resolution that "the

8 Article 1, paragraph (3) of the Constitution: "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed."

9 The encyclical of John Paul II entitled *Evangelium vitae.*

10 For more details on this matter see: Barcsi, 2005, pp. 116–118.

fundamental rights and freedoms granted in the Constitution are based on human dignity."[11] And this is an indirect acknowledgement of the proposition that human dignity is more than a mere declaration of moral value, even though this is also of great significance. However, the Constitutional Court went even further than that in a recent resolution, in which it stated that the constitutional concept of human dignity does not only have a declarative, but a normative value as well; it shall be considered a definite fundamental right with a substantive value of its own, and it defines the human quality of each individual. Consequently, any violation of fundamental rights also means a violation of human dignity, as the latter serves as a foundation of the former.[12]

The technical literature on Romanian constitutional law interprets human dignity as a "parent law", which is the root of the most fundamental rights related to human existence and human quality. The legal and moral concepts of human dignity are based on the unconditional respect of human life, which is originated from the Christian concept of man being created in God's image. Furthermore, the Christian tradition of natural law can still be found in some contemporary concepts of human dignity, i.e. the basis of human personality can be traced back to being created by God.

Therefore, the right to life, the prohibition of death penalty, the protection of the family, but even the right to property, solidarity or social security are basically based on human dignity, including the free choice of employment or the right to health or a healthy environment.

2.1.2. The free development of human personality

Among the major world religions, most probably Christianity defines and prioritizes the role and significance of the individual and the human personality to the greatest extent and in the most unique manner. It is the Christian teaching that points out the necessity of a harmonic balance between man as a separate individual/autonomous personality and as a social being.

It is the Christian system of values that – while acknowledging the importance of the community of individuals of the same religious beliefs – also highlights the individual and the need to support the evolution and development of the individual personality, especially through letting the Christian free will and freedom of choice prevail.

Firstly, the Constitutional Court stated that the free development of human personality is closely related to human dignity, which is a source of constitutional fundamental rights. And secondly, it defined two aspects of the free development of personality: First, it means the freedom of action in an active sense; and second, in its passive sense, it means the respect of the private sphere of the individual and the requirements that follow from this. Consequently, to ensure free development, the

11 Resolution 1.109 of 2009 of the Romanian Constitutional Court.

12 Resolution 465 of 2019 of the Romanian Constitutional Court (published in issue 645 of 2019 of the Official Gazette).

individual must be granted freedom of action, and the state should establish a legal framework that can guarantee the respect of the individual, the expression of personality and equal opportunities.[13]

There are further fundamental rights that can be derived from the constitutional fundamental right of the free development of human personality including, but not limited to the freedom of conscience, religious freedom, freedom of expression or the right to education, the right to access culture, the right to information, the right to work and related social protection, or the right to identity.[14]

2.1.3. Justice

Human nature is integrally bound to the fundamental intention, desire or idea that social coexistence should be organized based on justice. The need for social justice in the broadest and most diverse sense is primarily expressed in the fundamental rights and principles of constitutional order on the level of legal regulation. Justice is a fundamental value and a normative (moral, religious and legal) requirement of today's modern societies, but basically any kind of human society.

Law is formed with the inevitable mission to meet the conditions of justice in each social relation it regulates.

In different (socially and historically defined) legal cultures, there are various concepts of right and justice in law, but the requirement for justice appears in each case. Consequently, it is the requirement for justice in the sense of natural and positive law that defines and provides the functions of law to protect society and itself at the same time.

While right is still defined by laws and legally founded judicial decisions in modern societies today, justice is an intricate conglomerate of extremely complex expectations, feelings and requirements that manifest in individual and communal activities and social processes, with or without legal relevance. Justice is a moral, ethical, theological, power-theoretical, sociological, economic, social and jurisprudential matter at the same time.

Justice assumes legal, moral and political theses (supposed fundamental values) like equality, fairness, liberty, tolerance, common good, public order, integrity, social care etc. And the Christian subject matter, explanation or origin of these imperative values could hardly be questioned.

According to the teaching of the Roman Catholic Church the quality of life of people living in societies can be described by the *"relationship between justice and love"*, which *"makes up the fabric of society"*. In this regard it is also expressed that "Society is about the dignity and the rights of the person as well as the peace of interpersonal and

13 Resolution 601 of 2020 of the Romanian Constitutional Court (published in issue 88 of 2021 of the Official Gazette).

14 These are all explicitly listed in the Catalog of Fundamental Human Rights of the Romanian Constitution.

inter-communal relations. These are benefits that shall be sought after and provided by the social community."[15]

While the concept or at least the expression of justice is an essential part of any constitution, a legal, and especially a normative definition thereof would be pretty hard or even impossible to formulate, for the simple reason that this is basically not a legal term. In constitutional technical literature there are only a few traces of the explanation or interpretation of this concept; at best it came up in legal theoretical studies as a research topic.

During the norm control of the constitution there were only a few occasions when the infringement of justice as a core constitutional value as stated in Article 1 paragraph (3) was expressly criticized. Needless to say, justice has countless components including the equality of rights, or discrimination as the infringement thereof, which in undoubtedly the most common reason for requesting a norm control.

The Constitutional Court formulated a comprehensive theoretical reasoning on the concept of justice in a 2021 resolution –[16] probably for the first time – in an additional norm control[17] in relation to one specific case. The Constitutional Court explained that "the rationale and finality of the existence of the state is based upon the core values stated in Article 1 paragraph (3) of the Constitution including justice. Justice does not only ensure the proper functioning of the state but also the trust of society in the measures taken by the state, and in specific, the trust in the administration of justice. A criminal procedure represents an explicitly public power relationship between the state and the citizen, in which the relevant public authority may apply the coercive power of the state legitimately. But it may do so within the framework of the constitution and the law, adhering to the procedures defined by law and respecting constitutional fundamental rights, principles and core values. Should any act of the state – even if each part of it is legitimate – come out to be unjust for the citizen at the end (in finding them guilty/not guilty), the state shall ensure legal remedy or even

15 The encyclical of John Paul II titled *Centesimus annus* (1991). See also: Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, p. 60.) Let me point out here that the justice requirements of the modern age were highlighted by John Rawls, a great expert on this topic, in two principles: a) every person shall be equal to an extent that is compatible with the liberty of others; b) social equality should be organized in a way that it shall be beneficial for everyone and establish positions that are accessible for everyone. And this results in equality and tolerance, and makes restriction of liberty for the sake of liberty itself acceptable.

16 Resolution 136 of 2021 of the Romanian Constitutional Court (published in issue 494 of 2021 of the Official Gazette).

17 The case in a nutshell: the petitioner was sentenced to imprisonment by the First Instance Court, but after an appeal, the Court of Appeal finally found the person not guilty. When this person demanded financial compensation, the request was denied on a basis that this is only granted by the relevant law if the authorities that conducted the procedure had made unlawful actions in relation to the person. The law (Code of Criminal Procedure) did not cover the possibility that someone may also be entitled to compensation in case he or she, though did not suffer any unlawfulness during the procedure, but was found innocent in the final judgment after spending almost a year in prison as a result of the first instance conviction. The petitioner definitely found this unjust.

compensation in a given situation, in order to restore justice for the person affected, as well as for society as a whole. (...) Justice is a constitutional concept which – taking its moral philosophical nature into account – cannot be made normative (cannot be formulated as a positive legal provision) on its own, still it serves as a framework and gauge for the actions of the state. Society understandably wants justice. And it is the duty of the state to demand and enforce it through its authorities. Justice is essentially and inherently involved in each act of the state, which is projected to the fundamental rights and the respect thereof. Consequently, any restriction of these fundamental rights should be complemented with guarantees that make sure for the affected person and society that the action made by the state was not arbitrary, moreover, it was actually fair. And, in case the state made a wrong judgement, the remedy in place should be capable of compensating for the injustice that took place."

With regard to other cases, the Constitutional Court highlighted the component of justice that pertains to fairness, more specifically, the requirement of a fair legal procedure. Because, if certain infringements (for example, unduly late explanation of conviction) are made in certain obligatory phases of the procedure, that can lead to severe injustice for the person affected, which might even involve the dismissal of his/her human dignity.[18]

The interpretations of the constitution that have been drawn up in relation to these cases with the purpose of legal development indicate that moral philosophical aspects have been included that definitely represent a Christian approach, in some cases even commitment for the Christian approach, or simply the application and implementation of Christian values, and it probably doesn't even matter which judge in the Constitutional Court is religious and which isn't, to what extent or, to whichever denomination they belong.

■ *2.2 Relations between the entrenched clause[19] and the restriction of practicing[20] fundamental rights*

The Romanian Constitution contains a provision to restrict amendments. It states that certain principles and values included in other constitutional regulations are

18 Resolution 233 of 2021 of the Romanian Constitutional Court (published in issue 508 of 2021 of the Official Gazette).

19 Article 152 of the Constitution: "(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime." In this study I will not bring up any political or legal disputes in relation to the provisions. With regard to the current topic, I deem paragraph (2) relevant.

20 Article 53 of the Constitution: "(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic

untouchable and unchangeable by the derived constituent body. This provision is called the entrenched clause in the legal technical literature, despite the fact that there are professional debates going on whether a law (even the fundamental law) can prohibit anything for a future constituent body by formulating provisions that are intended to be eternal. Furthermore, it is also subject to debate which ones of the explicitly listed values are reasonably "eligible" to be eternal and unchangeable, and which aren't.

The concepts of "eternal" and "unchangeable" are basically religious and metaphysical concepts, although it's not about that in this particular situation. However, the law does undoubtedly contain static elements that can be deemed permanent. These may not be considered eternal, especially in their subject matter, still they provide stability and predictability for the legal system as a whole. However, I don't see the Christian spirit basically in this, but in the way the part of the entrenched clause with relevance to the fundamental rights is complemented by another constitutional provision that is aimed at restricting the exercise of fundamental rights.

The Entrenched Clause (paragraph (2) of Article 152) states that "no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof". This means that an amendment to the constitution allows changes or additions to the subject matter of each existing fundamental right, or even adding new fundamental rights, but it does not allow to revoke any existing fundamental right.

Article 53 of the Constitution (on the restriction of exercising fundamental rights) states firstly that "(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be". The circumstances and the arguments relevant to the given situation are listed one by one. (For example: national security, public order, public healthcare, public morality etc.). On the other hand, (2) "Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

In conclusion and to summarize the above: firstly, fundamental rights cannot be revoked; and secondly, they may be restricted exclusively by law. The restriction shall be proportional to the root cause and shall not concern or jeopardize the existence of the given fundamental right. In order to implement these provisions the Constitutional Court has drawn up a proportionality test and applies it in each case when the possibility of the infringement of Article 53 arises.

This approach and regulatory practice can be considered common in European legal systems and is aimed at the implementation of the rule of law and the protection of fundamental rights. In its deepest layers we might discover the Christian spirit, especially if we consider the fact that the fundamental rights originally stem from Christian principles.

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society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

■ *2.3 The Christian/moral inherent value in the system of fundamental rights*

Behind the development and institutionalization of fundamental human rights lies an idea that is deeply rooted in natural law, goes beyond legal positivism and basically stems from Christianity, as this is the only religion that is centered around man as an individual with a complex personality and dignity, as well as the unconditional respect of human life.

To illustrate this, let me cite the clear, exact and modern view of the Catholic Church on this matter: "The Church believes our age gives us an exceptional opportunity to make the acknowledgement and improvement of human dignity (as a trait that was implanted by God into his creatures) more effective worldwide through supporting human rights.

The source of human rights is the dignity every human being is entitled to. This dignity is inseparable from human life, identical for all persons, and most of all, the mind can grasp and understand it.

