

Constitutional Implications of EU Sanctions against the EU Citizens

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Summary: Since Russia started its full-scale invasion against Ukraine, the EU imposed an unprecedented volume of sanctions against Russia and its individuals. To this date, Russia is the most sanctioned country in the world and over 1500 individuals have been put on the EU sanctions list. The system of adoption of EU sanctions is strictly regulated by the EU law, however, the implementation is a matter of national law of Member states which may create tensions in application of the EU sanctions. The article introduces how the EU sanctions are adopted and the role of EU courts in the process of judicial review. It also provides the relevant case law produced by the Slovak constitutional court in relationship to EU law. The last part analyzes the possible conflicts between the EU law and the constitutional law of Slovakia in the implementation stage of EU sanctions.

Keywords: EU, constitutional law, sanctions, EU citizens.

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1. Introduction

In light of recent events, we can conclude that we are living in a “golden era” of EU sanctions. The scale of sanctions imposed on state, non-state actors or various individuals and entities is unprecedented.¹ Since the adoption of the Maastricht

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¹ The list is subject to permanent changes and updates, therefore it is not relevant to provide exact numbers. See <https://www.sanctionsmap.eu/#/main>. In addition, EU created in December 2020 specific legal framework aimed only on human rights violations. The European Union’s Global

treaty in 1993 the European Union (“EU”) created an autonomous system of international sanctions. The system is separated from the United Nations (“UN”) sanction system or sanction system of other countries e.g. United States.² The autonomous character of the EU sanctions regime was enhanced in 1996 when the EU adopted the Blocking Regulation 2271/1996.³ The key feature of this regulation is that companies and individuals under EU jurisdiction are required to not follow other sanction regimes listed in the Annex.⁴ The *raison d’être* for the adoption of blocking regulation was the threat of extraterritorial application of the Helms-Burton Act from the US.⁵ The autonomy policy of the EU in the area of international sanction is strengthening the EU strategic autonomy.⁶

Even despite the regulation within the EU law, the application of EU sanction is on the shoulders of national authorities which have to balance the fact that the source of the obligations stems from the EU law, however, the application scope is regulated by the national legislation. The Slovak Republic does not have a sanction system of its own and its national legislation is implementing sanctions adopted within the EU or by the UNSC. The unique situation, when the only EU citizen listed on the EU sanction list is Mr. Jozef Hambálek raises questions not only in relation to the implementation of EU sanctions within the national legislation but also about the relationship between the Slovak constitutional law and EU law. The right for judicial review of acts adopted within Common Foreign and Security Policy (“CFSP”) was not established via the Treaty of European union (“TEU”) or Treaty of Functioning of the European Union (“TFEU”) but it was the CJEU itself who derived this right via other provisions, especially through Article 19 (1) TEU and Article 47 of the Charter.⁷

Human Rights Sanctions Regime (EUGHRSR) is the first thematic sanctions regime on the topic with a general scope of applicability (Restrictive measures against serious human rights violations and abuses, Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998).

² In case of United States the responsible authority is the Office of Foreign Assets Control (“OFAC”) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goal

³ For further discussion on blocking regulation see ROVETTA, D., PANDEY, G., SMIATACZ, A. Don’t Wake up the (EU) Bear! The Scope of the EU Blocking Regulation 2271/96 in Light of the Recent Preliminary Ruling Reference in Bank Melli V. Telekom Deutschland Case, C-124/20. *Global Trade and Customs Journal*. 2021. vol. 16, no. 2.

⁴ The Annex included *Iran and Libya Sanctions Act* of 1996, however as removed and Iran was added in 2018.

⁵ See also VAN DEN BERG, The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners. *Maryland Journal of International Law*. 1997, vol. 21, no. 2, pp. 279-314.

⁶ See also LONARDO, L., SZÉP, V. The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument. *European Foreign Affairs Review*. 2023, vol. 28, no. 4, pp. 363–378.

⁷ GUTMAN K. The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?.

The first part of this article introduces how the EU sanctions are adopted and the role of EU courts in the process of judicial review. The second part explains the relevant case law produced by the Slovak constitutional court in relationship to EU law. The last part analyzes the possible conflicts between the EU law and the constitutional law of Slovakia in the implementation stage of EU sanctions.

2. Sanction system of the European Union

The EU originally did not possess the competence to impose sanctions in its current shape, although Article 57 of the Rome Treaty from 1957 included several restrictions vested to EU authority, including its legal ability to impose arms embargoes.⁸ Hence, the history of EU sanctions can be traced back to 80s when the European Community adopted the first sanctions against USSR over its actions against Poland.⁹ However, the beginning of EU sanctions in its current model came to light with the adoption of the Maastricht Treaty in 1992. The EU's competence to adopt and impose its own sanctions, independent from the UN system, is enshrined in Article 21 (2) TEU which states that: "*The Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations*". The EU's competence is classified under the Common Foreign and Security Policy. The key aspect from the perspective of the EU sanction regime is that each Member State has a veto, because the decision must be adopted by unanimity. Another important feature is that sanctions normally have a "limited clause", meaning that they are to be automatically lifted after a certain amount of time—typically 12 months (but this can vary) unless the Council decides to extend them.¹⁰

The EU sanctions are a tool of CFSP, therefore its core is to pursue EU policy. The goals of CFSP are inherently linked to EU values which are preserving peace, strengthening international security, promoting international cooperation and developing and consolidating democracy, the rule of law and respect for

German Law Journal. 2019, no. 20, pp. 898.

