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Kiššová, Sloboda, Ťažká (ed.)

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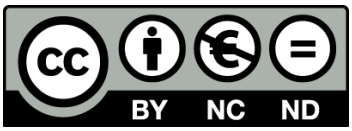

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Content

Agricultural law and agricultural activity in Poland after 20 years of membership in the European Union – selected issues 5

Aneta Suchoń

Sports before the Court of Justice of the European Union 22

Sára Kiššová

Ancillary Restrains under ARTICLE 101(1) TFEU after Superleague 34

Mária T. Patakyová

Dialogue between the EFTA court and the court of justice of the European Union through the advocates general opinions 44

Igor Sloboda

Roman Law in the Legal order of the European Union: Embellishment or a Genuine Source of Law? 55

Ondrej Blažo, Róbert Brtko, Matúš Nemec

AGRICULTURAL LAW AND AGRICULTURAL ACTIVITY IN POLAND AFTER 20 YEARS OF MEMBERSHIP IN THE EUROPEAN UNION - SELECTED ISSUES

Aneta Suchoń[1]

Abstract: This paper aims to assess, firstly, the impact of European Union membership on agricultural law in Poland and, secondly, the main effects and directions of changes in agrarian activity in Poland after 20 years of EU membership. Initially, the definitions of agricultural law in Poland and the general framework of the Common Agricultural Policy are presented. Significant changes have occurred in the financing of agriculture and the obligations of agricultural producers. The article discusses, among other things, market and land issues, including the acquisition of real estate by foreigners from the European Union. While each Member State maintains its own national rules in transfers of land and lease, EU programs such as e.g. the Young Farmer scheme have influenced changes in the agricultural structure. Membership has also contributed to greater development in environmental protection within agricultural legislation. Poland's membership in the European Union should be assessed positively in terms of agricultural activity, but further changes to the Common Agricultural Policy are necessary.

Keywords: agricultural law, Common Agricultural Policy, agricultural market regulations, agricultural structure, agriculture activity

Introduction

Agricultural policy has been part of the Treaty of Rome signed on 25 March 1957 , since the inception of the European Economic Community (EEC). It included objectives such as increasing agricultural productivity by promoting technical progress, the rational development of agricultural production, stabilizing markets, and guaranteeing the security of supply (Article 39 of the Treaty of Rome, now Article 39 of the Treaty on the Functioning of the European Union). The result of agricultural activity is agricultural products, with food being essential for life, particularly in the context of post-war food shortages . As one of the first EU policies, the Common Agricultural Policy (CAP) has long been a significant part of the EU budget. CAP regulations are extensive and divided into market and rural development measures. Since the 1980s, there has been an increasing emphasis on environmental issues .

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Article 11 of the Treaty on the Functioning of the European Union stipulates that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, particularly to promote sustainable development. Consumer protection (Article 12 TFEU), animal welfare requirements (Article 13 TFEU), the protection of public health (Article 168(1) TFEU), and economic, social, and territorial cohesion (Articles 174-178 TFEU) , environment protection (Article 191), energy (Article 194) are also important in the Common Agricultural Policy .

Poland is a country where agriculture is an important sector of the economy. In 2004, there were 1,850 milion farms in Poland with an average size of 8.7 ha. The added value of agriculture reached only EUR 6.8 billion, which was three times lower than in Germany and more than 30 per cent lower than in the Netherlands . Today, there are more than 1.3 million farms, and the average farm size in 2023 is 11.42 ha Due to the great importance of agriculture, agricultural law was and continues to be important. This is a set of legal norms regulating agricultural activities and social relations closely related to these activities It is a comprehensive field of law that mainly consists of provisions from civil and administrative law. Poland's membership in the European Union on 1 May 2004 changed the legal rules for agricultural activity in the country. First and foremost, agrarian producers can benefit from EU direct payment schemes, including the single area payment, or apply for funds from CAP Pillar II programmes included in the Rural Development Plan. At the same time, however, additional restrictions and obligations have emerged, including those related to environmental protection and limiting production .

Over the 20 years of our country's membership in the European Union, agricultural regulations affecting the activities of agricultural producers in the member states have changed. Mention should be made, for example, of the abolition of milk quotas in 2015 , the increased importance of the association of agricultural producers, the issue of environmental protection in agriculture, and the introduction of strategic plans for the Common Agricultural Policy. On 1 January 2023, a new phase of the European Union's Common Agricultural Policy began. It is important to note, first of all, Regulation (EU) 2021/2115 of the European Parliament and the Council of 2 December 2021, laying down provisions on support for strategic plans drawn up by the Member States under the Common Agricultural Policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 . According to Article 6 of this legislation, the objectives of the CAP for the period 2023-2027 include promoting a smart, competitive, resilient, and diversified agricultural sector ensuring long-term food security, promoting and enhancing environmental protection, including biodiversity, and climate action, as well as strengthening the socio-economic fabric of rural areas.

The legal regulation of the Common Agricultural Policy is extensive and is contained mainly in the EU Treaties and UE Regulations. By contrast, there are fewer EU Directives under the CAP. Mention should also be made of soft law, which, according to the Court of Justice of the European Union (hereinafter CJEU), can influence the scope of application of EU legally binding acts by clarifying their provisions. Resolutions and statements on agriculture that present commitments or political positions should also be noted. An example is the European Parliament resolution of 20 October 2021 on a farm-to-fork strategy for a fair, healthy, and environmentally friendly food system (2020/2260(INI)).
The aims of this article are, firstly, to assess the extent to which Poland's membership in the European Union has influenced agricultural law, and secondly, to identify the main effects and directions of changes in conducting agricultural activity in Poland after 20 years of membership in the European Union. Due to the limited scope of the article, only selected issues will be discussed.

Agricultural law definitions, elements, characteristics and principles

Agricultural law is a dynamic field , and changes in agriculture, the social and economic situation, and Poland's membership in the European Union contribute to its expanding scope. It is worth recalling that, according to A. Lichorowicz, agricultural law should be understood as a set of institutions and legal solutions of a special nature, dictated by the specificity of agriculture as a separate branch of the economy. These solutions form the legal (structural and technical) framework for production activities in agriculture, as well as for processing and trading in agricultural products . A shorter definition of agricultural law was proposed by R. Budzinowski, who suggests that agricultural law is a set of legal norms regulating agricultural activity and social relations closely related to this activity .
As already indicated, agricultural law is a complex field. It includes norms of civil law (characterized by the equality of subjects, e.g., regulations on the contract of cultivation and the lease of agricultural land), norms of administrative law (e.g., the procedure of consolidating agricultural land), and norms of criminal law, albeit to a small extent (e.g., infringement of the exclusive right to a plant variety).
As an aside, it is worth noting that the agricultural law of Romance-language-speaking countries (France, Spain, Italy) derives more from civil law, arising from the specific regulation of civil law contracts. German agricultural law, on the other hand, originates largely from public law . The provisions of agricultural law, due to its material scope, are very extensive and scattered across many legal acts. Poland does not have an agricultural code, although there have been initiatives to create such a law.

Common Agricultural Policy – General comments

The Common Agricultural Policy (CAP) is a partnership between the agricultural sector and society, between Europe and its farmers . Agricultural markets are a core element of the Common Agricultural Policy , with the first common market regulations enacted as early as 1962. It was necessary to abolish national intervention mechanisms that were incompatible with the principle of free movement and to transfer them to the Community level According to Article 40 of the Treaty on the Functioning of the European Union (formerly the Treaty of Rome), a common organisation of agricultural markets shall be established to achieve the objectives provided for in Article 39. Depending on the agricultural products, it takes one of the following forms: a) common competition rules; b) compulsory coordination of the various national market organisations; c) a European market organisation. The common market organisation may include any measure necessary to achieve the objectives set out in Article 39 of the Treaty.

Over the years, various instruments have been used, such as prices, subsidies for the production and marketing of different products, storage and transport systems, and common mechanisms for stabilising imports and exports . For many years there were regulations relating to specific agricultural markets . The regulations in the milk market were particularly extensive. For example, in 2007, there were more than 20 different agricultural markets, each with separate regulations. In 2013, the Common Agricultural Policy was further reformed. The main objective of Regulation 1308/2013 was to provide stability to agricultural markets through the use of market support tools, exceptional measures, and aid schemes for certain sectors, to encourage producer cooperation through producer organisations and specific competition rules, and to establish marketing standards for certain products. Market policy relates to agricultural products and consists of setting up a specific system for them in the form of a common organisation of agricultural markets. Structural policy, relating to farms, aims to increase their productivity by rationalising and modernising their structures .

The Common Agricultural Policy has been and continues to be regulated by a very broad catalogue of legal acts, which are also subject to change. As a rule, six-year funding periods have been established over the years. Despite the extensive legal regulations, many issues have been the subject of case law by the Court of Justice. It is worth mentioning the book Treaty Bases of EU Agricultural Law in the Light of Case Law by J. Jurcewicz . In another publication, A. Jurcewicz, B. Kozłowska, and E. Tomkiewicz state that, "As agricultural policy was the first and for a long time the only common policy, for many years the ECJ jurisprudence concentrated on agriculture and related legislation. It also constituted the first arena in which the Court promoted European integration processes. It is therefore impossible to overestimate the role of the Court's rulings on agricultural matters, which have had an impact on laying the legal foundations for integration" . The case law deals with a

great many issues: concepts, competition rules, state aid, and direct payments. For example, in its judgment of 14 November 2017, C-671/15 , the Court of Justice ruled, inter alia, that "concerning the attainment of the objectives of establishing a common agricultural policy and of establishing a system of undistorted competition, Article 42 of the TFEU recognises the primacy of the common agricultural policy over the objectives of the Treaty in the field of competition and the power of the Union legislature to decide to what extent the rules of competition apply in the agricultural sector."

Pre-accession period and Treaty of Athens and first years of membership

Poland started official negotiations on 22 December 1990, which culminated in the signing of the Europe Agreement establishing an association between the Republic of Poland and the European Communities and their Member States on 16 December 1991 . Poland's integration process began in Athens on 8 April 1994 with its application for membership in the European Union. Already in the pre-accession period, many new laws were passed, introducing new institutions into agricultural law. Examples include the Law of 15 September 2000 on agrarian producers' groups and their associations and amendments to other laws , the Law of 16 March 2001 on organic farming , and the Law of 8 June 2001 on the designation of agricultural land for afforestation. The Treaty of Athens, signed on 16 April 2003, provided the legal basis for the accession of 10 Central and South European countries (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) to the European Union. Before accession, there were many fears that Polish agriculture and the food sector would not withstand competition and that Poland would be flooded with food from the EU-15 countries. Farmers feared they would be forced to limit production and that their income would be significantly reduced due to additional requirements.

There is no doubt that farmers, as a social group, had to comply with EU rules from the very beginning of accession while carrying out agricultural activities. The Treaty of Accession provided for direct payments and set the level of milk quotas. Poland committed to introducing the necessary legal solutions, such as a system of veterinary and phytosanitary controls at its borders with non-EU countries, a system for supervising the safety of authorised foodstuffs, and veterinary and phytosanitary standards for food products. Transitional periods for the introduction of certain EU regulations were also agreed upon. The period from 2004 to 2006 was marked not only by dynamic legislative activity in areas covered by the Common Agricultural Policy but also by a significant expansion of agricultural legislation to include agri-food and agri-environmental issues. "Agricultural" agencies, such as the Agricultural Market Agency and the Agency for the Restructuring and Modernisation of Agriculture, were adapted to implement the mechanisms of the Common

Agricultural Policy and gained the status of paying agencies concerning the distribution of support funds. Between 2004 and 2008, funds for agricultural and rural development came from four multi-annual programmes: the SAPARD pre-accession programme, the "Rural Development Plan 2004-2006" (RDP 2004-2006), and the Sectoral Operational Programme (SOP) "Restructuring and Modernisation of the Food Sector and Rural Development 2004-2006" .

Farm organisation. Acquisition and leasing of agricultural property, agricultural contracts and EU law.

In Poland, the main titles for organizing and enlarging agricultural holdings are ownership and lease. Concerning the transfer of ownership of agricultural real estate and the leasing of agricultural land, each country has its internal regulations. The CAP does not contain regulations on the transfer of agricultural real estate. In this respect, there is a phenomenon of so-called 'constualisation' . Article 23 of the Polish Constitution states that the basis of the agricultural system is the family farm. This notion impacts agreements concerning the transfer of ownership of agricultural real estate or lease agreements, both private and from the WRSP resource. As a rule, an individual farmer may acquire agricultural real estate unless the Act provides otherwise.

It should be pointed out that the concept of acquiring agricultural real estate is broad . The Act on the Formation of the Agricultural System includes not only the transfer of ownership of agricultural real estate or the acquisition of ownership as a result of a legal action, court ruling, public administration authority decision, or other legal events but some restrictions under the Act also apply to the leasing of agricultural land. For example, obtaining the consent of the National Agricultural Support Centre is required when leasing agricultural land before the expiry of 5 years from its acquisition. These restrictions do not apply to relatives.

It should be noted that citizens of European Union countries may acquire agricultural property on the same terms as Polish citizens. These provisions are therefore not discriminatory. In the author's opinion, the restrictions on the acquisition of land do not violate the provisions of the Treaty on the Functioning of the European Union and other EU regulations. However, the case law of the Court of Justice has analyzed Article 63 TFEU, which prohibits all restrictions on the movement of capital between Member States and between Member States and third countries. In the author's view, the restrictions are justified by overriding reasons of general interest that the CJEU allows in the context of national regulations directly affecting agricultural real estate.

Agricultural producers also enter into other contracts, such as cultivation contracts, contracts for the sale of agricultural products, and farmers' liability insurance, as well as contracts for buildings and crops. There are also agricultural machinery leasing

contracts and loan agreements. A harvest assistance contract has also been in place for several years. The main legal provisions regulating most contracts related to agriculture are primarily found in the Civil Code, as well as in other relevant legislation and laws on social insurance for farmers.
It is important to note the impact of the Common Agricultural Policy, which is part of European law, on agricultural contracts. Some regulations refer to the form, elements of contracts, consent to contract, or control of contracts. Examples include Regulation 1308/2013 of the European Parliament and of the Council of 17 December 2013, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001, and (EC) No 1234/2007 or Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair business-to-business commercial practices in the supply chain of agricultural and food products . In the case of crop insurance contracts, there is the possibility of obtaining UE fund for part of insurance fee.

Setting up of agricultural producers and registration in CAP-related registers

It should be noted that a farmer undertaking agricultural activity does not register with the Central Register and Information on Economic Activity. According to the Act of 6 March 2018, Entrepreneurs' Law, the provisions of the Act do not apply, inter alia, to production activities in agriculture in the fields of crops and animal husbandry, horticulture, vegetable growing, forestry, and inland fishing. At the same time, when applying for EU funds, it is necessary to obtain an entry in the register of agricultural producers.
This means that, according to the Act of 18 December 2003 on the national system of producers' records, the register of agricultural holdings, and the register of applications for the granting of payments (Article 11), a producer is entered into the producers' register by way of an administrative decision, at their request, submitted to the head of the district office of the ARMA competent for the location, on a form developed and made available by the ARMA. According to Article 12 of the Act, the producer is assigned an identification number in the decision. This number is unique and does not pass on to a legal successor. An applicant subject to registration in the register of producers under several titles is assigned a single identification number . The CAP also introduces other registers, e.g., for animal producers, tobacco producers, or hop producers.

Agricultural financing

In Poland, as in other Member States of the European Union, the financing of agriculture is carried out by specific rules enshrined in EU legislation. Member States have limited freedom to transfer national funds to support the agri-food sector. The

reasons for this include the principles of competition (Article 101 of the Treaty on the Functioning of the European Union) and state aid (Article 107 of the CJEU). Recognising the role of agriculture as a major producer of public goods and responding to societal demands for their protection, a new emphasis on innovation, climate change, and the environment has been pursued since the CAP reform of 2013.

It is worth emphasising that support for the agricultural sector has an axiological basis, grounded in agriculture's productive and non-productive functions, such as environmental protection and social objectives. Food is essential for human life, and there is increasing emphasis on the sustainability of agriculture, which can only be achieved by meeting three objectives: environmental, economic, and social .

Under programmes co-financed from EU funds (including the SAPARD programme), more than PLN 426.63 billion was paid out to beneficiaries. The largest amounts of support were received by the following voivodeships: Mazowieckie – PLN 59.58 billion, Wielkopolskie – PLN 50.70 billion, and Lubelskie – PLN 40.74 billion . Without a doubt, the most important source of financial support for the majority of Polish agricultural producers, as well as farmers in other EU countries, is the system of direct payments. This constitutes a significant subsidy addressed to all agricultural producers who are the owners of agricultural land, generally over 1 ha, and who carry out agricultural activities. Direct payments were already provided for in the Accession Treaty and have been paid since 2004. Over the successive years of the EU budget, Polish laws concerning these payments and the environmental obligations of beneficiaries have evolved. According to a report by the ARMA, from 2004 until the end of 2022, a total of PLN 234.15 billion was paid to agricultural producers under the 1st Pillar of the CAP .

Another important aspect of support for agriculture is the second pillar of the Common Agricultural Policy, which concerns rural development . Programmes targeting agricultural producers included in successive Rural Development Plans have been diverse and tailored to specific needs (e.g., Areas with Natural Constraints (LFAs), Modernisation of Farms, Restructuring of Small Farms, Aid for Young Farmers) .

On 1 January 2023, a new phase of the European Union's Common Agricultural Policy began. It is worth mentioning Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, which lays down provisions on support for strategic plans drawn up by Member States under the Common Agricultural Policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013.

