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The Protection of the Right to Property in the Jurisdictions of the European Court of Human Rights, the Court of Justice of the European Union and the Constitutional Court of the Slovak Republic

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Abstract

The present thesis provides a comparison of the three approaches to the protection of the right to property in the jurisdiction of the European Court of Human Rights, the Court of Justice of the European Union and the Constitutional Court of the Slovak Republic. It does so mainly by examining the standards for justification for interference with the right to property and the compensation for deprivation of property within the three frameworks. One of the aims of the thesis is to examine the concept of multilevel protection of the individual right to property within the Slovak Constitutional Court and the two "European Courts" and to assess the effectiveness of such protection within the selected jurisdictions. The thesis mainly examines and analyzes the selected cases concerning the two abovementioned standards, which serve as a distinguishing factor within each jurisdiction. The evaluation of these two aspects reveals that the standard of protection clearly differs between the Court of Justice of the European Union and the other two courts. The main reason for this is that the Court of Justice of the European Union, as an institution of the European Union, is not able to provide an effective protection of right to property, being limited by the objectives of the European Union and its limited competence. Comparing to this, the European Court of Human has a well-established case law and provides an effective protection for this right. The Constitutional Court of the Slovak Republic is in general successfully following the approach of the European Court of Human Rights. This gives the European Court of Human Rights the position of standard creator in protection of the right to property, which the other two courts are pursuing, with a different level of success. The thesis also reveals how the problematic relation between the constitutional law and the Union Law might influence the protection of the right to property.

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Introduction

This thesis analyzes the protection of the right to property within three selected jurisdictions, the jurisdiction of the European Court of Human Rights, the Court of Justice of the European Union and the Constitutional Court of the Slovak Republic. The thesis has three primary aims; to make an overview of the protection of the right to property, to compare and to evaluate the approaches of the three courts, first by identifying the legal basis for protection of the right to property and subsequently through analyzing the selected cases. The secondary but no less important aim of the thesis is to examine the relation between the Constitutional Court and the two European Courts in protection of the right to property.

In the European area, there are now basically three systems of protection of fundamental rights. Europe-wide, established by the European Convention on Human Rights and Fundamental Freedoms[1] and the case law of the European Court of Human Rights; Second, the European Union level, as established by the founding Treaties and the Charter of Fundamental Rights of the European Union[2]; And finally the national level, protected by the State Constitution, which is usually guarded by the Constitutional Court, as it is in the Slovak Republic.

The reason why the right to property is used for the comparative analysis is twofold. First is that the right to property is considered a controversial and complex right by many authors who analyzed this right from the human rights perspective.[3] This controversy was based mainly on

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. Rome, 4.XI.1950.

[2] The Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/20

[3] see James W. Harris. *Is property a Human Right?*, *Property and the Constitution*, (Oxford: Hart Publishing, 1999); Allen, T. *Property and the Human Rights Act*. (Oxford, Hart Publishing 1999); Ugo Mattei. *Basic Principles of Property Law*. (London: Greenwood Press, 2000); F.H Lawson and Bernard Rudden. *The Law of Property*, (Oxford: Clarendon Law Series, 1992); Theo R.G Banning. *The Human Right to Property.* (Antwerpen: Intersentia 2002),

discussion about determining the concept of the right to property, justification of interference and the compensation for interference or deprivation.[4] This thesis will particularly focus on these aspects of the right to property. The second reason for choosing the right to property for the comparative analysis is, as will be shown, of the special nature of protection of the right to property, which provides the possibility of wide interpretation and space for discrepancy.

This thesis focuses on two aspects of interference with the right to property. First is the justification for deprivation or interference with property rights because the approach of the relevant Court provides a picture of the position of the right to property within the relevant legal framework and how the Court scrutinizes the principles of fairness and proportionality when it comes to the interference. The question of proportionality commonly stands on the consideration of balance of interests, and examining which interests are the more important and prevailing within the relevant jurisdiction. One of the important features of justification is compensation for deprivation or interference with property. The comparison of the approaches towards compensation shows the power of the Court to protect the right to property and whether it is willing and has the legal power to award just compensation for deprivation or interference with property.

The right to property is one of the key institutes of private law and is covered mainly in civil codes and other private law legal acts. However, this thesis provides a comparison through the constitutional perspective, but not *stricto sensu*, as it is mere comparison through judicial interpretation of the constitutional, conventional and treaty provisions. However, it is very pragmatic to choose the constitutional approach, as many authors claim that the effect of

Gregory S. Alexander, *The Global Debate over Constitutional Property*. (Chicago: The University of Chicago Press, 2006)

[4] Theo R.G van Banning. *The Human Right to Property.* (Antwerpen: Intersentia, 2002). p. 76

constitutional provision depends mainly on its interpretation, which is based on political traditions, society establishment or legal culture.[5] The constitutional approach provides solid ground for a comparative perspective, through the judicial interpretation of the provisions, which are drafted more vaguely than the private law provisions and not only allow, but also need, a judicial "constitutional" interpretation.

As will be provided in the thesis, the level of protection of the right to property is not equivalent within the three jurisdictions. This is caused not only by the controversial feature of the right to property but also by different perceptions of the protection of this right within the three jurisdictions. Each of these systems includes a more or less separate catalog of human rights and fundamental freedoms, the meaning and scope of which may not be expressed exactly the same.[6]

The structure of the thesis is divided into three chapters, each focusing on the relevant jurisdiction of the selected Court. The first chapter examines the protection of the right within the jurisdiction of the European Court of Human Rights, because as will be shown, it sets a standard for protection for this fundamental right. The following chapter focuses on the approach of the other European Court and points out the reasons for the lack of protection. This chapter not only compares the two jurisdictions, but also reveals the problematic relation between these two Courts. The last chapter pursues the second aim of the thesis and examines the protection from the perspective of national and international protection and its effectiveness through comparison of the standards of protection between the national Constitutional Court and the two European Courts.

[5] International Colloquium on Property Law, *Property Law on the Threshold of the 21st Century: Proceedings of an International Colloquium ... 28-30 August 1995, Maastricht*, ed. Gerrit van Maanen, A. J. Van der Walt, and Gregory S. Alexander, Ius Commune Europaeum Book Series 18 (Antwerpen: Maklu, 1996). p.110,111

[6] Andrea Butašová, Daniel Švaby. *Protection of human rights and fundamental freedoms in the European area*. in *European Law in Slovakia (*Bratislava: Kalligram, 2003) http://www.kbdesign.sk/cla/sk/eu_law_publication.htm, accessed 25/03/2014

As was mentioned, the thesis makes a connection between the questions of standards of the right to property in the first two chapters and also provides a brief view to the legal hierarchy between the Union Law, the European Convention on Human Rights and constitutional law. The most obvious is the conflict between the Union Law and the constitutional law of the Member States. Although the Member states unanimously accept the doctrine in relation to national law, they did not accept it in relation to the national constitutional law.[7] The Slovak Constitutional Court is influenced mainly by the jurisprudence of the European Courts of Human Rights. The more problematic is the relation between the Constitutional Court and CJEU or the constitutional law and the Union Law.