⁸ It could be argued that competence was enshrined in original Rome Treaty 1957. KREUTZ, J. Hard Measures by a Soft Power? Sanctions policy of the European Union 1981–2004. *Bonn International Center for Conversion Papers*. 2005, no. 45, p.6.

⁹ In that time it was not conducted through CFSP but via European Political Co-operation (EPC). See: KREUTZ, J. Hard Measures by a Soft Power? Sanctions policy of the European Union 1981–2004. *Bonn International Center for Conversion Papers*. 2005, no. 45, pp.6.

¹⁰ GIUMELLI, F., HOFFMANN, F., & KSIAŻCZAKOVÁ, A. The when, what, where and why of European Union sanctions. *European Security*, 2021, vol. 30, no.1, p. 6. <https://doi.org/10.1080/09662839.2020.1797685>.

human rights and fundamental freedoms.¹¹ It is necessary to emphasize that any adoption of EU sanctions is a political decision which must be approved by all Member States during the procedure within the framework of Article 29 of TEU. The right of Member State to veto any sanction proposal has been used in various situations, therefore any sanctions adopted on the EU level should be considered as a compromise and common attitude of all EU members.

A recent example of this complicated negotiation tactic policy is a situation when Austria refused to give the green light to the latest, 12th sanctions package due to fact that its Raiffasen bank is listed on the Ukrainian register “Sponsor of the war”.¹² The other example is a situation when Hungary demanded a transition period for the import of Russian oil and gas.¹³

The EU sanctions tools include trade embargoes, targeted sanctions which aim to target individuals and entities, asset freezing or ban to travel.¹⁴ The goal of any sanctions adopted by the EU is to persuade or to compel other actors to change their policy. In some situations, there is the goal to deter others not to continuing in subject policy as occurred in 2020 when the EU imposed its first so-called cyber sanctions.¹⁵

Notwithstanding, the EU sanctions are adopted within the EU legal framework, therefore these are binding legal acts. The entire system of EU sanctions evolved in recent years from a topic studied by experts to a robust system that has implications for all actors in the EU. The EU system of sanctions could be in some way described as platypus.¹⁶ The reason for this kind of description is to lay down the fact that sanctions are adopted within the legal framework of EU law, however, there is no specific system of enforcement on the EU level. It

¹¹ See article 2 and 3 of TEU. See also European Parliament, Foreign policy: aims, instruments and achievements. [online] Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements>

¹² RETTMAN, A. Austria bankers still blocking EU sanctions on Russia, *EU Observer*, 16 December, 2023. [online] Available at: <https://euobserver.com/world/157838>

¹³ SPIKE, J.; PETREQUIN, S. Why is Hungary blocking sanctions on Russian oil?, *AP News*. May 10, 2022, [Online] Available at: <https://apnews.com/article/russia-ukraine-business-global-trade-europe-budapest-d53daf0475b40ca3478cfe4f858ef015>

¹⁴ There also other examples like diplomatic sanctions (expulsion of diplomats, suspension of diplomatic relations, suspension of official visits) military (arms embargo), traffic sanctions (restriction of land, air or shipping connection) etc.

¹⁵ The European Union has imposed today its first ever cyber-sanctions against six individuals and three entities involved in significant cyber-attacks or attempted cyber-attacks against the EU or its Member States. EU imposes first ever cyber sanctions to protect itself from cyber-attacks 30. 7. 2020. [online] Available at: https://www.eeas.europa.eu/eeas/eu-imposes-first-ever-cyber-sanctions-protect-itself-cyber-attacks_und_en

¹⁶ This comparison was used by AG Čapeta in case Case C-106/22, Opinion of Advocate General, Čapeta, Xella Magyarország C-106/22 delivered on 30 March 2023 paragraph 32.

is the sole responsibility of EU member states to implement EU sanctions and put them into effect.¹⁷ The implementation phase is left to national authorities, therefore we are witnessing situations where each Member state has its own system of implementation e.g. in the case of the Slovak Republic there are nine national authorities responsible for the implementation of EU sanctions.¹⁸ In comparison, the Czech Republic has three, Finland one.¹⁹

The lack of harmonization in the area of enforcement of EU sanctions across Member States can demonstrate that in many EU countries, the violations of EU sanctions are not even considered as criminal acts according to the Penal Code.²⁰ Although the European Parliament and Council reached a provisional agreement on Tuesday 12 December 2023 on a proposal to harmonize criminal offences and penalties for the violation of EU sanctions, it is hard to predict when the legislation will come into force.²¹

If the Member States fail to enforce EU sanctions, there is the possibility that EU Commission will initiate infringement proceedings for violations of EU law but this kind of procedure may take years to conclude.

