Klára Drličková, Radovan Malachta,
Patrik Provazník (eds.)

COFOLA INTERNATIONAL 2023

Conference proceedings

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Table of Content

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List of Abbreviations[1]

AG	Advocate General
Art.	Article / Articles
Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I bis Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Brussels II Regulation	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
Brussels II bis Regulation	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
Brussels II ter Regulation	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

1 The authors were allowed to introduce their own abbreviations for the purposes of their contributions. These are not listed here.

Cf.	Confer
CJEU / ECJ	Court of Justice of the European Union (previously as European Court of Justice)
Czech PILA	Act no. 91/2012 Coll., on private international law
EU / Union	European Union
Hague Convention on the Protection of Children	Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
HCCH	Hague Conference on Private International Law
MEP	Member of the European Parliament
No. / no.	Number
p. / pp.	Page / Pages
para.	Paragraph / Paragraphs
Parenthood Regulation Proposal	Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood
Slovak PILA	Act no. 97/1963 Coll., on private international law
TEC	Treaty establishing the European Community
TEU / Maastricht Treaty	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States / United States of America
Vol.	Volume

Preface

The COFOLA ("Conference for Young Lawyers") conference has been annually organized by Masaryk University, Faculty of Law, since 2007. The main aim of this conference is to give the floor to doctoral students and young scientists at the early stage of their career, and to enable them to present the results of their scientific activities.

In 2013, COFOLA was enriched by a special part called "COFOLA International". From 2013 to 2019, COFOLA International formed part of the COFOLA conference. Since 2020, COFOLA International has been organised as a separate conference. COFOLA International focuses primarily on issues of international law and the regulation of cross-border relations, and is also oriented to doctoral students and young scientists from foreign countries. COFOLA International contributes to the development of international cooperation between students and young scientists from different countries. It constitutes a platform for academic discussion, and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so vital in current days.

This year's COFOLA International conference was divided into two sections. The first one was titled "Three I's of European Private International Law – Interpretation, Interaction, Inspiration". In this section, papers on private international law were presented. The second one was titled "Quo vadis, EU citizenship?". In this subsection, since the year 2023 marks the 30th anniversary of the introduction of EU citizenship, papers on European law and EU citizenship were presented. The oral part of the conference was held in a hybrid form (both at the Faculty of Law, Masaryk University, and online) with a total of 10 participants. Representatives of 5 countries (namely the Czech Republic, Slovakia, Poland, Hungary, and Russia) gathered to present their papers on selected topics. Eventually, 8 papers were submitted in a written form. The papers included in these proceedings represent topics that were recommended for publication after an independent double-blind review process.

The first Section comprises 4 papers on private international law. The introductory paper critically analyses the relationship between the Brussels I bis Regulation and arbitration against the background of the CJEU's judgment in *London Steam-Ship Owners' Mutual Insurance Association*. Another paper focusing on the interpretation of EU private international law provides a thorough analysis of the problem of classification of contract and tort claims in the light of the Brussels I bis Regulation. It also provides a comprehensive overview of the often incoherent case law of the Czech courts on this issue. The third contribution offers a detailed analysis of the Brussels II ter Regulation, applicable between Member States as of August 2022, concerning substitute family care with an international element. The last contribution of the introductory Section focuses on analysing the Parenthood Regulation Proposal, which aims to unify the rules of private international law on parentage, as well as comparing the Proposal with Slovak national legislation. The aim of the paper is to assess the potential benefits a unified regulation might provide for the protection of children's rights.

The second Section comprises 4 papers on EU citizenship. The first paper recalls the milestones in the historical development of EU citizenship and identifies the challenges faced by the European Union and the Member States as the EU citizenship concept continues to expand. The following paper critically assesses whether or not it would be appropriate to introduce the concept of federal EU citizenship. Another paper analyses the EU citizenship project and seeks to answer, for example, whether it is merely a symbolic project or a cornerstone of building a political community. The fact that EU citizenship is still a topical issue is also reflected in the case law of the Court of Justice. The last paper of this Section focuses on the recent case law on EU citizenship, in particular the case of *X vs. Udlændinge- og Integrationsministeriet*, where the author offers critical reflections on the Advocate General's opinion, especially as regards the proportionality test.

The final versions of the papers included in these conference proceedings were submitted by the authors on 31 May 2023. After this date, some papers could have been revised based on the recommendations by the reviewers.

Klára Drličková, Radovan Malachta, Patrik Provazník

THREE I'S OF EUROPEAN PRIVATE INTERNATIONAL LAW – INTERPRETATION, INTERACTION, INSPIRATION

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Crying Over Spilled Oil: The Brussels I Regulation and the Judicial Enforcement of Arbitral Awards

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Abstract

After the European Court of Justice ("ECJ") has considered the scope of the "Brussels Regime" vis-à-vis arbitral proceedings in some of its landmark decisions such as *West Tankers* or *Gazprom*, the recent *London Steam-Ship Owners' Mutual Insurance Association* (C-700/20) judgment, in which the ECJ ruled on the interpretation of the notion of "irreconcilable judgments" within the meaning of Article 34 of the Brussels I Regulation, adds yet another piece to this already tricky puzzle. In this article, I am critically assessing the conclusions of the ECJ in the *London Steam-Ship Owners'* ruling and discussing the implications of that decision for the future cohabitation of judicial and arbitral proceedings in the European Union.

Keywords

Arbitral Awards; Brussels Regime; European Court of Justice; Irreconcilable Judgments; Relative Effect of an Arbitration Agreement; *Lis Pendens*.

1 Introduction

The creation of the Brussels Regime[1] with the aim to establish binding rules for jurisdictional disputes as well as to facilitate the recognition and

[1] The reference to the "Brussels Regime" within this article shall be understood as a reference to the rules adopted by the Member States of the European Communities and later the European Union concerning the determination of international jurisdiction of civil and commercial courts, as well as the recognition and enforcement of foreign judgments. For an overview of the development of the legal instruments falling under the Brussels Regime, see ROZEHNALOVÁ, N., VALDHANS, J., KYSELOVSKÁ, T. Recognition and Enforcement of Foreign Judgments: From Brussels Convention to Regulation Brussels I Recast. In: RIJAVEC, V., KENNETT, W., KERESTEŠ, T., IVANC, T. (eds.). *Remedies Concerning Enforcement of Foreign Judgements: Brussels I Recast*. Alphen aan den Rijn: Kluwer Law International, 2018, pp. 39–61.

enforcement of judgments in different Member States unsurprisingly brought many open questions and interpretational challenges (not only) for the courts, advocates, and legal scholars. By contrast, one would expect that the clear and explicit exclusion of arbitral proceedings from its material scope[2] will not cause any difficulties. Yet, the opposite is true. The Court of Justice of the European Union has already handed down several decisions that explore the relationship between the Brussels Regime and arbitration.

Most recently, in the *London Steam-Ship Owners' Mutual Insurance Association* ruling[3], the ECJ had an opportunity to assess three significant questions related to the interpretation of the Brussels I Regulation.[4] First, the ECJ was called upon to assess whether a judgment entered in terms of an award rendered by an arbitral tribunal indeed qualified as a "judgment" within the meaning of its Article 34(3). Secondly, the ECJ considered whether a judgment falling outside the material scope of that regulation by reason of the exception concerning arbitration might nevertheless be relied on to prevent recognition and enforcement of a judgment from another Member State pursuant to Article 34(3) of that Regulation. Finally, the ECJ discussed whether, in the alternative, it was permissible to rely on Article 34(1) as a ground for refusing recognition or enforcement of a judgment from another Member State on the basis that such recognition or enforcement would disregard the force of *res judicata* acquired by a domestic arbitral award or a judgment entered in the terms of such an award.

The *London Steam-Ship Owners'* ruling is the latest in a series of the ECJ's decisions on the relationship between the Brussels Regime and arbitral proceedings. In 2009, the ECJ ruled in *West Tankers* that the Brussels I Regulation did not allow English courts to grant an anti-suit injunction to restrain a party from pursuing proceedings in another Member State court, where those

2 Under Article 1(2)(d) of both the Brussels I Regulation as well as the Brussels I bis Regulation, the rules contained therein shall not apply to arbitration.

3 Judgment of the CJEU (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20.

4 Indeed, the regulation applicable *ratione temporis* in the case in question was the Brussels I Regulation. Nevertheless, the currently applicable Brussels I bis Regulation does not differ from the former as far as the provisions discussed in this article are concerned. Consequently, it should be noted that the conclusions of the CJEU are equally pertinent to the current legal framework.

proceedings would breach an arbitration agreement between the parties.[5] Six years later, in *Gazprom*, the ECJ held that Brussels I Regulation did not preclude a court in a Member State from recognising and enforcing an anti-suit injunction made by an arbitral award, prohibiting a party from bringing certain claims before a court of that Member State.[6] Parallelly, in *Achmea* and more recently in *Komstroy*, the ECJ has commented on broader questions concerning the incompatibility of the intra-EU arbitration with the autonomy and the peculiar nature of European Union ("EU") law.[7]

In this article, I shall briefly analyse the existing approach of the ECJ towards the relationship between arbitral and judicial proceedings within the European Union (Section 2). Secondly, I will outline the conclusions of the ECJ in its recent *London Steam-Ship Owners'* judgment, along with the factual circumstances which gave rise to the request for a preliminary ruling in that case, and its post-judgment follow-up at the national level (Section 3). Finally, drawing on the arguments made by the ECJ, I shall conclude by critically assessing the approach of the ECJ in the *London Steam-Ship Owners'* ruling and by discussing the implications of this ruling for the future "cohabitation" of judicial and arbitral proceedings in the European Union (Section 4).

The goal of this paper is to comprehensively examine and analyse the evolving relationship between the Brussels Regime and arbitral proceedings within the EU. Through a detailed exploration of recent jurisprudence, the paper aims to elucidate the interpretational challenges and open questions that arise from the exclusion of arbitral proceedings from the material scope of the Brussels Regime. By critically assessing the approach of the ECJ and synthesising insights from legal scholarship, this paper seeks to contribute to a nuanced understanding of the potential conflicts inherent in the coexistence of judicial and arbitral processes within the EU's legal framework. The ultimate objective is to provide valuable

5 Judgment of the CJEU (Grand Chamber) of 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA vs. West Tankers Inc.*, Case C-185/07.

6 Judgment of the CJEU (Grand Chamber) of 13 May 2015, *"Gazprom" OAO vs. Republic of Lithuania*, Case C-536/13.

7 Judgments of the CJEU (Grand Chamber) of 6 March 2018, *Slovak Republic vs. Achmea BV*, Case C-284/16, and of 2 September 2021, *Republic of Moldova vs. Komstroy LLC*, Case C-741/19.

insights for legal practitioners, scholars, and policymakers grappling with the intricate dynamics between arbitration and the Brussels Regime.

2 Friend or Foe? The ECJ's Case Law on the Relationship Between the Brussels Regime and Arbitration

The tension between arbitral proceedings and judicial proceedings is inherent, regardless of the legal context. Unsurprisingly, this is also true for the EU.

The seemingly unambiguous exclusion of arbitration from the scope of the Brussels Regime has in the past led to a considerable number of interpretational problems.[8] The overall concision of the Regulation with respect to issues related to arbitration is perhaps the reason why the ECJ causes a stir whenever it makes a substantial comment on the relationship between the Brussels Regime and arbitral proceedings.

2.1 Anti-Suit Injunctions Before the ECJ

In *West Tankers*, a landmark 2009 judgment, the central issue was whether an anti-suit injunction restraining parties from having recourse to proceedings other than arbitration and from continuing judicial proceedings could infringe the Brussels I Regulation. First, the ECJ affirmed the principle established in *Rich*[9] and confirmed in *Van Uden*[10], under which the question of whether a dispute falls within the scope of the Brussels Regime depends on the subject-matter of the proceedings, or, more precisely, the nature of the rights which the proceedings in question serve to protect.[11] Yet, the ECJ clarified that even where one was to conclude that the subject-matter falls outside of the scope of that Regulation, it may nevertheless be covered

8 For an analysis of the arbitration exclusion negotiation process, see HARTLEY, T. *Civil Jurisdiction and Judgments in Europe*. New York: Oxford University Press, 2017, pp. 403–406.

9 Judgment of the CJEU of 25 July 1991, *Rich vs. Società Italiana Impianti*, Case C-190/89.

10 Judgment of the CJEU of 17 November 1998, *Van Uden Maritime vs. Kommanditgesellschaft in Firma Deco-Line and Others*, Case C-391/95.

11 Judgment of the CJEU (Grand Chamber) of 10 February 2009*, Allianz SpA and Generali Assicurazioni Generali SpA vs. West Tankers Inc.,* Case C-185/07, para. 15 and 22.

by the latter if it jeopardises its *effet utile*, represented by *"the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters"* [12]. Curiously, the ECJ had to refer to Evrigenis and Kerameus Report on the accession of the Hellenic Republic to the Brussels Convention to conclude that an incidental review of an arbitration agreement in a dispute before a civil court – in order to contest the jurisdiction of that very court – indeed fell within the scope of the Brussels I Regulation.[13] The ECJ went on to observe that as the objection of lack of jurisdiction raised by the defendant on the basis of the existence and validity of an arbitration agreement came within the scope of the Brussels I Regulation, the use of an anti-suit injunction to prevent a court, that would otherwise have jurisdiction to hear that case, from ruling on the applicability of the Regulation, would encroach on that court's right to rule on its own jurisdiction.[14] Accordingly, the ECJ found anti-suit injunctions incompatible with the Brussels I Regulation, using three main persuasive arguments: the jurisdictional equality between the Member States' courts, the principle of mutual trust between the Member States, and the right to an effective remedy of a party who wishes to contest the validity of an arbitration agreement.[15] This conclusion has been criticised by the scholarship for undue interference with the principles of arbitration.[16]

The recasting of the Brussels I Regulation introduced a significant clarification as to the scope of the arbitration exclusion. The Regulation was supplemented by an extensive Recital 12, which further qualified this

12 Judgment of the CJEU (Grand Chamber) of 10 February 2009*, Allianz SpA and Generali Assicurazioni Generali SpA vs. West Tankers Inc.,* Case C-185/07, para. 23 and 24.

13 Ibid., para. 26 and 27.

14 Ibid., para. 28.

15 Ibid., para. 29–32.

16 See BĚLOHLÁVEK, A. J. West Tankers as a Trojan Horse With Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958. *ASA Bulletin.* 2009, Vol. 27, no. 4, pp. 646–670. See also BOLLÉE, S., FARNOUX, É. Arbitration and the Twists of Recital 12 of Brussels Ibis Regulation. In: MANKOWSKI, P. (ed.). *Research Handbook on the Brussels Ibis Regulation.* Cheltenham: Edward Elgar Publishing, 2020, p. 43.

exclusion, explicitly affirming the competence of EU courts to review the existence and validity of an arbitration agreement.[17]

The recital distinguishes between a judicial ruling which exclusively concerns the validity of an arbitration agreement and a ruling on the merits issued following a declaration of invalidity of an arbitration agreement. Only the latter of these two might be recognised or enforced under the Brussels Regime. Moreover, the Brussels Regime naturally reflects the fact that every single one of the EU Member States is simultaneously a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). It therefore explicitly acknowledges the precedence of the New York Convention over the Brussels Regime in the matters of the Member States' competence to rule on the recognition and enforcement of foreign arbitral awards. Importantly, the recital also affirms the non-application of the Brussels Regime nboth "actions or ancillary proceedings" relating to procedural aspects of arbitration, as well as to rulings concerning the "annulment, review, appeal, recognition or enforcement of an arbitral award".

Despite its considerable breadth (it is the longest recital in the Brussels I bis Regulation), Recital 12 is nevertheless considered a compromise and incomplete solution to the much more ambitious proposals voiced during the debate on the revision of the Brussels Regime.[18]

All eyes were therefore back on the ECJ, eagerly awaiting the answer to the question of just how important the inclusion of the Recital has been. In *Gazprom*, a case which concerned an anti-suit injunction issued by an arbitral tribunal ordering a party to withdraw or limit some of the claims which it had brought before an ordinary court in a Member State, the ECJ had an opportunity to consider the relationship between arbitration and the Brussels I bis

17 For a thorough analysis of Recital 12, see BOLLÉE, S., FARNOUX, É. Arbitration and the Twists of Recital 12 of Brussels Ibis Regulation. In: MANKOWSKI, P. (ed.). *Research Handbook on the Brussels Ibis Regulation*. Cheltenham: Edward Elgar Publishing, 2020, pp. 45–52.

18 See BOLLÉE, S., FARNOUX, É. Arbitration and the Twists of Recital 12 of Brussels Ibis Regulation. In: MANKOWSKI, P. (ed.). *Research Handbook on the Brussels Ibis Regulation*. Cheltenham: Edward Elgar Publishing, 2020, pp. 49–51; See also HESS, B. Article 1. In: REQUEJO ISIDRO, M. (ed.). *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*. Cheltenham: Edward Elgar Publishing, 2022, p. 32.

Regulation, Recital 12 included. However, it refused to do so as the regulation applicable *ratione temporis* was the original Brussels I Regulation.[19]

Nevertheless, it brought some further clarity as to the scope of the arbitration exclusion. First and foremost, the ECJ reaffirmed that arbitration did not fall within the scope of the Brussels I Regulation as the latter governed solely jurisdictional conflicts between *courts of a State*, not *arbitral tribunals*. The principle of mutual trust therefore did not at all come into play.[20] So was the case for the right to judicial protection. In this regard, the ECJ held that such protection is offered by means of recognition and enforcement proceedings.[21] The ECJ further distinguished the *Gazprom* case from *West Tankers* by reference to the effects of the arbitral award in question as a failure to comply with the anti-suit injunction was, according to the Luxembourg court, not capable of resulting in penalties being imposed upon the concerned party by a court of another Member State.[22] A court of a Member State was, therefore, not precluded from recognising and enforcing (as well as refusing to do so) an arbitral award which included an anti-suit injunction prohibiting a party from bringing certain claims before a court of that Member State.[23] All in all, although the ECJ maintained its arbitration-cautious approach demonstrated by *West Tankers*, it refused to further extend the prohibition against anti-suit injunctions to cover arbitral awards lacking a penalty.[24]

2.2 Investment Arbitration Before the ECJ: Lessons Learned for Commercial Arbitration?

Although there is a significant difference between international commercial and investment arbitration, both share common features vis-à-vis EU law. Most importantly, both forms of alternative dispute settlement might pose similar questions with respect to the autonomy and effectiveness of EU law

19 Judgment of the CJEU (Grand Chamber) of 13 May 2015, *"Gazprom" OAO vs. Republic of Lithuania*, Case C-536/13, para. 3.
20 Ibid., para. 36–37 and 39.
21 Ibid., para. 38.
22 Ibid., para. 40.
23 Ibid., para. 44.
24 See HARTLEY, T. Antisuit Injunctions in Support of Arbitration: *West Tankers* Still Afloat. *International & Comparative Law Quarterly*. 2015, Vol. 64, no. 4, p. 974.

as well as the mutual trust between Member States as far as judicial protection of private individuals is concerned.

This was the case of the judgment in *Achmea*, a case which involved a dispute arising out of a bilateral investment treaty ("BIT") concluded between the Netherlands and Czechoslovakia and, more precisely, a question of whether Articles 267 and 344 of the Treaty on Functioning of the European Union ("TFEU") preclude that such a dispute – that is to say between a private company and a Member State – must be obligatorily resolved by an international arbitration tribunal.[25] The ECJ referred to Article 19 of the Treaty on European Union ("TEU") when holding that it is for the *national courts and tribunals* and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.[26] In this regard, the Court emphasised the role of the preliminary ruling procedure as a keystone of the EU judicial system, ensuring *"its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties"*[27]. The ECJ further held that the arbitration clause provided for by the BIT had "an adverse effect on the autonomy of EU law", mostly because the disputes falling into its scope might concern the questions of EU law, which were to be interpreted by a body alien to the EU judicial system, in breach of principles of mutual trust and sincere cooperation.[28] Interestingly, however, the ECJ expressly distinguished the arbitration mechanism under BITs from international commercial arbitration. This was arguably because the latter was an expression of free will of private parties, while the former by a decision of two Member States to opt out from the system of judicial remedies under Article 19(1) TEU.[29]

The ECJ followed up on its strict stance towards investment arbitrations in *Komstroy*.[30] This was a case that concerned the Energy Charter Treaty

25 Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slovak Republic vs. Achmea BV*, Case C-284/16.
26 Ibid., para. 36.
27 Ibid., para. 37.
28 Ibid., para. 58 and 59.
29 Ibid., para. 54 and 55.
30 Judgment of the CJEU (Grand Chamber) of 2 September 2021, *Republic of Moldova vs. Komstroy LLC*, Case C-741/19.

("ECT"), which provides for an arbitration clause under which the investor party might choose to settle a dispute in arbitration, and parties to the ECT (including, once again, all EU Member States) give their unconditional consent to such form of settlement. The ECJ essentially reaffirmed the conclusions of *Achmea* adding that "preservation of the autonomy and of the particular nature of EU law" precluded the arbitration clause from being imposed on Member States "as between themselves".[31] Consequently, the ECJ held that the arbitration clause was not applicable to disputes between a Member State and an investor based in another Member State.[32]

Both rulings suggest that, unlike the intra-EU investment arbitration (whether it arises from a BIT or a multilateral treaty), commercial arbitration between private parties does not pose a risk to the effectiveness of EU law. This is, however, a somewhat baffling conclusion, given the strong parallels between investment and commercial arbitration. In fact, the Luxembourg court bases its conclusion on two main arguments: the inability of arbitral tribunals to make use of the preliminary reference procedure and the limited review by the ordinary courts of awards rendered by such tribunals. Yet, the Court offers no explanation on why this is only problematic in case of investment arbitration. As a result, its argumentation is somehow doubtful.

Despite a certain degree of inconsistency on the part of the ECJ with respect to investment and commercial arbitration, it can be argued that the ECJ is willing to openly embrace the latter, perhaps purposefully declining to address the structural problems it may bring for the uniformity of EU law. Instead, the ECJ continues to tackle concrete issues emerging in relation to commercial arbitration on a case-by-case basis.

3 The London Steam-Ship Owners' Case

3.1 Background

The case dates back to 2002, when the oil tanker *MV Prestige*, carrying over 70 000 tons of heavy fuel oil, sank off the Galician coast. The accident

31 Judgment of the CJEU (Grand Chamber) of 2 September 2021, *Republic of Moldova vs. Komstroy LLC*, Case C-741/19, para. 65.

32 Ibid., para. 66.

has caused a major environmental disaster, inflicting immense damage to the Spanish and Portuguese coastline ecosystems. Quite naturally, that could not go without legal repercussions. Criminal proceedings were conducted in Spain against the persons responsible for the accident, upon conclusion of which a direct action pursuant to the Spanish Criminal Code was brought by the Spanish State against the insurer of the vessel.

The owners of the vessel were insured with a UK-based Protection and Indemnity (P&I) association ("insurer"). Essentially, the insurance contract contained two important provisions. First, a "pay to be paid" clause under which the insurer undertook to cover all expenses the owners incurred by compensating *inter alia* pollution-related damages to third parties. Secondly, an arbitration clause under which any dispute was to be referred to a sole arbitrator based in London subject to English law and the Arbitration Act 1996.

Pursuant to the insurance contract, the insurer has initiated arbitration in London, seeking, on the one hand, an anti-suit injunction under which the Spanish State would have been obliged to pursue its claims in that very arbitration and, on the other hand, a declaration that the insurers were not liable to the Spanish State in respect of such claims under that contract. The Spanish State, however, failed to appear before the arbitral tribunal. Subsequently, the arbitral tribunal delivered its award, in which it held that the Spanish State could not have relied on the obligations of the insurer pursuant to the insurance contract unless it had complied with both the arbitration clause and the "pay to be paid" clause. Due to the failure to initiate arbitration proceedings and the absence of prior payment of damages by the owners, the insurer was not liable to the Spanish State in respect of the claims.

The insurer then applied to an English court, seeking the leave to enforce the arbitral award in the same manner as a judgment, which would then be entered in terms of the award, a procedure allowed under Sections 66(1) and (2) of the Arbitration Act 1996.

The Spanish State sought to contest the award pursuant to Sections 67 and 72 of the Arbitration Act 1996 under which an arbitral award could be challenged on the grounds, *inter alia*, that the tribunal lacked substantive

jurisdiction and that the relevant dispute could not properly be submitted to arbitration. It further argued that the English court should decline to exercise its discretion to enter judgment. Nevertheless, the UK court granted the leave to enforce the arbitral award and declared that the judgment was to be entered against the Spanish State in the terms of the award. The appeal of the Spanish State against that judgment was dismissed.

Parallely, a Spanish first-instance court dismissed the direct action of the Spanish State. On appeal, however, the Spanish Supreme Court held, *inter alia*, that the owners of the vessel were liable in respect of the civil claims and that the insurer was directly liable pursuant to the Spanish Criminal Code. Eventually, the first-instance court, bound by the decision of the Supreme Court, issued an execution order setting out the individual amounts that each of the claimants, including the Spanish State, were entitled to enforce against the respective defendants, including the insurer.

The Spanish State successfully applied to a UK court to have the Spanish judgment recognised under Article 33 of the Brussels I Regulation by means of a registration order. The insurer appealed such order arguing that the Spanish judgment was irreconcilable with the arbitral award under Article 34(3) of the Brussels I Regulation and that the recognition or enforcement of the Spanish judgment was manifestly contrary to English public policy in the sense of Article 34(1) of that Regulation.

Just days before the end of the post-Brexit transitional period, the UK court decided to refer to the ECJ what was one of the last British preliminary references. It essentially asked, first, whether a judgment in the terms of arbitral award could constitute a relevant "judgment" for the purposes of Article 34(3) of the Brussels I Regulation, and whether such conclusion was prevented on the grounds of the arbitration exception under Article 1(2)(d) of that Regulation. Secondly, in the negative, the court asked whether the recognition and enforcement of a judgment of another Member State would be nevertheless contrary to domestic public policy on the grounds that it would violate the principle of *res judicata* and whether it was permissible to rely on Article 34(1) of the Brussels I Regulation as a ground for refusing recognition or enforcement in that regard.

3.2 Opinion of Advocate General Collins

In its Opinion, AG Collins first addressed the issue of the arbitration exclusion under the Brussels I Regulation, which he suggested was to be interpreted broadly.[33] With reference to *travaux préparatoires* as well as the existing case law of the ECJ, he concluded that a judgment entered in the terms of an arbitral award was indeed caught by the arbitration exclusion of the Brussels I Regulation.[34] This, in turn, made it impossible to use that Regulation to enforce an arbitral award in another Member State by first turning it into a judgment and then asking the courts of the other Member State to enforce that judgment.[35]

AG Collins was, however, quick to distinguish such a scenario from the case at hand. Indeed, the relevant question in the analysed case concerned the recognition and enforcement of a – pretty much ordinary – *foreign* judgment which conflicted with a previously issued *domestic* judgment entered in the terms of an arbitral award.[36] For the Advocate General, there were three reasons why the latter should qualify as a "judgment" in the sense of Article 34(3) of the Brussels I Regulation, thereby precluding the recognition of the former judgment.[37]

First, the notion of "judgment" under the Regulation must be interpreted broadly, as it follows from Article 32 thereof.[38] Second, a judgment entered in the terms of an arbitral award is in no way a product of an "automatic approval" or an "exercise in rubber-stamping". Rather, when faced with the request under Section 66 of the Arbitration Act 1996, the court decides on a series of substantive issues, not necessarily related to the questions determined by the arbitral tribunal. Consequently, it is not in the same position as, for instance, a court ratifying a settlement concluded by the parties.[39] Third, in order to be qualified as a "judgment" under Article 34(3)

33 Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 45.
34 Ibid., para. 46–48.
35 Ibid., para. 49.
36 Ibid., para. 50.
37 Ibid., para. 51–52.
38 Ibid., para. 53.
39 Ibid., para. 54–56.

of the Brussels I Regulation, a decision of the court must not determine *all* of the substantive elements of a dispute.[40] Importantly, the Advocate General concluded that the arbitration exclusion under Article 1(2)(d) thereof does not exclude such judgments from falling within the ambit of Article 34(3) of the Brussels I Regulation: the arbitration exclusion was enacted "for different purposes and pursues different objectives".[41]

AG Collins, however, acknowledged that the exclusion of certain matters – arbitration included – posed a risk of the emergence of irreconcilable decisions, potentially disturbing the rule of law and internal legal order of Member States if the earlier decisions would have been ignored by EU courts. It was thus reasonable to conclude that the EU legislature did not intend to enact provisions to that effect.[42] Referring to the judgment in *Hoffmann*, the Advocate General concluded that, notwithstanding the fact that an *earlier* judgment falls outside of the scope of the Brussels I Regulation, it should be deemed to prevail over a *subsequent* foreign judgment, a recognition of which is sought, and which manifestly falls within the scope of that Regulation.[43]

For the Advocate General, a conclusion, under which a judgment under Section 66 of the Arbitration Act 1996 was *not* to be considered a "judgment" in the sense of Article 34(3) of the Brussels I Regulation, would give rise to "at least two anomalies".[44] First, this interpretation would create an inequality between earlier judgments falling outside of the scope of the Brussels Regime *ratione loci* (i.e., a judgment delivered by a court in a Third State) as compared to earlier judgments that fall outside of that very scope *ratione materiae*.[45] Second, the same inequality would also occur in relation to a non-domestic arbitral award (recognised under the New York Convention) as compared to a domestic arbitral award (enforced by way of a judgment).[46]

40 Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 57.
41 Ibid., para. 59–60.
42 Ibid., para. 62–63.
43 Ibid., para. 64 and 65.
44 Ibid., para. 66.
45 Ibid., para. 67.
46 Ibid., para. 68.

AG Collins thus concluded that a judgment made under Section 66(2) of the Arbitration Act 1996 was indeed capable of constituting a "judgment" for the purposes of Article 34(3) of the Brussels I Regulation, irrespective of whether it fell outside of the material scope of that Regulation.[47]

AG Collins also addressed the public policy exemption question. For him, Article 34(1) of the Brussels I Regulation must be interpreted strictly. While it is not for the Court to define the content of a domestic public policy of a Member State, it may indeed set its limits, represented by a *"manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as fundamental within that legal order"*[48]. The Advocate General, however, added that the public policy exemption must be regarded as a *lex generalis* to the remaining exemptions under Article 34 of the Brussels I Regulation, which makes it inapplicable once the other exceptions address the relevant issue. As regards *res judicata*, this would be the case of Article 34(3) and (4) of that Regulation.[49]

3.3 Judgment

Like AG Collins, the ECJ, sitting in a Grand Chamber, started by addressing the issue of the arbitration exclusion under the Brussels I Regulation, affirming that recognition and enforcement proceedings are not covered by that Regulation.[50] It agreed with AG Collins that while a judgment entered in the terms of an arbitral award is caught by the arbitration exclusion laid down in Article 1(2)(d) of the Brussels I Regulation, such a judgment is, nevertheless, capable of being regarded as a "judgment" within the meaning of Article 34(3) of the Regulation, preventing the recognition of a subsequent irreconcilable judgment. In this respect, the ECJ put

47 Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 69 and 70.

48 Ibid., para. 73 and 74.

49 Ibid., para. 75–77.

50 Judgment of the CJEU (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 44–46. Interestingly, the CJEU referred to Recital 12 in that regard, although the Brussels I bis Regulation was not applicable *ratione temporis* to the dispute at hand.

forward two arguments: the breadth of the notion of "judgment" under Article 32 of the Brussels I Regulation, and the purpose of that provision.[51]

But here comes the twist. The ECJ, unlike AG Collins, qualified this conclusion.

It held that the situation was different *"where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation"* [52]. Referring to principles underlying judicial cooperation in civil matters and the mutual trust in the administration of justice in the EU, it concluded that a judgment entered in the terms of an arbitral award could produce effects in the context of Article 34(3) of the Brussels I Regulation only if this would not infringe the right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the EU.[53]

In the case at hand, the ECJ identified two fundamental *rules* of the Brussels I Regulation that would be infringed if the arbitral award was to be considered as a judgment in the sense of that very Regulation: the relative effect of an arbitration clause included in an insurance contract and the *lis pendens*.[54] As regards the former, the ECJ held that the objective of protecting injured parties would be compromised if a judgment entered in the terms of an arbitral award would prevent the recognition of a judgment adopted on the basis of a direct action for damages brought by the injured party. Such a party would thus be deprived of effective compensation for the damage suffered.[55] With respect to *lis pendens*, the Court noted that, at the time the arbitration was initiated, the judicial proceedings, between the same parties and relating to the same cause of action, were already pending in Spain. Moreover, the insurer must have been aware of the civil claims brought before the Spanish courts. As the minimisation of the risk of concurrent proceedings is one of the objectives and principles underlying

51 Judgment of the CJEU (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 47–53.
52 Ibid., para. 54.
53 Ibid., para. 56–58.
54 Ibid., para. 59.
55 Ibid., para. 60–63.

judicial cooperation in civil matters in the EU, the arbitral tribunal should have declined jurisdiction in favour of the Spanish court.[56]

The ECJ added that a court seized with a view to entering a judgment in the terms of an arbitral award is obliged to verify that *the provisions and fundamental objectives* of the Brussels I Regulation have been complied with, in order to prevent circumvention of those provisions and objectives. Yet, in the present case, no such verification took place before the English courts, neither did those courts make a preliminary reference to the ECJ.[57] In such circumstances, the ECJ concluded, a judgment entered in the terms of an arbitral award cannot prevent, under Article 34(3) of the Brussels I Regulation, the recognition of a judgment from another Member State.[58]

Lastly, the Court also addressed the public policy argument, concurring with AG Collins in the inapplicability of the Article 34(1) proviso to the issue of the irreconcilability of a foreign judgment with a domestic one as well as in the precedence of Article 34(3) and (4) in the capacity of *leges speciales*.[59]

3.4 National Level Follow-up

Interestingly, the insurer lodged an appeal against the decision to request a preliminary ruling from the ECJ. On appeal, Phillips LJ held that it was not necessary to request the preliminary ruling in this matter and set aside the order for reference.[60] Naturally, this has not stopped the ECJ from considering the preliminary reference. Although Phillips LJ urged the referring judge to withdraw the order for reference before the ECJ,

56 Judgment of the CJEU (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 64–69.

57 Ibid., para. 71.

58 Ibid., para. 72 and 73.

59 Ibid., para. 74–80.

60 Judgment of the Court of Appeal of England and Wales (Civil Division) of 1 March 2022, *The London Steam-Ship Owners' Mutual Insurance Association Ltd vs. The Kingdom of Spain*, [2022] EWCA Civ 238, para. 20–47. In: *Jus Mundi* [online]. [cit. 28. 4. 2023]. Available at: https://jusmundi.com/en/document/decision/en-the-london-steamship-owners-mutual-insurance-association-limited-v-the-kingdom-of-spain-m-t-prestige-i-judgment-of-the-court-of-appeal-of-england-and-wales-2022-ewca-238-tuesday-1st-march-2022

the latter did not submit to that judgment.[61] The ECJ was thus able to deliver the judgment discussed in Section 3.3 above.

The Spanish State challenged the judgment of the Court of Appeal before the Supreme Court of the United Kingdom. At the date of submitting this paper, the Court has yet to decide on the appeal.

4 Lost in Translation: A Closer Look on the *London Steam-Ship Owners'* Judgment

The *London Steam-Ship Owners'* judgment is particularly interesting because it tries to *balance the unbalanceable* twice: a contractually-based and – at least to some extent – less formally designed arbitral proceedings with the rather strict jurisdictional rules of the Brussels Regime (loyal to the principles of EU law and its self-proclaimed autonomy) on the one hand and the English approach to enforcement of arbitral awards with the continental on the other. It, therefore, does not come as a surprise that some scholars condemned the judgment for being *"truly, madly, deeply weird"*[62] or for representing *"concocted reality"*[63].

Indeed, the ruling suffers from a certain number of methodological flaws. Nevertheless, its conclusion is correct as a matter of EU law. Any awkwardness it may bring into the interplay between ordinary judicial proceedings and arbitration seems to rather stem from an insufficient legislative framework relating to the interaction between the two forms of litigation than from the ruling itself.

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61 Judgment of the Court of Appeal of England and Wales (Civil Division) of 1 March 2022, *The London Steam-Ship Owners' Mutual Insurance Association Ltd vs. The Kingdom of Spain*, [2022] EWCA Civ 238, para. 56 and 57.

62 BRIGGS, A. Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford. *EAPIL Blog* [online]. 23. 6. 2022 [cit. 28. 4. 2023]. Available at: https://eapil.org/2022/06/23/humpty-dumpty-arbitration-and-the-brussels-regulation-a-view-from-oxford/

63 CALSTER, G. van. Brussels Ia and arbitration. The Prestige aka London Steam-Ship Owners' Mutual Insurance Association Limited v Spain. Time for the EU to decide its direction of travel on commercial arbitration. *GAVC Law* [online]. 24. 6. 2022 [cit. 28. 4. 2023]. Available at: https://gavclaw.com/2022/06/24/brussels-ia-and-arbitration-the-prestige-aka-london-steam-ship-owners-mutual-insurance-association-limited-v-spain-time-for-the-eu-to-decide-its-direction-of-travel-on-commercial-arbitratio/

4.1 A Correct Conclusion, But at What Cost?

To begin with, the ECJ is right that both principles it emphasised in its decision – the impossibility of an arbitration clause to be invoked against a third party and the respect towards the *lis pendens* rule – are indeed important enough to prevent a judgment entered in the terms of an arbitral award to thwart the recognition of a judgment from another Member State.

In this respect, the ECJ was right to conclude, as to the relative effect of an arbitration clause, that the victim of an incident, if established in an EU Member State, should be able to seek compensation for any incurred damage before a court which would otherwise have jurisdiction under the Brussels I Regulation. It should come as no surprise that EU law – and, in particular, its rules on the determination of cross-border jurisdiction – protects the *weaker* party, all the more so if it is the *injured* party.[64] As a result, the ECJ could not have reached a different conclusion as long as it did not want to disregard the very core principle of not only the Brussels I Regulation, but the EU law as such.

Similarly, the ECJ did not err in holding that any court other than the court first seized was obliged to stay the proceedings until the jurisdiction of the competent court has been established and then to decline jurisdiction in favour of that court. Here, it is not even necessary to have recourse to the principles underlying the Regulation. In fact, the conclusion clearly follows from the wording of Article 27 of the Brussels I Regulation (now Article 29 of the Brussels I bis Regulation). Some scholars[65] have, however, argued that this conclusion is at odds with the 2019 ruling in *Liberato*.[66]

64 See, for instance, Recital 18, Article 11(1)(b) or Article 14(1) of the Brussels I bis Regulation.

65 See CUNIBERTI, G. London Steam-Ship Owners: Extending Lis Pendens to Arbitral Tribunals? *EAPIL Blog* [online]. 23. 6. 2022 [cit. 28. 4. 2023]. Available at: https://eapil.org/2022/06/23/london-steam-ship-owners-extending-lis-pendens-to-arbitral-tribunals/; See also CALSTER, G. van. Brussels Ia and arbitration. The Prestige aka London Steam-Ship Owners' Mutual Insurance Association Limited v Spain. Time for the EU to decide its direction of travel on commercial arbitration. *GAVC Law* [online]. 24. 6. 2022 [cit. 28. 4. 2023]. Available at: https://gavclaw.com/2022/06/24/brussels-ia-and-arbitration-the-prestige-aka-london-steam-ship-owners-mutual-insurance-association-limited-v-spain-time-for-the-eu-to-decide-its-direction-of-travel-on-commercial-arbitratio/

66 Judgment of the CJEU of 16 January 2019, *Liberato*, Case C-386/17.

In what I consider to be a remarkably fallacious judgment, the ECJ held that, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the recognition of a judgment delivered by a court seized in breach of Article 27 of the Brussels I Regulation cannot be refused solely for that reason.[67] While it is lamentable that the Court did not address this divergence directly, it should be noted that *London Steam-Ship Owners'* was decided (perhaps for this very reason) by the Grand Chamber, while *Liberato* was decided by a chamber of three judges. As a result, *Liberato* now seems to be effectively overruled.[68]

That being said, the reasoning of the ECJ is far from being convincing.

First of all, when rejecting the effect of an arbitration clause vis-à-vis injured parties, the ECJ only relied on the *Assens Havn* ruling, in which the ECJ held that an agreement on jurisdiction made between an insurer and an insured party could not be invoked against a victim of insured damage.[69] In this regard, the ECJ could have been significantly more thorough in explaining why the EU law requires it to protect the injured party at the expense of the legal certainty of the insurer. This would have been all the more opportune in a situation where the main (but not the sole) victim of the incident was the Spanish State, which, practically speaking, can hardly be considered as a *weaker* party.

Secondly, and more importantly, the ECJ has left too many unanswered questions. Regrettably, it is not clear what it means by *provisions and fundamental objectives* of the Brussels I Regulation with which the judgment must be in compliance in order for its recognition to be permitted under that very Regulation. In this regard, the ECJ held that it was necessary to take into account *"not only the wording and the objective of Article 34(3) of [the Brussels I Regulation] but also the context of that provision and all of the objectives pursued by the regulation"*[70]. The ECJ went on to explain that those objectives

67 Judgment of the CJEU of 16 January 2019, *Liberato*, Case C-386/17, para. 56.

68 For the role of (not only) the Grand Chamber of the CJEU, see BOBEK, M. What are Grand Chambers for? *Cambridge Yearbook of European Legal Studies*. 2021, Vol. 23, pp. 9–19.

69 Judgment of the CJEU of 13 July 2017, *Assens Havn*, Case C-368/16, para. 40.

70 Judgment of the CJEU (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 55.

were reflected in the *"principles which underlie judicial cooperation in civil matters in the European Union"*[71].

Indeed, the ECJ provided several examples of such principles[72]. Yet, one cannot resist the impression that this list is highly arbitrary and even mutually exclusive. In particular, the conclusion that a judgment entered in the terms of an arbitral award cannot prevent the recognition of a judgment from another Member State is certainly in conformity with the principle of minimisation of the risk of concurrent proceedings, but, at the same time, to some extent denies the mutual trust in the administration of justice as well as the free movement of judgments in civil matters. Besides, the question of legal certainty for litigants is clearly a subjective category which depends on the perspective: the insurer relied on the valid arbitration agreement and might not have been expecting the parallel proceedings under the Spanish Criminal Code to outweigh the outcome of the arbitration in London. Last but not least, by holding that the mutual trust in the administration of justice in the European Union did not extend to decisions made by arbitral tribunals or to judicial decisions entered in their terms, the ECJ manifestly refused to apply this principle to the case at hand.

It follows that, instead of listing a haphazard list of principles, the ECJ should have proceeded to identify which specific fundamental principles are at stake and – in line with Robert Alexy's theory of optimisation requirements[73] – to examine which of them prevailed in the case at hand and why.

Thirdly, as already mentioned above, the ECJ emphasised that an arbitral award entered in the terms of a judgment would not produce effects under Article 34(3) of the Brussels I Regulation if it infringed the right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the EU. Yet again, this fundamental right extends both to the injured party as well as to the insurer relying on the arbitration clause. In order

71 Ibid., para. 56.

72 The CJEU mentioned the following: free movement of judgments in civil matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice.

73 ALEXY, R. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002, p. 50.

for the ECJ's conclusion to be compelling, it should have weighted the two rights and explained which of them trumped the other one.

Finally, the ECJ was completely silent on the relationship between the Brussels Regime and the New York Convention. This is extremely problematic as the latter takes precedence over the former.[74] In this sense, the ECJ should have at least tackled the Advocate General's argument on the inequality between a foreign and a domestic arbitral award.[75] Perhaps this would be a good opportunity to rely on the doctrine of the autonomy of EU law as well as on Article 19 TEU, under which the national courts and tribunals are bound to ensure the full application of EU law in all Member States.[76] Regrettably, the ECJ failed to do so. Instead, the Court cast further doubt on the status of arbitration under EU law as it effectively endorsed the view that the most important international convention on arbitration shall be ignored as a matter of EU law.[77] This is all the more remarkable in a situation where arbitration is expressly excluded from the Brussels Regime.[78]

Moreover, the New York Convention is not the only international instrument in the field of arbitration with which the ruling in *London Steam-Ship Owners'* is inconsistent. Under Article 8(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), where a parallel judicial action is brought before a national court, arbitral proceedings might

74 Although this conclusion was not explicitly expressed before the inclusion of Recital 12 to the Brussels I bis Regulation, it is clear that the recital has a declaratory function, and certainly does not exclude (but rather confirms) that the New York Convention prevailed even before the adoption of the Brussels I bis Regulation.

75 Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 68.

76 Opinion 2/13 of the CJEU (Full Court) of 18 December 2014, *Accession of the European Union to the ECHR*, para. 174 and 175; Judgment of the CJEU (Grand Chamber) of 6 March 2018, *Slovak Republic vs. Achmea BV*, Case C-284/16, para. 35 and 36.

77 As *Briggs* put it, EU law required the UK court to construct a *"parallel reality to enable and require it to ignore its law on arbitration"*. See BRIGGS, A. Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford. *EAPIL Blog* [online]. 23. 6. 2022 [cit. 28. 4. 2023]. Available at: https://eapil.org/2022/06/23/humpty-dumpty-arbitration-and-the-brussels-regulation-a-view-from-oxford/

78 Once again, *Briggs* aptly remarks that *"it will be for those working in legal systems which remain tied by the jurisprudence of the European Court to explain to their colleagues working in the field of international arbitration how the principle that the Brussels Regime does not apply to and does not prejudice the law of arbitration has had such a dramatic effect on their business: good luck with that"*. – ibid.

nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court. This seems to contradict the ECJ's suggestion that the London-based arbitral tribunal should have stayed the proceedings and declined its jurisdiction in favour of the first-seized Spanish court. Unlike the New York Convention, the Model Law is in no way binding neither for the EU nor for English courts. Consequently, there is formally no issue as regards its inconsistency with EU law. That being said, any divergence between the rules of international commercial arbitration and the jurisdictional rules within the EU exacerbates the legal uncertainty for parties who wish to resolve their disputes in arbitration and subsequently have the award recognised in an EU Member State.

4.2 Political Subtext of the Judgment

Naturally, one cannot resist two provocative questions. First, would the ECJ come to the same conclusion if the parallel proceedings were conducted in the UK and the arbitral tribunal had its seat in Spain? And second, would the ECJ come to the same conclusion if the arbitral tribunal ruled that the insurer was liable to the Spanish State?

It has been suggested by many authors that the ECJ tends to act as a political actor, reflecting the Member States' preferences.[79] Consequently, if there was a consensus among Member States' governments to keep the damages within the EU, one could explain the unconvincing reasoning of the ruling by the ECJ's attempt to find a way to accommodate such a preference "at any price".

However, this was not the case in *London Steam-Ship Owners'*. It follows from AG Collins's Opinion that at least the German government did not support the outcome chosen by the Court and – along with the insurer, the UK government, and the Commission – instead endorsed the conclusions of the Advocate General, ultimately not accepted by the Court.[80] Even if the governments of the remaining Member States intervening in the case

79 For a thorough analysis, see SCHMIDT, S. K. *European Court of Justice and the Policy Process: The Shadow of Case Law*. Oxford: Oxford University Press, 2018, pp. 23–49.

80 Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 59, 62 and 63.

involved favoured the opposite solution[81], the conclusion on the political character of the ruling would be at the very least unfounded and highly conjectural.

4.3 Obsolete or Precedential? The Real Impact of the *London Steam-Ship Owners'* Ruling

The last question to address is a fundamental one: how much impact will the Grand Chamber decision have (not only) on the judicial enforcement of arbitral awards?

As far as the UK is concerned, under Section 6(1) of the European Union (Withdrawal) Act 2018, a UK-based court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the ECJ. Indeed, under Section 6(2) of the said Act, it *may* have regard to the Court's case law *"as it is relevant to any matter before the court or tribunal"*. There is, consequently, an option for the UK to follow *London Steam-Ship Owners'* even after Brexit. However, this option is not likely as, by applying the 2005 Hague Convention on Choice of Court Agreements, UK courts do not have any regard for rules under the Brussels Regime.

As for the EU Member States, the ruling naturally remains binding. But given the absence of a provision similar to Section 66 of the Arbitration Act 1996, one might argue that the significance of the ruling is either limited, or even obsolete as the UK has withdrawn from the EU. It has, however, been suggested that the Court's reasoning might be applied to any other exclusion under Article 1(2) of the Brussels I (bis) Regulation.[82] This would mean that the Regulation could prevent the recognition of a judgment relating to, for

81 From the text of the judgment and/or the opinion of AG Collins, it is not possible to identify the positions of the Spanish, Polish and Swiss governments. According to the opinion, the French government submitted that the Spanish judgment and the judgment entered in the terms of an arbitral award were not irreconcilable and that the fact that the arbitral tribunal held that the "pay to be paid" clause was enforceable against third parties having suffered damage caused by the insured in the absence of prior payment did not preclude a national court from not applying that clause. – See Opinion of Advocate General Collins of 5 May 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited vs. Kingdom of Spain*, Case C-700/20, para. 33 and 34.