[7] Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002). p. 286

1 Protection of the right to property in the jurisdiction of the European Court of Human Rights

This chapter will give as brief overview of protection of the right to property by the ECtHR by providing examples from the "landmark" cases and aims to focus on the Court's approach towards interference justification and requirement of compensation for interference. The controversy and the problem with understanding the right to property has also been reflected in the discussion about the suitable text for the Convention by its drafters and was incorporated into the Convention only by Protocol No. 1 in Article 1 (hereinafter A1P1) in 1952. One of the main questions and concerns were about the extent to which the interference would be acceptable and to what extent interference of this right could be justified and what a just compensation for such interference would be.[8] Despite the long lasting debate the drafters came to a quite extensive definition of protection of this right e.g. comparing to UN UDHR.[9]

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[10]

Before looking at the Court approach towards the justification and compensation for the interference of the right it is useful to briefly analyze these provisions. As provided, the term of right to property is not explicitly recognized by the Convention. The abovementioned article uses

[8] Theo R.G van Banning. *The Human Right to Property.* (Antwerpen: Intersentia. 2002) p. 76
[9] Article 17 of the United Nations Universal Declaration of Human Rights right stipulates that *"(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."*
[10] Article 1 of Protocol No. 1 of the ECHR

the term *possession* instead of property. The first Case in which the ECtHR had explicitly provided that the A1P1 gives protection to the right to property was the *Marcx* case.[11] The Court made a notion to the travaux preparatoires of the ECHR and clarified that this article is a "substance guaranteeing the right of property" and added its previous statement from *Handyside*[12] that the disposing of the right to property forms a "traditional and fundamental aspect."[13]

The first part A1P1 gives protection to any interference of the property. The right to property under the A1P1 is a qualified right, which means that the Contracting States may limit this right in case of *public interest* complying with certain conditions. This provides for Contracting States a relatively wide margin of appreciation. On the other hand, the Court may examine the relevant public interest because it is not bound by the understanding of this concept by Contracting States as the Court has recognized in its case law autonomous meaning for many concepts.[14] According to this, the concept of the property in the meaning which should be considered for purpose of protection of right to property and which should not possess such protection for the purpose of A1P1 is also interpreted through the autonomous doctrine and the Court has repeated this throughout its case law.[15] This approach has a pragmatic aim of not letting the states avoid the obligation under the A1P1 by creating their own concepts of the right to property. For example if a state did not consider the notion of "legitimate interest" as part of the right to property, the Court would not be able to protect such right of the individual despite the Court specifying in *Pine Valley,* that such expectation is "a competent part of the applicants property".[16] In the more

[11] *Marckx v Belgium*, App No 6833/74 [1979] ECHR 2
[12] *Handyside v. The United Kingdom*, App No 5493/72 [1976] ECHR 5
[13] *Marckx*, para 63
[14] *James v The United* Kingdom, App No 8793/79 [1986] ECHR 2, para 42
[15] Allen, T. *Property and the Human Rights Act*. (Oxford, Hart Publishing, 1999), p. 140
[16] *Pine Valley Developments Ltd and Others v. Ireland*, App No 12742/87 [1991], ECHR para 51

recent case of *Gasus* the Court stated that the term possession under A1P1 is not limited to the meaning of "ownership of physical good" and that other types of proprietary rights are included in this term.[17] Accordingly, the Court applies a wide definition of the right to property with combination of the autonomous doctrine. This allows the Court to recognize the right to property in a broader sense and without limitation from the States understanding of the right to property.

1.1 The approach of the European Court of Human Rights towards justification

The Court has established three principles or rights which are protected by the A1P1.The leading case for this principle are the joint cases of *Sporrong and Lönnroth v. Sweden.* In this decision the Court added that these conditions have to be fulfilled cumulatively.[18] The first principle is the general protection of peaceful enjoyment of the right to property for everyone (protection against deprivation of property), second is the principle lawfulness and the third provides that the control of use of property by state must be in accordance with the general interest.

The ECtHR applies a step-by-step approach when determining whether the interference might be considered as justified. First of all the Court observes whether there was an interference with the right within one of the mentioned principles of A1P1.[19] Subsequently the Court decides whether there is a justification for the interference by the State. It is up to state to provide arguments for the interference and the burden of proof lies on the State in this matter. Only when the State can reasonably justify the interference there will be no violation of right to property. For interference to be reasonably justified, it must pursue a legitimate aim which would be commonly a general or public interest.[20] The other requirement according to *Sporrong and Lönnroth* case is that the

[17] *Gasus Dosier and Fodertechnik GmbH v The Netherlands*, App No 306-B [1995], para 53
[18] *Sporrong and Lönnroth v. Sweden*, App No 7151/75, 7152/75 [1982] HER, para 35
[19] Monica Carss-Frisk, *A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Human rights handbooks, No. 4, (Council of Europe, 2003), p. 8
[20] *James v The United* Kingdom, App No 8793/79 [1986] ECHR 2, para. 46

interference must be proportionate to the aim pursued. In this case the Court stated that there must be a balance between the need of general interest and protection of the individual right.[21] The question of the fair balance was further explained in the *Sporrong and Lönnroth* as there will be no fair balance when an individual has would be subject to an "individual and excessive burden".[22]

The second sentence of the A1P1 guarantees the legality or legal certainty providing that interference must be "*subject to the conditions provided for by law and by the general principles of international law".* The legality and legal certainty requirement is met when there is an "*adequately accessible and sufficiently precise domestic legal provisions*". This concept of the wording does not prevent to apply other than domestic law. The Convention seeks to ensure that the domestic law itself complies with the essential requirements of "law". This involves a fair and proper procedure, namely, that the measure in question should issue from and be executed by an appropriate authority and should not be arbitrary.[23]

For a proper comparison it is useful to focus more on the evaluation of the general interest as a basis for justification of the interference. The ECtHR has implemented different justifications based on "public interest", which are mostly based on the text of ECHR, however, the term is used only in A1P1 within the Convention. [24] The concept of the general interest is quite general. As it was stated the Court respects the State approach towards accessing the "public interest". The ECtHR did not apply a doctrinal approach for deciding when the public interest prevails over the individual rights or vice versa. The reason is that the opinions within states are

[21] *Sporrong and Lönnroth v. Sweden*, App No 7151/75, 7152/75 [1982] EHRR 35, para. 73
[22] Ibid, para. 73
[23] *Winterwerp v. the Netherlands*, App No 6301/73 [1979], 2 EHRR 387, para 45
[24] See Aileen McHarg. *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human,* The Modern Law Review, Vol. 62, No. (Blackwell Publishing, 2010). http://www.jstor.org/stable/1097381Accessed: 25/03/2014

inconsistent and it would be practical to categorize the public interests for purpose of the right to property. However, the States margin of appreciation is limited to extent that the interference should not impose on the individual an "individual and excessive burden". [25]