To summarize this section, it is undisputable that EU sanctions are currently an inherent part of EU foreign policy. It also transformed from a purely political tool into a new robust regime in which numerous features must be taken into

¹⁷ Communication from the Commission to the European Parliament and the Council Towards a Directive on criminal penalties for the violation of Union restrictive measures', COM(2022) 249 final, 25 May 2022. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022DC0249>

¹⁸ Ministry of Economy Ministry of Transport, Constructions and Regional Development Ministry of Culture, Ministry of Education, Science, Research and Sport Ministry of Interior Ministry of Labour, Social Affairs and Family Ministry of Justice Industrial Property Office Ministry of Finance.

¹⁹ Communication from the Commission to the European Parliament and the Council Towards a Directive on criminal penalties for the violation of Union restrictive measures', COM(2022) 249 final, 25 May 2022. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022DC0249>

²⁰ See also PORTELA, C.; OLSEN, K.B. *Implementation and monitoring of the EU sanctions' regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions*, European Parliament, 2023. [online] Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702603/EXPO_STU\(2023\)702603_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702603/EXPO_STU(2023)702603_EN.pdf)

²¹ The proposal will create consistency in penalties across Member States by establishing a common basic standard for penalties including imprisonment of at least five years for certain offences and enhanced rules on freezing and confiscation. Council and Parliament reach political agreement to criminalize violation of EU sanctions, Council of the EU Press release 12 December 2023 16:00, [online] Available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/12/12/council-and-parliament-reach-political-agreement-to-criminalise-violation-of-eu-sanctions/#:~:text=16%3A00-,Council%20and%20Parliament%20reach%20political%20agreement%20to%20criminalise%20violation%20of,the%20violation%20of%20EU%20sanctions>

account. Each state around the world has its system of adoption, implementation and application of international sanctions. However, while it is relatively simple to adopt sanctions on the state level, the process is very complicated within the legal framework of the European Union. The EU sanctions are the result of complicated procedures within the EU institutions and organs and the outcome is legal EU acts such as EU Regulation 269/2014 which are directly applicable in all EU Member States. However, enforcement and relevant penalties are primarily governed by national laws. Member States can also initiate their own sanctions as happened in the case of Baltic states which imposed travel bans on Belarusian president Lukashenko with no agreement on the EU level.²²

3. EU judicial review

The competence to review EU sanctions before EU courts is currently a well-established principle. What is rather interesting is the way how the jurisprudence evolved. The CJEU did not accept the limited or restricted approach enshrined in Article 275 and expanded its competence via the right to effective judicial protection which is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. This “march of CJEU” started shortly after the adoption of the Lisbon Treaty in the case *Council v. Parliament*.²³

The key precedent in relation to the right of a legal or natural person to rely on annulment actions and preliminary rulings on the validity of CFSP is the *Rosneft* case.²⁴ The Court refused to accept that Article 275²⁵ prohibits judicial review of acts adopted within its framework and ruled that it has its competence,

²² SYTAS, A. Lithuania, Latvia and Estonia imposed travel bans on President Alexander Lukashenko and 29 other Belarusian officials on Monday, signaling impatience with the West’s cautious approach by announcing sanctions without waiting for the rest of the EU. Baltic States impose sanctions on Lukashenko and other Belarus officials, August 31, 2020. Reuters. [online] Available at: <https://www.reuters.com/article/us-belarus-election-sanctions/baltic-states-impose-sanctions-on-lukashenko-and-other-belarus-officials-idUSKBN25R0Z7/>

²³ Case C-658/11 P, *Parliament v. Council*, EU:C:2014:2025.

²⁴ Case C-72/15, *Rosneft Oil Company*, EU:C:2017:236.

²⁵ The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2.

of Title V of the Treaty on European Union.

otherwise “the system of effective judicial protection established by the Treaties” would be undermined.²⁶ In addition, the CJEU refused to accept that it is only at the discretion of national courts to have competence in the jurisdiction to give preliminary rulings on the validity of decisions in the field of the CFSP that prescribe the adoption of restrictive measures against natural or legal persons.²⁷ CJEU in *Rosneft* stated that Articles 263, 267 and 277 TFEU constitute a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts.²⁸ Following the *Rosneft* judgment the EU courts enhanced its right to conduct a judicial review of so-called sanctions decisions adopted within the CFSP even despite the explicit legal basis in Article 275(2) TFEU to conduct such a judicial review.²⁹ Moreover, in the case *Bank Refah Kargaran*,³⁰ the CJEU expanded the reasoning established in *Rosneft* by declaring it also must have jurisdiction to rule on the harm allegedly caused by restrictive measures under CFSP decisions.³¹