The ultimate source of human rights is not to be found in the mere will of human beings, the existence of the state or the public power, but in man itself and God, their Creator. These rights are universal, invulnerable and unalienable. *Universal* because they are present in each and every human being, regardless of place, time or person. *Invulnerable* because they form an integral part of each person and their dignity, and it would be futile to declare rights if, at the same time, we didn't do everything to ensure that everyone is bound to respect these rights everywhere and in every person. *Unalienable* because no one can legally take away these rights from any fellow human being, as that would be a violation of their own nature as well as the other person's nature."[21]

Before I would name the specific fundamental rights, let me mention two principles which define the whole system of fundamental rights and can definitely be explained and interpreted along Christian values. These are the equality of rights, and liberty.

With regard to both of these principles, Christian thinking has also undergone long development, shaping and transformation processes, especially in their interpretation and practical implementation. However, the starting points i.e. biblical phrases and their theological explanation have proven to be correct.

Of course it is true that neither the equality of rights nor liberty was included in the text of the Constitution as principles, rights or values that are (also) related to Christianity in any form. But one thing is for sure: the Christian spirit, the acceptance of, and the belief and trust in Christian values was a decisive factor in the acceptance of these normative texts. Anyway, it couldn't have happened differently, given the fact that the constituent power had set out the goal of catching up with European civilization and culture. There is no other world religion that propagates so apparently the freedom, free will and freedom of choice of the individual, as well as the equality of people (in front of God, at least), the unconditional respect of human life, human dignity,

21 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, pp. 83–95.)

supporting the poor and the disadvantaged, fraternal love and care, just to mention the most basic principles, which all appear in the constitution as legal normative texts in various fundamental rights.

Let me cite a few fundamental human rights from the Romanian Constitution's Catalog of Fundamental Rights, which can be found in the constitutions of basically all Western democratic states, and which I believe are close to (or can be traced back to) the Christian thinking or teaching.

Just to mention a few: the right to life, as well as the right to physical and mental integrity, and the prohibition of death penalty (Article 22); individual freedom (Article 23); freedom of conscience including freedom of thought, opinion, and religious beliefs, and freedom of expression (Articles 29 & 30); the right to a healthy environment (Article 35); protection of children and young people (Article 49); protection of disabled persons (Article 50).

All in all we can see that the whole system of fundamental rights – as it is in the Romanian and European democratic constitutions in general – is interwoven with love, care, solidarity, being considerate of one another, mutual respect, the dignity of the individual and the community, freedom and free will, deliberation and choice, social peace and justice – both theoretically and based on the above quotes. All these appear basically and originally in Christianity, to be more specific, in the teachings of Jesus.

These fundamental rights (which might even be assumed as values) have been defined by the Christian civilization and culture beyond the Christian religion, and are basically stated so explicitly in the constitutions of western legal systems. And this is true even if we consider the fact that there were certain periods in history when people, Europeans, states and churches strongly diverged (and still diverge) from these values.

■ *2.4 The theologically based Christian approach that appears in certain governmental organizational principles*

The famous Hungarian writer, jurist and politician József Eötvös put it a bit radically, but he was right: "Christianity is nothing else but the protest of the individual against the all-pervasive tyranny of the state."[22]

Regarding its wording, spirit and the governmental organizational principles, the Romanian Constitution is obviously intended to follow the European traditions and the accomplishments of political theory and the history of ideas that proved to be working in practice. We might discover faults, deficiencies or even wrong normative solutions in the exercising of power, the regulation of the institutional system of relations, and the implementation thereof in the past few decades, but these are less relevant to our current topic.[23]

22 Eötvös, 1977, p. 189.

23 Let me mention only two examples: the unique semi-presidential political system that creates a lot of tension and conflict, and the institution of legislative mandate, which is often exercised in an abusive manner.

The most important governmental organizational principles including the division of power, the rule of law, representative democracy, local governments, political freedom or even the separation of church and state are basically universal values of which precursors and intellectual roots can be traced back to Protestantism, more specifically to Calvinism.

Of course I do not want to say that in 2003, when the Romanian constituent power explicitly stated the principle of the division of power during the amendment of the Constitution (even though it had been accepted and used as a governmental organizational principle since 1991), they were guided by Calvin's thoughts as set out in one of his most important works called Institutio Christianae religionis[24] regarding the organization of church and civil government.[25] The same way they weren't thinking of the encyclical of Pope Leo XIII as the intellectual origin of the principle of subsidiarity.

However, by accepting these principles, the Christian origins of the fundamental governmental organizing principles in the Romanian Constitution can be traced – even if only indirectly. Anyway, this intellectual heritage can be at best knowledge or information for the Romanian society and political sphere, and by no means social and/or political practice or experience. That is to say that the existing constitutional exercise of power is not a result of centuries of organic development, but the transplantation and adoption of constitutional ideas.

One of the decisive elements of Calvin's view on the state and civil government is that he recognized the inclination and nature of the state to absolutism, autocracy and self-centeredness, which is still present today, and he was searching for means to hold these tendencies back and keep them in check. In his view the civil government is though ordained by God, it is also a necessity in order to maintain society, peace and common good. He puts the requirement of legitimacy, lawfulness and authority up against the possible autocracy of the civil power. The exercise of power, government and judgement can only be made lawful by existing legitimacy, within the framework of legitimate procedures.[26]

24 Calvin, 1559.

25 Chapter 20 of Institutio is about the Civil Government. See also: Calvin (Kálvin, 1559, pp. 509–535.)

26 The timeliness of Calvin's view and its impact on the development of governmental organizational principles is analyzed by Béla Szathmáry in a comprehensive study. Hence, on one hand, Calvin puts the mandate and the obedience to civil government in the spiritual sphere of the individual as a spiritual freedom. And on the other hand, he links the obedience to secular power (as a means God ordained for implementing the common good) to civil obedience in a way that the obedience to God's will should be its core element. "According to Calvin, laws that apply to the power in charge and the subordinated citizens alike are based on what he calls moral laws that rely on two commandments: the unconditional love and respect of God, and the mutual love of one another. Calvin expands the conceptual scope of moral laws with natural laws, adds the requirement of fairness to the scope of laws, and makes the application thereof binding for governmental bodies. Doing so, he imposes further constraint on the civil government insofar as it is both limited by divine and natural laws. According to Calvin, power is lent to secular authorities by God, but not in order to renounce it or to transfer it to others, but to use it, promote it, protect good deeds and stand up against evil. According to modern

Protestantism has undeniably earned imperishable merits by reviving original Christian ideas and spreading the ideas of liberty, progress, religious and political freedom and the principles of modern democracy. It has contributed to the generation of comprehensive social, economic and political processes and changes that required a novel approach of law, and also reformulated the most important principles of natural law.

Finally, although it is not a governmental organizational principle, let me point out that the validity of the constitution and the mandate of the President of the Republic begins after taking the oath upon inauguration. And this oath ends with the phrase "*So help me God!*"[27] This oath is also taken by members of the parliament or members other public authorities, for example constitutional judges or mayors at local governments. Of course it is not mandatory to conclude or confirm an oath like this, but it is not likely to be missed either.

3. The regulation of marriage and family through constitutional and civil law of a Christian approach

Family and its foundation, marriage between man and woman is not an expression of the regulatory intention of the state but most of all, a fundamental institution that lies outside and beyond state and law. It has been shaped in the human community, according to the natural norms of coexistence and its function in society. In Western Christian culture, family, its objective and role are basically defined by religion, by Catholic or Protestant views.

"Family, as the first natural community, is the center of social life. (...) Family is born from the love-based partnership of conjugal unity, and this partnership is based on the marriage of a man and a woman. It has a specific and original social dimension in a sense that family is the primary source of interpersonal relationships, the atomic cell that gives rise to society. It is a divine institution and, as the prototype of all kinds of social organization, serves as a basis for every person's life. (...) Family is a natural union for humans to experience human community and as such, it is one of society's

concepts it serves the protection of the common good and order which – in Calvin's opinion – is necessary because the liberty we got from Christ towards our fellow human beings is not unlimited, and we cannot forget about keeping to these limitations. By highlighting God's absolute sovereignty, Calvin creates an opportunity for establishing the right proportion and boundary between authority and liberty, and establishes the relationship of power and the individual as a solid ground upon which the state philosophy of future centuries can be built. Through this, Calvin attempts to create balance between the power and its agent that are necessary for the coexistence of humans, and the need to restrict free human autocracy. All kinds of earthly power is limited; therefore, the authority that emerges this way cannot acquire unlimited power over the individuals who owe obedience primarily to God." Szathmáry Béla: Kálvin a kortársunk? See also: Fazekas (ed.), 2009, pp. 382–383.

27 Article 82, paragraph (2) of the Constitution

unique and irreplaceable assets. (...) Family as a community of persons is the primary form of human society."[28]

After discovering that the social importance of family had started to erode, moreover, there were even conscious, organized and systemic efforts aimed at destroying the idea and reality of family, John Paul II voiced his concerns as follows: "The People of God should also make approaches to the public authorities, in order that the latter may resist these tendencies which divide society and are harmful to the dignity, security and welfare of the citizens as individuals, and they must try to ensure that public opinion is not led to undervalue the institutional importance of marriage and the family."[29]

Finally, let me sum up the above with another quote from this extremely substantial teaching: "Family is more than just a legal, social or economic base unit. It is a unity of love and solidarity, which is a unique means of passing on fundamental cultural, moral, social, spiritual and religious values for society and its members."[30]

The concept of family as per the Christian moral values is different from the contractual concept stated in Roman law, as well as from the family concept of totally different religious systems (for example, Islam).

In the Christian family concept of European law, legal principles and legal values defined by the Christian concept of human dignity, divine and natural law, the equality of rights, mutual respect and care appear, as they prevail in the relationship between man and woman.[31]

28 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, pp. 123–124.)

29 The apostolic exhortation of John Paul II entitled *Familiaris consortio* (1982). See also: Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, p. 132.)

30 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, p. 132.)

31 A comparative analysis of laws will reveal that significant Christian moral value is attributed to family in the constitutions of several countries. The most convincing may be the Constitution of Ireland in Article 41 paragraph (1): "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Article 21 (1) of the Constitution of Greece states that "The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State." Or we might mention the Constitution of Spain, Article 32: "Man and woman have the right to marry with full legal equality." Or Article 18 of the Constitution of Poland: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." And finally, Article 29 of the Constitution of Italy: "The Republic recognises the rights of the family as a natural society founded on marriage." What's more, not so long ago, even the Supreme Court of the United States uttered that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition." Also it might be of interest to cite Article 12 of the European Convention on Human Rights which says: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." The UN Universal Declaration of Human Rights (Article 16) basically says the same. We might also mention the International Covenant on Civil and Political Rights (Article 23), complemented and confirmed by the International Covenant on Economic, Social and Cultural Rights (Article 10), which also prescribes for the

In the view of the Romanian constitutional and civil law, the legal concepts of marriage and family are interpreted separately, but are organically and inseparably interconnected, and have a causal relationship.

The Constitution considers marriage a life partnership that can be established solely by two people and, despite the peculiar wording (the grammatically neutral term *spouses* is used) it is definitely a life partnership between man and woman, and protects it as a moral, social and legal asset.

This also implies that the protection of marriage and family as legal institutions is primarily a matter of constitutional law; setting out related principles and objectives is in the scope of constitutional regulations in particular. On the other hand, the procedural rules of marriage, as well as the internal relations of marriage and family are regulated by the civil code or other regulations of family law.

The legal institution of family and marriage, which serves as the basis thereof, are regulated by Article 48 of the Constitution of Romania, which also provides an interpretation from the perspective of constitutional law. It says: "*(1) The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children. (2) The terms for entering into marriage dissolution and nullity of marriage shall be established by law. Religious wedding may be celebrated only after the civil marriage. (3) Children born out of wedlock are equal before the law with those born in wedlock.*"

We can definitely say that in the Romanian legal system the traditional Christian view of marriage and family prevail both on the level of the Constitution, and particularly on the level of civil law, and this corresponds to the views of the overwhelming majority of society.