1.2 The European Court of Human Rights approach toward compensation

This subchapter will examine the approach of the ECtHR towards compensation for deprivation or interference with property. Article 1 of Protocol 1 does not refer to compensation for deprivation of property. This requirement is according to the ECtHR case law an implicit requirement. The issue of compensation was also raised in the previously mentioned *Sporrong and Lönnroth* in which the Court had to consider in connection with the balance test. The expropriation in the case would meet the proportionality requirement, if there was a possibility for the applicant to seek a reduction of the limitation "or of claiming compensation".[26]

The Court went further in *James v UK* stating that a deprivation of property without compensation might be considered as justifiable only exceptionally and that the conditions for compensation are important for considering the proportionality criteria, whether there is fair balance between the competing interests at stake.[27] More concretely to the amount of compensation the Court stated that the amount should be "reasonably related to its value", otherwise the deprivation of property would not be justifiable.[28] Despite the obligation to compensate being established, it is questionable how the term "reasonably related" should be interpreted. Is it a same value of the property depending on objective evaluation, i.e. the market value of the property? In *James* the Court further explains that there is no guarantee under A1P1 to right to full compensation under every circumstance. For example in cases of economic

[25] See e.g. *Sporrong & Lönnroth*, para 73*; Lithgow*, para 120
[26] *Sporrong and Lönnroth v. Sweden*, App No 7151/75, 7152/75 [1982] EHRR 35, para 28
[27] *James*, para 54
[28] Ibid, para 50

measures and reforms, which are regarded as legitimate "public interest", and aim to pursue a higher social justice, the amount of compensation might be less than the full market value.[29] This means that the compensation condition will be satisfied if the "victim" receives such compensation which would reduce the negative impact to a reasonable level, or the public interest for interference with right to property is so strong that it itself amounts for justification and there is no requirement to fully compensate for deprivation.

The other important issue concerning the level or amount of compensation is that it falls under a certain margin of appreciation. In the latter case of *Lithgow,* the Court explained that the state has a wide margin of appreciation in deciding the amount of compensation and the Court stated that it "will respect the legislature's judgment" until such judgment was "manifestly without reasonable foundation."[30] This means that the very same policy and measure of the state implemented should provide and decide the proportionate compensation and the court will not intervene into such compensation unless it had manifestly unreasonable basis.

However, or *Jahn* the ECtHR justified the absolute lack of compensation for deprivation of right to property. But it made clear that this is an exceptional case and base on exceptional circumstances, otherwise it will be considered as disproportionate interference with the right to property.[31]

According to Alan, the level of compensation required to provide the balance should be based on the "social function" of the relevant property.[32] This is a reasonable approach, however in the area of right to property interference where the State has a wide margin of appreciation, the

[29] *James case*, para 54
[30] *Lithgow and others v. UK* , App No 9405/81 [1986], para 122
[31] *Jahn and Others v. Germany* App No 72552/01 [2005], para 94-95
[32] Tom Allen, *Compensation for Property under the European Convention on Human Rights* (Bepress Legal Series, 2006) http://law.bepress.com/expresso/eps/1875, 22.04.2014, p. 43

social function as a balance factor can be interpreted with discrepancy and does not provide a strong guarantee for a just compensation.

To summarize the Court approach toward the amount of compensation; the legitimate objectives or public interest may be required to pay less than market value[33] and, according to *James*, the legitimate objectives of "public interest" as measures of economic reform or measures designed to achieve greater social justice may require lower compensation than the full market value. Lack of compensation, respectively, its absence does not ipso facto mean that deprivation of property is automatically a violation of A1P1 as in *Jahn* case, however this is only allowed in exceptional circumstances. For this reason it is always necessary to examine whether the challenged legislation treatment for the person concerned constitutes an unfair or disproportionate burden for the individual.

[33] Holy Monasteries v. Greece Series App No 13092/87 [1994], para 35

2 The Court of Justice of the European Union as protector of the right to property

Before analyzing the approach of the Court of Justice of the European Union (CJEU) towards the protection of the right to property by focusing on justification and compensation for interference with right to property it is necessary to look at the substantive legal basis for such protection within the European Union. The protection of the right to property as a fundamental right is not explicitly mentioned in the founding EU Treaties. There is no clear reference to protection of the right to property of an individual.

However, a reference to right to property is mentioned by Article 345 of TFEU, which provides that "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*."[34] Nevertheless, the aim of this Article unfortunately is not to provide protection of right to property for an individual. This Article only prevents the European Union from interfering with the State competence to legislate in the area of right to property. According to this provision, the CJEU when applying the treaties in relevant cases should avoid making a decision which would have such effect. This might be seen as undermining the possibility for CJEU to protect the right to property, however, the outcome is rather opposite. This provision prevents the EU legislation from interfering with right to property to level in areas which are governed by the State and fall within the "system of property ownership".[35] This means that the right to property system of protection is in the sole competence of the Member States, and should not be intervened by the Union, however, as it will be provided this is not absolutely the case. The EU implements various regulation[36] which of the internal market, which have the impact on

[34] Article 345 of the Treaty on Functioning of the European Union
[35] Article 345 of the Treaty on Functioning of the European Union
[36] E.g. the milk quotas from the *Wachauf* and *Bostock* or the agricultural restrictions from the *Nold* and *Hauer*

the right of the property of the individual and by that interfering with the system of property ownership of the Member states.

After implementing the Charter of Fundamental Rights of the European Union to the EU legal system, the main provision for protection of right to property within the European Union became Article 17 of the Charter. This provision is based on the A1P1 of the European Convention on Human Rights. Article 17 of the Charter states the following:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

The second paragraph of the article stipulates that the intellectual property shall be protected. This is one of the clear distinctions between the ECHR and EU framework. The EU emphasizes the intellectual property and this term is mentioned in the founding treaties several times because it is one of the important features of functioning of the internal market. However, as it is not comprised by both frameworks it does not serve as and distinctive feature for comparison.

For comparing the scope of the right of property protected by the Charter and Convention, it is essential to mention Article 52 (3) of the Charter, which provides that if the Charter includes a right that *"corresponds*" to rights contained in ECHR, *"the meaning and scope of those rights shall be the same as those laid down by the said Convention."* According to this provision, the CJEU in its decision might consider also the case law of the ECtHR concerning the right to property which is based on the A1P1.

However, since the fundamental rights guaranteed by the Charter must be respected when national legislation falls within the scope of the Union Law, under the opinion of the CJEU, there cannot be a case, that would fall under EU law and have not be referred to fundamental rights.