The EU legal framework provides options for individuals listed on the sanction list to:

– *Demand temporary suspension of sanctions.*

The possibility to request a suspension of effectiveness pursuant to Art. 278 and 279 TFEU. Article 156(4) of the Rules of Procedures of the Court

²⁶ This may sound remarkable for textualism approach however the CJEU emphasized specific autonomous nature of Article 47 for a long time as AG Cruz Villalon stated in Opinion of Advocate General Cruz Villalón at para. 39, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail*. „On the basis of the foregoing, I consider that, beyond the interpretative value of those Explanations, the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question stems and, together with them, the conceptual universe within which the defining principles of a State governed by the rule of law operate. This is in no way to disregard the very tradition represented by the *acquis* of over half a century of European Union law, which, as a system of law, has given rise to the development of its own set of defining principles.” GUTMAN, K. The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?. *German Law Journal*. 2019, no. 20, p. 888.

²⁷ *Rosneft* Para 76–77.

²⁸ *Ibid.*, pp. 65–67.

²⁹ See POLI, S. The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy. *Common Market Law Review*. 2022, vol. 59, no 4, pp. 1046–1047.

³⁰ Case C-134/19 P, *Bank Refah Kargaran*, EU:C:2020:793.

³¹ Case C-134/19 P, *Bank Refah Kargaran*, para. 38–40.

provides that requests for interim relief must specify “the subject matter of the dispute, the circumstances establishing urgency as well as the factual and legal grounds justifying at first sight the granting of the interim measure to which they conclude.” In case *Usmanov v. Council* the court stated that “Thus, the suspension of execution and other provisional measures may be granted by the judge hearing the summary proceedings if it is established that their granting is justified *prima facie* in fact and in law (*fumus boni juris*) and that they are urgent, in the sense that it is necessary, to avoid serious and irreparable harm to the interests of the party requesting them, that they be enacted and produce their effects before the decision in the main case. These conditions are cumulative, such that requests for interim measures must be rejected if one of them is missing.”³² In other words, it is not possible just to declare that sanctions are causing economic damage to individual or entities under his or her control. The applicant must demonstrate that the application of sanctions could cause irreparable harm. The argumentation based on pure economic losses cannot be successful because the economic impact on any individual or entity is a substantial feature of economic sanctions. The specific nature of the CJEU decision is that the order to suspend sanctions is approved by the President of the General Court. At the time of writing this article, it is known only one case where this order was granted.³³ It is a case of Nikita Mazepin who is actually F1 driver and the sanctions prevented him from participating in F1 race.³⁴

– *Removal from the sanction list*

Any listed individual or person on the EU sanction list possesses a right to initiate judicial proceeding to be removed from the sanction list. The process of delisting pursuant to Article 263 TFEU is inherently linked to Article 47 Charter – the right to judicial protection. GC stated in T-291/20, *Yanukovich v. Council* “Furthermore, it is apparent from well-established case-law that, in a review of restrictive measures, the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all EU acts in the light of the fundamental rights forming an integral part of the EU legal order, which include, in particular, the right to effective judicial protection

³² Order of the President of the Court, in case *Usmanov v Council*, T-237/22 R, delivered on 27 June 2022.

³³ Order of the President of the General Court in case *Mazepin*, T-743/22 R delivered on 1 March 2023.

³⁴ However the justification for enlisting him was not related to his occupation. Official statement was: “He is a natural person associated with a leading businessperson (his father) involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine”. Implementing Regulation (EU) 2022/396 implementing Regulation No 269/2014 (OJ 2022 L 80, p. 1), to the list in Annex I to Regulation No 269/2014.

*and the rights of the defence, as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union”.*³⁵

In addition, the court emphasized that Article 47 also set forth the framework that must be followed by the Council in the process of adding names to sanction list. The material substance of Article 47 requires “... *that, in reviewing the legality of the reasons underlying the decision to include or retain the name of a person on the list of persons subject to restrictive measures, the courts of the European Union should ensure that this decision affecting that person is accepted on a sufficiently firm factual basis. This requires verification of the factual allegations in the summary of reasons on which this decision is based, as a result of which judicial review cannot be limited to an abstract assessment of the validity of the reasons given, but must concern the question whether those reasons, or at least one of those reasons, which is itself considered sufficient to support this decision, they are justified*”.³⁶

Nonetheless, removing from the sanction list does not mean that an individual or entity could not be put back via the scheme procedure as was used the first time. However, this should include new evidence but the term new needs to be understood as new in reasoning but not new in terms of existence. In other words, it is possible to use evidence that already existed at the time of the first sanction but could not be used.³⁷

For the purposes of this article, the key aspect is not the fact that CJEU found a way how to deal with sanctions cases but the reasoning which was used. It is clear that according to CJEU it was not acceptable to exclude EU courts from the process of judicial review of sanctions decisions. We will discuss the question of whether the situation where the national court has only competence to conduct judicial review of implementation acts or decision but not the decision of enlisting itself. We try to draw a picture in which the right to judicial protection on a constitutional level is linked to the EU level.