At the end of August 2022, the European Commission approved the Strategic Plan for the Common Agricultural Policy for 2023-2027 prepared by Poland. This extensive

document, comprising approximately 1,300 pages, introduces new rules for direct payments and provides increased EU support related to environmental protection. Under the Strategic Plan of the CAP, Poland is guaranteed EUR 22 billion from the European Union (EUR 17.3 billion under Pillar I and EUR 4.7 billion under Pillar II) .
According to the Law of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy 2023-2027 , aid is granted by administrative decisions under various schemes, including direct payments. These include basic income support for sustainability purposes (Art. 16(2)(a) of Regulation 2021/2115), complementary redistributive income support for sustainability purposes (Art. 16(2)(b) of Regulation 2021/2115), supplementary income support for young farmers (Art. 16(2)(c) of Regulation 2021/2115), production-related income support payments, payments under climate, environmental, and animal welfare schemes (Art. 16(2)(d) of Regulation 2021/2115), payments under environmental and climate-related interventions and other management commitments (Art. 69(a) of Regulation 2021/2115), payments for areas with natural or other specific constraints (Art. 69(b) of Regulation 2021/2115), support for forest or woodland investments implemented under Art. 69(d) of Regulation 2021/2115, and risk management tools in the form of financial contributions to premiums under insurance schemes.
In the new funding period (2023-2027), funding from Pillar II of the CAP is generally granted after a call for proposals and is not provided by administrative decision but by contract. Article 81 of the Act of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy stipulates that the provisions of the Code of Administrative Procedure (except for provisions on the territorial competence of authorities, the exclusion of the authority's employees, access to files, and complaints and applications, unless the Act states otherwise) do not apply to aid cases where assistance is granted based on a contract.
As R. Budzinowski emphasizes, in contemporary agricultural law, the importance of contracts as an instrument for achieving the goals set for the administration of agriculture is growing. This phenomenon, called "contractualisation," , occurs not only in the sphere of market policy (contracts concerning the production and sale of agricultural produc), but, above all, in the sphere of rural development. The increase in the importance of contracts in aid measures for the development of these areas provides the best example of the role of contractualisation in agricultural law .
In addition to Pillars I and II of the Common Agricultural Policy, financial support includes what is known as de minimis aid in agriculture. This type of aid is linked to European Union membership and does not require prior control by the European Commission through notification. Its admissibility is justified by the fact that it has only a negligible effect on competition and trade between Member States . For many agricultural producers, support under the de minimis rule in agriculture is an important instrument for subsidising their activities.

It should be clearly emphasized that funds for de minimis aid are provided from the national budget. At the same time, their disbursement, as detailed in Polish regulations, must comply with the general principles set out in the EU regulation. Examples of financial aid granted to agricultural producers under the de minimis rule include various support measures, such as subsidies for the purchase of seed material, cancellation of liabilities to the Agricultural Social Insurance Fund (KRUS), exemptions and relief from agricultural tax, or agreements to cancel or spread debts owed to KOWR into instalments.
Additional forms of aid include support related to combating African Swine Fever (ASF), drought aid for agricultural holdings that have suffered losses of less than 30% in production, exemption from civil law transaction tax (PCC) on the purchase of agricultural land, and aid related to soil liming, which positively impacts agricultural production potential and quality improvement.
Therefore, the increase in the amount of de minimis aid in agriculture from €7,500 to €15,000, and then to €20,000 in 2019 over three years, should be viewed positively. However, this amount is now too low in 2024 and should be increased.

Agricultural markets, including in particular the removal of quotas in the milk and sugar markets

Milk production, both in Poland and in the European Union as a whole, is a crucial issue. Our country is one of the important producers of this essential agricultural product, ranking twelfth in the world milk market , with the share of 8.3% of global production. For many years, the milk market in the European Union was one of the most regulated and subsidized. As of 1 April 2015, milk quotas are no longer required for milk production for sale. Farmers are therefore not subject to administrative restrictions on expanding production or starting such activities.
When the EU legislator decided on such significant changes in this market, efforts were made to gradually introduce legal instruments to protect milk producers. Examples include the Commission Delegated Regulation (EU) 2015/1853 of 15 October 2015, establishing temporary emergency aid for farmers in the sector , and the Commission Delegated Regulation (EU) of 8 September 2016: no. 2016/1612 granting aid for the reduction of milk production . As mentioned earlier, for many years there were more than 20 different agricultural markets, each with separate regulations. In 2013, the Common Agricultural Policy was reformed further. EU Regulation 1308/2013 establishes a common organisation of agricultural markets, referring to products listed in Annex I to the Treaty on the Functioning of the European Union (TFEU). Agricultural products are divided into sectors, covering ering cereals, sugar, dried fodder, flax and hemp, fruit and vegetables, wine, tobacco, beef and veal, milk and milk products, mutton and goat meat, eggs and poultry meat, among other foodstuffs. It must be said that agricultural markets are

becoming increasingly liberalized. Not only have milk quotas been abolished, but sugar quotas have also been eliminated. On the other hand, the wine market remains a sector with an extensive catalogue of restrictions. It is regulated not only by Regulation (EU) No 1308/2013 but also by other legal acts, such as Commission Delegated Regulation (EU) 2018/273 of 11 December 2017, which supplements Regulation (EU) No 1308/2013 of the European Parliament and the Council regarding the system of authorisations for planting vines, the vineyard register, accompanying documents, and certificates .

Emergency measures

EU legislation also provides for the possibility of extraordinary financial support. For this purpose, the European Commission adopts implementing acts introducing necessary and justified programmes to address specific issues. The limited scope of this article does not allow for a broader analysis, but a few examples are worth mentioning. One such example is the Commission Implementing Regulation (EU) 2024/2023 of 23 July 2024, which provides exceptional financial support to the fruit and vegetable sector and the wine sector affected by adverse climatic events in Austria, the Czech Republic, and Poland. According to this legislation, to provide exceptional support to farmers, EU aid totalling EUR 10 million is made available to Austria, EUR 15 million to the Czech Republic, and EUR 37 million to Poland, subject to the conditions set out in this regulation. These countries use these funds to compensate the most disadvantaged farmers in the fruit, vegetable, and wine sectors for economic losses that affect farmers' profitability .
Due to the war in Ukraine, several new pieces of legislation have been enacted to support emergency measures for agricultural producers. Examples include Commission Implementing Regulation (EU) 2023/739 of 4 April 2023, establishing an emergency support measure for the cereals and oilseeds sectors in Bulgaria, Poland, and Romania and Commission Implementing Regulation (EU) 2023/1343 of 30 June 2023, establishing an emergency support measure for the cereals and oilseeds sectors in Bulgaria, Hungary, Poland, Romania, and Slovakia .

Concluding remarks

This analysis allows us to draw the following conclusions.
Firstly, there is no doubt that the Common Agricultural Policy has had a significant impact on agricultural law, the situation of agricultural producers, their activities, and the organisation of farms and rural areas in Poland. At the same time, the impact of Europeanisation on certain elements of agricultural law varies, with the most significant influence concerning agricultural markets. Initially, these markets were highly regulated, with quotas for milk or sugar, but today there is greater

liberalisation. The legal rules for agricultural funding set out in EU legislation are of great importance. Many issues are standardised by both EU and national legislation. Examples of this include Pillar I and II of the Common Agricultural Policy, as well as de minimis aid in agriculture.

Secondly, the consequence of Europeanisation is the expansion of both the subject matter and the quantitative scope of regulation. There is no doubt that the sources of agricultural legislation and the subject of regulation have greatly expanded. As R. Budzinowski points out, the expansion of agricultural law is reflected in the transition from the "agrarian roots" of this field of law (when the main subject of regulation was agricultural land), through commercialization, to the agrarianisation of environmental issues in agriculture, food, and rural areas . It is also necessary to mention definitions in EU legislation of classical notions (e.g., agricultural real estate, agricultural holding, agricultural producer), as well as new CAP concepts (e.g., active farmer), which have enriched agricultural law, although differences sometimes exist between the definitions in Polish law and EU regulations. The dynamics of agricultural law characterize the development of this field from the point of view of its sources. The expansion indicates the growing scope of regulation, while institutionalisation reflects the legal instruments applied . Following Poland's accession to the European Union, the sources of agricultural law became even more extensive. The wide range of EU law instruments requires that national legislation apply the relevant principles of legislative policy and technique when implementing EU agricultural law into national law.

Thirdly, there is a greater publicisation of law, which is reflected in the shift of the burden of agricultural regulation from private agricultural law to public agricultural law. The role of the Agency for the Restructuring and Modernisation of Agriculture as the paying agency, along with the activities of agricultural administration—such as issuing decisions, control, supervision, monitoring, and reporting—has increased enormously. The importance of administrative activities, such as the introduction of registers related to the implementation of the Common Agricultural Policy, has also grown. The development of other entities that perform tasks related to the Common Agricultural Policy, such as the National Support Centre for Agriculture (in activities related to agricultural markets and the promotion of agriculture) and the Agricultural Advisory Centre, has also expanded. There has been an increase in the number and scope of court cases in Poland related to the CAP, especially in administrative courts. The growing importance of the economic method, which involves the use of economic instruments, should also be noted. Agricultural producers, understanding the principles of these instruments, make their own decisions regarding the direction and scope of production. On the other hand, the method of social influence focuses on shaping the awareness of agricultural producers and the rural population, particularly in promoting pro-ecological and pro-health awareness.

Fourthly, Poland's accession to the European Union created greater opportunities for farm development and financing for Polish farmers. Farms and agri-food processing have been modernised using EU funds. At the same time, farmers are obliged to comply with additional standards, such as those related to environmental protection, ensuring high-quality agricultural products, and animal welfare . These measures are generally costly. The greening of the CAP and the global challenges of climate change and environmental degradation are key concerns. The European Union is pursuing an ambitious environmental, climate, and energy policy, promoting sustainable forest management to improve the quality and increase the area of EU forests. Sustainable afforestation, reforestation, and restoration of degraded forests can increase CO_2 sequestration, improve forest resilience, and support a circular bio-economy. Combating land degradation is also an important aspect to note. In addition, direct payments under the first, basic pillar of the CAP to Polish agricultural producers were, and still are, lower than those in other EU countries . As mentioned earlier, the financing of agriculture in Poland is now largely based on rules derived from EU regulations. The most important instrument is the system of direct payments. From 2004 until the end of 2022, a total of PLN 234.15 billion was paid to agricultural producers through the 1st Pillar of the CAP.

Fifthly, Poland's membership in the EU has resulted in changes to the agrarian structure and an increase in the number of medium-sized farms in Poland, particularly those with an area of over 20 ha[1]. The reasons for this change include EU programmes such as the Structural Pension, Young Farmers' Premium, and the Modernisation of Farms. Polish agriculture has made significant progress in recent years, and its role in ensuring food security and in the country's economy is important . In Poland, other changes are also taking place in rural areas as a result of EU membership. Between 2004 and 2022, the number of natural persons doing business in rural areas per 100,000 people of working age almost doubled (an increase of 5,493, from 7,701 to 13,194), while the unemployment rate fell from 17.6 per cent to just 3.3 per cent. Infrastructure development has also occurred. In Western literature, Roland Norer, in particular, points to the evolution of agricultural law, expanding the scope of this area of law, sometimes referring to it as rural law .

Finally, as a result of Russia's invasion of Ukraine, the position of agricultural producers in the agri-food chain has been further weakened. First and foremost, the cost of farming has increased. There have also been issues with the sale of agricultural products, disruptions in continuity, added uncertainty, and problems with loan repayment. The impact of political risks on agricultural activities and the agri-food industry as a whole is evident. It is necessary to increase financial assistance to agricultural producers. In the agri-food supply chain, there are often significant power imbalances between suppliers and buyers of agri-food products. It is therefore very important for agricultural producers to join together for example cooperatives,

in order to increase the importance of farmers in the market . Poland's membership in the European Union should be assessed positively in terms of agricultural activity, but further changes to the Common Agricultural Policy are necessary.

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SPORTS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract: The European Union does not have explicit competence in sports governance, but the Court of Justice of the European Union (CJEU) has developed a significant body of case law regulating sports by applying EU competition law. This article explores how the CJEU has leveraged competition law and the internal market to influence key aspects of sports governance, such as transfer rules, athlete mobility, and anti-doping measures, despite the absence of direct legislative competence in the field of sports.

Keywords: C-333/21 European Super League, C-124/21 P ISU, arbitration, CAS, the right to sport

Introduction

Sports fulfill multiple roles in our society, regardless of whether it is an amateur or professional sporting activity.[2] Even the European Sports Charter, in Article 10, enshrines the right to the sport as a fundamental right, defining sport as a "*social, educational and cultural activity*".[3] However, it cannot be overlooked that sports also have significant economic benefits, i.e., they create a specific industry in which, among other things, business and employment relationships are created. However, sport is a particular area from the point of view of law, especially regarding the setting of the governance of sport and the subjects that operate in this area. In terms of organisational structure, the most influential actors in sports are private sports associations, such as FIFA or UEFA. Still, there are also national sports associations, which may or may not be linked to the State.

Whether umbrella sports associations are private or public entities has a significant impact on the enforcement of certain obligations, including, for example, human rights obligations before the European Court of Human Rights (hereafter also referred to as the "ECtHR"). However, I will not address this complex issue in this article and leave the rest of the details for other, future research. Long story short, the enforcement of human rights under the European Convention on Human Rights

[1] Institute of European Law, Faculty of Law, Comenius University.

[2] E.g. promoting physical health and mental well-being, social cohesion or economic growth, etc.

[3] See: Revised European Sport Charter, online June 2022 [cit. 15. October 2024]. Available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680a42107%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}.

and Fundamental Freedoms (hereinafter also referred to as "the Convention") before the ECtHR is challenging in the field of sports since most of the umbrella sports associations are private organizations established under Swiss law and thus are not direct addressees of the human rights obligations under the Convention.[4] Moreover, it is worth reminding the reader of the somewhat burdensome conditions for the admissibility of applications to the ECtHR, which, in my opinion, make seeking justice before the ECtHR a rather complex process for athletes.[5] This is compounded by the fact that most sports contracts include a mandatory arbitration clause, which brings sports disputes under the jurisdiction of the Court of Arbitration for Sport (hereafter referred to as "CAS").[6] I leave it to readers to decide whether this *modus operandi of* resolving disputes in sports through arbitration is an appropriate means of justice in all circumstances.

This article, however, explores another dimension of justice in Sports, particularly recent developments regarding seeking justice before the Court of Justice of the European Union (hereafter referred to as the "CJEU"), either by or against sports entities. In recent judgments touching upon the field of sport, the Court of Justice has dealt with the infringements of EU competition or the EU internal market by sports associations, which has attracted the attention of several academics.[7] Of particular interest for the objective of this article is the *ISU* judgment,[8] which has pointed to the elephant in the room in the form of the CJEU's jurisdiction in the field of sport. This article seeks to answer the following questions: What was the impact of the ISU judgment on the CJEU competence in sports, and what does it mean for arbitration in Sports?

EU Competence and CJEU Jurisdiction in Sports

From a legal point of view, sport is specific. Firstly, in terms of the subjects that make binding rules in this area, in terms of the characteristics of the rules created by them, and also in terms of the subjects that decide on any disputes that may arise.

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[4] RIETIKER, D. *Defending athletes, players, clubs and fans*. Strasbourg: Council of Europe Publishing, 2022, p.24.

[5] See Article of the Convention.

[6] WEATHERILL, S. *Principles and Practices in EU Sports Law*. Oxford: Oxford University Press, 2017, p.10

[7] MADURO, P.,M. Sports governance after the Super League judgment: going into extra time? In *The International Sports Law Journal*, 23(2), 2024, pp. DOI: 10.1007/s40318-024-00269-6; ZGILINSKI, J. Can EU competition law save sports governance? In *The International Sports Law Journal*, 23(4), 2024, DOI: 10.1007/s40318-024-00258-9.

[8] Judgment of the Court (Grand Chamber) of 21 December 2023, *International Skating Union v European Commission*, C-124/21 P, ECLI:EU:C:2023:1012.

This specificity of sport is based, in particular, on the generally recognised principle of the autonomy of the sporting movement.[9] Based on this principle, the self-regulatory capacity of sports governing bodies is derived, which in turn, based on this principle, creates the so-called *lex sportiva* (sports rules created by sports governing bodies), the observance and enforcement of which is ensured by the self-established system of sports justice in the form of the Court of Arbitration for Sport.[10]

The main actors in the sports field are associations, federations, other organisations (hereafter referred to as "sports associations"), sports clubs, and the athletes themselves. The status of sports associations or federations varies according to the legislation of the country concerned and the sport they represent. The status of athletes is also very specific; for example, in terms of employment law, they can be perceived as employees or self-employed persons.[11] From a hierarchical point of view, we can observe some kind of pyramid structure in sports management. Hierarchical or pyramidal sport governance represents the creation of a governance structure for a particular sport at international, national, and local/regional levels. In principle, it can be generally stated that every sport should have a tendency and interest in creating a governance structure up to the international level, as the sport in question would undoubtedly benefit from such a governance structure.

However, as mentioned above, state intervention in the governance of sport varies from country to country. Some countries support national federations financially, which in turn creates state intervention only in terms of the use of finances, and other countries create competencies for national associations for the governance of sport (such as France).[12] Despite the principle of the autonomy of the sports sector, it cannot be ignored that sports represent a field in which legal relations are formed and dissolved, and different situations are shaped with diverse consequences, affecting a range of social, economic, and legal aspects of life. However, the field of sport is not, and cannot be, completely isolated. It is, therefore, quite natural that some aspects of sports fall within the remit of other subjects and that these subjects deal with these aspects within their own competencies and jurisdiction, regardless of whether it is a private or public matter.

The European Union is also one of these entities (even *a sui generis* entity), creating a unique internal market in which the EU not only combats social exclusion and discrimination and promotes social justice and protection but at the same time

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[9] CHAPPELET, L-J. *Autonomy of sport in Europe*, The Council of Europe, 2010, pp.-16-20, Available at: https://rm.coe.int/autonomy-of-sport-in-europe/168073499f.

[10] See: WEATHERILL, S. *Principles and Practices in EU Sports Law*. Oxford: Oxford University Press, 2017, pp.9-49.

[11] Such a double regime also occurs, for example, in the Slovak legislation. See §4 (3) of Act No 440/2015 Coll. on sport and on amendments and supplements to certain acts.

[12] CORNU, P., CUENDET, S., VIDAL. L. *Disciplinary and Arbitration Procedures Of The Sport Movement- Good practice handbook- for judicial authorities*. Council of Europe, Strasbourg, 2017, p. 13.

protects an essential aspect of the internal market, which is EU competition.[13] Therefore, what competence does the EU have in the Sports sector?