Thus, from the applicability of the Union law implies the applicability of fundamental rights guaranteed by the Charter. On the other hand, if the legal situation does not fall within the scope of the Union Law the possible applicable provisions of the Charter cannot establish themselves the CJEU jurisdiction. The requirement for establishment of the jurisdiction of the CJEU differs, for example in *Fransson*[37] it was sufficient that there was a direct link between the Union's own resources and the collection of revenue of added value tax.

As will be provided later, the rights to property cases were the first in which the ECJ has dealt with the protection of the fundamental rights within the Community legal framework. Despite this, the ECJ did not provide, comparing to ECtHR, an extensive definition of the right to property.

2.1 CJEU approach towards the justification of infringement

Despite the fact that there was no explicit recognition of the right to property as a fundamental right within the EU legal system, the CJEU has recognized this right even before the EU Charter was implemented. The landmark case for protection of fundamental rights was the case *Nold.*[38] This case concerned a seller who sought for an annulment of a Commission decision which implemented new conditions for conducting a business in the coal whole selling field. He also complained that the Commission Decision was violating his right to property protected by A1P1. In this case the CJEU clearly stated for the first time that the right to property is subject to protection as a fundamental right, by looking at the Constitutional systems of the Member States, which recognized and protected this right.[39]

[37] C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26 February 2013, para 25-28
[38] 4/73 *Nold v Commission* [1974] ECR 491
[39] Ibid, para 13

On the other hand, the CJEU stipulated similarly as the ECtHR in *James* that the right to property serves a social function and the protection afforded should be similar to the right to freely choose a profession or practice a trade.[40] According to the Court, the right to property should be protected differently from other fundamental rights because of its function. This is an important fact for justification of interference with the right, mainly from the point of objects of general interest, which could be more likely to prevail within the concept of "social function". The example of this attitude was already provided in *Nold*, when the Court further observed the right to property can be a subject to particular necessary limits, on the basis of "overall objectives of the Community".[41] The problem with the term "overall objectives of the Community" is very broad not only because the set of objectives is quite extensive, but mainly it is up to EU to decide which measures serve for this aims. The Union is free to adopt legislation which would pursue any of its objectives and despite interfering with the individual's right to property, the requirement for legal aim will always be easily satisfied. This leaves the Union in position to legislate without any real limitation to aims required.

The other problematic feature is that when it comes to pursuing the aims of the EU, the Court comes to rather surprising conclusions. As for example in the *Nold* case, the Court used the "economic uncertainty" as a reason for the negative effect for Mr. Nold business, for which he should have been prepared and able to adjust to changes in the relevant business field, and not the clearly limiting provisions of the Commission decision.[42]

In general when it comes to justification of interference with the right to property, the CJEU is put in a position to observe the EU legislation interfering with the individual rights. When we

[40] *Nold*, para 14
[41] Ibid, para 14
[42] Ibid, para 14,15

look at the Court of Justice of the EU's main aims, it could be regarded as protector of Treaties and EU law proper enforcement and not a protector of individual rights. According to this, it might be anticipated what attitude the court will apply in cases of interference with the right to property, based on legislation promoting the internal market. To stick to examples from the *Nold* case the, the Agencies from the case argued that if the Court will rule for annulment of the Commission decision it would have a detriment effect not only to the new implemented system but also to trading rules already in force. This would clearly have a negative effect on the functioning of the relevant market and would obviously hinder one of the main "objectives" of the Community. Under such circumstances it is not a much surprise that a Court came to conclusion in its decision that there was no violation of the right to property by the Commission decision. The ECJ approach toward right to property after this landmark case remained to be little unclear but provided a look into the ECJ willingness to declare the EU legislation in violation with the fundamental rights and mainly how the court will access the objects for justification with the interference with the right.

After *Nold*, the next case in which the ECJ observed the right to property as a fundamental right which should be protected was *Hauer*.[43] It is necessary to analyze this case more closely because it concerned both the limitation of the right to property and the subsequent justification for it. Looking at the merits of the case, it is necessary to briefly mentioned that the applicant was Mrs. Hauer, who intended to authorize planting vines on her field. However, the authorization was not granted because during the process an EU regulation came into force and prevented any new planting of the vine for the following three year period.[44] The applicant alleged that the regulation was infringing her right to property protected by the German Basic Law. The ECJ

[43] 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727
[44] Ibid, para 2

noted that when considering the protection of the fundamental rights it looks at the *common constitutional ideas* of Member States, which are often based on the A1P1 of the ECHR.[45] According to this statement, the protection of the right to property by the ECJ should be similar to those afforded by the Member States. As it would be further explained it is not the case. The Court further stated regarding the justification for interference, that the right to property according to legislation of Member States serves mainly the social function and this legislation imposes certain restrictions.[46] This observation served as a very strong argument for the interference. However, the concept of the property within Constitutions of Member States may differ from the ECJ definition. Tridimas also point out this problem, stating that regarding *Hauer* and *Nold*, it is obvious that the definition or concept of the right to property might be different from Constitutional definitions of Member States.[47]

The Court further stated, considering the justification of interference with the right to property that the interference with the aim of organizing the common internal market and for the corresponding policies, such limitation "corresponds" with Community objectives of general interest. Nevertheless, the Court stated that such interference should not "constitute a disproportionate and intolerable interference with the right" and should not infringe "the very substance of the property".[48]

The Court continued with its approach from *Nold* toward justification of interference, but also added the "reasonableness" test - which corresponds to the ECtHR approach concerning the justification of interference. The Court specified that it is essential to identify the aim pursued by legislation and to determine the relationship between the measures implemented for the relevant

[45] Ibid, para17
[46] Ibid, para 20
[47] Takis Tridimas, *The General Principles of EU Law*, (Oxford EC Law Library, 2006), p.303
[48] *Hauer*, para 23

aim. The aim pursued by the Community and the measures implemented have to be "reasonable" relationship.[49] The controversy of this test is identical to the problem of considering the legal aim for interference. It is a vague definition, which can be interpreted by CJEU in favor of the EU legislation. For example in the Hauer case the Court itself provided that the objectives of the challenged regulation to promote the wine market which would be not only positive outcome for the consumers but also for the producers through balanced prices and would improve the wine quality within market. Under such well stipulated and promoted objectives, it is not difficult to predict the outcome of such cases. In the *Hauer* case, there was no violation of the right to property found, as the interest of the Community overweighed the individual interest and the interference with right to property justified by its objectives.

The ECJ in the above mentioned cases of *Nold* and *Hauer* established the requirement of legal aim and objectives for justification very broadly, leaving an uncertainty which would be qualified under these terms, however, it clearly showed its approach concerning the EU legislation as violating the right to property. The ECJ, probably intentionally, avoided considering the question of compensation for interference with the right to property on the basis of EU legislation. The other issues is that *Hauer*, compared to the ECtHR proportionality, even lacks the requirement of using the less restrictive measure, which is was an important condition for justification under the ECtHR approach.