82 See MAIHLÉ, F. London Steam-Ship, in the Eye of the Beholder. *EAPIL Blog* [online]. 25. 8. 2022 [cit. 28. 4. 2023]. Available at: https://eapil.org/2022/08/25/london-steam-ship-in-the-eye-of-the-beholder/

instance, insolvency, social security, maintenance obligations or succession proceedings once it does not comply with *provisions and fundamental objectives* of the Brussels I (bis) Regulation, albeit all of the aforementioned are formally governed by different – or, more precisely, special – provisions and, consequently, by different objectives.

As a result, the impact of the *London Steam-Ship Owners'* ruling might be far more significant than the Grand Chamber originally intended.

4.4 The ECJ Is Not to Blame: A Need to Address the Arbitration Exclusion

Despite the ECJ's unconvincing reasoning, I have argued above that, as a matter of EU law, the conclusion of the ECJ is correct. Admittedly, this may seem at odds with the fact that arbitration is explicitly excluded from the Brussels Regime. On the other hand, it would be naïve to argue that the rules for litigation and alternative dispute resolution exist in completely separate worlds. In other words, although the Brussels Regime does not *apply* to arbitration, it certainly *affects* it.[83]

In order to prevent surprising and controversial rulings such as the one in *London Steam-Ship Owners'*, it is necessary to amend the current rules governing the relationship between the Brussels Regime and arbitration. The case law shows that a stark exclusion clause is simply not sufficient.

In particular, the EU legislator shall find the courage to include the already existing Recital 12 into the normative part of the Regulation.[84] At the same time, it should finally stop pretending that the proclamation under which the Brussels I bis Regulation "should not apply to arbitration" is as categorical as it might at first appear.

Furthermore, all questions related to arbitral proceedings which have been considered by the ECJ in its arbitration-related jurisprudence should be expressly addressed by the Regulation, including the possibility of conflict between an arbitral award (regardless of the form in which

83 HARTLEY, T. *Civil Jurisdiction and Judgments in Europe*. New York: Oxford University Press, 2017, p. 402.

84 HESS, B. Arbitration and the Brussels I bis Regulation: *London Steam-Ship Owners' Mutual Insurance Association*. *Common Market Law Review*. 2023, Vol. 60, no. 2, p. 544.

it is enforced) and a judgment.[85] Specifically, it should be clarified to what extent is the arbitral tribunal, established under an arbitration agreement, obliged to ascertain its jurisdiction in a situation where parallel proceedings have already been brought before a court of a Member State, and under what conditions might a court refuse to recognise such award, once it finds out that the arbitral tribunal failed to comply with such obligation. In this regard, the EU legislator should give clear guidance to the arbitral tribunals as to the manner in which they are expected to engage with *the provisions and fundamental objectives* of the Brussels I Regulation as well as fundamental rights laid down in the Charter of Fundamental Rights of the EU.

Finally, the EU legislator should consider overruling the *Nordsee* jurisprudence[86] by expressly granting arbitral tribunals the right to refer a preliminary reference to the Luxembourg court. This would enable an arbitral tribunal to ensure proper interpretation of EU law in a situation where it is required to apply it (however counterintuitive such *obligation to apply* might sound in light of the arbitration exclusion).[87]

5 Conclusion

After the ECJ's rulings in *West Tankers*, *Achmea* or *Komstroy*, the *London Steam-Ship Owners'* judgment might be considered as another decision where the Luxembourg court maintained its arbitration-unfriendly approach. But no matter how awkward this might seem for arbitration practitioners, the conclusion of the ECJ was, as a matter of EU law, indeed correct. Yet, the Court's findings were followed by a particularly unconvincing reasoning.

The ECJ was not quite thorough in explaining why it rejected the relative effect of an arbitration clause in an insurance agreement vis-à-vis the injured party

85 HESS, B. Arbitration and the Brussels I bis Regulation: *London Steam-Ship Owners' Mutual Insurance Association*. *Common Market Law Review*. 2023, Vol. 60, no. 2, p. 544.

86 In this ruling, the CJEU held that *"the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbitrator to be considered as a 'court or tribunal of a Member State' within the meaning of [what is now Article 267 TFEU]"*. – See Judgment of the CJEU of 23 March 1982, *Nordsee vs. Reederei Mond*, Case C-102/81, para. 13.

87 See VLČEK, F. Applicability of Rome I Regulation in International Commercial Arbitration. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University Press, 2019, p. 362.

and on what basis it inferred an obligation on the part of arbitral tribunals to adhere to the principle of *lis pendens* despite the existence of a valid arbitration agreement. Furthermore, its conclusion on arbitral tribunals' duty to observe *provisions and fundamental objectives* of the Brussels I Regulation and the Charter of Fundamental Rights of the EU is similarly unclear as to its actual scope. Besides, the Court failed to address the relationship between the EU jurisdictional rules and the New York Convention as far as international arbitration is concerned.

Whilst the conclusions of the *London Steam-Ship Owners'* judgment may have been influenced by specific factual circumstances of the case and appear to be rather limited following the UK's withdrawal from the EU, there remains a real possibility that they will be relevant in areas which, just like arbitration, are exempt from the Brussels I Regulation.

This paper suggests that the only solution to avoid the scenario where it is the ECJ who is constantly required to shape the rules on the relationship between the Brussels Regime and arbitration is to amend the Brussels I bis Regulation. Specifically, it would be highly desirable if the Regulation explicitly addressed all conceivable arbitration-related issues affected by the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU.

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Articles 7(1) and 7(2) of the Brussels I bis Regulation in Czech and CJEU Case Law

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Abstract

The article follows case law concerning the delineation between contract cases under Article 7(1) and tort cases under Article 7(2) of the Brussels I bis Regulation as developed by the CJEU and Czech courts. While the CJEU keeps moving towards clarifying the issue, rulings of Czech courts appear disconnected from the CJEU's approach, especially if an action is based on a claim of unjust enrichment. This article contains analysis of rules developed by case law of both the CJEU and Czech courts, pointing out recent encouraging developments at the Czech national level.

Keywords

Special Jurisdiction; Article 7; Brussels I bis Regulation; Unjust Enrichment.

1 Introduction

In January 2023, the European Commission published a study analysing practical application of the Brussels I bis Regulation on key issues or gaps which should be addressed by potential reform of the Regulation.[1] The study included a survey among academics, representatives of EU Member States and other stakeholders. One of the survey questions asked whether *"the delineation between contract cases under Article 7(1) on the one hand and tort cases under Article 7(2) on the other hand still raises problems"*[2]. This question refers to the ongoing academic discussion and case law on special jurisdiction rules

1 RASS-MASSON, N. et al. Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) – Final report. *Publication Office of the European Union* [online]. 2023 [cit. 17. 6. 2023]. Available at: https://data.europa.eu/doi/10.2838/14604

2 Ibid.

applicable in cases listed under Article 7 of the Brussels I bis Regulation[3]. The relevant rules offer an alternative option for claimants to sue outside the defendant's domicile in an EU Member State based on the theory of close connection between another court and the action itself.[4] Such tempting alternative is often preferred by claimants but also challenged by defendants. Article 7 has several "heads" and in theory, the rules are mutually exclusive, meaning that one claim should not be subjected to more than one rule of special jurisdiction. However, the wording of the first two heads is rather general and a court may easily face difficulty distinguishing whether the action is a "matter relating to a contract" or rather a "matter relating to tort, delict or quasi-delict" within the meaning of the Brussels I bis Regulation. Hence the survey question.

Nonetheless, 57% of the respondents answered that the issue no longer raises problems, while only 15% stated the opposite, the rest of the respondents simply did not have a clear opinion.[5] While the numbers are encouraging, the comments noted several nation-specific struggles. In the case of the Czech Republic, submission from the Czech Ministry of Justice noted that: *"Liability for quasi-delicts including* […] *unjust enrichment has been traditionally recognised in the jurisprudence of the Czech Supreme Court as being in the scope of Article 7(2) of the Brussels* [I bis Regulation]. *The CJEU judgment in Hrvatske Šume gave the opposite interpretation of quasi-delicts in comparison with its perception in Czech jurisprudence.*[6] […] *the jurisdiction for quasi-delicts must be in the scope of special jurisdiction in Article 7 and not the general jurisdiction in Article 4(1) and thus it would be also useful to make it clear that quasi-delicts cover unjust enrichment"*[7]. To admit

3 And its predecessors, Articles 5(1) and 5(3) of the Brussels I Regulation and the Brussels Convention.

4 Recital 16 of the Brussels I bis Regulation.

5 RASS-MASSON, N. et al. Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) – Final report. *Publication Office of the European Union* [online]. 2023 [cit. 17. 6. 2023]. Available at: https://data.europa.eu/doi/10.2838/14604

6 The study quotes an unidentified Czech Supreme Court case where it was found that: *"A 'quasi-delict' differs from a tort in that it does not always require an offence on the part of the defendant. Thus, a quasi-delict within the meaning of the Brussels I Regulation may be a claim for negotiorum gestio or unjust enrichment, provided it is not related to a contract under Article 5(1) of the Brussels I Regulation."* – ibid.

7 Ibid.

that Czech case law has "opposite perception" to the CJEU is a curious conclusion to make. The purpose of this article is to take a closer look at how exactly such disconnection manifests.

The following text is divided into four chapters. After introduction, the second chapter focuses on how the CJEU developed its interpretation of Articles 7(1) and 7(2) of the Brussels I bis Regulation over time, with particular focus on the case law concerning claims filed under the concept of unjust enrichment and the following third chapter then analyses how Czech courts approach the same issue. The underlying question of the article is whether the request from the Czech Ministry of Justice to specify that quasi-delicts within the meaning of Article 7(2) of the Brussels I bis Regulation cover claims of unjust enrichment is justified. In other words, is such "full coverage" of unjust enrichment under the concept of quasi-delict truly the direction the CJEU case law is going? Final chapter is dedicated to the summary of findings and to the answer to this question.

2 CJEU Case Law on Articles 7(1) and 7(2) of the Brussels I bis Regulation

At the most general level, the CJEU concluded that the interpretation of Article 7 of the Brussels I bis Regulation should be restrictive, avoiding expansion beyond the cases expressly envisaged by the Regulation.[8] The categories of "matters relating to a contract" and "matters relating to tort, delict or quasi-delict" are autonomous and independent concepts. As such they should be interpreted to uphold the objectives of the Brussels I bis Regulation itself without reference to any national law.[9] While this chapter is dedicated to distinguishing between the categories, the rule development is not limited to hard, ambiguous cases. Before we start looking for differences, it is worth summarizing what aspects the CJEU requires for either category.

Regarding "matters relating to a contract", the self-imposed "restrictive interpretation" has not motivated the CJEU to apply rules of Article 7(1)

8 Judgment of the CJEU of 14 July 2016, Case C-196/15, para. 18.

9 Judgment of the CJEU of 22 March 1983, Case 34/82, para. 10; Judgment of the CJEU of 27 September 1988, Case 189/87, para. 16.

of the Brussels I bis Regulation narrowly.[10] With respect to "a contract", the CJEU case law demands no formalities, only freely assumed and identifiable obligation towards another person.[11] Such consent does not have to be written (or otherwise expressive), a tacit one suffices.[12] Under that logic, consensual mutual obligations were found by the CJEU between a manager and a company[13] or based on a membership in a private law association which, according to the CJEU, creates "close links" of the same kind as those created by a contract.[14] Article 7(1) of the Brussels I bis Regulation may also apply where the existence of a contract is disputed.[15] One of the most recent case law developments noted by Advocate General Szpunar is that the CJEU tends to consider a dispute to be covered under "matters relating to a contract" if the claimant based the claim on a legal obligation freely assumed by one person towards another without requiring that these persons are identical to the parties of the case.[16]

Regarding "matters relating to tort, delict or quasi-delict", it is much harder to recognize universal set of basic requirements applied by the CJEU. In fact, it was concluded that the rules are comprehensive enough to cover *"a wide diversity of kinds of liability"*[17], including liability for defamation[18], pre-contractual liability[19] and others[20]. In fact, the CJEU tends to treat Article 7(2) of the Brussels I bis Regulation as a sort of residual category[21] after Article 7(1) is considered and eventually ruled out.[22] In the context of this

10 Judgment of the CJEU of 20 January 2005, Case C-27/02, para. 48.
11 Judgment of the CJEU of 17 June 1992, Case C-26/91, para. 15.
12 Judgment of the CJEU of 25 March 2021, Case C-307/19, para. 87.
13 Judgment of the CJEU of 10 September 2015, Case C-47/14, para. 53 and 54.
14 Judgment of the CJEU of 22 March 1983, Case 34/82, para. 12 and 13.
15 Judgment of the CJEU of 4 March 1982, Case 38/81, para. 7 and 8; Judgment of the CJEU of 17 September 2002, Case C-334/00, para. 22.
16 Opinion of Advocate General Szpunar of 16 June 2022, Case C-265/21, para. 67, and case law quoted therein; Judgment of the CJEU of 7 March 2018, Joined Cases C-274/16, C-447/16 and C-448/16, para. 77 and 78.
17 Judgment of the CJEU of 30 November 1976, Case 21/76, para. 18.
18 Judgment of the CJEU of 7 March 1995, Case C-68/93, para. 31.
19 Judgment of the CJEU of 17 September 2002, Case C-334/00, para. 27.
20 Judgment of the CJEU of 27 October 1998, Case C-51/97 para. 22–26.
21 GRUŠIĆ, U. Unjust Enrichment and the Brussels I Regulation. *International & Comparative Law Quarterly*. 2019, Vol. 68, no. 4, p. 861.
22 REQUEJO ISIDRO, M. et al. Article 7. In: REQUEJO ISIDRO, M. (ed.). *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*. Cheltenham: Edward Elgar Publishing, 2022, p. 113.

article, the interesting question is whether Article 7(2) of the Brussels I bis Regulation requires a wrongful conduct on the defendant's part. Here, it should first be noted that the wording itself refers only to the "harmful event" and not a wrongdoing. Nevertheless, CJEU does refer to wording "wrongful conduct" and "wrongful act". For example, in a case concerning discharge of industrial wastewater into a river, the CJEU stated that the aim of Article 7(2) is to *"render claims based on an alleged wrongful act on the part of the defendant subject to the decision of the court best placed to verify the facts, as being the court for the place where the conduct complained of occurred"*[23]. Other CJEU case law includes terminology such as "victim"[24], "perpetrator" or "harmful act"[25], all of which suggest active bad faith or wrongful conduct of the defendants. The CJEU also indirectly answered the question when considering actions based on *action pauilenne*, ruling that Article 7(2) of the Brussels I bis does not apply in such cases because annulment under the *actio pauliana* affects a third party *"even, in cases where there is no consideration for the transaction, where that third party has not committed any wrongful act"*[26]. In other words, Article 7(2) of the Brussels I bis Regulation should not be applied where the action considered was in good faith / without fault.

2.1 Distinguishing Between Articles 7(1) and 7(2) of the Brussels I bis Regulation

Article 7 of the Brussels I bis Regulation operates as an exhaustive list of certain classes of claims which are generally mutually exclusive. As stated by *Mankowski*: *"Special jurisdiction under two or more heads for the same claim is a rare event. A claim in contract simply cannot be a claim in tort simultaneously."*[27] While the theory sounds solid, in practice it may not be entirely clear whether a claim based on a wrongful act affecting a contractual party should be considered as a matter related to a contract or to a tort. In some cases the scenario is simply too mixed-up to decide at glance. The question then follows: "Which point of Article 7 of the Brussels I bis Regulation takes

23 Judgment of the CJEU of 30 November 1976, Case 21/76.
24 Judgment of the CJEU of 7 March 1995, Case C-68/93, para. 28.
25 Judgment of the CJEU of 11 January 1990, Case C-220/88, para. 22.
26 Judgment of the CJEU of 26 March 1992, Case C-261/90, para. 22.
27 MANKOWSKI, P. Article 7. In: MAGNUS, U., MANKOWSKI, P. (eds.). *Brussels Ibis Regulation: Commentary*. Cologne: Otto Schmidt, 2016, p. 158.

priority and under what conditions?" Furthermore, there is a problem of multiple claims being raised based on the same factual situation where not all such claims may have the same classification. All these considerations were, at least to some extent, addressed by the CJEU. Although several cases touched upon the issue, the three most notorious ones are *Kalfelis*[28], *Brogsitter*[29], and *Wikingerhof*[30], all of them will be addressed in more detail in the following sub-sections.

2.1.1 *Kalfelis* Case

Probably the most quoted conclusion of the CJEU on the matter is Case 189/87 from 27 September 1988 (the "*Kalfelis* case"). The case formulates the most basic rule of autonomous interpretation of the "matters relating to tort, delict and quasi-delict".[31] The Court made it with reference to a similar decision rendered a few years before regarding the "matters relating to a contract"[32] and one of the arguments thus was that the interpretational approach should be the same in both categories. In addition, the CJEU ruled that *"a concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to 'contract' within the meaning of Article 5(1)"*[33]. Hence, the *Kalfelis* case suggests that when examining the situation, courts should first look whether the issue cannot be linked to a contract within the meaning of Article 7(1) of the Brussels I bis Regulation. Given the broad approach to a "contract" adopted by the CJEU, Article 7(2) applies unless there is a freely assumed and identifiable obligation by one party towards another.[34] The related opinion of the Advocate General argued for this conclusion claiming that in cases of overlapping claims, where grounds for claims considered tort or unjust enrichment under national law are based on non-performance of contractual obligation, the court best suited to deal with such claims is the court dealing with

28 Judgment of the CJEU of 27 September 1988, Case 189/87.
29 Judgment of the CJEU of 13 March 2014, Case C-548/12.
30 Judgment of the CJEU of 24 November 2020, Case C-59/19.
31 Judgment of the CJEU of 27 September 1988, Case 189/87, para. 16.
32 Judgment of the CJEU of 22 March 1982, Case 34/82, para. 10.
33 Judgment of the CJEU of 27 September 1988, Case 189/87, para. 17.
34 REQUEJO ISIDRO, M. et al. Article 7. In: REQUEJO ISIDRO, M. (ed.). *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*. Cheltenham: Edward Elgar Publishing, 2022, p. 113.

the contract itself.[35] In effect, the *Kalfelis* case framed the scope of Article 7(2) of the Brussels I bis Regulation by the "absence" of a contract[36] without providing any true and autonomous definition or at least positive criteria for matters relating to tort, delict and quasi-delict.[37] Given the fact that the case is quoted as a ground for autonomous interpretation of matters relating to tort, delict or quasi-delict, such conclusion is a bit unsatisfying.

The *Kalfelis* case also prepared a "headache" for national courts by refusing the idea of extending jurisdiction established under Article 7(1) or 7(2) of the Brussels I bis Regulation to any claim which does not by itself qualify for the relevant category.[38] As a result, national courts are compelled to examine jurisdiction for each claim even if such examination may split the case and refer claimant partially to another forum. From the CJEU's point of view, such a split is a result of the claimant's own choice not to sue under the general jurisdiction rule.[39] Why also the defendants should defend their split cases in several parallel forums is not clear.

2.1.2 *Brogsitter* Case

The issue of a relationship between "matters relating to a contract" and "matters relating to tort, delict or quasi-delict" came to the attention of the CJEU again in Judgment of 13 March 2014, *Brogsitter*, Case C-548/12. The dispute concerned alleged breach of exclusivity clauses but the claimant sued for damages suffered as a result of alleged unfair competition, i.e., based on tortious liability under German laws. The defendants claimed that their activity was not covered by the exclusivity commitment and disputed jurisdiction of German courts. Following the direction of the *Kalfelis*

35 Opinion of Advocate General Darmon of 15 June 1988, Case 189/87, para. 26–28.

36 REQUEJO ISIDRO, M. et al. Article 7. In: REQUEJO ISIDRO, M. (ed.). *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*. Cheltenham: Edward Elgar Publishing, 2022, p. 113.

37 PROVAZNÍK, P. Hranice mezi kvalifikací žalob ze smlouvy a z deliktu pro účely alternativních jurisdikčních pravidel bruselského systému. *Advokátní deník* [online]. 28. 3. 2021 [cit. 17. 6. 2023]. Available at: https://advokatnidenik.cz/2021/03/28/hranice-mezi-kvalifikaci-zalob-ze-smlouvy-a-z-deliktu-pro-ucely-alternativnich-jurisdikcnich-pravidel-bruselskeho-systemu/

38 REQUEJO ISIDRO, M. et al. Article 7. In: REQUEJO ISIDRO, M. (ed.). *Brussels I bis: A Commentary on Regulation (EU) No 1215/2012*. Cheltenham: Edward Elgar Publishing, 2022, p. 99.

39 Judgment of the CJEU of 27 September 1988, Case 189/87, para. 17.

case, German court of second instance ruled that the claim concerning civil liability may be adjudicated in Germany based on Article 5(3) of the Brussels Convention while other claims derived from the contract should be adjudicated by a French court based on Article 5(1) of the Brussels Convention.

The CJEU used the opportunity to clarify that not all disputes between parties regarding a contract must automatically be classified as "matters relating to a contract" but that a claim classifies as such only if *"the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract"*[40]. According to the *Brogsitter* case, this applies when the *"interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct"*[41]. *A contrario*, where interpretation of the contract is not indispensable, a civil liability claim (such as unfair competition claim raised in the *Brogsitter* case) should be considered as a "matter relating to tort, delict or quasi-delict". This clarification attempt was not commonly welcomed as successful. The new requirement of "indispensable interpretation of a contract" was considered as unclear and prone to different approaches when looking for the "indispensability" threshold.[42]

2.1.3 *Wikingerhof* Case

The decision in Case C-59/19 rendered at the end of 2020[43] (the "*Wikingerhof* case") is described by some authors as "turnaround" of the *Brogsitter* case.[44] The facts were quite similar – the action was filed by a German hotel alleging popular Internet platform *Booking.com* of dominant position abuse and breach of fair competition laws. The action was filed in Germany under

40 Judgment of the CJEU of 13 March 2014, Case C-548/12, para. 24.

41 Ibid. para. 25.

42 PROVAZNÍK, P. Hranice mezi kvalifikací žalob ze smlouvy a z deliktu pro účely alternativních jurisdikčních pravidel bruselského systému. *Advokátní deník* [online]. 28. 3. 2021 [cit. 17. 6. 2023]. Available at: https://advokatnidenik.cz/2021/03/28/hranice-mezi-kvalifikaci-zalob-ze-smlouvy-a-z-deliktu-pro-ucely-alternativnich-jurisdikcnich-pravidel-bruselskeho-systemu/

43 Judgment of the CJEU of 24 November 2020, Case C-59/19.

44 HAFTEL, B. Here Lies the Late Brogsitter Ruling. *EAPIL Blog* [online]. 14. 12. 2020 [cit. 17. 6. 2023]. Available at: https://eapil.org/2020/12/14/here-lies-the-late-brogsitter-ruling/

Article 7(2) of the Brussels I bis Regulation but since there was a contractual relationship between the parties, the question of whether Article 7(1) of the Brussels I bis Regulation should apply instead was quickly referred to the CJEU.

In contrast to the previous rulings, the CJEU went into greater detail on its concept of independent interpretation. The CJEU concluded that the applicability of rules under Article 7 requires first that the claimant chooses to rely on either of them. Secondly, the national court should examine whether the matter relates to a contract or some delict and should do so irrespective of the classification of the claim under national law. To distinguish between the two, the CJEU repeated the conclusion in the *Brogsitter* case but also added that the interpretation of the contract is "indispensable" if the action is *"based on the terms of a contract or on rules of law which are applicable by reason of that contract"*[45]. If the claimant relies on breach of an obligation imposed by law, it *"does not appear indispensable to examine the content of the contract concluded"* to assess defendant's behaviour because the obligation applies irrespective of the existence of a contract. The action then falls under Article 7(2) of the Brussels I bis Regulation.[46] Applied to the facts of the *Wikingerhof* case, the alleged abuse of dominant position was considered independent of the contract and related more to the obligations imposed by German laws. Since it was not indispensable to examine the content of the contract to consider breach of German laws, the CJEU ruled that the issue is covered by Article 7(2) of the Brussels I bis Regulation. Thanks to the *Wikingerhof* case, the line of the CJEU thoughts on the issue became more clearly developed.

To summarize the conclusions of the whole trio of cases, in the *Kalfelis* case the CJEU held that Article 5(3) of the Brussels Convention applies to cases which are not related to a contract. In the *Brogsitter* case, it developed the thought by stating that the mere existence of a contractual relationship is not enough and demanded that the examination of the contract itself is relevant for the claim to the point that it is "indispensable" for adjudicating the case. The ruling in the *Wikingerhof* case then answers the question of what

45 Judgment of the CJEU of 24 November 2020, Case C-59/19, para. 32.
46 Ibid., para. 33.

is meant by "indispensable interpretation", clarifying that it only applies when the claim relies on contractual provisions and not on the breach of law.

Was the *Wikingerhof* case the final stop of the discussion? no. In summer 2022, the CJEU was asked to consider certain aspects of the *Wikingerhof* case rules in Case C-265/21[47]. Although the CJEU's decision is not yet available at the date of the submission of this article, the case is worth monitoring. Factually, the dispute concerns various family members and third parties regarding trade of certain art works and the claimant sought recognition of their property rights. The case was filed in Belgium which denied its jurisdiction and referred to the CJEU with several questions including: *"Does the concept of 'action' on which the plaintiff 'relies', like the criterion used to distinguish whether an action comes within the concept of matters relating to a contract* […] *or within 'matters relating to tort, delict or quasi-delict'* […] *entail verification of whether the interpretation of the legal obligation freely assumed seems to be indispensable for the purpose of assessing the basis of the action?"* The question in essence asks whether the national court has to examine the contractual obligation or the content of the contract when establishing its jurisdiction. Advocate General Szpunar replied that the *Wikingerhof* case made no such requirement[48] but we will see how the CJEU deals with the case.

2.2 The Issue of Unjust Enrichment Under Articles 7(1) and 7(2) of the Brussels I bis Regulation

Article 7 of the Brussels I bis Regulation does not explicitly mention "unjust enrichment" claims. This, however, does not mean that a claim for unjust enrichment could not be considered a "matter relating to a contract" or a "matter relating to tort, delict or quasi-delict". As noted by *Grušić*, unjust enrichment claims may arise both in relation to a contract and in relation to a delict (i.e., harmful conduct).[49] From this point of view, unjust enrichment tests the relationship between Article 7(1) and 7(2) of the Brussels I bis Regulation, offering the CJEU space to develop the rules. The opportunity

47 Resolution of the CJEU of 21 July 2022, Case C-265/21. Not publicly available in English as of the date of this article.

48 Opinion of Advocate General Szpunar of 16 June 2022, Case C-265/21, para. 76–80.

49 GRUŠIĆ, U. Unjust Enrichment and the Brussels I Regulation. *International & Comparative Law Quarterly*. 2019, Vol. 68, no. 4, pp. 861–862.

was, however, side-stepped in the past. For example, in the *Kalfelis* case, one of the questions asked whether Article 5(3) of the Brussels Convention *"confers, in respect of an action based on claims in tort and contract and for unjust enrichment, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort"*, but the CJEU made reference to unjust enrichment in its answer stating that *"a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based"*[50]. In another case, a national court asked whether claims in restitution on the ground of unjust enrichment come within the scope of Article 5(3) of the Brussels I Regulation but the CJEU considered the claim a matter outside the scope of the Brussels I Regulation entirely[51] and made no other comment on the matter.

In 2021, the CJEU considered the issue of a claim for unjust enrichment in Case C-242/20 (the "*Hrvatske Šume* case")[52]. In this case, the defendant enforced a judgment against the claimant and recovered money from the claimant's account. Subsequently, the enforcement procedure was found invalid and the defendant had to return the money with interest. The claimant sued for unjust enrichment in Croatia (place of their accounts) but the German defendant challenged jurisdiction of Croatian courts claiming that there is no specific rule conferring special jurisdiction. Croatian national court asked the CJEU whether unjust enrichment falls under Article 7(2) of the Brussels I bis Regulation.

The CJEU referred to its previous findings, especially under the *Wikingerhof* case, and confirmed that unjust enrichment is no special category of claims which benefits from automatic result but that the full test applies. According to the CJEU: *"In order to determine whether an action for restitution based on unjust enrichment falls within the scope of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that regulation, it is necessary to ascertain whether two conditions are satisfied, namely, first, that that action does not concern matters relating to a contract within the meaning of Article 5(1)(a) of that regulation and, second, that it seeks to establish the liability of a defendant."*[53] For determining the contractual

50 Judgment of the CJEU of 27 September 1988, Case 189/87, para. 4 and 19.
51 Judgment of the CJEU of 28 July 2016, Case C-102/15, para. 43.
52 Judgment of the CJEU of 9 December 2021, Case C-242/20.
53 Ibid., para. 43.

claim we need to find a freely assumed obligation, but a claim for restitution arises without the defendant's intention. The CJEU thus concluded that while such a claim in principle is not related to a contract,[54] it may be, under certain circumstances, if the link of the claim to contractual relationship between the parties to the dispute is close enough, in which case the claim does fall under Article 7(1) of the Brussels I bis Regulation.[55]

The CJEU developed the rules for unjust enrichment even further and considered whether an action for restitution based on unjust enrichment seeks to establish liability of the defendant. The answer is positive if the harmful event may be *"imputed to the defendant, in that he or she is alleged to have committed an act or omission contrary to a duty or prohibition imposed by law. Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates."*[56]

With this new requirement, the CJEU concluded that a claim for restitution based on unjust enrichment refers to an obligation which does not originate in a harmful event but arises irrespective of the defendant's conduct. As a result, there is no causal link that can be established between the damage and any unlawful act or omission committed by the defendant. For that reason, the CJEU found that *"a claim for restitution based on unjust enrichment cannot come within matters relating to tort, delict or quasi-delict"*[57]. Instead of ruling that unjust enrichment classifies uniformly as a "quasi-delict", the *Hrvatske Šume* case confirmed a need for detailed examination but also, surprisingly, conceded that in some cases a claim will simply fall under neither Article 7(1) nor 7(2) of the Brussels I bis Regulation. The preliminary question was thus decided in favour of general jurisdiction rules.

The Czech Republic was not involved in the *Hrvatske Šume* case but the Agent of the Czech Republic before the Court of the European Union[58] has filed his statement on the case with the CJEU. The filing was summarized in the annual report from the Agent. Apparently, the effort was made in order to persuade the CJEU that unjust enrichment claims

54 Judgment of the CJEU of 9 December 2021, Case C-242/20, para. 44 and 45.
55 Ibid., para. 47.
56 Ibid., para. 52 and 53.
57 Ibid., para. 55 and 56.
58 Appointed under Article 19 of the Statute of the Court of Justice of the European Union.

fall under "matters relating to tort, delicts or quasi-delicts".[59] Why was this particular case of concern? The following chapter is dedicated to Czech case law context, showing why the *Hrvatske Šume* case was noticed by the Czech representation at the CJEU.

3 Czech Case Law on Articles 7(1) and 7(2) of the Brussels I bis Regulation

Czech courts are not that active when it comes to submitting preliminary questions to the CJEU. Between 2018 and 2022, Czech courts submitted only 47 cases out of 2879.[60] The total number of Czech submissions for the first 18 years of the Czech membership in the EU[61] is 94, which is notably below average.[62] With respect to special jurisdiction rules under Article 7 of the Brussels I bis Regulation, only one case originated in the Czech Republic was found during the preparation of this article.[63] In that case the Municipal Court in Prague asked the CJEU to determine whether it has jurisdiction to adjudicate dispute over a blank promissory note issued by a Czech company but signed "per aval" by individual domiciled in Austria. The Czech court was concerned whether there is a freely assumed obligation in case of the aval under such circumstances. The CJEU found in favour of the application of Article 5(1) of the Brussels I Regulation since the aval voluntarily agreed to guarantee obligations based on the promissory note by signing it.[64] The case is still often quoted as an example that an obligation may be freely assumed including a consent with future completion of the terms (by filling-up the missing information on a promissory note).

59 CZECH MINISTRY OF FOREIGN AFFAIRS, DEPARTMENT OF EU LAW. Zpráva o činnosti vládního zmocněnce pro zastupování České republiky před Soudním dvorem Evropské Unie za rok 2020. *ISAP* [online]. 2021, p. 41 [cit. 17. 6. 2023]. Available at: https://isap.vlada.cz/homepage2.nsf/pages/esdvlz/$file/VLZ-zprava_2020.pdf

60 Annual Report 2022: Statistics concerning the judicial activity of the Court of Justice. *Court of Justice of the European Union* [online]. 25. 5. 2023, p. 5 [cit. 17. 6. 2023]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf

61 Time period between 1 May 2004 and 30 April 2022.

62 DŘÍNOVSKÁ, N., VIKARSKÁ, Z. Evropská zletilost českých (nejvyšších) soudů aneb prvních 18 let předběžných otázek z Brna. *Časopis pro právní vědu a praxi.* 2023, Vol. 31, no. 1, 2023, p. 19.

63 Judgment of the CJEU of 14 March 2013, Case C-419/11.

64 Ibid., para. 46–49.

It is interesting that there are no other cases concerning Article 7 of the Brussels I bis Regulation or its predecessors referred by the Czech courts to the CJEU. Does that mean that Czech courts do not encounter any interpretative issues worth referring? Given the fact that rules of special jurisdiction are subject to so many other referrals, it seems unlikely that Czech courts have never had a good reason for more activity. As mentioned in the introductory chapter, the Czech Ministry of Justice noted that there might be some disaccords between Czech case law and the CJEU ruling in the *Hrvatske Šume* case, but is that all to note? How have the Czech courts dealt with the issue of unjust enrichment before the *Hrvatske Šume* case? How do they approach cases where claims concern both a contract and a breach of law?

In order to answer these questions, the following chapter discusses several cases decided by Czech courts where the special jurisdiction based on Article 7(1) or 7(2) of the Brussels I bis Regulation was disputed. It is fair to concede that the overview does not intend to show full statistical analysis. Its focus is naturally on cases where courts struggled with the issue or cases considered by the author as the best examples of Czech case law development on the matter.

3.1 Unjust Enrichment as an Unfortunately Automatic "Matter of Quasi-Delict" in Czech Case Law

From the Czech point of view, unjust enrichment is considered a quasi-delict. The Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* has explicitly recognized that *"the obligation* to *hand over unjust enrichment is not tied to fault on the part of the person enriched or to their illegal actions, but it is a concept of the so-called quasi-delict, where the law stipulates the obligation to hand over the object of unjust enrichment upon the occurrence of a certain reproved state, and it is therefore not a form of legal liability"* [65]. It is probably due to this national bias that Czech courts tend to subsume unjust enrichment claims automatically under

65 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 15 August 2012, Case no. 28 Cdo 1056/2012. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/; Similarly, Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 12 March 2014, Case no. 28 Cdo 2953/2013. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

quasi-delicts and thus under Article 7(2) of the Brussels I bis Regulation. While the end result may be correct, the legal reasoning behind it ignores the fact that the term "matters relating to (…) quasi-delict" has never been equated with unjust enrichment by the CJEU case law. The CJEU case law has much more nuance and the oversimplification on the part of Czech courts may put at risk the uniform application of the Brussels I bis Regulation. Especially when the same courts do not even consider a referral to the CJEU. The purpose of this Section is to examine the body of the Czech case law produced mostly by the Czech Supreme Court and to critically evaluate whether the cases actually adhere to the rules developed by the CJEU.

The starting point of the Czech case law on the issue was identified in the Czech Supreme Court Case no. 28 Cdo 797/2013 (the "*Co-owners* case")[66] which came out just a few months before the *Brogsitter* case. In the *Co-owners* case, the claimants' action was based on a claim for unjust enrichment on the side of a third co-owner of their house. The defendant allegedly did not participate in maintenance of the house and the house was also situated on a plot of land which was owned solely by the claimants who were thus requesting a lease payment for the land. The house was in the Czech Republic, the claimants were domiciled in the Czech Republic while the defendant was domiciled in Germany.

The Czech courts of the first and second instance referred the claim to Germany. However, the Czech Supreme Court ruled that Czech courts had jurisdiction based on Article 5(3) of the Brussels I Regulation because claims for unjust enrichment fall under this provision as "quasi-delicts". In support of such a result, the Czech Supreme Court referred to a Czech commentary on the Brussels I Regulation where it is stated that: *"A quasi-delict differs from a delict in that it does not always require wrongful conduct on the part of the defendant. A typical example of a quasi-delict is a claim for unjust enrichment or negotiorum gestio."*[67] In addition, a reference was also made to paragraph 18 of the *Kalfelis* case, where the Czech Supreme Court recognized that its classification of unjust

66 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 20 November 2013, Case no. 28 Cdo 797/2013. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

67 DRÁPAL, L. et al. *Občanský soudní řád II. § 201 až 376. Komentář.* Praha: C. H. Beck, 2009, p. 2903.

enrichment as a quasi-delict will apply only under condition that the unjust enrichment is not related to a contract within the meaning of Article 5(1) of the Brussels I Regulation.

The *Co-owners* case was published in the official case collection issued by the Czech Supreme Court and quoted in almost all cases which had to deal with the issue during the next decade. With the benefit of the hindsight, the conclusions of the *Co-owners* case do not seem to be the best example to follow. In the *Co-owners* case, there is no contract between the parties but neither is there any wrongdoing or harmful conduct of the defendant. He was merely passive. Even if it was true that he benefited from his passivity, it can hardly be argued that such behaviour is enough to trigger Article 7(2) of the Brussels I bis Regulation. A possible answer to the jurisdiction issue might have been a reference to general jurisdiction (originally made by the lower courts), or even to special jurisdiction under Article 7(1) of the Brussels I bis Regulation with the argument that co-ownership of the house constitutes a voluntary assumption of obligation to cooperate with other co-owners or to pay lease for the land under it. It is also a bit curious that no court in the *Co-owners* case gave any consideration (not even as *obiter dictum*) to exclusive jurisdiction under Article 24(1) of the Brussels I bis Regulation. Overall, the line of the Czech case law has not started at an ideal spot.

Not long after in 2014, just a few days after the *Brogsitter* case was published, the Czech Supreme Court published another decision on unjust enrichment with the same conclusion in favour of Article 5(3) of the Brussels I Regulation.[68] Similarly to the claim in the *Co-owners* case, there was no wrongdoing or harmful conduct on the part of the defendant. The case concerned immovable property re-claimed by the defendants under the specific Czech restitution law, where in case of a successful restitution, the same law required that recipients compensate the previous owner for the past improvements made on the re-claimed property. The Czech Supreme Court confirmed its previous decision under the *Co-owners* case and again ruled in favour of the application of the special jurisdiction

68 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 12 March 2014, Case no. 28 Cdo 2953/2013. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

under Article 5(3) of the Brussels I Regulation. The Czech Supreme Court explained that the defendants had not committed any illegal act that could establish any tortious liability but still considered the claim to be legally classified as unjust enrichment and thus a quasi-delict.

The unsaid conclusion of both of these cases is that the Czech Supreme Court does refer to autonomous and independent interpretation of "matters relating to tort, delict or quasi-delict" but does not follow it through. In both analysed cases it seems that the main focus is on labelling the claim as unjust enrichment. Thereafter, not much additional consideration was needed or provided for the claim to be deemed a quasi-delict. Moreover, in early 2020, the Czech Supreme Court refused to consider the issue again, arguing that it had already dealt with the legal questions raised and there is thus no reason for further rulings.[69]

In March 2021, just three months after the ruling in the *Wikingerhof* case was published, the Czech Supreme Court was directly asked to revise its previous rulings (the "*NURSUS* case").[70] In that case, the Czech company NURSUS s.r.o. sent money to another company allegedly without a legal reason. Henceforth, an action for unjust enrichment was filed to recover the money. The Czech courts of the first and second instance ruled in favour of jurisdiction of Czech courts under Article 7(2) of the Brussels I bis Regulation.

The extraordinary appeal was rejected but the Czech Supreme Court which at least provided a detailed justification for its position based mostly on references to the *Kalfelis* case and the CJEU decision in Case C-645/11[71]. The argument was that the CJEU agreed in the latter case that the action for recovery of unjust enrichment may be filed with the courts of the member state where the payment was made. Unfortunately, upon closer look, the choice of case law does not fit because it refers to a different legal problem. The C-645/11 case covered several defendants with various domiciles and

69 Judgments of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 29 January 2020, Case no. 27 Cdo 4100/2018 and of 25 February 2020, Case no. 27 Cdo 4469/2018. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

70 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 3 March 2021, Case no. 30 Cdo 240/2021. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

71 Judgment of the CJEU of 11 April 2013, Case C-645/11.

the question thus was whether they may be sued at the same forum under Article 6(1) of the Brussels I Regulation. The CJEU answered in positive, agreeing that all defendants may be sued at the court where the payment was made and where some of the defendants had their domicile.[72] Another argument raised by the Czech Supreme Court was a reference to the rules for substantive law under the Rome I Regulation which explicitly classifies unjust enrichment as a quasi-delict. While the CJEU acknowledged existence of this line of argumentation, it was not followed in its case law. The *NURSUS* case provided more background on how the Czech Supreme Court considers the issue but shows no development in its approach even though the CJEU itself has developed its case law since the time the *Co-owners* case was decided.

The last stop in the line of the Czech Supreme Court case law came in late 2022 (the "*Sugar* case").[73] Timewise, the *Sugar* case came approximately one year after the *Hrvatske Šume* case but makes no reference to it. That is disappointing because factually, there are significant similarities between both cases. In the *Sugar* case, the claimant filed an action based on unjust enrichment because the defendant allegedly received money from illegitimate enforcement proceedings. According to the claimant, there was no contract between the parties, hence no arbitration clause and no legal basis for arbitration awards enforced against the claimant. The Czech Supreme Court did not review its previous rulings and its legal argumentation simply copied the previous case law applying Article 7(2) of the Brussels I bis Regulation when it concluded that there is no contract and that a claim for unjust enrichment equals to a quasi-delict.

3.2 Good Practice of Distinguishing Between Articles 7(1) and 7(2) of the Brussels I bis Regulation in the Czech Case Law

It follows from the previous Section that the Czech Supreme Court case law tends to jump into fast conclusions when it considers actions based

72 Judgment of the CJEU of 11 April 2013, Case C-645/11, para. 48.

73 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 13 October 2022, Case no. 27 Cdo 957/2022. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

on unjust enrichment. How about other cases and courts? How do Czech courts approach the issue of distinguishing between "matters relating to a contract" and "matters relating to tort, delict or quasi-delict" then? To answer that question, the author researched the available case law using full text screening of the case law made available by the Czech Ministry of Justice and private databases and the following cases with interesting and in-depth application of the CJEU tests were identified.

First, Case 30 Cdo 6002/2016[74] was decided by the Czech Supreme Court several years after the *Brogsitter* case and offers a good example of the Czech Supreme Court correcting lower courts' decisions based on the CJEU case law.

The dispute arose between business partners from the Czech Republic and Slovakia whose contract prohibited the defendants from selling liquor in the Czech Republic and thus competing with the claimant. The dispute arose when the defendants unilaterally terminated the contract and made profit from sales of liquor in the Czech Republic. The claimant stated that the termination of the contract was invalid and classified its claim as damages for lost profit arising from a breach of the contract. The courts of the first and second instance classified the case as a "matter relating to tort, delict or quasi-delict" and thus focused on the identification of the place of the harmful event. The Czech Supreme Court overruled their previous decisions, ruling that the issue should be considered a matter related to a contract under Article 7(1) of the Brussels I bis Regulation. In contrast to the previously quoted Czech case law, in this instance, the Czech Supreme Court depended heavily on the *Brogsitter* case and developed the following two-step approach for lower courts to follow:

- First, the lower court has to examine and confirm that there is a contractual relationship between the parties.

  This is entirely in line with the CJEU case law, the only concern is that in its reasoning, the Czech Supreme Court used a surprisingly narrow approach. According to this decision, a "contract" under Article 7(1) of the Brussels I bis Regulation requires a written

74 Judgment of the Supreme Court of the Czech Republic (*Nejvyšší soud České republiky*) of 7 February 2018, Case no. 30 Cdo 6002/2016. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

contract or a long-term business relationship between the parties which includes a tacitly agreed relationship which may be classified as contractual. The Czech Supreme Court formulated the rule based on the CJEU Case C-196/15[75] and while the two options named are true, they are certainly not the only options. As described in Chapter 2 above, the CJEU's approach is in fact much broader and requires merely a freely assumed and identifiable obligation. In other words, the CJEU has ruled in favour of Article 7 even if there was neither a written contract nor a long-term business relationship.

- Second, assuming that there is a contractual relationship, the lower court should examine whether the allegedly breached obligation is contractual, i.e., whether the contract is necessary to prove that the relevant behaviour was allowed or prohibited. In case of a claim for damages this means that the court must consider whether the cause of the damage is a breach of the contract.

Following its two-step test, the Czech Supreme Court concluded that there is a contractual relationship and that the claim is based on a breach of the contractual provision, hence the jurisdiction should be established under Article 7(1), and not 7(2), of the Brussels I bis Regulation.

The second decision concerned a dispute between a company and its former executive director based on unjust enrichment.[76] The company claimed that the executive director unjustly enriched himself by receiving payments for services even though there was no management contract and the payments were not agreed upon by the general meeting of the company. The court of the first instance refused its jurisdiction but that ruling was overturned upon appeal when the court of appeal classified the unjust enrichment claim as a quasi-delict and confirmed the jurisdiction based on Article 7(2) of the Brussels I bis Regulation. The Czech Supreme Court, however, disagreed and ruled that the claim should be considered a "matter relating to a contract". It was then concluded that the claim of the company against its former executive director is a contractual claim falling under Article 7(1) of the Brussels I bis Regulation. Moreover, this time the Czech Supreme

75 Judgment of the CJEU of 14 July 2016, Case C-196/15, para. 23 and 24.

76 Judgment of the Supreme Court of the Czech Republic *(Nejvyšší soud České republiky)* of 15 April 2019, Case no. 27 Cdo 3456/2019. In: *Beck-online* [online]. [cit. 17. 6. 2023]. Available at: https://www.beck-online.cz/

Court correctly specified what constitutes a "contract" in such cases (i.e., a freely assumed and identifiable obligation). The Czech Supreme Court referred to numerous CJEU cases, including the *Brogsitter* case, but it did not provide further explanation or its own application of the CJEU rulings. The case is still a big step-up from the automatized exercise described in the previous Section of this article.

Third case which should be noted is a very recent decision of the Regional Court in Ostrava (court of appeal).[77] Factually, the claimant filed an action for unjust enrichment on the basis of undue payment made by one company to another for transportation of goods. According to the claimant, the transportation was either included in the cost of the goods or was not provided at all. The first instance court took a glance at "unjust enrichment" as the basis of the action and confirmed its jurisdiction under Article 7(2) of the Brussels I bis Regulation but upon appeal the legal reasoning was reconsidered.

Based on the facts of the case, the disputed payments were either made without any grounds or as a payment for logistic and storage services. Hence, the result of the dispute depended on the consideration whether there was a contract between the parties under which a service was provided or whether both services and invoices were entirely fictional. The court of appeal emphasized that legal classification of the claim as unjust enrichment made by the claimant does not, by itself, mean that jurisdiction is based on Article 7(2) of the Brussels I bis Regulation. That may be considered almost a U-turn. However, the final decision in this case has not yet been rendered.[78]

The case is a good example of how Czech courts have struggled with cases where the claim is classified as unjust enrichment – this leads them to automatically apply Article 7(2) of the Brussels I bis Regulation. This

77 Judgment of the Regional Court in Ostrava *(Krajský soud v Ostravě)*, Czech Republic, of 15 July 2022, Case no. 15 Co 95/2022. In: *Salvia Kraken* [online]. [cit. 17. 6. 2023]. Available at: http://kraken.slv.cz/KSSEMOS15Co95/2022

78 The case is currently awaiting decision of the Czech Supreme Court. According to the information published by the Czech Ministry of Justice, the claim was referred to the Czech Supreme Court on 18 November 2022 and is currently being administered under no. 23 Cdo 3517/2022.

is an unfortunate practice because, as shown above, under the current CJEU case law, unjust enrichment has never been classified as a quasi-delict or, more generally, as a claim that automatically classifies as a "matter related to tort, delict or quasi-delict" under Article 7(2) of the Brussels I bis Regulation. To the contrary, the CJEU applies much more complicated tests which the Czech courts are slow and hesitant to include in their considerations, and the most recent ruling of the CJEU in the *Hrvatske Šume* case even stated that in some circumstances claims for unjust enrichment do not even fall under Article 7 of the Brussels I bis Regulation.

4 Conclusion

Over the years the CJEU has actively developed its case law on the inner relationship of the first two heads of Article 7 of the Brussels I bis Regulation. One of the main themes of the CJEU's approach is the autonomous interpretation of the terms "matters relating to a contract" and "matters relating to tort, delict or quasi-delict" which have to be independent from national law and made with respect to the aims of the Regulation itself and not national legal concepts. Although these principles are noted in every piece of the relevant case law since 1980s, in case of actions based on claims for unjust enrichment, Czech courts appear to be very slow in applying them.