Under Article 6(e) TFEU, the EU exercises a supporting competence in the field of sport, and primary law specifies this competence in Article 165 TFEU in such a way that the Union is to contribute to the promotion of European matters relating to sport, taking into account its specific nature, its structures based on voluntariness. The EU's action in this area aims to develop the European dimension of the sport by promoting fairness and openness in sporting competitions, encouraging cooperation between sporting bodies, and protecting athletes' physical and moral integrity, with particular emphasis on the youngest athletes. Based on Article 165(3) and (4) TFEU, incentive measures or recommendations may be adopted to achieve these objectives without, however, harmonising the laws or regulations of the Member States. Therefore, this supporting competence is not the exercise of EU sport policy but the exercise of EU action in sport.[14]

However, the Court emphasises that Article 165 TFEU cannot be seen as a special rule exempting sport from the provisions of primary EU law or as an exception to the application of EU law in the field of sport.[15] It was back in 1974 when the Court of Justice said that if the pursuit of sport constitutes an economic activity, this activity falls within the scope of the provisions of EU law.[16] Therefore, only such sporting rules and activities will not fall within the scope of EU law, which has been adopted or implemented solely for non-economic reasons and relates exclusively to sport.[17]

Sports associations can thus adopt rules or carry out activities (of an economic nature) that may fall, for example, within the scope of Articles 45 and 56 TFEU, i.e., the free movement of workers and the free movement of services. They may even fall under the freedom of establishment in Article 49 TFEU or the free movement of capital in Article 63 TFEU. For example, there may be rules on transfers of players or restrictions on the number of foreign players in clubs, as was the case in C-415/93 *Bosman* or C-650/22 *FIFA v. BZ*. It may also concern rules governing anti-doping controls like those in judgment C-519/04 P *Meca-Medina*. However, sports are not only about clubs and athletes but also include coaches, sports agents, or referees, as in judgment 36/74 *Walrave and Koch*.

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[13] See Article 3 of the Treaty on European Union.

[14] Judgment of the Court (Grand Chamber) of 21 December 2023, Case C-333/21, *European Super League Company*, ECLI:EU:C:2023:1011, §99.

[15] *Ibid*. §101.

[16] Judgment of the Court of 12 December 1974, 36/74, *Walrave and Koch*, EU:C:1974:140, § 4.

[17] In this context, see: Judgment of the Court of 12 December 1974, 36/74, *Walrave and Koch*, EU:C:1974:140, § 8; Judgement of Court of Justice of 15 December 1995, C-415/93, *Bosman*, EU:C:1995:463, §§ 76 and *127, Judgment of the Court of 11 April 2000, C-51/96 a C-191/97, Deliège, EU:C:2000:199, §§ 43, 44, 63, 64, 69.*

As already indicated, it is not solely the EU internal market that can be distorted by sporting rules or sports activities. Such rules or activities must also comply with EU competition rules. Sports associations can be, in fact, subsumed under the concept of "undertaking" within the meaning of Articles 101 and 102 TFEU, and, at the same time, any agreements of sports associations can be classified as agreements between undertakings or sports rules of sports associations as decisions of associations of undertakings within the meaning of Article 101(1) TFEU. The latter has been the subject of 202CJEU'sss judgments in C-333/21 *Superleague*, C-680/21 *Royal Antwerp*, or C-124/21 *ISU*, where the Court recalled that sports associations are subjects of EU competition and that they are capable of distorting EU competition by their actions.[18]
Although it must be said that these CJEU judgments concerning sports law caused an equal wave of academic discussion as the *Bosman* judgment did decades ago,[19] one particular aspect is present in the ISU judgment that needs to be assessed. Has the Court of Justice expressed the need to change the arbitration clauses of sports associations?

Impact of *ISU* judgment- Sports before the CJEU?

As can be seen, some aspects of sports fall within the scope of EU law, even though sport falls under the EU's supporting competence in Article 6 TFEU, while at the same time, Article 165(4) TFEU excludes harmonisation of legislation. It will be those aspects of sport that are economic in nature that fall within the scope of EU law rules. EU law, and therefore the Union, does not have the competence to regulate and harmonise rules exclusively for sporting activities. That means, on the contrary, that EU law indirectly regulates the field of sport and guarantees a certain degree of protection for the various actors in sport and, in these cases, views the individual actors, rules, and actions through the prism of the respective freedoms.
However, on the other hand, as mentioned, sports associations (or sports clubs) include arbitration clauses in their contracts based on internal statutes, which may also be formulated as "compulsory" or exclusive arbitration before the CAS with its seat for arbitration in Switzerland. This means that those sports disputes must be referred to a CAS whose seat is in a non-EU country, while at the same time, the last instance of appeal belongs to the Federal Supreme Court of Switzerland (hereafter referred to as "SFT"), i.e., a national court, which, e.g., has neither the right nor the obligation to refer a question for a preliminary ruling under Article 267 TFEU to the

[18] C-333/21, §87.
[19] See for example: DIXON, D. The Long Life of Bosman– A Triumph of Law over Experience, *In Entertainment and Sports Law Journal*, vol. 6(2), DOI: 10.16997/eslj.60 or CUBBIN, J. The Bosman Ruling and the Emergence of a Single Market in Soccer Talent, In European Journal of Law and Economics, vol. 9(2), DOI: 10.1023/A:1018778718514.

Court of Justice. The CJEU is thus not competent for disputes that fall within its jurisdiction in substance, and this is due to the conduct of the proceedings in Switzerland.[20]

The foregoing was the subject of the cross-appeal in Case C-124/21 P *ISU proceedings*.[21] In the cross-appeal, the parties supported by the Commission argued that the General Court's assessment of the compatibility of the arbitration rules introduced by the ISU with Article 101(1) TFEU was incorrect. The fundamental question in this part of the judgment was whether the ISU's arbitration rules could be justified by a legitimate interest relating to the specific nature of the sport or, conversely, whether these rules reinforce infringement of competition under Art. 101(1) TFEU. At the same time, the question of whether the arbitration mechanism is sufficient for effective judicial protection of athletes against ineligibility decisions on anti-competitive grounds arose.[22]

The appellants have objected to three interesting (interconnected) points in this regard, arguing the reinforcement of infringement of competition under Art. 101(1) TFEU: 1) unilaterally imposed arbitration rules by the sports association, 2) the exclusive jurisdiction of CAS, and 3) the impossibility of considering an action for damages as an effective remedy instead of annulment of an ineligibility decision which infringes Article 101(1) TFEU before a national court.[23]

Unilaterally imposed arbitration rules are *the modus operandi* of some sports associations on pain of a ban on taking part in events they organized for the athletes, a ban which ultimately equates to it being impossible for the parties concerned to carry out their profession.[24] The same applies to ISU governance in this case, as pointed out by the appellants in their cross-appeal. **Exclusive jurisdiction of the CAS** means that any dispute regulated therein is heard exclusively by CAS with the seat of arbitration in Switzerland, i.e., outside the European Union. Hence, appeals against the awards of that body may be brought exclusively before the Federal Supreme Court of Switzerland, and the review of this court is limited to confirmation of the

[20] See: ESPINOSA R., N. *ISU v. Commission: Judicial review of CAS awards and EU public policy*. Online January 2024 [cit. 18 October 2924]. Available at: https://www.globalarbitrationnews.com/2024/01/23/isu-v-commission-judicial-review-of-cas-awards-and-eu-public-policy/.

[21] Judgment of the Court (Grand Chamber) of 21 December 2023, C-124/21 P, *International Skating Union v. European Commission*, ECLI:EU:C:2023:101, §§158-213.

[22] Ibid. §§158-176.

[23] Judgement of the Court of 16 December 2020, *International Skating Union v. European Commission*, T-93/18, ECLI:EU:C:2020:610, §159-162

[24] C-124/21 P, §166.

observance of public policy within the meaning defined by that court, which excludes EU competition rules (and automatically also EU internal market rules).[25,26]
Both of the abovementioned precludes the possibility for ISU athletes to bring an annulment of an ineligibility decision that infringes Article 101(1) TFEU before a national court of a Member State. Interestingly, the General Court had the view that this system (unilateral arbitration rules and exclusive jurisdiction of the CAS), in fact, does not go against the EU competition. Moreover, the General Court argued that even though the arbitration mechanism set by ISU arbitration rules does not permit skaters to bring an action before a national court for annulment of an ineligibility decision which infringes Article 101(1) TFEU, the skaters (or generally anyone in the same position) may bring, if they so wish, **an action for damages before a national court**.[27] However, this argument was not accepted by the appellants as appropriate given the ineffectiveness of protecting the athlete through damages, which may take several years and does not address the situation that is acutely impairing the exercise of their sporting profession at the current time.[28]
This view was not accepted by the Court of Justice as well, which objected to the reasoning as interfering with the effective judicial protection of athletes, as it constituted *ex post* judicial protection. To accept the General Court's conclusion would be to ignore the fact that the arbitration mechanism in question does not provide an effective *ex ante* remedy and creates space for anti-competitive practices in the EU.[29] The Court did not object in principle to unilateral arbitration clauses, referring in this respect to the case law of the ECtHR, which had already commented on this fact in *Mutu and Pechstein v. Switzerland***.**[30] The Court of Justice observed those ISU arbitration rules at issue since they exclusively granted jurisdiction to a CAS based in a non-EU state, which made the review body of the arbitral awards the SFT, a non-EU Member State court. The absence of the possibility of judicial review of an arbitral award by a national court of a Member State may cause the use of the arbitration mechanism to jeopardize the protection of the rights that subjects of the law derive from the direct effect of EU law.[31]
It can be said that the Court of Justice caused quite a stir in international sports arbitration. This judgment of the CJEU implicitly obliged the ISU to amend its internal rules governing the arbitration clause so as not to create an exclusive jurisdiction of

[25] C-124/21 P, §162.
[26] Swiss Federal Tribunal, *Tensacciai v. Terra Armata,* Judgment of 8 March 2006, 4P.278/2005.
[27] T-93/18 ,§159.
[28] C-124/21 P, §171.
[29] C-124/21 P, §200.
[30] The ECtHR limited itself to stating that the compulsory clause constitutes an obligation for the arbitration proceedings to afford the safeguards secured by Article 6 § 1 of the Convention. See: *Mutu and Pechstein v. Switzerland*, app. no. 40575/10 and 67474/10, 2. October 2018.
[31] C-124/21 P, §194.

the CAS with the seat of arbitration in Switzerland, with a consequent jurisdiction to review awards for the Supreme Federal Court of Switzerland and thus exclude the EU Court of Justice from reviewing the decisions.[32] In other words, the Court has expressed its position on such arbitration clauses (not only) in the field of sport, which *a priori* excludes from judicial review the ECJ, which would otherwise have subject-matter jurisdiction, and which concern disputes relating to the public policy of the EU.

However, I would argue that the Court of Justice, with the ISU judgment, has opened up a slightly more important topic, namely the issue of sports arbitration before a CAS based in a non-EU country, which creates a number of limits to the enforcement of the rules created by EU law.[33] Arbitration clauses with exclusive jurisdiction before the CAS, with the seat of arbitration in Switzerland, significantly narrow the possibilities for judicial protection or liability of sports associations, especially when an EU element is present.

Without further detailed research, it can be concluded that the mere possibility of appealing a CAS award before a national court of an EU Member State brings the unquestionable benefit of the possibility of initiating a preliminary ruling procedure. That could, among other things, substitute for the complex and sometimes unsuccessful route before the ECtHR and thus promote human rights issues in sports disputes, although it could only be done for those with an EU element.

On the other hand, one can ask whether the parties should be able to initiate the arbitration proceeding before the CAS with the seat of arbitration in an EU Member State. Does this mean the existing know-how and case law accumulated in Switzerland will be lost? Is the possible preliminary question before the CJEU efficient in terms of time relative to the efficiency of judicial protection?

In my view, the present cannot be fully perceived as a "loss of jurisprudence and know-how" as no one is taking away the SFT's jurisprudence, only extending it in terms of judicial protection of athletes and sports organisations. It is true, however, that the STF can, after years of its role as a review body, be seen as a specialised judicial body in sporting matters. However, from the point of view of judicial protection, it is probably more relevant for the parties that their case will be heard by a judicial authority impartially, independently, and in full application of the relevant right in question, thus *de jure* and *de facto* ensuring compliance with Article 6 of the Convention. As can be seen in the case law of the CJEU, a change in the organisation of the judiciary is not in itself contrary to EU law and thus to the right to a fair trial, as long as the Member State guarantees that the internal organisational change in

[32] Judgment of the Court (Grand Chamber) of 21 December 2023, C-124/21 P, *International Skating Union v European Commission*, ECLI:EU:C:2023:1012, §§ 192-204.

[33] In this case, the EU competition rules however EU internal market rules are relevant as well.

question will in no way affect the exercise of this right and that the rule of law will also be preserved.[34]

As regards time efficiency, which may be challenged as a counter-argument to the possibility of asking the CJEU to interpret the law in proceeding before a national court, the following should be pointed out in this respect. Before and after the Court's judgment in Case C-124/22 P *ISU*, individual disputes arising out of sporting activities (particularly those arising within the ISU and sporting organisations with similar arbitration rules) are governed by the pure arbitration rules of the sporting organisation. Thus, if a specific dispute arises, even if it relates to economic activity in the EU territory, the wording of the Arbitration Rules with a mandatory and exclusive arbitration clause provides that the CAS, with the seat of arbitration in Switzerland, is empowered to hear the dispute. However, the CAS does not examine disputes from the perspective of EU competition law and thus cannot provide an award declaring a conflict with EU competition law. The parties to the dispute can then appeal to the SFT, which will also not review the case under EU competition law. The argument that the parties can claim damages in the national courts may hold good, but it cannot hold good in terms of effective judicial protection and the timely pursuit of justice. We can speak here of a final judgment in a case with a time horizon of more than 500 days.

Nevertheless, is this fair and compatible with human rights? On the other hand, if sports associations adopt the CJEU judgment in C-124/21 P ISU and amend their arbitration rules to allow parties to choose the seat of arbitration also in an EU country, I dare say that the rights of athletes will be examined more efficiently, in particular on issues of competition infringement in a given case. These are, however, unsupported propositions that are not backed up by research and remain for us academics to examine in the future.

Recent judgments of the Court of Justice in *ISU, European Super League, Royal Antwerp,* and *FIFA v. BZ* point to systemic weaknesses in the governance of sport concerning EU competition and the EU internal market. It will, therefore, be essential to explore the possibility of creating legislation regulating the scope and nature of the powers of transnational sports organisations while setting out the legal accountability for exercising their autonomous regulatory powers.

Conclusion

In summary, it can be stated that the CJEU has substantive jurisdiction to rule disputes relating to sporting activities, but the specificity of sport, or sporting rules and the *lex sportiva*, can limit this jurisdiction considerably. However, the recent

[34] Judgement of the CJEU of 18 April 2024, *OT and others v. Sofijska gradska prokuratura*, C-634/22, ECLI:EU:C:2024:340.

judgment in the ISU case has highlighted these limits to the CJEU's judicial process and has thus opened a possible debate on the CJEU justice in Sports. In the ISU judgment, the Court made it clear that the General Court's assessment, where it did not observe the exclusive jurisdiction of the CAS with its seat in Switzerland as reinforcing the competition infringements, was incorrect. However, the present appeal before the Court of Justice is only binding inter partes. It will therefore be interesting to see whether and what the consequences of this procedure will be in the field of sport. It can be noted that, despite the Court of Justice indicating that the ISU Arbitration Rules are not entirely in line with EU law, there has been no change to date.

However, not even a few months after the *ISU* judgment, observing the first interesting changes in international sports rules has been possible. UEFA, which was also a party to the recent cases before the Court of Justice (however, the subject of the dispute was not the arbitration clause with exclusive jurisdiction to arbitrate in Switzerland, but also, e.g., the authorisation and eligibility rules),[35] made changes a few months after the judgment in the case.[36] In particular, the wording of UEFA's Authorisation Rules has been amended by adding Article 16(3), which appears to be UEFA's implementation of the *ISU* judgment.[37] On this basis, a party filing an appeal or a request for interim measures with the CAS must indicate in the first written submission whether it accepts Lausanne, Switzerland, as the place of arbitration or whether it wishes Dublin, Ireland, as the place of arbitration. The potential choice of Ireland as an alternative seat of arbitration thus allows for a review of the Award under EU public policy in the Supreme Court of Ireland, which can or must, if necessary, refer a question for a preliminary ruling to the CJEU.

In this respect, I note that the subject matter will be interesting for further research.

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[35] Judgment of the Court (Grand Chamber) of 21 December 2023, Case C-333/21, *European Super League Company*, ECLI:EU:C:2023:1011; Judgment of the Court (Grand Chamber) of 21 December 2023, C-680/21, *Royal Antwerp*, ECLI:EU:C:2023:1010.

[36] HORGAN, N. Ireland as a New Seat for Sports Law – How Did We Get Here? Online, September 2024 [cit. 19 October 2024]. Available at: https://www.lawlibrary.ie/viewpoints/uefa-dublin/#_ftn2.

[37] Article 16(3) of UEFA Statue states as follows: *"CAS shall primarily apply the UEFA Statutes, rules and regulations and subsidiarily Swiss law. The party filing the statement of appeal and/or a request for provisional in the measures, whichever is filed first with CAS, shall indicate in its first written submission to CAS whether the party accepts Lausanne, Switzerland, as seat of the arbitration or if the seat of arbitration shall be in Dublin, Ireland, in derogation of Article 28 of the CAS Code. In the latter case, UEFA is bound by the choice of Dublin, Ireland, as seat of the arbitration and UEFA shall confirm its agreement to such seat in its first written reply to CAS. In case no seat is indicated in the first written submission to CAS. Article R28 of the CAS Code shall apply."*

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ANCILLARY RESTRAINS UNDER ARTICLE 101(1) TFEU AFTER SUPERLEAGUE

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Abstract: The concept of ancillary restrains is not a novelty for EU competition law. It escapes the traditional systematics of Article 101 TFEU, as it states what is not a prohibition under 101(1), without the necessity to fulfil the conditions in 101(3). Lately, there has been an interesting development of case law, shading (or shadowing?) light to what does the concept of "ancillary restrains" mean and when is this concept acceptable. The paper seeks to answer these questions.