2.2 The CJEU approach towards compensation

Despite the Court not addressing the question of compensation in previous cases, in later cases it came to the point when it was inevitable to review the compensation requirement for interference with the right to property.

[49] Ibid para 23, 24

The first landmark cases were based on the organization of the milk market. First came *Wachauf*, in which the applicant was a tenant farmer, who requested compensation for discontinuance of production the milk. Again the Court delivered a judgment in which it found no conflict of the contested regulation with the fundamental rights, although for the first time clearly stated that that a Community rules, which would interfere with the right to property, by depriving an individual of fruits based on his labor and investments, without compensation, would be incompatible with the condition protection of fundamental rights. Further the Court specified that this requirement is binding on the MS and the MS should apply the Community rules in compliance with this requirement.[50] Moreover, the Court added that it is up to MS to compensate. The reason for this according to the Court is that the MS such wide margin of appreciation which allows them to implement the Community legislation in manner which would comply with the protection of fundamental rights requirement and compensate for the interference.[51] Although the Court failed to address more about the question of compensation, as for example the proportionality and amount of compensation it was a first positive reference towards the requirement to compensate. The most crucial oversight of the Court was that it did not observe more closely the legal basis for this obligation to compensate.

After the *Wachauf* judgment, came *Bostock*[52] in which the ECJ had to again consider the question of compensation for the loss based on milk market organization. The court came to the unexpected conclusion that the MS are not required to provide compensation under the General Principles of Community law.[53] The reason for this conclusion in the case which was contrary to

[50] C 5/88 *Wachauf* [1989] ECR 2609 19
[51] Ibid, para 21-22
[52] C-2/92 *Bostock* [1994] ECR I-955
[53] Ibid, para 27

Wachauf judgment that the right to property does not include the right to dispose for profit, such as in the Mr. Bostock case.[54]

The Court's restrictive approach towards providing compensation based on interference with right to property by EU legislation was most controversial probably in *Booker*.[55] In this case, the applicant fishery had been killed and destroyed under the Council Directive 90/667/EEC. The case again concerned the obligation of MS to adopt measures for compensation and whether this obligation has to be implemented relating to the protection of the right to property. The important fact which needs to be stressed is that the right to property was not only limited but absolutely deprived by destruction of the fishery. Despite that, the Court first observed that there is no general principle within the Community law, which would require the compensation to be paid in every situation. Subsequently the Court stated that the destruction of the property, without any compensation, in this case did not constitute a "disproportionate and intolerable interference impairing the very substance of the right to property".[56] The reason for finding no violation of fundamental rights was that the Court considered this as justified interference according to the aim of which the measures pursued - the general Community interest to control the "List I diseases". Even if the justification for the interference with the right could be accepted, the Court had failed to provide any argument why there was no obligation to compensate implemented by EU legislation for such interference and why it is not considered as a disproportionate and intolerable interference with the right to property without providing any compensation.[57] The Court had ignored the requirement from *Wachauf*, that there should be in cases of important interference with the right to property a financial compensation for such interference.

[54] Ibid, para 19
[55] Joined cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR, para 87-90
[56] *Booker*, para 86

2.3 The different standards for protection of the right to property between CJEU and ECtHR

When comparing the two approaches and standards of protection of the two Courts, it is obvious that the ECtHR has developed more extensive case law concerning the right to property and the level of protection by ECtHR is considerably higher. The first obvious distinction is the concept of the right to property. The issue of the concept of property should not be underestimated because it is crucial for deciding whether the subject of the case will be protected under the right to property. Despite the fact that the ECJ has in *Nold* and *Hauer* stated that it will protect the fundamental right within in the Community legal order accordingly to the ECHR, because it formed the national constitutions of Members States, from which the Court takes inspiration when protecting the fundamental rights. The ECtHR is not limited by the definition of the Contracting States and stipulated in *Gasus* that will create its own concept of right to property.[58] In comparison the ECJ prevented itself in the judgment from *Hauer* creating its own concept of protection of right to property, by following the ideas from national constitutions of Members States. The reason for that is that the ECJ had to establish its competence in area which did not exist within EU and probably the most pragmatic way was to refer to the Constitutions of the Member States. According to this, the ECtHR has a complex concept of what is subject to protection of right to property, while the ECJ has recognized the subject as right to property on a case by case basis without any intent for establishing a doctrinal approach.

Despite these obvious differences, in much more recent case, *Bosphorus*, the ECtHR observed that the protection of human and fundamental rights by Community law is equivalent to the

[58] *Gasus Dosier and Fodertechnik GmbH v The Netherlands*, App No 306-B [1995], para 59

protection of ECHR system.[59] This can hardly been accepted in the case of protection of the right to property. Although the legal basis for protection might be equivalent or comparable, the interpretation, of the principles essential for protection of the right to property, differs between the two Courts. For example if the *Bostock* case were considered by ECtHR, there requirement for compensation would most likely be stated as inevitable for justifying the deprivation of property.[60]

For the aim of the thesis it is not necessary to analyze more cases of the ECJ/CJEU and ECtHR, because it is apparent from the analyzed cases that the ECJ was not able to provide the same level of protection for the right to property as the ECtHR. The ECJ had a strong tendency to see the EU legislation as in compliance fundamental rights and it applies the requirement from *Hauer* too vaguely. The reason for the ECJ struggling with this protection is mainly that the ECJ was not established and designed for protection of human and fundamental rights, but the Community aims. The problem of imprecise definition of the "Community objectives" is underlined by Weiler, who point out that the Court failed to clarify the necessary balance between the individual and the Community interests.[61] When these two come into conflict, the ECJ seems to be unable to clearly state that the legislation pursuing the community objectives is disproportionate and intolerable interference with the right to property and rather finds a way how to justify the interference in every case. The fact is that ECJ now CJEU is an EU Institution, bound by treaties and depending on the EU budget. For this reason in lacks the necessary independence and when deciding on balance between the EU market aims and the individual right to property has strong tendency to give preference to the EU legislation. Despite the ECJ

[59] *Bosphorus v Ireland*, App No 45036/98 [2005] ECHR, para 165
[60] See cases of *Sporrong and Lönnroth v. Sweden*, or case of *James v UK*
[61] Joseph Weiler. *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities.* (Washington: Washington Law Review 1986), p. 1128

provided in the *Wachauf* case the requirement for compensation if the *Wachauf* case, it failed to apply the requirement in the Bostock and the *Booker* case. As a consequence of this approach it might be concluded the ECtHR provides better protection. The reasons for this is that the ECtHR has not only the longer experience with the protection of right to property and created a more complex case law, but also as an independent institution from the European Union it is not bound in its decisions by any functioning of EU objectives. It might be anticipated that the CJEU will remain in its tendency to find the EU measures "reasonable" to objectives of the Community (general interest), which are more essential for the functioning of the EU than the protection of the individual fundamental rights, which is the main aim of the ECtHR.