Under the Czech legal theory and case law, unjust enrichment is traditionally considered a quasi-delict and for years the Czech Supreme Court ruled almost automatically that actions based on unjust enrichment should be regarded as "matters relating to tort, delict or quasi-delict" subject to Article 7(2) of the Brussels I bis Regulation (or its predecessors). With the benefit of recent clarifications made by the CJEU, it seems that many of these Czech Supreme Court cases are not aligned with the CJEU position on the subject. While the Czech Supreme Court has not yet acknowledged the necessary shift in its interpretations, there is already a recent positive trend showing that Czech courts are slowly adopting more detailed tests. Furthermore, in some cases they even reject the "unjust enrichment = Article 7(2) of the Brussels I bis Regulation" equation in favour of a more nuanced application of Article 7 of the Brussels I bis Regulation.

The Czech Ministry of Justice suggested that the point should be resolved in the Brussels I bis Regulation reform by explicitly including unjust enrichment in the reformed rules. Given the CJEU case law, however, it does not seem to be a good idea and, notably, neither the European Commission nor the working paper issued by the Max Planck Institute[79] make such a recommendation. Rules of Article 7 of the Brussels I bis Regulation are not self-serving or random but based on the idea that a court other than the court of the defendant's domicile is better suited to decide the case thanks to a close link to the place of performance of a contract or the place of harm. The cases described above show that claims for unjust enrichment may be easily linked to either, therefore, to reform the rules and include unjust enrichment in the category of "quasi-delicts" would in effect go against the principle of the special jurisdiction by not allowing courts to examine whether there is an actual close connection. The concept of unjust enrichment should be left to the CJEU's interpretation as it is better to continue to develop a precise approach to such claims in the case law rather than to end up with a strict rule which no longer serves its original purpose. The Czech courts should get on board with the CJEU's case law development.

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Determining International Jurisdiction in Cases of Cross-Border Substitute Family Care

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Abstract

This paper focuses on the determination of the international jurisdiction of courts in matters of substitute family care with an international element. It presents all relevant instruments of private international law that can be applied by Czech (and usually by other European) courts and provides a clear analysis of the individual jurisdictional rules. The paper also offers a summary of the relevant CJEU case law, as well as practical diagrams, tables and examples for a better explanation of the whole issue. The aim of this article is to provide the reader with an organized overview of the whole topic, which will help to facilitate the application of the relevant provisions of private international law in practice.

Keywords

Brussels II ter Regulation; Hague Convention on the Protection of Children; International Jurisdiction; Jurisdictional Rule; Substitute Family Care.

1 Introduction

Family is an important social group and educational environment that socializes its members and shapes the child's attitudes not only towards themselves but also towards the world around them.[1] Therefore, every child has the right to grow up with their parents. The right to family life, including the rights of parents to have custody of their children, is recognized in many

1 ŠIMÁČKOVÁ, K. Art. 32 [Ochrana rodičovství, rodiny, dětí a mladistvých]. In: WAGNEROVÁ, E., ŠIMÍČEK, V., LANGÁŠEK, T., POSPÍŠIL, I. et al. *Listina základních práv* a *svobod. Komentář*. Praha: Wolters Kluwer, 2012, p. 659.

international and regional documents.[2] However, even this right is limited. Sometimes it is not possible for a child to grow up with their biological parents. In such cases, it is necessary to find a solution as quickly as possible. The goal is to bring security, support and love to the child and allow them to grow up properly and peacefully with their alternative carers.

Due to the growing European integration and high mobility of EU citizens, the number of cases in which the relationship is enriched by an international (cross-border)[3] element is growing. As *Pfeiffer* aptly points out, *"cross-border legal relations are not the exception; on the contrary, purely domestic relations are likely to become the exception very soon"*.[4] This is undoubtedly also applicable to family law situations including the field of parental responsibility.

Despite the growing phenomenon of international families, Czech literature does not address the issue of parental responsibility in the context of international family law very often. The plurality of legal provisions, as well as the lack of a solid literary background, may reflect in practical problems related to the lack of orientation of judicial and other authorities in this issue.

During 2021, I did a six-month internship at the Office for International Child Protection in Brno, Czech Republic ("OICP"). During this internship, I had the opportunity to become familiar with the decision-making practice of Czech courts in the field of alternative family care with an international element. I found out that some judges have problems with the proper application of the relevant provisions of international family law. As revealed in the interview with OICP lawyers, especially the proper application of international treaties is often problematic for Czech courts. Some judges are not aware of important international instruments, such as various Hague

2 E.g., Convention on the Rights of the Child, adopted by UN General Assembly resolution 44/25, on 20 November 1989 ("Convention on the Rights of the Child") guarantees this right through its Article 7, in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("European Convention on Human Rights") it can be found in its in Article 8, which talks about the protection of private and family life.

3 Although some authors distinguish between the international and cross-border element (cf. ŠÍNOVÁ, R., KAPITÁN, Z. et al. *Rodina v mezinárodních souvislostech*. Praha: Leges, 2019, p. 96), in the context of this paper I consider the given terms as synonyms.

4 PFEIFFER, M. *Kritérium obvyklého pobytu v mezinárodním právu soukromém*. Praha: Leges, 2013, p. 11.

Conventions or bilateral treaties. In addition, courts often do not sufficiently address the issue of the best interest of the child and only very sporadically cite available case law or academic literature in their reasonings.

The above-mentioned experience from my internship was the reason why I decided to write this paper. In my paper, I'm trying to clarify the application rules for the relevant legislation to help others to understand this complex issue. I am also trying to provide a detailed analysis of the applicable jurisdictional rules in the context of alternative family care with a cross-border element. However, I do not address the issue of international adoption.[5]

A care for a child is a part of parental responsibility. International jurisdiction for parental responsibility is regulated by several sources of legal regulation. We can talk about domestic legislation, EU legislation, multilateral and bilateral international treaties. In the first part of my paper, I introduce relevant legislation and the rules for its application. I do it from the perspective of Czech courts in relation to other European countries.

The application of the correct private international law regulation is undoubtedly essential in proceedings with an international element. But equally important is the proper interpretation and application of the rules contained therein. Therefore, in the second part of my paper I provide a reader with a detailed analysis of all applicable jurisdictional rules regarding substitute family care.

In the very end of my paper I address a practical problem related to the international jurisdiction of Czech courts in cases of so-called repatriation of foreign minor children. I provide a summary of the various solutions that are available and evaluate them in terms of their impact on the protection of the best interests of children.

5 Even the old Roman principle of *adoptio natura imitatur* points to the fact that adoption in many ways goes beyond other forms of substitute family care. Some authors even exclude adoption from the institution of foster care altogether. Traditionally, the issue of international adoption has been regulated in separate sources of legislation from other forms of substitute family care. Moreover, compared to other forms of substitute family care with an international element, it has also received a relatively high level of attention in the professional literature.

This paper includes schemes, tables and practical examples that provide the reader with a practical overview of how the individual rules of international family law work.[6]

2 Relevant Legislation and Rules for Its Application

For Czech courts, four types of legislation are the most relevant regarding substitute family care with an international element. These are EU regulations (in particular the Brussels II ter Regulation), multilateral international treaties (in particular the Hague Convention on the Protection of Children), bilateral international treaties and a national private international law legislation, i.e., the Act no. 91/2012 Coll., on private international law ("Czech PILA").

The identification of the mutual relationship between the above-mentioned regulations is crucial for their practical application. However complicated this relationship may seem, a precise application of the rules known mainly from public international law can quite easily lead to a conclusion which rule should be applied in a particular case.

2.1 The Applicability of the Czech PILA

First of all, the conflict of various legal regulations is addressed by Section 2 of the Czech PILA. This provision, however, only confirms the rules known from other legal regulations, namely the Czech Constitution[7] and the TFEU. According to these rules, the provisions of an international treaty, to which the Czech Republic is bound, shall prevail if that treaty states something different from Czech PILA. The directly applicable provisions of EU law

6 All schemes and examples are my own creation. However, some of them are inspired by real cases I have encountered during my internship at OICP, as well as examples contained in methodological manuals on the Brussels II bis Regulation or the Hague Convention on the Protection of Children.

7 Here, it should be pointed out that the provisions of the Czech PILA are broader in scope than Article 10 of Constitutional Act no. 1/1993 Coll., the Constitution of the Czech Republic ("Constitution"). While the Constitution speaks of the priority of international treaties whose ratification has been approved by the Parliament, this condition is absent in the Czech PILA. Therefore, it can be concluded that the Czech PILA also applies to treaties for the ratification of which the consent of Parliament was not required. However, such a situation will be exceptional (cf. BELLOŇOVÁ, P. § 2. In: PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 18).

also apply in preference to Czech PILA. It can therefore be concluded that Czech PILA will only be used if the Brussels II ter Regulation or an international treaty cannot be applied.

2.2 EU Law vs. International Treaties

Regarding the relationship between international treaties and EU law, Articles 94 et seq. of the Brussels II ter Regulation are particularly relevant when talking about parental responsibility with an international element. In inter-EU relationships (with the exception of Denmark), it is the Regulation that takes precedence over any international treaties. Nevertheless, the application of international treaties concluded with non-EU countries is not affected.[8] Therefore, if an international element refers to a non-member state of the EU with which the Czech Republic has concluded an international treaty, this international treaty shall be applied.

This particular rule can be practically illustrated on the example of a minor child of Belarusian nationality who is habitually resident in the Czech Republic. Belarus and the Czech Republic has concluded a treaty on legal assistance in family matters. Therefore, the international jurisdiction of the courts for the purposes of proceedings for the placement of a child in substitute care will be determined on the basis of this bilateral international treaty. Under the same treaty, the applicable law shall be determined as well.

At this point, it should be recalled that the adoption of the Brussels II bis Regulation gave the EU exclusive competence to conclude international treaties of the same nature with third countries.[9] In order for the Member States to be able to conclude international treaties on jurisdiction, recognition and enforcement of decisions in matters of parental responsibility, the Council of the EU had to adopt a special regulation granting the Member States the power to conclude such treaties.[10] Member States are therefore entitled to conclude international treaties which fall wholly or partly within

8 Cf. Art. 351 of the TFEU.

9 Reference may be made here to the CJEU's Opinion of 7 February 2006, Case 1/03.

10 Council Regulation (EC) no. 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.

the scope of the Brussels II ter Regulation with third countries. However, they must follow the procedure laid down in the above-mentioned Regulation.

Specific rules apply to the relationship between the Brussels II ter Regulation and the Hague Convention on the Protection of Children. If the child is habitually resident in the territory of a Member State of the EU, the Brussels II ter Regulation applies even if the international element refers to a Contracting State to the Hague Convention on the Protection of Children, e.g., Denmark (which is not bound by the Brussels II ter Regulation as we have already mentioned).[11] As a result, even though both Czech Republic and Denmark are bound by a multilateral treaty – the Hague Convention on the Protection of Children – the international jurisdiction of the courts for the purposes of proceedings for the substitute family care will be determined on the basis of the Brussels II ter Regulation. In other words, the Regulation applies even if there is an international treaty that should otherwise be applied in preference. Nevertheless, as the Brussels II ter Regulation does not contain conflict-of-law rules, the applicable law will be determined in accordance with the Hague Convention on the Protection of Children.

2.3 International Treaty vs. International Treaty

The conflict between several international treaties is addressed in by the Article 30 of the Vienna Convention on the Law of Treaties. It states that the international treaty to which both States concerned are party shall be applied. If there is more than one of these treaties, the solution to the conflict can usually be found in one of their provisions. For example, in the Hague Convention on the Protection of Children, we find the solution in Article 52. This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

Pursuant to the abovementioned Article 52, paragraph 1 of the Convention, the Czech Republic declared, that the rules on applicable law of the Convention shall take precedence over the rules of the Treaty between the Czechoslovak

11 Cf. Art. 97 of the Brussels II ter Regulation.

Socialist Republic and the Polish People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family, Labour and Criminal Matters, signed at Warsaw on 21 December 1987. Therefore, when talking about the cross-border placement of a minor child of Polish nationality who has their habitual residence in the Czech Republic, the Hague Convention on the Protection of Children will prevail over the legal assistance treaty.[12] On the other hand, if the child were not a citizen of Poland but of, for example, Ukraine, the relevant bilateral treaty in legal assistance would take precedence.

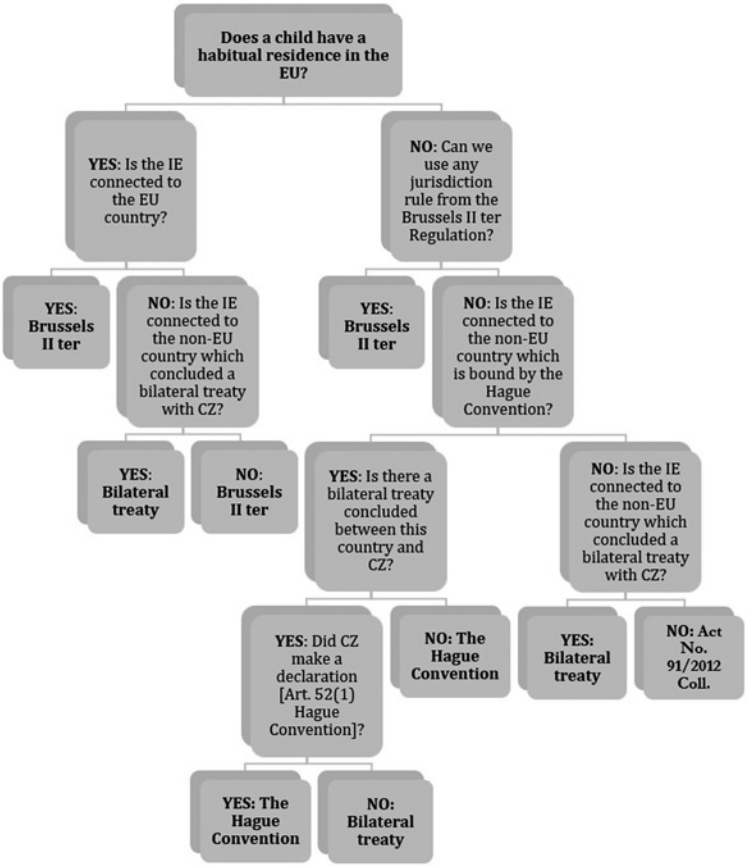
If an explicit provision on the relationship of an international treaty to other international treaties is absent, the rule *lex posterior derogat legi priori* should be applied.

2.4 Determining International Jurisdiction in Practice

To clarify the above-mentioned application rules, I created a scheme consisting of several easy questions. This scheme can be used to easily identify the relevant regulation governing international jurisdiction in matters of parental responsibility. For quicker orientation in the scheme, I draw the reader's attention to the abbreviations contained therein. "IE" stands for the international element, "CZ" stands for the Czech Republic and The Hague Convention on the Protection of Children is abbreviated to the "Hague Convention".

12 It should be added that in the case of determining the international jurisdiction of the courts, the jurisdictional rules contained in the Brussels II ter Regulation will be applied (both the Czech Republic and Poland are EU Member States). Hence, the Hague Convention on the Protection of Children will only be applied when determining the applicable law, which is not regulated by the Brussels II ter Regulation.

Scheme no. 1: Determination of the Particular Legal Instrument for the Purpose of Establishing International Jurisdiction from the Point of View of the Czech Court



3 International Jurisdiction Under the Brussels II ter Regulation

As we can see from the scheme, in relation to the courts of the Member States of the EU, the Brussels II ter Regulation stands on an imaginary pedestal of procedural rules in the field of international family law. This is the regulation under which Czech (and other European) courts generally proceed when they need to determine international jurisdiction in matters

relating to parental responsibility, including matters of substitute family care with a cross-border element.

3.1 A Brief History of Brussels II ter Regulation

At the end of the 20th century, there were intensive efforts to deepen the EU's internal market, which required, among other things, ensuring the free movement of judicial and other decisions issued in individual Member States. However, the free movement of judgments in matrimonial matters, as well as in matters of parental responsibility, was at that time severely restricted by divergent national rules within the EU. The adoption of directly applicable, unifying rules for the recognition of jurisdiction and decisions in the above areas thus seemed to be necessary.[13]

The Council of the EU had already drawn up the Brussels II Convention[14] in May 1998. Even though it never entered into force, it became the legal basis for the Brussels II Regulation, which largely took over its content.[15] A major drawback of the Brussels II Regulation was the definition of its material scope. It concerned only the parental responsibility of spouses in relation to divorce, legal separation or annulment. It therefore completely excluded children born out of wedlock from its scope, which was not sustainable in the long term. Therefore, relatively soon after the adoption of the Brussels II Regulation, a new regulation was drafted to remove this inequality. Already in November 2003, the new Brussels II bis Regulation was adopted and quickly became the most important legal instrument in the field of EU international family law.[16]

On the basis of Article 65 of the Brussels II bis Regulation, the European Commission adopted a report on the application of this Regulation in 2014.[17]

13 Cf. in particular the introductory recitals of the Preamble to the Brussels II Regulation.

14 Council Regulation (EC) no. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children.

15 Cf. Recital 6 of the Preamble to the Brussels II Regulation.

16 Cf. ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 307.

17 Report on The Application of Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000.

Although the report was broadly positive, the European Commission concluded that there was room for improvement, particularly in the area of parental responsibility. Therefore, in mid-2016, the Council of the EU presented a proposal for a completely new regulation to address the existing regulatory bottlenecks. Three years later, the final text of the new Regulation was published, replacing the former Brussels II bis Regulation as from 1 August 2022. The new legislation is commonly referred to as the Brussels II ter or Brussels II b Regulation and introduces a number of changes designed in particular to strengthen children's rights and to facilitate judicial cooperation and the enforcement of foreign judgments in family law matters with an international element.[18]

3.2 Application Test of the Brussels II ter Regulation

The rules on international jurisdiction contained in the Brussels II Regulation are similar in many respects to those we can find in the Hague Convention on the Protection of Children. In particular, the key connecting factor of the habitual residence of the child constitutes an important link between those two instruments. To apply the Brussels II ter Regulation, the case under consideration must pass the so-called application test, in which we examine the material, territorial, temporal and personal scope of the Regulation.

Obviously, the existence of an international element in the examined family law relationship is also important for the application of the Brussels II ter Regulation.[19] This may arise, for example, as a result of the different

18 Cf. Recital 3 of the Brussels II ter Regulation. We also learn from the original proposal for the Brussels II ter Regulation that the aim of the recast of the Brussels II bis Regulation is, *inter alia*, to better protect the best interests of the child, which is to be achieved by simplifying procedures and increasing their efficiency (cf. Explanatory Report to Council Regulation (EU) no. 2019/1111 of 25 June 2019 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and on international child abduction, p. 2).

19 However, there are authors who disagree with this conclusion. According to them, it does not follow from anything that the Regulation can only be applied if there is an international element in the proceedings, and so the court must always first examine whether it has jurisdiction under the Brussels II ter Regulation (cf. RAUSCHER, T. et al. *Europäisches Zivilprozesrecht. Kommentar. Bd. I. Brüssel I-VO, Brüssel IIa-VO.* Munich: Sellier, 2006, p. 796). I do not share this view and I fully agree with the conclusion of *Pauknerová*, according to whom the applicability of the Regulation only to proceedings with an international element follows from Article 81 of the TFEU itself, on the basis of which the Regulation was adopted (cf. PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé.* Praha: C. H. Beck, 2013, p. 134).

nationalities of the parties to the proceedings, their residence in different States or the situation arising in the territory of a foreign State. For the application of the Brussels II Regulation, it is irrelevant whether the international element refers to a Member State of the EU or to a third State.

It should not be forgotten that the Brussels II ter Regulation is nothing more than a recast of the Brussels II bis Regulation. Therefore, the material and territorial scope of the Regulation remain the same and the CJEU decisions concerning the Brussels II bis Regulation are largely applicable to the Brussels II ter Regulation as well.

3.2.1 Material Scope of Application

The Brussels II Regulation's definition of its material scope can be found in its very first article. The material scope of the Brussels II ter Regulation can be simplistically divided into two separate areas – matrimonial matters and parental responsibility. Specifically, the Regulation applies to civil matters relating to (a) divorce, legal separation or marriage annulment and (b) the attribution, exercise, delegation, restriction or termination of parental responsibility. While the former has not changed much over time, the issue of parental responsibility was at the focus of the various recasts of the original Brussels II Regulation.

With regard to the focus of this article, I will focus on the area of parental responsibility. This is defined quite widely in Article 2(7) of the Brussels II ter Regulation. It refers to all rights and duties relating to the child or the child's property. It does not matter whether the rights and duties are conferred on those persons by a decision, operation of law or a legally binding agreement. Parental responsibility includes, in particular, rights of custody and rights of access, but also other areas, which are illustratively defined in Article 1(2) of the Brussels II ter Regulation. This includes, *inter alia*, the institutions of guardianship and curatorship, the determination of the person responsible for the child or a child's property, and the placement of the child in a foster family or in institutional care. On the other hand, status and personal matters, such as the determination and denial of parenthood or questions relating to the name of the child, are expressly excluded from the scope of the Brussels II ter Regulation. Similarly, the Regulation does not cover

adoption or maintenance issues. The list of excluded areas is exhaustive and can be found in Article 1(3) of the Brussels II ter Regulation.

As is clear from the wording of Article 1(1) of the Brussels II ter Regulation, this Regulation applies only in civil matters. The interpretation of "civil matters" was dealt with by the CJEU in its judgment in Case C-435/06.[20] The CJEU's conclusions set out in this decision concern the Brussels II bis Regulation, but they are also fully applicable to the Brussels II ter Regulation. This is also reflected by Recitals 4 and 5 of the Preamble to the Brussels II ter Regulation, where the EU legislator summarises some of the conclusions coming from this decision.

In case C-435/06, Mrs C lived with her two children in Sweden, but after the Swedish authorities decided to place the children in foster care, she moved with the children to Finland.[21] As the Swedish authorities' decision was upheld by the Swedish courts, the Swedish police contacted the Finnish police for assistance in enforcing the decision. The Finnish police thus decided to extradite the children to the Swedish authorities. Mrs C challenged this decision by means of a legal action that made its way to the Swedish Supreme Administrative Court. This court asked the CJEU to interpret the material scope of the Brussels II bis Regulation. It was not clear whether decisions to take custody of a child and decisions to place the child in alternative care, which are public law matters in Finland, fell within the scope of the Brussels II bis Regulation. Regarding the definition of civil matters, the CJEU referred to its previous case law on the interpretation of the Brussels Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters. In the same way as the concept of "civil and commercial matters" contained in the Brussels Convention has be interpreted autonomously, the CJEU considered that an autonomous interpretation was also required in the case of "civil matters" under Article 1(1) of the Brussels II bis

20 The CJEU also addressed this concept in its judgment of 2 April 2009, Case C-523/07. It reached the same conclusions as in the judgment of 27 November 2007, Case C-435/06, discussed below.

21 For the sake of clarification, Swedish legislation distinguishes between two phases of the decision to place a child in substitute family care. While in the first phase the court decides on the taking over of care of the child by the State authorities, in the second phase it decides on the actual placement of the child in substitute family care.

Regulation. If a decision on custody and placement were to be excluded from the scope of the Brussels II bis Regulation purely on account of their public law nature, the objective of the Brussels II bis Regulation, which is the mutual recognition and enforcement of decisions in all matters of parental responsibility, would clearly be jeopardized. Moreover, according to the CJEU, the fact that the legislator did not intend to exclude all public measures from the scope of the Brussels II bis Regulation is also apparent from Recital 10 of the Preamble, according to which the Regulation does not apply *"in matters relating to public measures of a general nature concerning education or health,"* not in all matters of a public nature. The Swedish Supreme Administrative Court further asked whether the Brussels II bis Regulation applies to decisions on taking custody of a child by the State as well as to decisions on the placement of a child in substitute family care. Here, the CJEU referred to the illustrative nature of the list contained in Article 1(2) of the Brussels II bis Regulation and concluded that it was also necessary to bring decisions on taking custody of a child by the public authorities within the material scope of the Regulation, as it concerns parental responsibility as defined in Article 2(7). In addition, CJEU referred to the interrelation between the placement of the child in care and the taking into care of the child by the public authorities, which in Sweden must legally precede any placement of a child to a substitute family care.

The fact that the concept of "civil matters" must not be understood restrictively is also clear from the CJEU's decision in Case C-215/15[22] or the decision in Case C-92/12 PPU[23]. According to the latter decision, the placement of a child in closed institutional care, which involves the deprivation of the child's liberty, also falls within the scope of the Brussels II bis Regulation if the placement is ordered for the protection of the child and not as a punishment.

As can be seen from the CJEU judgment in Case C-404/14[24], the approval of the succession agreement concluded by the guardian of the minor heir also falls within the material scope of the Brussels II bis Regulation.

22 Judgment of the CJEU of 21 October 2015, Case C-215/15.
23 Judgment of the CJEU of 6 April 2012, Case C-92/12 PPU.
24 Judgment of the CJEU of 6 October 2015, Case C-404/14.

3.2.2 Territorial Scope of Application

The territorial scope of the Brussels II ter Regulation is no different from other regulations adopted in the framework of EU judicial cooperation in civil matters. Therefore, the Regulation applies in the territory of all Member States of the EU, with the exception of Denmark, which does not participate in the adoption of measures in the framework of judicial cooperation in civil matters in accordance with Article 81 of the TFEU.[25] Therefore, when this paper refers to "Member States", it generally means all Member States of the EU, with the exception of Denmark.

Article 355 of the TFEU must also be borne in mind in relation to the territorial scope of the Brussels II ter Regulation. In other words, certain territories, in particular overseas territories, which are also bound by EU rules, should not be forgotten when talking about Member States of the EU.[26]

Jurisdiction under the Brussels II bis Regulation is not limited only to the courts in the strict meaning of the word. According to the autonomous definition of a court contained in Article 2(1), a court is any authority of a Member State competent to rule on a matter falling within the Regulation's material scope.

3.2.3 Temporal Scope of Application

The temporal scope is governed by Article 100 of the Brussels II ter Regulation. To apply the rules on international jurisdiction contained in the Brussels II ter Regulation, proceedings must be instituted after the date of application of the Regulation. According to Article 100(2), the Brussels II ter Regulation applies from 1 August 2022. The Regulation therefore applies to proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after that date. Proceedings initiated before that date will therefore continue to be conducted in accordance with the rules contained in the Brussels II bis Regulation.

25 Denmark's special position in the field of judicial cooperation in civil matters with an international element derives from the Protocol (No. 22) on the position of Denmark annexed to the TFEU.

26 The Finnish province of Aland, the French overseas departments (French Guiana, Guadeloupe, Martinique, Mayotte, Réunion), the overseas autonomous territories of Portugal (Azores, Madeira) and Spain (Canary Islands) can be particularly mentioned.

3.2.4 Personal Scope of Application

In terms of personal scope of application, the habitual residence of the child at the time the court is seized plays a key role. Therefore, the nationality of the child or the habitual residence of the holders of parental responsibility is not usually not that relevant.[27]

As a general rule, a change in the habitual residence of the child during the proceedings does not affect the international jurisdiction of the courts.[28] However, there are exceptions to the general rule of jurisdiction, in particular in Articles 10 and 11 of the Regulation, but also in other provisions, which I discuss in more detail below.

The Brussels II ter Regulation does not apply if the child is habitually resident in the territory of a Member State but the international element refers to a non-Member State with which the Member State has concluded an international treaty. For example, from the point of view of the Czech court, this would be a situation in which a child who is a Belarusian citizen has their habitual residence in the Czech Republic.

While the Brussels II bis Regulation did not contain a specific definition of a child and the matter was therefore entirely a question of national law, the Brussels II ter Regulation explicitly states that a child is any person under the age of 18.[29] It is irrelevant whether the child has acquired legal capacity before that age. The age limit of 18 years fully corresponds to Article 2 of the Hague Convention on the Protection of Children. There should therefore be no overlap with the scope of the Hague Convention on the International Protection of Adults.[30] The introduction of a definition of the child in the Brussels II ter Regulation can be seen as a very positive

27 Regarding the consideration of nationality in the case of determining the international jurisdiction of courts under the Brussels II bis Regulation of the child, cf. the judgment of the Supreme Court of 24 April 2013, Case no. 30 Cdo 715/2013 and the judgment of the Municipal Court in Praha of 15 March 2007, Case no. 19 Co 88/2007.

28 GONZÁLES BEILFUSS, C. Brussels IIa Regulation. In: BASEDOW, J., RÜHL, G., FERRARI, F., MIGUEL ASENSIO, P. de (eds.). *Encyclopedia of Private International Law*. Cheltenham: Edward Elgar Publishing, 2017, p. 232, or ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 313.

29 Cf. Article 2(2)(6) of the Brussels II ter Regulation.

30 Convention of 13 January 2000 on the International Protection of Adults.

step, as there is no longer a risk that different States will treat persons of the same age differently.

3.3 Rules of International Jurisdiction

The rules of international jurisdiction are written with regard to the best interests of the child. This is why, since the Brussels II bis Regulation came into force, international jurisdiction has been determined primarily on the basis of proximity.[31] The Brussels II ter Regulation follows the same rule. This further emphasizes the need to apply the individual provisions with regard to the best interests of the child, which must be interpreted not only in accordance with Article 24 of the Charter of Fundamental Rights of the EU but also in the light of the Convention on the Rights of the Child.[32]

I would like to remark that the rules on jurisdiction refer to the Member State whose courts have jurisdiction in matters of parental responsibility, but not to a specific court in the territory of the particular Member State. Therefore, this particular court must be determined on the basis of national procedural rules.

Before explaining the various rules of jurisdiction in detail, I offer a brief summary of them in a following table:

Member State	**When is the international jurisdiction of its courts given?**
Member State of the child's habitual residence	- always, unless jurisdiction is established under Articles 7 to 11
Member State of the child's previous habitual residence[33]	- the child has moved lawfully to another Member State and the conditions in Article 8 are met

31 Recital 12 of the Brussels II bis Regulation.
32 Recital 19 of the Brussels II ter Regulation.
33 This applies only to the modification of a previous decision on the right of access to the child.

Member State	When is the international jurisdiction of its courts given?
Member State in which the child is present	- the habitual residence of a child cannot be established - the child is a refugee or was internationally displaced because of disturbances occurring in Member State of their habitual residence
Member State of the child's new habitual residence	- the child has been unlawfully removed or retained and the person having rights of custody has acquiesced in the removal or retention - the child has been unlawfully removed and the person having rights of custody has not acquiesced in the removal or retention, but the conditions required by Article 9(b) have been met
Member State whose jurisdiction has been chosen by the parties	a) the child has a substantial connection with that Member State b) all holders of parental responsibility have: (i) agreed freely upon the jurisdiction, at the latest at the time the court is seized; or (ii) expressly accepted the jurisdiction in the course of the proceedings and the court has ensured that all the parties are informed of their right not to accept the jurisdiction; c) the exercise of jurisdiction is in the best interests of the child
Member State to which the child has a particular connection	- the court of that State is better placed to assess the best interests of the child; and (a) the internationally competent court or party to the proceedings proposes to transfer the case (b) the requested court accept jurisdiction within six weeks
Sate determined under national law	- jurisdiction cannot be established under Articles 7–11

3.3.1 Article 7: General Jurisdiction

As outlined above, the general jurisdiction of the Brussels II ter Regulation is based on the habitual residence of the child. It is important to bear in mind the need for an autonomous interpretation of the habitual residence of a child, which differs in certain respects from that of an adult.

The habitual residence of the child at the time the court is seized is essential for the purpose of establishing international jurisdiction. Therefore, international jurisdiction must be verified each time proceedings are brought before the court. This conclusion was confirmed by the CJEU in its judgment in Case C-499/15.[34]

The Brussels II bis Regulation is based on the principle of *perpetuatio fori*. Therefore, a change in the habitual residence of the child during the course of proceedings is not normally a ground for a change in the international jurisdiction of the courts.[35]

While the original proposal for the Brussels II ter Regulation counted on the removal of the *perpetuatio fori* principle, this part of the provision is absent in the final text. As can be seen from Recital 21 of the Preamble to the Brussels II ter Regulation, the reason for maintaining the principle of *perpetuatio fori* was to ensure legal certainty as well as judicial efficiency. I consider the final regulation to be appropriate, as it is better able to protect the best interests of the child. The automatic transfer of international jurisdiction during the proceedings would create the risk of unnecessary delays and increased costs. Last but not least, it is not possible to say with certainty whether such rule would not be rather burdensome for the child. Therefore, it seems preferable to retain jurisdiction, with the possibility of transferring the case to the court of the child's new habitual residence if the child's interests require so. This is exactly what Articles 12 and 13 of the Brussels II ter Regulation, which are based on Article 15 of the Brussels II bis Regulation, allow us to do.

3.3.2 Article 8: Protection of the Person Who Has the Right of Access

A specific exception to the personal scope of application is provided for in Article 8 of the Brussels II ter Regulation. If a child is lawfully transferred

34 Judgment of the CJEU of 15 February 2017, Case C-499/15.

35 ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 313, or GONZÁLES BEILFUSS, C. Brussels IIa Regulation. In: BASEDOW, J., RÜHL, G., FERRARI, F., MIGUEL ASENSIO, P. de. (eds.). *Encyclopedia of Private International Law*. Cheltenham: Edward Elgar Publishing, 2017, p. 232.

from one Member State to another, the State of the child's habitual residence retains jurisdiction, but only for three months after the transfer. The purpose of the retention of jurisdiction is to modify a decision previously given on a right of access if the holder of that right remains habitually resident in the place of the child's original habitual residence. However, if the holder of the right of access participates in the proceedings before the court of the Member State of the child's new habitual residence without contesting the lack of jurisdiction, the jurisdiction of the court of the Member State of the child's new habitual residence shall be maintained.

3.3.3 Article 9: Jurisdiction in Cases of Child Abduction

In Article 9 of the Brussels II ter Regulation we find a specific jurisdictional rule applicable in cases of international child abduction. Due to the focus of this paper, I do not deal with this provision further. I will only mention that this rather complicated provision aims to preserve the jurisdiction of the court until the protected parent seeks the return of the child under the Hague Abduction Convention (1980).[36]

3.3.4 Article 10: Choice of Court

A significant difference from the general rule of jurisdiction is introduced by Article 10 of the Brussels II ter Regulation. Its equivalent was already regulated in Article 12 of the Brussels II bis Regulation and caused considerable problems in the practice of many courts across the whole EU, including the Czech courts.

The aforementioned Article 12 of the Brussels II bis Regulation provided for a form of prorogation, which, however, was conditioned by the consent of all parties to the proceedings, the existence of a substantial connection of the child to the Member State in question, as well as compliance with the best interests of the child. Some authors have assumed that the Article 12

36 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Hague Abduction Convention is *lex generalis* in relation to the Brussels II ter Regulation. The purpose of the partial modification contained in the Brussels II ter Regulation is to strengthen the application of the Hague Abduction Convention in the Member States of the EU (cf. ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 314).

could only be applied when the decision on parental responsibility was connected to other proceedings.[37] The drafters of the Czech translation of the Regulation probably came to the same conclusion when, in spite of other language versions, they gave Article 12 the misleading heading "Continuing jurisdiction".[38] This provision confused the Czech courts so much that they were unable to apply it without the help of the CJEU.

The interpretation of Article 12(3) of the Brussels II bis Regulation was addressed by the CJEU in 2014, in the context of a preliminary ruling procedure brought by the Supreme Court of the Czech Republic.[39] The CJEU made it clear, with regard to the interpretative confusion outlined above, that Article 12(3) established jurisdiction over parental responsibility proceedings even if no other related proceedings were pending.[40]

For a successful prorogation within the meaning of Article 12(3) of the Brussels II bis Regulation, all the parties to the proceedings must have accepted jurisdiction, expressly or in some other explicit way, at the time the proceedings were commenced. This condition has also raised interpretative problems in practice, which the CJEU addressed in its judgment in Case C-656/13[41] and also in Case C-215/15[42].

The interpretation of Article 12(3) of the Brussels II bis Regulation has also been the subject of other proceedings before the CJEU. In its judgment in Case C-436/13, the CJEU answered the question whether the effects of a jurisdiction arrangement continue after the decision has become final. Referring to Article 8(1) as well as to Recital 12 of the Brussels II bis

37 Cf. ANCEL, B. L'intérêt supérieur de l'enfant dans le concert des juridictions: le Règlement Bruxelles II bis. *Revue critique de droit international privé*. 2005, no. 4, pp. 569–581.

38 It is interesting that the Czech translator has chosen the heading "Continuing Jurisdiction". If we compare all the language versions of the Regulation, we find that the vast majority of States have chosen the same heading for this Article as for Article 25 of the Brussels I bis Regulation. The other States have chosen different terminology but have remained faithful to the prorogation in terms of meaning. The Czech text of the Regulation is thus the only one in which the misleading designation "Continuing Jurisdiction" can be found.

39 Cf. judgment of the Czech Supreme Court of 27 January 2015, Case no. 30 Cdo 1994/2013.

40 Judgment of the CJEU of 12 November 2014, Case C-656/13.

41 Ibid.

42 Judgment of the CJEU of 21 October 2015, Case C-215/15.

Regulation, the CJEU concluded that the jurisdiction of the court in matters of parental responsibility must be determined whenever proceedings are brought before the court. In other words, that the agreed jurisdiction ceases with the delivery of a final judgment in those proceedings.[43]

Although it may not have been obvious at first sight, Article 12(3) allowed prorogation even in proceedings concerning a child habitually resident in a State which was neither a member of the EU nor bound by the Hague Convention on the Protection of Children. However, all the conditions set out above had to be met.[44]

Given the serious uncertainties surrounding the interpretation and subsequent application of Article 12(3) of the Brussels II bis Regulation, this provision has been significantly revised for the purposes of the new Brussels II ter Regulation.

In contrast to the Brussels II bis Regulation, the provision does not distinguish between the choice of court for related and separate proceedings, but lays down three general rules on the basis of which prorogation can be made. The court of a Member State other than the place of habitual residence of the child has jurisdiction if (a) the child has a substantial connection with that State, (b) the parties as well as the other holder of parental responsibility have agreed or expressly accepted jurisdiction, and (c) the exercise of that jurisdiction is in the best interests of the child.

The Brussels II ter Regulation, like the Brussels II bis Regulation, refers to facts indicating a substantial connection of the child with the Member State concerned. Going beyond the Brussels II bis Regulation, the new Regulation links the existence of a substantial connection to the child's previous habitual residence. Although this is only an extension of the demonstrative list, this change is to be welcomed as it provides further guidance to the courts in interpreting this rather vague term.

The Brussels II ter Regulation has completely abandoned the attempt to approximate the facts that would suggest that prorogation is in the child's

43 Judgment of the CJEU of 1 October 2014, Case C-436/13.

44 PATAUT, É., GALLANT, E. Art. 12. In: MAGNUS, U., MANKOWSKI, P. et al. *European commentaries on private international law (ECPIL): Commentary. Volume IV, Brussels IIbis regulation.* Köln: Otto Schmidt, 2017, p. 166.

best interests and has not adopted the slightly chaotic wording of Article 12(4) of the Brussels II bis Regulation.

Successful prorogation requires that not only the parties to the proceedings but also, where appropriate, other holders of parental responsibility, freely agree on jurisdiction at the latest at the time the proceedings are initiated. Moreover, that agreement must be in writing, dated and signed. Persons who have become parties after the opening of the proceedings may accept jurisdiction during the proceedings. The court shall inform them of the possibility of objecting to jurisdiction. In the absence of their opposition, their agreement shall be regarded as implicit.

The Brussels II ter Regulation expressly incorporates the conclusions of the above-mentioned CJEU judgment in Case C-436/13. The reason for this is to maintain proximity for each individual proceeding. The incorporation of this rule in the text of the Regulation itself can also be seen as positive. With regard to the interests of the child, it seems appropriate that the jurisdiction of the courts should be examined whenever new proceedings are brought. Only then can the best interests of the child concerned be taken into account as much as possible.

Article 97(2)(a) of the Brussels II ter Regulation is very important for prorogation as well. According to this provision, the parties may also establish the jurisdiction of the courts of a non-Member State which is a party to the Hague Convention on the Protection of Children. In such a case, Article 10 of the Convention applies.

Overall, the new provision of Article 10 of the Brussels II ter Regulation can be seen positively. Besides the substantial clarification of the conditions of its application, it seems to strike a balance between autonomy of will and the protection of the interests of children.

3.3.5 Article 11: Jurisdiction Based on Presence of the Child

Article 11 is clearly inspired by the wording of Article 6 of the Hague Convention on the Protection of Children and is intended to establish international jurisdiction where the habitual residence of the child cannot be determined or where it is not possible to conduct proceedings in the child's habitual residence. In the former case, we are talking about

the analogy of the *forum necessitatis* rule, which prevents a situation in which the child would be denied access to the court.[45] In such a case, the court of the Member State in which the child is present has jurisdiction. The situation in which the habitual residence of the child cannot be established arises in particular where the child is frequently transferred and therefore does not have habitual residence in any State.[46] It should be added that the jurisdiction established under Article 11(1) is only temporary. Once the child is settled and their habitual residence can be determined, the jurisdiction of the courts must be adjusted to that.[47]

The second paragraph of Article 11 finds its application in the case of refugees and children internationally displaced because of disturbances occurring in their country. Even in this case, jurisdiction lies with the courts of the Member State in whose territory the child is present.

3.3.6 Articles 12 and 13: The European Way of *Forum Non Conveniens* Principle

Due to the Articles 12 and 13 of Brussels II ter Regulation, a court of a Member State that is more conveniently located to assess the best interests of the child and whose international jurisdiction would not otherwise be established may hear the case instead of the court of the child's habitual residence.

Generally, the jurisdiction of the court remains the same, even if the habitual residence of the child changes.[48] It should not be forgotten, however, that

45 Paul Lagarde's Explanatory Report to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. *HCCH* [online]. P. 555 [cit. 30. 5. 2023]. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=2943

46 SIMON, P. Nařízení Brusel IIa. In: DRÁPAL, L., BUREŠ, J. et al. *Občanský soudní řád II. Komentář. § 201–376*. Praha: C. H. Beck, 2009, p. 3085.

47 Cf. PATAUT, É., GALLANT, E. Art. 13. In: MAGNUS, U., MANKOWSKI, P. et al. *European commentaries on private international law (ECPIL): Commentary. Volume IV, Brussels IIbis regulation*. Köln: Otto Schmidt, 2017, p. 168, or GONZÁLES BEILFUSS, C. Brussels IIa Regulation. In: BASEDOW, J., RÜHL, G., FERRARI, F., MIGUEL ASENSIO, P. de. (eds.). *Encyclopedia of Private International Law*. Cheltenham: Edward Elgar Publishing, 2017, p. 232.

48 We are talking about the principle of *perpetuatio fori*, according to which the jurisdiction of the court where the proceedings were initiated remains (cf. ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 315).

the Brussels II ter Regulation considers the best interests of the child to be a key factor in determining the rules on international jurisdiction. These interests play such a significant role that, in some cases, they must prevail over the much-desired principle of legal certainty. This can be seen most clearly in the case of Articles 12 and 13 of the Brussels II ter Regulation. Although ensuring legal certainty and predictability in the area of family law with an international element is important, these articles allow the application of a rule similar to the doctrine of *forum non conveniens* known from common law, whose application has been expressly excluded by the CJEU in the context of the Brussels I bis Regulation.[49] In accordance with those articles of the Brussels II ter Regulation, it is possible for the court having jurisdiction to transfer its jurisdiction to another, more conveniently located, court where necessary. Nevertheless, the requested court should not be able to transfer the case to a third court.[50]

A transfer of a case or part of a case may occur following the request of a party, the request of a court of another Member State, or on the initiative of a court having general jurisdiction.

The predecessor of Articles 12 and 13 of the Brussels II ter Regulation was Article 15 of the Brussels II bis Regulation. According to that article, if one of the parties did not request the transfer of the case, at least one of them had to agree with the procedure laid down in Article 15.

The transfer of the case is conditioned by several requirements that must be fulfilled unconditionally. First of all, the transfer must take place only within the territory of the EU. It is therefore not possible for the case to be transferred to a non-member state.[51] In the context of Article 15

49 Cf. Judgment of the CJEU of 1 March 2005, Case C-281/02, according to which Article 2 of the Brussels Convention (i.e., Article 4 of the Brussels I bis Regulation) is mandatory in nature and can therefore be derogated only in expressly provided cases. Id. Recital 15 of the Brussels I bis Regulation.

50 According to Recital 13 of the Brussels II bis Regulation, the second court should not be able to refer the case to a third court.

51 Here it is appropriate to draw attention to Articles 8 and 9 of the Hague Convention on the Protection of Children, which also allow the transfer of a case to a court not otherwise competent. It is true that the Brussels II ter Regulation does not allow Member States to refer a case to a non-member State. However, as all EU Member States are also Contracting States to the Hague Convention on the Protection of Children, they can refer a case to any non-EU Contracting State on the basis of the rules set out in Articles 8 and 9 of the Convention.

of the Brussels II bis Regulation, the CJEU addressed the other requirements that have to be fulfilled in order to transfer the jurisdiction to another court.[52]

Ms D., a United Kingdom national, was a mother of a child who was placed in residential care by the authorities after she had been diagnosed with a personality disorder. During her second pregnancy, Ms D. underwent a psychological assessment which revealed her emotional attachment to her first child and her positive attitude towards the birth of her expected child. However, the competent authorities considered that the second child should also be placed in substitute care after its birth. Mrs D. therefore moved to Ireland where she gave birth to her second child. At the request of the British authorities, the Irish courts decided to place the child provisionally in foster care. Mrs D. visited her child regularly. When the British authorities requested a transfer of the case to the British courts under Article 15 of the Brussels II bis Regulation, the Irish Supreme Court referred several preliminary questions to the CJEU concerning the interpretation of that provision.

According to the CJEU, Article 15 must be understood as an exception to the rule and must therefore be interpreted restrictively. The task of the competent court is therefore to *"successfully rebut the strong presumption of retaining its own jurisdiction"*.[53] In the first place, the referring court must examine whether the child has a particular connection with the State of the requested court. When doing so, at least one of the factors listed exhaustively in Article 15(3) must be fulfilled.[54] If such a particular connection exists, the court must then consider whether the requested court is more appropriate to hear the case because of its location. That condition is met only if the transfer of the case represents a real and concrete added value compared with the retention of jurisdiction. This may be, for example, the more appropriate procedural rules applicable in the requested State. The court must then examine whether the transfer is in the best interests

52 Judgment of the CJEU of 27 October 2016, Case C-428/15.

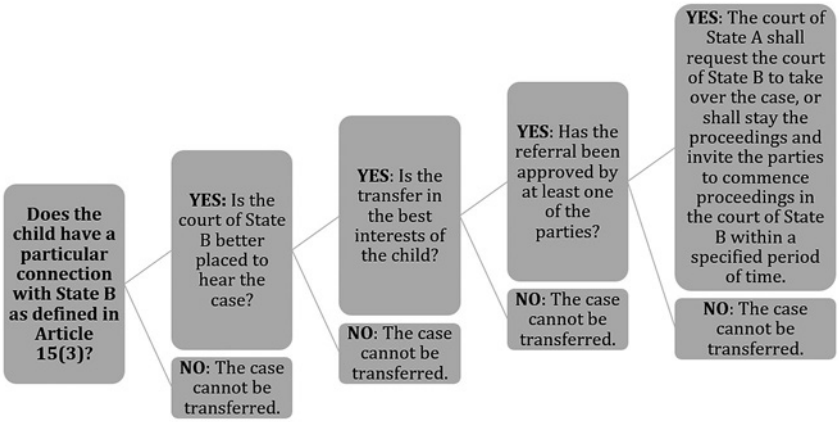
53 Ibid., para. 49.

54 The Brussels II bis Regulation offered five factors suggesting that there is a special relationship between the child and the Member State. According to this Regulation, a child may have a special relationship with the State (a) of his new habitual residence, (b) of his former habitual residence, (c) of which he is a national, (d) of the habitual residence of the holder of parental responsibility, (e) where their property is located.

of the child, that is to say, whether the transfer is not likely to have a detrimental effect on the child's emotional, family and social ties or on their financial situation. It is irrelevant what effect the transfer may have on the right to freedom of movement of other persons or the reason why the child's mother left her previous habitual residence before the proceedings were brought.

If the competent court concludes that all of the above conditions are met, it may then proceed to the actual transfer process. This process may be described on the following scheme:

Scheme no. 2: Transfer of Jurisdiction under Article 15 of the Brussels II bis Regulation



Article 15 of the Brussels II bis Regulation has been split into two separate articles for the purposes of the Brussels II ter Regulation. Article 12 of the Brussels II ter Regulation deals with the transfer of jurisdiction at the initiative of the court having international jurisdiction or at the request of one of the parties to the proceedings. Article 13 then allows a non-jurisdictional court of another Member State to request the transfer of jurisdiction.

The Brussels II ter Regulation does not in either case require the approval of the procedure by either party to the proceedings. The position of the courts, which do not have to be bound by the views of the parties,

has therefore been strengthened. However, the prohibition on the transfer of jurisdiction resulting from the choice of the parties under Article 10 represents a limitation. This solution seems appropriate as it prevents a party from overruling the transfer of jurisdiction, although such a procedure might better protect the best interests of the child.

It is still necessary that the child has a particular connection with the State of the requested court. The exhaustive list of factors constituting that particular connection remains identical to the one we know from the Brussels II bis Regulation.