Key words: C-309/99 Wouters, C-331/21 EDP, C-333/21 Superleague, C-680/21 Royal Antwerp, C-164/19 P Niche Generics

Introduction

EU competition law is applicable to, among others, agreements between undertakings that may affect trade between Member States. Agreements, in its broader sense[2], covers agreements, concerted practices and decisions by associations of undertakings. Naturally, not all agreements are prohibited. It is only those that have as their object or effect the restriction of competition within the internal market. This is prescribed by Article 101(1) TFEU[3], and further applied by the Commission, national competition authorities, national courts[4] and interpreted by the CJEU[5] and national courts.

The schematics of Article 101 is clear. Paragraph 1 defines what is prohibited and paragraph 3 gives an exception from the prohibition. In Article 101(3) TFEU, we identify four conditions which must be fulfilled cumulatively. Once an agreement fulfils these conditions, the prohibition of Article 101(1) TFEU is inapplicable to it.

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[2] PATAKYOVÁ, Mária T.: NOTION OF ANTICOMPETITIVE AGREEMENT CHALLANGED IN DIGITAL ENVIRONMENT. In: European Studies - The Review of European Law, Economics and Politics, Vol. 7, (2020), pp. 237-252.

[3] Treaty on functioning of the European Union („TFEU"). We will address the TFEU (with its current numbering) also when dealing with previous versions of the treaty.

[4] The application of 101 TFEU is decentralised. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[5] The Court of Justice of the European Union („CJEU"). We shall refer to the CJEU also when we are addressing its predecessors.

Apart from this "individual" exception, there are several regulations that provide for block exception, such as block exemption for vertical agreements[6].
In other words, an agreement is in line with Article 101(1) TFEU if (i) the requirements of Article 101(1) TFEU are not fulfilled, or (ii) the requirements of Article 101(3) TFEU (block exemptions included) are fulfilled.
The systematic of this step-by-step analysis, (first, identify an infringement, second, look for an exemption) is disturbed by the concept analysed by this paper. It addresses a situation when, although the conditions of Article 101(1) TFEU are met, there is no need to look into the condition of exemption (which would not be met) because the competition in the internal market is not (or is deemed not to be) restricted.
This paper looks into ancillary restrains and seeks answer to the following questions: What does the concept of "ancillary restrains" mean? When is this concept acceptable? In order to answer the questions, the paper analyses the cases which stood at the beginning of this concept as well as the very recent case law of the CJEU. The primary sources are the analysed judgements of the CJEU, supplemented by the views of scholars.
Thus, the paper is organised as follows. First, we will look into the roots of the concept of ancillary restrains. For the sake of comprehensiveness, we will limit ourselves to two judgements. Second, we will analyse five recent judgements delivered in 2023 and 2024. We will briefly present the factual background of the cases, followed by the analysis of the application of the concept. We will abstract from other elements if the cases. Finally, our findings will be summarised in the conclusion.

The concept of "ancillary restrains" – Roots

The beginning of the concept of ancillary restrains may be dated to 70s.[7] The CJEU "*articulated the 'ancillary restraints' doctrine, whereby additional restrictions in an agreement that do not go further than is objectively necessary to achieve its principal purpose, which is otherwise unobjectionable, are not caught by the prohibition in Article 101*"[8].

[6] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VBER).
[7] Judgment of the Court of 25 October 1977. Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities. Case 26-76. ECLI:EU:C:1977:167.
[8] ROTH, Sir, Peter: The continual evolution of competition law. In: Journal of Antitrust Enforcement, Volume 7, Issue 1, (2019), pp. 6–26, p. 12.

In the case 42/84 *Remia*[9], the CJEU ruled on non-competition clauses incorporated in an agreement for the transfer of an undertaking.[10] The purpose of non-competition clause was to guarantee the effectiveness of the transfer. Without it, the vendor "*would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business*"[11]. Therefore, no undertaking would purchase a business without a non-competition clause.[12]
The effective transfer was also beneficial for competition as there would be more undertakings in the market (vendor and purchaser).
The CJEU said that the non-competition clause escapes Article 101(1) TFEU, if:

- There is possible beneficial effect on competition;
- The clause is necessary. In this case, the clause must have been necessary to the "*transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose*"[13].

An evergreen of ancillary restrains is the case C-309/99 *Wouters*[14]. A Dutch court sought help in assessment of a decision by association of undertakings (a bar association). In particular, the Bar adopted a 1993 Regulation on formation of multi-disciplinary partnerships (e.g. a partnership of lawyers and auditors).[15] The problem was formation of partnerships with accountants.[16] Pursuant to the assessed 1993 Regulation, "*members of the Bar were no longer authorised to form part of a professional partnership unless the primary purpose of each partner's respective profession is the practice of the law*"[17].
The CJEU assessed both markets: accountancy market being highly concentrated (the big five) and legal market being decentralised. Unreserved and unlimited authorisation of partnerships between these professions "*could lead to an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on that market*"[18]. As to the necessity, the CJEU stated that the effects restrictive of

[9] Judgment of the Court (Fifth Chamber) of 11 July 1985. Remia BV and others v Commission of the European Communities. Case 42/84. ECLI:EU:C:1985:327.
[10] Ibidem, para. 19.
[11] Ibidem.
[12] JONES, Alison – SUFRIN, Brenda – DUNNE – Niamh: Jones & Sufrin's EU Competition Law: Text, Cases & Materials. 8th ed. Oxford: OUP, 2023. ISBN: 9780192855015, s. 274.
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[15] Ibidem, para. 73.
[16] Ibidem, para. 78.
[17] Ibidem, para. 79.
[18] Ibidem, para. 93.

competition does not "*go beyond what is necessary in order to ensure the proper practice of the legal profession*"[19].
As pointed out by Monti, this concept of what we call ancillary restrains resembled mandatory requirements under Cassis de Dijon case law.[20] To certain extant, it resembles the US concept of rule of reason.[21]

Recent judgements

Lately, there has been an interesting development to the concept of ancillary restrains. In the following part, we will analyse five cases from various sectors, all related in one way or another to ancillary restrains.

1) C-331/21 EDP – Energias de Portugal[22]

Modelo Continente and MC retail, being part of group of companies active in many sectors (from retail, shopping centers, audiovisuals to energy), were active in food distribution and consumer product sector in Portugal (the former) and retail distribution sector (the latter). The EDP Group was active in production and supply of electricity and natural gas in Portugal.[23] "*On 5 January 2012, EDP Comercial and Modelo Continente concluded an association agreement defining the terms and conditions of the 'EDP Continente Scheme'. That agreement aimed to attract customers, stimulate sales and offer discounts to consumers. On the date when that agreement was concluded, those two companies were not actual competitors on the distinct markets for (i) the retail sale of food products and consumer products and (ii) the supply of electricity and natural gas in Portugal*."[24]
Portuguese competition authority imposed a fine for the breach of competition law.[25] Portugal court, when reviewing the decision, asked, with respect to ancillary restrains, whether "*a non-compete clause contained in a commercial association agreement concluded between two undertakings active on different product markets and intended to promote the development of sales of the products of those two*

[19] Ibidem, para 109.
[20] MONTI, Giorgio: Article 81 EC and Public Policy. In: Common Market Law Review. Volume 39, Issue 5 (2002) pp. 1057 – 1099.
[21] BLAŽO, Ondrej: Rule of Reason, Pridružené obmedzenia a systém výnimiek v prípade dohôd obmedzujúcich súťaž v európskom a slovenskom práve. In: ACTA FACULTATIS IURIDICAE UNIVERSITATIS COMENIANAE, Vol. 31, No. 1 (2012), pp. 17-81, p. 45.
[22] JUDGMENT OF THE COURT (Third Chamber) 26 October 2023. Energias de Portugal and Others. Case C-331/21. ECLI:EU:C:2023:812.
[23] Ibidem, paras. 9-11.
[24] Ibidem, para. 12.
[25] Ibidem, para. 30.

undertakings by means of a promotion and cross-discount mechanism may be regarded as a restriction ancillary to that association agreement."[26]
The CJEU repeated that the effects on competition must be neutral or positive, and that the clause must be objectively necessary to the intended activity and proportionate to the objectives.[27] If it is not possible to dissociate a restriction from the main activity, "*it is necessary to examine the compatibility of that restriction with Article 101 TFEU in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 101(1) TFEU*".[28]
Unfortunately, the CJEU did not give more than a generic guidance to the referring court, and we do not know whether the non-compete clause, in its scope and duration (longer than the agreement itself[29]) was ancillary. In general, the CJEU confirmed its rather restrictive approach to the concept.

2) C-333/21 Superleague[30]

The case was concerned with European Superleague Company (ESLC), FIFA and UEFA. The "*action was brought following the launch of the Super League project by ESLC and FIFA's and UEFA's opposition to that project*"[31]. As to the application of ancillary restrains to FIFA's and UEFA's rules regulating opening of a new league, the CJEU repeated the settled case law and stated that not every agreement (in broader sense) that restricted undertaking's behaviour was prohibited by Article 101(1) TFEU. "*Indeed, the examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding,*

- *first, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature;*
- *second, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and,*
- *third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition*." (bullet points added).[32]

[26] Ibidem, para. 87.
[27] Ibidem, para. 88.
[28] Ibidem, para. 89.
[29] Ibidem, para. 91.
[30] JUDGMENT OF THE COURT (Grand Chamber) 21 December 2023. European Superleague Company. Case C-333/21. ECLI:EU:C:2023:1011
[31] Ibidem, para. 29.
[32] Ibidem, para. 92.

Importantly, the CJEU added that the concept of ancillary restrains does not apply to agreements that restrict competition by object.[33] The CJEU does not formulate this as a novelty, however, novelty it is.
It is not an easy task to categorise a restriction of competition as by object restriction. It has been described as uncertain and incoherent[34]; and it lacks clarity[35]. There are supposedly "obvious" and "less obvious" by object restrictions, the latter requiring more profound analysis.[36]
Was, in this case, the competition restricted by object? Pursuant to para. 179 of the judgement, the answer is in the affirmative. Consequently, the concept of ancillary restrains is not applicable.

3) C-680/21 Royal Antwerp[37]

The case is related to rules on "home-grown players", prescribing e.g. number of players that must be trains by Belgian clubs.[38]
The case was the same to *Superleague* when it comes to the concept of ancillary restrains. The CJEU also repeated that ancillary restrains are out of question if the restriction at hand is by object restriction. Was it so also in this case? The wording of the CJEU seems less strict than in *Superleague*. The final decision was left for the referring court, which should establish, first, whether the competition was restricted by object, and second, if not, whether the conditions for ancillary restrains are met.[39]

4) C-438/22 Em akaunt BG[40]

[33] Ibidem, paras. 185, 186. GOFFINET Pierre, BERSOU Laure: Application of the 'Commercial Ancillary Restraints' Doctrine to Non-compete Clauses Concluded Between Potential Competitors: Case C-331/21 EDP—Energias de Portugal. In: Journal of European Competition Law & Practice, Volume 15, Issue 2, (2024), pp. 102–104, p. 103.
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[36] BERGQVIST, Christian: WHEN DO AGREEMENTS RESTRICT COMPETITION IN EU COMPETITION LAW? In: NORDIC JOURNAL OF EUROPEAN LAW, Vol. 5, No. 1 (2022), pp. 96-118, p. 107.
[37] JUDGMENT OF THE COURT (Grand Chamber) 21 December 2023. SA Royal Antwerp Football Club. Case C-680/21. ECLI:EU:C:2023:1010.
[38] Ibidem, para. 11.
[39] Ibidem, para 117.
[40] JUDGMENT OF THE COURT (Second Chamber) 25 January 2024. Em akaunt BG EOOD v Zastrahovatelno aktsionerno druzhestvo Armeets AD. ECLI:EU:C:2024:71

The case was related to setting of minimum fee amounts by a lawyers' professional organization. "*Em akaunt BG EOOD brought an action* […] *claiming property insurance compensation from* […] *its insurer* […] *following the theft of a motor vehicle*".[41] The claim included fees of the applicant's lawyer (circa 547 EUR). The defendant considered them to be excessive.[42] Pursuant to national law, the amount of lawyers' fees may be reduced, however, not under the amount provided for by the regulation issued by Supreme Council of the Legal Profession, Bulgaria.[43]
The CJEU applied the concept of ancillary restrains. It referred to *Wouters*, reminded that there are the three conditions pursuant to *Superleague* and that the concept cannot be applied for by object restrictions.[44] The behaviour at stake was considered to be a restriction by object.[45]

5) C-164/19 P Niche Generics[46]

The case is set to the pharmaceutical sector. Servier developed a medicine. "*Between 2003 and 2009, a number of disputes arose between Servier and manufacturers preparing to market a generic version of*"[47] the medicine. On 8 February 2005, the Niche agreement was concluded between Servier and Niche and Unichem. The aim was to settle the dispute and the opposition proceedings to patents.[48] In a nutshell, the Niche and Unichem agreed not to market the medicine until the expiry of Servier's relevant patents, not to challenge these patents.[49] In return, Servier undertook not to bring any actions and to "*compensate them for the costs that could result from the cessation of their programme to develop a version*"[50] of the medicine.
What is interesting from the perspective of ancillary restrains, there is no reference to *Superleague* and to the three conditions mentioned therein.[51] The judgement in Niche Generics was delivered half a year after *Superleague*, therefore, there was no obstacle timewise. Moreover, there is no reference to the inapplicability of the concept when the competition is restricted by object.

[41] Ibidem, para. 12.
[42] Ibidem, para. 13.
[43] Ibidem, para. 15.
[44] Ibidem, paras. 24, 30.
[45] Ibidem, para. 52.
[46] JUDGMENT OF THE COURT (First Chamber). 27 June 2024 Niche Generics v Commission. Case C-164/19 P. ECLI:EU:C:2024:547.
[47] Ibidem, para. 17.
[48] Ibidem, para. 25.
[49] Ibidem, para. 26.
[50] Ibidem, para. 27.
[51] Ibidem, para. 151.

However, the CJEU (the Court of Justice on appeal) stated that the General Court correctly applied the concept to the present case, as there were no neutral or positive effects on competition.[52]

Conclusion

The concept of ancillary restrains occurs in many cases. Lawyers got in habit to refer to this concept whenever there is some feasible neutral/procompetitive effect of the agreement. In order to answer the questions, we believe that ancillary restrains are acceptable, in theory if:

- there is a legitimate objective in public interest which is neutral/procompetitive;
- the means used for attaining the objective are genuinely necessary;
- the inherent effects of restricting competition do not o beyond what is necessary.

These three conditions were formulated in *Superleague* and they seem to be in line with case law before and after *Superleague*. However, when it comes to the inapplicability of the concept for by object restrictions, this was not confirmed by *Niche Generics*, although it was delivered half a year later. In any case, *Superleague* was decided by Grand Chamber, having arguably "higher authority" than a "mere" Chamber deciding *Niche Generics*.

In our view, it is difficult to estimate when the concept will be allowed. If it is not to be applied for by object restrictions, the concept becomes even less clear, as the categorisation of a restriction into "by object" box is not an easy task in itself.

Moreover, as pointed out by Nagy, the CJEU should have dealt more with the "ancillarity" of the restriction than with "by-objectness" of restriction.[53] On the other hand, some authors, such as Zelger, welcome the judgement as clarification of the rules.[54]

Therefore, when, in practice, is the concept applicable? It is difficult to say, which was confirmed by the uncertain wording of the CJEU's judgement in *Royal Antwerp*.

We believe that if undertakings want to be on the safe side, they should apply the concept cautiously and they should avoid its application when a by object restriction may be identified in their agreement.

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[52] Ibidem, para. 154.

[53] NAGY, Csongor István, The doctrine of ancillary restrictions as a delimitation tool and an absorption principle: twin notions but not identical twins. In: Journal of European Competition Law & Practice, Volume 15, Issue 5, (2024), pp. 299–305, p. 304.

[54] ZELGER, Bernadette, Object Restrictions in Sports after the ECJ's Decisions in ISU and Superleague. In: Journal of European Competition Law & Practice, Volume 15, Issue 2, (2024), pp. 90–101, p. 100.

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DIALOGUE BETWEEN THE EFTA COURT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION THROUGH THE ADVOCATES GENERAL OPINIONS[1]

Igor Sloboda[2]

Abstract: The EFTA Court was constituted through a distinct agreement between the EFTA States, which established a Surveillance Authority and a Court of Justice. In reaching its decisions, the latter is guided by the principles of homogeneity, reciprocity and loyal cooperation. In the present paper, the author analyses the relationship between the EFTA Court and the Court of Justice of the European Union from the perspective of the opinions made by Advocates General. To what extent can the opinions of the Advocates-General be considered a reference point for the decisions of the EFTA Court ? To what extent are these suggestions accepted by the Court and subsequently reflected in the decisions ? Given that the two agreements in question envisage, in order to preserve the homogeneity of the EEA, only the compliance of the EFTA Court with the decisions of the Court of Justice and not vice versa, the present article seeks to provide an answer to this issue.

Key words: EFTA Court, EEA, advocate general, Court of Justice EU, opinion

Introduction

The European Economic Area (EEA) was established on 1 January 1994 in accordance with the 1992 Agreement establishing the European Economic Area (EEA Agreement). This gives rise to a distinctive concept of regional collaboration, uniting the three EFTA Member States (Norway, Iceland and Liechtenstein) with the EU. Furthermore, the establishment of a homogeneous economic area ensures the free movement of goods, persons, services and capital. In order to guarantee the smooth functioning of the economic area, a framework for legislative and judicial dialogue has been established through the EEA Agreement. This occurs within the context of the two-pillar structure established by the agreement, wherein the EFTA pillar and the EU pillar are equally represented. In addition to the institutional framework established by the EEA Agreement, the EFTA pillar comprises two institutions, the

[1] This paper is an output of the project GUKE 2024: UK/3268/2024: „European Economic Area – advantages and disadvantages of incomplete integration"

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EFTA Surveillance Authority and the EFTA Court, which were established by special agreement.
The focus of the present article is the EFTA Court, which will be the subject of an analysis of the opinions of the Advocates General of the Court of Justice in relation to the decision-making activity of the EFTA Court and the decision-making activity of the Court of Justice itself in relation to the application and reflection of the case-law of the EFTA Court.
The scientific methods of quantitative analysis, comparison and synthesis were applied during the research carried out for the purposes of this article.
The following section outlines the structure of the present article. The first chapter will define the relationship between the CJEU and the EFTA Court, with a particular emphasis on the theoretical background and the legal basis. The second chapter will then proceed to examine the issue of legislative and application homogeneity. In the third part of this article, we will examine the decision-making activity of the EFTA Court through the lens of the Advocates General of the Court. In particular, we will examine how the Advocates General collaborate with the decisions of the EFTA Court in their opinions. In the subsequent chapter, we will then analyse this issue through the lens of the Court of Justice, to which these non-binding opinions are addressed. We will conclude the article by summarising our main findings.