This is true even considering the fact that the citizen initiative that aimed to amend the constitutional definition of family in paragraph (1) of Article 48 to remove the reference to "spouses", replacing it with a specific reference to one man and one woman, finally failed. Although the Parliament accepted the draft bill, it failed the referendum, as it was invalid and unsuccessful due to a low participation rate.[32]

States Parties to recognize the following: "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." However, this formerly self-evident approach has undoubtedly changed by now; that is, the social role of marriage and family in particular has significantly declined.

32 The Constitutional Court has addressed this issue even in two resolutions. In Resolution 580 of 2016 of the Romanian Constitutional Court (published in issue 857 of 2016 of the Official Gazette) a citizen's initiative was addressed with the purpose of amending paragraph (1) of Article 48. Accordingly, the amended text would go on as follows: "The family is founded on the freely consented marriage of one man and one woman, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children." As the Parliament accepted the draft bill for constitutional amendments in the sense and with the wording of the citizen's initiative, the Constitutional Court also examined whether it is fit for the Constitution, in Resolution 539 of 2018 (published in issue 798 of 2018 of the Official Gazette), and qualified the procedure and the contents of the proposed text constitutional in a sense that it does not interfere with the entrenched clause.

The constitutional provisions define the concept and social function of family, as well as its basis, marriage, the constitutional prerequisite of marriage (free consent), its fundamental principle (full equality of the spouses), the socially and legally relevant purpose of marriage, that is parental care and the right and duty of the parents to ensure the upbringing, education and instruction of their children.

The Constitutional Court of Romania found that on one hand the Constitution uses the concept of family life – a concept that is much more complex and expansive, and allows the expression of the right of self-determination – and the duty of public authorities to respect family life including intimacy and private life.[33]

On the other hand the Constitution uses the concept of family separately as something that is created through the marriage of a man and a woman, and which establishes the constitutional foundations of the relationship between parents and their children.

In Resolution 580 of 2016 the Constitutional Court stated that replacing the original term *"spouses"* with *"one man and one woman"* is basically just a clarification of exercising the fundamental right of marriage; a clear statement that it can be made between two persons of different biological sexes. The Constitutional Court also pointed out that the above interpretation also pertains to the original text, as it was also the intention of the original constituent (in 1991) to use the traditional concept of marriage (the one based on human nature), and to ensure protection for this concept.

Independent from the fact that the paragraph of the Constitution about marriage and family remained unchanged, the above interpretation is also supported by the Civil Code that entered into force much later, in 2011. The provisions of the Civil Code leave no doubt about the traditional views of the lawmaker on this topic and these concepts. Accordingly: "In the context of the current code, spouses mean man and woman united through marriage."[34] And it goes on by stating clearly and categorically that "marriage is the freely consented union between one man and one woman made according to the law. The man and the woman have the right to marry in order to constitute a family/ have a family."[35] And "Marriage is performed between the man and the woman through their personal and free consent."[36]

Regarding the marriage of same-sex couples the provisions of the Civil Code are again, fairly categorical. "Same sex marriage is forbidden. Same sex marriage contracted abroad whether between Romanian citizens or by foreign citizens are not recognized in Romania. Civil partnerships between opposite sex persons or same-sex persons, whether by Romanian citizens or foreign citizens are not recognized in Romania. Legal provisions regarding free movement in the territory of Romania of citizens from the EU member states and the EEA, are valid."[37]

33 This is regulated by Article 26 of the Constitution.
34 Article 258, paragraph (4) of the Civil Code of Romania.
35 Article 259, paragraphs (1) & (2) of the Civil Code of Romania.
36 Article 271 of the Civil Code of Romania.
37 Article 277 of the Civil Code of Romania.

Family, which is created through the marriage of man and woman, is basically considered a moral community by society, regardless of its legal regulation.

According to the most general and most widely accepted legal definition, family is a free consent-based life partnership between a man and a woman, who are connected by an actual relationship, bonding or dependence. In this relationship system, each party has well-defined rights and (except for the children) obligations.

Family is therefore primarily an emotional, moral and (of course) economic community, which constitutes family relations and serves as a basis for mutual support and care obligations.

Therefore, family has a status that lies beyond the realm of law; it is considered some kind of a natural state of humans by society, so much that even legal normative regulation may penetrate this sphere only discreetly, and to a limited extent.

All these provisions reflect a clear moral viewpoint that is based on the Judeo-Christian (in our case, Eastern Christian Orthodox) religious conviction that God created man male and female;[38] it's their natural, biological and also social inclination to form a family, and the legal means to do so is marriage.

Civil partnership is not regulated by the Civil Code, despite the fact that it was recognized by the former Family Code. However, this doesn't interfere with the legal regulation which states that children born out of wedlock are equal before the law with children that are born in wedlock or have been adopted.[39]

To sum it up, we can say that the Constitution of Romania considers family the most basic form, way, and also a defining value of society and as such, human relations and coexistence, therefore it should be protected by law.

Although constitutional legislation contains laws to support families (especially families with children) through social measures, there is still a significant room for expansion in the scope of these measures and regulations.

In the Constitution the protection of family is intentionally separated from the protection of private life and intimacy, as the latter are spheres that need no intervention from the state, but the state is required to ensure protection from any intervention or attempts for intervention by natural persons, legal persons or public authorities.

These are in fact the social, social psychological or sociological processes that have been leading to the atomization of society for decades now, and which are being significantly facilitated by various technological means (as achievements of civilization). In such circumstances it may be understandable (although still not acceptable) if private life and intimacy come into view even for legislation, while marriage, family, having and raising children are becoming less important right in a Christian-rooted civilization in which these used to be defining values.

38 The Old Testament, First Book of Moses 1.27-29: "God created man in the image of himself, in the image of God he created him, male and female he created them. God blessed them, saying to them, 'Be fruitful, multiply, fill the earth and subdue it. Be masters of the fish of the sea, the birds of heaven and all the living creatures that move on earth'."

39 Article 260 of the Civil Code of Romania.

And all this happens in the European Union, even though the intention of the Founding Fathers as religious (mostly Catholic) men was to build the new European order, relations, cooperation and institutions to a foundation of Christian values.

4. Instead of conclusions

Let me cite two ideas (one from a Catholic and one from a Protestant person), as these are more concise and insightful than any of the conclusions I have made. One of them is from the past, while the other is basically from these days.

As a former governor of Connecticut, USA *John Winthrop* said at a people's assembly: "What we need is not the corrupt liberty that reduces man and gives free way to all kinds of whims, respects no authority, takes no order and is totally opposed to right and justice. No. Our liberty shall be true civil and moral liberty that does not destroy but create; that does in fact rely on authority and respects the law; and enables us to confidently channel our affections, thoughts and actions into something that is good, nice, noble and fair."[40]

The other thought is from *Joseph Ratzinger*, a decisive spiritual and moral authority our time. "The two great cultures on the West, Christian faith and secular rationality (also, the two main partners in the essential correlation of mind and faith) are not actually universal, even though each of them has a decisive impact in its own way all over the world, in every culture. (...) It is important for both compounds of Western culture to pay attention to other cultures and create a true correlation with them. It is important to involve them in an attempt of a polyphonous correlation in which they can also open up to take in the essential complementarity of mind and faith, so that the universal process of purification can start. During this process, the essential values and norms that had been recognized or suspected by every human being in some way, will regain their light so that the powerful enlightening force that keeps the world together, can conceive in humankind again."[41]

The moral of both quotes is that law, legal and especially constitutional norms cannot exist and cannot be interpreted without moral and – in most cases – religious (Christian) inherent value. Without that, the coherent force that keeps society together, would decline or even cease, which would lead to the decay of not only society, but Western civilization itself.

40 John Winthrop (1616–1650) as cited by Kuyper, 1923, p. 5.
41 Habermas and Ratzinger, 2007, pp. 47–48.

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ILAN WURMAN[1]

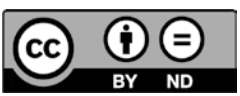
Subsidiarity and Fundamental Rights Protection in the United States

ABSTRACT: *Since the middle of the last century, fundamental rights protection in the United States has largely been the domain of the federal government, and primarily its Supreme Court. Under the Fourteenth Amendment to the United States Constitution, which guarantees "due process of law," the United States Supreme Court has assumed for itself the role of defining fundamental rights even if such rights are not specifically enumerated in any constitutional text and requiring all states to abide by such rights, a concept referred to as "substantive due process." It has also "incorporated" the Bill of Rights in the federal Constitution against the state governments, even though such rights historically only bound the federal government.*

These doctrinal developments were likely mistakes, at least if Americans purport to be bound by the original meaning of the Fourteenth Amendment to their Constitution. "Due process of law" was not a substantive guarantee of unenumerated rights or against unreasonable legislation. In antebellum America, judicial courts did review local or municipal legislation to ensure reasonableness, but not the legislation of the states themselves except in narrow circumstances. Many American scholars believe that the "privileges or immunities" clause of the Fourteenth Amendment, instead of the due process clause, is what was intended to incorporate the Bill of Rights against the states and transfer fundamental rights protections to the federal government. This, too, is likely incorrect, as that clause was likely a guarantee merely of equality, leaving it up to the state governments otherwise to define and regulate the content of civil rights. This account, if correct, suggests that the Fourteenth Amendment, while guaranteeing the fundamental right to equality, otherwise respected the principle of subsidiarity even in the protection of fundamental rights, and provides insights for the ongoing European debate over fundamental rights protection.

KEYWORDS: American constitutional law, federalism, fundamental rights, due process, subsidiarity, equality, judicial review, common values, European Union.

1 Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, Phoenix, Arizona, United States, e-mail: ilan.wurman@asu.edu.



https://doi.org/10.47078/2022.1.241-257

1. Introduction

Today, fundamental rights protection in the United States is primarily the domain of the federal government, and particularly its Supreme Court. The Fourteenth Amendment to the United States Constitution, adopted after the Civil War and the abolition of slavery, provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[2] Under this injunction, the Supreme Court has developed a doctrine known as "substantive due process." This doctrine maintains that certain rights are so fundamental that no state can deprive any person of that right no matter how much "process" it may afford, unless the government has exceptional reasons for doing so. This seems contrary to the text of the clause, which appears to permit deprivations of any right so long as "due process of law" is in fact afforded. Thus, "substantive" due process appears to be a contradiction—in the words of a famous American scholar, it is kind of like "green pastel redness."[3]

In the early twentieth century, federal courts deployed substantive due process doctrine to guarantee economic liberties like contract and property rights against what the courts deemed to be unreasonable legislation. In the most famous (or infamous) of these cases, the Supreme Court struck down a democratically enacted state law that limited the number of hours bakers could work in a day.[4] "Economic" substantive due process fell out of fashion in the progressive and New Deal eras.[5] Starting in earnest in the second half of the twentieth century, however, courts began to enforce a "social" version of substantive due process, by which courts guaranteed certain social rights against interfering state legislation, for example the right to abortion or same-sex marriage.[6] Additionally, although the federal Bill of Rights historically only restricted the legislation of the federal government,[7] through substantive due process the Supreme Court has "incorporated" the Bill of Rights against the states, which are now bound by essentially all of those rights as they are interpreted by the Supreme Court.[8] The idea is that the due process clause protects against governmental interference the most fundamental of individual rights, and there is no better indication that a right is fundamental than its enumeration in the federal Bill of Rights.