4. The approach from Košice to EU law³⁸

The relationship between the Slovak constitutional law and EU law is rather uncomplicated compared to other case law released by constitutional courts in

³⁵ T-291/20, Yanukovich v. Council, 30. March 2022, ECLI:EU:T:2022:187, para. 77 and the case-law cited.

³⁶ Ibid., para 78.

³⁷ See BUTLER, G. Of Rulers, Relatives, and Businesspersons: The Imposition of Sanctions on Family Members. *Legal Issues of Economic Integration*. 2023, vol. 50, no. 4, pp. 377.

³⁸ Kosice is second largest city in Slovakia and seat of the Constitutional court.

other EU Member states.³⁹ The first and probably most important decision regarding the relationship between the Slovak Constitutional law towards the EU law was PL. 3/09 published in 2011.⁴⁰ The Slovak Constitutional Court accepts the primacy of EU law without any effort to create a new doctrine.

However, in recent years we have witnessed a new wave of decisions produced by constitutional courts across the EU whose goal is to redefine the relationship between constitutional law and EU law. From this perspective, it is possible to expect that the new case law produced by the Slovak Constitutional court will go further and set up the clearer legal framework. Nevertheless, it is hard to expect that any decision may significantly shift the entire relationship, therefore it is more plausible that the Constitutional Court will rather focus on the precise relationship instead of radical modification. This approach was adopted by the German constitutional court which firstly created the doctrine of “*ultra vires*” in the case, *Solange III*⁴¹ and specified through decisions in *Honeywell*⁴² or *OMT*⁴³ and used it in *Weiss*⁴⁴ case.

The CJEU is rather coherent in its argumentation about the primacy of EU law over national law provisions⁴⁵ even provisions of a constitutional nature.⁴⁶ This approach is understandable because the CJEU is the guardian of the EU law, however the constitutional courts⁴⁷ are in a different position. Their primary goal is to protect the constitutional system and constitutional rights, therefore it is necessary for them to find ways how to protect constitutional values and principles and at the same time respect the obligations stemming from the EU law.

The Slovak constitutional court is very cautious in case law related to the position of EU law within the constitutional legal system of the Slovak Republic. The case law is limited to a few cases, therefore it is possible to identify numerous dark spots which need to be clarified in the future. The decision PL. 3/09 has

³⁹ Here we are referring to decisions adopted by German constitutional court in case *Weiss* (*Weiss*, 2 BvR 859/15 and others of 5 May 2020) Polish Constitutional court in case ref. no. K 3/21 Judgment of 7 October 2021, Danish in case *Ajos* (ase 15/2014 Case no. 15/2014 Dansk Industri (DI) acting for *Ajos A/S* vs. The estate left by A. An unofficial translation of the ruling into English is available on the Danish Court's website. [online] Available at: <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>. Czech in case *Slovak pensions* (Constitutional Court, Brno, 15 February 2012 (TZ 8/12).

⁴⁰ The Constitutional Court of the Slovak Republic, Ref. No. PL. ÚS 3/09 of 26 January 2011.

⁴¹ BVerfG, Judgment of the Second Senate of 12 October 1993 – 2 BvR 2134/92, 2 BvR 2159/92.

⁴² BVerfG, Order of the Second Senate of 6 July 2010 – 2 BvR 2661/06.

⁴³ BVerfG, Judgment of the Second Senate 16. May 20182 BvR 2728/13.

⁴⁴ BVerfG, Judgment of the Second Senate of 5 May 2020-2 BvR 859/15.

⁴⁵ *Internationale Handelsgesellschaft* 11/70 [1970] E.C.R. 1125.

⁴⁶ 106/77 *Simmenthal* [1978] E.C.R. 629.

⁴⁷ The term „constitutional court“ is used for all courts which has the right to take final position in constitutional matters, irrespective of their names.

been followed by decision PL. ÚS 10/2014 which dealt with the position of the Charter of Fundamental Rights of the European Union. The Constitutional Court declares that it falls under Article 7 paragraph five of the Slovak Constitution, therefore it has primacy over national laws.⁴⁸ This strong pro-EU law approach cannot be taken for granted because the Constitutional Court underlined that its position is to protect constitutional legal order when emphasizing that even after the accession of the Slovak Republic to the European Union, the norms of the constitutional order of the Slovak Republic remain the reference framework for the evaluation of the Constitutional Court.⁴⁹

The openness of the Constitutional Court towards other sources of the law, especially to international conventions, is clear in the area of human rights. In a recent decision, PL 15/2020 Constitutional Court stated: *"The Constitutional Court constantly rules that fundamental rights and freedoms under the Constitution must be interpreted and applied in the sense and spirit of international treaties on human rights and fundamental freedoms (PL. ÚS 5/93, PL. ÚS 15/98, PL. ÚS 17/00, PL. ÚS 10/2014, PL. ÚS 24/2014). Thus, the Constitutional Court always took into account the wording of these treaties and the relevant jurisprudence relating to them when defining the content of fundamental rights and freedoms established in the Constitution (II. ÚS 55/98, PL. ÚS 10/2010, PL. ÚS 24/2014)".*⁵⁰