The relationship between the Court of Justice of the European Union and the EFTA Court - legal basis and theoretical background

At the outset of the deliberations concerning the final form of the EEA, it was evident that a mechanism was required to oversee the enforcement and breaches of EEA legislation. Indeed, the provisions of the EEA Agreement must be consistent with the rules of the internal market, and there must be judicial mechanisms in place to ensure that these provisions are interpreted in a uniform manner.[3] Nevertheless, the question remained as to how this mechanism could be implemented. In the case of the European Community, this function was discharged by the Commission and the Court of Justice. Conversely, the EFTA, as a more integratively "loose" grouping, had never established institutions comparable to those within the Community. The terms of the agreement established institutions that were to serve as an intergovernmental forum for discussing and pursuing the objectives set forth in the EFTA Convention.[4]
The first negotiations resulted in a draft agreement which proposed the creation of a single common structure for all the Contracting Parties, i.e. the European

[3] Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C. H. Beck 2018 p. 210 par. 1
[4] Article 32 - 34 Stockholm declaration (EFTA Convention)

Community (later the European Union) and its Member States and the EFTA States acceding to the Agreement.[5]
This option was rejected as it ran up against constitutional limits, as those EFTA states that decided to join the agreement could not transfer their decision-making powers to the relevant EU institutions. This was subsequently confirmed by the Court of Justice in its opinion, which stated that the establishment of a unified judicial system would be inconsistent with the terms of the EEC Treaty, particularly in relation to the proposed system of judicial supervision. [6] However, this decision can also be interpreted as an attempt by the Court of Justice to safeguard its authority, particularly in terms of its exclusive jurisdiction over the interpretation of EU law.
For these reasons, the option of establishing a unified judicial institution was rejected in favour of a second alternative, which proposed the creation of a supervisory mechanism through a two-pillar structure.[7] Furthermore, in light of the Court's rejection, the decision was taken to establish the institutional framework of the EFTA pillar outside the scope of the Agreement.
The solution was to include an enabling provision, which would bind the Member States to create the institution by means of a separate agreement. In accordance with Article 108(2) of the EEA Agreement, the EFTA States that have acceded to the EEA Agreement, established two institutions, namely the EFTA Surveillance Authority and the EFTA Court, through a separate agreement between themselves. This has resulted in the establishment of a distinct EFTA Court for the EFTA pillar within the EEA, comprising judges from the EFTA States and operating as a separate entity from the Court of Justice. The Court of Justice subsequently expressed its favourable opinion of the chosen solution.[8] It can therefore be concluded that a significant step has been taken towards the creation of a judicial institution for the EFTA pillar.

Legislative homogeneity vs. decisional homogeneity

As mentioned in the previous chapter, through the EEA Agreement, a two-pillar structure is created. The institutional framework is thus only one aspect of it. The other is the relationship between these pillars themselves, and how they engage in institutional dialogue with each other in order to fulfil the objectives set out in the Agreement.

[5] Arnesen, F., Haukeland, H. H., Graver, P. H., Mestad, O., Vedder, Ch., Agreement on the European Economic Area A Commentary – 1. ed. – München, Germany: C. H. Beck 2018 p. 840 point 1
[6] Opinion of the Court of Justice 1/91 par. 72
[7] Article 108 (2) EEA Agreement and Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice
[8] Opinion of the Court of Justice 1/92

The essential expression of the relationship between the Court of Justice of the EU and the EFTA Court is the provision of Article 6 of the EEA Agreement: „*Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.*."[9] In conjunction with Article 3(2) of the Agreement between the EFTA States on the Establishment of an EFTA Surveillance Authority and an EFTA Court: „*In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.*."[10]

At this point, we can identify a difference in the wording used in the relevant provisions of the EEA Agreement and the Agreement between the EFTA States on the Establishment of the EFTA Surveillance Authority and the EFTA Court. The provision of the former Agreement establishes an obligation to interpret in accordance with decisions prior to the signing of the Agreement, whereas the later Agreement establishes this obligation *'pro futuro'*. It follows that the EFTA Court is obliged to interpret EEA law in accordance with the relevant decisions of the CJEU. Otherwise, however, this obligation does not apply, and the CJEU is not obliged to refer to the relevant case law of the EFTA Court or to take it into account in its decision-making. Another difference is that, in relation to the EEA Agreement, the EFTA Court has competence to give advisory opinions to the courts of the EFTA States, whereas the CJEU has competence to give preliminary rulings to the EU Member States.[11]

It is these provisions that govern one of the fundamental principles governing the EEA, namely the principle of homogeneity. As is clear from the foregoing, its essence is that EEA law will be interpreted in the same way in both EU and EFTA member

[9] Article 6 EEA Agreement

[10] Article 3 (2) Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice

[11] Varga, Z., EU and EEA Law Litigation Before National Courts A Practical Guide – 1. ed. – Oxford, United Kingdom: Hart Publishing 2024 p. 366

states. However, the principle of homogeneity is not only expressed in the provisions in question; on the contrary, its cross-section can be identified across the EEA Agreement.[12]

However, this is not the only principle governing the relationship between the CJEU and the EFTA Court. Others are the principles of reciprocity and loyal cooperation. The EEA Agreement expresses the principles of reciprocity and homogeneity in the preamble under recital 15 as follows: „*WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition*;"

Recital 4, in turn, tells us that, according to the principle of reciprocity, EU-sourced economic operators under the EFTA pillar have the same rights as EFTA-sourced economic operators under the EU pillar. [13] This is expressed as follows: „*CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;*"

Finally, the principle of sincere cooperation is expressed in Article 3 of the EEA Agreement as follows: „*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement*." And transposed into the Agreement establishing the EFTA Court in the following wording: „*The EFTA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement*."[14] The EFTA Court has also taken a position on the principle in question in its adjudication when it formulated its position in one of its decisions as follows: „*The EEA/EFTA States' obligations arising from a directive to achieve its result and from Article 3 EEA to take all appropriate measures, whether general or particular, are binding on all the authorities of the EEA/EFTA States, including the courts, for matters within their competence. It is*

[12] Article 105 and 106 EEA Agreement

[13] Varga, Z., EU and EEA Law Litigation Before National Courts A Practical Guide – 1. ed. – Oxford, United Kingdom: Hart Publishing 2024 p. 367

[14] Article 2 Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice

therefore the responsibility of the national courts in particular to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective."[15]

Advocates General opinions as the start of a judicial dialogue

Our findings so far suggest that the relationship between the judicial institutions of the two pillars of the EEA is significantly asymmetric by virtue of the legal framework. This asymmetry is manifested in particular by the monopoly of the CJEU.

For the purposes of the present article, we will look at the dialogue between the two institutions through the lens of the Advocates General's proposals. Their role as independent 'advisers' is to provide reasoned opinions on cases before the Court of Justice in public hearings.[16] In addition to a detailed analysis of the case, they conclude their opinions with a recommendation to the Court on how to decide the case. They are not there to pursue the interest of any of the parties to the dispute, but to assess the case objectively and independently. The proposals are not binding on the Court and the Court may consider and decide the case differently from the proposal. Nevertheless, in the case of a persuasive opinion, the Court often follows it.[17] In practice, however, we may also encounter cases where a combination of the previous alternatives occurs, where the Court of Justice, for example, agrees with only part of the Advocate General's opinion and rejects the remainder or does not take it into account at all in its decision.

In order to answer the question of whether the Advocates General's opinions constitute an opening for a judicial dialogue between the two institutions, it is necessary to carry out a quantitative analysis in order to ascertain whether the Advocates General also refer to and work with the relevant case-law of the EFTA Court in their opinions.

At the outset, it is therefore necessary to determine the criteria against which we will search for proposals. The EEA Agreement covers the free movement of goods, persons, services and capital and competition.[18] In addition to these areas, the agreement also provides for cooperation in areas outside the four freedoms.[19] Specifically, in the areas of research and technological development, information services, environment, general and vocational training for young people, social policy, consumer protection, small and medium-sized enterprises, tourism,

[15] Case E-28/13 par. 40

[16] Article 252 TFEU

[17] Kellerbauer, M., Klamert, M., Tomkin, J., Commentary on the EU Treaties and the Charter of Fundamental Rights – 1. ed. – Oxford, United Kingdom: Oxford University Press 2019 p. 1754

[18] Article 1 (2) a - e EEA Agreement

[19] Article 1 (2) f EEA Agreement

audiovisual, civil protection[20] as well as intellectual property protection.[21] On the other hand, the following areas are excluded from the scope of the Agreement: the Common Agricultural and Fisheries Policy (the Agreement contains provisions on trade in agricultural and fishery products), the Customs Union, the Common Commercial Policy, the Common Foreign and Security Policy, Justice and Home Affairs (the EFTA States that are members of the EEA are also part of the Schengen area), direct and indirect taxation, and Economic and Monetary Union. The Advocates General will therefore most likely refer in their opinions to decisions given in cases involving the above areas.

Therefore, as part of the analysis, we applied the following criteria when searching for Advocates General's opinions in the Court's search form: 'Status of the case: Pending cases; Court: Court of Justice; Documents: Documents published in the collection - motions; Words in text: EFTA; Period: Date of motions 01/01/1994 - 01/01/2024; Area: Intellectual, industrial and commercial property, freedom of establishment, civil protection, tourism, consumer protection, social security' education, training and youth, environment, research and technological development, State aid, competition, internal market - principles, free provision of services, free movement of workers' free movement of goods, free movement of capital".

After entering the above criteria, a total of 156 applications from Advocates General of the Court of Justice of the EU were found.[22] 1 duplicate case has been deleted, therefore the final number is 155. We then proceeded to a content analysis of the individual proposals, which yielded the following data. In 87 of the opinions, reference was made to EFTA Member States, to legislation to which the EFTA States were party, to a decision of the EFTA Surveillance Authority or to cases where one of the litigants in the proceedings was supported by the EFTA Surveillance Authority. We have therefore excluded these proposals as irrelevant from the remainder of our analysis. In the remaining 68 cases [23] the Advocates General referred to one or more

[20] Article 78 EEA Agreement

[21] Article 65 EEA Agreement

[22] Results available at: https://curia.europa.eu/juris/documents.jsf?page=1&nat=or&mat=RDT%252CTOUR%252CSESO%252CENV%252CEFPJ%252CPROT%252CCONC%252CCONC.AIDE%252CPCIV%252CPROP%252CMARI%252CSERV%252CLCT%252CETAB%252CLCM%252CLCC%252Cor&pcs=Oor&jur=C&for=&jge=&dates=%2524type%253Dcon%2524mode%253DfromTo%2524from%253D1994.01.01%2524to%253D2024.01.01&language=en&pro=&etat=clot&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3B%3B%3BPUB3%3B%3B%3B%3BORDALL&avg=&lgrec=en&text=EFTA&lg=&cid=9059601

[23] Opinions in the following cases: C-11/95, C-34/95, C-189/95, C-355/96, C-95/01, C-126/01, C-192/01, C-452/01, C-41/02, C-537/03, C-170/04, C-348/04, C-374/04, C-434/04, C-170/05, C-276/05, C-287/05, C-379/05, C-438/05, C-265/06, C-42/07, C-260/07, C-316/07, C-203/08, C-304/08, C-447/08, C-72/09, C-

decisions of the EFTA Court. This means that Advocates General have referred to common areas within the EEA in less than half of the cases over the last thirty years. In the following part of the analysis, we will therefore take a closer look at the substance of the opinions, focusing on specific decisions of the EFTA Court. Within these, the Advocates General referred to 52 cases decided by the EFTA Court.[24] For the purposes of our research, however, it is essential to see to what extent the Court itself follows these recommendations and applies these decisions. In the following section, we will therefore take a closer look at how the Court itself treats the EFTA Court's case law in its own decision-making.

The Court of Justice's case-law in relation to decisions of the EFTA Court

As stated at the beginning of Chapter 2, the Advocates General's opinions are not binding on the Court of Justice. Thus, it does not have to follow their recommendations and may come to different conclusions after examining the case. For the purposes of our research, we will thus be interested to see in how many of the cases analysed in the opinions before us, the Court has shared the views of the

81/09, C-255/09, C-343/09, C-484/09, C-300/10, C-49/11, C-358/11, C-501/11 P, C-681/11, C-22/12 a C-277/12, C-105/12, C-295/12 P, C-371/12, C-382/12 P, C-557/12, C-51/13, C-83/13, C-303/13 P, C-482/13, C-127/14, C-41/15, C-360/15, C-375/15, C-488/15, C-620/15, C-646/15, C-74/16, C-206/16, C-510/16, C-637/17, C-16/18, C-228/18, C-240/18 P, C-298/18, C-610/18, C-735/19, C-819/19, C-143/20, C-128/22

[24] Decisions in the following cases: E-1/94 Restamark, E-8/94 and E-9/94 Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S, E-2/95 Eidesund v Stavanger Catering A/S, E-3/96 Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner AS, E-6/96 Tore Willemsen, E-2/97 Mag Instruments Inc. V California Trading Company Norway Ulsteen, E-4/97 Norwegian Bankers Association v EFTA Surveillance Authority, E-9/97 Eva Maria Sveinbjörnsdóttir, E-1/99 Storebrand and Finangen, E-1/00 Íslandsbanki-FBA, E-3/00 EFTA Surveillance Authority v Norway, E-7/00 Helgadóttir, E-8/00 Landsorganisasjonen i Norge, E-7/01 Hegelstad, E-3/02 Paranova v Merck, E-1/04 Fokus Bank v The Norwegian State, E-3/04 Tsomakas Athanasios m.fl. v Staten v/Rikstrygdeverket, E-4/04 Pedicel v Sosial-og helsedirektoratet, E-3/05 EFTA Surveillance Authority v Norway, E-4/05 HOB-vín, E-1/06 EFTA Surveillance Authority v Norway, E-2/06 ESA v Norway, E-3/06 Ladbrokes Ltd. V Government of Norway, E-5/07 Private Barnehagers, E-7/07 Seabrokers v Norway, E-8/07 Nguyen, E-11/07 and E-1/08 Rindal and Slinning, E-4/09 Inconsult Anstalt, E-1/10 Periscopus v Oslo Børs and Erik Must, E-14/10 Konkurrenten.no v EFTA Surveillance Authority, E-15/10 Posten Norge v EFTA Surveillance Authority, E-9/11 EFTA Surveillance Authority v Norway, E-13/11 Granville Establishment, E-14/11 DB Schenker v EFTA Surveillance Authority, E-15/11 Arcade Drilling, E-16/11 EFTA Surveillance Authority v Iceland, E-17/11 Aresbank S.A. v Landsbankinn hf. Fjármálaeftirlitið and Iceland, E-3/12 Norway v Jonsson, E-7/12 DB Schenker v EFTA Surveillance Authority, E-11/12 Koch, E-3/13 E-20/13 Fred Olsen, E-25/13 Engilbertsson, E-26/13 Gunnarsson, E-6/15 EFTA Surveillance Authority v The Kingdom of Norway, E-7/15 EFTA Surveillance Authority v Norway, E-15/15 and E-16/15 Franz-Josef Hagedorn und Vienna-Life Lebensversicherung AG v Rainer Armbruster un Swiss Life (Liechtenstein) AG, E-3/16 Ski Taxi SA and Others, E-5/16 Municipality of Oslo, E-15/16 Yara International ASA, E-6/17 Fjarskipti v Síminn, E-10/17 Nye Kystlink AS v Color Group AS and Color Line AS

Advocates General and can thus be found in its decisions a direct or indirect reference to the EFTA Court's rulings.

The decisions analysed show that the Court's reference to previous decisions of the EFTA Court on which the Advocates General have worked in their opinions has been reflected by the Court in 12 cases.[25] Since in one case the reference was made by the national court making the reference for a preliminary ruling, it will not be taken into account.[26] The final number is thus 11 decisions. In this respect, these were either direct references, where the Court gave the decision's case-number verbatim. Or indirect references, where the Court referred in the judgment to points in the Advocate General's application in which the EFTA Court's decision was directly referred to or relied on by the Advocate General.[27] From the foregoing, it appears to us that the Court's direct or indirect reflection of the EFTA Court's case-law occurs in only one-fifth of the cases where decisions have been proposed by Advocates General.