As a result of these doctrinal developments, fundamental rights discourse in the United States takes place at the federal level, and fundamental rights are defined

2 U.S. Const., amend XIV, § 1, cl. 3.
3 Ely, 1980.
4 Lochner v. New York, 198 U.S. 45 (1905).
5 West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
6 Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).
7 Barron v. Baltimore, 32 U.S. 243 (1833).
8 Gitlow v. New York, 268 U.S. 652 (1925) (assuming the First Amendment bound the states); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment); McDonald v. City of Chicago, 561 U.S. 742 (2010) (incorporating the Second Amendment).

and protected at the federal level. Yet, as I shall argue, these doctrinal developments were both likely mistakes—not necessarily as a matter of policy, but as a matter of the Fourteenth Amendment's original meaning.[9] In antebellum (pre-Civil War) America, due process of law did not guarantee any rights against state deprivation or protect against unreasonable legislation; it merely required that there be established law that was violated before any person could be deprived of life, liberty, or property, and that that person's violation of such established law was adjudicated according to judicial processes. Judicial courts in the states did often police *municipal* regulations for reasonableness on a theory that the state itself could not have intended to subdelegate power to municipalities to do unreasonable things. But what was wise policy at the state level was within the legislative wisdom (absent an express constitutional prohibition).

Many American scholars agree with this account of due process but argue that the Fourteenth Amendment's privileges or immunities clause was originally intended to do the work of substantive due process. That clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[10] Some scholars argue that this clause was intended to incorporate the Bill of Rights against the states; after all, the rights therein are the quintessential privileges of U.S. citizens.[11] Others argue that the clause incorporates the Bill of Rights, and also guarantees unenumerated, fundamental rights, similar to substantive due process involving economic and social legislation.[12] Although these views are textually plausible, they are also likely incorrect. The clause was most likely intended to be a guarantee of equality with respect to civil rights under state law. In other words, U.S. citizens have a variety of common privileges and immunities—to acquire property, to enter into contracts, to speak freely—but each state can still define and regulate these rights differently. The states must simply treat their own citizens equally, without arbitrary discrimination.

The implication is that the Fourteenth Amendment is not the libertarian, pro-national powers amendment it is sometimes thought to be, but one far more consistent with antebellum American views of federalism and subsidiarity, state power, and civil rights. The upshot for the ongoing European debates over "common values" and fundamental rights protection is that it is possible to conceive of a legal system in which certain rights or values are "common" to multiple jurisdictions, but each jurisdiction still defines and regulates those rights and values in different ways.

9 Originalism, which is likely the interpretive method adopted by a majority of the U.S. Supreme Court today, maintains that the Constitution should be interpreted with its original meaning. This interpretive theory is often contrasted with living or common law constitutionalism, which holds that the Constitution is a living, breathing document and that judges can update the meaning and content of the Constitution over time. *See* Wurman, 2017, pp. 11–21, 25–44, 84–96; Whittington, 2010.

10 U.S. Const. amend. XIV, § 1, cl. 2.

11 Amar, 1998, pp. 163–180; Curtis, 1986, pp. 22–25; Lash, 2014, pp. 65 and 85–108.

12 Barnett and Bernick, 2021, pp. 143-146, 168–169 and 200.

2. Due process as a procedural guarantee

The terms of the due process clause suggest that its guarantee is indeed about process. Surveying Anglo-American history from Magna Charta to antebellum American court cases and treatises, it appears that due process of law historically had two requirements.[13] First, there had to be established law before any person could be deprived of life, liberty, or property. In other words, the government could not take away one's life, liberty, or property, if that individual had not violated any *known* law.

In the 1628 Petition of Right, the House of Commons admonished that King Charles I had directed imprisonments by his mere "Command" and "against the Laws and Free Customs of the Realm."[14] Referring to the trial of five prominent nobles, the petition complained that the King had violated various statutes requiring "due process of law" because the nobles had not been "charged with any Thing to which they might make Answer according to the Law."[15] In a celebrated American case in 1819, Daniel Webster argued that "the law of the land," which was synonymous with due process,[16] meant "that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."[17] Thus a legislative "act" that directly deprived someone of property or directed that someone surrender his liberty would be a violation of due process of law because someone could be deprived of rights only according to already existing law. Legislative acts masquerading as judicial decrees were frequently invalidated.[18]

The second requirement of due process of law was intuitive: an individual's violation of some existing law had to be adjudicated according to processes known to the law. As Senator Webster also said, due process of law means a law "which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[19] The legal theorist William Blackstone, in his *Commentaries on the Laws of England*, wrote that courts "must proceed according to the old established forms of the common law" and deprivations of liberty or property "ought to be tried and determined in the ordinary courts of justice, and by course of law."[20] What is striking from the early evidence is that few if any courts struck down state legislation for being unreasonable or contrary to some fundamental rights not protected by express constitutional provisions.[21]

13 Wurman, 2020, pp. 15–35; Chapman and McConnell, 2012.

14 The full text of the Petition may be found at: http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/transcripts/petition_right.htm.

15 Ibid.

16 Chapman and McConnell, 2012; Coke, 1642.

17 Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

18 Wurman, 2020, pp. 31–33.

19 Dartmouth College, supra at 581.

20 See: Blackstone, 1765.

21 To be sure, some legal thinkers in this period argued that a law inconsistent with natural right was no law at all. *See, e.g.*, Germain, 1761. ("Nor it is not to be understood of a law made by man commanding or prohibiting any thing to be done that is against the law of reason, or the law of

Several American scholars have argued, however, that states were limited to reasonable exercises of the "police power" to regulate for the health, safety, welfare, and morals of the people, and that courts could enforce such limits.[22] I have shown in prior scholarship,[23] however, that although courts reviewed *municipal* legislation for reasonableness, they did not review the legislation of the states themselves. The courts did review municipal legislation because municipal corporations only exercised power specifically delegated by the state, and courts presumed that the legislature did not intend to delegate power to act unreasonably.[24] Additionally, the courts subjected municipal corporations to the common law of corporations and, at the time, courts could void corporate acts if they were unreasonable, contrary to the general good of the corporation, or in restraint of trade.[25] Neither rationale applied, nor did courts apply them, to acts of the state legislatures themselves.[26] At most, courts might use "substantive due process" as a kind of rule of statutory construction: they would *presume* that the legislature did not intend to violate natural rights or the fundamental principles of free government.[27] But if the legislature did expressly act unreasonably, there was nothing a court could do to stop it, unless the legislature violated some express constitutional prohibition.

State legislatures were, however, limited to reasonable exercises of the police powers in two narrow circumstances where state power might come into potential collision with federal constitutional requirements. For example, on the assumption that the federal commerce power was exclusive, federal courts sometimes invalidated state legislative acts affecting interstate or foreign commerce if they were not genuinely for a police-power purpose. If the legislation was not for a legitimate police-power

God. For if any law made by him, bind any person to any thing that is against the said laws, it is no law, but a corruption, and manifest error."). But this was a minority view. By Blackstone's time, parliamentary supremacy was the rule. See: Helmholz, 2009, p. 328. As Blackstone wrote, "[I]f by any means a misgovernment should any way fall upon it [Parliament], the subjects of this kingdom are left without all manner of remedy." See: Blackstone, 1765, p. 157.

22 Gillman, 1993; Mayer, 2009a, p. 284; Mayer, 2009b, p. 571; Bernstein, 2011; Barnett and Bernick, 2019, p. 1638.

23 Wurman, 2020b.

24 Wurman, 2020b, pp. 826–829.

25 Wurman, 2020b, pp. 829–831.

26 For example, a prominent nineteenth-century treatise on municipal corporations had an entire subsection on "Legislative Authority to Adopt Unreasonable Ordinances," and specifically concluded that "what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable." See: Dillon, 1872.

27 One state supreme court explained that "we cannot presume that the legislature intended to ratify an unreasonable and oppressive contract, but only such as was in accordance with the purposes for which the charter had been granted, and not those which were opposed to the design of creating such bodies." City of Chicago v. Rumpff, 45 Ill. 90, 98-99 (1867). And in the most prominent constitutional law treatise of the era, the author explained that it "must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government," and that the state is "presumed" to bestow no favors, and therefore "discriminations against persons or classes . . . as a rule of construction are always to be leaned against as probably not contemplated or designed." See: Cooley, 1868.

purpose, it was not considered a regulation of police, but rather a regulation of interstate commerce prohibited to the states.[28] Similarly, the Constitution prohibited states from impairing contractual obligations,[29] but courts often held that states could enact generally applicable laws that *incidentally* altered ongoing contractual obligations so long as the state had a genuine police-power purpose.[30] These limits on state power did not, however, apply to acts of state legislatures regulating solely internal commerce or local matters or which affected no existing contracts.

I have argued elsewhere that it appears that the Supreme Court, after the adoption of the Fourteenth Amendment, conflated these doctrines to fashion a general police-power limitation on the states. In a series of cases in the 1870s and 1880s, the Supreme Court assumed that the individual states were limited to reasonable exercises of the police power and that courts could, in theory, adjudicate such questions.[31] In so holding, the Court cited to municipal corporations cases, contracts clause cases, and commerce cases interchangeably, never recognizing that these doctrines did not imply that courts could *generally* review state legislation for reasonableness.[32]

In sum, the early economic version of substantive due process, which culminated in that case striking down a state law limiting the number of hours bakers could work in a day, is not supported by the text of the due process clause of the Fourteenth Amendment. Neither is the modern doctrine, in its social legislation and incorporation variations, supportable under that clause.

3. Privileges and immunities of U.S. citizens

Although I have not taken a survey, it is my impression that most originalist scholars today agree that substantive due process is inconsistent with the text of the U.S. Constitution. The general consensus appears to be that, rather, the Fourteenth Amendment's privileges or immunities clause, which provides that no state shall "abridge the privileges or immunities of citizens of the United States," was intended, at a minimum, to incorporate the Bill of Rights against the states.[33] Some more libertarian scholars also argue that the clause was intended to guarantee a fundamental floor of civil rights such as contract and property rights, very much as in the New York baker case.[34] In other words, many accept that substantive due process is likely a judicial invention, but argue that the work of substantive due process would have been accomplished anyway under

28 Wurman, 2020b, pp. 837–845.
29 U.S. Const. art. I, § 10.
30 Wurman, 2020b, pp. 845–847.
31 Wurman, 2020b, pp. 865–869.
32 Wurman, 2020b.
33 *See* sources cited in note 10.
34 Lochner v. New York, 198 U.S. 45 (1905). For the most recent and prominent example of scholars making this argument, see Barnett and Bernick, 2021.

a proper understanding of the privileges or immunities clause if the Supreme Court had not eviscerated that clause in the infamous *Slaughter-House Cases*.[35]

At a surface level, these accounts have some plausibility. The Bill of Rights surely contains privileges and immunities of American citizenship. And it is plausible to read the word "abridge" and conclude that, under the Fourteenth Amendment, the states cannot violate those rights. This superficial plausibility dissolves, however, upon a moment's reflection: citizens of the United States have privileges and immunities by virtue of the federal Constitution, to be sure, but they *also* have numerous privileges and immunities by virtue of federal statute law, by state constitutions, by state statute law, and by the common law. If Americans have privileges and immunities by all those sources of law, it does not make sense to *limit* the phrase "privileges or immunities of citizens of the United States" to federally enumerated constitutional rights.

In my prior work,[36] I described an understanding of the privileges or immunities clause that is much more consistent with the historical evidence: the clause guarantees equality with respect to civil rights under state law. If I am right about this, then it would mean that New York can impose whatever safety regulations that it thinks is reasonable upon bakers. It would mean that California can ban handguns. And it would mean that Texas need not require the suppression of evidence when police conduct an unlawful search. It would mean that a state can experiment with rights, so long as it does not arbitrarily discriminate against some of its citizens. This reading would keep rights definition and protection largely at the state level, with the federal government ensuring only that a state treat its citizens equally.