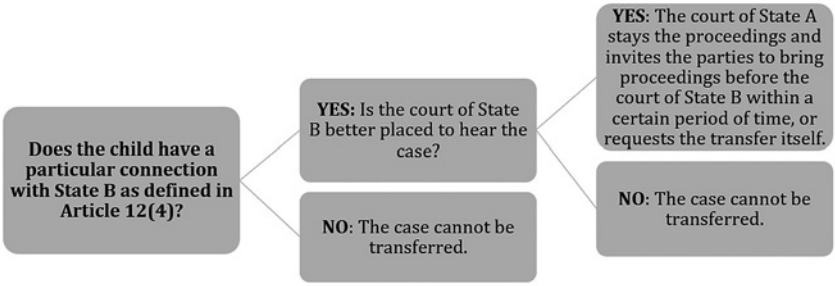
In contrast to the Brussels II bis Regulation, the competent court must stay the proceedings even if it itself requests the court of another Member State to take charge of the case. The requested court then has six weeks to decide whether to accept jurisdiction because of the special circumstances of the case. The requested court shall be bound by the same time limit if a party to the proceedings requests it to take charge of the case. If the requested court does not provide the information within seven weeks after the expiry of the period within which the parties should have brought the application or after receipt of the request by the competent court, the court first seized shall resume its jurisdiction.

Similar rules apply to the transfer of jurisdiction at the request of an internationally incompetent court. If the internationally incompetent court requests the transfer of jurisdiction, the internationally competent court must give a decision on the request within six weeks after receiving it. If the internationally competent court fails to decide on time, jurisdiction shall not be transferred. The introduction of this rule is to be welcomed as it fills a gap contained in Article 15 of the Brussels II bis Regulation.

The Brussels II ter Regulation expressly provides for the possibility of transferring jurisdiction to a court of a non-member State which is a party to the Hague Convention on the Protection of Children. If jurisdiction is to be transferred to that State, the provisions of Articles 8 and 9 of the Convention apply.[55]

55 Cf. Article 97(2)(b) of the Brussels II ter Regulation.

Scheme no. 3: Transfer of Jurisdiction under Article 12 of the Brussels II ter Regulation



Since the consent of the court of the requested Member State is required for the delegation of jurisdiction, the rule contained in Articles 12 and 13 of the Brussels II ter Regulation represents a new type of cross-border judicial cooperation rather than the traditional theory of *forum non conveniens*.[56] In any case, these articles give courts a certain degree of discretion, which, if abused, might endanger or harm the interests of children or other parties. In respect of the exceptional nature of the transfer of the case, as well as the potential threat to the best interests of the child, only a procedure in which both courts give sufficiently specific and convincing reasons for the need to transfer the case can be accepted. Even if the transfer is to be made at the request of a party, the courts are obliged to take into account such aspects that have not been objected to by the parties and which may have an impact on the transfer.[57]

The transfer of a case to a court of another Member State constitutes an interference with the procedural rights of the parties. The court having international jurisdiction should therefore ascertain the parties' views on the procedure under Articles 12 and 13, although it is not bound by them.[58]

56 On the nature of Article 15, Cf. BOGDAN., M. *Concise Introduction to EU Private International Law*. Groningen: Europa Law Publishing, 2016, p. 98, or GONZÁLES BEILFUSS, C. Brussels IIa Regulation. In: BASEDOW, J., RÜHL, G., FERRARI, F., MIGUEL ASENSIO, P. de. (eds.). *Encyclopedia of Private International Law*. Cheltenham: Edward Elgar Publishing, 2017, p. 233.

57 STONE, P. *Stone on Private International Law in the European Union*. Cheltenham: Edward Elgar Publishing, 2018, p. 641.

58 VORLÍČKOVÁ, J., PIŠVEJC, L., ROMÁNKOVÁ, K., KORYNTOVÁ, T. Příslušnost soudů ve věcech rodičovské odpovědnosti v rámci EU. *Právní rozhledy*. 2016, Vol. 24, no. 22, pp. 791–793.

The court may, in accordance with the procedure laid down in Articles 12 and 13 of the Brussels II ter Regulation, transfer the entire case or only a part of it. A splitting of jurisdiction seems appropriate, for example, where it is necessary to decide on a child's property located in another Member State. However, the splitting of jurisdiction should only take place in exceptional cases. This is the only way to avoid mutually incompatible decisions and thus to enhance the protection of the best interests of children.[59]

3.3.7 Article 14: Residual Jurisdiction

For cases in which jurisdiction cannot be established on the basis of Articles 7 to 11, Article 14 of the Brussels II ter Regulation provides for the rule of residual jurisdiction. According to this rule, jurisdiction is determined by the law of that Member State.

In my opinion, the term "law of the Member State concerned" should not only include rules of national origin, but also international treaties applicable in that State.[60] In the case of all courts of the Member States of the EU, Article 14 of the Brussels II ter Regulation would therefore also refer to the Hague Convention on the Protection of Children. If the case did not fall within its scope, only then would the courts apply their national rules of private international law.

This consideration may have a significant impact on the determination of international jurisdiction from the perspective of the Czech courts, especially if the case concerns a minor Czech citizen habitually resident outside the territory of the EU. If we conclude that Article 14 refers only

59 PATAUT, É., GALLANT, E. Art. 13. In: MAGNUS, U., MANKOWSKI, P. et al. *European commentaries on private international law (ECPIL): Commentary. Volume IV, Brussels IIbis regulation*. Köln: Otto Schmidt, 2017, p. 168, or GONZÁLES BEILFUSS, C. Brussels IIa Regulation. In: BASEDOW, J., RÜHL, G., FERRARI, F., MIGUEL ASENSIO, P. de. (eds.). *Encyclopedia of Private International Law*. Cheltenham: Edward Elgar Publishing, 2017, p. 176.

60 This is supported by Recital 29 of the Preamble to the Brussels II ter Regulation, according to which the term should also include international instruments applicable in the Member State concerned. The same conclusion also follows from the literature. Cf. FIŠEROVÁ, Z. § 56. In: BŘÍZA, P., BŘICHÁČEK, T., FIŠEROVÁ, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, p. 296. For the opposite view, cf. VORLÍČKOVÁ, J., PIŠVEJC, L., ROMÁNKOVÁ, K., KORYNTOVÁ, T. Příslušnost soudů ve věcech rodičovské odpovědnosti v rámci EU. *Právní rozhledy*. 2016, Vol. 24, no. 22, pp. 791–793.

to the Czech PILA, the Czech courts will always have jurisdiction, since according to Section 56(1) of the Czech PILA the Czech courts also have jurisdiction if the child is a Czech citizen.[61] If, on the other hand, we conclude that Article 14 of the Brussels II ter Regulation also refers to international treaties, it is the Hague Convention that we will apply with respect to children habitually resident in the territory of a contracting state to the Hague Convention. Therefore, the jurisdiction of the Czech courts will not be determined, since under the Hague Convention it belongs to the courts of the child's habitual residence.

From my point of view, the application of Article 14 is only appropriate if no Member State has jurisdiction under one of the rules contained in Articles 7 to 11. Thus, if the court seized of the proceedings finds that it does not have jurisdiction to decide the case, but that jurisdiction under Articles 7 to 11 is conferred on the courts of another Member State, it should not establish its jurisdiction in accordance with Article 14, but should declare its lack of jurisdiction in favour of the courts of the other State.

We can illustrate the mentioned conclusions on an example of a Czech court deciding on the cross-border placement of a Czech minor child who is habitually resident in Denmark. As the Czech Republic has not concluded any bilateral legal assistance treaty with Denmark, the court will examine its jurisdiction in accordance with Article 18 of the Brussels II ter Regulation. Neither the Czech court nor the court of another Member State has jurisdiction under Articles 7 to 11 of the Brussels II ter Regulation. The court will therefore determine international jurisdiction in accordance with its national law, which also includes the Hague Convention on the Protection of Children. Since the child is habitually resident in the territory of a Contracting State to the Hague Convention, the Danish courts will have international jurisdiction (and thus, the Czech courts will not have jurisdiction under Article 14 of the Brussels II ter Regulation). However, if the child had their habitual residence in a non-Contracting State of the Hague Convention with which the Czech Republic has not

61 However, in accordance with the last sentence of Section 56(1) of the Czech PILA, they will not have to initiate proceedings if they consider that measures taken abroad are sufficient to protect the rights and interests of the child.

concluded a bilateral legal assistance treaty (e.g., Iceland), the Czech courts would apply the jurisdictional rules contained in Czech PILA. According to its rules, Czech courts have jurisdiction if the child is habitually resident in the Czech Republic or if the child has a nationality of the Czech Republic. Since the child is a Czech citizen, the international jurisdiction of the Czech courts will be established under Article 14 of the Brussels II ter Regulation.

4 International Jurisdiction Under the Hague Convention on the Protection of Children

If the child is habitually resident outside a Member State of the EU, but the international element refers to a Contracting State of the Hague Convention on the Protection of Children, the rules contained in the Hague Convention come into play.

The Hague Convention on the Protection of Children, which was concluded in 1996 under the auspices of the Hague Conference on Private International Law, plays an important role in the area of parental responsibility. This treaty is unique not only in its content but also in the number of Contracting Parties.[62] Although the Convention itself does not contain an accession clause for regional integration units and ratification by the EU is therefore prohibited, it is applicable in the territory of all the Member States of the EU.[63] Moreover, unlike the Brussels II ter Regulation, it is also binding on the territory of Denmark. This makes it a key source of law for determining international jurisdiction in relation to that country. Most other European countries are also bound by the Hague Convention

62 Currently, 49 countries of the world are bound by the Hague Convention on the Protection of Children.

63 EU countries have seen the Hague Convention on the Protection of Children as a valuable instrument to ensure the international protection of children and to help develop judicial cooperation in civil matters. However, as the Convention overlapped in part with the Brussels II bis Regulation in terms of its scope, the ratification or accession by Member States required the authorisation of the EU Council. By decision of 19 December 2002, the Council first authorised Member States to sign the Convention in the interests of the Community. Subsequently, by its decision of 5 June 2008, the Council authorised the Member States to ratify the Convention and, consequently, to accede to it. The Member States were also authorised to make a declaration according to which the decisions of the Member States would be enforced in other Member States in accordance with the arrangements contained in the Brussels II bis Regulation.

on the Protection of Children. Outside the Member States of the EU, it is also applicable in Monaco, Norway, the United Kingdom, Switzerland, Turkey, Albania, Montenegro, Serbia, Ukraine and Russia.

The Hague Convention on the Protection of Children replaced, in relation to its contracting states, the 1902 Hague Convention on the Guardianship of Minors[64], as well as the 1961 Hague Convention on the Protection of Minors[65]. In relation to the latter Convention, there is an exception. The Hague Convention on the Protection of Minors makes it possible to recognise measures that were taken in accordance with it, although recognition of the decision would not be possible under the Hague Convention on the Protection of Children.[66]

The Hague Convention on the Protection of Children has not, however, replaced other international treaties concluded between the Contracting States governing the same subject matter. The Hague Convention on the Protection of Children applies to them in priority only if the Contracting States expressly declare it so. The Czech Republic has also made such a declaration, specifically in relation to the 1987 International Treaty between the Czechoslovak Socialist Republic and the People's Republic of Poland on Legal Assistance and Regulation of Legal Relations in Civil, Family, Labour and Criminal Matters.[67] The Hague Convention on the Protection of Children shall therefore apply in priority in relation to this Treaty. No further declarations have been made by the Czech Republic. Therefore, in relation to Albania, Montenegro, Russia, Serbia and Ukraine, the specific rules contained in the international treaties on legal assistance take precedence.

64 The Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors.

65 Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants.

66 At this point, the application of this exemption can no longer be assumed. All Contracting States to the Hague Convention on the Protection of Minors (with the exception of China) have been bound by the Hague Convention on the Protection of Children since at least 2017. All measures must therefore be taken in accordance with the Hague Convention on the Protection of Children and therefore their recognition will be subject to its rules.

67 Treaty between the Czechoslovak Socialist Republic and the People's Republic of Poland of 21 December 1987, published under no. 42/1989 Coll., on legal assistance and the regulation of legal relations in civil, family, labour and criminal matters.

The Hague Convention on the Protection of Children was the main source of inspiration for the jurisdictional rules contained in the Brussels II bis Regulation.[68] The rules of international jurisdiction are therefore similar in many respects to those we know from Brussels II bis and Brussels II ter Regulation. However, there are still a few differences, that are worth mentioning.

4.1 Application Test of the Hague Convention on the Protection of Children

As in the case of the Brussels II ter Regulation, the various application requirements must be met for the application of the Hague Convention on the Protection of Children.

In terms of its material scope, the Convention applies to the taking of measures to protect the child's person or property. These are basically the same measures that fall within the material scope of the Brussels II ter Regulation. A demonstrative list of these can be found in Article 3 of the Convention. The scope of the Convention covers, *inter alia*, all forms of substitute care of the child, with the exception of adoption. That, together with other matters, is expressly excluded from the scope of the Convention in Article 4.

The Hague Convention on the Protection of Children is binding on the authorities of 49 States, including all 27 Member States of the EU. Four other States have signed the Convention but have not ratified it and are therefore not obliged to apply it.[69]

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68 DUTTA, A., SCHULZ, A. First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C to Health Service Executive. *Journal of Private International Law*. 2015, Vol. 10, no. 1, p. 8.

69 These are the United States of America, Canada, Argentina and North Macedonia. A list of all Contracting States can be found at Status Table of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. *HCCH* [online]. 18. 10. 2022 [cit. 20. 5. 2023]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=70

The personal scope of the Convention is essentially linked to the habitual residence of the child in one of its Contracting States. A child is defined as a person under 18 years of age.[70]

The Hague Convention on the Protection of Children is applicable from 1 January 2002 or from the moment of its entry into force in the Contracting State concerned.

4.2 Rules of International Jurisdiction

As in the case of the Brussels II ter Regulation, in the very beginning of this chapter, I offer an overview table of the jurisdictional rules contained in the Hague Convention on the Protection of Children:

Contracting State	When is its international jurisdiction given?
State of the child's habitual residence	• whenever the jurisdiction of another State is not established (Art. 5(1))
State in which the child is currently present	• in the case of refugee children, children displaced as a result of disturbances in their country and children whose habitual residence cannot be established (Art. 6) • where necessary measures (Art. 11) or provisional measures (Art. 12) are required
State of the child's new habitual residence	• if the child acquires a new habitual residence during the proceedings (Article 5(2)) • in the case of children who are lawfully removed • in the case of children who are unlawfully removed or detained and the conditions of Article 7 are met
State of which the child is a national	• if, exceptionally, it takes jurisdiction instead of the authority otherwise competent, if it considers to be in the best interests of the child (Articles 8 and 9)
State in whose territory the child's property is situated	• if it exceptionally takes international jurisdiction instead of the authority otherwise competent, if it considers it to be in the best interests of the child (Articles 8 and 9) • if it is necessary to take the necessary measure (Article 11) provisional measures (Article 12)

70 Cf. Article 2 of the Hague Convention on the Protection of Children.

Contracting State	When is its international jurisdiction given?
State before whose organs the proceedings for divorce, legal separation or annulment of the marriage of the child's parents are pending	• if it exceptionally takes jurisdiction instead of the authority otherwise competent if it considers to be in the best interests of the child (Articles 8 and 9) • if, at the time when the proceedings are instituted, one of the child's parents is habitually resident in this State and if one of them has parental responsibility for the child, and the power to take such measures has been accepted by the parents as well as by another person having parental responsibility for the child, i fit is in the best interests of the child (Article 10)
State with which the child has a substantial relationship	• if it exceptionally takes jurisdiction instead of the authority otherwise competent, if it considers to be in the best interests of the child (Articles 8 and 9)

4.2.1 General Rule of the International Jurisdiction

Similar to the Brussels II ter Regulation, the general rule of international jurisdiction of the Hague Convention on the Protection of Children is based on the habitual residence of the child in one of the Contracting States.[71] However, unlike the Brussels II ter Regulation, the Convention expressly excludes the principle of *perpetuatio fori*. Thus, if the habitual residence of the child changes during the proceedings, international jurisdiction automatically passes to the authorities of the State of the child's new habitual residence. This does not apply if the child's new habitual residence is outside the territory of a Contracting State. In such a case, Article 5 ceases to apply at the time of the change of habitual residence of the child and jurisdiction must be determined on the basis of national rules.[72]

A change in the habitual residence of the child shall not have the effect of automatic termination of the decisions previously taken. They shall

71 Cf. Article 5 of the Hague Convention on the Protection of Children.

72 Paul Lagarde's Explanatory Report to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. *HCCH* [online]. P. 555 [cit. 30. 5. 2023]. Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=2943

remain in force unless the courts of the child's new habitual residence issue other appropriate decisions instead.[73]

The Explanatory Report to the Hague Convention on the Protection of Children indicates that there was originally a definition of the habitual residence of the child for the purposes of this provision. However, this was not ultimately adopted and the concept must be interpreted autonomously, having regard to the purpose and objectives of the Convention.

4.2.2 Exceptions to the General Rule of Jurisdiction

The first exception to the general jurisdiction rule is jurisdiction based on the presence of the child, as set out in Article 6 of the Convention. As that provision was the direct inspiration for Article 13 of the Brussels II bis Regulation, the same applies to this exception as I have set out in the subsection on the Brussels II ter Regulation. The same applies to the special rule of jurisdiction applicable in the case of unlawful removal of a child (Article 7 of the Convention), as well as to the continued jurisdiction of the courts empowered to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage (Article 10 of the Convention). On the contrary, one would not find an analogy to the prorogation provision which we know from Article 10 of the Brussels II ter Regulation.

In Articles 8 and 9 of the Convention we find an analogy to Articles 12 and 13 of the Brussels II ter Regulation. Under these articles, a case may exceptionally be transferred to the court of a Contracting State which would not otherwise have international jurisdiction. The transfer is dependent on the ability of that court to better assess the best interests of the child. As in the case of the Brussels II ter Regulation, the requested court must accept its jurisdiction. It may do so if it considers it to be in the best interests of the child. As in the case of the Brussels II ter Regulation, the Convention does not require the consent of any of the parties to the proceedings in order to transfer jurisdiction. Even though the Hague Convention on the Protection of Children does not expressly make the child's special relationship to the requested Member State a condition for the transfer of jurisdiction,

73 Cf. Article 14 of the Hague Convention on the Protection of Children.

it nevertheless lists the States to which the matter may be transferred. On the basis of this enumerative list, the matter may be referred to, *inter alia*, a State with which the child has a substantial connection. This term is not further defined in the Convention, so the courts have wider discretion in comparison to the Brussels II ter Regulation. Unfortunately, the Hague Convention does not contain time limits within which the transfer should take place. There is therefore a risk of unjustified delays and a consequent threat to the best interests of the child.

5 International Jurisdiction Under Bilateral International Treaties

Although in practice these will be rather exceptional cases, I believe it is also appropriate to mention bilateral international treaties concluded between the Czech Republic and European states which regulate the rules of international jurisdiction in family matters. Generally speaking, Czech courts will apply the treaties in question if the international element relates to a non-member state of the EU with which the Czech Republic has concluded such a treaty. These will involve some Balkan states (Albania, Bosnia and Herzegovina, Montenegro, Kosovo, North Macedonia, Serbia) and several republics of the former Soviet Union (Belarus, Moldova, Russia, Ukraine).[74] Some bilateral treaties concluded between the Czech Republic and other Member States of the EU also contain rules on international jurisdiction in family matters. These are international treaties concluded

74 Treaty between the Czechoslovak Republic and the People's Republic of Albania of 16 January 1959, published under no. 97/1960 Coll., on legal assistance in civil, family and criminal matters; Treaty between the Czechoslovak Socialist Republic and the Socialist Federal Republic of Yugoslavia of 20 January 1964, published under no. 207/1964 Coll, on the regulation of legal relations in civil, family and criminal matters; Treaty between the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics of 12 August 1982, published under no. 95/1983 Coll., on legal assistance and legal relations in civil, family and criminal matters; Treaty between the Czech Republic and Ukraine of 28 May 2001, published under no. 123/2002 Coll., on legal assistance in civil matters.

with Bulgaria, Hungary, Romania and Slovenia.[75] Nevertheless, due to the primacy of the Brussels II ter Regulation, these treaties are not applicable for determining the international jurisdiction of the courts in matters of parental responsibility.

While in the bilateral treaties concluded with the Balkan States we find mainly a connecting factor of the nationality of the child, different rules apply in relation to Russia, Belarus and Moldova, where the jurisdiction is given to the courts of the State in whose territory the child permanently lives.[76] However, for tutorship and guardianship matters, the main factor is also the nationality of the child. The most progressive legislation, which is also the one most capable of protecting the interests of the minor child, is contained in the bilateral treaty with Ukraine. Here, for parental responsibility matters in general, but also for tutorship and guardianship matters, alternative connecting factors, namely the child's place of residence and his or her nationality, are established.

6 International Jurisdiction Under Czech PILA

The rules contained in Czech PILA will find their application in cases where the Brussels II ter Regulation, the Hague Convention on the Protection of Children or any international treaty on legal assistance cannot be applied. This will only happen if the child is habitually resident outside the EU and the international element relates to the non-Contracting state to the Hague Convention on the Protection of Children with which the Czech Republic has not concluded an international legal assistance treaty.

75 Treaty between the Czechoslovak Socialist Republic and the People's Republic of Bulgaria of 25 November 1976, published under no. 3/1978 Coll., on legal assistance and the regulation of legal relations in civil, family and criminal matters; Treaty between the Czechoslovak Socialist Republic and the People's Republic of Hungary of 28 March 1989, published under no. 63/1990 Coll, on legal assistance and the regulation of legal relations in civil, family and criminal matters; Treaty on legal assistance in civil matters between the Czech Republic and Romania of 11 July 1994, published under no. 1/1996 Coll.

76 Article 30 of the international treaty refers specifically to the State in whose territory the child is habitually resident. I believe that this phrase should not be understood as a reference to permanent residence in the sense of Czech law, but is more similar to the concept of the child's habitual residence. It will therefore refer to the State where the child has been for a long time and is integrated into the local environment.

While both the Brussels II ter Regulation and the Hague Convention on the Protection of Children lay down rules on international jurisdiction for all parental responsibility measures, Czech PILA contains special jurisdictional rules concerning tutorship and guardianship of minors.

Jurisdictional rules applicable in matters of parental responsibility can be found primarily in Section 56 of the Czech PILA. This provision covers all proceedings concerning the custody of minors, for which no special jurisdictional rule is provided in Czech PILA. Such a special rule can be found in Section 64 of the Czech PILA. It applies to international jurisdiction in matters of tutorship and guardianship of minors. With regard to other substitute care institutes, it is necessary to follow Section 56 of the Czech PILA. Even the special jurisdictional rule contained in Section 64 of the Czech PILA refers to the general rule contained in Section 56(1).[77] Therefore, the general rule of jurisdiction is in principle also applicable to tutorship and guardianship.[78]

According to Section 56(1), the Czech courts have jurisdiction if the child is habitually resident in the Czech Republic or is a Czech citizen. However, it is not necessary to initiate proceedings if foreign measures are sufficient to protect the rights and interests of a Czech citizen.

If no one exercises parental rights and obligations in respect of a Czech minor who has their habitual residence abroad, the procedure set out in Section 56(2) of the Czech PILA may be applied. According to this provision, the Czech embassy may take custody of the child if the State of the child's habitual residence recognizes this jurisdiction. This provision is related to Article 37(b) of the Vienna Convention on Consular Relations[79]. According to it, the authorities of the receiving State are obliged

77 However, if the procedure under Section 56 does not establish the international jurisdiction of the Czech courts in matters of tutorship and guardianship of minors, the court must, in accordance with Section 64(2), proceed in accordance with Section 33(2) and (3) of the Czech PILA. The Czech court may nevertheless issue the measures necessary to protect the child and his/her property and notify the authorities of the state where the child has his/her habitual residence. If the competent foreign authorities remain inactive, the Czech court may decide on tutorship or guardianship itself.

78 KUČERA, Z., GAŇO, J. *Zákon o mezinárodním právu soukromém. Komentované vydání s důvodovou zprávou a souvisejícími předpisy*. Brno: Aleš Čeněk, 2014, p. 121.

79 Vienna Convention on Consular Relations of 24 April 1963.

to inform the consular authority of the State of the child's nationality that it is in the child's interest to appoint a tutor or guardian. Since there is nothing to prevent the State of the child's habitual residence from appointing a tutor or guardian on the basis of its own legal rules, it can be assumed that the procedure under Article 56(2) of the Czech PILA will be rather rare.

7 Jurisdiction of Czech Courts in Cases of Repatriation

In the very end of this paper, I would like to point out one of the most problematic parts of Czech substantive law that is closely related to international jurisdiction in cases of substitute family care with a cross-border element.

Czech courts will usually apply Czech substantive law in proceedings concerning substitute family care.[80] According to Czech law, we can divide the alternative care system into individual family-type care and collective (institutional) care.[81] Collective care provided in institutionalized facilities should always be a last possible solution. The court is therefore obliged to examine whether a child for whom there are grounds for placement outside the care of their parents cannot be placed in the individual family-type care. This derives from the provisions of Section 971(1) in fine of the Act no. 89/2012 Coll., Civil Code (hereinafter as "Czech Civil Code") and Article 20(3) of the Convention on the Rights of the Child. The subsidiarity of institutional care is also expressed in particular provisions of the Czech Civil Code relating to the various forms of alternative family care.[82]

The different types of individual family-type care in terms of Czech substantive law are "svěřenectví" (officially translated as "entrusting a child to the care of another person", "pěstounská péče" (foster care) and, in some cases, "poručenství" (tutorship). A characteristic feature of these institutes

80 This is because both the international jurisdiction of the courts and the applicable law will usually be determined on the basis of the connecting factor of the child's habitual residence.

81 TRNKOVÁ, L. *Náhradní péče o dítě*. Praha: Wolters Kluwer, 2018, p. XIII.

82 The primacy of "svěřenectví" (entrusting a child to the care of another person) over institutional care is established by Section 953(2) of the Czech Civil Code, and the primacy of foster care is established by Section 958(2) of the Czech Civil Code.

is their temporary nature.[83] The removal of a child from foster care should, in principle, be a temporary solution and should be terminated as soon as circumstances allow.[84]

Czech legislation on substitute family care comes into significant conflict with the best interests of the child in certain cases of so-called repatriation, i.e., the return of foreign children who have been left without accompaniment in the Czech Republic.[85] Specifically, the problem concerns foreign minors whose parents are unable to care for them personally. The reasons for which personal care of the child by the parent is not possible may be objective (the parents have died, are seriously ill or are serving a prison sentence), but also subjective (the parent simply does not want to care for the child personally).[86] For such children, it is usually preferable to consider placing them in the care of close relatives living in their country of origin.

This is where we encounter an obstacle in the form of Sections 954(1) and 962(1) of the Czech Civil Code. These provisions impose some conditions on the possible alternative carer in cases of foster care and above mentioned "svěřenectví" (entrusting a child to the care of another person). They imply that in both cases the alternative carer must reside in the Czech Republic. This condition was incorporated into the Czech Civil Code as a result of a major recodification of civil law, in order to prevent abuse of foster care and to prevent trafficking of children.[87]

These provisions can very easily come into conflict with Sections 954(2) and 962(2) of the Czech Civil Code, according to which a person related to or close to the child has the prior right of custody if he or she has

83 HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z., WESTPHALOVÁ, L. et al. *Rodinné právo.* Praha: C. H. Beck, 2017, p. 307.

84 KRATOCHVÍL, J. Art. 8 [Právo na respektování soukromého a rodinného života]. In: KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech.* Praha: C. H. Beck, 2012, p. 863.

85 KAPITÁN, Z. § 36 [Zajišťování návratu dětí nacházejících se v cizině bez doprovodu]. In: ROGALEWICZOVÁ, R., CILEČKOVÁ, K., KAPITÁN, Z., DOLEŽAL, M. et al. *Zákon o sociálně-právní ochraně dětí.* Praha: C. H. Beck, 2018, p. 331.

86 LORENC, J. „Repatriace" nezletilých do zahraničí a vybrané problémy s nimi spojené. *Právo a rodina.* 2020, Vol. 22, no. 2, p. 1.

87 Explanatory Report to the Act no. 89/2012 Coll., Civil Code. Pp. 242–243. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf [cit. 20. 5. 2023].

taken custody of the child. It also collides with the principle contained in Article 20(2) of the Convention on the Rights of the Child that due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background, when considering solutions in terms of alternative family care.

How should the court decide, for example, if a Slovak mother living in the Czech Republic is about to start serving a prison sentence? Can her child, who has lived with her until now, be placed to the care of their grandparents who are interested in the child's custody if they live in Slovakia near to the Czech border? The Czech authors cannot agree on a firm position.

The most restrictive position is held by *Bartoníčková*. According to her, foster care is not mediated from the Czech Republic to foreign countries. If the Czech courts will share the same view as *Bartoníčková*, abandoned foreign children living in the Czech republic will probably have to be placed in Czech institutional care. I strongly disagree with this approach and consider it to be completely ridiculous.

In the first edition of the C. H. Beck Commentary to the Czech Civil Code, we find the opinion that in cases of repatriation, it is possible to simply disobey Sections 954(2) and 962(2) of the Czech Civil Code and to place a child in the care of a grandparent if the procedure is consistent with the best interests of the child. I would be rather sceptical about this approach, as it seems to be contrary to the provision of Section 2(2) of the Czech Civil Code, according to which statutory provisions may not be given a meaning other than that which follows from the evident intention of the legislature. The "evident intention of the legislature" may be found in the Explanatory Report to Section 954 of the Czech Civil Code according to which *"it cannot be accepted that there are boundaries between the child and the parent"*.[88]

Neither the conclusion reached by *Bruncko*, that the child could be placed in the tutorship instead of "svěřenectví" (or foster care) can be accepted.[89]

88 Explanatory Report to the Act no. 89/2012 Coll., Civil Code. Pp. 242–243. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf [cit. 20. 5. 2023].

89 BRUNCKO, S. § 954. In: MELZER, F., TÉGL, P. et al. *Občanský zákoník IV. svazek – 2 díly §§ 655–975 Rodinné právo*. Praha: Leges, 2016, p. 1897.

In cases of "svěřenectví" or foster care, the child has their own legal representative. The appointment of a tutor, who should primarily represent the child legally, therefore does not appear to be ideal.

On the other hand, a satisfactory solution can be found in the second edition of the above-mentioned Commentary by C. H. Beck. In this Commentary, *Westphalová* recommends that the court should apply the foreign law that allows the child to be placed to the care of the person living abroad. This solution is entirely consistent with Article 15(2) of the Hague Convention on the Protection of Children which allows the court to apply the law of the State with which the situation has a substantial connection. In the above mentioned example, the court would apply Slovak law and therefore, the child could be placed to the care of their grandparents in Slovakia. The main disadvantage of this solution is that the court has to apply foreign substantive law, which may cause difficulties and can cause procedural delays, as well as increase the costs of the proceedings.

In my opinion, by far the best solution is offered by the Brussels II ter Regulation and its Articles 12 and 13, which allow the transfer of jurisdiction to a court of another Member State.[90] In order to transfer the case, all the conditions laid down in these Articles have to be fulfilled. I would like to mention only one of these conditions, which is the special connection of the child with the State in whose territory the matter is to be transferred. As can be seen from Article 12(4) of the Brussels II ter Regulation, this relationship is established for example if the Member State is the State of the nationality of the child. On the other hand, just the fact that the child's close relatives live in the territory of the State does not establish the special connection of the child to that State. Therefore, unless the child is a national of the State in which their grandparents or other close relatives reside, the transfer of jurisdiction to this State will not be possible. In this context, I find it regrettable that the EU lawmakers have not regulated the conditions on the model of the Hague Convention on the Protection of Children. Under Article 8(2)(d) of this Convention, the transfer of jurisdiction

90 In relation to a non-member State which is also a contracting State to the Hague Convention on the Protection of Children, Articles 8 and 9 of that Convention, which also govern the transfer of jurisdiction, may be applied.

is possible every time the child has a substantial connection to the State, even in cases when they are not a national of this State. Such a solution appears to be more consistent with the protection of the best interests of a child.

As we can see, probably the best solution that is able to solve the alarming problem of Czech substantive law is offered by the Brussels II ter Regulation and its articles on the transfer of jurisdiction (or, in relation to a non-EU state, Articles 8 and 9 of the Hague Convention on the Protection of Children). Thanks to these provisions, children can be placed in the care of their relatives and do not have to end up in a Czech institutional setting. I think it is crucial for Czech courts to reflect this solution and apply these provisions of the Brussels II ter Regulation. Otherwise, there is a risk that the courts will rule in a way that collides completely with the best interests of the child.

8 Conclusion

For proceedings with an cross-border element in general, the proper application of the various legal provisions is particularly important. Only the accurate application of the relevant legal provisions can provide the parties of cross-border legal relations with the much-desired legal certainty, in particular with the predictability of the applicable law and international jurisdiction of the courts.

Due to the numerous legal provisions, it is sometimes difficult to know how to navigate through them. Besides the national rules of private international law, there is usually a specific rule contained in an international treaty. Last but not least, courts of the Member States of the EU must not neglect the regulations adopted in the area of judicial cooperation in civil matters.

In the Czech Republic, there are no specialized courts dealing with cross-border cases. The Czech judges whose agenda consists mainly of domestic cases are faced with a difficult task when they have to decide a family law case with an international element. Not only do they have to deal with a multiplicity of legislation, but they must not forget that they are deciding on family law relationships which are particularly vulnerable and fragile. Inconsistent or even completely incorrect application of the law

can therefore cause irreparable damage, particularly in proceedings involving minor children.

In the first part of my paper, I tried to clarify the application rules for the relevant legislation regarding substitute family care with a cross-border element. After a detailed analysis of these application rules, I have concluded that even though the Czech courts will mostly apply the Brussels II ter Regulation, in some cases, they will have to apply the jurisdictional rules contained in international treaties or "Czech PILA".

With regard to the given analysis, it can be concluded that Czech courts should be particularly cautious when it comes to specific rules that apply to the relationship between the Brussels II ter Regulation and the Hague Convention on the Protection of Children. They should also bear in mind the reservations made by the Czech Republic in relation to certain articles of the Hague Convention on the Protection of Children.

In the second part of my paper, I focused on a detailed analysis of individual jurisdiction rules applicable in cases of cross-border placement of children.

The second part of my paper was dedicated to a detailed analysis of the particular rules of international jurisdiction, with the greatest emphasis on the rules contained in the Brussels II ter Regulation, as this is the one that will be used most often by Czech (and other European courts). I have also summarised the conclusions that the CJEU has already taken on these rules.

I believe that although the EU legislator has very satisfactorily implemented many of the CJEU's conclusions on the interpretation of the Brussels II bis Regulation into the Brussels II ter Regulation and its Preamble, it is still necessary to follow the CJEU's decision-making and to respect its conclusions when applying the Brussels II ter Regulation. Therefore, as it is still possible to apply some of the conclusions of the CJEU on the application of the Brussels II bis Regulation, the courts can only be advised to become well acquainted with all relevant CJEU decisions.

I finished my article with a chapter on a particular problem arising from Czech substantive law that is directly related to the international jurisdiction of Czech courts in cases of repatriation of foreign minor children back to their country of origin. In that chapter, I have presented an ideal solution

that solves this problem and through which the best interests of children can be protected.

All courts deciding on the repatriation of children can only be reminded that the interests of the child must prevail over formalistic decisions and that it is not possible to be content with domestic institutional care if there is a real possibility of placing the children in the care of their relatives or other persons living abroad.

Even though I was primarily focusing on the legislation which can be applied by Czech courts, majority of the rules is applicable across the whole EU. Therefore, I hope that this paper can be helpful for all who would like to understand the jurisdiction rules applicable by Czech (or other European) courts while placing a child abroad, to another European country.

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Proposal for a Regulation on Parenthood: An Important Step Forward or Another Missed Opportunity?

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Abstract

In the presented paper, we explore the potential impact of the proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood ("Parenthood Regulation Proposal"). The proposed regulation aims to strengthen fundamental rights of children in cross-border situations, however it seems unlikely to be adopted unilaterally but rather through enhanced cooperation, since some Member States have already announced their intention to block its unanimous adoption. In this context, we have carried out a thorough analysis of the key provisions of the proposed version of the Parenthood Regulation, and discuss the reasons why unilateral adoption of the regulation may be problematic, in order to achieve the aim of this paper, namely to test our hypothesis that the Parenthood Regulation Proposal is an important step forward for the protection of the fundamental rights of children in cross-border situations.

Keywords

Cross-Border Parenthood; Fundamental Rights of Children; Parenthood Regulation Proposal.

1 Introduction

Parenthood can be defined as the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents.[1]

1 Art. 4(1) of the Parenthood Regulation Proposal.

Under EU law, some questions relevant to the parent-child relationship are already regulated, e.g., jurisdiction, and the recognition of decisions in matters of parental responsibility is regulated by the Brussels II ter Regulation.

However, the questions of parenthood determination and recognition of parenthood between Member States are absent from EU law.[2] Therefore, Member States needed to establish their jurisdiction to act on parenthood matters as well as to determine the applicable law under which questions relevant to parenthood will be governed – whether through international treaty or national law relevant to parenthood. In terms of Slovak private international law, these are bilateral international treaties on legal assistance.

For the purpose of recognition of parenthood established in one Member State by another and respect for fundamental rights, the Parenthood Regulation Proposal was delivered on 7 December 2022.[3] As indicated above, the aim of the Parenthood Regulation Proposal is to regulate jurisdiction for parenthood matters, applicable law, and recognition of parenthood. As Commission President *Ursula von der Leyen* said: *"I will also push for the mutual recognition of family relations in the EU. If you are a parent in one country, you are parent in every country."* We believe that the recognition of parenthood might represent the greatest challenge to its unanimous adoption.

The necessity for the adoption of such a regulation can be justified on multiple levels:

1. The absence of a comprehensive regulation of parenthood questions within the EU,
2. The promotion of children's interests: every child will have the right that their parenthood will be the same and accepted in all Member States,
3. The LGBTQ Equality Strategy.

2 BURDOVÁ, K. *Krívajúce rodičovstvo v slovenskom medzinárodnom práve súkromnom*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2012, p. 9.

3 Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood {SEC(2022) 432 final} – {SWD(2022) 390 final} – {SWD(2022) 391 final} – {SWD(2022) 392 final}. *European Commission* [online]. 7. 12. 2022 [cit. 26. 5. 2023]. Available at: https://commission.europa.eu/system/files/2022-12/com_2022_695_1_en_act_part1.pdf

In this paper, we argue that the unilateral adoption of the Parenthood Regulation Proposal is an important step forward for the protection of the fundamental rights of children in cross-border situations.

For this reason, in the first part of this paper, we analyse the legal rules proposed within the Parenthood Regulation Proposal and subsequently compare the current Slovak regulation on parenthood enshrined in the Slovak Act no. 97/1963 Coll., on private international law ("Slovak PILA") with the Parenthood Regulation Proposal, as regards jurisdiction, applicable law and the recognition of parenthood. The aim of the first part of the paper is to point out the differences between the two regulations in question, and highlight the necessity for their harmonisation. The second part of the paper focuses on the adoption process of the Parenthood Regulation Proposal itself. In particular, whether the Parenthood Regulation Proposal will be adopted unanimously on the basis of Article 81(3) TFEU or on the basis of enhanced cooperation as, e.g., the Rome III Regulation in the past.

2 Current Regulation of Parenthood

2.1 International Jurisdiction

The question of international jurisdiction is one of the fundamental questions of private international law.

Within the Parenthood Regulation Proposal, the question of international jurisdiction is regulated in Articles 6 to 15. The general jurisdiction in Article 6 governs multiple possibilities for the establishment of international jurisdiction. International jurisdiction in the matter of parenthood can be determined on the basis of the child's habitual residence at the time the court is seised, the child's nationality at the time the court is seised, the respondent's habitual residence at the time the court is seised, the habitual residence/nationality of either parent at the time the court is seised, or the Member State of the child's birth.[4]

All the criteria in Article 6 are designed to safeguard the best interests of the child. The best interests of the child are highlighted by the formulation

4 Art. 6 of the Parenthood Regulation Proposal.

of the general rule for the determination of international jurisdiction itself, since the grounds for its determination are based on the proximity of the child. The cascade approach suggested in the Parenthood Regulation Proposal also provides for legal certainty. If international jurisdiction cannot be determined according to Article 6 of the Parenthood Regulation Proposal, Article 7 provides additional grounds for its establishment, namely on basis of the presence of the child.[5] Therefore, a Member State court can establish jurisdiction even if none of the other alternatives regulated through the general jurisdiction rule are fulfilled. This ensures the legal certainty principle since a court of the Member State where the child is present can act and decide on the matter of parenthood.

Additionally, the Parenthood Regulation Proposal provides for residual jurisdiction and *forum necessitatis*. Which are closing the rules for jurisdiction establishment.

The choice of forum however, is not a part of the Parenthood Regulation Proposal, meaning that the parties to the proceeding on parenthood cannot influence the international jurisdiction of the court by agreement or by appearing in the proceeding. The exclusion of the possibility to make an agreement on international jurisdiction can be justified by the following arguments.

First, the choice of forum is not regulated in the Parenthood Regulation Proposal. The total exclusion of the autonomy of the parties in terms of international jurisdiction is rare in EU secondary law, however there are also other EU regulations that do not allow prorogation of international jurisdiction, or provide a basis for such prorogation, but only to a limited extent. For example, the Brussels II ter Regulation does not regulate the legal basis for agreeing on international jurisdiction in matters of divorce, legal separation and marriage annulment. Such a possibility was not even part of the predecessor of the Brussels II ter Regulation, the Brussels II bis Regulation. In the matter of parental responsibility, an agreement on jurisdiction may be concluded, however such choice is not unlimited, meaning that the parties to the choice-of-court agreement cannot establish the international jurisdiction of any State, but may only

5 Art. 7 of the Parenthood Regulation Proposal.

consolidate the parental responsibility claim before the Member State where the parents are engaged in a divorce or legal separation proceeding.[6] The limited possibility for the parties to enter into an agreement on the choice of court is also enshrined, e.g., in the Succession Regulation, the Matrimonial Property Regimes Regulation, etc. Even if we establish that the limited choice of court or exclusion of choice of court is not a novelty, we should still answer the question of whether at least a limited choice of court should be enshrined in the Parenthood Regulation Proposal.

Despite the EU trend of autonomy of will, we argue that the choice-of-court agreement should remain absent from the Parenthood Regulation Proposal. The main reasons are the scope of application of the regulation, its aim, and the general rule for establishing international jurisdiction. The general rule sets the basis for international jurisdiction widely and all the bases are closely connected to the child in question. Allowing unlimited choice of court could therefore be against the aim of the regulation, namely the best interests of the child, since unlimited choice of jurisdiction could vest international jurisdiction with a Member State with which the child in question has either no connection or only limited connection. At the same time, limited choice of court is also not applicable in the Parental Proposal Regulation, which can be once again justified by the scope of the general rule for international jurisdiction as well as the aim of the regulation itself. Since the general rule widely regulates the grounds for international jurisdiction, choice of court would not be in the best interests of the child, and would not establish international jurisdiction with a closer connection to the child. For example, the question of establishing parenthood for a child living with their mother, a Czech citizen, in Czechia. The child was born in Czechia, and has lived there since their birth. The presumed father, who is the claimant, is a Slovak national living in Slovakia. He is seeking to establish his parenthood of the child. According to Article 6 of the Parenthood Regulation Proposal, the Member State of the habitual residence of the child at the time the court is seised (Czechia), the Member State of the child's nationality at the time the court is seised (Czechia), the habitual residence of the respondent

6 LUPOI, M. A. Between parties' consent and judicial discretion: joinder of claims and transfer of cases in Regulation (EU) 2019/1111. *Polski Proces Cywilny*. 2019, no. 4, p. 545.

at the time the court is seised (Czechia), the habitual residence of either parent at the time the court is seised (since in this case, we have the mother as one parent and only a presumed father, the habitual residence of the parent would be mother's habitual residence, therefore Czechia) or the Member State in which the child was born (Czechia) should have jurisdiction.

Second, the existing criteria in the Parenthood Regulation Proposal are set out so that the best interests of the child are met and safeguarded.

Next, the question of whether in some cases a choice of court would be justified, e.g., when there is substantial connection to the legal order of the State and the parties have agreed with the prorogation, or when jurisdiction is established on the basis of appearance in the proceeding. We believe that in some cases, such establishment of jurisdiction could be justified, however the above rules exhaustingly set out multiple criteria for international jurisdiction establishment, so we do not believe that an amendment of the Parenthood Regulation Proposal is necessary.

Compared to the EU Parenthood Regulation Proposal, the Slovak PILA provides more modest legal regulation. It differentiates between jurisdiction in the matter of parenthood determination and in the matter of child adoption.

The question of parenthood determination, meaning whether someone is a parent or not, is regulated in Section 40 of the Slovak PILA, according to which: *"A petition for determination of parenthood (establishment and denial) may be filed with the Slovak general court of the petitioner if the respondent does not have a general court in the Slovak Republic. If the petitioner does not have a general court in the Slovak Republic either, but one of the parents or the child is a Slovak citizen, the petition may be filed in a court designated by the Supreme Court."* A general court can be specified as the court of the one's residence, and is always determined on the basis of the national procedure rule regulating court jurisdiction.[7] Section 40 of the Slovak PILA has remained practically unchanged since the adoption of the Act in 1963, and we would argue that it does not meet the required standard to protect the fundamental rights of children.

7 LYSINA, P. et al. *Zákon o medzinárodnom práve súkromnom a procesnom. Komentár.* Praha: C. H. Beck, 2012, p. 242.

First, a petition for the determination of parenthood may be filed with the Slovak general court of the petitioner if the respondent does not have a general court in the Slovak Republic. The petitioner is the person seeking to either establish or deny their parenthood, their relationship to a specific child, however Slovak law does not consider the child at all, does not take the residence or nationality of the child as the factor for determining jurisdiction, instead prioritising the petitioner and their place of residence. The Slovak court will have international jurisdiction to act, even though the respondent does not have residence in the Slovak Republic. The other question to be determined is who the respondent actually is in such a proceeding, since the Slovak PILA itself does not regulate such person. Here, the PILA does not even conform with the Slovak internal procedure act, which does not differentiate between petitioner and respondent in a proceeding on parenthood determination, instead stating the parties to the proceeding itself.

Second, if the petitioner does not have a general court in the Slovak Republic, but one of the parents or the child is a Slovak citizen, the petition may be filed with a court designated by the Supreme Court. The second sentence of Section 40 of the Slovak PILA, like the first one, does not consider the interests of the child but those of the parents of the child.

A choice-of-court agreement is excluded from the Slovak PILA, as it is also excluded from the Parenthood Regulation Proposal. Hence at this level, both the compared sources of law uphold the same approach.

When comparing the Parenthood Regulation Proposal and the current regulation enshrined in the Slovak PILA, it is evident that the criteria for international jurisdiction stated in the former is mostly based on the proximity of the child. Although the rules in the Slovak PILA do not put the child's interests in first place, they are still addressed in the regulation itself. The current Slovak regulation does not reflect the fundamental rights of the child and prefers other criteria to establish international jurisdiction, such as the general court of the claimant in Slovakia. At the same time, we must add that the rules enshrined in the Slovak PILA would still be used even after the adoption of the Parenthood Regulation Proposal on the basis of residual jurisdiction.

3 Applicable Law

The Parenthood Regulation Proposal sets the rules for the determination of applicable law for parenthood establishment in Chapter III According to Article 17(1): *"The law applicable to the establishment of parenthood shall be the law of the State of the habitual residence of the person giving birth at the time of birth or, where the habitual residence of the person giving birth at the time of birth cannot be determined, the law of the State of birth of the child."* To determine the law applicable to the establishment of parenthood, the conflict-of-law rule refers to the application of the law of the State of habitual residence of the person giving birth at the time of birth. The connecting factor "habitual residence" is not a new one in European private international law since it is increasingly used in international instruments. The term "habitual residence" is not defined in the Parenthood Regulation Proposal. Habitual residence is characterised by two factors: first, the intention of the person concerned to establish the habitual centre of their interests in a particular place and, second, a sufficiently stable presence in the Member State concerned.[8] Determination of the habitual residence of the person giving birth at the time of birth should not be problem in practice.

The additional connecting factor is provided by the Parenthood Regulation Proposal in the event the habitual residence cannot be determined. In such a case, the law of the State of birth of the child will apply. Two questions stem from the mentioned conflict-of-law rule. First, is it necessary to regulate an additional connecting factor? And second, if so, should the conflict-of-law rule refer to the application of the law of the State of birth of the child or another connecting factor?