For a more comprehensive picture of the Court's reflection of the EFTA Court's decision-making, it is necessary to proceed to a quantitative analysis of its decisions similar to that of the Advocates-General's opinions. To this end, the same criteria will be applied in the search for decisions as in Chapter 2 for the Advocates General's applications. Once these have been entered, the data obtained is as follows. During the period under review, the Court handed down a total of 4,870 decisions in the same areas.[28] After narrowing the identified criteria to only those decisions containing a reference to EFTA, the number of decisions was reduced to 125.[29] Within

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[25] Decisions in the following cases: C-34/95, C-192/01, C-41/02, C-537/03, C-348/04, C-434/04, C-49/11, C-22/12, C-371/12, C-83/13, C-375/15, C-206/16

[26] C-371/12 bod 19

[27] Par. 22 C-537/03 and partly the par. 47 C-22/12, par. 38 C-83/13, par. 43 C-375/15, par. 39 C-206/16

[28] Results available at:
https://curia.europa.eu/juris/documents.jsf?nat=or&mat=LCC%252CLCM%252CETAB%252CLCT%252CSERV%252CMARI%252CPROP%252CPCIV%252CCONC.AIDE%252CCONC%252CPROT%252CEFPJ%252CENV%252CSESO%252CTOUR%252CRDT%252Cor&pcs=Oor&jur=C&for=&jge=&dates=%2524type%253Dpro%2524mode%253DfromTo%2524from%253D1994.01.01%2524to%253D2024.01.01&language=en&pro=&etat=clot&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3B%3B%3BPUB1%3B%3B%3BORDALL&avg=&page=1&lg=&cid=9290886

[29] Results available at:
https://curia.europa.eu/juris/documents.jsf?page=1&nat=or&mat=LCC%252CLCM%252CETAB%252CLCT%252CSERV%252CMARI%252CPROP%252CPCIV%252CCONC.AIDE%252CCONC%252CPROT%252CEFPJ%252CENV%252CSESO%252CTOUR%252CRDT%252Cor&pcs=Oor&jur=C&for=&jge=&dates=%2524type%253Dpro%2524mode%253DfromTo%2524from%253D1994.01.01%2524to%253D2024.01.01&language=en&pro=&etat=clot&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3B%3B%3BPUB1%3B%3B%3BORDALL&avg=&lgrec=en&text=EFTA&lg=&cid=9290886

these, we can find reference to the EFTA Court's decision in only 17 cases. As in the case of the Advocates General's applications, the remaining decisions referred only to legislation to which the EFTA States were party, to a decision of the EFTA Surveillance Authority or to cases where one of the litigants in the proceedings before the Court was supported by the EFTA Surveillance Authority. Of the 17 cases found, 4 involved a reference by one of the parties to the dispute. However, we wondered whether the Court also refers to EFTA Court decisions in cases where they are not the subject of applications by Advocates General.
In the next part of the analysis, we therefore excluded from the existing decisions those which had a reference to a previous decision of the EFTA Court in the Advocate General's application. As a result, we are left with only 4 decisions in which the Court refers directly to a previous decision of the EFTA Court, without these having previously been the subject of Advocates-General's applications.[30] From the foregoing, it is clear to us that the Court's decisions reflect the previous case-law of the EFTA Court, particularly where those decisions have previously been referred to in Advocates General's applications. Although these references constitute only a small fraction of the decisions, it is an illustration that the EFTA Court may also consider certain factual circumstances in its decision-making before the Court of Justice reaches them, despite its broader jurisdiction. The EFTA Court may thus reach conclusions in its adjudicatory work which in some way advance the development of the EU legal order.

Conclusion

In light of the aforementioned facts and the conducted analysis, we can synthesise the acquired knowledge and draw the following conclusions.
A quantitative analysis of the Advocates General's opinions in relation to references to previous EFTA Court case-law, compared with references made by the Court in its decisions, revealed that the former are much more frequent. Conversely, however, there is a paucity of reference to these decisions in the Court's judgments.
Notwithstanding the reduced number of EFTA Court decisions that have been referenced by the Court, it can be concluded that the principle of homogeneity has undergone a seamless transition into the judicial dialogue between the two supranational judicial bodies over the thirty years of the EEA. However, given the extent of the catchment area, it is unlikely that any more fundamental proportional changes will be expected in the future. It may therefore be anticipated that a lower number of decisions of the EFTA Court to which the Court will refer will occur in the future. Nevertheless, these references are of particular significance, particularly in

[30] These are decisions in matters: C-140/97, C-522/04, C-471/04 and C-452/04 , with referring to the following decisions of the EFTA Court E-9/97, E-1/00 and E-1/03

instances where the circumstances are not analogous, and the EFTA Court has reached a conclusion in its judgment that has made a substantial contribution to the further development of EU law.
In light of the aforementioned considerations, it can be concluded that the opinions presented by the Advocates General provide a basis for the application of the decisions rendered by the EFTA Court in the proceedings before the Court. This represents a significant departure from the conditions set forth in the EEA Agreement and the Agreement establishing the Surveillance Authority and the Court of Justice, which stipulate only a reference from the EFTA Court to the Court of Justice, and not vice versa.

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ROMAN LAW IN THE LEGAL ORDER OF THE EUROPEAN UNION: EMBELLISHMENT OR A GENUINE SOURCE OF LAW?

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Abstract: The paper explores whether Roman law is an additional layer or root for the system of EU law norms or whether the references to Roman law norms are accidental without any practical significance. The research employs a quantitative analysis from the point of view of the occurrence of Roman law references in the judgments of the Court of Justice of the European Union as well as in the opinions of the Advocates General. Furthermore, the analysis explores the quality and practical impact of every individual reference to Roman law that occurred in the abovementioned sources.
It is hard to confirm that Roman law can be considered an unwritten source of EU law as a general principle of law. Roman law "lives in its offsprings", i.e. through legal orders of the Member States which maintained Roman law maxims and traditions embedded in their respective legal principles. Therefore, in some cases, it is possible to make a shortcut in argumentation that a legal principle or a rule stem from Roman law and thus it is a general principle of law common to all Member States. In the majority of cases, it can be observed that references served as a form of intellectual embellishment of the opinions of the Advocates General without any practical use for solving the case itself. However, even these references are worthless because they are helping to preserve and vitalize the European legal traditions of the Member States. These references could be, on the other hand, more credible if the Advocates General included precise quotations of Roman law sources, otherwise such a reference can look like a made-up argumentum ad antiquitate.

Key words: European Union law, Roman law, general principles of law, legal principles

Introduction

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The legal order of the European Union is based not only on "explicit" written sources, i.e., primary law and secondary law, but also includes a set of norms of unwritten law. Although the EU legal order is considered autonomous or, in the words of judgment in *Costa/Enel* case, it constitutes an independent source of law,[4] it incorporates norms stemming from public international law[5] as well as principles having their origin in the legal orders of the Member States through "general principles of Union law". The latter category will be subject to the research of this paper because the primary law does not explicitly limit the scope of this category, and the primary law does not rigorously describe it. The references to sources of law other than primary law and secondary law are scattered through the Treaties :

Art. 6 (2) of the Treaty on European Union (TEU): "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Art. 19(1) TEU: "The Court of Justice of the European Union shall (…) ensure that in the interpretation and application of the Treaties the law is observed." It is visible that the provision distinguishes between "law" as a general category, and "Treaties" as a "subcategory" of law applicable in the EU.

Art. 19(3)(b) TEU: "The Court of Justice of the European Union shall, in accordance with the Treaties: (…) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions (…)". Again, the wording of the provision refers to the category of "Union law" rather than to narrower category of primary and secondary law.

Art. 263 of the Treaty of the Functioning of the European Union (TFEU) ZFEÚ: The CJEU shall annul an act "…on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers." Again, the provision considers the broader scope of the legal order of the EU than merely written primary and secondary law.

Hence, an amoebic structure of the unwritten body of legal norms can be divided at least into four categories: first, general principles common to the laws and constitutional traditions of the Member States; second, general principles of international law; third, general principles of EU law stricto sensu; and, fourth,

[4] Judgment of 15 July 1964, Costa v E.N.E.L., C-6/64, EU:C:1964:66.

[5] Judgment of 24 November 1992, Anklagemindigheden v Poulsen and Diva Navigation, C-286/90, EU:C:1992:453; judgment of 25 February 2010, Brita, C-386/08, EU:C:2010:91; judgment of 21 December 2016, Council v Front Polisario, C-104/16 P, EU:C:2016:973, par. 87.

general principles of law (in general).[6] On the other hand, this flexibility of this element of the EU legal structure can generate at least three functions: filling gaps of written law, aid for interpretation of written law and safeguard within the judicial review.[7]

This paper to a particular section of the general principles of law as a source of EU law which has its origins in Roman law as a part of the legal heritage of the Member States of the EU (at least a substantial majority of them). The rationale for the research can be found in the occurrence of references to Roman law rules (or at least rules claimed to be included in Roman law) in the judgments of the CJEU (including its legal predecessors). Thus, it invokes a question if Roman law is an additional layer or additional root for the system of EU law norms or whether the references to Roman law norms are accidental without any practical significance.

The Roman law context of legal orders overreaching legal orders of individual states is not novel and was analysed in international law[8] and EU law as well,[9] however this paper critically scrutinizes this phenomenon in its entirety.

Before any analysis of the occurrence of references to Roman law, it must be noted that referring to the provisions of Roman law in general, without reference to the source of the origin (production) or knowledge of the law, can be misleading. Roman law is the legal order that was in force in the territory of the ancient Roman State for more than a thousand years (from the foundation of the city of Rome in 753 BC to the death of Emperor Justinian in 565 AD). Even after the end of the Western Roman Empire (in 476), due to the principle of personality, Roman law did not cease to be applied in the territory of the vanished part of the empire, i.e. in today's Italy, France, and Spain. This is a unique historical fact in the history of law. Two important schools of law gradually emerged: a) the glossators (11th-13th centuries), who scientifically elaborated and explained Justinian Roman law; b) the commentators (from the late 13th century onwards), who produced coherent commentaries on Roman legal texts, making Roman law the common law (ius commune) in the Middle Ages. It was only

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[6] J. NEUVONEN, P., S. ZIEGLER, K. General principles in the EU legal order: past, present and future directions. In ZIEGLER, K.S., NEUVONEN, P.J., MORENO-LAX, V. eds. *Research Handbook on General Principles in EU Law* [online]. Edward Elgar Publishing, 2022, p. 8. DOI: 10.4337/9781784712389.00007

[7] LENAERTS, K., GUTIÉRREZ-FONS, J.A. The constitutional allocation of powers and general principles of EU law. In *Common Market Law Review* [online]. 2010, vol. 47, no. Issue 6, p. 1629. DOI: 10.54648/COLA2010069

[8] LESAFFER, R. Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription. In *European Journal of International Law*, 16(1), 2005, p. 25–58. https://doi.org/10.1093/ejil/chi102

[9] MAŃKO, Rafał T. Roman Roots at Plateau du Kirchberg: Recent Examples of Explicit References to Roman Law in the Case-Law of the Court of Justice of the EU. In *Z. Benincasa, & J. Urbanik (Eds.), Mater Familias: Scritti romanistici per Maria Zabłocka.* Journal of Juristic Papyrology. Supplement XXIX, Warszawa, 2016, p. 501-526. ISBN 978–83–938425–9–9.

during the 19th century, with the advent of the great European codifications (Code Civil of 1804, Algemeines Bürgerliches Gesetzbuch of 1811, Burgerliches Gesetzbuch of 1900), that Roman law ceased to be positive law and became a discipline of history of law.

Scope and methodology

The aim of the paper is not to evaluate Roman legacy in the EU legal environment as a whole because it would require covering not only explicit principles, but also the aspects of legal thinking, basic institutes and their construction, etc. Therefore, the scope of the analysis was narrowed and streamlined. For the purpose of the analysis included in this paper, judgments of the courts of the CJEU and opinions of the Advocates Generals were selected on the basis of a criterion of whether they include a direct reference to Roman law norms. Therefore, documents containing some rules that can have their origins in the Roman law system but without such a reference were not included. The arguments of the parties and text of the preliminary references by the court were not included in the analysis because of the different quality of its reproduction in published texts throughout the history of the CJEU and its predecessors and also for the reason that merely arguments of the court and Advocates Generals were relevant for the research.
The analysis is split into two sections: first, quantitative, which assesses a number of cases containing references to Roman law in the arguments of the court or Advocate Generals, the second, qualitative, assesses the quality of the references, i.e., whether the references are precise enough to identify a Roman law rule and whether such a rule is relevant for the solution of the case.

Quantitative analysis

Number of cases

The reference to a Roman law rule was identified in six judgments of the Court of Justice (including the European Court of Justice), four judgments of the General Court (including the Court of the First Instance), and 51 opinions of the Advocates Generals. It is apparent that the Advocates Generals are willing to provide a broader evaluation of the presented case, including a historical context of legal concepts in the issue. On the other hand, express references to Roman law in the judgments are limited and thus the courts are more reluctant to consider Roman law being a source of EU law.
In the *Klomp* case, the Court referred to a legal principle allegedly stemming from the Roman law tradition for the first time: "In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary

intention, continuity of the legal system must be ensured."[10] Compared to the other language versions of the text of the judgment can be assumed that the judgment refers to Roman law tradition of the principle of the stability of legal order, rather than to the common origins of the legal orders of the Member States in Roman law.[11] This formula was repeated in the majority of the judgments refereeing to Roman law (see Table No 1), in 3 of 5 remaining judgments of the Court of Justice, and in three of four judgments of the General Court/Court of the First Instance.

Table No. 1

List of the judgments with the references to Roman law and occurrence of "Klomp formula"

Number of case	Case title	Date of the judgment	Klomp formula
Court of Justice			
C-352/09 P	ThyssenKrupp Nirosta v Commission	29.3.2011	Yes
C-216/09 P	Commission v ArcelorMittal Luxembourg and Others	29.3.2011	Yes
C-201/09 P	ArcelorMittal Luxembourg v Commission	29.3.2011	Yes
C-326/99	"Goed Wonen"	4.10.2001	No
C-296/95	EMU Tabac and Others	2.4.1998	No
C-23/68	Klomp	25.2.1969	Yes
General Court/Court of the First Instance			
T-124/14	Finland v Commission	11.12.2015	No
T-91/10	Lucchini v Commission	9.12.2014	Yes
T-472/09	SP v Commission	9.12.2014	Yes
T-405/06	ArcelorMittal Luxembourg and Others v Commission	31.3.2009	Yes

The occurrence of references to Roman law is much higher in the opinions of the Advocates General varies (Table No 2); opinions of AG Trstenjak constitute almost ¼ of all opinions containing such a reference. Since the Advocates General referring to

[10] Judgment of 25 February 1969, Klomp v Inspectie der belastingen, C-23/68, EU:C:1969:6, par. 12-14.

[11] German: "Nach einem den Rechtsordnungen der Mitgliedstaaten gemeinsamen, auf das römische Recht zurückgehenden Grundsatz ist bei Änderung der Gesetzgebung, soweit der Gesetzgeber nicht einen entgegenstehenden Willen zum Ausdruck gebracht hat, der Auslegung der Vorzug zu geben, welche die Kontinuität der Rechtsstrukturen gewährleistet."
Italian: "Conformemente a un principio comune agli ordinamenti giuridici degli stati membri, le cui origini risalgono al diritto romano, qualora venga mutata la legge ed il legislatore non esprima una volonta contraria, e opportuno favorire la continuita degli istituti giuridici."
French: "...que, conformément à un principe commun aux systèmes juridiques des États membres, dont les origines peuvent être retracées jusqu'au droit romain, il y a lieu, en cas de changement de législation, d'assurer, sauf expression d'une volonté contraire par le législateur, la continuité des structures juridiques;".

Roman law more often have been in office prevalently in the recent period, the references to Roman law appear to be popular among Advocates General in the decades after 2000 (Table No. 3), since this period corresponds to the terms of V. Trstenjak, M. Bobek, M. Campos Sánchez-Bordona, H. Saugmandsgaard Øe, and P Léger, i.e. the Advocates General with the several opinions with the references to Roman Law.

Table No. 2

Number of AGs' opinions containing references to Roman Law

AG's surname	**Number of opinions**
Trstenjak	12
Bobek	5
Campos Sánchez-Bordona	4
Saugmandsgaard Øe, Léger	3
Szpunar, Wahl, Cosmas, Mancini, Dutheillet de Lamothe	2
Tanchev, Wathelet, Mengozzi, Ruiz-Jarabo Colomer, Elmer, Lenz, Capotorli, Sharpston, Poiares Maduro, Jacobs, Saggio, Fennelly, Warner, Mischio	1

Table No. 3

Number of AGs' opinions containing references to Roman Law in respective decades

Decade	**Number of AGs' opinions**
2020	5
2010	15
2000	18
1990	7
1980	4
1970	2
1960	0

Qualitative analysis

Quality of references

Although the court as well as the Advocates General refer several times to Roman law, under the scrutiny, it is not always clear, which precise norm they have in their minds. Only in ten opinions, the Advocates General provide a precise reference to the wording or citation of Corpus Iuris Civilis.

1. Campos Sánchez-Bordona in *Wightman*[12] quoted Digest 33.5.2.2 to 3 in the context of the principle "*optione facta, ius eligendi consumitur*", which was, in fact, not confirmed in the context of Art. 50 TEU.
2. Bobek in *Nemec*[13] analyses the rule of *ne ultra alterum tantum* in the historic context of CJ.1.2.17.3[14] and Ulp. D. 12, 6, 26, 1.[15]
3. Trstenjak in *Budějovický Budvar*[16] refers to legal maxim "*impossibilium nulla obligatio est*" found in Digests, 50, 17, 185 and followed by the same reference of AG Wathelet in *Scuola Elementare Maria Montessori*.[17]
4. Trstenjak in *Commission/Germany*[18] mentions the concept of *contractus similatus* and the Roman law maxim "*plus valere quod agitur, quam quod simulate concipitur*" (Justinian Code, title to book 4.22).
5. Ruiz-Jarabo Colomer in *Seagon*[19] provides quite an extensive review of the *actio per manus iniectio* referring (Gaius 4, 21), the *maxim adversus hostem aeterna auctoritas esto* (Table III of the Law of the Twelve Tables) and *actio pauliana*.
6. Bobek in *Feniks*[20] quotes Gaius, Institutiones, Book 4:37[21] when explaining "fiction of citizenship" of the Roman Empire.
7. Sharpston in *Gasparini*[22] traces the *ne bis in idem* principle back to Demosthenes and his Speech 'Against Leptines' and Dig.48.2.7.2 and CJ.9.2.9pr.
8. Elmer in *Job Centre*[23] compared the competence of the Italian court "*giurisdizione volontaria*" to the rule established by Roman law under which all proconsuls had jurisdiction, outside the bounds of their district, but only as

[12] Opinion of 4 December 2018, Wightman, :EU:C:2018:978, par. 61.
[13] Opinion of 28 July 2016, Nemec, C-256/15, EU:C:2016:619, par. 66.
[14] "If any of the things mentioned are omitted, the creditor and purchaser shall lose the property, the debt and the price paid; and he who made an exchange shall lose both what he gave and what he received; whoever received any property by emphyteusis (long lease) for his life or by gift or alienation, shall return what he received and an additional amount equal to what was given".
[15] "*Supra duplum autem usurae et usurarum usurae nec in stipulatum deduci, nec exigi possunt, et solutae repetuntur*".
[16] Opinion of 3 February 2011, Budějovický Budvar, C-482/09, EU:C:2011:46, par. 72.
[17] Opinion of 11 April 2018, Scuola Elementare Maria Montessori v Commission, C-622/16 P, EU:C:2018:229.
[18] Opinion of 8 March 2007 , Commission/Germany, C-536/07, EU:C:2009:340, par. 88.
[19] Opinion of 16 October 2008, Seagon, C-339/07, EU:C:2008:575, part. 23 et seq.
[20] Opinion of 21 June 2018, Feniks, C-337/17, EU:C:2018:487.
[21] "Item civitas romana peregrino fingitur, si eo nomine agat aut cum eo agatur quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi…"
[22] Opinion of 15 June 2006, *Gasparini*, C-467/04, EU:C:2006:406, par. 72.
[23] Opinion of 8 June 1995, Job Centre, C-111/94, EU:C:1995:178, par. 6.

regards voluntary matters (that is, where there was consensus) and thus not in disputes, included in the First Book of Justinian, Chapter XVI.