The argument for such a reading goes as follows. The original Constitution contained a clause in Article IV, Section Two, which provided that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."[37] This privileges *and* immunities clause (not to be confused with the clause in the Fourteenth Amendment) required that State A give to a citizen of State B, when that citizen was travelling through or residing in State A, the same civil rights—the same privileges and immunities—that State A accorded to its own citizens. In other words, the states of the Union were not to treat citizens of other states as aliens or foreigners. The clause "was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities

35 In those cases, the Supreme Court held that the privileges or immunities clause guaranteed only federal rights like the right of interstate travel or navigation, or the right to petition Congress for a redress of grievances. In so doing, the Supreme Court rendered what was the crown jewel of the Fourteenth Amendment into a clause that barely did any work whatsoever. 83 U.S. (16 Wall.) 36 (1872). If the Supreme Court had held that those rights include those found in the Bill of Rights, which now applied to the states, at least the clause would have accomplished something. But the Court held in two subsequent cases that the Bill of Rights bound only the national government. United States v. Cruikshank, 92 U.S. 542 (1875); The Civil Rights Cases, 109 U.S. 3 (1883).

36 Wurman, 2020a.

37 U.S. Const. art. IV, § 2.

(whatever they might be) accorded in each to its own citizens."[38] Hence the clause was often called the "comity clause."

Importantly, the clause did not require a state to give *all* rights to citizens of other states. In the words of a famous case from 1825, the clause extended only to "fundamental" rights, that is, rights "which belong, of right, to the citizens of all free governments."[39] It did not, however, require a state to give the same *political* rights (to vote, to hold office, to sit on juries), or the same *public privileges* (such as welfare benefits) to citizens of other states. The idea was that civil rights, which are just natural rights as modified by the rules of civil society, are fundamental to citizens everywhere, and should not be denied to any citizen. Political rights and public privileges were not fundamental because they were not natural rights; they depended on the existence of political society. It is also important to note that civil rights varied from state to state; each regulated contracts, property, and gun rights (to take a few examples) a bit differently. But whatever privileges and immunities a state accorded to its own citizens, it had also to accord to citizens of other states when travelling or residing in the state under the same rules and regulations.

In any event, the question in the antebellum period was what to do with the free blacks who were citizens of several Northern states. When travelling to other states, their citizenship in other states would seem to entitle them to the privileges and immunities of *citizens* of those other states, even if free blacks were not citizens of those states. Many western states, however, sought to exclude free blacks from travelling to their states at all, and in a series of statutes several Southern states provided that free black seamen from Northern states would be imprisoned in Southern ports until their ships left port. All of these statutes and exclusions would appear to violate the comity clause. The Southern states argued that free blacks, however, although citizens of some Northern states, were not citizens *of the United States* such that they were entitled to the benefit of any clause in the federal Constitution.[40] The Supreme Court cemented this reasoning in the notorious case of *Dred Scott v. Sandford*, in which Chief Justice Taney held that any person of African descent could never be a citizen of the United States.[41] The Fourteenth Amendment resolves this constitutional problem with its first sentence, declaring that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[42] Thus, all black persons were now American citizens, entitled to the privileges and immunities of citizens in whatever state they were travelling to or residing.

That did not, however, solve the problem of discrimination against black Americans *within* particular states. After abolition, the southern states adopted a series of "Black Codes" that systematically denied civil rights to their black residents. The newly

38 Lemmon v. People, 20 N.Y. 562, 599–600, 626-27 (1860) (Wright, J., concurring).
39 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825).
40 These debates are described in Wurman, 2020a, pp. 72–83.
41 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–07 (1857).
42 U.S. Const. amend. XIV, § 1, cl. 1.

freed people, for instance, could not carry arms, could not assemble, could not own real property, and could not testify in many states; they also had to enter into certain kinds of agricultural contracts by a particular day in January each year lest they be deemed vagrants and subjected to forced labor or imprisonment.[43] These statutes did not violate the comity clause because that clause required only that the state not discriminate against citizens from *other* states. Hence the Thirty-Ninth Congress enacted the Civil Rights Act of 1866, which declared:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; *and such citizens*, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . *shall have the same right*, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[44]

It is important to observe what this statute did *not* do. It did not guarantee any fundamental rights at all. It presumed the civil rights would still be defined by state law. It merely required that those civil rights be given *equally* to all citizens. It also declared all persons to be "citizens of the United States" and provided that *such* citizens—that is, these citizens *of the United States*—were entitled to equality in the privileges and immunities defined by state law.

There was no obvious federal power to enact the Civil Rights Act of 1866, and leading members of the Thirty-Ninth Congress believed that an amendment was necessary both to supply a constitutional basis for the Act, and to enshrine the principles of the Act in the fundamental law to ensure future Democratic Congresses would not roll back the progress made by the Republicans during Reconstruction.[45] The obvious

43 These Black Codes are described in Wurman, 2020a, pp. 91–92.

44 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphases added).

45 See Wurman, 2020a, pp. 95–97. For example, as the then-representative and future president James Garfield argued, the Civil Rights Act "will cease to be a part of the law whenever the sad moment arrives when" the Democrats come to power, and therefore it was necessary "to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution." Cong. Globe, 39th Cong., 1st sess. 2462 (1866) (Garfield). For other statements to this effect, see ibid. at 2459 (Stevens) (noting that the Fourteenth Amendment was necessary because the Civil Rights Act "is repealable by a majority" and "the first time that the South with their copperhead allies obtain the command of Congress it will be repealed"); ibid. at 2465 (Thayer) (Fourteenth Amendment necessary so "the principle of the civil rights bill" will be "forever incorporated in the Constitution"); ibid. at 2498 (Broomall) (similar).

clause that does this work is the privileges or immunities clause. Just as with the Civil Rights Act itself, the first sentence of the Fourteenth Amendment declares all persons born in the United States to be citizens *of the United States*. Then the privileges or immunities clause provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The text of the clause does the necessary work because the word "abridge" was often used when one class of individuals received fewer rights than another.[46] And the American scholar John Harrison has observed that we can speak meaningfully of "abridging" a right without having to define the content of that right. Section Two of the Fourteenth Amendment provides that a state that denies "or in any way abridge[s]" the right of a male citizen over 21 years of age to vote will have its representation in Congress proportionally diminished. Yet the states themselves still determined the content of the right to vote. A state could still decide whether to have elections every two years, or three years, or four years. Moving from a two-year system to a four-year system of elections would not "abridge" the right to vote. The right to vote is "abridged" only when a lesser set of voting rights is given to any male citizen over 21 years of age.[47]

Additionally, as noted, the term privileges or immunities of "citizens of the United States" applies to civil rights under state law because, as the Civil Rights Act itself acknowledged, such civil rights are privileges of American citizens just as much as are those rights in the federal Bill of Rights.

If that were not enough on its own, neither of the other two provisions of the Fourteenth Amendment is sufficient to constitutionalize the Civil Rights Act. As noted in the previous section, due process of law does not guarantee any rights at all, equal or otherwise. It merely requires that whatever rights one happens to have by law, the state will not take those rights away without established law and judicial processes. The obvious candidate is the only remaining clause of the Fourteenth Amendment's first section that has yet to be discussed: the equal protection clause, which provides that "No State shall . . . deny to any persons within its jurisdiction the equal protection of the laws."[48] This is in fact the clause that does most of the equality work under modern Fourteenth Amendment doctrine. It cannot supply a constitutional basis for the Civil Rights Act, however, because, like due process, it does not require equal civil rights. It merely requires equal *protection of the laws*, which was a narrower concept related to due process of law. The protection of the laws was the protection the government had to afford individuals against *private interference* with the exercise and enjoyment of their rights, whatever those rights happened to be.[49] The principal requirements were protection against private violence and judicial remedies when private rights were

46 Green, 2015, pp. 30, 32, 45 and 84–86.
47 Harrison, 1992, pp. 1420–1422.
48 U.S. Const. amend XIV, § 1, cl. 4.
49 As I argue in Wurman, 2020a, pp. 36–47.

invaded.[50] The quintessential violation of the protection of the laws was mob rule and lynchings, which were endemic against black Americans and abolitionists both before and after the Civil War.[51]

It is certainly possible to read the privileges or immunities clause as a fundamental rights provision incorporating the Bill of Rights, but there is little evidence in the historical record for that view. For example, against all the evidence just described, the only unequivocal evidence for the incorporation of the Bill of Rights against the states is a statement by Representative John Bingham, the principal drafter of the Fourteenth Amendment's first section, from 1871—five years after he drafted the amendment.[52] Senator Jacob Howard did mention the first eight amendments as being among the privileges and immunities of U.S. citizens when he introduced the amendment in the Senate, although it is not entirely clear what was his purpose in doing so given that he also mentioned the traditional civil rights under state law including contract and property rights.[53] If the clause incorporated the Bill of Rights against the states, then the word "abridge" would be a fundamental rights provision with respect to the Bill of Rights, but an equality provision with respect to state civil rights—an odd result.

It could be that the clause is a fundamental rights provision with respect to *both* the Bill of Rights and other civil rights. That is, it could be that the clause was intended to give Congress and the federal courts a power to define a minimum content of contract, property, and other civil rights that were traditionally defined by state law. Presumably that would mean the states could discriminate against citizens with respect to any rights or privileges above the floor (wherever that is) of fundamental rights. But there is essentially no evidence for this possibility, either.[54] It would have been an entirely radical proposition to say that the federal government could define such rights. If it could, what limits were there to federal power? The enumeration of power in Article I, Section 8 of the Constitution would have become obsolete. And no statement in the historical record until 1871—again, five years after drafting—suggests that anyone thought either before or

50 For example, William Blackstone explained that the "remedial part of the law," or the "method of recovering and asserting those rights, when wrongfully withheld or invaded," is "what we mean properly, when we speak of the protection of the law." Blackstone, supra at 55-56. And Chief Justice John Marshall wrote, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

51 Wurman, 2020a, pp. 85–91.

52 Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871) (statement of Rep. Bingham) (explaining that he had intended that the "first eight amendments" should be incorporated by the privileges or immunities clause). As I have explained, although Bingham referenced enforcing the bill of rights against the states in 1866, the bill of rights was not a term of art referring to the first eight amendment to the United States Constitution until the twentieth century, and Bingham himself defined the bill of rights differently: his definition included only due process of law and the comity clause. Wurman, 2020a, p. 111.

53 Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866) (statement of Sen. Howard).

54 I examine the evidence for a fundamental rights reading in a forthcoming work. Ilan Wurman (2021) *Making Sense of Nineteenth Century Fundamental Rights Discourse* (paper on file with author) (reviewing Barnett and Bernick, 2021).

after the Civil War that the problem of discrimination against blacks should be resolved by transferring the power to define fundamental rights to the federal government. The solution was always to require the states to treat black citizens *equally*—not to define contract and property rights at the national level. Not a single statement denied that it was up to the states to define and regulate the content of civil rights.[55]

If the United States courts were to return to the original meaning of the Fourteenth Amendment, the implications for modern doctrine would be immense. Many modern equality cases would of course transfer to the privileges or immunities clause, where they belong. (In fact, *Brown v. Board of Education*, the famous American case requiring the desegregation of public schools, can be supported by the original meaning of the Fourteenth Amendment only if I am correct in my conclusions.) Substantive due process cases involving economic or social legislation would have to be overturned, unless those cases could be reconceptualized as equality cases under the privileges or immunities clause. And the Bill of Rights would not be incorporated against the states.