However, as the difference between the two courts' approaches might be considerable, after the *Bosphorus* judgment, the possibility to seek for the better protection in front of the ECtHR might become difficult. If an infringement of right to property were solely based on obligation based on EU legislation without possibility of any discretion of the State, the principle of equivalent protection would be applied and would have consequence of raising the threshold for level of infringement which would be considered as violation of the ECHR. The principle of equivalent protection can be rebutted only if the ECtHR would see the relevant interference as "manifestly deficient protection" of the right to property otherwise it would be automatically as in compliance with the Convention. In the most recent case of *MSS v Belgium and Greece*,[62] the ECtHR limited that the scope of the *Bosphorus* principle, to the area of the previous first pillar of EU.[63] For the purpose of the protection of the right to property it does not mean much difference as most of the legislation interfering with the right to property falls within the scope of the organization of the internal market which would under the previous EU first pillar. In this case

[62] *MSS v Belgium and Greece,* App No 30696/09, [2011] ECHR
[63] Ibid, para 33

the ECtHR further pointed out that if the State would have any discretion to acts when implementing the EU regulation, such acts are fully subject to the ECtHR review.[64] This is a decisive finding in the cases of EU Directives, which give the Member states full discretion in implementation and such cases would fall under the full review of the ECtHR without applying the *Bosphorus* higher threshold (for rebutting the equivalent presumption). Second case which even more limited the Bosphorus principle was *Michaud.* According to this judgment the *Bosphorus* principle can be applied only if the Member state used the possibility of preliminary reference to the CJEU.[65]

Nevertheless, it would be interesting to see how the ECtHR would access case which would be similar to the case of *Booker*, if an applicant made an application to the ECtHR, whether such case would pass the *Bosphorus* threshold and a destroying of the property according to EU legislation without any compensation would be considered as manifestly deficient protection or not.

[64] Wyatt, Derrick., *Wyatt and Dashwood's European Union Law*, (Oxford: Hart Publishing, 2011), p.357
[65] para 112-116

3 Protection of the right to property in jurisdiction of the Constitutional Court of Slovak Republic

This chapter will examine the approach of the Constitutional Court of the Slovak Republic (hereinafter Constitutional Court) towards the protection of right to property and provide a brief review of the position of the Constitutional Court in correlation with the framework of the Union Law and the Convention system of protection of human rights.

The CJEU and ECtHR developed relatively separate systems for the protection of the right to property, which are not binding on each other despite that the EU Charter and the ECJ case law were clearly influenced by the ECHR. The Constitutional Court is in a different position when both jurisprudences of the "European Courts" are binding within national level. The Union Law according to CJEU should have primacy even over the national constitutional law[66] and the ECHR as International Treaty has primacy over the national law.[67] The Constitutional Court is, if not clearly bound by both, than at least strongly influenced by these two jurisprudences. This gives a rise to multiple questions on the separation powers,[68] which would be explained later in this chapter. The problem with relation of the three separate jurisdictions would be a much lesser problem if the two "European" jurisdictions were in compliance with each other, which as was already revealed is not the case. It would be interesting to see how the Constitutional Court

[66] The paragraphs 1 and 2 of Article 7, and Art. 144 of the Constitution provides adequate though not absolutely perfect legal framework primacy of European law as formulated by the ECJ, to one exemption and questions) potential conflict of provisions of primary Community law with the Constitution. Article 7(2)- *The Slovak Republic may, by an international treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and European Union. Legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic*

[67] Article 7 (5) of the Constitution - *International treaties on human rights and fundamental freedoms, international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws.*

[68] see e.g. L. E. de Groot-van Leeuwen and Wannes Rombouts, eds., *Separation of Powers in Theory and Practice: An International Perspective* (Nijmegen: Wolf Legal Publishers, 2010).

would handle a case in which merits would give a jurisdiction to both the European Courts and also the Constitutional Court.

The protection of the right to property as a fundamental right is contained in Article 20 of the Constitution of the Slovak Republic (Act no. 460/1992 Coll. as amended by subsequent legislation, hereinafter "the Constitution"). From the constitutional perspective the direct and most important protection of right to property is provided by the Constitutional Court as protector of constitutional compliance. The finding of the Constitutional Court is binding for all courts.[69] However, the individual protection of the right to property is provided by the general courts. The Constitutional Court control of constitutionality is limited to consideration of proportionality of the state authority's interference with the fundamental right protected by the Constitution.[70] The Constitutional Court in its finding clarified that his own jurisdiction is limited on the basis of Article 127 of Slovak Constitution, since the protection to right to property before the interference or threat of interference is provided in principle by the general courts a this protection by the Constitutional Court and there is no possibility of individual reference to the Constitutional Court in such cases.[7172] For this reason the Constitutional Court protection might be considered as indirect protection of the right to property.

Despite the concept and the content of the right to property being based on Article 20 of the Constitution, the right to property has been subject to the decision-making of the Constitutional Court. The definition of the property is not based on the Constitutional provision itself, since it refers to the Act. 40/1964 Coll. Civil Code, which in § 123 provides that the owner is within the law legitimate subject of your property to hold, enjoy, enjoy its fruits and benefits, and dispose

[69] Article 144 of the Constitution of the Slovak Republic
[70] Article 127 of the Constitution of the Slovak Republic
[71] The following books and decisions of the Constitutional Court are translated by author and authors takes all responsibility for the correct translation
[72] Decree of the Constitutional Court of Slovak Republic folder mark I. ÚS 132/1993

of him. This content of the right to property/ownership is respected by the case-law of the Constitutional Court.[73]

This together stands as a basic introduction to the protection right to property under the Constitution and the role of the Constitutional Court. The following subchapters will provide a closer comparison of the two European Courts by revealing the position of the Court in what could be called a multilevel protection of right to property.

3.1 The Constitutional Court of the Slovak Republic following the approach of the ECtHR

In *Sporrong and Lönnroth v. Sweden*, the ECtHR specified that for considering the justification of interference with right to property, it is up to states to decide what should be considered as pursuing a public interest, because the states and the national authorities are in a better position as they have closer connection and knowledge about thee relevant society. Under the Convention legal framework, it is the role of the national authorities to consider the public interest concerned and the measures taken of interference with property and the remedy which should be applied. This means that the states and the national authorities possess a "certain" margin of appreciation.[74]

Comparing the concept of what is subject to property, the Constitutional Court noted that this subject, as guaranteed by Article 20 of the Constitution, is not only moveable and immovable property, but under this concept it is possible to include other 'proprietary' rights. The Court specified that it might be not solely a property *stricto sensu* but also any other rights and property

[73] for example the Constitutional Court of the Slovak Republic decision ÚS SR 8/97
[74] *Sporrong and Lönnroth v. Sweden*, App No 7151/75, 7152/75 [1982] EHRR 35, para 69-73

values.[75] According to the Constitutional Court, everyone has in particular the right to control the objects of ownership and also it includes all partial rights based on Roman law theory of property rights (the right "to hold", right to dispose of property, the right to use, right to benefit from the "fruits" of the property).[76] This decision is a clear tendency towards a very broad interpretation of the concept of property, as interpreted by the ECtHR.