The connecting factor of habitual residence is already applied, e.g., through the Brussels II ter Regulation to determine general jurisdiction in the question of parental responsibility for a child,[9] and also in the Succession Regulation, to determine jurisdiction and the applicable law in matters of succession. The Brussels II ter Regulation regulates, under Article 13, *forum necessitatis* that should be applied if the child's habitual

8 Judgment of the CJEU of 25 November 2021, Case C-289/20, para. 47.
9 Art. 8 of the Brussels II ter Regulation.

residence cannot be determined and at the same time the jurisdiction cannot be determined based on agreement under Article 12.[10] This practice shows that Article 13 is used only in exceptional cases and in respect of refugee children or internationally displaced children.[11] The Succession Regulation uses the connecting factor of habitual residence for the determination of jurisdiction and applicable law. As regards the jurisdiction question, the Succession Regulation does not provide any additional connecting factor for a situation in which the habitual residence cannot be determined, but rather establishes international jurisdiction if the deceased did not have habitual residence in a Member State. The situation is similar with applicable law. The general rule enshrined in Article 21(1) recommends determining the applicable law according to the habitual residence. The escape clause allows the application of another law, but only in exceptional cases, when the deceased was manifestly more closely connected with another State.

Therefore, when comparing two other EU private international law sources using habitual residence, the Brussels II ter Regulation provides for an additional criterion, namely when the habitual residence cannot be determined, yet the Succession Regulation uses a single connecting factor.

The aim of the general provision enshrined in Article 17 is to provide applicable law for the establishment of the parenthood of a child. The best interests of the child will always be prioritised and, since in rare cases it may be difficult to determine habitual residence, the existence of an additional connecting factor is justified. Since the answer to our first question was positive, should the conflict-of-law rule refer to application of the law of the State of the birth of the child, or should the Parenthood Regulation Proposal state another connecting factor? According to the Council of Bars and Law Societies of Europe ("CCBE"), *"the law of the State of the birth of the child as proposed by the Parenthood Regulation Proposal is extremely risky as it allows for law shopping, is a volatile criterion and is not a strong link, which*

10 Art. 13 of the Brussels II ter Regulation.

11 Regulation Brussels IIbis Guide for Application. *ASSER INSTITUTE* [online]. July 2018 [cit. 26. 5. 2023]. Available at: https://www.asser.nl/media/5260/cross-border-proceedings-guide-for-application.pdf

is an important factor in relation to parenthood"[12]. As we have already mentioned, a connecting factor referring to the legal order of the State in which the child was born can be only used in situations where the habitual residence cannot be determined. This stems from the practice that such additional connecting factor will most likely be used in connection with refugee cases or displaced mothers, where it may be impossible to determine habitual residence. For example, a Syrian woman leaves her home while pregnant. On her journey to Germany, she gives a birth in a refugee camp in Turkey. If the court of the Member State had jurisdiction to act according to the Parenthood Regulation Proposal and the habitual residence of the person giving birth at the time of the birth cannot be determined, the additional connecting factor will apply, namely the law of the State of the child's birth. However, if the child was born in, e.g., a refugee camp, the existence of a strong link to such legal order remains questionable. For this reason, we do not consider the place of birth of a child to be an appropriately chosen connecting factor for determining the law applicable to parentage issues. Therefore, a third question arises – which connecting factor should be used?

Modifying Article 17(1) of the Parenthood Regulation Proposal so that the nationality of the person giving birth is applied seems like the obvious choice, since it would refer to the legal order with reasonably closer connection, as the presented version of the Parenthood Regulation Proposal states. In such a case, additional regulation would be required to avoid application problems with persons having multiple nationalities or none.

Article 17(2) of the Parenthood Regulation Proposal is aimed at the determination of parenthood through only one parent. In such a case, *"the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent"*[13]. This Article therefore only applies in situations where one of the parents is known and the parenthood of the second parent needs

12 CCBE position paper on the proposed Council Regulation regarding the recognition of parenthood between Member States. *CCBE* [online]. 31. 3. 2023 [cit. 26. 5. 2023]. Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/FAMILY_SUCCESSION_LAW/FSL_Position_papers/EN_FSL_20230331_CCBE-position-paper-on-the-proposed-Council-Regulation-regarding-the-recognition-of-parenthood-between-Member-States.pdf

13 Art. 17(2) of the Parenthood Regulation Proposal.

to be approved. There are also some issues in this conflict-of-law rule. For example, the mother has the nationality of State X, while her ex-husband has Slovak nationality. When the divorce was finalised, the woman was already pregnant with another man. However, according to the laws of some States, including Slovakia, if a child is born between the conclusion of a marriage and the end of the 300th day after the dissolution or annulment of such marriage, the mother's (former) husband will be deemed the father.[14] Therefore, if the real father of the child wishes to dispute the parenthood of the child, the law of the nationality of the parent (ex-husband) who is the putative father may apply.

Additionally, as regards the conflict-of-law rules referring to the applicable law, the Parenthood Regulation Proposal also governs other questions closely connected to the applicable law, such as the scope of the applicable law, exclusion of renvoi, public policy, etc.

When the conflict-of-law rule enshrined in the Parenthood Regulation Proposal is compared to Article 23 of the Slovak PILA, significant differences need to be pointed out. The general rule, Article 23(1) of the Slovak PILA, determines: *"The determination (establishment or denial) of parenthood is governed by the law of the State whose nationality the child acquired by birth."* Unlike the Parenthood Regulation Proposal, the Slovak PILA uses a different connecting factor, which focuses not on the person giving birth but on the child itself and the nationality of the child at the time of birth. Habitual residence prefers a person's spatial connection to a given legal order over the more formalistic bond often associated with nationality. The child's nationality often derives from the *jus sanguinis* principle. For example, in refugee cases, a child may have foreign nationality but was born in Slovakia, has habitual residence in Slovakia, and no connection to the State of their nationality, yet the question of their parenthood will be governed by it due to the Slovak conflict-of-law rule. The applicable law determined in the quoted paper may be changed to Slovak law if the child is living in the Slovak Republic and such change is in its best interests. Such change would, however, not be applicable if a Slovak court has international jurisdiction to decide on the parenthood of a child living in the Czech Republic,

14 Slovak Republic. Art. 85(1) of the Act no. 36/2005, on family.

with third-State nationality, when one of the parents is a Slovak national. As, generally speaking, nationality is losing importance as a connecting factor, and nationality may not represent the closest link to the applying legal order, we believe that using habitual residence, as per the Parenthood Regulation Proposal, would be more convenient and in compliance with the current private international law practice.

Article 23(2) follows on from the general provision, stating that if a child who has acquired Slovak citizenship by birth, is born and lives in a foreign country, the determination (establishment or denial) of parentage is governed by the law of the State in which the child has their habitual residence. Unlike Article 23(1), Article 23(2) of the Slovak PILA takes into account the closest connection with the applicable law.

To summarise, the "perfect" legal regulation of the applicable law relevant to the establishment of parenthood is not enshrined in the Parenthood Regulation Proposal, nor in the national legal act, the Slovak PILA. In both sources of law, some deficiencies have been identified. Nevertheless, the Parenthood Regulation Proposal is a new source of law reflecting the best interests of the child, filling the current regulation gap and unifying conflict-of-law rules at European level.

4 The Problem of Non-Recognition

Chapter IV of the Parenthood Regulation Proposal sets out rules for recognition of parenthood between EU Member States. Parenthood is a foundation stone of one's identity, and many rights of a child and their parents are derived from it. The law recognises various grounds for the establishment of parenthood. Parenthood is usually established in the relevant legal order, with the legal order clearly stating who are the parents of a child. Parenthood can be also established by an act of a competent authority, such as a court decision, notarial deed, etc. The establishment of parenthood in one Member State, however, does not automatically mean that such parenthood is recognised in another Member State, or that all the rights derived from parenthood will be granted in another

Member State.[15] Parenthood established in one Member State might not be recognised in another. Multiple reasons why parenthood recognition currently faces difficulties have been identified.

Different substantive law rules on the establishment of parenthood are the first of these. The question of family law has never been part of EU competencies.[16] For this reason, national substantive rules differ considerably as to the question of the establishment of parenthood, but also as to the position towards so-called rainbow families and the establishment of parenthood in relation to a rainbow family.

Different conflict-of-law rules. As we mentioned in the previous chapter, the Parenthood Regulation Proposal also aims to unify conflict-of-law rules on parenthood. These rules are currently missing from the uniform regulation, and are therefore regulated at national level or by international treaties, often leaving the interested party subject to a foreign legal order used based on conflict-of-law rules stated in the law of a State with which the interested party has little to no connection.

Different rules on the recognition of parenthood are the third reason why the recognition process itself is problematic and requires European legislation. Different rules on the recognition of parenthood can mean that a person is a parent in one Member State, but their parenthood is not recognised in another, leaving the parent with a document valid in one State yet completely irrelevant in another.

4.1 Proposed Regulation

Pursuant to the general rule, *"**a court decision on parenthood** given in a Member State shall be recognised in all other Member States without **any special procedure** being required"*. Recognition of a decision between EU Member States is not a novelty introduced by the Parenthood Regulation Proposal, but it is based on several other legal instruments regulating such proceedings.

15 The exception stems from the judgment of the CJEU of 14 December 2021, *V.M.A. vs. Stolichna obshtina, rayon "Pancharevo"*, ruling that a Member State must issue an identity card or a passport to a child who is a national of that Member State and whose parents are two persons of the same sex. The Member State must recognise the child's right to move and reside freely within the territory of the EU with each of those parents.

16 See Art. 4–5 of the TEU and Art. 2–6 of the TFEU.

A court decision on parenthood is defined in Article 4 as a decision of a court of a Member State, including a decree, order or judgment, concerning matters of parenthood.[17] The parent-child relationship established by law is commonly not a part of such court decision. It can also be established – and usually is – through other legal instruments with varying legal effect. Narrowing down parenthood recognition only to court decisions would significantly reduce the number of situations in which the recognition system established in the Parenthood Regulation Proposal would apply. For this reason, the proposal also provides for the acceptance of authentic instruments that establish parenthood with or without binding legal effect in the Member State of origin.[18] The recognition of authentic instruments with binding legal effect is regulated in Article 35 *et seq.* of the Parenthood Regulation Proposal, however the rules for the recognition of court decisions will apply accordingly to the recognition of authentic instruments with binding legal effect.[19] The recognition of authentic instruments with no binding legal effect is regulated in Article 44 *et seq.* of the Parenthood Regulation Proposal.

The general rule for court decision recognition states that recognition will be performed without any special procedure being required, meaning that once parenthood is established in one Member State, it does not automatically have to be separately recognised in another Member State.

Even though the recognition process is automatic, any interested party may exercise grounds for refusal of recognition as defined in Article 31 of the Parenthood Regulation Proposal. The Parenthood Regulation Proposal states an exhaustive list of grounds based on which the recognition of parenthood can be refused and for refusing recognition of authentic instruments establishing parenthood with binding legal effect. Both lists include the grounds of public policy and require that this derogation is applied while observing fundamental rights, while they underline the importance of hearing the children's views.[20] The automatic recognition

17 Art. 4 of the Parenthood Regulation Proposal.

18 Such authentic instruments can be, for example, an extract from the civil register or a birth or parenthood certificate.

19 Art. 36 of the Parenthood Regulation Proposal.

20 TRYFONIDOU, A. Cross-border recognition of parenthood in the EU: comments on the Commission proposal of 7 December. *ERA Forum*. 2023, Vol. 24, no. 1, p. 156.

of court decisions is based on the mutual trust principle. The listed grounds for refusal are justified by the objective of the regulation and the nature of parenthood itself. At the same time, the public policy exception may only be applied in accordance with the non–discrimination principle, meaning that the State cannot refuse the recognition of a court decision or authentic instrument with binding legal effect only because it would recognise the parenthood of a same-sex couple.

The Parenthood Regulation Proposal only sets grounds for the recognition of parenthoods established within the EU, meaning the recognition of decisions of courts of EU Member States or authentic instruments issued by a relevant authority in an EU Member State. Even though it is standard in similar EU instruments, parenthood established in a third State could be refused on basis of the "ordre public" exception enshrined in national legislation.

The Slovak PILA also regulates parenthood recognition. If at least one of the parties to the proceeding is a Slovak citizen, such decision will be recognised if none of the listed grounds for refusal exist.[21] The main difference between these two legal regulations lies in the application of the "ordre public" exception.

While the Parenthood Regulation Proposal literally forbids its application to parenthood established for same-sex couples, the Slovak regulation does not exclude the application of the "ordre public" exception on a non-discrimination basis. It is highly unlikely that such parenthood would not be recognised in Slovak Republic, specifically on the basis of the "ordre public" exception.

5 Adoption of the Parenthood Regulation Proposal

Enhanced cooperation was initially introduced in the Amsterdam Treaty under the term "closer cooperation", allowing Member States to establish enhanced cooperation between themselves on matters covered by the Treaties. The EU motto "united in diversity" first introduced in 2000 cannot be achieved in all the issues which arise. The introduction of enhanced cooperation

21 Slovak Republic. Art. 65 of the Act no. 97/1963, on private international law.

was approved by both its supporters and opponents. While the supporters argued that such a step is essential for ensuring that the process of European integration will not be hampered by a lack of political agreement between the parties, the opponents shared the concerns regarding the fragmentation of the internal market and potentially adverse impacts in the long term.[22] Due to different points of view on multiple questions arising from the various geographic, cultural and political backgrounds, enhanced cooperation, currently foreseen in Article 20 of the TEU, is used for the adoption of secondary sources of EU law in cases where unilateral adoption is not an option. Enhanced cooperation has already been used for the adoption of multiple private international law regulations, allowing participating States to cooperate more in regulation.[23]

The question of enhanced cooperation has become relevant since the Parenthood Regulation Proposal was adopted. Multiple Member States have shared their concerns regarding the Parenthood Regulation Proposal. The legal basis for the Parenthood Regulation Proposal is given in Article 81(3) of the TFEU, according to which: *"The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. Such proposal shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."*

The adoption of the Parenthood Regulation Proposal via enhanced cooperation is the least desirable but most probable possibility for its adoption. Although it is true that adoption even by some Member States would significantly improve children's rights, such adoption would not be enough.

22 GAJA, G. How Flexible Is Flexibility Under the Amsterdam Treaty? *Common Market Law Review*. 1998, Vol. 35, no. 4, pp. 855–870.

23 In recent years, the enhanced cooperation has been used for the adoption of the Rome III Regulation, Matrimonial Property Regimes Regulation, Registered Partnership Property Regimes Regulation, but also for the regulation regarding EU patent system and financial transaction tax.

There has been no official announcement by any Member State of its intention to vote against the proposal in the Council. There are serious doubts as to whether an instrument which includes, within its personal scope, rainbow families and surrogate-born children, will receive a positive vote from every Member State that will be involved in its adoption.[24] For example, the position of the Slovak Republic as regards the Parenthood Regulation Proposal has been a point of discussion at the Committee on European Affairs of the National Council of the Slovak Republic, which at first obliged the members of the government of the Slovak Republic to take a positive position on the Parenthood Regulation Proposal,[25] although the same parliamentary council quickly changed its decision.[26] Even though it is current, the position of the Slovak Republic is not final, and a viral political discussion on the topic of Slovakia's position on the Parenthood Regulation Proposal can be expected.

If the Parenthood Regulation Proposal is adopted via enhanced cooperation, the Member States participating in such enhanced cooperation would probably be those Member States already upholding the rights of the child in question and not refusing to recognise same-sex parenthood established in another Member State. Looking at the situation from the Slovak point of view, the abovementioned can be demonstrated using the following example. A same-sex couple legally adopted a child in one Member State. They later wanted to recognise their parenthood in the Slovak Republic. In theory, there are two ways to resolve such a case. The first is that if the Slovak Republic adopts the Parenthood Regulation Proposal and if other conditions set by the Parenthood Regulation Proposal are met, then the Slovak Republic will recognise the parenthood of this same-sex couple, since such parenthood could not be refused only on the basis of a discriminatory position toward such

24 TRYFONIDOU, A. Cross-border recognition of parenthood in the EU: comments on the Commission proposal of 7 December. *ERA Forum*. 2023, Vol. 24, no. 1, p. 160.

25 See 141. Uznesenie Výboru Národnej rady Slovenskej republiky pre európske záležitosti z 15. marca 2023. *Národná rada Slovenskej republiky* [online]. [cit. 26. 5. 2023]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?WFTID=NRDK&MasterID=293802

26 See 143. Uznesenie Výboru Národnej rady Slovenskej republiky pre európske záležitosti z 22. marca 2023. *Národná rada Slovenskej republiky* [online]. [cit. 26. 5. 2023]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?WFTID=NRDK&MasterID=293943

couple. On the other hand, when applying Slovak national law, the parenthood of a same-sex couple would not be recognised in full. Therefore, the adoption of the Parenthood Regulation Proposal would achieve its goal only partially, only between the States that decide to participate in enhanced cooperation, and probably between the States that are already recognising same-sex parenthood based on other legal sources. Enhanced cooperation would therefore achieve its aim only between Member States that already recognised same-sex parenthood, not between States that previously refused to recognise it due to the public policy exception.

It remains questionable whether amendments to some articles would make the Parenthood Regulation Proposal more acceptable to the hesitating Member States. The Parenthood Regulation Proposal would not change the Slovak material rules regarding parenthood, nor would it break the EU subsidiarity principle. Adoption by all Member States would liberate it from political influence and prioritise the interests of children.

Considering the abovementioned, the Parenthood Regulation Proposal will be adopted, and will enter into force in as many Member States as possible. As we argued in the first part of this paper, the Parenthood Regulation Proposal states clear rules regarding international jurisdiction, the applicable law, and the recognition of parenthood. Such harmonised regulation is currently lacking in the EU, resulting in different Member States taking different approaches towards the recognition of parenthood.

6 Conclusion

In the presented paper, we analysed the regulation in the Parenthood Regulation Proposal with the goal of confirming the hypothesis that the unilateral adoption of the Parenthood Regulation Proposal is an important step forward for the protection of the fundamental rights of children in cross-border situations. We compared the proposed rules in the Parenthood Regulation Proposal with the current Slovak ones. In all three analysed sets of rules regarding international jurisdiction, the applicable law and the recognition of judgments, the Parenthood Regulation Proposal would provide greater protection for children's fundamental rights than the Slovak PILA.

Although some deficiencies were identified in the Parenthood Regulation Proposal, its adoption would significantly increase the protection of the fundamental rights of children. The main question remains how the Parenthood Regulation Proposal will be adopted. As we argued, only unilateral adoption can have the desired impact on the protection of children's fundamental rights, nevertheless partial adoption of the Parenthood Regulation Proposal is more likely, and will bring only partial results.

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Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood {SEC(2022) 432 final} – {SWD(2022) 390 final} – {SWD(2022) 391 final} – {SWD(2022) 392 final}. *European Commission* [online]. 7. 12. 2022 [cit. 26. 5. 2023]. Available at: https://commission.europa.eu/system/files/2022-12/com_2022_695_1_en_act_part1.pdf

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141. Uznesenie Výboru Národnej rady Slovenskej republiky pre európske záležitosti z 15. marca 2023. *Národná rada Slovenskej republiky* [online]. [cit. 26. 5. 2023]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?WFTID=NRDK&MasterID=293802

143. Uznesenie Výboru Národnej rady Slovenskej republiky pre európske záležitosti z 22. marca 2023. *Národná rada Slovenskej republiky* [online]. [cit. 26. 5. 2023]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?WFTID=NRDK&MasterID=293943

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QUO VADIS, EU CITIZENSHIP?

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Issues of Citizenship of the European Union and Concepts of Its Development

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Abstract

The aim of the article is to analyse the institution of citizenship of the European Union, which is one of the most important achievements of European integration. The subject of research is also the concept of the development of European Union citizenship in regards to extending it to other groups of people. In this article, the author analyses the institution of European citizenship through the prism of international law and national regulations. The aim of the article is also to identify and analyse the challenges facing the European Union and its Member States in the context of the concept of extending Union citizenship.

Keywords

Citizenship of the European Union; Development of European Citizenship; European Union; Europeanization; Rights and Freedoms of Citizens.

1 The Genesis of European Unity

1.1 Historical View

In Poland and Europe, the historic beginning of the European integration process is considered to be the speech of the French Minister of Foreign Affairs, Robert Schuman, which was undoubtedly the turning point of his entire political activity, as afterward he strived for the great and long-term process of European integration. The presentation on 9 May 1950 to the general public of a document developed in collaboration with Jean Monnet, proposing a sectoral method of European integration, was

the beginning of the European nations' road to unity. This project went down in the history of modern Europe under the name of the Schuman Plan.[1] In this historic statement, also known as the Schuman Declaration, Robert Schuman, on behalf of the French government, presented a proposal to coordinate coal and steel production in France and the Federal Republic of Germany, with open cooperation for other European countries.[2] He said then: *"Europe will not be created all at once or in its entirety: it will be created through specific implementations, first by creating real solidarity."*[3] This is how the process started, first economic consolidation, and then tightening political cooperation. The first form of binding Europe together was the creation of the European Coal and Steel Community, the aim of which was to create a common coal and steel market. Although the Preamble states that the European Coal and Steel Community was to constitute *"the basis of a broad and independent unity of peoples"*, the Treaty does not allow us to talk about any political goals, tasks or areas of its operation. The main objective was to create a market for goods covered by the Treaty. As part of the regulations, it was not the elimination of barriers that created a free trade zone, but a permanent merger of markets, or even economic sectors, enabling the conduct of a common policy within them as well as cooperation and coordination between states under conditions of equality, lack of restrictions and uniform legal regulation. The result was a new area whose national systems became formalized subsystems.[4]

On the basis of the Treaty of Rome signed on 25 March 1957, the European Economic Community was also established. Constructors were the same countries that founded the European Coal and Steel Community six years earlier. They have now set themselves a long-term, incomparably broader task: to shape a common market for all products in the countries

1 SZAREYKO, H. Robert Schuman – jeden z ojców zjednoczonej Europy. *Wrocławski Przegląd Teologiczny*. 2009, Vol. 17, no. 1, pp. 219–227.

2 KIENZLER, I. *Leksykon Unii Europejskiej*. Warsaw: Świat Książki, 2003, p. 193.

3 Unia Europejska. Cele i etapy integracji. *Zintegrowana Platforma Edukacyjna* [online]. [cit. 18. 5. 2023]. Available at: https://zpe.gov.pl/a/unia-europejska-cele-i-etapy-integracji/Dtpk6FHGX

4 MADEJA, A. Europejska Wspólnota Węgla i Stali a suwerenność państwa członkowskiego. Aspekt instytucjonalno-doktrynalny. *Czasopisma Prawnicze UKSW*. 2011, Vol. 11, no. 4, p. 322.

of the Community and to ensure the possibility of free movement of goods and factors of production across borders. At the same time, the countries of the Community created an organization with a specialized profile of activity: the European Atomic Energy Community ("Euratom"), aimed at developing joint research and their applications in the field of nuclear science, creating a common market for fissile materials and personnel in this field.[5] The importance of Euratom is clearly visible in the context of enlargement. Nuclear energy is an important source of energy in many Eastern European countries, but safety standards in nuclear power plants and the level of protection of the public and workers are not always sufficient. Euratom provided the conditions for European Union support.[6] In Article 2 of the Treaty establishing the European Atomic Energy Community, it is indicated that the Community, under the conditions provided for in this Treaty: supports research and ensures the dissemination of technical knowledge; creates uniform safety standards to protect the health of workers and the general public and ensures their application; facilitates investment and ensures, in particular by stimulating action by companies, the establishment of the basic installations necessary for the development of nuclear energy in the Community; guarantees a regular and fair supply of ores and nuclear fuels to all users of the Community; ensure, through appropriate supervision, that nuclear materials are not used for purposes other than intended; exercises the right of ownership of special fissile materials conferred on it; ensures universal outlets and access to the best technical solutions by creating a common market for specialist materials and equipment, free movement of capital for investment in nuclear energy and freedom to employ specialists in the Community; establishes relations with other states and international organizations to enable progress in the peaceful use of nuclear energy.

These undoubted successes of the Union took place in parallel with the process of its constant enlargement to new Member States, from

5 WINIARSKI, B. Polska a Wspólnota Europejska – uwagi o współpracy i integracji gospodarczej. *Ruch Prawniczy, Ekonomiczny i Socjologiczny.* 1994, Vol. 56, no. 1, pp. 41–48.

6 Traktat o Euratom. *Parlament Europejski* [online]. [cit. 18. 5. 2023]. Available at: https://www.europarl.europa.eu/about-parliament/pl/in-the-past/the-parliament-and-the-treaties/euratom-treaty

5 to 15 countries in the early 1990s. Successive enlargements did not conflict with the deepening of further cooperation, rather to the contrary. The model of functional integration at the regional level even enforced deeper integration by accepting new members. Despite various problems and shortcomings, the European Union in the 1990s presented a picture of probably the most successful supranational integration in the history of the world. This successful process of economic integration turned into a willingness to undertake political cooperation between the countries forming the Communities.[7] As a result, in 1992, the Treaty on European Union ("TEU"), known as the Maastricht Treaty, was signed and entered into force the following year. This legal act not only established a new international organisation, but also granted European citizenship to nationals of the Member States, which complements national citizenship. From that moment, every citizen of a Member State is also a citizen of the European Union. As I have indicated, the establishment of citizenship of the Union was one of the subsequent natural processes on the way of the Member States of the European Union to unity. The Maastricht Treaty establishing the European Union was a step forward in creating "an ever-stronger union among the peoples of Europe". Since then, the foundation of the European Union has been the European Communities, which complement the strategies and forms of cooperation provided for in the TEU. The European Union has a unique institutional framework consisting of the Council, the European Parliament, the European Commission, the Court of Justice and the Court of Auditors. As the only EU institutions in the strict sense of the word, they exercise their prerogatives in accordance with the provisions of the Treaties. Under the treaty, the Economic and Social Committee and the Committee of the Regions were set up with advisory functions. The European System of Central Banks and the European Central Bank were established in accordance with the procedures set out in the Treaty.[8]

7 SADURSKI, W. Obywatelstwo europejskie. *Studia Europejskie / Centrum Europejskie Uniwersytetu Warszawskiego*. 2005, no. 4, pp. 31–45.

8 Traktat z Maastricht i Traktat z Amsterdamu. Notatki tematyczne o Unii Europejskiej. *Parlament Europejski* [online]. 2023, p. 1 [cit. 18. 5. 2023]. Available at: https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/pl/FTU_1.1.3.pdf

Almost 15 years have passed since Tadeusz Mazowiecki, the first Prime Minister of the Third Republic of Poland, declared his willingness to open our country to Europe and the world. At that time, successive governments, regardless of their political views, consistently worked hard to bring our country closer to membership in the European Union. This cross-party agreement on the direction of foreign policy proves how important Poland's goal was to participate in the process of European integration. The time taken to achieve this goal shows that it was an extremely complex process, requiring numerous adjustments and overcoming many difficulties. The history of the process of Poland's integration with the European Union is primarily through international agreements covering various areas of life – from economic to political issues. Each of them required lengthy negotiations and then ratification – on the one hand, by the Polish authorities, on the other – by the Community authorities, and often also by the authorities of individual Member States. The most important of these agreements are the Europe Agreement and the Accession Treaty. An important role in this process was played by institutions and documents created in our country, whose task was to organize, coordinate and monitor the progress of the integration process: the Committee for European Integration, the National Integration Strategy, the National Program of Preparation for Membership.[9] On 16 April 2003 in Athens, on behalf of Poland, the accession treaty was signed by Prime Minister Leszek Miller, Minister of Foreign Affairs Włodzimierz Cimoszewicz and, thirdly, by the then Minister of European Affairs Danuta Hübner. The next day, the Sejm of the Republic of Poland adopted a resolution to set the date of the accession referendum on 7 and 8 June 2003.[10] In the nationwide referendum on expressing consent to the ratification of the Treaty on the accession of the Republic of Poland to the European Union, 77,45% of those taking part in the vote were in favour, while 22,55% of Poles were against. 0,72% of invalid votes were cast. The turnout was 58,85%. On 23

9 Droga Polski do Unii Europejskiej. *Zintegrowana Platforma Edukacyjna* [online]. [cit. 18. 5. 2023]. Available at: https://zpe.gov.pl/pdf/P9S4OshRD

10 1 maja – 16. rocznica przystąpienia Polski do UE. *Serwis Rzeczypospolitej Polskiej* [online]. 1. 5. 2020 [cit. 27. 5. 2023]. Available at: https://www.gov.pl/web/maroko/1-maja--16-rocznica-przystapienia-polski-do-ue

July 2003, the accession treaty was ratified. On 1 May 2004, Poland became a member of the European Union.[11]

1.2 Poland in the Face of European Changes

The results of the Polish June elections, held on 4 and 18 June 1989, led to rapid changes and reshuffles among the political elites of the Polish People's Republic. During these elections, for the first time, citizens were allowed to at least partially decide on the composition of the constitutional organs of the state. Such a situation was, of course, the result of arrangements formulated during the "Round Table" meetings. Before 1989, representatives to the Sejm of the People's Republic of Poland (the Senate did not exist) did not apply for a mandate through free elections, but were only approved. This didn't allow for the direct formation of the elite, nor for the expression of citizens regarding the shape of the state and policy. The elections also allowed new people to join the political elite, who were well aware of the coming wave of democratization. The post-election situation, which clearly indicated the defeat of the Polish United Workers' Party and the victory of the opposition camp, further accelerated the transformation of the political system. The election of Wojciech Jaruzelski by the National Assembly was one of the last symbols of the outgoing communist power. This political exchange of elites, caused of course by many other factors – change of thinking, economic factors, external factors and other political factors, such as the aforementioned arrangements of the "Round Table", enabled Poland to take a step forward towards the democratic World. The presidential election was accompanied by the consolidation of political elites. The slogan "Jaruzelski must go" was widely chanted. In 1990 there was a general presidential election. Their significance for the transformation of the elites was enormous, as two candidates with Solidarity roots took part in them: L. Wałęsa and T. Mazowiecki. Each of the candidates gathered a group of supporters around him, who were to constitute his political base. People supporting L. Wałęsa found themselves in the Citizens' Committee.

11 Referendum 2003. Ogólnopolskie referendum w sprawie zgody na ratyfikację Traktatu Akcesyjnego Rzeczypospolitej Polskiej do Unii Europejskiej. *Państwowa Komisja Wyborcza* [online]. [cit. 27. 5. 2023]. Available at: https://referendum2003.pkw.gov.pl/sww/kraj/indexA.html

Among them were: Z. Najder, J. Olszewski, W. Chrzanowski, W. Lamentowicz and Z. Romaszewski. They were opposed by B. Geremek, J. Kuroń, and W. Frasyniuk, who formed the Civic Movement Democratic Action.[12]

The process, which began in the 1950s, has been running steadily towards ever stronger European integration, as evidenced by one of the largest enlargements in history. From 1 May 2004, both the Czech Republic and Poland became full members of the European Union, which means that from that moment both Czechs and Poles also became full EU citizens. In this way, the dreams of Poles of returning to the free world and finally overcoming the division of the continent from competing hostile ideological and political camps came true. However, the Polish road to freedom began much earlier. Poles have always remembered that due to their history, their country's place is in Europe. That is why they never reconciled themselves to living in the shadow of the "Iron Curtain". The birth of the "Solidarity" movement, which gave impetus to changes in Central and Eastern Europe, was not only a protest against restrictions on political and economic freedom – it was an opposition to the division of Europe.[13] The conclusion of accession negotiations and entry into the European Union marked the culmination of a certain stage of Poland's transformation process. This change covered almost all spheres of the state's activity and, of course, did not end either on 16 April 2003 with the signing of the Accession Treaty, or on 1 May 2004, when Poland formally became a member of the Union. It was at that moment that the adjustment period, as important as the accession negotiations, began for the Polish authorities. We have been faced with the need to redefine the strategic goals of our country. So far, the focus has been on accession to the Community, and it was the Community that set us certain standards of conduct through its expectations and requirements. The conclusion of accession negotiations, on the other hand, prompted reflection on what kind of Union we want, what role we see in it for Poland,

12 KLEPKA, R. Czynniki dynamizujące zmiany polskich elit politycznych po roku 1989. *Chorzowskie Studia Polityczne. Wydział Wyższej Szkoły Bankowej w Chorzowie*. 2009, no. 2, p. 35.

13 18. rocznica przystąpienia Polski do Unii Europejskiej. *Senat Rzeczypospolitej Polskiej* [online]. 1. 5. 2022 [cit. 10. 5. 2023]. Available at: https://www.senat.gov.pl/aktualnosci-lista/art,14725,18-rocznica-przystapienia-polski-do-unii-europejskiej.html

and how our state is to function within this structure.[14] The presence of Poland in the European Union not only has a great impact on the rights and freedoms of Poles as citizens of the Union, but has also provided many positive changes in the functioning of Polish public administration. Poland's membership in the EU has created excellent systemic and, above all, financial opportunities for the development of public administration. This was facilitated by programs such as the Human Capital Operational Program – Measure 5.2 "Strengthening the potential of local government administration". The program was aimed at: Improving the effectiveness and efficiency of performing public tasks by local government units and high quality of public services through the implementation of modern management systems, as well as improving the quality of local law enacted by local government units.[15]

2 Treaty Regulation of Citizenship of the European Union

2.1 Legal Regulations

Citizenship of the European Union has been subject to considerable criticism since its introduction. The allegations relate primarily to the insignificance of this institution, purely symbolic impact, little added value it brings to the citizens of the Member States, and the intention of the project promoters to hide under an ambitious name something that does not really meet the conditions of citizenship and cannot be the basis for building a political community. Many commentators pose the question of whether anything has changed in this regard after twenty years of citizenship. At the same time, this twenty-year period was also a time of extremely dynamic internal and external development of the Union itself.[16] The concept and

14 TERESZKIEWICZ, F. Ewolucja polskiej polityki zagranicznej po wejściu do Unii Europejskiej. In: TERESZKIEWICZ, F. (ed.). *Polska w Unii Europejskiej. Bilans dekady.* Warsaw: Kancelaria Prezydenta Rzeczypospolitej Polskiej, 2013, pp. 215–241.

15 Program Operacyjny Kapitał Ludzki – Działanie 5.2 Wzmocnienie potencjału administracji samorządowej. *Ministerstwo Administracji i Cyfryzacji* [online]. 2015, pp. 3–19 [cit. 10. 5. 2023]. Available at: https://docplayer.pl/2990564-Wzmocnienie-potencjalu-administracji-samorzadowej-program-operacyjny-kapital-ludzki-dzialanie-5-2-ministerstwo-administracji-i-cyfryzacji.html

16 POBOŻY, M. Obywatelstwo i obywatelskość w Unii Europejskiej. *Przegląd Europejski.* 2014, Vol. 31, no. 1, pp. 44–67.

provisions of citizenship of the European Union appeared in the Treaty establishing the European Community ("TEC") only from the entry into force of the Maastricht Treaty, i.e., with the creation of the EU.[17] However, some authors believe that already in the preamble of the first version of the Treaty of Rome, which referred to "an ever closer union among the peoples of Europe", there was a signal that the will of the Member States was not only to create an economic union, but also a union of a political nature, where nationals would enjoy certain rights.[18] J. Weiler even claimed that the Treaty establishing the European Economic Community and then the European Community constituted a kind of "social contract" between the citizens of the Member States, and not the Member States themselves.[19]

Reading the treaties, legal acts and EU documents one gets the impression that the EU attaches great importance to the principles of democracy and the role of citizens in every aspect of its operation. The European Commission's 2013 European Union Citizenship Report begins with the words "citizens are and must be at the heart of European integration". These words are intended to convince that citizens play a particularly important role in the functioning of the European Union, they are the central element of the integration project and its fundamental point of reference.[20] Article 20 of the Treaty on the Functioning of the European Union ("TFEU") explicitly establishes citizenship of the Union. Any person holding the nationality of a Member State is a citizen of the Union. Citizenship of the Union is additional to national citizenship, but does not replace it. Citizens of the Union enjoy the rights and are subject to the obligations laid down in the Treaties. They have, *inter alia*, the right to move and reside freely within the territory of the Member States; to vote and stand as candidates in elections to the European Parliament and in municipal elections in the Member State in which they reside, under the same conditions as nationals of that State;

17 KOWALIK-BAŃCZYK, K. Komentarz do art. 20 Traktatu o funkcjonowaniu Unii Europejskiej. In: WRÓBEL, A. (ed.). *Traktat ustanawiający Wspólnotę Europejską. Komentarz*. Warsaw: Wolters Kluwer, 2008.

18 KOVAR, R., SIMON, D. European citizenship. *European Law Books*. 1993, p. 285.

19 WEILER, J. H. H. To Be a European Citizen: Eros and Civilisation. *CES Working Paper*. 1998, Vol. 1, no. 2, pp. 1–52.

20 POBOŻY, M. Obywatelstwo i obywatelskość w Unii Europejskiej. *Przegląd Europejski*. 2014, Vol. 31, no. 1, pp. 44–67.

enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the diplomatic and consular protection of each of the other Member States, under the same conditions as nationals of that State; submitting a petition to the European Parliament, to refer to the European Ombudsman and to address the Union's institutions and advisory bodies in one of the languages of the Treaties and to receive a reply in the same language. These rights shall be exercised under the conditions and within the limits laid down by the Treaties and by the measures adopted pursuant to them.[21] Article 20 of the TFEU has been modified in comparison with the previous Article 17 of the TEC in such a way that a catalogue of rights contained in subsequent articles has been added – the right to move and reside; active and passive electoral rights in local elections and elections to the European Parliament; the right to equivalent diplomatic and consular protection in a third country where the country of origin is not represented; the right to petition the European Parliament; the right to complain to the European Ombudsman and the right to ask questions and get answers in the same official language to the EU institutions, bodies, offices and agencies. These rights, pursuant to the new Section 2 of the cited legal act, are to be performed in accordance with the conditions and limitations defined by the treaties and acts issued on their basis. This catalogue does not mention the new entitlement added to this chapter, defined by Articles 15 and 16 – the right of access to documents of EU institutions, bodies and bodies and the right to the protection of personal data.[22]

Citizenship of the European Union is regulated primarily in Article 9 of the TEU, which states that in all its activities the Union shall respect the principle of equality of its citizens, who shall be treated with equal attention by its institutions, bodies, offices and agencies. Any person holding the nationality of a Member State is a citizen of the Union. Citizenship of the Union is additional to national citizenship and does not replace it.[23] It should be pointed out that this institution has given rise to a new kind

21 Treaty establishing the European Economic Community (1957).

22 KOWALIK-BAŃCZYK, K. Komentarz do art. 20 Traktatu o funkcjonowaniu Unii Europejskiej. In: WRÓBEL, A. (ed.). *Traktat ustanawiający Wspólnotę Europejską. Komentarz*. Warsaw: Wolters Kluwer, 2008.

23 Art. 9 of the TEU.

of citizenship which is neither state nor cosmopolitan citizenship, but which is multiple in nature in allowing the expression of different identities held and the exercise of rights and duties through an increasing complex configuration of common institutions, states, national and transnational interest groups and voluntary associations, local and provincial authorities, regions and associations of regions.[24] Article 10 of the TEU indicates that representative democracy is the basis for the functioning of the Union. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments; heads of state or government and governments are democratically accountable to national parliaments or to their citizens. Every citizen has the right to participate in the democratic life of the Union. Decisions are made as openly and as closely as possible to the citizen. It should be remembered that the model of EU institutions is uniquely oriented towards the supranational shape and functions of the EU, and that genuine institutional reform (especially of the European Parliament) was very dynamic in each phase of the Treaty revision. The symbiotic nature of this system is also particularly important here. Political legitimacy and democratic character are essential for the EU and this should be accepted. Nevertheless, the still existing elements of the EU's dependence on States can, are considered and probably could be more consciously considered as elements also drawing on their political legitimacy and democratic character. At present, Article 10 of the TEU puts the precise emphasis on those mixed ways in which citizens are politically represented, both directly and indirectly, in decision-making processes at Union level.[25]

Moreover, Article 11 of the TEU provides that the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. The European Commission consults extensively with stakeholders to ensure

24 MEEHAN, E. Citizenship and the European Community. *The Political Quarterly*. 1993, Vol. 64, no. 2, pp. 172–186.

25 SHUIBHNE, N. N. The resilience of EU market citizenship. *Common Market Law Review*. 2010, Vol. 47, no. 6, pp. 1597–1628.

consistency and transparency of Union action. Not less than one million citizens of the Union, who are nationals of a significant number of Member States, may take the initiative of inviting the European Commission, within the framework of its powers, to submit an appropriate proposal on matters where, in the opinion of citizens, the application of the Treaties requires legal act of the Union. Article 11 of the TEU postulates a transition from the instrumental use of participation typical of the system of participatory governments to participation perceived as the basis of participatory democracy.[26] Pursuant to Article 13 of the TEU – the Union has an institutional framework designed to promote its values, pursue its objectives, serve its interests, the interests of its citizens and the interests of the Member States, and ensure the coherence, effectiveness and continuity of its policies and activities. The institutions of the Union are the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as "the Commission"), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. Each institution acts within the limits of the powers conferred on it by the Treaties, in accordance with the procedures, conditions and objectives set out therein. Institutions loyally cooperate with each other. From a legal point of view, the principle of institutional balance is one of the manifestations of the principle that institutions must act within the limits of their powers. The principle of institutional balance does not mean that the authors of the treaties have created a balanced distribution of powers, according to which the importance of each institution is the same. This principle simply refers to the fact that the institutional structure of the Community is based on the separation of powers between the various institutions established by the Treaties.[27]

2.2 Rights Related to Citizenship of the European Union

The practical dimension of European citizenship was the subject of many activities on the part of the authors of the Maastricht Treaty, who wanted

26 MENDES, J. Participation and the role of law after Lisbon: A legal view on Article 11 TEU. *Common Market Law Review.* 2011, Vol. 48, no. 6, pp. 1849–1877.

27 JACQUÉ, J. The principle of institutional balance. *Common Market Law Review.* 2004, Vol. 41, no. 2, pp. 383–391.

to prove that the newly emerging political construction would follow the Community methodology, effectively proving for several decades that the ideology of European freedoms is backed by specific rights, visible benefits and ambitious solutions repeatedly confirmed by the Court of Justice.[28] European citizenship is a bundle of rights. It consists of the following rights: the freedom of movement of persons, resulting from Article 21(1) of the TFEU, electoral rights in elections to the European Parliament, which are based on Article 20(2) of the aforementioned treaty, the possibility of requesting a European legislative initiative, the right of petition to the European Parliament, the right of complaint to the European Ombudsman, access to documents, diplomatic and consular protection and participation in local elections.[29] According to Article 21 of the TFEU, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and the measures adopted to implement them. This provision contains the rights that constitute the essence of "free movement of persons" in the European Union, guaranteeing all EU citizens the freedom to move and reside in EU Member States.[30] Particularly interesting is the right to participate in local elections of EU citizens. This right was reflected outside the aforementioned TFEU in the Charter of Fundamental Rights of the EU[31], whose Article 40 entitled "Right to vote and to stand as a candidate in local elections" provides that: *"Every citizen of the Union has the right to vote and to stand as a candidate in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State"*.[32] Granting this right as part of EU citizenship

28 JASIŃSKI, F. Prawo dostępu obywateli Unii Europejskiej do pomocy konsularnej. In: BODNAR, A., BARANOWSKA, G., GLISZCZYŃSKA-GRABIAS, A. (eds.). *Ochrona praw obywatelek i obywateli Unii Europejskiej. 20 lat – osiągnięcia i wyzwania na przyszłość*. Warsaw: Wolters Kluwer, 2015, pp. 155–169.

29 BODNAR, A., PLOSZKA, A. Rozszerzenie czynnego i biernego prawa wyborczego w wyborach samorządowych na osoby niebędące obywatelami Unii Europejskiej. *Samorząd Terytorialny*. 2013, no. 9, pp. 66–74.

30 KOWALIK-BAŃCZYK, K. Komentarz do art. 21 Traktatu o funkcjonowaniu Unii Europejskiej. In: WRÓBEL, A. (ed.). *Traktat ustanawiający Wspólnotę Europejską. Komentarz*. Warsaw: Wolters Kluwer, 2008.

31 Charter of Fundamental Rights of the EU (2019).

32 BODNAR, A., PLOSZKA, A. Rozszerzenie czynnego i biernego prawa wyborczego w wyborach samorządowych na osoby niebędące obywatelami Unii Europejskiej. *Samorząd Terytorialny*. 2013, no. 9, pp. 66–74.

is an expression of the tendency in the constitutionalism of many countries to extend electoral rights to the so-called permanent residents, i.e., to abandon the absolute condition of citizenship as a condition for participation in elections in favour of the condition of permanent residence.[33] On the basis of these treaty provisions, Council Directive 94/80/EC of 19 December 1994 was issued, laying down detailed conditions for the exercise of the right to vote and stand as a candidate in local elections by EU citizens residing in a Member State of which they are not nationals. The implementation of this directive into the national legal order resulted in a significant reconstruction of the concept of self-governing community.[34]

Article 20 of the TFEU also stipulates that anyone staying in the territory of a third country where his country is not represented may benefit from the diplomatic and consular protection of another Member State. This protection has not been framed in terms of a civil right, but as an advantage, the receipt of which depends entirely on the will of the state providing legal protection. In order to ensure this protection, the Member States started international negotiations. They ended with the adoption of appropriate rules within the framework of European Political Cooperation, in force since 1 July 1993. Upon the accession of the new Member States to the Union, their citizens became equal to the citizens of the "old" Member States in terms of the rights to obtain diplomatic and consular protection.[35] According to Article 23 of the TFEU, every citizen of the Union shall enjoy, in the territory of a third country where the Member State of which he is a national is not represented, diplomatic and consular protection of any other Member State under the same conditions as nationals of that State. Member States shall adopt the necessary provisions and enter into the international negotiations required to ensure this protection. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament,

33 BODNAR, A. *Obywatelstwo wielopoziomowe. Status jednostki w europejskiej przestrzeni konstytucyjnej*. Warsaw: Wydawnictwo Sejmowe, 2008, p. 234.

34 BODNAR, A., PLOSZKA, A. Rozszerzenie czynnego i biernego prawa wyborczego w wyborach samorządowych na osoby niebędące obywatelami Unii Europejskiej. *Samorząd Terytorialny*. 2013, no. 9, pp. 66–74.

35 BRODECKI, Z. Komentarz do Traktatu ustanawiającego Wspólnotę Europejską. In: BRODECKI, Z., DROBYSZ, M., MAJKOWSKA-SZULC, S. *Traktat o Unii Europejskiej, Traktat ustanawiający Wspólnotę Europejską z komentarzem*. Warsaw: LexisNexis, 2006.

may adopt directives laying down the coordination and cooperation measures necessary to facilitate this protection.[36]

Article 23 of the TFEU, both in terms of its scope and manner of application, raises numerous doubts. First of all, it is not clear what kind of protection is covered by this provision. It should be noted that in Article 23 does not refer to diplomatic or consular "protection", but to "protection", which would indicate that it is only a part of what is traditionally understood by the term "protection".[37] Consular protection consists in the protection of citizens abroad by the consular posts of their country and is usually of a preventive nature. It covers administrative activities such as the issuance of passports, assistance with family and inheritance matters, assistance with judicial matters, legal assistance, etc. These tasks can certainly be carried out by a representation of another Member State. Diplomatic protection, on the other hand, refers to situations in which a state supports its own citizens in a situation where the host state violates international law.[38] Moreover, Article 24 of the TFEU provides that the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt rules on the procedures and conditions required for the presentation of a citizens' initiative within the meaning of Article 11 of the TEU, including the minimum number of the Member States from which the citizens who take such an initiative must come. Every citizen of the Union has the right to petition the European Parliament, in accordance with the provisions of Article 227 of the TFEU. Every citizen of the Union may apply to the Ombudsman established in accordance with the provisions of Article 228 of the TFEU. Every citizen of the Union may write to any institution, body, office or agency referred to in in this Article or in Article 13 of the TEU in one of the languages indicated in Article 55(1) of the TEU and receive a reply

36 KOWALIK-BAŃCZYK, K. Komentarz do art. 23 Traktatu o funkcjonowaniu Unii Europejskiej. In: MIĄSIK, D., PÓŁTORAK, N., WRÓBEL, A. (eds.). *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*. Warsaw: Wolters Kluwer Polska, 2012.

37 MUSZYŃSKI, M. Opieka dyplomatyczna i konsularna w prawie wspólnotowym. *Kwartalnik Prawa Publicznego.* 2002, Vol. 2, no. 3, p. 151.

38 KOWALIK-BAŃCZYK, K. Komentarz do art. 23 Traktatu o funkcjonowaniu Unii Europejskiej. In: MIĄSIK, D., PÓŁTORAK, N., WRÓBEL, A. (eds.). *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*. Warsaw: Wolters Kluwer Polska, 2012.

in the same language. The Commission is the registrar of applications containing a citizens' initiative, which is necessary to start collecting signatures in support of the initiative. So far, only 6 out of 76 registered applications have collected the required number of signatures. However, they did not have a significant impact on the Commission's legislation. For only two of them, the Commission has expressed its readiness to adopt legislative proposals. Despite the changes that entered into force in 2020, the situation has not improved significantly, although the new regulation was intended to facilitate the participation of as many citizens as possible in the democratic decision-making process.[39] More importantly, the content of EU citizenship rights established in Maastricht is very narrow and not comparable to the normal rights attached to national citizenship; according to Marco Martiniello, this is at best a "functional semi-citizenship".[40] The rights of EU citizenship either repeat the already guaranteed "Union" rights of nationals of the Member States (such as freedom of movement and residence throughout the Union), or have very little "added value" (e.g., voting in local and European Parliament elections, consular protection in third countries by consular offices of any EU Member State, the right to petition the European Parliament and the EU Ombudsman). According to many scientists dealing with EU issues, the citizenship established in Maastricht was a purely bureaucratic act, imposed from above, with no real meaning for EU citizens.[41]

39 SADURSKI, W. Obywatelstwo europejskie. *Studia Europejskie / Centrum Europejskie Uniwersytetu Warszawskiego*. 2005, no. 4, pp. 31–45.