5. Unknown path for Slovak constitutionalism

The application of EU sanctions within the Slovak constitutional system could represent new challenges for the national courts or even the Constitutional Court itself. The situation when Slovak citizen Jozef Hambálek is enlisted on the EU sanction list and facing EU sanctions in terms of freezing assets and travel ban brings attention to the relationship between the Slovak constitutional law and EU law. He is the only EU citizen list on the sanction list without any dual nationality in 2023.⁵¹

⁴⁸ *"The Charter of Fundamental Rights of the European Union, which has the same legal force as the treaties on which the Union is based, must therefore be given the same status in the constitutional order of the Slovak Republic as the Constitution in Art. 7 par. 5 recognizes the above categories of international agreements; specifically, the Charter of Fundamental Rights of the European Union needs to be recognized in the constitutional order of the Slovak Republic as having the status according to Art. 7 par. 5 of the Constitution, international treaties on human rights and fundamental freedoms."* Constitutional Court of the Slovak Republic, PL. ÚS 10/2014 of April 29, 2015)

⁴⁹ Ibid., para. 62.

⁵⁰ Constitutional Court of the Slovak Republic, PL. 15/2020.

⁵¹ The other Slovak citizens on US sanction list are Marian Koncner and Ashot Mkrtychev. Whereas Mr. Hambalek was sanctioned in relation to war in Ukraine Mr. Kocner was listed on US sanction

According to article 46⁵² paragraph 2 of the Slovak Constitution “*Any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by a law. The review of decisions in matters regarding the fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts*”.

The Constitutional Court concluded that there is “*no fundamental difference*” between the right for judicial protection enshrined in the Slovak constitution, in the European Convention of Human Rights and the Charter.⁵³ This approach could indicate that the essence of the article has the same value. However, this approach should not omit the procedural aspects of the right for judicial review. In the case of sanctioned individuals it is not clear whether the fact that only the EU court has the right to annul the decision could be considered an extension of procedural aspects from the perspective of Slovak constitutional law. The right enshrined in Article 46 of the Slovak constitution has also “*material substance*”.⁵⁴ The Slovak citizen listed on EU sanction list has the right to initiate judicial proceedings before the national court to question the application and implementation of EU sanctions.

If any similar case appears before the Slovak Constitutional Court, it will be inevitable for the Constitutional Court to provide the answer whether it is possible to conclude that the situation, wherein only the EU court could decide on delisting from the sanction list is constitutionally acceptable. The Constitutional Court may decide on the nature of human rights protection within the Slovak

list within so-called the Global Magnitsky Human Rights Accountability Act, for persons involved in serious Human Rights Abuse or Corruption. Mr. Ashot Mkrtichev is sanctioned for having attempted to, directly or indirectly, import, export, or reexport to, into, or from the DPRK any arms or related materiel.

⁵² Article 46 Right to judicial protection

(1) Everyone may claim his or her right by procedures laid down by a law at an independent and impartial court or, in cases provided by a law, at other public authority of the Slovak Republic.

(2) Any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by a law. The review of decisions in matters regarding the fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts.

(3) Everyone shall have the right to compensation of a damage caused by an unlawful decision of a court, of other public authority or of a body of public administration or by improper official procedure.

(4) A law shall lay down details and terms of the judicial and other legal protection.

⁵³ Constitutional Court of the Slovak Republic, PL. 15/2020. para. 38.

⁵⁴ Even in cases where the right of access to the court of the party to the court proceedings has its constitutional basis in Art. 46 par. 2 of the Constitution, the court acting in the matter is bound by the principles of fair trial arising from Art. 46 par. 1 of the Constitution (III. ÚS 305/08).

legal framework and its relationship with guarantees provided by the EU law. The two possible scenarios are:

- it is a violation of the individual right enshrined in Article 46 (2) *Any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by law. The review of decisions in matters regarding the fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts.* The situation where the applicant cannot rely upon a domestic court and initiate proceedings for a judicial review of enlisting is a violation of constitutional rights. In this scenario, it is not possible to accept that the right to initiate proceedings before GC in Luxembourg is within the constitutional right for judicial review;⁵⁵
- the second option is that the Constitutional Court will look at it as the broader picture in which the constitutional rights could be applicable on the EU level. This concept could be described as a “unitary approach” in which the key question is whether there is a possibility or right to initiate a judicial proceeding before an impartial court. If the answer to this question is yes, then the constitutional rights are not violated. The concept of the “unitary approach” understand human rights enshrined in the Slovak Constitution as part of the system of human rights protection on European level via the Charter of Fundamental rights or the European Convention of Human Rights. This scenario is undoubtedly an “*unknown path*” for Slovak constitutionalism because it created a situation where constitutional rights are *stricto sensu* enhanced through a system outside of the Slovak national courts.