The Constitutional Court approach towards the interference with the right to property stands on the general principle that the right to property is inviolable. This is a fundamental principle in its protection. The meaning of the right is that no one can be deprived of his right to property against his will. In essence, it is analogous to the second principle enshrined in A1P1 of the ECHR. Nevertheless, even in this case, the possibility to interfere with property rights is allowed under certain conditions. Interference with property rights is only possible to a certain extent. According to the Court the extent is limited by the achievement of the aim.[77] The interference itself must be justified by the public interest and the relevant public interest should be located directly in the legal act that allows the interference.[78] This is very similar to the approach of the ECtHR test of justifying the interference with the right to property, with lack of clearly stating the requirement of the least intrusive means applied for achieving the aim, as the extent of the interference is limited only by the achievement of the aim.

The Constitutional court mentioned in connection with the interference the requirement for compensation. For the amount of compensation the Constitutional Court provided just a very vague requirement that is should be "reasonable". For the purpose of reasonableness the Court

[75] Constitutional Court of the Slovak Republic decision no. II. ÚS 19/97, see also Jánošíková Martina. Community Law in the Judicature of the Constitutional Courts of Slovak and Czech Republic Bratislava: IURA EDITION, spol. s r. o. 2009
[76] Constitutional Court of the Slovak Republic decision no. II. ÚS. 8/97
[77] Constitutional Court of the Slovak Republic decision no. PL ÚS. 38/95
[78] Constitutional Court of the Slovak Republic decision no. PL ÚS. 26/00

further stated that it should be taken into account into what degree the right to property was interfered and whether the level of interference requested from the owner was fair.[79] However, the Court did not stop there and further stated that the amount of the compensation should be preferably based on the market value and should also take into account the price development and the compensation to be at a "given time and a given place considered as equitable".[80]

The ECtHR has stated that it is not bound by the definition of the states, as it applies the autonomous doctrine. However, the Constitutional Court took inspiration in the ECtHR jurisprudence. This should be seen as wise and practical attitude because of the two following reasons. The first is that the ECtHR has longer experience with protection of the right to property, as the Slovak Constitutional Court, which gives this right a "full protection" only after the year 1989[81] and the second is that it gives the Convention greater significance in the national legal order and step forward in compliance with the Convention.

According to the Constitutional Court judicature, it might be concluded that it pursues to conform to the trend that has been established by the ECtHR for the protection of right to property. The Constitutional Court inspiration in the ECtHR jurisprudence is a practical step for the two following reasons. First is that the ECtHR has longer experience with protection of the right to property than the Slovak Constitutional Court. Secondly the higher the compliance with the ECHR standard is provided by the Constitutional Court, the more effective is the protection of the right to property by the Constitutional Court. This is mainly because the Constitutional Court judgments are more persuasive and acceptable when the Court supports its decision with the ECtHR case law and the ECtHR approach in similar cases.

[79] Constitutional Court of the Slovak Republic decision no. PL ÚS 37/95
[80] Ibid
[81] Before the 1989 the Czechoslovak Socialistic Constitution gave priority mainly to the collective ownership and the state property.

3.2 Relation between the Slovak Constitutional Court and the Court of Justice of the European Union in the protection of the right to property

As noted in the previous subchapter, according to the Slovak Constitutional Court's cases, it follows the jurisprudence and the approach of the European Court of Human Rights. The comparison of standards between the Constitutional Court and the CJEU would be more or less the same as between the ECtHR and CJEU as in the second chapter. However, the more specific issue is the fact that the CJEU and Constitutional Court are in a different relation. The reason for this is the specific relation of the Union Law and the national constitutional law of Member States.

It is necessary to mention that there is a possibility of individual reference under Article 127, in which the applicants allege the violation of the Charter of the European Union on the fundamental rights.[82] The Constitutional Court, when considering such references, makes a reference to Article 51 (1) of the Charter. According to this Article, the provisions of this Charter are addressed to the institutions, bodies, offices and agencies, and to the Member States only when they are implementing the Union law. The Charter is therefore primarily for the institutions and bodies of the EU, it applies in the Slovak Republic only if the State is acting within the scope of EU law (must involve the implementation of the act EU), or is it a case that the Slovak Republic derogates from the EU law, or there is a material rule of EU law to be applied in the case under consideration.[83] If the case would not fall under any of the three options, the Constitutional Court would reject a complaint as manifestly invalid.[84] The interesting fact is that

[82] Ján Mazák and Martina Jánošíková. *The Lisbon Treaty (the constitutional system and the judicial protection*) *(*Bratislava: IURA EDITION, spol. s r. o. 2011). p. 40.
[83] Ibid p. 41
[84] Finding of the Constitutional Court of the Slovak Republic folder mark. III. ÚS 141/2011

the Constitutional Court takes into account the explanations drawn up to provide guidance for interpretation of this Charter,[85] as well as the existing case law of the CJEU.

According to the CJEU case law, the Union law has primacy over the constitutional law of Member States. This primacy is based on the decision from *Internationale Handelsgesellschaft,* in which the Court repeated the arguments of decisions in *Costa v. ENEL,* which created the doctrine of primacy of the Community law over national law, stating that secondary Community law prevails over the constitutional principles of the Member States. The validity of Community law or effect such law within a Member State should not be influenced by the fact that the law is contrary to fundamental rights arising from the Constitution of the State or with significant structural features of Constitutions.[86] Despite the jurisprudence, the ECJ has been struggling determine and establish a stable position in relation to the Member states constitutional law, which affects also the position of protection of the fundamental rights the hierarchy of the courts in this protection.[87]

This creates an interesting conflicting position for protection of the right to property, when interfered by the Union Law. On the one hand, according to the CJEU case law,[88] the protection of the right to property as a fundamental right stands on the basis of institutional traditions of the constitution of the Member states, but on the other hand the "recourse" to the legal concepts of the national law to consider the validity of the adopted measures is prohibited and even if the

[85] The document has been published in 14 December 2007 under the mark 2007/C303/02
[86] C 11/70 *Internationale Handelsgesellschaft* [1970], para. 3
[87] See Procházka Radoslav, and Juraj Čorba: *The European Union Law (Selected questions for legal practice)* (Žilina: Poradca podnikateľa, spol. s.r.o., 2007); Wyatt, Derrick. *Wyatt and Dashwood's European Union Law*. 6th ed. Oxford: Hart Publishing, 2011, p. 354-357
[88] 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979], para 17

measure goes against the fundamental rights from national Constitutions it should not be considered as invalid.[89]

The Constitution, under Article 7 and Art 144 provides in the Slovak Republic an adequate, although not absolutely perfect, legal framework of primacy of Union law as formulated by the EJC/CJEU. This is to one exemption - of the primacy of the Community law over the Constitution itself. The supremacy doctrine of the Union law is regulated by the second sentence of Art. 7 (2) of the Constitution:

> Legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic. Undertaking of legally binding acts that require implementation shall be executed by law or a government ordinance pursuant to Article 120, paragraph 2.