40 MARTINIELLO, M. Citizenship in the European Union. In: ALEINIKOFF, T. A., KLUSMEYER, D. (eds.). *From Migrants to Citizens: Membership in a Changing World*. Washington: Carnegie Endowment for International Peace, 2000, pp. 342–380.

41 SADURSKI, W. Obywatelstwo europejskie. *Studia Europejskie / Centrum Europejskie Uniwersytetu Warszawskiego*. 2005, no. 4, pp. 31–45.

3 Concepts of European Union Citizenship Development

3.1 Development of EU Citizenship

The first concepts of creating European citizenship appeared in the 1970s. During the Paris Summit and in the so-called the 1976 Tindemans report. The importance of creating a specific "European" citizenship was emphasized at the time. Also, the introduction of universal direct elections to the European Parliament by the Council decision of 1976 is seen as the first stage leading to the establishment of EU citizenship. The draft treaty establishing the European Union, drafted under the direction of Altiero Spinelli in the European Parliament in 1984, used the term "citizenship of the Union" for the first time. The Fontainebleau European Council in June 1984 set up an *ad hoc* Committee, chaired by M. Adonnino, which in 1985 presented a report proposing a series of measures that directly inspired the treaty provisions adopted. Some of the suggestions contained in this report have been reflected in the existing Articles 17-22 of the TEC, i.e., the current Articles 20–25 of the TFEU.[42] Formal work on including the concept of citizenship of the European Union in the TEC was undertaken on the initiative of Spain, presented during the intergovernmental conference in Rome. The proposed changes were aimed at introducing a much broader catalogue of rights for EU citizens than the one finally included in the Maastricht Treaty. The relatively narrow catalogue of rights was a consequence of the inability of the then Member States to reach a compromise.[43]

Citizenship of the European Union is one of the most important achievements of the European integration process. At the same time, it is a concept that raises many controversies and questions about whether the EU can be considered a state, and thus whether it has the ability to govern independently. Merely recognizing nationals of Member States

42 DOUGLAS-SCOTT, S. In Search of Union Citizenship. *Yearbook of European Law*. 1998, Vol. 18, no. 1, p. 31.

43 KOWALIK-BAŃCZYK, K. Komentarz do art. 20 Traktatu o funkcjonowaniu Unii Europejskiej. In: WRÓBEL, A. (ed.). *Traktat ustanawiający Wspólnotę Europejską. Komentarz*. Warsaw: Wolters Kluwer, 2008.

as EU citizens is not enough to define the European Union as a state or superstate. As indicated in the doctrine, the European Union is a specific institution standing apart between an international organization and a state, as it draws inspiration from state systems in the way it functions and legislates. In view of the above, Union citizenship acquires distinct characteristics and should be defined as supranational citizenship. Although many researchers believe that its establishment cannot be treated as the moment that initiated the formation of the nation at the EU level, there are many indications that in the case of subsequent European integration and the development of Union citizenship, this view may be wrong. The current development of the idea of European citizenship can also be another example of a kind of opening up of citizenship to the outside world. Its institutionalization in the Maastricht Treaty of 1992 proves in favour of the thesis that citizenship in Europe is facing new, as yet unknown stages of development. European citizenship already confirms the right of citizens of the EU countries to freely move and live in other EU countries, and what is extremely important, it gives them active and passive electoral rights to local governments and the European Parliament in their place of residence.[44]

3.2 Real Concepts of Extending Citizenship

One of the ideas that is subject to public debate among European countries is the idea of extending EU citizenship by making it possible for people from countries that are not EU members to obtain it. However, a necessary condition would be that the citizens "candidate" for the status of a citizen have strong cultural, historical or political ties with the countries of the European Union. For example, if a person from a non-EU country met the indicated criteria, such as a specified period of residence or family relationships with other Union citizens that meet the criteria, he or she would be entitled to apply for European Union citizenship. In fact, after obtaining the status of a Citizen, a person would gain the same rights and freedoms guaranteed by the Treaties as other citizens of the Member States. For example, as indicated above, Article 20 of the TFEU guarantees the right

44 TRZCIŃSKI, K. Obywatelstwo w Europie. Idea i jej wyraz formalny w perspektywie historycznej. *Studia Europejskie*. 2002, no. 2, pp. 45–67.

to move and reside; active and passive electoral right in local elections and elections to the European Parliament; the right to equivalent diplomatic and consular protection in a third country where the country of origin is not represented; the right to petition the EP; the right to complain to the European Ombudsman and the right to ask questions and get answers in the same official language to the EU institutions, bodies, offices and agencies. In accordance with Article 9 of the TEU, in all its activities, the Union respects the principle of equality of its citizens, who are treated with equal attention by its institutions, bodies, offices and agencies. So, that's how they would be treated.

However, the implementation of this postulate would be difficult to implement due to several problems. The first problem is the choice of criteria that would apply in this case. An obstacle would also be the issue of institutional solutions to the procedure for granting such citizenship. In this case, the question should be asked which institution would be competent to determine whether a given candidate meets the criteria for recognizing him as a citizen of the European Union. In this context, difficulties would also be faced by Ukrainian citizens, even in the case of a tendency towards Europeanization in Ukraine and its status as a candidate country. The reason for this is that Ukraine does not have such strong cultural, historical or even political ties with EU countries. In my opinion, the most rational indicator would be the criterion for granting Union citizenship to persons with European roots whose cultural and historical connections are close to the Union. People whose ancestors – one of the parents – come from EU Member States, but who themselves are not nationals of any of these countries, should have the right to acquire EU citizenship. Another difficulty would be to change the treaty solutions, because Article 9 of the TEU states directly – every person having the citizenship of a Member State is a citizen of the Union. Change procedures are set out in Article 48 of the TEU. However, in each case, EU Member States must adopt changes to the provisions of a given treaty unanimously. In addition, one of the rights of EU citizens is the right to ask questions and get answers in the same official language to EU institutions, bodies, offices and agencies. The proper implementation of this right would also involve organizational

changes to EU institutions, due to the fact that EU citizens would become people who speak languages other than those of other Member States, for example Ukrainian or Turkish.

Another idea is to extend the citizenship of the European Union to people born in the Member States, but who do not themselves have such citizenship. This principle would mean the implementation of the jus soli (right of birth) principle in its full sense. This rule means that the territory of birth guarantees the citizenship of the country (in this case, the European Union) in which the child was born. This criterion would also apply in EU countries where the principle of conferring citizenship on the basis of the law of the place of birth is not fully operational. In Poland *jus soli* applies only when the child is born or found in the territory of the Republic of Poland and both parents are unknown or their citizenship is undetermined, or they have no citizenship at all (Articles 14 and 15 of the Act of 2 April 2009 on Polish Citizenship). A minor acquires Polish citizenship by birth if: at least one of the parents is a Polish citizen; was born in the territory of the Republic of Poland, and his parents are unknown, do not have any citizenship or their citizenship is undefined. Such a child acquires Polish citizenship by law. Similarly, in Italy, the acquisition of citizenship based on the fact of being born in this country is possible only for a child who is free or found. Article 1 of the Law of 5 February 1992, no. 91, New Rules on Italian Nationality, states that a citizen is born: a child of a citizen's father or mother; who was born in the territory of the Republic, if both parents are unknown or stateless, or if the child does not have the nationality of the parents according to the law of the state to which they belong. A child of unknown parents found on the territory of the Republic of Poland is considered a citizen by birth, unless it is proved that he has another citizenship. The regulations of these two States are very similar, if not identical. In Poland, as in Italy, citizenship can be obtained only in indicated cases, which constitute a closed catalogue. Newborn children receive Italian or Polish citizenship and thus become EU citizens. In the case of the mere fact of being born in the territory of the Member States – Italy and Poland – the citizenship of this country (and thus the EU citizenship) is not granted by mere fact of being born in the territory. Thus, if, for example, two Peruvian citizens

in Italy are expecting a child, they will not have Italian citizenship after birth. According to the concept of extending EU citizenship, the parents of this child would only be able to apply for the status of a citizen of the European Union.

3.3 The Concept of Development as a Strengthening of European Values

The above concepts are among the most likely solutions that the European Union may introduce. However, the concept of developing European Union citizenship should also include increasing the awareness and involvement of EU citizens in matters related to European integration, and also related to the promotion of democracy and civic participation at the EU level. An important element of the concept of the development of EU citizenship is the promotion of European values, which have been enshrined in Article 2 of the TEU. It states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Under this concept, projects and programs related to the theme of EU values should continue to be carried out. This category includes the "Erasmus+" program – a program that allows young scientists to study and train professionally as part of youth exchanges in various European countries, as well as the European Solidarity Corps – a program of the European Commission that allows young people to get involved in local initiatives and participating in volunteering projects that benefit communities across Europe.[45]

The objectives of the European Union have been enshrined in Article 3 of the TEU, which defines the objectives and areas of the Union's activity. The first paragraph states that the Union's objective is to promote peace, its values and the well-being of its peoples. The Union then provides its citizens with an area of freedom, security and justice without internal

45 Europejski Korpus Solidarności. *FRSE* [online]. 2023 [cit. 13. 5. 2023]. Available at: https://eks.org.pl/

borders, in which the free movement of persons is guaranteed, coupled with appropriate measures regarding external border control, asylum, immigration as well as preventing and combating crime. The Union establishes an internal market. It works for the sustainable development of Europe, based on sustainable economic growth and price stability, a highly competitive social market economy aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It supports scientific and technical progress. It combats social exclusion and discrimination and supports social justice and protection, equality between women and men, solidarity between generations and the protection of children's rights. It respects its rich cultural and linguistic diversity and ensures the protection and development of Europe's cultural heritage. Therefore, the concept of further development of EU citizenship should also include actions to strengthen the objectives of this particular organisation.

These currently include programs for the integration of migrants – the European Integration Fund. It was established by Council Decision 2007/435/EC of 25 June 2007. The purpose of the Fund is to support actions taken by Member States to enable third-country nationals from different economic, social, cultural, religious, linguistic and ethnic backgrounds to meet the conditions for obtaining the right of residence and to facilitate their integration into European societies. The fund focuses primarily on activities related to the integration of newly arrived third-country nationals.[46] The second program is *Welcome Centers*, which is implemented, among others, by the Adam Mickiewicz University in Poznań. As part of the program, the university performs tasks in the field of providing foreign guests (including students and doctoral students) with information about the university (concerning the rules and organization, course of study or social matters), about the city, region, as well as legal and formal issues (including security and medical care) related to the legalization of stay, moving around the city, region and country. In addition, informing about accommodation in student dormitories, guiding foreign students through

46 Europejski Fundusz na rzecz Integracji Obywateli Państw Trzecich. *Centrum Projektów Europejskich Ministerstwa Spraw Wewnętrznych i Administracji* [online]. 2023 [cit. 13. 5. 2023]. Available at: https://copemswia.gov.pl/fundusze-2007-2013/efi/

the process of selecting a tutor/mentor, providing assistance in solving problems related to visas, health insurance or legalization of stay.[47]

In terms of support for national minorities, there is the European Charter for Regional and Minority Languages. It is an initiative of the Council of Europe (however, EU Member States, such as Poland or Germany, have ratified and implemented its provisions), which promotes the protection and promotion of regional and minority languages in Europe through legislative and educational activities. The preamble to the aforementioned act reads that the member States of the Council of Europe, signatories to this Charter, Considering that the aim of the Council of Europe is to achieve greater unity among its members, in particular with a view to guaranteeing and realizing the ideals and principles which are their common heritage, Considering that the protection of Europe's historic regional or minority languages, some of which are in danger of extinction, contribute to the maintenance and development of Europe's cultural richness and traditions[48], decide to introduce specific regulations to protect regional or minority languages. In the fight against hatred and racism, the European Union creates educational programs on human rights and educational initiatives that aim to increase awareness and understanding of human rights, including the fight against racism, xenophobia and intolerance. In addition, monitoring and actions against hate speech are carried out, including programs that track and monitor cases of hate speech, racist propaganda and extremist activities, and take actions to prevent and combat these phenomena. Campaigns and projects promoting equality and diversity include the More Equal Europe Together Campaign. The aim of the project is to prevent Islamophobia against women and girls; supporting dialogue and community building between different communities in Europe; encourage critical thinking among young people to promote new ideas, initiatives and independent messages about Muslim women and girls; activating young people as "Defenders of the equality paradigm" against racism and discrimination. Campaign activities include the creation of Local Observatories of Islamophobia; activities to support intercultural and interreligious dialogue and social inclusion; implementation

47 Centrum powitalne. *Uniwersytet Adama Mickiewicza w Poznaniu* [online]. 2023 [cit. 22. 5. 2023]. Available at: https://amu.edu.pl/en/main-page/welcome-center

48 European Charter for Regional or Minority Languages (1992).

of the Educational Debate, counteracting discrimination and Islamophobia; initiating a campaign aimed at combating stereotypes against Muslim women and girls and their presence in social life.[49] The campaign is carried out in by the Polish Migration Forum.

4 Conclusion

Initially, the introduction of EU citizenship was considered by most of the doctrine as a purely symbolic, even "decorative" measure, not making any significant changes to the group of rights already granted by the Community law to citizens of individual Member States (except for granting the right to participate in local elections and elections to the European Parliament and diplomatic and consular protection).[50] Therefore, a minimalist concept of this citizenship was adopted, focusing on a few of its selected features. In recent years, the Court of Justice has strongly challenged this perception of EU citizenship and, through its jurisprudence, has given real meaning to the rights arising from, in particular, Articles 20 and 21 of the TFEU.[51] In Poland, the concept of extending EU citizenship may play an important role in increasing citizens' interest in matters related to European integration and strengthening citizens' participation in decision-making processes, however, it may also raise many controversies, e.g., due to the expected increase in migration pressure and the increase in the number of citizens of other EU countries who will be able to benefit from Polish social welfare systems. This may raise serious concerns, especially given the growing number of anti-EU attitudes and speeches fuelled by the ruling party in Poland. In conclusion, it should also be pointed out that it is not so much the issue of extending EU citizenship that is of key importance for the creation of a state as the European Union, but rather the timing and development of EU civil society. In addition, a change in how EU citizenship is acquired

49 Poznaj: Bardziej równa Europa razem. *Polskie Forum Migracyjne* [online]. [cit. 22. 5. 2023]. Available at: https://forummigracyjne.org/projekt/meet-more-equal-europe-together

50 KOSTAKOPOULOU D. Ideas, Norms and European Citizenship: Explaining Institutional Change. *The Modern Law Review.* 2005, Vol. 68, no. 2, p. 234.

51 KOWALIK-BAŃCZYK, K. Komentarz do art. 20 Traktatu o funkcjonowaniu Unii Europejskiej. In: WRÓBEL, A. (ed.). *Traktat ustanawiający Wspólnotę Europejską. Komentarz*. Warsaw: Wolters Kluwer, 2008.

also requires changes to the Treaties contracting to EU countries, which in turn requires the consent and unity of Member States. This seems impossible at the present time due to the strong divergence of interest groups in the European Union arena. The introduction of the concept of citizenship into the supranational discourse was mainly due to three reasons: the need to legitimize the institutions of the European Union by introducing the category of EU citizenship; the need to respond to the persistent presence of a large number of third-country nationals in European countries who are loyal and valuable members of their communities; transformations in the structure of sovereignty of modern states and the related emergence of new structures of identity and civic loyalty, based to a greater extent on mutual respect for rights than on organic ethnic or cultural ties.[52]

Although citizenship is measured by the level of citizens' involvement in community affairs, and this is conditioned by individual activity, the community can support and stimulate it, providing appropriate conditions for the development of this type of social activity. If these conditions are met, citizenship may mean a combination of conscious activity with loyalty, contribute to a valuable bond between the state and the citizen, as well as between citizens, a sense of identification with the community, recognition of it as a common good worth engaging in.[53] Citizenship of the Union can even be considered as supplanting national citizenship in the Community area in the long term. There is a distant analogy here to the medieval urban citizenship, which consisted in confrontation with state citizenship, transposing a number of its solutions and values to it.[54] Thus, instead of treating EU citizenship in competition with national citizenships and denying the former the legitimacy of using the term "citizenship", it should be regarded as a special type of membership in a multi-level, non-state

52 SADURSKI, W. Obywatelstwo europejskie. *Studia Europejskie / Centrum Europejskie Uniwersytetu Warszawskiego.* 2005, no. 4, pp. 31–45.

53 POBOŻY, M. Obywatelstwo i obywatelskość w Unii Europejskiej. *Przegląd Europejski.* 2014, Vol. 31, no. 1, pp. 44–67.

54 TRZCIŃSKI, K. Obywatelstwo w Europie. Idea i jej wyraz formalny w perspektywie historycznej. *Studia Europejskie.* 2002, no. 2, pp. 45–67.

system – post-national political membership.[55] In this way, the coexistence of state citizenship and citizenship of the European Union, a particular international organization, can be accepted.[56] The European Union is a specific institution standing between an international organization and a state, as it draws inspiration from state systems in the way it functions and legislates. In view of the above, Union citizenship acquires distinct characteristics and should be defined as supranational citizenship. However, due to the lack of statehood of the European Union, it cannot create a real, properly legitimized bond that connects an individual with the state.[57] The introduction of European Union citizenship has indeed deepened the element of European integration. The Union attaches great importance to the principles of democracy and the role of citizens in every aspect of its operation. The European Commission's 2013 European Union Citizenship Report begins with the words "citizens are and must be at the heart of European integration". These words are intended to convince that citizens play a particularly important role in the functioning of the European Union, they are the central element of the integration project and its essential point of reference.[58] However, further extending the status of citizenship to persons born in the territory of the Union or having strong cultural, social or historical ties seems to be impossible and unrealistic in the current legal and political situation. In my opinion, the European Union should develop the concept of developing European Union citizenship by increasing the awareness and involvement of EU citizens in matters related to European integration, and also related to the promotion of democracy and civic participation at the EU level, moreover, in its activities it should focus primarily on activities – strengthening the values and goals of this particular international organization, as well as strengthening the rights and freedoms of Union citizens.

55 SHAW, J. The Interpretation of European Union Citizenship. *The Modern Law Review*. 1998, Vol. 61, no. 3, pp. 293–317.

56 POBOŻY, M. Obywatelstwo i obywatelskość w Unii Europejskiej. *Przegląd Europejski*. 2014, Vol. 31, no. 1, pp. 44–67.

57 Ibid.

58 Ibid.

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About a Federal European Union Citizenship

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Abstract

I wish to shine a light on the past, present and future issues of EU citizenship, with a focus on how it may look like in the context of a federal EU. Additionally, I wish to present current issues of EU citizenship, and how it might be improved in the existing context of the European Union's structure. These are some of the questions I wish to highlight in my research paper, focusing on how the original goals of this legal instrument's role changed since its introduction and what the organic development of it in a federal European Union might look like. It is of utmost importance to look at the current impact of EU citizenship on national law, in particular how it affected national administrative law. As a conclusion to my paper, I will present why the introduction of this kind of federal citizenship, and a federation's existence in particular would pose many challenges and would generally do more harm than good in the long term.

Keywords

Citizenship; Essential State Functions; Federalism; National Interest.

1 Introduction

The European Union started off as an economic integration, with the hope that it might provide a better life for the citizens of the Member States.[1] However, over time it became a cooperation with different goals, reaching its current form of a unique entity. The tides of integration seem to be pulling into different directions, striving towards greater autonomy

1 HORVÁTH, K. G. Recenzió: Halmai Péter: Európai gazdasági integráció. *Pro Publico Bono.* 2022, Vol. 10, no. 2, pp. 170–178.

and less cooperation[2] – with Great-Britain even leaving the EU[3] – or going into the direction of one day possibly becoming a federal EU.[4]

In this climate of uncertainty, with the war in Ukraine devastating the continent as well as the after-effects of the COVID-19 pandemic on all nations, it is especially important to have an open dialogue regarding what the future of the European Union might look like.[5] It is of utmost vitality to discuss these issues because of the approaching Convent as well, which will discuss 49 proposals and 326 measures,[6] as well as new policy objectives and, in some cases, proposals for amendments to the EU's primary legal sources, the Treaties.[7]

One of the most important tasks that we have with the world rapidly changing around us because of the crises mentioned as well as technological developments,[8] is to decide in which direction we wish to take the integration: are we going to become a stronger EU through stronger Member States or perhaps through a confederation, even a federal state?

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2 Some argue that Article 4(2) TEU provides the possibility for national constitutional courts in occasional situations to set aside EU law on constitutional identity grounds – see CAPETA, T. The Weiss/PSPP Case and the Future of Constitutional Pluralism in the EU. In: KOVAC, D. (ed.). *Exploring the social dimension of Europe. Essays in honour of Nada Bodiroga-Vukobrat* [online]. 2021, pp. 5–8 [cit. 12. 2. 2023]. Available at: http://dx.doi.org/10.2139/ssrn.3719419. This has previously happened in the *PSPP* decision, and after that more and more decisions of national constitutional courts echoed this sentiment – see TÜRSTEHER, K. Das Bundesverfassungsgericht verhandelt das Eigenmittelbeschluss-Ratifizierungsgesetz. *Verfassungsblog* [online]. 2022 [cit. 12. 4. 2023]. Available at: https://verfassungsblog.de/karlsruher-tursteher/

3 KISS, L. N. *Az Európai Unióból való kilépés jogi kérdései*. Miskolci Egyetem: Állam- és Jogtudományi Kar. Deák Ferenc Állam és Jogtudományi Doktori Iskola, 2020, pp. 17–54.

4 Federal Alliance of European Federalists. *Federal Alliance of European Federalists* [online]. [cit. 1. 2. 2023]. Available at: https://www.faef.eu/wp-content/uploads/The-making-of-the-Constitution-for-the-Federated-States-of-Europe-16-May-2022.pdf

5 Conference on the Future of Europe, Report on the final outcome, May 2002. Available at: https://prod-cofe-platform.s3.eu-central-1.amazonaws.com/ [cit. 3. 4. 2023].

6 Parliament activates process to change EU Treaties. *European Parliament* [online]. [cit. 12. 2. 2023]. Available at: https://www.europarl.europa.eu/news/en/press-room/20220603IPR32122/parliament-activates-process-to-change-eu-treaties

7 Commission sets out first analysis of the proposals stemming from the Conference on the Future of Europe. *European Commision* [online]. [cit. 12. 3. 2023]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3750

8 COTRA, A. Why AI alignment could be hard with modern deep learning. *Cold Takes* [online]. [cit. 12. 4. 2023]. Available at: https://www.cold-takes.com/why-ai-alignment-could-be-hard-with-modern-deep-learning/

My humble opinion is that due to the cultural, historical and political differences between the countries that make up the EU becoming one nation is not a viable option that could lead to long-term positive effects. Rather, I am of the belief that stronger nations might work together better, keeping their constitutional identity and essential state functions[9] at the forefront. But it is necessary to mention that countries are not just having these goals and opinions for themselves. In fact, it is the citizens from whom a government derives their power.[10] This brings us to the question of citizenship in the EU. During my research, I have decided to focus my efforts on figuring out what the past, present and future issues of EU citizenship are, with a focus on how it may look like in the context of a federal EU. As a result of my inquiries, I have found that the introduction of a federal citizenship, and a federation's existence in particular would pose many challenges and would generally do more harm than good in the long term.

2 History of the EU Citizenship

During the course of the integration so far, the question of citizenship was first addressed in a codified manner the Treaty on European Union (the 1992 Maastricht Treaty), which introduced the concept of European Union citizenship.[11] From this point onward all citizens of the 28 EU Member States (of which there are currently 27, after Great Britain left the EU) are also EU citizens through the very fact that their countries are members of the EU. Acquired EU citizenship gives them the right to free movement,

9 Article 4(2) of the TEU encloses provisions surrounding these concepts, when it states that: *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".*

10 CASSINELLI, C. W. The 'Consent' of the Governed. *Political Research Quarterly.* 1959, Vol. 12, no. 2, pp. 391–409.

11 Art. 8 of the Maastricht Treaty.
"1. Citizenship of the Union is hereby established.
Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."

settlement and employment across the EU,[12] the right to vote in European elections,[13] and also the right to consular protection from other EU states' embassies when abroad.[14] The rights of citizens were therefore codified to a high degree,[15] but the key to attaining EU citizenship lies in the hands of the Member States even today.

The Charter of Fundamental Rights of the EU enshrines a range of political, economic and social rights for EU citizens.[16] In particular, rights

12 Art. 8a of the Maastricht Treaty.
"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

13 Art. 8b of the Maastricht Treaty.
"1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1994 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.
2. Without prejudice to Article 138(3) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1993 by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."

14 Art. 8c of the Maastricht Treaty.
"Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Before 31 December 1993, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection."

15 Art. 8d of the Maastricht Treaty.
"Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 138d.
Every citizen of the Union may apply to the Ombudsman established in accordance with Article 138e."
Art. 8e of the Maastricht Treaty.
"The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee before 31 December 1993 and then every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.
On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this Part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements."

16 Art. 15 of the Charter of Fundamental Rights of the EU.
"2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

of citizens include the right to vote and to stand as a candidate at elections to the European Parliament,[17] the right to vote and to stand as a candidate at municipal elections,[18] the right to good administration,[19] the right to access documents,[20] the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions,[21] the right

17 Art. 39 of the Charter of Fundamental Rights of the EU.
"Right to vote and to stand as a candidate at elections to the European Parliament
1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot."

18 Art. 40 of the Charter of Fundamental Rights of the EU.
"Right to vote and to stand as a candidate at municipal elections
Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State."

19 Art. 41 of the Charter of Fundamental Rights of the EU.
"Right to good administration
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

20 Art. 42 of the Charter of Fundamental Rights of the EU.
"Right of access to documents
Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

21 Art. 43 of the Charter of Fundamental Rights of the EU.
"European Ombudsman
Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role."

to petition,[22] the freedom of movement of residence[23] and diplomatic and consular protection.[24]

Currently, Article 9 of the TEU states that: "*Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*" But how did these concepts come about and what can the past, theories and development of citizenship tell us about a possible future where the EU may be able to overtake the right of Member States and possibly grant anyone citizenship based on different criteria? In this article I aim to argue against a federal Europe and the idea of taking this integral right, this essential state function away from Member States.

The idea of citizenship is an inherent part of Western civilisation.[25] In ancient Greece,[26] citizens actively participated in the civic affairs of the *polis*, as part of the direct democracy.[27] That required citizens to be well-educated, in addition to being able to effectively communicate their thoughts and desires surrounding the issues presented to them. At this time, women and several minority groups were excluded from citizenship in cities such as Athens.[28]

22 Art. 44 of the Charter of Fundamental Rights of the EU.
"Right to petition
Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament."

23 Art. 45 of the Charter of Fundamental Rights of the EU.
"Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State."

24 Art. 46 of the Charter of Fundamental Rights of the EU.
"*Diplomatic and consular protection*
Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State."

25 WEBER, M. *General Economic History* (trans. KNIGHT, F.). New York: Greenberg, 1927, p. 316.

26 It is important to note that not all of what is currently known as Greece was a homogenous entity. Rather, there were cities all over the area of ancient Greece, all with various legal systems.

27 MARANGUDAKI, M. Visions of Brotherhood. A Comparative Analysis of Direct Democracy in Ancient and Modern Greece. *Política y Sociedad* [online]. 2016, Vol. 53, no. 3, pp. 773–793 [cit. 12. 4. 2023]. Available at: https://revistas.ucm.es/index.php/POSO/article/view/50777

28 KATZ, M. Women and democracy in Ancient Greece. In: FALKNER, T. M., FELSON, N., KONSTAN, D. (eds.). *Contextualizing classics: Ideology, Performance, Dialogue*. Lanham, Maryland: Rowman & Littlefield Publishers Inc., 1999, pp. 41–58.

During the Middle Age, people were either subjects of a monarch or were citizens of a city or town.[29] However, the concept of citizenship reared its head again with the expansion of nationalism in the 19th century and the consolidation of modern states.[30] Women were not granted the right to vote until 1893, when New Zealand became the first country in the world to do so.[31]

Despite the current standing of the western world on the concept of citizenship, we must acknowledge that there is a wide range of questions about why there is a need for this as well as what it is based on. Since citizenship refers to the relationship between an individual and the state, social contract theory should be noted when we talk about it.

According to this school of thought, the state is formed when a social contract is agreed between individuals to cede some of their individual rights to create laws that regulate their interactions. This social contract resulted in the formation of the sovereign entity of the state.[32] The purpose of this contract is to take the individuals out of the anarchic state of nature. John Locke's conception of classical liberalism in his *Second Treatise of Government* (1689) provided for government to be the neutral arbiter that protects lives, liberty and property, so that people would not live in fear. Jean-Jacques Rousseau's *Du contrat social* (1762) laid the foundations of political rights based on popular sovereignty.

Therefore, it would seem that according to the western way of thinking and the thought of most of Europe, citizenship constitutes a binding relationship between the state at hand and the individual. It is therefore not surprising that a key 1975 European Commission report entitled "Towards European Citizenship" already looked into establishing a passport union for European Economic Community member states, as well as some

29 WOOD, E. M. *Citizens to Lords – A Social History of Western Political Thought from Antiquity to the Middle Ages*. London: Verso Publishing, 2008, 256 p.

30 BEINER, R. *Liberalism, Nationalism, Citizenship – Essays on the Problem of Political Community*. Vancouver: UBC Press, 2003, 240 p.

31 PUGH, M. The Impact of International Developments on Women's Suffrage. In: The March of the Women: A Revisionist Analysis of the Campaign for Women's Suffrage. *Oxford Academic* [online]. 2002, Vol. 3. pp. 1866–1914 [cit. 12. 3. 2023]. Available at: https://doi.org/10.1093/acprof:oso/9780199250226.003.0005

32 See Thomas Hobbes's Leviathan (1651).

preliminary ideas for political rights for citizens at the Community level.[33] According to public international law citizenship is defined as a special legal tie linking the individual with the state. It is the source of the obligation of faithfulness and loyalty towards the state and the personal supremacy of the state (jurisdiction) over its own citizens.[34]

The European Court of Justice's (ECJ) case law also affected the way in which we view EU citizenship today. In particular, the *Micheletti case* of 1992 the ECJ, it ruled that anyone holding a citizenship in an EU member state must be afforded the same rights in any other Member State, regardless of any other non-EU citizenships they also hold, and regardless of their country of residence. The ECJ ruling also established that the regulation of citizenship laws should be in line with EU interests.[35] In 2004's *Chen case*,[36] the ECJ ruling reaffirmed the plaintiff's right as an EU citizen to reside anywhere in the EU. The government of Ireland realised that its nationality laws were causing difficulties in Ireland's relations with other EU Member States.[37] In the wake of the case, the Irish government proposed changing the laws, and putting it through a referendum on the Twenty-seventh Amendment of the Constitution of Ireland in 2004. This was passed, making it legally possible for Ireland to refuse citizenship to individuals who did not have an Irish parent.[38]

The draft of the Constitution of the European Union, which failed to ever enter into force wished to establish a uniform rule of naturalisation and citizenship. In the wake of the new regulations passed and the current landscape of EU citizenship, the European Commission reports every

33 TINDEMANS, L. 1976. Report to the European Council [Tindemans Report]. *Archive of European Integration* [online]. Bulletin EC 1/76, 1976 [cit. 19. 2. 2023]. Available at: http://aei.pitt.edu/942/

34 GORALCZKY, W., SAWICKI, S. *Prawo międzynarodowe publiczne w zarysie*. Warszawa: Wolters Kluwer, 2007, p. 250.

35 Judgment of the CJEU of 7 July 1992, *Micheletti vs. Delegación del Gobierno en Cantabria*, Case C-369/90.

36 Judgment of the CJEU (Full Court) of 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen vs. Secretary of State for the Home Department*, Case C-200/02.

37 BARRY, R. The Celtic Cubs. *European Journal of Law and Migration*. 2004, Vol. 6, no. 2, p. 188.

38 Citizens Information: Irish citizenship through birth or descent. *Citizens Information* [online]. [cit. 17. 3. 2023]. Available at: https://www.citizensinformation.ie/en/moving-country/irish-citizenship/irish-citizenship-through-birth-or-descent/

3 years on progress towards effective EU citizenship[39] and new priorities for the years ahead in the area of EU citizenship rights. A public consultation on EU citizenship was held in the summer of 2020 in preparation of the Citizenship Report 2020.[40] EU citizenship now comprises a number of rights and duties in addition to those stemming from citizenship of a Member State.[41]

3 A Federal EU Citizenship?

After having taken a thorough look at what EU citizenship entails and what kind of strong bond a citizenship itself creates between a state and the citizen, we must pursue the question of whether it is a possibility for EU citizenship to replace citizenship to a Member State in the future. This raises questions of sovereignty, whether federalism is a viable option for the future of Europe and the allocation of powers in the region.

3.1 Questions of Sovereignty, Essential State Functions and More

The question of sovereignty is of utmost importance when we discuss topics such as this. There are two differing opinions about whether the concept of sovereignty is a good thing for states.

Sovereignty, for Realists, involves the territorial inviolability of the state from external interference, in a manner consistent with the depiction of sovereignty in the Treaty of Westphalia and the monopoly on the legitimate use of violence by the state.[42] This understanding of the concept is clearly related to broader

39 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Under Article 25 TFEU. On Progress Towards Effective EU Citizenship 2016–2020. *European Commission* [online]. [cit. 12. 3. 2023]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A731%3AFIN

40 EU Citizenship Report: empowering citizens and protecting their rights. *European Commission* [online]. [cit. 12. 3. 2023]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2395

41 Judgment of the CJEU (Grand Chamber) of 2 March 2010, *Janko Rottmann vs. Freistaat Bayern*, Case C-135/08.

42 MAKINDA, S. M. The United Nations and State Sovereignty: Mechanism for Managing International Security. *Australian Journal of Political Science.* 1998, Vol. 33, no. 1, pp. 101–116.

Realist claims of the centrality of the state in international relations, and the reliance on self-help as a means of preserving sovereignty.[43] Preserving sovereignty is therefore a vital part of the Realist theory, even if classical and structural Realism differ in their opinion of why, with the former emphasizing the social contract between citizens and the state.[44] *John Mearsheimer*, a Realist, explicitly related state survival with the maintenance of sovereignty to the point of conflating survival and sovereignty,[45] which *Jack Donnelly* describes as common among Realist scholars.[46]

What Critical Security theorists think about sovereignty is that, sovereignty constitutes an obstacle to the realization of security. This stands in direct opposition to Realist claims that the best means through which security may be achieved is through the sovereign power of the state. Critical Security Studies actually reject the belief that the state is and should be the key guardians of peoples' security.[47] Some scholars believe that the overwhelming majority of states create insecurity rather than foster an atmosphere within which stability can be attained, and prosperity created.[48] Many believe that the maintenance of internal and external sovereignty obfuscates the possibility for the victims of insecurity to be empowered.

The most interesting point, however, is that Critical Security shares with Realism a perception that sovereignty will win out over competing norms.[49]

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43 BUZAN B. *People, States, and Fear*. Hemel Hempstead, Hertfordshire: Harvester Wheatsheaf, 1983, 262 p. Of course, positive sovereignty is also important for Realists as the basis for allowing an escape from the Hobbesian state of nature. The important point to note here is that negative sovereignty is particularly important in terms of the prioritization of the state over individuals within it regarding debates concerning human rights and intervention.

44 WEBER, M. The Profession and Vocation of Politics. In: LASSMAN, P., SPIERS, R. (eds.). *Weber: Political Writings*. Cambridge: Cambridge University Press, 1994, pp. 180–185.

45 MEARSHEIMER, J. The False Promise of International Institutions. *International Security*. 1994, Vol. 19, no. 3, pp. 5–49.

46 DONNELLY, J. *Realism and International Relations*. Cambridge: Cambridge University Press, 2000, p. 54.

47 BOOTH, K. Security and Self: Reflections of a Fallen Realist. *Critical Security Studies, Review of International Studies*. 1991, Vol. 17, no. 26, pp. 3–38.

48 JONES, R. W. Message in a Bottle? Theory and Praxis. *Contemporary Security Policy*. 1995, Vol. 16, no. 3, p. 310.

49 KRAUSE, K., WILLIAMS, M. C. Broadening the Agenda of Security Studies: Politics and Methods. *Mershon International Studies Review*. 1996, Vol. 40, no. 2, pp. 242–243.

To sum up, a sovereign state is one which governs itself independently of any foreign power,[50] and sovereignty itself is defined as a state having inviolable territorial integrity and political independence, the right to freely choose and shape its political, social and cultural system, and the obligation to fulfill its international obligations in good faith, fully and to live in peace with other states.[51] The internal side of state sovereignty means the ability of the state to create and apply its own legal order, as well as to exercise supreme authority over the persons and things within its territory.[52] The essence of external sovereignty is that the state is an independent actor in international life, there is no other authority above it, and its decisions do not depend on the approval or agreement of others.[53]

The closeness of the relationship between security, sovereignty and identity is such that security discourses are partially constructed by actors' conceptions of sovereignty. Those who reject state centrism as a foundation for thinking about security, also, as a corollary, embrace some notion of common security, which conceptualises security as being with rather than against the other.[54]

Giving up some of a state's sovereignty is possible of course, even required if they wish to enter into an international treaty.[55] Member States gave

50 BOUVIER, J. *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union*; *with References to the Civil and Other Systems of Foreign Law*. City Philadelphia: Childs & Peterson, 1856, pp. 180–275.

51 BACK, A. (ed.). *Közigazgatási szakvizsga: Kül-* és *biztonságpolitikai* ágazat. Budapest: Magyar Közigazgatási Intézet, 2002, 150 p.

52 CHRONOWSKI, N., PETRÉTEI, J. Szuverenitás. In: JAKAB, A., KÖNCZÖL, M., MENYHÁRD, A., SULYOK, G. (eds.). *Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat, ed.: Bodnár Eszter, Jakab András)*. 2020, pp. 15–31.

53 KISS, B. A nemzetközi jog hatása a szuverenitás „klasszikus" közjogi elméletére Szabó József munkássága tükrében. *Acta Universitatis Szegediensis : acta juridica et politica*. 2014, Vol. 77, pp. 313–322.

54 JONES, R. W. Travel Without Maps: Thinking About Security After the Cold War. In: DAVIS, M. J. (ed.). *Security Issues in the Post-Cold War World*. Cheltenham: Edward Elgar, 1996, p. 208.

55 CHRONOWSKI, N., PETRÉTEI, J. Szuverenitás. In: JAKAB, A., KÖNCZÖL, M., MENYHÁRD, A., SULYOK, G. (eds.). *Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat, ed.: Bodnár Eszter, Jakab András)*. 2020, pp. 15–31.

up some of their sovereignty when they entered into the EU.[56] However, this does not mean that the entirety of a country's sovereignty can be at stake due to its participation in the EU.

3.2 A Federal EU Citizenship – Pros and Cons

There are several advocates for a European Federation, who believe that the next step towards full integration should be the introduction of an EU citizenship, which is not just complementary to citizenship acquired in a Member State but is the only existing form of citizenship across the landscape of the EU.

When it comes to the current form of EU citizenship, there is a legal tie linking the individual with a political community, but it is only subsidiary, as it is a result of holding citizenship of a Member State instead of a direct link to the EU. Therefore, there is no jurisdiction as well as the obligation of faithfulness and loyalty.[57] The European Union is a special case which requires redefinition of notions, as it is no longer a classical international organization and not yet a federal state.[58] But what is federalism, and could the EU ever be one? Or could it be a confederation?

Federalism refers to a genus of political organization encompassing a variety of species, including federations, confederacies, associated statehoods, unions, leagues, condominiums, constitutional regionalization, and constitutional "home rule". Confederations have generally been distinguished from federations as a species of federal system in which the institutions of shared rule are dependent on the constituent governments, being composed

56 For example, the Fundamental Law of Hungary, Article E)(2) states that*: "With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."*

57 ROJEWSKA, M. European Union citizenship in the federalist perspective. *Polish Journal of Political Science*. 2019, Vol. 5, no. 3, pp. 47–81.

58 GRZESZCZAK, R. Federalizacja systemu Unii Europejskiej. *Nowapolitologia.pl* [online]. [cit. 19. 2. 2023]. Available at: http://www.nowapolitologia.pl/sites/default/files/articles/federalizacja-systemu-unii-europejskiej-390.pdf

of delegates from the constituent governments and therefore having only an indirect electoral and fiscal base. By contrast with federations, in which each government operates directly on the citizens, in confederations the direct relationship lies between the shared institutions and the governments of the member states.[59] In a federation, a shared citizenship identity that would supersede rival identities based on, in the first place, national identities. In this regard, there would be a moral commitment consisting of developing a sense of solidarity and tolerance among the citizens of the new federation to encourage the emergence of a new pan-national, shared citizenship identity, a "sense of community". In the context of a federal Europe, the idea of a "double identity", leads us to the idea of "belonging" that comes with the concept of national identity. However, in a federal Europe individuals would have one basic political identity from which all the others are derivative. According to scholars who advocate for federalism in Europe, cultural and ethnic pluralism is not denied. What is denied is that ethno-cultural characteristics should play a role when developing a "sense of community" on a European level.[60]

In my opinion, this double identity would indeed be quite hard to reach not just because of a current lack of sense of belonging, but because in the European Union, 11 countries ban people from taking up another nationality while retaining their original nationality.[61] Therefore, we can state that not all nations are willing to give up this strong bond between themselves and their citizens, even to the extent of a dual citizenship. Additionally, the recent crises resulted in the decline of trust in EU institutions, which also has a negative effect on the possibility of federalism and a federal citizenship, where individuals belong not to their home countries, but to a larger institution, which for the average man might seem impossible to reach and be a part of. The joint economic policy and its strengthening

59 WATTS, R. L. Federalism, federal political systems, and federations. *Annual Review of Political Science*. 1998, Vol. 1, no. 1, pp. 117–137.

60 LEHNING, P. B. European Citizenship: Towards a European identity? *Law and Philosophy*. 2001, Vol. 2, no. 3, pp. 239–282.

61 TÓTH, J. A képzelt közösségtől a virtuális állampolgárságig. *ANKÉT* [online]. P. 243 [cit. 19. 2. 2023]. Available at: http://www.jakabffy.ro/magyarkisebbseg/pdf/48_011Toth%20Judit.pdf

are seen as the next step towards a federalism by some,[62] but to my mind they are part of the integration process in its original form – helping Europe stay relevant and strong in the current geopolitical climate, dominated by the US and China.

Looking at the issues of EU citizenship from the perspective of federalism forces one to detach oneself from understanding it as the status of belonging to a particular nation (nationality) and look at it as the status of belonging to a political community (citizenship).[63] Three methods could possibly be used to build a tie between the individual and the European Union: European identity, the scope of rights exercised by citizens, or channels of access of individuals to decision-making processes and participation in a broadly conceived community.[64] These are all employed in the current EU citizenship to some degree, and yet, have not resulted in a push of citizens to attempt to give supremacy to EU citizenship in the face of national citizenship.

I agree with the statement of *Palombella*, who argues that "Europe does not need to abandon *demoi* in order to make *in e pluribus unum*".[65] Additionally, erasing Member States' nationalities would not only harm these states themselves, but the EU as a whole, as the fundamental notion of the "peoples of the Member States", thus the source of legitimacy of the integration itself would be undermined.[66] Thus, from a state organization standpoint, the creation of a federation would backfire, in addition to not having much support from the people.

62 SILVEIRA, A., CAMISAO, I. Federative dynamics in the EU under the influence of EU citizenship rights in times of crisis. *Studia Diplomatica*. 2014, Vol. 67, no. 4, pp. 39–56.

63 KELEMEN, D., NICOLAIDIS, K. Bringing Federalism Back In. In: JØRGENSEN, K. E., POLLACK, M., ROSAMOND, B. (eds.). *Handbook of European Union Politics*. London: SAGE Publications, 2006, p. 472.

64 WIENER, A. Obywatelstwo. In: CINI, M. (ed.). *Unia Europejska – organizacja i funkcjonowanie*. Warszawa: Polskie Wydawnictwo Ekonomiczne, 2007, p. 567.

65 PALOMBELLA, G. Whose Europe? After the Constitution: A Goal-based citizenship. *International Journal of Constitutional Law*. 2005, Vol. 3, no. 2 and 3, p. 365.

66 KOCHENOV, D. Rounding up the Circle: The mutation of Member States' Nationalities under pressure from EU citizenship. *EUI Working Papers* [online]. [cit. 12. 3. 2023]. Available at: https://ec.europa.eu/migrant-integration/sites/default/files/2011-05/docl_20281_300619532.pdf

EU citizenship, focused on fundamental rights, equality and a critical rethinking of the core grounds behind the division of competences between the EU and the Member States, could provide such a much-needed narrative and a starting point.[67]

3.3 Changes to the Current Regulation?

As I have mentioned before, the current regulation had an effect on national law, in particular about how Member States deal with people trying to attain EU citizenship by becoming a citizen of a Member State. National administrative law has changed because of this, particularly in the case of Ireland, where the aforementioned decision of the ECJ resulted in stricter laws. All states wish to attain the right to decide which conditions a person has to fulfil in order to become a citizen. This is understandable, as citizenship is an extremely vital concept from the perspective of a country: giving it to people based on pre-existing conditions is its essential state functions. I argue that it constitutes one of the most basic functions that a state can have because it is directly tied to sovereignty through the people's will being the power behind a country's legitimacy. Similarly to concept such as territorial integrity or national security, as provided in Article 4(2) of the TEU, the giving of citizenship is a state function that cannot be given over to any other legal entity or a shared competence. Dual citizenship is a concept that only exists if states allow its existence, and it is not a coincidence. Rather, it is rooted in sovereignty to a degree that I would argue that giving up the chance to exercise the right of granting citizenship would equal giving up sovereignty to a degree in which it would simply cease to exist. There would be no more chance for states to effectively make decisions or exercise the internal or the external side of their sovereignty anymore if they could not decide who gets to be a citizen. The people thrust upon the Member States in a Europe which has moved towards becoming a federation would feel no obligation towards any particular state, only the EU itself, which would mean that the concept of citizenship in regards to nations would be empty. This would result in a federal Europe becoming

67 KOCHENOV, D. The Citizenship Paradigm. *Cambridge Yearbook of European Legal Studies*. 2013, Vol. 15, no. 1, pp. 197–225.

the only option of integration, with Member States having no chance to become stronger, form some sort of confederation or even exist anymore. Europe would become a completely new entity – a real federation, even if the EU tried to introduce EU citizenship as anything other than a complementary citizenship, as it stands now.

To sum up, the reason I cannot support the idea of changing the regulation of the current EU citizenship issues, despite the possible change of pace in the integration of the EU, because it would without a doubt result in the death of Member States and federalism, even if we tried to keep the EU in its current form while strengthening citizenship.

Right now, the Union is a legal person, but not a state, as the requirements of state sovereignty are not met. The European Union sees the relationship, which most closely resembles citizenship but is otherwise not, as a neutral, purely legal bond, independent of ethnic, linguistic, cultural, and other backgrounds.[68] This could be changed in some way during the Convent, which will sooner or later take place and possibly make significant amendments to the Treaties. However, I do not think that in the current climate, a stronger integration and issues such as this will be addressed in a manner which would benefit the forces who wish to see a European Federation. On the other hand, my humble opinion is that it should not even be a question at the moment. Rather, the integration should focus on solving the many crises past and present that ail Europe, while respecting the sovereignty and essential state functions of the nations that make up the EU.

4 Conclusion

As a conclusion to my paper, I would like to once again stress, that the introduction of a federal citizenship, and federalism in general, would pose many challenges and would generally do more harm than good in the long term. However, I acknowledge that somewhere down the line we must decide in which direction to take integration: stronger nations for

68 TÓTH, J. Miért nem lehet, ha szabad? *Beszélő online* [online]. 2003, Vol. 8, no. 10 [cit. 15. 3. 2023]. Available at: http://beszelo.c3.hu/cikkek/miert-nem-lehet-ha-szabad#2003-f10-03_from_19

a stronger EU, federation or something else entirely? Whichever way the tide turns, Brexit has shown us that the current form of the EU is fragile and needs questions answered. Citizenship of the Union and the rights that go with it are perennial questions arising from the linking of nationality to citizenship of the Member States, which could only be clearly answered if the Member States decided to make the Union a federal state.[69] However, as I do not think it a viable option seeing the current trends of the EU and the world's political climate, I anxiously await to which direction the European Union is going to turn and what the future holds.

The current regulation of EU citizenship is not perfect of course, but its complementary nature helps reach the goals of the integration, provide a better level of protection of fundamental rights, build cooperation between Member States and is generally an important part of what makes the European Union a flawed but necessary and unique entity. To my mind, perfecting it will take time and we cannot be impatient with this process, possibly endangering the success of the entire initiative behind the European Union and integration.