It is debatable which option (or combination of options) will the Constitutional court adopt, however, we are inclined to prefer the latter. The complexity of human rights protection for the Slovak citizens should not be divided into three separable pillars but must be seen as a system in which the pillars are interconnected and together provide an effective protection of human rights for any individual. The meaning of Article 46 is to enhance the right to a fair trial.

⁵⁵ It is also possible to invoke issue whether, in case of an annulment of listing decision, applicant can ask for damages from the Slovak republic on national court. On EU level there is a possibility of suing the Union for damages caused by regulation, therefore EU courts have jurisdiction to rule on the harm allegedly caused by restrictive measures under CFSP decisions. (Bank Refah Kargaran, Case C-134/19 P, para 39.) However, the possibility of suing the Union for damages caused by regulations does not ensure full judicial protection for individuals, since there are cases in which restrictions are enacted through CFSP decisions only (e.g. in the case of travel bans). In this situation, the addressee of this measure is deprived of the right to bring an action for non-contractual liability. POLI, S. The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy, *Common Market Law Review*. 2022, vol. 59, no 4, p. 1052.

The second paragraph of the Article guarantees the right for judicial review of any decision adopted by the administrative authority.

As we explained above, the application of EU sanctions is solely the responsibility of Member states through their national institutions. In the case of the Slovak Republic, the application of the international sanctions is conducted through numerous state organs⁵⁶ and according to Sanction Act Coll. 289/2016. The application of sanctions is matter of national law and the Sanction Act is *lex specialis*, however the *lex generalis* is an administrative act. This feature means that the process of application of international sanctions is conducted within the administrative proceeding, therefore it is possible to initiate judicial review of any act of application. If there is an individual put on the EU sanction list and the regulation requires to freeze his or her banking accounts this is conducted by the decision of the relevant authority within administrative proceedings. Any decision of responsible authority could be reviewed by the national court.

Notwithstanding, there is no possibility for an individual listed on the sanction list to initiate a proceeding before the national court to achieve removal from the sanction list. There is the possibility to ask the national court conducting a judicial review of the application of sanctions to submit a preliminary question to the Constitutional Court whether the provisions of the Sanction Act are not violating the Constitution.⁵⁷

In addition to previous thought, we can also raise a question whether the situation wherein only the EU court could declare the decision of enlisting invalid is a violation of the right of judicial review set forth in Article 47 Charter. The answer would be highly likely no because from the perspective of CJEU the right to an effective remedy enshrined in Article 47 does not distinguish between EU courts and national courts. The CJEU considers Article 47 as a standalone right which is “sufficient in itself and does not need to be made more specific by provisions of [Union] or national law to confer on individuals a right which they may rely on as such”.⁵⁸

⁵⁶ § 1 of Implementation of International Sanctions 289/2016 Sb. adopted in October 2016 (Sanction Act).

⁵⁷ Article 144 of Slovak Constitution. If the court believes that another generally binding legal regulation, its part or its individual provision, which relates to the matter under discussion, contradicts the constitution, constitutional law, international treaty according to Art. 7 par. 5 or the law, suspends the proceedings and submits a motion to initiate proceedings based on Art. 125 par. 1. The legal opinion of the Constitutional Court contained in the decision is binding for the court.

⁵⁸ See C-414/16, Egenberger, 2018, para. 78; C-274/21 and C-275/21, EPIC Financial Consulting, 2022, para. 83; C-175/21, Harman International Industries, 2022, para. 32. See: LENAERTS, K.; GUTMAN, K.; NOWAK, J. T. *Union Law and National Procedures and Remedies, EU Procedural Law*. 2nd edition, Oxford, OUP, 2023; p. 125.

From the perspective of CJEU article 47 serves as a roof which provides a guarantee and protection for an individual that the right to a judicial review is ensured even in situations when national legislation fails to provide this protection. In other words, the right to challenge the legality of Union measures is part of the construction of a truly complete and coherent system of judicial protection in the EU to ensure that individuals have access to a court—either at national or EU level.⁵⁹ This interpretation was confirmed by the CJEU in recent cases where the CJEU stated that Article. 47 of the Charter creates an obligation for national courts to provide judicial protection where national law does not provide for a remedy in case of a breach of Union law.⁶⁰

In light of above-mentioned case law, it is hard to draw a picture in which CJEU may declare violation of Article 47 because only the EU court has the power to annul the decision to add name to the sanction list.