9. Mancini in *Ammann/Council*[24] found that the principle "*qui tardius solvit minus solvit*" as mentioned in Digest 50, 16, 12, 1 is a general principle of law and thus applicable within the scope of the Treaties.

The references to Roman law made by the Advocates General are uncertain in the majority of their opinions and they usually refer to general concepts, general maxims rather than the exact wording of Roman law itself. Already from this short review, it is apparent, that it is possible to draw a preliminary conclusion that in some cases the Advocates General uses references to Roman law unessential for arguments in the case itself or as a shortcut for the explanation of a concept analysed within the scope of the case.

Roman law in the judgments

As it was described above, the "*Klomp* formula" is the most frequent argument used by the court relying on Roman law. However, the court does not explain any source of its assertion of the existence of such a rule in Roman law. Moreover, although the Advocate General Gand mentions similar conclusions as the court regarding the continuity of legal rules, he does not mention the origins of such a principle in Roman law.[25]

As writes Mańko, in the case *Klomp* the Court of Justice explicitly refers to a text from Roman law to support the principle of continuity of the legal system. This is a direct logical inference from the principle "*lex specialis derogat legi generali*", which, however, was formulated by medieval jurists, not by Roman lawyers[26]. The same opinion was adopted by Zimmerman - he writes, that these remedies were only inspired by the aedilitian remedies of Roman law[27].

But in the Digest we noted one fragment, which refers in a certain sense to the rule "*lex specialis derogat legi generali*". In the fifth title of the first book of the Digest (D. 1,5,24) we can read the fragment with this text: "*Lex naturae haec est, ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi lex specialis aliud inducit*." (The law of

[24] Joined opinion of 31 January 1985, Ammann/Council, C-174/84, EU:C:1985:42, par. 5.

[25] Opinion of 29 January 1969, Klomp, 23-68, EU:C:1969:2.

[26] Cf. MAŃKO, R. T.: Roman Roots at Plateau du Kirchberg: Recent Examples of Explicit References to Roman Law in the Case-Law of the Court of Justice of the EU. In Z. Benincasa, & J. Urbanik (Eds.), Mater Familias: Scritti romanistici per Maria Zabłocka. Journal of Juristic Papyrology. Supplement XXIX, Warszawa, 2016, p. 510-511; cf also: LESAFFER, R. Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription. In *European Journal of International Law*, 16(1), 2005, p. 25–58.

[27] ZIMMERMANN, R.: The Law of Obligations. Roman Foundations of the Civilian Tradition. Oxford University Press, 1996, p. 813.

nature is that a child born out of lawful matrimony follows the mother, unless a special law provides otherwise.)
The only fragment, which explains *stricto sensu* the idea of mentioned rule is in the last book of Digest, which is named "*De diversis regulis iuris antiqui*". *(Different rules of ancient law). The text of it reads as follows (D. 50,17,80): "In toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est*." (In the whole of law species takes precedence over genus and anything that relates to species is regarded as the most important).
The remaining judgments of the courts involve a limited scope of references to Roman law traditions, if any. In *EMU Tabac and Others* the Court of Justice rejected the application of the maxim of Roman law "*qui facit per alium facit per se*"[28] as a general principle of law within the EU law, because such an interpretation was not expected by the directive under interpretation, the principle is linked to civil law and thus inapplicable in fiscal law and because national law can be employed for interpretation of EU law only of the EU provides so.[29]
In "*Goed Wonen*" rejected the possibility of interpretation of the provision of the VAT directive based on national civil rules based on Roman law traditions and distinguishing between leasing and letting and *usufructus.*[30]
The General Court in *Finland/Commission* identified the "*principle singularia non sunt extendenda*"[31] as a principle originating from Roman law and confirmed by previous case law. This reference has, however, two caveats. First, the previous case law of the court does not mention the Roman origin of the principle[32] that EU rules providing for exceptions must be interpreted strictly to preserve the effectiveness of the general rule from which they are derogating. And secondly, it did not confirm the application of such a principle in that particular case. [33]

Roman law in the opinions of the Advocates General

Principles and maxims of private law
It is no surprise that the Advocates General invoke the Roman law maxims of private law because of the common roots of civil law of continental Europe in Roman law

[28] Roman civil law applied, as a matter of principle, unchanging position that an expression of will causes legal effects for the only one who expresses the will. This concept has been maintained by the Roman *ius civile* continuously and, with only a few exceptions, in order to prefer the needs of commercial practice. The principle *per extraneam personam non adquiritur* (Institutes of Gaius 2,95) roman lawyers applied not only in the field of substantive law but also in the field of procedural law in the form in which it is found also in D. 50,17,123: *nemo alieno nomine lege agere potest.*
[29] Judgment of 2 April 1998, EMU Tabac and Others, C-296/95, EU:C:1998:152, par. 28-30.
[30] Judgment of 4 October 2001, Goed Vonen, C-326/99, EU:C:2001:506, par. 42 and 48.
[31] Judgment of 11 December 2015, Finland/Commission, T-124/14, EU:T:2015:955, par. 30.
[32] Judgment of 13 December 2001 in Heininger, C 481/99, Rec, EU:C:2001:684, par. 31.
[33] Judgment of 11 December 2015, Finland/Commission, T-124/14, EU:T:2015:955, par. 30.

tradition. The array of private law related from principles of contractual law, such as "*pacta sunt servanda*" to principles of ownership rights.

Principles of contractual law

Although the Advocates General do not name the source of a Roman law rule, some of the well-established principles of contractual law are actually easy to find:

- *Impossibilium nulla obligatio* est (No obligation is binding which is impossible.); D. 50,17,182; or: D. 50,17,185: "*Quod nullius esse potest, id ut alicuius fieret, nulla obligatio valet efficere*." (When the title to property cannot vest in anyone, no obligation can cause it to do so)[34]: AG Wathelet described the development of the position of the rule in EU law in *Scuola Elementare Maria Montessori:* "First of all, I note that, although that formulation may have been described as a 'maxim' or mere 'adage' by some of my predecessors, the Court itself recently described it as a 'principle'. Moreover, the Court has, more recently, used it to justify the interpretation of a provision of EU law."[35] AG Wathelet (similar to AG Trstenjak in *Budějovický Budvar*) has no problem to find *Impossibilium nulla obligatio est* rule as a general principle of EU law confirmed by the CJEU.[36] However, the CJEU when confirming the existence of such a principle did not include any reference to Roman law sources in its judgments.[37]
- *Qui tardius solvit minus solvit*: D. 50,16,12,1: "*Minus solvit, qui tardius solvit: nam et tempore minus solvitur*." (He who is in default pays less than he owes, for less is paid when the time of settlement is deferred): AG Mancini in *Amman* expressly stated that the mentioned rule is a general principle existing within the framework of the EEC Treaty.[38]
- *Cuius commoda eius incommoda (*Who gets the benefits should also bear the costs); D. 50,17,10: "*Secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda*" - It is in accordance with nature that he should

[34] For a legal-philosophical analysis of this maxim see: HOLLÄNDER, Pavol: Impossibilium nulla obligatio est: iusnaturalistická maxima či pozitívno-právny príkaz zákonodarcu? In: Constans et perpetua voluntas: pocta Petrovi Blahovi k 75. narodeninám. Trnava : Trnava university in Trnava, Faculty of Law, 2014, p. 207-216.

[35] Opinion of 11 April 2018, Scuola Elementare Maria Montessori v Commission, C-622/16 P, EU:C:2018:229, par. 106.

[36] Opinion of 11 April 2018, Scuola Elementare Maria Montessori v Commission, C-622/16 P, EU:C:2018:229, par. 110.

[37] See, e.g., judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, par. 96.

[38] Opinion of 31 January 1985, Ammann v Council, C-174/83, EU:C:1986:130, par. 5.

enjoy the benefit of anything who pays the expenses attached to it)[39]. AG Trstenjak found this principle embedded in Recital 31[40] of Directive 2001/29/EC[41] when interpreting that directive in the *Padawan* case.[42]

- *Fraus omnia corrumpit* (D. 44,4,11,1*: In universum autem haec in ea re regula sequenda est, ut dolus omnimodo puniatur, etsi non ali cui, sed ipsi, qui eum admisit, damnosus futurus erit* - In general, however, the following rule should be observed in matters of this kind, that is to say, that fraud should always be punished, even if it will not injure anyone but the person who committed it.)[43]. Although in *Paletta II* AG Cosmas noted that the Court was reluctant to confirm the principle in general[44], the Court confirmed, that it constantly upholds the principle that the EU law cannot protect fraudulent behaviour.[45] On the other hand, the Court neither linked this principle with Roman law, nor it confirmed that a fraud corrupts "everything" because it allowed a migrating worker to replace fraudulent documents with new evidence.
- *Pacta sunt servanda*: AG Trstenjak mentioned it as a Roman law principle in the *Commission/Germany* case stressing that the pacta sunt servanda principle can be relied on only if Community law expressly accepts that rights acquired under contracts concluded in breach of public procurement law are to be protected, i.e. not in a case of an illegal contract.[46] It is necessary to explain the origins of this rule in Roman law in more detail in a separate subchapter to understand its context precisely.
- The "*actio pauliana*" is mentioned several times in the opinions of the Advocates General and different contexts:

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39 Cf. Ugo Mattei and Alessandra Quarta, The Turning Point in Private Law. Ecology, Technology and the Commons (Cheltenham: Edward Elgar, 2019) 192 pp, ISBN: 9781786435170

40 "A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market."

41 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10–19).

42 Opinion of 11 May 2010, Padawan, C-467/08, EU:C:2010:264, par. 75.

43 Cf. also: D. 16,3,1,7; D. 13,6,17 pr.; D. 50,17,23.

44 Opinion of 30 January 1996, Paletta, C-206/94, EU:C:1996:20, par. 51 and footnotes.

45 Judgment of 2 May 1996, Paletta, C-206/94, EU:C:1996:182, par. 24 and case law cited therein.

46 Opinion of 28 March 2007, Commission v Germany, C-503/04, EU:C:2007:190, par. 74.

- In *Seagon*[47] AG Ruiz-Jarabo Colomer directly refers to *actio per manus iniectio* referring (Gaius 4, 21), the *maxim adversus hostem aeterna auctoritas esto* (Table III of the Law of the Twelve Tables) as well as *actio pauliana* for historical background in solving the question whether bankruptcy procedural rules[48] or Brussels I Regulation[49] is applicable in particular case; for the purposes of the analysis of the case, AG Ruiz-Jarabo Colomer acknowledged that *actio pauliana* changed through millennia. Hence, he used it rather as a general description of a legal remedy governed by civil law which protects creditors against disposals of assets made by their debtors with the intention to defraud than drawing a general principle of law from it.
- In *Feniks*[50] AG Bobek provides an extensive context of the rights of the foreigners in the Roman Empire, i.e., the protection by the *ius civile* was granted to the Roman citizens, only.[51] At the same time he used the term of *actio pauliana* in a similar was as AG Ruiz-Jarabo Colomer *Seagon* and examined it wheter the claim can be deemed as "related to a contract".
- In *Dimos Zagoriou*[52] AG Bobek suggested rejecting the Commission's argument of using the analogy with *actio pauliana* in order to enforce a debt jointly and severally from an undertaking in issue and also a municipality which was a legal successor of the municipality that originally established that undertaking.
- In *I.G.I* AG Szpunar also looked at the role of *actio pauliana* in company law as a tool for the protection of company creditors.[53]

[47] Opinion of 16 October 2008, Seagon, C-339/07, EU:C:2008:575, part. 23 et seq.
[48] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30/06/2000, p. 1–18).
[49] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1–23).
[50] Opinion of 21 June 2018, Feniks, C 337/17, EU:C:2018:487.
[51] For the comparison, following principles omitted in AG Bobek's opinion can be recalled: *Commercium iure gentium commune esse debet* (Commerce must be with regard to ius gentium accesible to all people); D. 1,1,5: "Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae: exceptis quibusdam quae iure civili introductae sunt." (By this Law of Nations wars were introduced; races were distinguished; kingdoms founded; rights of property ascertained; boundaries of land established; buildings constructed; commerce, purchases, sales, leases, rents, obligations created, such being excepted as were introduced by the Civil Law.)
[52] Opinion of 17 May 2017, Dimos Zagoriou, C-217/16, EU:C:2017:385
[53] Opinion of 26 September 2019, I.G.I., C-394/18, EU:C:2019:790, par. 1 to 4.

Since the Advocates General used the concept of *actio pauliana* in so many different contexts, it will be examined in a separate subchapter of this paper.

Pacta sunt servanda

The historical roots of the well-known principle of private law "*pacta sunt servanda*" paradoxically stem from the opposite principle of Roman law, formulated by the classical jurist Ulpian:
"*nuda pactio obligationem non parit*" (Ulpianus D 2, 14, 7, 4[54]). ["(...) the agreement itself is not the basis of the obligation]".
Even though convention (consensus) was the basis of every actionable contract (i.e., treaty), but also of agreement (i.e., pactum: originally a non-actionable obligation as an informal agreement), Roman law never arrived at a general principle of the binding nature of agreements, because the Roman system of obligations was characterized by type-binding. Obligations could only arise from certain contracts (contracta) or from certain recognised conventions (pacta).
It was only with the introduction of the office of praetor that certain agreements within his jurisdiction were protected by praetorian actions (i.e. actions created on a factual situation) or by procedural objections.
In that sense, the agreement (pactum) was a legal act which was not one of the recognised contracts, but which, through the influence of praetorian law and later imperial law, became actionable.
In other words, the agreement (pactum) was the cause of the actionable obligation, but only based on praetorian or imperial law.
Post-classical Roman law (at the time of its vulgarization and profound decline) tended to equate agreement with contract.
The first written formulation of the principle of *pacta sunt servanda* (as the general binding force of agreements) is found in the field of ecclesiastical law[55], in the context

[54] Cf. Pauli sententiae 2,14,1; this rule also appears in other textual versions: *ex nudo pacto non sequitur actio*; or: *ex nudo pacto non nascitur actio*; or: *ex nudo pacto actio non oritur.*

[55] In Justinian`s Digest is a fragment, which expresses this idea in the limited sense, because it must be noted that informal attached agreements (pacta adiecta) were not the part of the system of typical contracts; the text of fragment reads as follows (D. 2,14,1 pr.): *Quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt servare?* (For what so accords with human faith as that which men have decided among themselves to observe?) Also in Code of Justinian we can find similar text (Cod. Just. 2,3,29,1 from the year 531 A.D.: *Si enim ipso edicto praetoris pacta conventa, quae neque contra leges nec dolo malo inita sunt, omnimodo observanda sunt* (For if, according to the praetor's edict, agreements which have not been made contrary to law or in bad faith are always to be observed) or another fragment (Cod. Just. 2,3,12 from the year 231 A.D.): *Pacta novissima servari oportere tam iuris quam ipsius rei aequitas postulat.* (Law, as well as equity, requires that the most recent informal agreements shall be observed); cf: BĚLOVSKÝ, P.: Kořeny zásady pacta sunt servanda v římském

of a dispute between two bishops concerning the boundaries of two dioceses, which was dealt with by the Ecclesiastical Council of Carthage (c. 348). That Council used the words "*pax servetur et pacta custodiantur*" (let peace be kept and agreements observed). This decision was taken up in 1234 by Pope Gregory IX's collection of decrees, which later became part of the "Corpus iuris canonici". To the conclusion of the Carthaginian pronouncement was later added the remark: *pacta quantum cunque nuda servanda sunt*, i.e. "(...) agreements, though bare, must be kept". The classical Roman law concept of *'pactum nudum'* (bare agreement) was still used in the 13th century to indicate that certain agreements were not actionable.

The roots of the principle "*pacta sunt servanda*" also have their origin in the paraphrase of the above-mentioned text of Ulpian, bequeathed to us in the Codex by the Emperor Justinian Cod. Just. 2, 3, 29, 1:

"*Si enim ipso edicto praetoris pacta conventa, quae neque contra leges nec dolo malo inita sunt, omni modo observanda sunt* (...)" (If agreements have been made based on a praetorian edict which are not contrary to the laws, nor were they malicious, they must in any case be observed).

From the 15th century onwards, the view began to prevail that any informal agreements may be actionable.

From the turn of the 16th and 17th centuries, under the growing influence of natural law, we can note in the writings of humanist jurists, as well as in the works of the German *"usus modernus"* an overwhelming consensus on the general binding force of agreements and the abandonment of the Roman principle of *"nuda pactio obligationem non parit*." The main contribution to the development of the general enforceability of agreements away from the Roman principle of "*nuda pactio obligationem non parit*" towards the formulation of the principle of 'pacta sunt servanda' is thus primarily due to legal scholarship. Thus, unlike canon law, the principle of *pacta sunt servanda* was never expressed as a general principle of a normative nature in the field of civil law during the Middle Ages. However, in terms of the law in force in the various legal systems, we can only definitively confirm the validity of this principle in the great private law codes of the 19th century.

Actio pauliana and protection of creditors

The identification of the instruments against *alienatio in fraudem creditorum* in Roman law is not entirely clear, since in the Justinian compilation all the instruments of the classical law, created by the praetorian jurisdiction, has been adapted to be in

právu. In: Perpauca terrena blande honori dedicata: pocta Petrovi Blahovi k nedožitým 80. narodeninám. Trnava : Trnavská univerzita v Trnave, 2019, p. 341-357.

harmony with the only instrument (action), which was later called *actio Pauliana*[56], in the sources also referred to as an *actio in factum* (D. 42,8,1 pr.-1[57] and Cod. Iust. 7,75,5)[58], which was an action with arbitrarian formula *(actio arbitraria)*, by which the plaintiff could force restitution or payment of the value of the thing. In classical law, the creditors or the administrator of the bankruptcy assets *(curator bonorum*) could presumably proceed against the fraudster in a penal way, the starting point of which was the value by which the fraudster's property had been diminished by the acts of alienation.