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BARRY, R. The Celtic Cubs. *European Journal of Law and Migration*. 2004, Vol. 6, no. 2, pp. 177–193.

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The Impact of the European Union Citizenship Institution on the Polish Legal Order and National Jurisprudence

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Abstract

The legal situation of an individual in the European Union is currently one of the key issues of EU law. The institution of EU citizenship plays a special role in the process of shaping it. The broader European aspect of citizenship becomes more important in the light of increasing globalization and legislative changes in the European Union and its Member States. The legal situation of an individual in Poland, which has been changing since the early 1990s, should be regarded as one of the manifestations of adopting new values, deepening international cooperation, especially that which is carried out as part of European integration. How, then, should the project of EU citizenship be assessed in its entirety and finally as the basis for building a political community? Is EU citizenship a purely symbolic project with no added value? Does it meet the conditions for being called citizenship? The article is devoted to answers to these questions.

Keywords

European Integration; European Union; Citizenship; International Cooperation; Polish Legislation.

1 Introduction

The legal situation of an individual in the European Union is currently one of the key issues of EU law. The institution of EU citizenship plays a special role in the process of shaping it. The official establishment of the institution

of citizenship of the Union by the Maastricht Treaty[1] was ground-breaking, mainly due to the fact that in the traditional approach of legal science, the concept of "citizenship" was inextricably linked to the nation-state. Citizenship in the Maastricht Treaty was a form of legitimizing the Union in the eyes of citizens. This resulted from the conviction that, in our political culture, the concept of citizenship is so integral to the sense of belonging, identification and loyalty that the introduction of the concept of EU citizenship could reduce the existing distance between the citizens of the Member States and the EU institutions. In addition, the same treaty established the European Ombudsman to protect citizens against the arbitrariness of the power of the EU institutions. In fact, until the beginning of the 1990s, the scope of Community law covered only persons conducting business activities, i.e., employees, business people, service providers.[2] At the time when the institution of Union citizenship was introduced into the legal order of the then European Community, most representatives of the doctrine regarded it as a purely decorative and symbolic institution, devoid of any real meaning. It was only intended to reflect the former "market citizenship" and apply only to those nationals of the Member States who had benefited from the treaty free movement of persons, i.e., they were economically active or had sufficient financial resources. Thus, citizenship was not intended to bring about any real institutional change. At the beginning of the Community integration, the citizens of the Member States were perceived in a one-dimensional way – their value and usefulness for the progress of integration was measured by their economic activity. The concept of a citizen in the political sense, legitimizing the activities of the Community institutions, did not appear in the initial language of the Treaties or acts of secondary law. Instead, there was an employee, an entrepreneur providing services, self-employed – one of the participants in economic turnover, who could contribute to the efficient functioning of the common market and increase the level of prosperity in the Member States, which is why it was a major challenge for

1 Signed in Maastricht, the Netherlands, on 7 February 1992, also known as the Treaty on European Union ("TEU").

2 WRÓBEL, A., PÓŁTORAK, N., MIĄSIK, D. (eds.). *Traktat o funcjonowaniu Unii Europejskiej. Komentarz. Tom. I*. Warszawa: Wolters Kluwer, 2012, p. 437.

European integration, both then and now. Currently, there is the problem of conflicting identities – European, which can be attributed to the EU, and national, proper to the Member States that make it up.

2 Definition of EU Citizenship

The precursor of the concept of European citizenship was R. Picard, once a specialist in private international law.[3] In the formula of the so-called *inter-citizenship* (fr. *intercitoyenneté européenne*), from 1947, Picard treated it as a temporary naturalization, resulting in obtaining all the rights and obligations of citizens throughout the period of residence in the territory of a given country belonging to the European political union. After all, in his opinion, civil rights should be granted gradually, as the process of creating a union between states deepens. The very concept of "citizenship" is very broad and covers many aspects, of which three elements seem to be the most important: legal status, participation in the political community, and identity.[4] Traditionally, citizenship has been defined, for example, as *"an individual's passive or active membership in a nation-state with universal rights and obligations specified as equal"*[5]. Pursuant to the definition contained in the PWN Encyclopaedia, citizenship is *"the nationality of a natural person associated with the rights and obligations specified by the law of a given state, the basic of which are usually contained in constitutions"*[6]. As indicated by the Polish Constitutional Tribunal, *"citizenship consists in a permanent legal bond connecting a given individual with a certain state, in the fact that an individual belongs to that state, and its essence is expressed in the entirety of mutual rights and obligations of the individual and*

3 MIK, C. Obywatelstwo europejskie w świetle prawa wspólnotowego i międzynarodowego. *Toruński rocznik praw człowieka i pokoju*. 1994, Vol. 1993, no. 2, p. 64.

4 BELLAMY, R. Evaluating Union citizenship: belonging, rights and participation within the EU. *Citizenship Studies*. 2008, Vol. 12, no. 6, p. 599; VAN OERS, R. *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom*. Leiden: Brill | Nijhoff, 2014, pp. 17–19; More on these elements from the point of view of not only law, but also various fields of social sciences, see, in particular, a collection of essays: BELLAMY, R., PALUMBO, A. (eds.). *Citizenship. The Library of Contemporary Essays in Political Theory and Public Policy*. Farnham: Ashgate, 2010, 488 p.

5 JANOSKI, T., GRAN, B. Political Citizenship: Foundation of Rights. In: ISIN, E. F., TURNER, B. S. (eds.). *Handbook of Citizenship Studies*. London: SAGE Publications, 2002, pp. 14–52.

6 KACZOROWSKI, B. (ed.). *Encyklopedia PWN Oryginalna Azetka*. Warszawa: Wydawnictwo Naukowe PWN, 2008, p. 700.

the state, determined by the applicable legal standards"[7]. The above definitions even indicate that it is inappropriate to understand EU citizenship through the prism of traditional definitions, because they refer only and exclusively to ties with a given country. However, the European Union is not a state, but an international organization, which makes the bond associated with EU citizenship a special one. According to *Łazowski*, citizenship of the Union is *"a special bond connecting the citizens of the Member States with the European Union, from which certain rights and (theoretically) obligations result"*[8]. Due to the lack of a "European nation", the role of EU citizenship is therefore completely different from its equivalent at the national level. By establishing rights specific to EU citizens, it is intended to strengthen the legal position of the individual in EU law and to emphasize the political nature of cooperation between Member States. Creating a real link between a citizen and the EU as an international organization is an extremely difficult task. The reason for the introduction of European citizenship was the need to reduce the so-called democratic deficit, which consisted of the following factors:

1. a shift of sovereignty from national parliaments to the Community level, where decisions were often taken in secret;
2. little importance of the European Parliament in the legislative process, although it is the only Community body elected in direct and democratic elections;
3. the executive power of the Communities was vested in the exclusive competence of the Commission and the Council, whose composition was practically unaffected by the citizens of the nation-states; in this context, the creation of EU citizenship was to be an important element of reducing the democratic deficit and the foundation of the democratic legitimacy of the Union.

Another premise behind the idea of EU citizenship was the creation of a "European identity", which could strengthen the social legitimacy

7 Judgment of the Constitutional Tribunal (Trybunal Konstytucyjny), Poland of 18 January 2012, Case Kp5/09.

8 ŁAZOWSKI, A. Obywatelstwo Unii Europejskiej – uwagi teoretyczne i praktyczne w dziesięć lat po wejściu w życie Traktatu z Maastricht. In: PIONTEK, E., ZAWIDZKA-ŁOJEK, A. (eds.). *Szkice z prawa Unii Europejskiej, t. I, Prawo instytucjonalne*. Kraków: Zakamycze, 2003, pp. 135–136.

of the process of European integration. It was intended to be a means of achieving the social acceptance and support necessary for a functioning internal market and economic and monetary union. *O'Leary's* point is apt, noting the ambiguity behind the idea of a "European identity". Well, it is not very clear whether the development of a European identity would mean a greater sense of belonging to the Union, or whether it would be aimed at greater identification with other EU citizens, while excluding non-citizens residing in the Communities.

3 Additional Nature of EU Citizenship

The institution of citizenship of the European Union is therefore shaped in a rather characteristic way. Remaining at the junction of EU law and national law, it is additional and derivative at the same time in relation to national citizenship. As provided for in Article 9 of the TEU, every citizen of a Member State is an EU citizen, and EU citizenship itself is additional to national citizenship, but does not replace it. At this point, it should also be noted that in most of the official languages of the Member States there is a terminological difference between nationality (English *Nationality*, French *Nationalité*, German *Staatsangehörigkeit)* and citizenship of the European Union (English *Citizenship of the European Union*, French *citoyenneté de l'Union européenne*, German *Unionsbürgerschaft)*. The indicated differences in terminology make it possible to claim that they are intended to emphasize the differences between these institutions and the intrinsic nature of citizenship of the Union.[9] The subjective scope of the institution of EU citizenship was indicated in the Maastricht Treaty in a seemingly simple and clear way. As written in Article 2 of the TEU, Member States have decided to *"establish a uniform citizenship of the Union for their citizens in order to strengthen and protect their rights and interests"*. The definition to whom the institution of Union citizenship is addressed is also repeated

9 GROOT, G. R. de. The relationship between the nationality legislation of the Member States of the European Union and European Citizenship. In: LA TORRE, M. (ed.). *European Citizenship: An Institutional Challenge*. The Hague: Kluwer Law International, 1998, p. 121; See also GROOT, G. R. de. Towards a European Nationality Law – Vers un droit européen de nationalité. *Electronic Journal of Comparative Law*. 2004, Vol. 8, no. 3, pp. 1–5.

in Article 17(1) of the Treaty establishing the European Community ("TEC"), which states that *"every person holding the nationality of a Member State becomes a citizen of the Union"*. An analysis of these provisions shows that citizenship of the Union is *"derived from the condition of national citizenship"*[10] and that it is secondary to citizenship of a Member State.[11] Despite the derivative and additional nature of EU citizenship in relation to national citizenship, it should be borne in mind that the competence of the Member States to shape the subjective scope of EU citizenship through national regulations is subject to certain limitations. Where a matter falls within the scope of EU law, Member States cannot be guided by the principle of "effective citizenship". It was confirmed under public international law in the *Nottebohm* case. According to its assumptions, in the case of dual citizenship, the one which the third country considers dominant prevails, and the international effectiveness of citizenship depends on the effectiveness of citizenship defined by specific material criteria.[12] This approach was rejected by the ECJ in the *Micheletti* case.[13] The Court then ruled that the Spanish authorities could not apply the principle of efficiency and consider a citizen with dual nationality (Italian and Argentinian) as an Argentinian national, thus denying him the right to exercise freedom of establishment. By limiting the application of the rule of effective citizenship in EU law, the Court was guided by the principle of non-discrimination on grounds of national origin. The *Micheletti* case, apart from the rejection of the doctrine of effective citizenship under EU law, initiated the use of an important interpretative formula, according to which Member States, when determining the rules for the acquisition or loss of national citizenship, should respect EU law.

10 PELC, R. Obywatelstwo Unii Europejskiej a obywatelstwo państw członkowskich i państw trzecich. In: BIERNAT, S. (ed.). *Studia z prawa Unii Europejskiej: w piątą rocznicę utworzenia Katedry Prawa Europejskiego Uniwersytetu Jagiellońskiego*. Kraków: Wydaw. Uniwersytetu Jagiellońskiego, 2000, p. 83.

11 WIERUSZEWSKI, R. Obywatelstwo Unii Europejskiej – character i znaczenie instytucji. In: ZIELENIEC, A. (ed.). *Obywatelstwo europejskie. Rozważania*. Warszawa: Fundacja im. Stefana Batorego, 2003, p. 21.

12 PUDZIANOWSKA, D. *Obywatelstwo w procesie zmian*. Warszawa: Wolters Kluwer, 2013, pp. 60–61.

13 Judgment of the CJEU of 7 July 1992, *Mario Vicente Micheletti and Others and Delegación del Gobierno en Cantabria*, Case C-369/90.

4 Rights of an EU Citizen

Citizenship, as indicated by *Sadurski*, has two main dimensions – formal and legal, political and symbolic.[14] The first one, which is dominant in the case of EU citizenship, includes rights provided for in the Treaty, which, thanks to the extensive interpretation of the CJEU, have become part of the basic status of every citizen of a Member State over time. Rights granted directly to EU citizens include: freedom of movement and residence (Article 21 of the TFEU), electoral rights in elections to the European Parliament and local elections based on the EU citizen's place of residence, not nationality (Article 22 of the TFEU), the right to diplomatic and consular protection in third countries (Article 23 of the TFEU), the right to petition the European Parliament (Article 24(2) of the TFEU), complaints to the European Ombudsman (Article 24(3) TFEU), the right to address any EU institution (Article 24(4) of the TFEU) and the so-called European Citizens' Initiative (Article 24(1) of the TFEU in conjunction with Article 11 of the TEU). It can be seen that some of the powers granted by the Treaty are closely related to the functioning of the internal market (freedom of movement and residence) and thus strengthen the implementation of the freedom of movement of people existing from the beginning of integration, and some of them are powers of a political nature. While the first of these rights is specific to EU citizenship, electoral rights or rights related to relations between an individual and EU institutions are rights typical of the institution of citizenship in general. They define the relationship between the individual and the political community of which they are a part. In this way, the formal and legal dimension overlaps with the symbolic and political dimension of citizenship. In the second of these dimensions, citizenship primarily determines the relationship between the citizen and the political community and the relationship between citizens themselves. The subjective European identity, which is significant from the point of view of an individual – an EU citizen, is much more difficult to define and achieve. It is about

14 SADURSKI, W. Obywatelstwo europejskie a legitymacja demokratyczna Unii Eurpejskiej. In: BARANOWSKA, G., BODNAR, A., GLISZCZYŃSKA-GRABIAS, A. (eds.). *Ochrona praw obywatelek i obywateli Unii Europejskiej. 20 lat – Osiągnięcia i wyzwania na przyszłość*. Warszawa: Wolters Kluwer, 2015, p. 30.

establishing a certain collective identity that would strengthen integration mechanisms and be a source of democratic legitimacy for the Union. No wonder that the doctrine often emphasizes that EU citizenship is still more of an ongoing process than a fully formed legal institution.[15]

5 Poland's Accession to the EU and EU Citizenship

Reading today's treaties, legal acts and EU documents, one gets the impression that the EU attaches great importance to the principles of democracy and the role of citizens in every aspect of its operation. It is also often emphasized that citizens play a particularly important role in the functioning of the European Union, they are the central element of the integration project and its fundamental point of reference. This approach is reflected in the TEU. Its second title (added by the 2007 Lisbon Treaty), placed right at the beginning of the treaty, is devoted to democratic principles. From the content of the provisions contained therein, we can learn that the Union functions on the basis of representative democracy. Citizens at the level of the Union are represented in two ways: directly in the European Parliament by Members of the European Parliament ("MEPs") whom they themselves elect, and indirectly by their presidents or prime ministers sitting in the European Council and members of governments sitting in the Council. Importantly, from the point of view of citizens' involvement in the EU political process, the Treaty emphasizes that every citizen has the right to participate in the democratic life of the Union and that all EU institutions and bodies are obliged to treat everyone with equal consideration. It can therefore be concluded that at the declarative level the Union represents a deep commitment to democratic values. Poland joined the European Union on 1 May 2004, upon accession, all citizens

15 POPTCHEVA, E.-M. *Multilevel Citizenship: The Right to Consular Protection of EU Citizens Abroad*. Brussels: P.I.E. Peter Lang, 2014, p. 86; KOSTAKOPOULOU, D. When EU Citizens become Foreigners. *European Law Journal*. 2014, Vol. 20, no. 4, p. 449; Compare, at an early stage of the functioning of Union citizenship, WIENER, A. Promises and Resources – The Developing Practice of 'European' Citizenship. In: LA TORRE, M. (ed.). *European Citizenship: An Institutional Challenge*. The Hague: Kluwer Law International, 1998, pp. 388–389; WEILER, J. Introduction. European Citizenship – Identity and Differentity. In: LA TORRE, M. (ed.). *European Citizenship: An Institutional Challenge*. The Hague: Kluwer Law International, 1998, pp. 1–24.

of the Republic of Poland, pursuant to Article 17 of the TEC, done in Rome on 25 March 1957, became citizens of the Union. In terms of systemic solutions, Community law has led to the emergence of a third group of people (besides citizens and foreigners), namely the group of EU citizens. Therefore, already against the background of preparations for Poland's accession to the EU, the problem of political rights emerged. Poland's accession to the EU meant, among other things, the requirement to grant active and passive electoral rights in elections to the local government and the European Parliament to citizens of other Member States permanently residing in Poland. Before the accession, as pointed out by *Garlicki*, divergent positions emerged in scientific discussions on this issue. It was noted, however, that *"since the granting of electoral rights is an important instrument for the implementation in the Republic of Poland of the sovereign power belonging to the Nation (Article 4(1)) and since the Nation is the citizens of the Republic, the legislative granting of electoral rights to non-citizens can be perceived as a violation of the Constitution"*[16]. The right of a citizen of the European Union, which provides him with the possibility of creating the personal composition of bodies in a basic unit of local government, is the right to vote and stand as a candidate in local elections. The basis for granting active and passive electoral rights in local elections to citizens of the European Union who are not nationals of the Member State in which they reside is Article 22 of the TFEU, according to which: *"Every citizen of the Union residing in a Member State of which he is not a national has the right to vote and to stand as a candidate in municipal elections in the Member State of which he is a non-national, under the same conditions as citizens of this country. This right shall be exercised subject to detailed conditions to be determined by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these conditions may provide for derogations if the specific problems of a Member State so justify."* Granting EU citizens the right to vote in local elections in the Member State in which they reside is an expression of the principle of non-discrimination between persons having the nationality of a given Member State and persons being citizens of another EU Member State, and is also a consequence

16 See *Garlicki's* opinion of February 16, 2002, in *Poland's accession process to the European Union and the Constitution of April 2, 1997*.

of freedom of movement and residence in the territory of all EU Member States. It is emphasized that the granting of these rights does not mean full harmonization of the national electoral laws of the EU Member States, but it is an expression of the desire to abolish the condition of citizenship, which most countries made participation in local elections conditional on. An EU citizen who wants to exercise the right to participate in local elections in another EU Member State in which they reside must: submit a declaration that they wish to exercise this right, which may mean the need to submit an application to be entered on the list of voters or candidates, in the case of the right to vote, with the exception that in countries where voting is compulsory, European voters entered on the electoral roll are also obliged to participate in the elections; in case of refusal to be entered on the list of voters or to stand as a candidate, an EU citizen may use the same legal remedies as nationals of the country of residence; meet the same conditions, e.g., with regard to the minimum period of residence in a given local government unit, or present essentially the same documents that are required from citizens of a given country; this may mean consent to the candidacy, submission of a list of persons supporting the candidate, the need to submit a declaration that one has full electoral rights, a property declaration or vetting declaration; the State may also stipulate that the candidate may not be deprived of the right to stand as a candidate in their country of origin. In addition, such a person should meet the same requirements as national citizens with regard to the principle of incompatibility of positions. After Poland's accession to the European Union, the Constitutional Tribunal commented on the electoral law to the European Parliament. It stressed that the establishment of active and passive electoral rights for foreign citizens of the European Union in the electoral law does not infringe the Polish Constitution, nor is it an unconditional right. The Tribunal drew attention to the differences between the electoral rights of a foreign EU citizen in elections to state and public authorities and EU bodies. Accordingly, the superior authority in the state is exercised by state authorities (so it is not exercised by local government authorities), while the European Parliament does not exercise this authority in the State. Moreover, exercising the right to vote is not an unconditional right, as submitting a formal declaration

of participation in elections and permanent residence in the territory of the Republic of Poland is required.[17]

6 Local Elections in Poland

Poland's accession to the European Union made it necessary to adapt Polish law to the above-mentioned regulations, which in relation to the electoral law in local elections meant the introduction of appropriate changes primarily in the electoral law to commune councils, poviat councils and voivodeship assemblies, and in the Act on commune self-government. As a result, active electoral rights in local elections were granted to European Union citizens who are not Polish citizens, who turn 18 on the day of voting at the latest and permanently reside in the area of operation of a given commune. The above-mentioned amendments to the Act of 16 July 1998 – Electoral law for commune councils, poviat councils and voivodeship assemblies made the possibility of exercising electoral law in a given commune also conditional on whether the voter was entered in the permanent register of voters kept in this commune no later than 12 months before election day. A voter had the right to vote for the commune council also if they were entered into the permanent register of voters within 12 months preceding the voting day, if they turned 18 within 12 months before the voting day or on the voting day. Therefore, the legislator introduced in this case the domicile census known to the science of law, as a condition for the exercise of electoral law at the commune level, and in accordance with the general principle of non-discrimination referred it to Polish citizens and the so-called European voters. The introduction of the domicile census and referring it only to a specific commune proves that the purpose of this regulation was to create a relatively permanent bond connecting a person with other residents or with the territory. The domicile census cannot be considered a criterion that determined membership in a self-governing community, because this criterion is only residence, but it was undoubtedly one of the factors that

17 Judgment of the Constitutional Tribunal (Trybunał Konstytucyjny), Poland of 31 May 2004, Case K 15/04; See also BIAŁOCERKIEWICZ, J. Glosa do wyroku Trybunału Konstytucyjnego z dnia 24 marca 2004 r. (sygn. Akt K 37/03). *Przegląd Sejmowy*. 2004, Vol. XII, no. 5, pp. 159–169.

differentiated the legal position of community members and created a group of residents temporarily deprived of the possibility of exercising the right to vote. However, this solution was questioned by the Commissioner for Human Rights, who argued that all adults, citizens of the Republic of Poland and EU citizens who changed their place of permanent residence in the last 12 months before the elections were deprived of active and passive electoral rights. In its judgment of 20 February 2006, the Constitutional Tribunal shared the position of the Commissioner for Citizens' Rights and concluded that the challenged regulation is unconstitutional, and the introduced restrictions on the right to vote and the right to be voted are not justified by the need to protect any of the values enumerated in the Constitution of the Republic of Poland, the respect or protection of which may constitute a reason for limiting constitutional rights and freedoms. The granting of active and passive electoral rights in local elections to EU citizens who do not have Polish citizenship was the subject of many comments expressed in the literature on the subject, both critical and positive. Their reason is the wording contained in Article 62(1) of the Constitution of the Republic of Poland, which reserves the right to elect the President of the Republic of Poland, deputies, senators and representatives to local government bodies only for Polish citizens. Finally, the doubts were dispelled by the Constitutional Tribunal, which in its judgment of 11 May 2005 stated that the provisions of Article 62(1) of the Constitution of the Republic of Poland cannot be attributed to a specific "exclusivity". Understood in such a way that if a given right has been granted to a Polish citizen, it cannot also be granted to citizens of other countries, including citizens of the European Union. *"The exclusivity of citizens' constitutional rights, understood in this way, is not unequivocally justified in the provisions of the Constitution itself. In particular, not every extension of a given civil right to other persons leads to a violation of the constitutional guarantee granted to that right."* The Tribunal approved the state in which the phrase "Polish citizen" used in Article 62 of the Constitution of the Republic of Poland is understood differently in relation to local elections, and differently in relation to presidential and parliamentary elections or participation in a national referendum.

7 Elections to the European Parliament

As far as the ability to influence the European legal order is concerned, it began to develop when direct elections to the European Parliament were introduced in 1979. Members of Parliament, directly elected by the citizens, increasingly gained influence over the law passed in the Communities, which contributed to raising the role of the citizens themselves. The history of the European Parliament dates back to the beginnings of post-war European integration, i.e., the Treaty of Paris, which established the European Coal and Steel Community. One of the four basic organs of this organization was the Common Assembly, which can be called the predecessor of the European Parliament. Initially, it had a control function. Five years later, after the signing of the Treaties of Rome, two more bodies were established: the European Parliamentary Assembly of the European Economic Community and Euratom. These assemblies from the beginning of their existence, in accordance with the Merger Treaty, formed a unity, which later was customarily called the European Parliament. Parliament is the only body of the European Communities to be universally and directly elected. The European Parliament is the only institution of the European Union with democratic legitimacy. Regulations concerning elections to the European Parliament applicable in Europe concern only general aspects. Detailed issues are regulated by national electoral laws. As a consequence, the electoral systems in individual Member States differ in such important issues as the electoral formula, a different number of constituencies, varying levels of the prohibitive clause or its absence, and the voter's rights in the act of voting. Almost all technical rules relating to these choices are developed at the level of Member States. The number of MEPs is not fixed and may change due to demographic changes or changes in the number of Member States. The deputy has a free and pan-European mandate. They are protected by immunity guarantees, such as full immunity protection (the same as that enjoyed by members of national parliaments outside their own country), formal immunity, as well

as the privilege of inviolability.[18] The MEP is not limited by the instructions of the voters, they do not only represent the interests of their country, but also all citizens of the European Union to the same extent. Unfortunately, since the beginning of the existence of the European Communities, it has not been possible to establish a uniform, pan-European electoral law for the European Parliament.[19] Until its creation, according to Article 8 of the Act concerning the election of representatives to the European Parliament by direct universal suffrage: *"Subject to the provisions of* […] *the Act, the electoral procedure in each Member State shall be governed by national law"*. This document therefore contains guidelines that Member States must follow in relation to the organization and conduct of elections to the Parliament. The Act contains fundamental principles of electoral law, which should be applied equally in all Member States, and the formulation of detailed guidelines lies within the competence of national legislators. In Poland, elections to the European Parliament are the only general elections not regulated by the Constitution, but only by the Election Code. It adopted four guiding principles: freedom of choice; universality; directness; secrecy of voting. The provisions of the Code also resolve the issue of incompatibility of the function of a parliamentarian in Poland with the function of an MEP – the election of a Deputy or a Senator as an MEP results in the automatic loss of a seat in the Sejm or Senate. In addition, the electoral system to the European Parliament in Poland is slightly different from the solutions in force in other Polish elections, raising the electoral threshold to 8% for committees running in a coalition. On the other hand, electoral rights are vested in all Polish citizens, as well as citizens of other Member States permanently residing in Poland, included in the permanent register of voters (principle of domicile). This principle was confirmed in the judgment of the Constitutional Tribunal of 31 May 2004: *"The Election Code to the European Parliament (Journal of Laws no. 25, item 219) to the extent that they grant the right to vote and be elected to the European Parliament in the Republic of Poland*

18 WISZOWATY, M. M. Na drodze do jednolitej ordynacji wyborczej. Regulacja prawna wyborów do Parlamentu Europejskiego w 2009 r. w 27 krajach członkowskich. In: KNOPEK, J. (ed.). *Integracja europejska a lokalność*. Chojnice: Przedsiębiorstwo Marketingowe LOGO: na zlecenie Powszechnej Wyższej Szkoły Humanistycznej "Pomerania", 2009, pp. 21–38.

19 Ibid.

to citizens of the European Union who are not Polish citizens, are not inconsistent with Article 4(1) of the Constitution." The right to vote is granted to persons who are over 18 years of age and have not been deprived of public rights, electoral rights or incapacitated by a court judgment. The right to be elected is granted to persons who have not been punished for a crime committed intentionally, prosecuted by public indictment and have been permanently residing in Poland or in the territory of another European Union country for at least 5 years. The lower age limit (census) is 21 years. The most contentious issue, however, is the structure of electoral districts and the procedure for the allocation of seats, which has been a problematic issue since the beginning of Poland's membership in the EU. It was felt that the system inconsistently applied the principle that the area of the constituency coincides with the boundaries of the province. Opponents of such a formula of the electoral law claimed that large regional constituencies would have an artificial character and division incomprehensible to society.[20] Other experts have argued that too many districts are also a threat, as it will *"significantly increase district representation standards"*[21] and will negatively affect the proportionality of elections. If a rigid distribution of seats were applied, it would mean 4 seats per constituency, which would definitely disturb the proportionality of the elections. The purpose of constituencies is mainly to ensure an even distribution of seats among specific areas in accordance with fundamental electoral principles. The correct and fair distribution of seats should be the result of the implementation of rational selection criteria. It is worth noting that it is the manner in which the seats will be distributed (whether at the national or regional level) that determines how voters are represented by individual candidates. There is also no doubt that the construction of the elements that make up the electoral system has a direct impact on the result of a given election, which means that almost every electoral system distorts electoral preferences in some way at the level of their articulation, and as a consequence, the obtained electoral result is then

20 MICHALAK, B. Ile okręgów wyborczych? Uwagi do struktury okręgów wyborczych w Polsce w wyborach do Parlamentu Europejskiego. In: SOKALA, A., MICHALAK, B., FRYDRYCH, A., ZYCH, R. (eds.). *Wybory do Parlamentu Europejskiego. Prawne, polityczne i społeczne aspekty wyborów*. Toruń: TNOiK, 2010, p. 49.

21 Justification to the government bill on the election of members of the European Parliament, print 1785 of the Sejm of the 4th term.

deformed in the conversion process. As a result, numerous political consequences of each type of electoral system can be distinguished, including, among others, the degree of deformation of the will of voters, reduction of the effective number of parties, electoral strategies of political parties. The ordinance to the European Parliament described above was changed by the Electoral Code of 5 January 2011. In accordance with the applicable electoral law, the number of constituencies in the elections to the European Parliament has not changed. However, a new way of distributing seats in individual regions was introduced. Currently, the distribution of seats takes into account the level of participation in elections by citizens from a given constituency. If the turnout of residents in a given district is low, the given seat is transferred to the region where voters participated in the vote in greater numbers. To sum up, the Polish case should be classified as proportional systems, in the variant of party lists there are regional lists at the level of the electoral district, however, the allocation of seats takes place at the national level. Only the seats obtained on a national scale by electoral committees taking part in their division are then divided between 13 constituencies depending on the number of votes obtained in the given constituencies (which is closely related to the voter turnout in a given constituency), taking into account the elements of the electoral system, exact the characteristics of elections to the European Parliament are as follows: in the first place, treating Poland as one constituency, the d'Hondt electoral formula applies when it is used to distribute seats between individual electoral committees on a national scale, the next stage will be the distribution within a given list party mandates obtained on a national scale between 13 constituencies, using the Niemeyer rule. Through these measures, the final distribution of seats into constituencies is significantly affected by the aforementioned voter turnout. The seats, in the number obtained by a given list in the constituency, are finally given to those candidates who received the highest number of votes in that list. Therefore, in the distribution of seats, the position of the candidate on the list is not important, but their election result within the list. As for the shape and size of the constituency, in elections to the European Parliament, Poland is divided into 13 constituencies consisting of the area of one voivodeship (seven constituencies), two voivodeships (four districts)

or a part of the voivodship (in the case of the *Mazowieckie* voivodship – division into two districts). However, this solution still does not satisfy all voters. It should be emphasized that there are new proposals in this area, including the introduction of a nationwide electoral list or the creation of one pan-European constituency, and thus the introduction of a pan-European electoral list in elections to the European Parliament.

8 Work of an EU Citizen in Polish Public Administration

In addition, the extension of the provisions of Article 60 of the Constitution to persons who do not have Polish citizenship in connection with the free movement of persons and services, although – as follows from Article 45(4) of the TFEU – persons employed in public administration were not covered by this freedom (provisions relating to freedom of employment do not apply to employment in public administration, Article 45(4) of the TFEU is a *lex specialis* provision, in view of the general prohibition of discrimination on the grounds of it allows for rationing the employment of foreigners by regulating national law). At this point, it should be emphasized that the provisions of Article 45(1) and 45(2) of the Treaty are considered as a specific application of the principle of non-discrimination and the freedom of profession and the right to employment in each Member State enshrined in the Charter of Fundamental Rights of the European Union. Close connection of Article 45 with the principle of non-discrimination indicates that the provisions of the Treaty on the free movement of persons refer to the prohibition of discriminatory national measures.[22] This freedom includes, in accordance with the provisions of Article 45(3) the right to apply for the job actually offered, to move freely within the territory of the Member States for this purpose, to reside in one of those States in order to work there and, finally, to remain in the territory of a Member State after employment has ended. A detailed regulation implementing the treaty provisions on the freedom of movement of workers is contained in Regulation 492/2011. Pursuant to the Regulation, a migrant worker has the right to work

22 ZAWIDZKA, A. *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*. Warszawa: Wydawnictwo Prawo i Praktyka Gospodarcza, 2002, p. 199.

in any Member State on the same terms as a national of the host country and cannot be discriminated against in concluding an employment contract. It is forbidden to define the limits of jobs that may be assigned to foreigners and apply restrictions on recruitment or use of the services of employment offices.[23] The freedom of movement of workers, like other freedoms, is not and cannot be absolute. In the light of Article 45(3) of the Treaty, the freedom of employment as defined above is exercised subject to legitimate restrictions for reasons of public policy, public security and public health. In Poland, however, foreigners-EU citizens have been allowed access to certain positions in public administration, provided that the work performed is not related to the exercise of sovereign powers of the State, requiring specific loyalty to the State. A person who does not have Polish citizenship may therefore be employed in a position where the performance of work does not involve direct or indirect participation in the exercise of public authority and functions aimed at protecting the general interests of the State, and if they have knowledge of the Polish language confirmed by documents specified in the provisions on the civil service. According to EU law, the possibility of taking up employment in public administration has become the rule, while the limitation has become the exception. In the Polish literature on the subject, it is claimed that *"in each case, the actual scope of power exercised by the person holding a given position and the public interests protected by him should be decisive"*[24]. According to Polish regulations, a person may be employed in the civil service who, firstly, is a Polish citizen, subject to Article 5. The principle of access of foreigners-EU citizens to work in the civil service, after meeting the requirements set out in the Act, was also confirmed by the judgment of the Warsaw District Court.

9 Work of an EU Citizen in Polish Local Government Administration Bodies

Community law does not directly refer to the employment of Union citizens in local government administration bodies in other Member

23 SKUBISZ, R., SKRZYDŁO-TEFELSKA, E. *Prawo europejskie. Zarys wykładu*. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2008, p. 249.

24 SZEWCZYK, H. *Stosunki pracy w służbie cywilnej*. Warszawa: Wolters Kluwer, 2010, p. 79.

States. Originally, until 1 January 2009, Polish legislation did not provide for the possibility of establishing employment relationships with foreigners in official positions in local government administration. Currently, the head of the unit in which the recruitment is made indicates the positions for which EU citizens and other foreigners may apply, who, on the basis of Community law or international agreements, are entitled to take up employment in the territory of the Republic of Poland. A foreigner may be employed in a position where the performed work does not involve direct or indirect participation in the exercise of public authority and functions aimed at protecting the general interests of the State. In addition, such a person must have documented knowledge of the Polish language and meet other requirements set out in the Act for employment in a given position. The adopted solution should be assessed positively. It adapts statutory regulations to the provisions of the Constitution of the Republic of Poland and implements the provisions of Community law in the field of freedom of movement of workers. It gives the opportunity to distinguish between jobs that relate to the functioning of the State (foreigners do not have access to these), and other jobs related to the activities of the community (where they can be employed). However, it should be borne in mind that the law on employing foreigners applies only to persons with whom an employment relationship is established on the basis of a contract. As a consequence, persons employed on the basis of election (members of the board of the voivodeship, poviat and associations of local government units) and on the basis of appointment (deputy of the commune head, mayor, city president, treasurer of the commune, poviat and voivodship) will have to be bound by the bond of belonging to Poland. The legislator decided that these positions are connected with the functioning of the State, and loyalty and trust should be required from the persons holding them, which are conditioned by the possession of Polish citizenship. The inconsistency is particularly clear in the case of a commune, where the city president may be a foreigner with EU citizenship, and their deputy and commune treasurer not.

10 Professional Activity of Foreign Lawyers with EU Citizenship in Poland

10.1 Judges

When analysing the legal situation of lawyers-foreigners with EU citizenship who want to pursue professional activity in Poland, we must refer to two legal systems: Community law and Polish law. As far as Community law is concerned, the most important are the provisions of the TFEU on the free movement of workers, entrepreneurship and services, as well as the directives regulating the recognition of professional qualifications of lawyers and the establishment of their activity. As far as the provisions of Polish law are concerned, the performance of each of the above-mentioned professions is regulated by a separate act. The Constitution of the Republic of Poland provides that the administration of justice in Poland is exercised by the Supreme Court and common, administrative and military courts. According to this division, we distinguish judges of the Supreme Court, common courts (a judge of a district court or appeal court), administrative courts (a judge of a provincial court or a judge of the Supreme Administrative Court) and military courts (a judge of a military garrison or military court). The Polish law stipulates that only a person with Polish citizenship may be appointed to the position of a judge.

10.2 Prosecutors

The organization of the prosecutor's office in Poland is regulated by the Act of 28 January 2016 on the Public Prosecutor's Office. According to it, the prosecutor's office in Poland is constituted by the Prosecutor General, the National Prosecutor, other deputies of the Prosecutor General and prosecutors of common organizational units of the prosecutor's office and prosecutors of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation ("Institute of National Remembrance"). In the light of the Act, only a person with Polish citizenship can become a prosecutor.

10.3 Attorneys and Legal Advisers

The Polish Act of 5 July 2002 on the provision of legal assistance by foreign lawyers in the Republic of Poland is of great importance in the analysis of the problem of practising the legal profession in the European Union. The Act on the provision of legal assistance in the Republic of Poland defines the concept of "legal assistance" (as providing legal advice, preparing legal opinions, drafting legal acts and appearing before Polish courts and offices) and makes a dichotomous division of lawyers who can provide legal assistance before Polish courts. According to the provisions of the Act, a foreign lawyer is a lawyer from the European Union and a lawyer from outside the European Union. An EU lawyer is a person with the citizenship of an EU Member State, authorized to practice under one of the professional titles obtained in an EU Member State. Interestingly, when performing permanent practice, a foreign lawyer entered on the list uses the professional title obtained in the home country, expressed in the official language of that country, with an indication of the professional organization in the home (obtaining the right) country to which they belong, or the court in which they are entitled to occur. It should be emphasized that the provisions of the Polish Act are the implementation of EU directives, the provisions of which ordered the Member States to liberalize the regulations concerning the practice of the legal profession in accordance with the freedoms of the internal market. The implementation of the Community law in the field of freedoms of the internal market required the adoption of statutory regulations concerning the principles of recognition of professional qualifications acquired in the Member States. Originally, the Polish Parliament defined the rules for recognizing qualifications acquired in the EU Member States to perform regulated professions in the Act of 26 April 2001. Currently, the Act of 22 December 2015 is in force in this regard, and in conjunction with the above-mentioned Act, the provisions governing the practice of legal professions in Poland are set out in the Act of 5 July 2002 on the provision by foreign lawyers of legal assistance in the Republic of Poland. The Act stipulates that: *"On the basis of reciprocity, unless international agreements ratified by the Republic of Poland or the provisions of international organizations of which the Republic of Poland is a Member State provide otherwise, foreign lawyers are entitled*

to practice on a permanent basis, on the terms set out in the provisions of this section, after having been entered into one of the lists of foreign lawyers kept by the District Bar Councils or Councils of District Attorneys, respectively." Relevant provisions were adopted in the Act of 26 May 1982 on the Bar and in the Act of 6 July 1982 on Legal Advisers.

10.4 Notaries

The judgment of the CJEU of 24 May 2011 was of great importance for the activities of notaries in the EU, in which the Court confirmed the position of the Advocate General[25], stating: *"Although notarial activities, as currently defined in the Member States concerned, serve to achieve the goal in the general interest, they are not connected with participation in the exercise of official authority within the meaning of the Treaty."*[26] In addition, it held that: *"The act of authenticating a document entrusted to notaries is therefore not related to direct and specific participation in the exercise of public authority. As a result, the nationality condition required by the laws of those Member States for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by EU law."*[27] As a consequence, pursuant to Article 6 of the Act of 13 June 2013, amending acts regulating the performance of certain professions, amending, among others, the law on notaries public (Article 11), in Poland a notary may be a person who has Polish citizenship, citizenship of another European Union Member State, a Member State of the European Free Trade Association ("EFTA") – a party to the agreement on the European Economic Area or the Swiss Confederation, or citizenship of another country, if, on the basis of the provisions of European Union law, they have the right to take up employment or self-employment in the territory of the Republic of Poland on the terms set out in these provisions.

25 On 14 September 2010, Advocate General *Cruz Villalón* stated that these Member States violated the provisions of the Treaty, and the introduced regulation is not a sufficient justification for discriminating notaries on the basis of nationality. The Ombudsman added that even the specific conditions of this profession did not justify the use of such a disproportionate measure. The nationality requirement is disproportionate to the actual involvement of notaries in the provision of services related to the exercise of public authority.

26 Judgment of the CJEU of 24 May 2011, Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08.
Press release for ruling in Joined Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08.

27 Ibid.

11 Conclusion

To sum up, there is currently a strong tendency to expand the catalogue of individual rights and thus narrow the exclusive rights of citizens. This is evident in international, community and constitutional law. *"The catalogue of rights reserved exclusively for citizens of a given state is constantly limited by the explicit intervention of the legislator, who universalizes civil rights and freedoms in such a way that they qualify as human rights."* Certainly, the impact of EU citizenship on the strengthening of European identity is much smaller than originally assumed. As *Konopacki* points out, the very structure of EU citizenship based on the sovereign powers of the state to determine the subjective scope of national citizenship leads to a reduction in the possibility of emerging a European identity.[28] However, Professor Shaw's observes that: *"In practice, under the current conditions, where the edges of Europe seem to threaten in ever more immediate ways the very core of the integration project, the presence of a concept of citizenship at the supranational level is more likely to be seen as a provocation and a threat to the continued existence and relevance of the Member States, under whose protective umbrella (however leaky) citizens still want to take refuge in times of crisis. The voices calling for free movement to be given greater prominence and the mobility of young people in particular to be supported in order to combat youth unemployment are very much minority voices."*[29] A natural consequence of the increased importance of the Community institutions. As *Monar* rightly wrote: *"When public authorities exercise real control over citizens – as EU institutions do – there must be a partnership established on the other side in the form of citizenship rights and political participation – which is the very essence of citizenship."*[30] In addition, the current political events, including the Brexit referendum, indicate a serious crisis of common European values, which were supposed to bind the identity of EU citizens. It turns out that one of the key rights of EU citizens – the right to free movement and residence – is becoming a reason for a split.

28 KONOPACKI, S. Problem suwerenności w Unii Europejskiej. *Studia Europejskie*. 2008, no. 3, p. 14.

29 SHAW, J. European Citizenship: The IGC and Beyond. *European Integration online Papers* [online]. 1997, Vol. 1, no. 3, p. 2 [cit. 30. 5. 2023]. Available at: http://eiop.or.at/eiop/texte/1997-003.htm

30 MONAR, J. A Dual Citizenship in the Making: the Citizenship of the European Union and its Reform. In: LA TORRE, M. (ed.). *European Citizenship: An Institutional Challenge*. The Hague: Kluwer Law International, 1998, p. 173.

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From *Rottman* and *Tjebbes* to a Current Danish Nationality Case

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Abstract

This paper addresses the case-law of the CJEU in the domain of EU citizenship. Recently, Advocate General *Szpunar* issued his opinion in a case of the automatic loss of Danish nationality by the operation of law upon reaching the age of 22 on the grounds of lack of a genuine link if no application to retain nationality has been made before that date. It is the fourth in a series of highly important cases relating to the obligation of Member States to respect EU law in the domain of the acquisition and loss of nationality. This paper seeks to present critical reflections on the content of the opinion, particularly in relation to the specific test of proportionality.

Keywords

EU Citizenship; Loss of the Nationality of the Member State; Principle of Proportionality.

1 Introduction

A State defines its people through nationality. Nationality represents the legal relationship under public law between an individual and a State. Through this bond, the individual becomes the beneficiary of a set of rights and obligations. It is also important to recall that this relationship is based on the principle of solidarity towards the State and on the reciprocity of rights and obligations. This is the exclusive competence of the Member States. Each Member State can determine who its nationals are and, where appropriate, exclude someone from this relationship.[1]

1 Opinion of Advocate General Poiares Maduro of 30 September 2009, *Rottmann*, Case C-135/08, para. 17.

The EU was originally established to integrate the Member States economically. However, it has come a long way since then and today we can clearly talk about integration that is broader than merely economic. Part of that deeper integration was the introduction of the status of EU citizenship by the Maastricht Treaty. Citizenship of the Union is not a separate citizenship and is only a complement to nationality of a Member State. Anyone who holds nationality of at least one Member State is therefore a citizen of the Union. However, EU citizenship does not replace national citizenship, which is retained, and EU citizenship exists alongside it. Union citizenship has a separate nature and meaning. It goes beyond the nationality of a Member State.[2] The introduction of Union citizenship was not intended to extend the material scope of the Treaties. The Treaties cannot be invoked in national situations which have no connection with European law. However, when a situation concerns an area within the competence of the Member States, it falls within the *ratione materiae* of European law if it involves a foreign element, i.e., if it has a cross-border dimension. Only a situation in which all the relevant elements are situated within a single Member State is to be regarded as a purely internal one.[3]

Citizens of the Union have quickly become accustomed to the privileges of this status. We often forget that we have many rights because of the way the EU works. They derive from EU law, not from purely national citizenship. It is the CJEU that points this out and is still addressing the nature of EU citizenship, as well as the Union's competences in this area by answering requests for preliminary rulings. In the last five years, 48 cases in matters of Union citizenship have been concluded by judgments.[4] Unsurprisingly, some of the questions referred for preliminary rulings deal precisely with the issue of loss of the status of Union citizen as a result of loss of national citizenship, which is the subject of the author's paper.

Specifically, the CJEU addresses the loss of Union citizenship in relation to the Danish legislation on the automatic loss of nationality, which also

2 Opinion of Advocate General Poiares Maduro of 30 September 2009, *Rottmann*, Case C-135/08, para. 15–16.

3 Ibid., para. 9–10.

4 List of search results (EU citizenship; Court of Justice; last five years). *Curia* [online]. [cit. 15. 5. 2023]. Available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/

results in the loss of Union citizenship, in Case C-689/21. There has already been a hearing and the Advocate General's opinion has been delivered. No date has yet been set for the delivery of the judgment.[5]

This paper is divided into three chapters. In the first part, the author will discuss the general principles in the area of citizenship of the Union arising from the CJEU's case-law to date. The subsections of this part will be devoted to answering the question of when the EU has competence in this area, what requirements the CJEU places on the consideration of the individual circumstances of each case, and the application of the principle of proportionality. In the following chapter, the facts of Case C-689/21 will be summarised, and the position adopted by the Advocate General in his opinion discussed. The last chapter will analyse the author's subjective view on the opinion, with an attempt to predict how the CJEU is likely to approach the case in its future judgment.

2 General Principles and Case-Law

2.1 EU Competence

The origins of the contemporary understanding of nationality as a genuine link can be traced back to the *Nottebohm* judgment of 1955. Prior to that year, the level of connection between a State and citizen was only invoked in terms of international law, whose main and perhaps only objective in the area of nationality was to prevent the undesirable emergence of multiple nationalities. However, there is a view amongst scholars that the interpretation of citizenship arising from the *Nottebohm* judgment cannot be applied generally outside the facts of that particular case.[6]

Given that nationality falls within the exclusive competence of the Member States, it is useful to define in the first chapter which specific situations fall

5 Author's Note: At the time of writing, the CJEU had not yet published its judgment, and the publication date was not available. Therefore, the analysis provided here is based on information and precedents available up to that point. Any subsequent developments or judgments are not reflected in this article.

6 SWINDER, K. Legitimizing precarity of EU citizenship: Tjebbes. *Common Market Review Law* [online]. 2020, Vol. 57, no. 4, p. 1168 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020719

within the scope of EU law, and therefore to what extent the CJEU has jurisdiction to rule on preliminary questions.

The basis for this reasoning was set out in the *Rottmann* judgment.[7] The facts need not be recalled in detail, but a brief summary is that Mr Rottmann was a native Austrian who took advantage of his freedom of movement and moved to Germany. In Germany he applied for German nationality. His application was granted. Under Austrian national rules, he lost his Austrian nationality since those rules precluded multiple nationalities. Thus, if an Austrian citizen wished to acquire another nationality, he automatically lost his Austrian nationality. However, the decision to grant German nationality was subsequently annulled when it became apparent that Mr Rottmann had acquired German nationality by fraud. As a result of that loss, he not only lost his status as a citizen of the Union but also became stateless.