This may sound like a shocking result, but it is not. Most states already guarantee the same rights in their own state constitutions as the federal Bill of Rights guarantees in the federal Constitution. (In fact, another reason to doubt the incorporation thesis is that all of the state constitutions as of 1866 guaranteed most of the same rights.) Under the view I advance, states would be free to experiment with their own state constitutions and with their own civil rights. Some states could deny free speech rights to "corporations" or could prohibit handguns. Others could experiment with criminal procedure and do away with *Miranda* warnings,[56] the exclusionary rule,[57] and perhaps even the requirement that the government must pay for an indigent defendant's lawyer.[58] (Of course, many of these cases reflect good policy, and I expect most states would require them as a matter of state legislation.) The states would serve as laboratories of democracy when it comes to fundamental rights protection, with the only requirement being that they not arbitrarily discriminate against classes of their own citizens.

4. Insights for European discourse

The insights for European fundamental rights discourse should be evident, particularly for central European countries. There has been movement in recent years to allow European courts to define a set of rights and values that are "common" to all member states of the European Union, and to enforce those common values directly in individual rights cases, or more generally against those states that are perceived as "backsliding"

55 Ibid.
56 Miranda v. Arizona, 384 U.S. 436 (1966).
57 Mapp v. Ohio, 367 U.S. 643 (1961).
58 Gideon v. Wainwright, 372 U.S. 335 (1963). It is possible this requirement is compelled by the procedural understanding of due process, however.

on democracy or rule of law.[59] These efforts are rooted in Article 2 of the Treaty on European Union (TEU), which provides that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights," and that "[t]hese values are common to the Member States." Additionally, Article 51(1) of the Charter of Fundamental Rights (CFR) independently limits member states' actions "when they are implementing Union law." As a general matter, Article 2 TEU is understood to be nonjusticiable, along the lines of the American "political question" doctrine. And Article 51(1) CFR applies very much like the Bill of Rights used to apply in the United States when it only bound the federal government.[60]

Some European scholars have advocated untethering fundamental rights from the implementation of EU law and rooting them instead in EU citizenship itself.[61] In a case called *Ruiz Zambrano*, the Court of Justice of the European Union (CJEU) held that EU citizenship "precludes national measures which have the effect of depriving citizens of the Union of . . . the substance of the rights conferred by virtue of their status as citizens of the Union"[62] regardless of whether any implementation of EU law is involved. It appears, however, that this decision was widely criticized and the European courts have retreated from this approach because it undermines the federal structure of the Union.[63] Additionally, some liberals worry that tethering fundamental rights to citizenship would be "exclusionary" of those who are not EU citizens, itself an idea that "could oppose the EU's very own values."[64]

The parallel to the American experience is the incorporation of the Bill of Rights against the states. These rights, although historically binding only on the federal government, through the doctrine of substantive due process now bind the state governments, too. As a result, the states are bound by the same fundamental guarantees. The central problem, however, is not only that this shift was likely a judicial invention, but additionally that centralizing fundamental rights protection means that all the states are bound by erroneous interpretations and applications of those rights (or even correct but controversial interpretations). Does the freedom of speech require that hate speech be permitted? That corporations enjoy speech rights? What gun regulations are permissible under the Second Amendment? Does the Fourth Amendment require the exclusion of unlawfully obtained evidence? And so on. It is hardly clear that reducing the diversity in fundamental rights protection and adjudication in the United States has been an overall good.

Another insight from the American experience is the distinction between persons and citizens. Recall that the privileges or immunities clause protects *citizens*. That is, no state can discriminate in the provision of civil rights when it comes to their

59 I am not a scholar of European Union law, and the following discussion relies heavily on Spieker (2019), which I found very helpful in understanding the ongoing European debates.
60 Barron v. Baltimore, 32 U.S. 243 (1833).
61 Spieker, 2019, pp. 1189–1191.
62 ECJ, Case C-34/09, Ruiz Zambrano, ECLI:EU:C:2011:124, Judgment of 8 Mar. 2011, para. 42.
63 Spieker, 2019, pp. 1190–1191.
64 Spieker, 2019, p. 1191.

citizens. Aliens, in contrast, were historically denied certain rights, in particular real property rights. All persons, citizens or not, however, are entitled to the guarantees of due process and equal protection of the laws. Those clauses specifically apply to "persons" and not merely to citizens. Thus, it is up to the state to decide what rights non-citizens should have, but *all* such persons must have the benefit of due process and the protection of the laws.

An even more radical proposal in the European debate has been to make the "common values" of Article 2 TEU judicially enforceable. This would go far beyond fundamental rights adjudication to matters involving separation of powers, judicial independence, and the like.[65] The idea here is that although political diversity should be preserved, Article 2 can be seen as "establishing . . . a regime of 'red lines,'" which would determine negatively what could *not* be done (without establishing what must be done), and that would only apply in "exceptional" situations.[66] Article 2 cannot require any "detailed obligations upon the Member States, because this would ignore the actually existing constitutional pluralism in the Union,"[67] but it could impose a minimal, fundamental floor.

The parallel to the American experience is to those scholars who argue that the privileges or immunities clause creates a fundamental floor of civil rights, including property and contract rights. (To be sure, under this reading the privileges or immunities clause would still be focused on fundamental rights as opposed to the broader target of this European proposal, which would reach separation of powers and rule of law more generally.) What I want to point out is that in antebellum American discourse, the various civil rights protected by the comity clause *were* understood to be "common" to citizens in the several states, *even though* each state regulated and defined their content a bit differently.

In the most famous antebellum case (mentioned above) interpreting the comity clause, Justice Bushrod Washington—nephew of President George Washington and the inheritor of his papers and estate—held that the comity clause did not require that a state give out-of-state citizens the same access to its natural resources that it gave its own citizens. Justice Washington explained that the clause only applies to "fundamental" rights, that is, rights "which belong, of right, to the citizens of all free governments."[68] As noted, such fundamental rights were described by other antebellum courts as *civil rights*—that is, natural rights as modified by the rules of civil society.[69] The important point is these rights belonged to citizens of all free governments and to the citizens of all the states, but that did not mean that their definition and regulation were uniform. Each right was "subject . . . to such restraints as the government may justly prescribe for the general good of the whole."[70] Each government protected civil rights but in different

65 Spieker, 2019, pp. 1198–1213.
66 Spieker, 2019, p. 1211.
67 Spieker, 2019, p. 1210.
68 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825).
69 As explained, for example, by Bouvier's antebellum legal dictionary. See: Bouvier, 1860, p. 484.
70 Corfield, supra at 552.

ways. Indeed, each state had its own bill of rights, which largely protected similar rights as the federal Bill of Rights, but there were certainly variations.[71]

As briefly mentioned, "public privileges" like welfare or access to natural resources were not covered by the comity clause. In 1876, the United States Supreme Court explained that "the reason" for this exclusion "is obvious": because access to natural resources "is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of [a particular state] on account of the peculiar circumstances in which they are placed."[72] This once again confirmed that fundamental rights could be common to "citizens in the several states," but the precise regulation of each was still left entirely up to the state. A further lesson for the European context is that public privileges—like welfare benefits, immigration benefits and status, and public education—are not "fundamental," at least in the sense that such public privileges do not belong to the citizens of all free governments. A state may legitimately refuse to create such rights in the first place,[73] or to reserve such rights to its own citizens or to foreign persons of its choosing.

To conclude, perhaps the lesson for European discourse is that the American experiment in nationalizing fundamental rights adjudication was contingent, maybe a mistake under its founding document, and possibly not good as a matter of policy. At least in the American context, the national government's fundamental concern was with *equality* given the history of discrimination and subordination in the several states. Whatever path the European Union chooses to pursue will of course be up to its members. But if the experience of the United States is to be assessed, it should be assessed in its full historical context.

71 Calabresi and Agudo, 2008, p. 72.

72 McReady v. Virginia, 94 U.S. 391, 396 (1876)

73 Perhaps a state could never refuse to protect natural rights by denying such fundamental rights altogether, but if this is the fundamental rights work of the privileges or immunities clause then it hardly does any work at all. I suppose such a circumstance might arise if a state totally abolished private property, or prohibited anyone from entering into contracts.

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REVIEWS

BOGLÁRKA BÓLYA[1], ÁKOS BENCE GÁT[2], DOROTTYA COLLET-RETKES[3], MÁRTA BENYUSZ[4]

Dialogue on the Future of Europe: Is Enlargement a Key to the Future?

ABSTRACT: *This article concludes the presentations made at and the main lessons drawn from the international conference on Western Balkan enlargement held on December 6, 2021, within the framework of the pan-European dialogue on the future of Europe. The event was the fourth high-level international conference on the Future of Europe co-organized by the Ferenc Mádl Institute and the Ministry of Justice, and was attended by representatives of the European Union (EU), Hungarian, Serbian, and Slovenian politicians; and representatives from academia. The article briefly presents the EU context and the background of the enlargement in the Western Balkans. The presentations at the conference—almost without exception—highlighted the issues of credibility, political, economic, security, and strategic interests of the future of Europe in thinking about the future of the enlargement. Even though there are some slight differences regarding their approach to specific issues related to the advancement of European integration of the Western Balkans, every participant stressed the importance and urgency of their accession. The Hungarian government's stance consisting of a firm support to the EU accession of the Western Balkans based and justified on their merits and the accomplishment of the required criteria, especially with regard to Serbia, was reaffirmed. In view of all this, the organization of the international conference by the Ferenc Mádl Institute of Comparative Law and the Ministry of Justice can be considered very timely and proactive.*

1 Deputy Secretary of State, Deputy State Secretariat for EU Relations, Ministry of Justice, Hungary, boglarka.bolya@im.gov.hu, ORCID: 0000–0002-8766–8059.

2 Head of Department, Department of Institutional and Human Policy, Deputy State Secretariat for EU Relations, Ministry of Justice, Hungary, akos.bence.gat@im.gov.hu, ORCID: 0000–0002-0871–9277.

3 Senior Government Counselor, Department for Institutional Relations with the European Union and Personnel Policy, State Secretariat for European Union Affairs, Ministry of Justice, Hungary, dorottya.collet-retkes@im.gov.hu.

4 Head of Department, Department of International and EU Law, Ferenc Mádl Institute of Comparative Law, Budapest, Hungary, marta.benyusz@mfi.gov.hu [corresponding author].

https://doi.org/10.47078/2022.1.261-271

■ **KEYWORDS:** enlargement, Western Balkans, conference on the future of Europe, European Commission, European strategic interest.

Following the success of the three previous high-level international conferences, the Ministry of Justice and the Mádl Ferenc Institute for Comparative Law organized a fourth international conference[5] in the framework of the Conference on the Future of Europe[6] on December 6, 2021.[7] The event, titled "Dialogue on the Future of Europe: Is Enlargement a Key to the Future?," aimed to facilitate discussions among the Member States and Western-Balkan countries on the future of Europe and the complexities of the enlargement.

It outlined the different interests and aspects of enlargement as seen by high-level politicians, the European Commissioner, acknowledged members of academia, and key stakeholders. The views expressed at the conference reaffirmed the need for common thinking on the future of a geographically expanded Europe, which is essential both to reinforce and preserve the credibility of the European Union (EU).

Status quo—The Western Balkans on their way to the EU

After a decade of enlargement fatigue,[8] in his 2017 State of the Union address,[9] former President of the European Commission *Jean-Claude Juncker* reaffirmed the European future of the Western Balkan countries. The speech was followed by the release of a key document[10] by the European Commission on February 6, 2018. The document outlined that the Western Balkans are part of Europe, and that the people of the EU and the region have a common heritage and history, and a future defined by shared opportunities and challenges. The EU's enlargement policy must be part and parcel of the larger strategy to strengthen the Union by 2025. It is an investment in the EU's security, economic growth, and influence; and in its ability to protect its citizens. The document introduced goals

5 For the program and the synopsis of the conference, see: http://mfi.gov.hu/en/esemenyek/dialogue-on-the-future-of-europe-is-enlargement-a-key-to-the-future/ [Accessed: 18 January 2022].