6. Conclusion

A steep increase of EU sanctions after the Russian invasion of Ukraine is unprecedented in EU history.⁶¹ The invasion pushed EU into unknown territories of application of the EU sanctions. The evolution of judicial review on the EU level means that any individual listed on sanction list could initiate legal proceedings of delisting or temporary suspension. However, the application of EU sanctions still faces numerous challenges in Member states. The current effort to achieve at least partial harmonization to penalize sanctions circumvention is necessary to improve the implementation and application phase. The application of EU sanctions in the Slovak Republic is still without significant amount of case law and the courts are not pushed into the position as CJEU used to be a few years ago. The question of whether the decision to put an individual on the EU sanction list has constitutional implications is not purely an academic debate, as we demonstrated in the case of Mr. Hambálek.

The article shows an example of Slovak constitutional provision enshrined in Article 46 that there is still a blurred line between the Slovak constitutional

⁵⁹ GUTMAN K. The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?. *German Law Journal*. 2019, no. 20, p. 897.

⁶⁰ See C-497/20, *Randstad Italia*, 2021, para. 62; C-261/21, *F. Hoffmann-La Roche*, 2022, para. 47. See: LENAERTS, K., GUTMAN, K., NOWAK, J. T. *Union Law and National Procedures and Remedies. EU Procedural Law*. 2nd edition, Oxford, OUP, 2023.

⁶¹ ZANDT, F. The World's Most-Sanctioned Countries, Feb 22, 2023. [online] Available at: <https://www.statista.com/chart/27015/number-of-currently-active-sanctions-by-target-country/>

law and EU law. The circumstances are rather unusual because the constitutional guarantee that any decision having an impact on human rights could not be excluded from judicial review, however, the structure of EU sanction does not allow the national court to conduct judicial review of the enlisting decision. We argued that the plausible outcome would be a declaration of the constitutional court that the constitutional right may be guaranteed outside of the constitutional framework. This approach would be in the line of the previous case-law, however it is hard to predict which path the constitutional court would take in the future.

The relationship of the Slovak Constitutional Court toward the EU law was still not articulated by the Court in the form of a coherent doctrine, therefore it is not easy to conclude which approach would be preferred by the Constitutional Court if the case of Mr. Hambálek would end before the Constitutional court. This is rather unlikely because according to the last reports, the government declared that its priority is to remove Mr. Hambálek from the sanction list.⁶² However, this case underlines the necessity to adopt a new doctrine towards EU law which would reflect recent developments.

List of references

- BUTLER, G. Of Rulers, Relatives, and Businesspersons: The Imposition of Sanctions on Family Members. *Legal Issues of Economic Integration*. 2023, vol. 50, no. 4.
- GIUMELLI, F., HOFFMANN, F., & KŠIAŽČÁKOVÁ, A. The when, what, where and why of European Union sanctions. *European Security*, 2021, vol. 30, no.1, p. 6. [online] Available at: <https://doi.org/10.1080/09662839.2020.1797685>.
- GUTMAN K. The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?. *German Law Journal*. 2019, no. 20.
- KREUTZ, J. Hard Measures by a Soft Power? Sanctions policy of the European Union 1981–2004. *Bonn International Center for Conversion Papers*. 2005, no. 45.
- LENAERTS, K., GUTMAN, K., NOWAK, J. T. *Union Law and National Procedures and Remedies, EU Procedural Law*. 2nd edition, Oxford, OUP, 2023.
- LONARDO, L., SZÉP, V. The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument. *European Foreign Affairs Review*. 2023, vol. 28, no. 4.
- POLI, S. The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy, *Common Market Law Review*. 2022, vol. 59, no 4.

⁶² Premier Fico to Request that Hambalek Is Removed from EU Sanctions List, The News Agency of the Slovak Republic, 15. December 2023. [online] Available at: <https://www.tasr.sk/tasr-cla-nok/TASR:2023121500000421>

- PORTELA, C., OLSEN, K. B. *Implementation and monitoring of the EU sanctions' regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions*, European Parliament, 2023. [online] Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702603/EXPO_STU\(2023\)702603_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702603/EXPO_STU(2023)702603_EN.pdf)
- RETTMAN, A. Austria bankers still blocking EU sanctions on Russia, *EU Observer*, 16 December, 2023. [online] Available at: <https://euobserver.com/world/157838>
- ROVETTA, D., PANDEY, G., SMIATACZ, A. Don't Wake up the (EU) Bear! The Scope of the EU Blocking Regulation 2271/96 in Light of the Recent Preliminary Ruling Reference in Bank Melli V. Telekom Deutschland Case, C-124/20. *Global Trade and Customs Journal*. 2021, vol. 16, no. 2.
- SPIKE, J., PETREQUIN, S. Why is Hungary blocking sanctions on Russian oil?, *AP News*. May 10, 2022. [online] Available at: <https://apnews.com/article/russia-ukraine-business-global-trade-europe-budapest-d53daf0475b40ca3478cfc4f858ef015>
- VAN DEN BERG, The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners. *Maryland Journal of International Law*. 1997, vol. 21, no. 2.
- ZANDT, F. The World's Most-Sanctioned Countries, Feb 22, 2023. [online] Available at: <https://www.statista.com/chart/27015/number-of-currently-active-sanctions-by-target-country/>