The case-law has already established that the conditions for acquiring and losing nationality fall within the exclusive competence of the Member States.[8] However, in exercising that competence, Member States must comply with EU law.[9] In general, the CJEU regards the fact that by losing the nationality of a Member State, the applicant would also lose their status as a citizen of the Union and, consequently, the rights attached to that status, to be an important criterion. That was the situation in the *Rottmann* case, and it could therefore be assumed that the case fell, by its nature and consequences, within the ambit of EU law.[10] If it involves a citizen of the Union, such a case must then be subject to judicial review from the point of view of EU law. That review is limited to the extent to which it affects rights conferred and protected by the legal order of the Union.[11]

For a decision to withdraw nationality, where such withdrawal would result in loss of the status of citizen of the Union, the CJEU, in its review, requires that such a decision pursue an objective of public interest. In the present case, the CJEU considers that the loss of nationality acquired by fraud can

7 Judgment of the CJEU of 2 March 2010, *Rottmann*, Case C-135/08.
8 Ibid., para. 39.
9 Ibid., para. 45.
10 Ibid., para. 42.
11 Ibid., para. 48.

legitimately be justified by the Member State's desire to protect the unique relationship of solidarity and loyalty between itself and its nationals, as well as the reciprocity of rights and obligations which underlie the relationship based on nationality.[12] Given that the loss of citizenship will lead to the loss of the status of citizen of the Union, it is for the national court to verify compliance with the principle of proportionality, not only in relation to national law but also as regards the consequences for the situation of the person concerned in the light of EU law.[13]

2.2 Individual Examination of the Consequences of the Loss of EU Citizenship

The competence of the EU to decide, to a limited extent, on questions of citizenship was subsequently developed in principle in the *Tjebbes* judgment.[14] That was an examination of the general condition of national law for the automatic loss of Dutch nationality in the event of an interruption of residence in the Netherlands for a period exceeding 10 years. The CJEU reiterated that the desire of Member States to protect the unique relationship of solidarity and loyalty is legitimate. The aim of the Dutch legislation was to avoid the undesirable effects of a situation where a person has several nationalities and to exclude situations where a person who no longer has any connection with the Netherlands has Dutch nationality. According to the CJEU, the requirement of the interruption of residence in the Netherlands for 10 years could be regarded as a criterion reflecting the absence of a genuine link between the citizen and the Member State. EU law did not, in principle, preclude the loss of nationality on grounds of public interest, even though the person concerned would also lose their status as a citizen of the Union.[15] In the Advocate General's view, loss of nationality pursues an objective of public interest if it is appropriate for attaining the objective pursued. At the same time, deprivation of nationality cannot be considered an arbitrary act.[16]

12 Judgment of the CJEU of 2 March 2010, *Rottmann*, Case C-135/08, para. 51–52.
13 Ibid., para. 55.
14 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17.
15 Ibid., para. 35–39.
16 Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 51.

The CJEU relied on the legitimacy requirement adopted in *Rottmann*, where it was also established that it is legitimate for a State to seek to protect the special relationship between itself and its citizens.[17] The *Tjebbes* decision confirmed that this legitimate aim need not be individualised. This had already been said in *Rottmann*, but was made explicit in the *Tjebbes* decision. The CJEU has adopted a broad range of legitimate aims to justify the limitation of Article 20 of the TFEU. The legitimate aim constructed in *Rottmann* is therefore still valid yet is much broader.[18] The CJEU has not commented on the criteria it uses to examinate the legitimacy of the public interest. By uncritically accepting the most controversial and problematic principles of national law, the CJEU has only indicated that the standards are very low, while not even explaining what they are. It did not mention what might be considered the essential ingredients of the legitimacy test, such as appropriateness or lack of arbitrariness, nor did it consider whether the relevant public interest objectives were in fact "worthy of protection" at the cost of precarity of EU citizenship.[19]

The CJEU differed from the Advocate General's opinion in several parts of its judgment. In his opinion, the Advocate General considered that the proportionality review must be carried out, in particular, in the light of the grounds for the withdrawal of nationality and of EU citizenship. It is not required that all the circumstances of each case be taken into consideration in the examination of the proportionality of a national measure withdrawing nationality from an individual so, unlike the CJEU, he opted for an abstract proportionality test.[20] Under the pretext of a request for

17 Judgment of the CJEU of 2 March 2010, *Rottmann*, Case C-135/08, para. 51; Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 33.

18 EIJKEN, H. van. Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and others* v *Minister van Buitenlandske Zaken*, ECLI:EU:C:2019:189. *European Constitutional Review Law* [online]. 2019, Vol. 15, no. 4, p. 722 [cit. 18. 5. 2023]. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/tjebbes-in-wonderland-on-european-citizenship-nationality-and-fundamental-rights-ecj-12-march-2019-case-c22117-mg-tjebbes-and-others-v-minister-van-buitenlandse-zaken-eclieuc2019189/BAB30839651B104E2717BD6B2629F528

19 SWINDER, K. Legitimizing precarity of EU citizenship: Tjebbes. *Common Market Review Law* [online]. 2020, Vol. 57, no. 4, p. 1173 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020719

20 Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 86–87.

an examination of observance of the principle of proportionality, a national court cannot be required to dismiss the grounds for loss of nationality chosen by the national legislature in accordance with international law and without conflicting with EU law. A contrary conclusion would lead to a breach of the Union's obligation to respect the national identity of the Member States.[21] In addition, as a result, the national court would have to determine, without specific guidance from the national legislature, the relevant criteria, their scope and their relative importance.[22] Requiring national courts to do so would expose individuals to situations of legal uncertainty.[23]

The CJEU, unlike the Advocate General, has concluded that it is incompatible with EU law if the national legislation does not make it possible to allow an individual examination of the consequences of that loss for the persons concerned at any time.[24] The CJEU takes into account the fact that loss of citizenship can be prevented, but does not specify whether this is an essential requirement. The failure to take into account the predictability of the loss for the persons affected was rightfully one of the main points of criticism of the *Tjebbes* judgment by scholars.[25]

According to the CJEU, in a situation such as that at issue in the main proceedings, the national authorities should have been able to examine the consequences of the loss and, where appropriate, provide for the restoration of citizenship with *ex tunc* effects.[26] As regards the circumstances of the individual situation of the person concerned, which could be relevant to the examination to be made by the competent national authorities and the national courts in the case, it should be mentioned in particular that, as a result of the loss of Dutch nationality and of his status as a citizen of the Union by law, the person concerned would be subject to restrictions on the exercise of his right of free movement and residence

21 Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 106–107.
22 Ibid., para. 110.
23 Ibid., para. 113.
24 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 41.
25 SWINDER, K. Legitimizing precarity of EU citizenship: Tjebbes. *Common Market Review Law* [online]. 2020, Vol. 57, no. 4, p. 1173 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020719
26 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 42.

within the territory of the Member States, which may in turn entail particular difficulties in the event of subsequent visits to the Netherlands or another Member State to maintain genuine and regular ties with family members, to pursue a professional activity or to take the necessary steps to pursue such an activity in those States.[27]

The CJEU, unlike the Advocate General, has diverged from the existing case-law on the abstract test of proportionality, which it has so far developed through social rights case-law.[28] The CJEU has always taken a rather restrictive approach in the field of social rights. In addition, mention may be made of the *Delvigne* case[29], which also involved a breach of Article 20 of the TFEU and on which the Advocate General based his opinion in *Tjebbes*. In the opinion in *Delvigne*, which concerned the denial of voting rights to prisoners, the Advocate General argued that it was not necessary to examine the individual, concrete circumstances, but merely whether the system of refusing voting rights to prisoners serving long sentences as such leads to disproportionate effects. The CJEU went even further in *Tjebbes* than in *Delvigne* and said that there should be an ancillary possibility for review. The CJEU did not impose a condition of mere negative effect in the proportionality test, but the person concerned would be seriously restricted in the normal development of their family and professional life. The question that has not yet been answered is whether there is a time limit to challenge the loss of nationality by raising the argument that the loss would constitute a serious threat to private or professional life. The moment of review is limited to the moment of loss, not the moment of discovery of the loss.[30]

27 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 46.

28 Judgment of the CJEU of 11 November 2014, *Dano*, Case C-333/13; Judgment of 15 September 2015, *Alimanovic*, Case C-67/14; Judgment of 8 April 2016, *Garcia-Nieto*, Case C-299/14.

29 Judgment of the CJEU of 6 October 2015, *Delvigne*, Case C-650/13.

30 EIJKEN, H. van. Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and others* v *Minister van Buitenlandske Zaken*, ECLI:EU:C:2019:189. *European Constitutional Review Law* [online]. 2019, Vol. 15, no. 4, pp. 724–725 [cit. 18. 5. 2023]. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/tjebbes-in-wonderland-on-european-citizenship-nationality-and-fundamental-rights-ecj-12-march-2019-case-c22117-mg-tjebbes-and-others-v-minister-van-buitenlandse-zaken-eclieuc2019189/BAB30839651B104E2717BD6B2629F528

The CJEU did not explain how the requirement to examine individual circumstances could work with an automatic loss system. Indeed, the General Advocate resolved this dilemma by stating that this examination could not be required. Interestingly, the CJEU did not even address the question of how the loss of citizenship contributes to its objective. The relevant factors were the development of family and professional life, compliance with fundamental rights, the fact that the citizenship of a third State cannot be renounced, etc. The Advocate General considered the examination of the existence of a genuine link to be particularly dangerous because of the division of competences between the EU and the Member States. The CJEU avoided mentioning the existence of a genuine link between these factors. This omission was very significant.[31] As *Swinder* states: *"By not objecting against the automatic nature of the loss of nationality, though insisting on the possibility of individually testing EU proportionality and restoring lost nationalities, the judgment results in a paradox. It almost looks like a failure to understand the mechanism of an automatic loss of a nationality."*[32] As a result, *Tjebbes* issued in mixed message for Member States. Formally, it sanctions automatic loss of nationality. Subsequently, it requires an individualised EU proportionality test and the possibility of restoration of lost nationality *ex tunc*. In practice, this renders the automatic loss of Member State nationality that results in the loss of EU citizenship impossible.[33] By labelling EU citizenship as a "fundamental status", the CJEU created an expectation that this status is stable and reliable. The *Tjebbes* decision confronted those expectations. In that decision, the CJEU decided to take the relatively safe route of developing the principle of proportionality. Although the development of this principle can be seen as a major contribution to the jurisprudence, there are many more significant opportunities that the CJEU missed in its decision.[34]

31 SWINDER, K. Legitimizing precarity of EU citizenship: Tjebbes. *Common Market Review Law* [online]. 2020, Vol. 57, no. 4, pp. 1174–1175 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020719

32 Ibid., p. 1177.

33 Ibid., p. 1181.

34 Ibid., p. 1163.

In summary, the CJEU stated that the person concerned must be seriously restricted in the normal development of their family and professional life. The CJEU did not comment on whether the requirement of 10 years of residence outside the EU is adequate to prove the absence of a genuine link with the nationals. It applied a less intrusive test, balancing the interests of the Member State in defining its own nationals with the consequences of the loss of nationality for the person concerned. In this respect, the CJEU made sure that the Union's powers were not exceeded. It did not review the time limit of 10 years.[35] For this, at the very least, it can be credited. It leaves sufficient room for discretion to the Member States in the sensitive area of citizenship. Yet, at the same time, it requires an individual proportionality test to protect the rights of a Union citizen. The judgment is not surprising, but reflects the CJEU's broad jurisdiction in sensitive cases.[36]

2.3 Application of the Principle of Proportionality

The most recent case already decided in this area is the *Wiener Landesregierung* decision.[37] At dispute was the Austrian government's decision to revoke a promise to grant Austrian citizenship to an Estonian citizen who had committed some administrative offences. However, the Estonian citizen had previously relinquished her Estonian citizenship on the basis of the requirement laid down by Austrian law for acquiring Austrian citizenship. A refusal of her citizenship application would result in her not only losing her status as a citizen of the Union but would actually make her stateless.

The CJEU has ruled that any loss of nationality, however temporary, also implies the loss of the status of Union citizen, so national authorities should ensure that the loss of original citizenship does not occur until the date

35 EIJKEN, H. van. Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and others* v *Minister van Buitenlandske Zaken*, ECLI:EU:C:2019:189. *European Constitutional Review Law* [online]. 2019, Vol. 15, no. 4, p. 725 [cit. 18. 5. 2023]. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/tjebbes-in-wonderland-on-european-citizenship-nationality-and-fundamental-rights-ecj-12-march-2019-case-c22117-mg-tjebbes-and-others-v-minister-van-buitenlandse-zaken-eclieuc2019189/BAB30839651B104E2717BD6B2629F528

36 Ibid., pp. 729–730.

37 Judgment of the CJEU of 18 January 2022, *Wiener Landesregierung*, Case C-118/20.

on which the person concerned acquires another citizenship. In essence, the CJEU was thus addressing itself to Estonia which, in its view, was under an obligation to ensure that Article 20 of the TFEU had a useful effect. The decision must be taken only on the basis of legitimate grounds and in compliance with the principle of proportionality. The CJEU reiterated that it is legitimate for Member States to seek to protect the special relationship of solidarity and good faith between them and their nationals. In relation to the Austrian legislation, the CJEU noted that the purpose of the Austrian legislation was to avoid one person having multiple nationalities.[38] The revocation of the assurance as to grant of nationality pursued the public interest of public order and security. The national courts were obliged to verify the principle of proportionality as regards the consequences of the loss of citizenship for the person concerned and, where applicable, his family members in the light of EU law. The consequences of the loss must not disproportionately impact the development of family and professional life. The Austrian authorities were under an obligation to verify the gravity of the offence as well as the possibility for the person to recover their original nationality.[39] A Member State cannot be prevented from revoking assurance as to the granting of nationality merely on the grounds that the person concerned who no longer fulfils the conditions required for acquisition, can only with difficulty recover their original nationality.[40] Although breaches of public order and security may justify the definitive loss of the status of citizen of the Union, in the light of significant consequences for the person concerned the loss does not appear proportionate to the gravity of the offences. The national authorities are required to ascertain whether the decision to revoke the assurance as to the granting of nationality is compatible with the principle of proportionality in the light of its consequences.[41]

This decision can be seen as another link in the citizenship saga for several reasons. First of all, unlike in previous cases, the CJEU commented

38 Judgment of the CJEU of 18 January 2022, *Wiener Landesregierung*, Case C-118/20, para. 48–53.
39 Ibid., para. 57–60.
40 Ibid., para. 63.
41 Ibid., para. 71–74.

on the acquisition of citizenship and not on the loss of citizenship. For the first time, the CJEU not only reminded the national authorities of the general criteria laid down in previous cases, but also performed its own examination. The CJEU disagreed with the Advocate General's opinion on the point concerning the responsibility of the Estonian authorities. While the Advocate General concluded that the Estonian authorities could not be blamed for granting the request for withdrawal of citizenship, the CJEU considered that they should have made other choices, such as ensuring that the decision to renounce nationality would take effect only after the new nationality had been acquired.[42]

Although the CJEU recalled that it was up to the national authorities to verify compliance with the principle of proportionality in the light of the circumstances of the case, it itself embarked on an extensive and in-depth analysis of the facts of the case. The tension is even stronger if we take into account the opinion of the Advocate General in *Tjebbes*, in particular paragraph 88 of the Opinion. On paper, the CJEU confirmed the responsibility of the Member States to examine the proportionality of their own measures in relation to the right to citizenship. In practice, the CJEU has embarked on an unnecessarily detailed analysis which indicates its aversion to the national rules in question. In essence, the CJEU implicitly confirmed that, although citizenship issues are in principle governed by national law, as far as cases concerning the protection of EU citizenship rights are concerned, there is simply no nucleus of sovereignty that the Member States can invoke, as such, against the EU.[43]

Also in this case, the CJEU laid down the requirement to take account of the fundamental rights in the Charter of Fundamental Rights of the EU by means of a proportionality test, i.e., taking into account the concrete consequences of the loss of status of citizen of the Union. However, the CJEU does not mention how these consequences are manifested. Nor

42 GAMBARDELLA, I. JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship. *European Papers Law* [online]. 2022, Vol. 7, no. 1, pp. 399–409 [cit. 18. 5. 2023]. Available at: https://www.europeanpapers.eu/en/europeanforum/jy-wiener-landesregierung-another-stone-nationality-citizenship

43 BELLENGHI, G. The Court of Justice in JY v. Wiener Landesregierung: Could we expect more? *Maastricht Journal of European and Comparative Law* [online]. 3. 3. 2023 [cit. 18. 5. 2023]. Available at: https://journals.sagepub.com/doi/10.1177/1023263X231161017

does the Advocate General, with one exception, namely that the person concerned is a stateless person – and this can trigger difficulties. The CJEU lags far behind the European Court of Human Rights in terms of taking account of fundamental rights. The failure of the CJEU in this respect uncovers its real motive behind the postulate of weighing the consequences in a fundamental rights examination: naked protection of Union citizenship itself, as a status, and its dogmatic restoration, which is a primary interest. The fundamental rights argument serves only as a lever to achieve the goal.[44]

3 The Facts of Case C-689/21

In the present case, the applicant was born on 5 October 1992 in the United States of America to a Danish mother and an American father. She had American and Danish nationality from birth. She has never lived in Denmark and has no family there. On 17 November 2014, she applied for a certificate of retention of her Danish nationality. At the time of her application, the applicant was already 22 years old. The applicant claimed that she had spent a maximum of 44 weeks in Denmark before reaching the age of 22. After the age of 22, the applicant had spent five weeks in Denmark and in 2015 she had been a member of the Danish national basketball team.

This application was decided on 31 January 2017. The applicant was informed that, pursuant to Article 8(1), first sentence of the Nationality Act[45], she ceased to be a Danish citizen upon reaching the age of 22. No exception could be made in the applicant's case as she had applied only after she had attained the age of 22. It was mentioned in the reasoning of this decision that the applicant had never been resident in Denmark and had never lived

44 WEBBER, F. Competence Fusion Through Citizenship. The Federal Logic in the CJEU's Jurisprudence on Union Citizenship. *European Public Law* [online]. 2022, Vol. 28, no. 3, pp. 412–413 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/European+Public+Law/28.1/EURO2022021

45 *"A person born abroad who has never lived in Denmark and who has also not resided there in circumstances indicating a close attachment to Denmark shall lose his or her Danish nationality upon reaching the age of 22, unless he or she would thereby become stateless. The Minister for Refugees, Migrants and Integration, or the person whom he or she authorises for that purpose, may, however, upon application submitted before that date, allow nationality to be retained."* – Paragraph 8(1) of the Lov no. 422 om dansk indfødsret, lovbekendtgørelse (Law on Danish nationality, Consolidating Decree No 422) of 7 June 2004.

there. There is therefore no indication that there is a close attachment to that Member State, in which she spent a maximum of 44 weeks in total.

The applicant brought an action for annulment of that decision and for the case to be remitted for reconsideration. The case was referred to the High Court of Eastern Denmark, which decided to refer the following questions to the CJEU for a preliminary ruling:

"Does Article 20 of the TFEU, in conjunction with Article 7 of the EU Charter of Fundamental Rights, preclude legislation of a Member State, such as that at issue in the main proceedings, under which citizenship of that Member State is, in principle, lost by operation of law on reaching the age of 22 in the case of persons born outside that Member State who have never lived in that Member State and who have also not resided there in circumstances that indicate a close attachment to that Member State, with the result that persons who do not also have citizenship of another Member State are deprived of their status as Union citizens and of the rights attaching to that status, taking into account that it follows from the legislation at issue in the main proceedings that:

A. a close attachment to the Member State is presumed to exist, in particular, after a total of one year's residence in that Member State,

B. if an application to retain citizenship is submitted before the person reaches the age of 22, authorisation to retain citizenship of the Member State under less stringent conditions may be obtained and for that purpose the competent authorities must examine the consequences of loss of citizenship, and

C. lost citizenship can be recovered after the person concerned reaches the age of 22 only by means of naturalisation, to which a number of requirements are attached, including that of uninterrupted residence in the Member State for a longer duration, although the period of residence may be somewhat shortened for former nationals of that Member State?"

The applicant argues that the provisions of the Danish Nationality Act are contrary to Article 20 of the TFEU in conjunction with Article 7 of the Charter of Fundamental Rights of the EU. In the applicant's view, the automatic loss of citizenship without exception is disproportionate, even though it pursues a legitimate and objective aim, namely the preservation of a genuine link and the protection of a special relationship of solidarity and good faith between the Member State and its nationals. She sees a problem

in the fact that Danish citizenship can only be restored under the general citizenship regime and, moreover, that the restoration of citizenship does not take place *ex tunc*.

The Ministry claims that the provision does not breach EU rules. In this respect, it states that it is justified by legitimate aims and proportionality. This is underlined by the wide margin of discretion. The Danish legislature is of the opinion that foreign-born persons who have not lived in Denmark gradually lose their ties of good faith and solidarity to Denmark as they grow up. The Danish law sets a reasonable and proportionate age limit of 22 years. In addition, the determining authority may, on the basis of an application made before the expiry of the time limit, allow nationality to be retained on the basis of a specific examination. There is therefore a case-by-case examination of the consequences of the loss of Danish nationality and therefore of the loss of EU citizenship.

In Denmark, the provision was amended in 2020 following the CJEU's decision in *Tjebbes*. According to the *travaux préparatoires*, it was newly introduced that the Ministry should proceed to an individual examination of the consequences of the loss of Danish nationality when considering applications for a certificate. In practice, factors connecting the applicant to other Member States must also be taken into consideration. With regard to the application for retention, even after the amendment the Ministry still considers that the Danish system allows for an individual examination, as required by the CJEU, and does not appear to require that such an examination must be allowed at any time. According to the Ministry, therefore, there is nothing to prevent the maintenance of the Danish provision at issue.[46]

In addition to the Danish government, the French government and the European Commission also joined the proceedings and submitted written observations. At the hearing held on 4 October 2022, all participants were present, with the exception of the French government. On 26 January 2023, the opinion of AG *Szpunar* was delivered. The date of delivery of the CJEU's judgment is not yet known.

46 Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the CJEU.

4 Opinion of the Advocate General

On 26 January 2023, the opinion of AG Szpunar was delivered. He divided his analysis into three parts. In the first, he dealt with relevant aspects of the dispute in the main proceedings. In the second, he summarised the main rules arising from the case-law to date. And in the third part, he applied the relevant case-law to the subject-matter of the proceedings.

4.1 Relevant Aspects of the Dispute in the Main Proceedings

In the first part, the Advocate General summarises that the provision of the Danish law in question provides for the loss of Danish citizenship upon reaching the age of 22 for any foreign-born national who has never lived or resided in Denmark in such a way as to imply a close attachment to Denmark. An exception is granted to nationals who apply to retain Danish nationality before reaching the age of 22. A sufficiently close attachment is presumed if the period of residence in Denmark has lasted at least 1 year. In the case of shorter stays, the conditions for close attachment are stricter and must be proved by the applicant. Other aspects, such as the total duration of residence in Denmark, the number of stays, the duration of these stays and knowledge of the language are also taken into account for the granting of the exception.

The way the application is processed varies depending on whether it is made when the applicant is under the age of 21, between 21 and 22, or over 22. In the first case, the authority responsible only issues a certificate of nationality, meaning that the applicant has nationality. It is not a certificate of retention of nationality. The retention of nationality must be assessed as closely as possible to the age of 22, so that in the second case it is really a processing of an application for retention of nationality.

This Danish practice continued despite the *Tjebbes* judgment, which was delivered after the decision in the main proceedings. However, the national provision has been amended. Henceforth, when dealing with an application made before the person attains the age of 22, the competent authority

must take a number of additional factors into account in order to make an examination of the individual impacts of the loss.[47]

4.2 Case-Law of the CJEU on the Loss of EU Citizenship

In this chapter, we refer to chapter 2 of the paper which dealt with general principles and case-law, as it is a broader analysis of what the Advocate General was referring to.

4.3 Application of the Case-Law

In his Opinion, the Advocate General stated that the applicant was in risk of losing her status as a citizen of the Union in the original proceedings. That loss falls, by its nature and consequences, within the scope of EU law. Denmark must therefore comply with EU law in the exercise of its nationality jurisdiction, and the situation is subject to review in the light of that law. The question therefore arises whether the loss of nationality is in accordance with EU law. The Advocate General points out that, in order to answer in the affirmative, the legislation must pursue a reason of public interest, which means that it must be capable of achieving its objective and that the loss must not be regarded as an arbitrary act.[48]

4.3.1 Examination of Whether the Public Interest Aim Pursued by the Rules on Loss of Danish Nationality Is Legitimate

According to the case-law of the CJEU, it is legitimate for a State to wish to protect the special relationship of solidarity and good faith between it and its nationals, as well as the reciprocity of rights and obligations. Moreover, in the *Tjebbes* decision, the CJEU was able to specify that the criterion of a sufficiently long stay outside the territory of the Member State may be regarded as an indication that there is no such genuine link. The aim of the Danish legislation is then to prevent the transmission of Danish nationality over generations to persons who no longer have a genuine link with Denmark. Foreign-born persons who have not lived in Denmark lose their solidarity and good faith with Denmark. In those circumstances,

47 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 19–27.
48 Ibid., para. 48–51.

the Advocate General is of the opinion that the Danish legislation pursues a legitimate aim. In the Advocate General's view, it is legitimate in principle for a Member State to decide that a period of residence of less than one year does not indicate a genuine link with the Member State and, further, to fix a certain age for the purpose of examining whether the conditions of nationality are fulfilled. The Advocate General was of the opinion that EU law does not in principle preclude a Member State from providing for the loss of nationality for reasons of public interest, even where that loss results in the loss of status of citizen of the Union.[49] The Advocate General also raised an issue which goes beyond that of the referring court, namely whether a criterion for loss of nationality based on the fact that the Danish national is resident outside Denmark and which does not distinguish between residence in the Union and residence in a third State can be regarded as a legitimate criterion.[50] Although this is clearly an interesting issue, the author does not address it in this paper as it is not the subject of our analysis. In brief, however, the author agrees with the Advocate General's (and the Commission's) view that it may be highly problematic if Danish legislation does not distinguish between residence in the territory of another Member State and in a third State from the point of view of EU law because the results of the loss are importantly different. This problem was not addressed in *Tjebbes* since the national legislation there made that distinction. It would therefore be helpful if the CJEU were to comment on that point in the future if such a case appears in Luxembourg.

4.3.2 Review of the Proportionality of the National Legislation at Issue Having Regard to the Consequences It Entails for the Person Concerned

The Advocate General doubts compatibility with the principle of proportionality stemming from the constitutive elements of national legislation, namely the absence of an individual examination of the consequences of the loss of nationality and the *ex tunc* retention of citizenship.[51] The person affected by the loss of nationality never had

49 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 55–59.
50 Ibid., para. 60–66.
51 Ibid., para. 67.

the possibility of an individual examination. An individual assessment is only possible if the application is submitted between the 21st and 22nd year of age, which is a very short period. If the application is submitted after the age of 22, the application is automatically rejected, and the person loses Danish nationality as well as their status as a citizen of the Union, and does not have the possibility to benefit from an individual examination of the consequences of this loss at any time.[52]

In implementing the conclusions arising from *Tjebbes*, the Danish government considered that the judgment did not impose the systematic possibility of individual examination. In its view, the judgment does not imply an obligation to allow individual examination whenever the person concerned so wishes. The Danish government considers that it is sufficient to carry out an individual examination before the age of 22.[53] According to the Advocate General, such a conclusion cannot stand and is based on an incorrect interpretation of the judgment. In his view, it is contrary to the national authorities' obligation to respect the principle of proportionality and to carry out an individual examination of the consequences of the loss of status from the point of view of EU law, in compliance with that principle. That would deprive Article 20 of the TFEU of its effectiveness.[54]

On the contrary, it can be correctly inferred from the *Tjebbes* judgment that loss of nationality is incompatible with the principle of proportionality if national law does not allow an individual examination of the consequences of that loss at any time. The Danish authorities are not in a position to examine, at any time, the consequences of the loss for all nationals who apply for retention after the age of 22. Those nationals never have the possibility to benefit from an individual examination of the proportionality of the consequences of that loss in terms of EU law. The absence of such an examination is not only automatic but also systematic.[55] The complete and systematic absence of an individual examination for persons who have applied after the age of 22 means it is not possible to achieve the objective pursued by the obligation to carry out an examination of proportionality,

52 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 69.
53 Ibid., para. 71–72.
54 Ibid., para. 74–76.
55 Ibid., para. 78–79.

namely to allow the retention of nationality. Deprivation is an arbitrary and inconsistent act.[56]

The Advocate General then gave, as illustration, the example of two sisters, one of whom was born in Denmark and subsequently moved to the United States. The other sister was then born to Danish parents in the United States. Thus, the first sister would automatically retain her Danish nationality and the second, like the applicant in the present case, would lose her nationality if she did not apply for a waiver before the age of 22, without having the opportunity to challenge such loss. At the hearing, the applicant stated that her siblings had retained their Danish nationality because they had applied on time. The applicant was thus the only member of her family who lost her Danish nationality and her status as a citizen of the Union. It should be recalled that an individual examination of the situation of the person concerned requires an examination of the situation of their family members in order to determine whether the loss of citizenship has consequences which disproportionately affect their normal life.[57]

The Advocate General considers that, irrespective of the legitimacy of the national legislature's decision, the national authorities must be able to examine individually any loss of nationality which results in the loss of EU citizenship. In the present case, the question arises as to which period should be taken into account for such an examination in the context of the proportionality test. As the Commission has rightly pointed out, such an examination could be made in the light of the situation of the person concerned at the age of 22. If it could be carried out even if the person made the application after the age of 22, this would, according to the Advocate General, be in accordance with the principle of legal certainty and proportionality. Even if the examination was carried out at the age of 22, it should be possible to carry out a new examination at a later date if new facts arise.[58]

With regard to the possibility of recovery of nationality *ex tunc,* the Advocate General stated that Danish legislation was again not in line with

56 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 83.
57 Ibid., para. 84–86.
58 Ibid., para. 87.

the requirements of the *Tjebbes* judgment. According to Danish legislation, nationality can be recovered in the context of a general naturalisation procedure subject to a number of requirements, including residence in Denmark at the time of application and nine years' continuous residence in Denmark.[59] Danish legislation is not in accordance with the requirements of EU law as interpreted by the CJEU in *Tjebbes*. Even if the general requirements were relaxed, this possibility for recovering nationality would not be sufficient to establish compliance with the principle of proportionality under Article 20 of the TFEU.[60]

5 Critique of Past Developments in the Case-Law and Prognosis of Future Judgment

In the first part, one cannot but agree with the Advocate General.[61] In the light of the criteria laid down by the case-law of the CJEU since the *Rottmann* judgment, there can be no dispute at all that the situation that is the subject of the main proceedings falls, by its nature and consequences, within the scope of EU law. It is clear that by losing her Danish citizenship, the applicant also loses her status as a citizen of the EU and the rights attached to it, and the dispute therefore falls, by its nature and consequences, within the ambit of EU law.[62]

The second question concerning the legitimacy of the measure cannot be disagreed with either.[63] The author agrees with the Advocate General that the case-law has established the legitimacy of the State's efforts to protect the special relationship between itself and its nationals, as well as the reciprocity of rights and obligations.[64] The Danish rule excludes from that relationship persons who have not lived or resided in Denmark in circumstances that would indicate a close connection. The aim of this regulation is to prevent Danish nationality being passed on from one

59 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 89–91.
60 Ibid., para. 94.
61 In particular, ibid., para. 49.
62 Judgment of the CJEU of 2 March 2010, *Rottmann*, Case C-135/08, para. 42.
63 In particular, opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 55.
64 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 36.

generation to the next, to people who have no connection with Denmark. Such a criterion can be regarded, according to the case-law, as sufficiently reflecting the absence of a genuine link.

It is possible to partly agree with the Advocate General in the initial part of his criticism of the provision through the proportionality test.[65] If Denmark explicitly required an application to be made between the 21st and 22nd year, otherwise it will either be just a confirmation of nationality or an automatic refusal of the application for retention, and thus all individual examinations must take place within one year, this could be criticised. As the Advocate General points out, the argument that the examination should be made as close as possible to the age of 22 does not appear to be persuasive. However, Denmark has for some reason chosen 22 years as the decisive age limit, and the CJEU has recognised Member States' discretion to choose that age limit. The Danish government then clarified this short period of one year at the hearing by saying that the review should be carried out as close as possible to the age of 22 because, for the Danish legislator, this age limit is somehow the most relevant for the examination. The author believes that the only possible criticism at this point can be made about the period of one year. Denmark cannot be denied the power to choose the age of 22, but if that age is chosen, the examination should not, as a matter of proportionality, be limited to one year before that age since the aim can be accomplished at the same point using a broader time period. The author therefore sees no justification why an application cannot be made by, for example, a person aged 15 who successfully demonstrates a genuine link with Denmark and thus retains their nationality. The aims of maintaining a genuine link between the State and the citizen, as well as preventing the transmission of citizenship to generations without a closer link to the Member State, would remain unaffected. In any case, care must be taken not to overstep the boundaries that the EU has in this area. The EU is still walking a fine line between the interests of the Member States and the protection of citizens' rights over the discretion of the Member States. The CJEU should confine itself to a mere examination of the consequences in EU law of loss of citizenship, thus

65 In particular, opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 69.

avoiding the surely tempting examination of the proportionality of national measures and thus of the means by which the genuine link is maintained. Thus, in its judgment, the CJEU should, as it did in *Tjebbes,* merely examine the legitimacy of maintaining a genuine link with a Member State, without examining whether the defined limit actually achieves it.[66] The review should be limited to determining whether the national measure in question, which has as direct consequence the loss of citizenship of the Union, is suitable for attaining the public-interest objective it pursues, and whether that objective cannot be attained by less restrictive measures.[67] The review of proportionality must be carried out on the basis of the grounds for the withdrawal of nationality and of citizenship of the Union.[68] Applying these conclusions to the subject of the main proceedings, the Danish legislature first of all applies the Danish Nationality Act to persons who were born abroad, have not resided in Denmark and do not have a close connection with Denmark. If such persons apply to retain their nationality before attaining the age of 22, the Danish legislature considered that they intended to retain a genuine link with Denmark. If, on the contrary, they do not do so, it is presumed that that relationship has ceased. Such conditions do not appear to go beyond what is necessary to achieve the aim pursued by the Danish legislature.[69]

We then turn to the Section where the Advocate General addresses the failure to meet the requirement of an individual and concrete proportionality test. The author considers that already in *Tjebbes* the CJEU should have followed the Advocate General's opinion, which correctly outlined the risk of adopting a specific proportionality test.[70] However, in the *Tjebbes* decision, the CJEU had already decided to boldly abandon that suggestion and to adopt a proportionality test that was the opposite

66 COUTTS, S. Bold and Thoughtful: The Court of Justice intervenes in nationality law Case C-221/17 Tjebbes. *European Law Blog Law* [online]. 25. 3. 2019 [cit. 27. 5. 2023]. Available at: https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/

67 Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 82.

68 Ibid., para. 86.

69 *Ad analogum,* ibid., para. 97–100.

70 In particular, ibid., para. 67, 82, 91, 105, 110.

in nature: individualised and concrete. Contrary to the Advocate General's opinion, which was supported by previous case-law in different cases[71], the CJEU made the choice of a concrete proportionality test without further explanation or elaboration in paragraph 41 of the *Tjebbes* judgment. In a single sentence, it thus introduced an individualised proportionality test to be applied at any time. The author understands why it is important for the CJEU to ensure that Member States have the possibility of individual examination. It is of course desirable to carry out such an examination, as it will ensure that only those who have a genuine link to a Member State will have nationality and the status of Union citizen, thus ensuring reciprocity of rights and obligations. What the author questions, however, is the requirement that a Member State should examine individual circumstances at any time. Nonetheless, such a conclusion unfortunately follows explicitly from the *Tjebbes* judgment, so cannot be doubted. In view of its explicit expression, it is difficult to accept the view defended by the Danish government. The latter has already changed its regulation in an attempt to comply with the requirement of *Tjebbes*. However, the phrase "at any time"[72] in the judgment cannot be interpreted as meaning that the individual circumstances are to be considered at any time up to the end of the time limit set for the application.[73] There can be no doubt that by "at any time" the CJEU meant absolutely at any time. In the author's view, such an individual examination as the CJEU requires of a Member State is without justification, however the retention of the exclusive competence of the Member States to lay down rules on the acquisition and loss of nationality loses its factual meaning. The intention that this measure of review of individual circumstances was intended to pursue at any time, could be achieved by means of procedural rules on the waiver of time limits. However, these are clearly not subject to EU review.

The Advocate General did not address in any way the fact that, although the applicant's application was rejected for being late, the Danish authorities

71 In particular, judgment of the CJEU of 6 October 2015, *Delvigne*, Case C-650/13. See also subsection 2.2 of this paper.

72 In English: "at any time", in Czech: "kdykoliv", in French: "à aucun moment".

73 It is interesting that in the Slovak version no expression of "any time" is mentioned. Instead, it uses "vôbec", which is closer to the Danish argument.

did also address the fact that the applicant had no connection with Denmark.[74] The author considers this to be quite significant. This is unlikely to be an omission, but a simple precaution not to exceed the CJEU's competence in the area of fact-finding. However, the author herself can afford to draw the following conclusions to justify her conclusions. Hence, although the applicant's application was rejected for late submission, Denmark also dealt with the existence of a genuine link to Denmark (length of residence in Denmark, etc.) for an unspecified reason. This should perhaps have been the subject of further explanation by the Danish government. Although the Danish government, in its submissions, "resists" individual examination of applications made after the age of 22, the rejection of the applicant's application refers to this. It would therefore be necessary to explain how the national legislation works in practice. Why did the Denish authorities make such a concrete examination if it should be irrelevant to the outcome of the proceedings? The author considers that the CJEU was in a unique position to request such an explanation at the oral hearing. However, unless the author is mistaken, it unfortunately did not do so.

In paragraph 79 of the Opinion, it is not clear to the author what the Advocate General meant by *"also for persons in a situation such as that of the applicant in the main proceedings"*. The author finds no justification that the applicant's situation is so specific as to justify a different approach.[75] The applicant has in no way alleged a genuine link with Denmark. The arguments on record do not suggest that she has a genuine link with Denmark. Did the Advocate General mean that she missed the deadline by only a few days? Or was it that the other family members retained their Danish nationality? Nor

74 *"On 17 November 2014, the applicant in the main proceedings applied to the Udlændinge – og Integrationsministeriet (Ministry of Immigration and Integration) for a certificate of retention of her Danish nationality after the age of 22. Based on the information in that application, the ministry found that she had spent a maximum period of 44 weeks in Denmark before her 22nd birthday. Furthermore, the applicant in the main proceedings stated that she had spent 5 weeks in Denmark after her 22nd birthday and had been a member of the Danish women's national basketball team in 2015. She also submitted that she had stayed in France for approximately 3 to 4 weeks in 2005. There was, however, nothing to indicate that, in addition to that, she had stayed in any other Member State of the European Union."* – Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 11.

75 Of course, the examination of the facts of the case is not relevant in the proceedings before the CJEU, and his approach in the *Wiener Landesregierung* could be seen as very dangerous. See also subsection 2.3 of this paper.

does the Advocate General explain how the consequences of the loss are disproportionate. At the hearing, it appeared that the CJEU did not "like" the primary reason that the applicant lost her nationality even though she missed the deadline by only a few days. This can, of course, be considered a "mitigating circumstance", but missing a deadline must always have consequences. If that were not the case, and if a missed deadline of "only a few days" were to be forgiven, then the whole institution of time limits would be meaningless.

With regard to the example of the applicant's two sisters[76] and other family members, the author also begs to differ with the Advocate General. In relation to the situation of the two sisters, the Danish legislation is highly problematic. The point is that sister AA was born in Denmark and therefore did not lose her Danish nationality when she reached the age of 22, even though she never subsequently lived in Denmark. Sister BB was born to Danish parents in the United States and therefore will lose her Danish citizenship if she does not apply by the age of 22. There is some reasoning behind this conclusion of the Danish legislator. Arguably, it can be concluded that for the legislator, sister AA had more prerequisites to have some attachment to Denmark, whereas sister BB had not spent a minute in Denmark. However, the reasonableness of this difference can legitimately be questioned. What the Advocate General leaves aside, however, is that if sister BB had applied for retention at the required age, her citizenship could have been retained. It cannot therefore be accepted that she had no opportunity to challenge the loss. The Advocate General does not address the argument that sister BB also had the opportunity to apply for retention within the time limit, and leaves aside the fact that, like AA, she held Danish nationality until the age of 22. If she had formed any attachment to Denmark during her lifetime, she would have rightly retained that citizenship. It would then, in the author's view, be beyond the scope of the present case to analyse sister AA's situation. The CJEU cannot criticise a Member State for not adopting the criterion of continuous residence in the territory of that Member State, but instead a different criterion. Also, the EU case-law[77] stated that the Member State

76 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 84.
77 Mostly, judgment of the CJEU of 8 March 2011, *Ruiz Zambrano*, Case C-34/09.

does not have to refrain from adopting a decision withdrawing nationality. It just means that the Member State has to ensure that the person concerned can continue to reside in the territory of the EU as a member of the family of citizens of the Union. There are two alternatives: either the adoption of a decision withdrawing nationality can be "neutralised" because of the loss of citizenship of the Union it entails, or the adoption of such a decision cannot be "neutralised" by the loss of citizenship of the Union.[78]

In another part of his opinion[79], the Advocate General recalls the national authority's obligation to examine the consequences of the loss of citizenship as to whether they disproportionately impact the normal development of the family and professional life of the person concerned in the light of EU law, while those consequences cannot be hypothetical or potential.[80] However, he does not develop that consideration further. It may certainly involve, in particular, difficulties connected with the exercise of the right of free movement and residence within the territory of a Member State and making it more difficult for family members to visit. In the applicant's case, however, it appears that she has not visited the Member States much and no longer has any family members in Denmark. For its judgment, the CJEU should be very cautious and not examine the facts of the case, and rather merely introduce some guidelines to explain its position on this question. Any further examination is up to the national authorities.

With regard to the conclusion in paragraph 87 concerning the point in time at which the individual examination is to be made, again the author cannot agree. The conclusion reached by the Advocate General completely excludes the purpose of the Danish provision. In fact, in that paragraph it says that the review is to be carried out at the age of 22, but also later if the application is made after the deadline, and is to be carried out again if new facts come to light. The age limit thus becomes meaningless.

78 See also Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 80.

79 Opinion of Advocate General Szpunar of 26 January 2023, Case C-689/21, para. 86.

80 Judgment of the CJEU of 12 March 2019, *Tjebbes and others*, Case C-221/17, para. 44; Judgment of the CJEU of 18 January 2022, *Wiener Landesregierung*, Case C-118/20, para. 59.

Finally, the Advocate General addresses the recovery of nationality *ex tunc*. In paragraph 93 of his Opinion, the Advocate General draws on paragraph 42 of the *Tjebbes* judgment and recalls that the national authorities have an obligation to consider the consequences of loss of nationality on an *ad hoc* basis, but also an obligation to ensure that the person concerned has their nationality recovered *ex tunc* if they apply for a travel or other document confirming their nationality. The CJEU has based this requirement on the established requirement of an occasional examination of individual circumstances. This was already criticised in *Tjebbes*, where the CJEU was accused of misunderstanding the mechanism of automatic loss of nationality, i.e., loss without a formal decision.[81]

Of course, no one knows how the CJEU will rule on the matter. However, according to the author, there is probably no doubt that the CJEU will follow the Advocate General's opinion, which takes a broad view of the Union's jurisdiction with reference to previous case-law. Given that it had adopted that broad conception in the *Tjebbes* case where, on the contrary, it had been advised not to do so by the Advocate General, it is hard to imagine that it would now depart from the Advocate General's opinion, which speaks "in favour of the Union". The author is of the opinion that the CJEU will take the same view as the Advocate General. It is likely to find that it has jurisdiction to rule on the case, since there is no doubt that the case at hand has a cross-border dimension. Similarly, the author considers that it will agree with the Advocate General that the national legislation pursues the public interest and that it is legitimate for the Member State to deprive persons of nationality where they no longer have any connection with it, thus preventing the transmission of Danish citizenship from one generation to the next without any genuine link to Denmark. When the CJEU proceeds to examine whether the proportionality test has been complied with, the author believes that it will follow the Advocate General's opinion and conclude that Article 20 of the TFEU, read in conjunction with Article 7 of the Charter of Fundamental Rights of the EU, precludes the adoption of the rules that Denmark has set out, since it is not possible to carry

81 SWINDER, K. Legitimizing precarity of EU citizenship: Tjebbes. *Common Market Review Law* [online]. 2020, Vol. 57, no. 4, p. 1177 [cit. 18. 5. 2023]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.4/COLA2020719

out an individual examination of the consequences of loss of nationality in terms of EU law at any time, and due to the requirement for reacquisition of nationality *ex tunc* if a person applies for a travel or other document. Given that this approach was already adopted by the CJEU in *Tjebbes*, where the Advocate General's opinion was contradictory, and then followed in *Wiener Landesregierung*, where the Advocate General's opinion already followed the *Tjebbes* conclusions, there is probably no possibility that the CJEU could diverge from those rules in the future. There is, of course, nothing in the Danish rules to suggest that such an individual examination could be carried out at any time and that recovery would then occur *ex tunc*, so the CJEU can hardly come into line with EU law if the rules are set up as they are – by previous case-law. Similarly, at the hearing, it was clear from the questions asked by the judges that the CJEU was giving the Danish government the opportunity to try to explain its position rather than finding it consistent. Although the author may disagree with the trend already established by the *Tjebbes* judgment, it is becoming established case-law. The CJEU has jumped on a train that can no longer be stopped.

6 Conclusion

The Advocate General's opinion on the automatic loss of Danish nationality is not surprising. Given that the Advocate General in *Wiener Landesregierung* was *Szpunar*, it is not surprising that he is advocating the same views in the current Danish case. Nor is it surprising that another Advocate General would go against the current trend, knowing that the CJEU will almost certainly not follow it. If the author was to conclude with a brief summary of the development of the case-law to date, she would probably describe it as follows. The *Tjebbes* judgment was derived from the *Rottmann* judgment. However, the reasoning that the CJEU derived there is considered by scholars to be flawed, as we discuss in particular in Section 2.2 of this paper.[82] In general, the conclusions set out by the Advocate General in his opinion in *Tjebbes* are more accepted. It correctly protects the national identity of the Member States and the allocation of the competences between

82 See also the Opinion of Advocate General Mengozzi of 12 July 2018, *Tjebbes and others*, Case C-221/17, para. 60–91.

the Member States and the EU. He did not base his opinion on the *Rottmann* judgment, but on the case-law adopted by the CJEU in relation to social rights. The author therefore considers that already in *Tjebbes* the CJEU should have been inspired by the Advocate General. Still, this was not done and a similar approach was followed in *Wiener Landesregierung*. There, both the CJEU and AG Szpunar had already drawn on the conclusions of the Tjebbes judgment. Moreover, the opinion of the Advocate General is very concrete and balances on the edge of an examination of the facts of the case for the purposes of examining the proportionality test, which should be subject to review by the Member State. In the present case, therefore, AG Szpunar is simply deciding in accordance with settled case-law. He may not even carry out as extreme a factual review as in *Wiener Landesregierung*. He certainly cannot be faulted for that. The case-law is developing in this risky direction. Even when the author is convinced that the CJEU will follow the Advocate General's position, it has the unique chance to establish the case-law in the right way, respecting national identities.

The nature of the proportionality test appears to be particularly problematic throughout the history of the CJEU's case-law on loss of citizenship. The contradiction was outlined in *Tjebbes*, where the Advocate General recommended that the nature of the test of proportionality should be abstractive in the respect of Member States' national identities. The CJEU disagreed with this and proceeded to a concrete test. This has been criticised by a number of scholars. Following these conclusions with the *Wiener Landesregierung* judgment, which did not invalidate these conclusions, has in fact led to a *de facto* stabilisation of the case-law. This is now to be furthered by the decision in the Danish case where, according to the Advocate General, Article 20 of the TFEU, read in conjunction with Article 7 of the Charter of Fundamental Rights of the EU, precludes the adoption of national legislation which provides for the automatic loss of Danish nationality by a person who was not born in Denmark and who did not apply to retain their nationality between the ages of 21 and 22. According to the Advocate General, that legislation does not satisfy the requirement of a concrete and individual proportionality test and the *ex tunc* recovery of nationality. If we deduce these requirements from the case-law of the CJEU, we must

agree with the Advocate General's opinion. However, the author's criticism is directed at the question of whether the existing case-law is correctly set out. The most important point that the author would like to make, once again and despite the above, is that the test of proportionality is a matter for the national authorities themselves to examine. The CJEU's task should have been, at most, to outline certain guidelines. *Tjebbes* introduces the individual examination, as was clear from its wording. Now the CJEU has another chance to limit this examination in accordance with the allocation of the competences between the EU and the Member States.

The Advocate General's opinion is based on three pillars of existing case-law: *Rottmann, Tjebbes* and *Wiener Landesregierung*. A new member of the three musketeers will be recruited. The *Rottmann* judgment is the oldest. It demonstrates the wisdom and courage of the CJEU in "extending" its jurisdiction into the field of citizenship where a case goes beyond the national situation. It is a born leader from which almost all decisions in the field of nationality are based. The CJEU continues to derive its jurisdiction in this area from it. It has a dark past, and was a highly revolutionary decision. Like Athos. The *Tjebbes* judgment was a brave one in that the CJEU actually extended what it had adopted in *Rottmann*. This was a decision that was perhaps impulsive, coming as a surprise to many scholars. Indeed, unlike the Advocate General, the CJEU accepted the requirement of a concrete, rather than abstract, proportionality test. This decision is enjoying life, just like Porthos. The *Wiener Landesregierung* decision was then as calm and quiet as Aramis. It appeared without much noise, following the case-law established in *Tjebbes*. It was not the subject of such criticism. It is now up to the CJEU to show us whether the judgment in the Danish loss of nationality case can be seen as the young, brave, courageous and intelligent nobleman, D'Artagnan.

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