6 On January 22, 2020, the European Commission published its concept for a conference on the future of Europe, see: Shaping the Conference on the Future of Europe, COM (2020) 27 final.

7 The videos of the conference can be accessed here http://mfi.gov.hu/en/esemenyek/dialogue-on-the-future-of-europe-is-enlargement-a-key-to-the-future/ [Accessed: 18 January 2022].

8 Jana Juzová (April 2018) Enlargement to the Western Balkans: Finally ready to Commit? *Europeum Monitor, Eastern Monitor,* see: https://www.europeum.org/data/articles/vit-the-western-balkans-on-their-way-to-the-eu.pdf [Accessed: 18 January 2022].

9 See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 [Accessed: 18 January 2022]

10 A credible enlargement perspective for and enhanced EU engagement with the Western Balkans COM(2018) 65 final, see: https://ec.europa.eu/info/sites/default/files/communication-credible-enlargement-perspective-western-balkans_en.pdf [Accessed: 18 January 2022].

to achieve for each of the countries by 2025 and included several initiatives providing support to the Western Balkan countries.

On February 5, 2020, the Commission published another key document.[11] This Communication set out the Commission's concrete proposals for strengthening the whole accession process. Their overall aim seemed to be to enhance credibility and trust on both sides and yield better results on the ground.

On May 6, 2020, President of the European Commission *Ursula von der Leyen* issued a statement[12] at the joint press conference with *President Michel* and *Andrej Plenković*, Prime Minister of Croatia, following the EU-Western Balkans Zagreb Summit, where she said that "the Western Balkans belong in the EU."

The most recent document issued by the Commission was the *2021 Communication on EU Enlargement Policy*,[13] which took stock of developments since the last *Enlargement Package*, adopted in October 2020,[14] and reinforced in writing the European perspective of the Western Balkans.

The reality of the Western Balkan enlargement is unquestionable in the context of the debate on the future of Europe. Moreover, as Hungary has always been and continues to be a great supporter of Western Balkan enlargement, Budapest served as a great venue to keep this important topic on the table.

Presentation of the results of the conference "Dialogue on the future of Europe: Is enlargement a key to the future?"

The first panel of the international conference was opened by *Judit Varga*, Minister of Justice of Hungary. The panel also featured *Péter Szijjártó*, Minister of Foreign Affairs and Trade of Hungary, *Olivér Várhelyi*, Commissioner for Neighbourhood and Enlargement, *Jadranka Joksimović*, Minister for Integration of Serbia, *Andor Deli*, Member of the European Parliament, and *Gašper Dovžan*, Slovenian Secretary of State. The speakers first presented their points of view and subsequently answered questions from the audience. *Kinga Gál*, Member of the European Parliament, was the moderator of this panel.

11 Enhancing the accession process – A credible EU perspective for the Western Balkans (COM 2020) 57 final, see: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-02/enlargement-methodology_en.pdf [Accessed: 18 January 2022].

12 Statement by President von der Leyen at the joint press conference with President Michel and Andrej Plenković, Prime Minister of Croatia, following the EU-Western Balkans Zagreb Summit, see: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_825 [Accessed: 18 January 2022].

13 2021 Communication on EU Enlargement Policy COM(2021), see: https://ec.europa.eu/neighbourhood-enlargement/2021-communication-eu-enlargement-policy_en [Accessed: 18 January 2022].

14 2020 Communication on EU enlargement policy https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/20201006-communication-on-eu-enlargement-policy_en.pdf [Accessed: 18 January 2022].

Judit Varga spoke about the Conference on the Future of Europe as an excellent opportunity to discuss key issues related to the successful and safe future of European citizens. She highlighted the enlargement as a priority for the Hungarian government, emphasizing that Hungary supports several concrete projects in the region through the International Visegrád Fund.[15] These projects concern various areas such as education, innovation, regional development, or reinforcement of the business sector. She welcomed that Ursula von der Leyen named the Western Balkan enlargement as a priority for the Commission[16]. She spoke about the necessity of common efforts toward the restoration of the EU's credibility. For the minister, the time has come to welcome new countries in our community and build a stronger Europe based on strong Member States. The Western Balkans geographically, historically, and economically belong to the European family; and this family has to be strong and united. The minister highlighted the importance for the EU to recognize the candidate countries' efforts and reforms, emphasizing that the EU must also fulfill its obligations toward the advancement of integration. Finally, she underlined that the EU enlargement is the cornerstone of a safe, prosperous, stable, and competitive European future that must build upon our common interests and cooperation. The minister confirmed—as Prime Minister Viktor Orbán stated in his seven points on the future of Europe—that the Hungarian Government's position is that Serbia must be admitted to the EU and that the EU needs Serbia much more than Serbia needs the EU.

Péter Szijjártó sees the future of the EU in the Member States, and not in Brussels. He noted that the EU can be strong if its Member States are strong; therefore, competencies related to migration, economic, and sanitary emergencies must be maintained at a national level. He underlined that the global economic weight of the EU has diminished in the last few years, while our competitors were able to maintain or even increase their share. He criticized the efforts toward stopping internal competition among the Member States, because this diminishes the EU's external competitiveness. He underlined that only the Member States can effectively stop the migration flow, and, therefore, the EU needs to support them, emphasizing that the common migration policy has failed as Europe is under migration pressure from three directions. The minister urged the EU to integrate the Western Balkans, as third actors will increase their influence in the region otherwise. As he put it, there is no vacuum in geopolitics. The minister sees the enlargement as a key to reinforce the EU, especially after the loss of Great Britain. In his closing remarks, he noted that instead of dealing with issues that do not fall under the competence of the EU, EU institutions should focus on issues that are truly common competence, such as enlargement.

Olivér Várhelyi believes that following conflicts, the European perspective is the key driver of consolidation. The commissioner, in addition to stating that Europe can only

15 See: https://www.visegradfund.org [Accessed: 18 January 2022].

16 Statement by President von der Leyen at the joint press conference with President Michel and Andrej Plenković, Prime Minister of Croatia, following the EU-Western Balkans Zagreb Summit, see: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_825 [Accessed: 18 January 2022].

become stronger if the Western Balkans are fully integrated, also made it clear that only Europe can provide long-term stability and prosperity for the Western Balkan region. He recalled that the Commission adopted an economic and investment plan[17] that brought approximately thirty million Euros to the region, which corresponds to the third of the region's global GDP. He mentioned concrete examples through which the Commission helped the region advance toward integration, including economic, political, and social policies. The commissioner also underlined what the region must still accomplish to be allowed accession, emphasizing that the integration is a beneficial geopolitical investment for all parties. According to the commissioner, the Mini-Schengen initiative[18] is of key importance for the integration of the region, and the Commission supports all ideas contributing to the realization of the four fundamental freedoms of the EU. However, the Commission requires that this initiative remains open to all who wish to join and that it combines all other reforms demanded by the EU. The commissioner hopes that further developments will take place during the French Presidency, as the continuation of the enlargement process is of key importance.

Jadranka Joksimović noted that Hungary and the V4 have always demonstrated their support for Western Balkan integration. The minister underlined that accession to the EU has no alternative. She regretted that some Member States are still incredulous about the enlargement policy, despite the officially adopted credible enlargement perspectives. As the von der Leyen Commission named the enlargement as a priority, the EU's credibility is at stake. According to the minister, it is not an enlargement fatigue that Serbia sees from the EU, but the deliberate cut of previous engagements. The strategic interest of enlargement must be clearly seen from both sides. The future of European nations is within the natural borders of the continent that include the Western Balkans. Serbia has taken all the necessary steps toward integration, and accepted that the EU has "changed the rules in the middle of the game" with the new accession methodology. For this, Serbia even modifies its constitution on which Serbians voted on January 16, 2022.[19] The minister thanked Hungary for its support. She spoke highly of the quality of Hungarian–Serbian relations and of the Hungarian help provided for Serbian integration. In response to a question from the audience, she underlined that the Open Balkan initiative came from the region itself and not from the EU or a Member State. Its goal is to create another platform to strengthen mutual trust.

Andor Deli regretted that enlargement has slowed down. He underlined that the region shares with us not only the continent, but also cultural and historical roots. He focused on the nature of enlargement, which has shifted from a highly political question

17 An Economic and Investment Plan for the Western Balkans, COM(2020) 641 final, see: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/communication_on_wb_economic_and_investment_plan_october_2020_en.pdf [Accessed: 18 January 2022].

18 The initiative for regional cooperation "Mini Schengen" includes Albania, North Macedonia, and Serbia; and was renamed on July 29, 2021 as "Open-Balkan."

19 Serbian citizens voted to change the country's constitution and accept a judicial reform package, with 60.48 percent voters saying "Yes" to the proposals in a referendum held on January 16, 2022.

to an administrative one. This is a mistake, and we must return to the true nature of the enlargement process. European leaders cannot avoid responsibility with the excuse of an overly administrative accession process. The EU must become stronger, for which the enlargement would be an appropriate instrument. From his point of view, Western countries are becoming uninspired by the region, while China has recognized the business opportunities in the Balkans. He also highlighted that parallel initiatives like the Berlin Process or the Open Balkan are useful, as they are stepping stones toward integration.

Gašper Dovžan highlighted the question of the EU's credibility, as it did not deliver on its promises. He finds useful every initiative that the Commission launched to advance the integration. He believes that these initiatives must be reinforced. He regretted that the EU has become too inward-looking, and the enlargement is off the agenda as soon as a crisis arises. This is an error because enlargement should be treated as a strategic choice. The Conference on the Future of Europe offers an opportunity for the first time to debate in a conference's framework. The Slovenian Presidency has achieved two major wins related to the conference: the digital platform is not geo-blocked, and, therefore, people from the Western Balkans can also post content; and the ministers of the region were invited to the Conference's Plenary of October[20] as key stakeholders. In his opinion, one of the biggest dangers of the debate is the tendency to separate European democracy from other levels of democracy. He noted that in the future, Europe must find a way to be more robust and resilient while maintaining internal flexibility.

The second panel of the international conference was opened by *László Trócsányi, Honorary President of the Ferenc Mádl Institute of Comparative Law,* who also participated as the moderator of the panel and presented the closing remarks. The panel also featured *Prof. Marjan I. Bojadjiev, Rector of the American College Skopje University, Dr. Arta Rama-Hajrizi, member of the Venice Commission and former President of the Constitutional Court of Kosovo, István Balogh, Deputy State Secretary for Security Policy and Political Director of the Ministry of Foreign Affairs and Trade.*

In his opening speech of the second panel of the conference, *László Trócsányi* identified a deeper understanding and definition of the Balkan region and the identification of the values with which the region can enrich European integration as the objectives of the discussion. The history of Europe and the Balkan region is intertwined, with many similarities and significant differences. After the change of regime, the Balkan region suffered a very serious crisis, which has now been consolidated and accession to the EU has become a real possibility for the countries of the region.

The opening speech provided a platform for a dialogue on the future of Europe, where experts shared and assessed their expectations and the expectations of their countries' public—differentiated by generations—on EU accession, shared their experiences of the EU from the perspective of candidate and pre-candidate countries, and spoke about the essence of the Balkan identity and the foreign policy to be pursued after accession (especially in relation to China, Russia, and Turkey).

20 On October 23, 2021, the second Conference Plenary meeting took place in the European Parliament in Strasbourg to discuss citizens' contributions to the Conference of the Future of Europe.

Prof. Marjan I. Bojadjiev started by stressing that the North Macedonia–Greece agreement is a diplomatic success of the highest importance. He went on to define the concept of the Western Balkans, which essentially came into being with the accession of Bulgaria and Romania to the EU and is a gaping hole in the map of Europe that prevents real unity. On the rule of law, he said that a clear illustration[21] of the rule of law to the EU is needed and that both sides, the EU and Northern Macedonia, need to move. Northern Macedonia has already taken several steps in this respect, amending its constitution twice and reaching an international agreement in 2018 with the support of the European Commissioner for Neighbourhood and Enlargement. It is now the turn of the Union, and although the Council President has promised to continue accession negotiations, the Bulgarian veto has interrupted the process. Addressing the Bulgarian ambassador present, he stressed the strong and long-lasting toxic effect of the Bulgarian veto on relations between the two countries and underlined the need to develop a political framework to address the situation.