Ownership and in rem rights

Servitudes

AG Trstenjak in *Horvath*[59] compared imposing on farmers the obligation to maintain public rights of way to Roman law servitudes, in particular rural servitudes.[60] AG Jacobs in '*Goed Wonen*[61] and AG Saugmandsgaard Øe in *Commission/Hungary*[62]

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[56] Cf. WILLEMS, Constantin: Actio Pauliana und fraudulent conveyances. Zur Rezeption kontinentalen Gläubigeranfechtungsrechts in England. Comparative Studies in Continental and Anglo-American Legal History, 2012. ISBN 978-3-428-13800-5

[57] Praetor ait: *"Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit"* (The Praetor says: "I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind").

[58] *Ignoti iuris non est, adversus eum, qui sententia condemnatus intra statutum tempus satis non fecit nec defenditur, bonis possessis itemque distractis per actionem in factum contra emptorem, qui sciens fraudem comparavit, et eum, qui ex lucrativo titulo possidet, scientiae mentione detracta creditoribus esse consultum. (*It is a well-recognized legal principle that the interests of creditors shall be protected against a person who, after judgment has been rendered against him, does not satisfy it within the time prescribed; and no defence is made by bringing an action in factum against the purchaser, where property has been sold after the remaining assets have been found to be insufficient, and the purchaser knowingly and fraudulently bought the property, or against him who has possession under a lucrative title, whether he was aware of the fraud or not).

[59] Opinion of 03 February 2009, Horvath, C-428/07, EU:C:2009:47, par. 73-78.

[60] "In Roman law, a distinction was drawn within real servitudes between rural servitudes (*servitutes praediorum rusticorum*) and urban servitudes (*servitutes praediorum urbanorum*). That distinction did not depend on where the properties in question were located, but on the purpose of the servitude. Rural servitudes included the right of horse or foot passage (*iter*), a right for carriages drawn or cattle driven by man (*actus*) and via, which comprises the first two rights but extends also to carriage drawn by horses or other animals, and the right to conduct water across land (aquaeductus). Those four servitudes are probably the oldest in Roman law. The right of way (iter) also permitted riding. The right to via encompassed the right to walk, to cross by carriage and to drive cattle. The servitude of aquaeductus could also include the extraction of water. Other types of rural servitudes included the right of lead cattle to water, the right to draw water, the right of pasturage, and the right to search for minerals." (Opinion of 03 February 2009, Horvath, C-428/07, EU:C:2009:47, footnote 33).

[61] Opinion of 22 February 2001, "Goed Wonen", C-326/99, EU:C:2001:115.

[62] Opinion of 29 November 2018, Commission v Hungary (Usufruct Over Agricultural Land), C-235/17, EU:C:2018:971

analyse the usufruct as another type of a personal servitude. AG Saugmandsgaard Øe found that notwithstanding its contractual basis, usufruct can be considered an "asset" within the meaning of Article 63 TFEU and the Court followed this opinion.[63] Although the Roman law regulation of servitudes and usufruct provided little help for the interpretation of the current concept, a short description of servitudes in Roman law may show the reason for this conclusion.

Servitutes (D. 8, 1, 1: servitude): In ancient times, the Romans introduced the category of land servitudes (*servitutes praediorum*) into legal life, also known in modern law as easements, which allowed a person other than the owner to use another person's land free of charge and to a certain extent, e.g. *iter* (right to cross someone else's land); via (right to cross a roadway); *aquae haustus* (right to draw water); *aquae ductus* (right to channel water); *pecoris ad aquam appellendi* (right to drive cattle to water), etc. In the later period, especially in Justinian law, a category of personal servitudes (servitutes personae) was also established, which were tied to the authorized person and had an alimony nature, e.g. usufructus (right of usufruct); usus (right of use), etc. A set of further rules were attached to servitudes.

- *Nemini res suas servit*: cf. D. 8, 2, 26. *Nec enim potest ei suus fundus servire*: cf. D. 7, 6, 5 (no one can have servitude on his own thing).
- *Servitutibus civiliter utendum est*: cf. D. 8, 1, 9 (the exercise of servitude must be carried out cautiously).
- *Servitus servitutis esse non potest*: cf. D. 33, 2, 1 (servitude cannot be encumbered with a servitude).
- *Servitutis perpetua causa*: cf. D. 8, 2, 28 (the exercise of the servitude, in the case of land, had to be possible in perpetuity).
- *Nullum praedium ipsium sibi servire neque servitutis fructus constitui potest*: cf. D. 8, 3, 33, 1 ([you conduct water through the land of several persons. No matter in what way the servitude was created, unless an agreement was entered into, or a stipulation made with reference to it, you cannot grant to any of the owners, or to any neighbours the right to draw water from channels, but where an agreement or a stipulation was entered into, it is usual for this to be granted]; although no land can be the subject of servitude in favour of itself, nor can the usufruct of servitude be created).
- *Locare servitutem nemo potest*: D. 19, 2, 44 (no one can lease a servitude).
- *Vicinitas*: cf. D. 8, 2, 1 pr. (dominant and servient land had to be close to each other in order that the servitude may be exercised).

[63] Judgment of 21 May 2019, Commission v Hungary (Usufruct Over Agricultural Land), C-235/17, EU:C:2019:432.

- *Utilitas*: cf. D. 8, 3, 4 - 6; D. 50, 16, 86 (land servitude should be useful for the land itself and not for its owner; *utilitas is the nature of land*, i.e. its fertility, salubrity, and extent).

Joint ownership and in rem rights

The Advocates General invoked several times Roman law concepts of ownership and in rem rights.
In the context of the right of ownership of the European Atomic Energy Community to fuse materials AG Poiares Maduro mentioned *commodat* and the possibility of division "*dominium directum*" and "*dominium utile*"[64] but without any conclusion or consequence for such a mentioning for the case itself. In *Legea* AG Campos Sánchez-Bordona noted that the principles of joined ownership changed from the Roman times.[65] AG Trstenjak in *E. Fritz* started her analysis of joint ownership by recalling the concept of "*societas*" in Roman law.[66] However, for establishing common principles of law, her references to the provisions of civil laws of the Member States are much more important.
From these examples, it seems to be apparent that the current concepts of ownership rights, as were under the interpretation of the Advocates General, have little useful connection with Roman law and Roman law is not very helpful for the interpretation of the current concepts.

Principles and maxims of public law

Although Roman law is usually understood as a legal heritage for European civil law, in the opinions of the Advocates General, we can find also principles and maxims of public law. Outside of the scope of the core of research provided by this paper, it is interesting to recall that also modern principles of current modern public law can have their origin in Roman law, notwithstanding the social context and the form of

[64] Opinion of 06 April 2006, Industrias Nucleares do Brasil and Siemens, C-123/04 and C-124/04, EU:C:2006:230, par. 80-83.
[65] Opinion of 08 December 2022, Legea, C-686/21, EU:C:2022:977, par. 43 and footnote 18.
[66] Opinion of 08 September 2009, E. Friz, C-215/08, EU:C:2009:522, par. 44.

government. These maxims include rules such as *nulla poena sine lege*,[67], *in dubio pro reo*,[68] *crimen extinguitur mortalitate*,[69] *audiatur et altera pars.*[70]

Principles of procedural law

The legal system of the EU is based on the principles of legal certainty, fair trial, and impartiality of judiciary relying on its quasi-constitutional framework based on the values of the EU (Art. 2 TEU) as well as legal traditions of the Member States (Art. 6 TEU). Nevertheless, some of the Advocates General traced principles providing procedural safeguards of fairness of the trial not only to the EU law itself and the constitutions of the Member States, but also back to the Roman era.

Impartiality of judges: *Nemo potest iudex in causa sua*: cf. C.J. 3, 5, 1; D. 5, 1, 17 (nobody can judge his own case). Iurare rem sibi non liquere: cf. D. 42, 1, 36 (oath of a judge that the case is not clear to him, and he will leave the decision to another judge). These principles reflect the natural law postulate of judicial impartiality. In the period of the legis actiones and formulary process, private law disputes were decided by a sole judge (*iudex privatus*), who, although appointed by the praetor (datio iudicis), was subject to the agreement of the disputants on the judge and the subject matter of the dispute. AG Trstenjak in *Gorostiaga Atxalandabaso v Parliament* presents her opinion that the present principle of impartiality, "which is also

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[67] ***Nulla poena sine lege*** (No penalty without law); D. 50,16,131,1: "*Et multa quidem ex arbitrio eius venit, qui multam dicit: poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic delicto imposita est":* (A fine is left to the discretion of the magistrate who passes sentence; a penalty is not inflicted unless it is expressly imposed by law or by some other authority).

[68] ***In dubio pro reo*** (In doubt, on behalf of the [alleged] culprit); D. 48,5,19 pr.): "*Absentem in criminibus damnari non debere divus Traianus Iulio Frontoni rescripsit. Sed nec de suspicionibus debere aliquem damnari divus Traianus Adsidio Severo rescripsit: satius enim esse impunitum relinqui facinus nocentis quam innocentem damnari."* (The Divine Trajan stated in a Rescript addressed to Julius Frontonus that anyone who is absent should not be convicted of a crime. Likewise, no one should be convicted on suspicion; for the Divine Trajan stated in a Rescript to Assiduus Severus: "It is better to permit the crime of a guilty person to go unpunished than to condemn one who is innocent.".

[69] ***Crimen extinguitur mortalitate*** (Crime is extinguished by mortality); D. 48,4,11: "*Is, qui in reatu decedit, integri status decedit: extinguitur enim crimen mortalitate."* (He who dies while an accusation against him is pending retains his civil status unimpaired, for the crime is extinguished by death).

[70] ***Audiatur et altera pars*** (Let the other side be heard as well); D. 48,17,1 pr.: "*Divi Severi et Antonini magni rescriptum est, ne quis absens puniatur: et hoc iure utimur, ne absentes damnentur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur."* (The Divine Severus and Antoninus stated in a Rescript that no one who is absent should be punished, and it is the present law that absent persons shall not be condemned; for the rule of equity does not suffer anyone to be convicted without being heard.); it is an important rule, which has its origin in Greek law and was implemented in Roman law. Explicitly in literaly form is this rule expressed in Seneca, Medea 199-200: "*Qui statuit aliquidparte inaudita altera, aequum licet statuerit, haud aequus fuit*" (Whoever decided something without hearing the other side was not fair, even if he decided well).

recognised in the legal orders of the Member States, originally dates back to the Roman law maxim ..."[71]

***Prohibition of reformatio in peius*:** We find this principle in the Justinian's compilation - D. 49,1,1 pr.: "*Appellandi usus quam sit frequens quamque necessarius, nemo est qui nesciat, quippe cum iniquitatem iudicantium vel imperitiam recorrigat: licet nonnumquam bene latas sententias in peius reformet, neque enim utique melius pronuntiat qui novissimus sententiam laturus est".* (There is no one who is not aware how frequently appeals are employed, and how necessary they are to correct the injustice or the ignorance of judges; although sometimes sentences which have been properly imposed are changed for the worse, as he who renders the last judgment does not, for this reason, render a better one.)

This fragment from the Digest is located in the first title of the 49th book. This title contains material (responses of the lawyers), which includes the regulation from the field of penal law, i.e. public law. This rule - "*reformatio in peius iudici appellato non licet*" (change to worse is not allowed in the appeal to the judge) – expresses an idea of the principle of certainty, but we cannot find it - as it is formulated now - in the sources of Roman law. Roman lawyers consider as an initial principle in the interpersonal relations with regard to the law the term „*aequitas*". Its origin is in Cicero's philosophical conception and Roman lawyers applied the principles of *aequitas* in conjunction with metaphysical and ethical considerations, which, however, does not distort the value and place of *aequitas* in the legal system.

In the context of this general principle of modern procedural law, AG Trstenjak in *Éditions Albert René v OHIM*[72] discussed the possibility of a public body to introduce public interest issues in appeal and saw the system of pleas comparable to the Roman law concept of *actio*. Indeed, this reference made by AG Trstenjak has limited practical impact.

Ne bis in idem: The procedural rule stems from the principle of legal certainty, which prevented the same case from being re-litigated in the event of a final judgment in a particular case. In Roman law, within the legis actiones and formulary process, the final decision in the case (res iudicata) was the handing down of the judgment, and no appeal (appellatio) was admissible. The appeal appeared only later, in the period of the *cognitio extra ordinem process,* i.e. the time of the empire. In the case of the pronouncement of a final judgment, the judicial magistrate dismissed the repeatedly brought action (*denegatio actionis*) or granted the defendant a plea of res judicata (*exceptio rei iudicatae*). Repeated recovery of the same debt was considered by Roman jurists to be an act against good faith. *Bona fides non patitur, ut bis idem*

[71] Opinion of 11 September 2008, Gorostiaga Atxalandabaso v Parliament, C-308/07 P, EU:C:2008:498, par. 38.

[72] Opinion of 29 November 2007, Éditions Albert René v OHIM, C-16/06 P, EU:C:2007:728

exigatur: D. 50, 17, 57 (good faith does not permit the same debt to be collected twice). The above rule can be found in other Roman law texts:
Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim: Gai Inst. 3, 181 (accordingly, after suing by statutable action, the extinction of the original obligation disables me by strict law from bringing a second action).
Alia causa fuit olim legis actionum. nam qua de re actum semel erat, de ea postea ipso iure agi non poterat: Gai Inst. 4, 108 (it was otherwise formerly in the case of statute-process, since in this procedure a subsequent action on a question which had already been the subject of an action was always barred by direct operation of law).
Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit: D. 48, 2, 7, 2 (the Governor should not permit the same person to be again accused of crime of which he has been acquitted. This the Divine Pius stated in a Rescript addressed to Salvius Valens).
Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest: C.J. 9, 2, 9 (anyone who has been charged with a public crime, cannot again be accused of the same crime by another person).
AG Sharpston in *Gasparini and Others* traces the tradition of this principle back to Antiquity, including Roman law.[73]
*Res iudicata***:** The regula iuris "*ne bis in idem"* or "*bis de eadem res ne sit actio"* (res iudicata) expresses the general interest in legal certainty, in Roman law preferably „*aequitas*", so that the same case could not be litigated and decided repeatedly[74]. From a procedural point of view this was done by the praetor – he refused the action (*denegatio actionis*) or - if he was not sure that it was the same case (*eadem res*) – he inserted exception on the ground of res judicata (*exceptio rei iudicatae*) in the formula - in favour of the defendant. The jurist Gaius writes in general terms about the principle of this rule - ne bis idem - in the Digest (D. 50,17,57): "Bona fide non patitur, ut bis idem exigatur". (Good faith does not allow the same thing to be claimed twice). AG Léger in Köbler expressly states: "That principle of Roman law is recognised by all the Member States and the Community legal order."[75]

[73] Opinion of 15 June 2006, Gasparini and Others, C-467/04, EU:C:2006:406, par. 72, footnote 56.
[74] D. 44,2,5: Proceedings are considered to be instituted with reference to the same question, not only when a plaintiff does not make use of the same action which he brought in the first place, but when he brings another relating to the same matter. For instance, if anyone having brought an action on mandate should, after his adversary promised to appear in court, bring one on the ground of voluntary agency, or one for the recovery of the property, he institutes proceedings relating to the same matter. Hence, it is very properly said that he only does not institute proceedings with reference to the same matter who does not again attempt to accomplish the same result. For when anyone changes the action, he must also change the nature of his claim; as he is always considered to bring suit with reference to the same matter, even if he has recourse to a different kind of action from the one which he employed in the first place.
[75] Opinion of 08 April 2003, Köbler, C-224/01, EU:C:2003:207, par. 96.

Conclusions

In recent decades, we can observe the gradual proliferation of explicit references to Roman law rules in the opinions of the Advocates General of the CJ EU. The approach of the Court of Justice and the General Cort is, on the other hand, subtler when referring to Roman law expressly. In judgments, the "*Klomp* formula" was repeated, only, and even if the Court follows the opinion of an Advocate General referring to Roman law, the Court omits this direct reference. Therefore, the highest occurrence of direct references is in the opinions of the Advocates General (AG Verica Trstenjak having the highest "score").

The quality of references varies and in the majority of them it is not precise, i.e., the source is not mentioned. Even the court in the *Klomp* case does not include a source of argument and only in 10 cases of the opinions of the Advocates General the source is mentioned.

Although the Court in *Klomp* did not mention the source of its conclusion that the principle mentioned therein is linked to Roman law, the research found that it can be identified in Digest D. 1,5,24 and D. 50,17,80. However, it is not clear if the Court was aware of this source, because neither the Advocate General in this case mentioned it, or it was mere *argumentum ad antiquitatem.*

Based on the analysis of the references made by the Advocates General, they can be divided into the following groups:

1. principles of private law that are still reflected in the current legal systems of the Member States,
2. principles of private law that, as the Advocate General of the case admits, varied throughout history, and very little was left of them in the current legal orders of the Member States (e.g. *usufructus*, *societas*, *joint ownership*), or the concept maintained its name only, notwithstanding its meaning (e.g. *action pauliana*)
3. principles of public law and procedural law that stem from the modern constitutional traditions of the Member States but were also known in antiquity (e.g. *impartiality of judges*, *ne bis in idem*, *nulla poena sine lege*),
4. recalling Roman law rules without any reasonable link to the case itself (e.g. concept of Roman citizenship and protection of foreigners).

It is hard to confirm that Roman law can be considered an unwritten source of EU law as a general principle of law. Roman law "lives in its offsprings", i.e. through legal orders of the Member States which maintained Roman law maxims and traditions embedded in their respective legal principles. Therefore, in some cases, it is possible to make a shortcut in argumentation that a legal principle or a rule stem from Roman law and thus it is a general principle of law common to all Member States. In the majority of cases, it can be observed that references served as a form of intellectual embellishment of the opinions of the Advocates General without any practical use

for solving the case itself. However, even these references are not worthless because they are helping to preserve and vitalize the European legal traditions of the Member States. These references could, on the other hand, be more credible if the Advocates General included precise quotations from Roman law sources. Otherwise, such references may appear to be fabricated *argumenta ad antiquitatem*, even though they are actually based on thorough research.

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