Returning to the question of European integration, Bojadjiev raised the following questions: (i) Can integration be completed? (ii) Who is truly European; are the people of Western Balkans European? He likened Europe to a French cheese, which, in the absence of full integration of the Western Balkans, is full of holes and, thus, difficult to take seriously, and echoing MEP Kinga Gál's speech in Panel I, he pointed out that we are all deeply integrated in Europe, although in many different ways.

All the countries of the Western Balkans have signed pre-accession agreements;[22] thus, from this point of view, they are part of the EU. He stressed that it is important to join Europe's economy, as the Western Balkans are small, open economies. He referred to a strongly problematic element for the people of the Western Balkans: when crossing the border, they have to use the gate used by Senegalese and Zambian citizens, and not the one used by European citizens. Referring to Commissioner *Olivér Várhelyi's* speech in Panel 1, he suggested that the EU should work toward the immediate integration of the Western Balkan region into the European Economic Community, which would require the amendment of Articles 95, 98, and 128 of the Agreement on the European Economic Area. He presented the results of a Vienna survey on the future of Europe, which looked at how many countries could join the EU by 2035. The study concluded that the current accession scenario puts business first, with only Serbia, Montenegro, North Macedonia, and Albania joining the EU. The most vulnerable areas—Kosovo and Bosnia and Herzegovina—would be left out. Therefore, the process is unlikely to be completed. Another result of the primacy of the business sector, based on the philosophy of "one economy, one region," is the so-called Chamber of Commerce Investment Forum, in which all six Western Balkan countries are represented. The Forum has also launched the mini

21 He referred to the differences between Western and Eastern perspectives on the rule of law, as mentioned in the opening speech.

22 North Macedonia was the first state to sign the pre-accession agreement, before Croatia, which is now a member of the European Union, while not even negotiations have started with North Macedonia.

Schengen initiative (Skopje, Belgrade, and Tirana), which is now virtually passport-free, with all six Western Balkan countries expected to join soon. However, as soon as we look toward Belgrade, concrete practical difficulties immediately arise (long waiting times at the border, problems with goods transport and logistics, etc.), which the EU must find solutions to, since Mini Schengen should really be about freedoms and simplifying border controls.

The following question arises in this regard: Can the EU integrate the six Western Balkan countries while preparing them for EU accession? According to Bojadjiev, the European Economic Community is the best way to start integration. It is important that the six Western Balkan countries feel like active participants in the process. The enlargement of the European Economic Community is also a positive development for the Member States and can provide serious protection, especially for those EU countries that do not want to take in more immigrants. The ultimate issue is to maintain the EU's political influence in the region. In the Western Balkans, the EU has no official representation, while the United States, the United Kingdom, Russia, and China have a clear influence.

In conclusion, *Bojadjiev* said that integration and accession are processes that the region hopes to see completed, but uncertainty is causing the enthusiasm to wane. It should also be remembered that the EU is not only a stand-alone entity, a step on the Silk Road, but also part of Europe. Keeping the issue of integration on the agenda is essential.

Dr. Arta Rama-Hajrizi stated that integration is the goal of all Western Balkan countries, but this is being questioned by the attitude of the EU. To understand the accession process, she put the impact of the Western Balkans on European history in a historical context. Quoting Churchill, she explained that the Western Balkans have always been a Gordian knot for the European continent historically and although wars in the region have ended, peace remains fragile and the nations of the Western Balkans have not yet come to terms with the past. She stressed that overcoming the past requires national and European leaders; a vision of a larger, united, free, peaceful, and prosperous Europe based on trust; shared responsibility; and the vision of the founding fathers. However, to achieve all this, responsible action is needed, with the EU delivering on its promises, while the Western Balkan countries must also honor their commitments. Nevertheless, measures on the part of the EU have been inconsistent so far, particularly with regard to visa liberalization. Kosovo has fulfilled the 93 criteria[23] set by the Commission, including the most atypical criterion of resolving border issues, but a decision on visa liberalization has not been taken till date. She underlined that the lack of visa liberalization shows a lack of political will on the part of the EU, which in the eyes of the Kosovars calls into question the credibility of the EU—it has become clear that accession is a political process. She pointed out that the stagnation of the accession process and the lack of an EU strategy is leading to uncertainty and mutual blame in the Western Balkans. She

23 Kosovo 2020 report SWD(2020) 356 final, see: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/kosovo_report_2020.pdf [Accessed: 18 January 2022].

confirmed that the enlargement of the EU is hampered by several processes, such as the debates on migration, the internal reform of the EU, and the disputes between individual countries and the EU institutions. She also pointed out that the accession of the Western Balkans is one of the most crucial issues for the future of the EU. There would be no peace and security in the EU as long as the Western Balkans remained a black hole in the continent. The situation is exacerbated by the influence of China, Russia, and Turkey, which is reinforcing the division of the EU. All three countries are dominant international players, hampering the EU accession process. Turkey's presence is through investment, religious, and cultural ties, while China's influence is through various projects and investments that extend beyond the region. Regarding the importance of stability, her presentation referred to NATO Secretary General Stoltenberg's statement that some external factors are deliberately seeking to foment conflict between Bosnia and Kosovo. She stressed that because of their fragile economies and weak democracies, the Western Balkan countries could easily slip down the slippery slope of such conflicts, in which the lack of a clear position by the EU is a crucial factor.

She said that the Western Balkan countries do not expect the EU to take the Western Balkans on its shoulders and bring them into the EU. The EU must guide these countries along the path toward the realization of the European dream, because if it fails to do so, other countries will intervene with other means, which will instead lead to instability, disintegration, and conflict.

She stressed that the Republic of Kosovo continues to insist that the EU has no alternative despite the unfair and biased treatment by the EU. She also recalled that NATO and EU cooperation is necessary to continue the progress achieved so far, recognizing that the security of the region remains under threat.

She expressed hope that good neighborly relations between Serbia and Kosovo would be achieved with the help of the special envoys appointed by the United Kingdom, the United States, and the EU. The resolution of all these issues will make cooperation with the EU an achievable goal, but it will require concrete action on the part of the EU, not just reassuring words.

István Balogh presented theoretical and political arguments for the accession of the Western Balkan region to the EU, placing the issue of enlargement in the context of foreign policy. On Hungary's basic philosophy on enlargement, he stressed that the accession of the Western Balkans and the success of enlargement are closely linked to the future of Europe. Therefore, it is a priority for Hungary to develop an effective and successful enlargement policy. In outlining the key principles of the enlargement policy, he stressed the need for enlargement to be conducted as a successful political process. This has become essential, especially in the light of Brexit, and prevents enlargement from being interpreted as a bureaucratic process while maintaining the assessment of the candidate countries' preparedness. He set the dialogue with the candidate countries as a basic principle to gain a deeper understanding of the challenges facing the region. He also underlined the security policy importance of the Western Balkans for Europe, as the accession of the region is a cornerstone in the fight against illegal migration, and the

enlargement of the single internal market toward the South is also of economic importance. He also listed among the principles the acceleration of the accession process, which, if not achieved, risks losing the candidate countries' support for the EU. However, equally important are the promotion of infrastructure development and the stabilization of the Western Balkans region, which are also important for European security.

Another central issue of the speech centered on the political arguments for enlargement. In this respect, he underlined that if the enlargement policy fails, the EU will lose credibility, sending a negative message to the whole Western Balkan region and the international community. In his presentation, he pointed out that, in addition to the social and economic consequences of Brexit and COVID-19, several political debates are ongoing in the EU, which are reinforcing the division. In this context, a successful enlargement policy is of particular importance as a key element for long-term peace, security, and prosperity. He confirmed that the Western Balkans are a priority for Hungary, both in terms of security policy and COVID-19. The Western Balkans, as the main transit route for illegal migration, pose a major security challenge, and there were already examples of poor crisis management in the 1990s. In this context, adequate capacity building and effective border management in the region are particularly important, which indicates that failure to integrate these countries could lead to even more strategic challenges.

The third part of the presentation analyzed the social and economic aspects of enlargement. From the perspective of social impact, engaging young people from the Western Balkan region for the case of integration is of paramount importance, and is a key issue for a credible enlargement policy. From an economic perspective, the most important is the provision of rail and road access to the Aegean and Mediterranean Sea, which will also contribute to the economic growth of the region. Regarding the enlargement process, he reaffirmed that it remains merit-based, that is, based on preparedness and reforms implemented. However, the positive feedback from the EU confirming the reform efforts of the acceding countries, which in many cases is not forthcoming, is of paramount importance. The accession process is slowing down in Serbia and Montenegro, and accession negotiations have not even begun in the case of Northern Macedonia and Albania, underlining that the credibility of the EU depends on the candidate countries' accession in the near future. At this point, he pointed out that the EU countries have different views on enlargement, while confirming that Hungary is one of the pro-enlargement countries. In this context, he stressed that the realization of enlargement requires the development of political will and consensus, and the effective support of enlargement, while bearing in mind the interests of the Western Balkan countries and supporting their reform efforts.

He concluded his presentation by pointing out that without the political will for enlargement, the EU cannot act as a geopolitical factor, which makes it all the more necessary to proceed with enlargement as soon as possible.

At the end of Panel II, *Rama-Hajrizi* again stressed the importance of the integration of Kosovo and Bosnia and Herzegovina, because Europe will never be complete without everyone; we do not know how long it will take, maybe fifty years for Kosovo,

but we need a clear path. This is the last moment for the Union to solve its own problems. *Bojadjiev* proposed the "Budapest Process" as a strategic initiative to help Western Balkan integration.

In his closing remarks, President László Trócsányi, reacting to the "Budapest Process," recalled the "Szeged Process," in which Hungary wanted to help the Western Balkan countries during the war.

Regarding the current situation, he referred to his lack of optimism, contrasting the position of the EU, which wants to achieve centralization, even by amending the Treaties, with the position promoting the principle of subsidiarity, which is represented by Hungary. He also expressed interest in the French Presidency's vision for Europe, particularly regarding the position of the Western Balkans. He expressed his conviction that at the end of the Conference on the Future of Europe, the French presidency would want to amend the Treaties, which could lead to a new Europe, with the six founding countries at the heart of the EU, Hungary, and the other Member States in a second round, and the Western Balkans in a third round.

He stressed that equality between countries is a central element of EU integration for them, and that they reject any initiative that does not promote it. There are many possible scenarios, but the basic aim is to continue the work, articulate ambitions clearly, and maintain and build bilateral diplomatic relations. Finding a compromise is very important and can be a solution.

Conclusions

The high-level *European and Hungarian politicians* who spoke at the international conference came to the conclusion that the enlargement process should focus on global European strategic interests instead of being over-bureaucratic or slowed down by Member States that are uninspired by the enlargement, not seeing its economic and strategic benefits.

The speakers, almost without exception, highlighted the issues of credibility, political, economic, security, and strategic interests of the future of Europe in thinking about the future of the enlargement. Although some slight differences regarding their approach to specific issues related to the advancement of European integration of the Western Balkans exist, every participant stressed the importance and urgency of their accession. The Hungarian government's stance consisting of a firm support to the EU accession of the Western Balkans based and justified on their merits and the accomplishment of the required criteria, especially with regard to Serbia, was reaffirmed.

Design, layout:
IDEA PLUS (Elemér Könczey, Botond Fazakas)
Kolozsvár / Cluj
I. C. Brătianu street, 41–43./18.