To the application of national standards for protection of fundamental rights; The CJEU in a recent case *Fransson* acknowledged that if the court of a Member State is to examine compliance with fundamental rights in the event of national provisions or measures implementing Union law within the meaning of Article 51(1) of the Charter. National authorities and courts may impose national standards for the protection of fundamental rights, but to the extent which would not compromise the level of protection provided by the Charter, as interpreted by the Court, or primacy, consistency and effectiveness of the Union Law.[90]

The CJEU accessed the problem when the fundamental rights are given a better protection under Constitution than by the Union Law or the Charter also in other recent case of *Melloni.* The interference based on the Framework Decision on European Arrest Warrant, with the fundamental right in the case (right to fair trial) was in compliance with the EU Charter but was infringing the right protected by the Spanish Constitution. The CJEU has ruled that interpreting

[89] C 11/70 *Internationale Handelsgesellschaft* [1970], para. 3
[90] C-617/10 *Åklagaren v. Hans Åkerberg Fransson* [2013], para 29

the Article 53 of the Charter in a way, which would allow the Member States no apply the Union law because it is infringing the fundamental rights guaranteed by the national Constitution, would undermine the principle of primacy of the Union law.[91] According to this, the Court used a restrictive and narrow application of the Article 53 of the Charter.[92] This means that the protection of the fundamental rights is limited to the extent which would undermine the aim of the secondary legislation or the EU principles. This judgment was clearly influence by the so called Union objectives mentioned in the second chapter. In this case it was the preservation of the European Arrest Warrant. This is again very strange approach towards protection of the fundamental rights by the court. If this approach would be applied in future, the EU legislation can hardly be found in noncompliance with the fundamental rights.

The CJEU approach towards application of the national higher standards, for protection of the fundamental rights is, as been showed, obviously restrictive. On the other hand, this approach is not ultimately legally binding for the Constitutional Courts of the member states. On the other hand, there is still a reluctance of some Constitutional Courts to clarify its position towards the CJEU position towards national constitutions. One of them is the Constitutional Court of the Slovak Republic, which has still not resolved the question of primacy of the Union law over the Slovak Constitution. For this reason, to better understand the relation between these two Courts it is necessary to create a fictional case for analysis of the legal questions.

To not be far from reality, we can imagine that there would be a similar case with similar facts as the *Hauer* case. There would be an EU Regulation which restricts the free use of the land, thus interfering with the right to property. In this case the protection of the right to property of the

[91] C-399/*11 Stefano Melloni v Ministerio Fiscal* [2013], para 56-58

[92] According to Article 53 of the Charter – "*nothing in the charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective field of application,by"…"the Member States'Constitutions."*

Slovak Constitutional Court would be considerably higher than that one provided by the CJEU. According to the direct effect and primacy of the Union law, the Regulation interfering with the right to property should prevail despite it would not satisfy the requirements under the Slovak Constitution which provides higher protection of the right to property. How would the Constitutional Court assess this case and what would be an outcome? To find answers to these questions it is necessary to find out the possible approach of the Constitutional Court and not only the CJEU approach, which is relatively clear according to the cases *Fransson* and *Meloni*.

In the recent case PL. ÚS 3/09 (January 2011) the Constitutional Court had the chance to partly give an answer to this legal question, when considering the compliance of selected provisions of the Act 581/2004 on the Health insurance companies and the supervision on the healthcare with the Protocol No. 1 to the ECHR, the relevant provisions of the Treaty on the Functioning of the European Union and the Constitution. The case concerned the legality of the amendment of the above-mentioned Act, which briefly prohibited creating any profit for the Health Insurance Companies and amounted to the interference with the right to property.

Concerning the right to property, the Constitutional Court applied the broad definition of this right and identified the legitimate expectation of income as part of the right to property with reference to the ECtHR case law.[93] Again at this point is obvious that to great extent the Constitutional Court is influenced by the ECtHR and clearly states that it the relevant case of interference with the right to property it is necessary to interpret the contested Act in the light of A1P1 and the Courts jurisprudence. The Court continued with a review of the protection of the right to property by ECtHR and its applicability for this case.

[93] *Pine Valley Developments Ltd and Others v. Ireland*, App No 12742/87 [1991], para 51

In relation to Union Law, in its finding the Court stipulated that it is oblige to express its position towards considering the compliance of the national law with the Union Law. The court confirmed the qualification of the TFEU, falling to subcategory of the international treaties, is under the Article 7(2) of the Constitution. Accordingly the TFEU fills the condition to be in the scope of the Constitutional Court jurisdiction under the Article 125(1) of the Constitution and the Court has the competence to decide on the compliance with the national Act with the provision of the TFEU.

Taking into account the case law of the CJEU, it can be stipulated that the Constitutional Court "subscribed" to the principle of primacy of EU law, applying it also to the compatibility procedure (i.e.) review of the compliance of the contested provisions of the Act with the provisions of the EU primary law. However, the Constitutional Court applied the principle of "effective" examination. Applying this principle, the Constitutional Court came to the conclusion that it is not necessary to examine the compatibility of the contested provisions of the Act with the TFEU, as already the declaration of incompatibility of these provisions with the Constitution leads to the " same result " and " the same legal effect " as would have the declaration of incompatibility with the Union law.[94]

This leaves the relation between the Constitutional Court and CJEU still open. However, it shows the reluctance of the Constitutional Court to finally to give answer to this question, despite having such opportunity. The reason for this might be twofold. First is that the Constitutional Court probably does not want to clearly subscribe itself under the CJEU jurisdiction and neither it wants to clearly put itself in position in which it would have to turn down the primacy doctrine. Probably the Constitutional Court would resolve this question only when it would be inevitable.

[94] Finding of the Constitutional Court of the Slovak Republic folder mark PL. ÚS/09

This situation might come very early under the situation created by the judgments in *Melloni* and *Fransson,* in which the CJEU showed its tendency for determining the level of protection of the fundamental rights for the whole EU area. In addition, the Constitutional Court will have to take in consideration the new approach of the ECtHR, which in judgment from *Michaud*, as it has been mentioned the ECtHR by this judgment created some pressure on national courts, to use preliminary ruling under Article 267 TFEU and to use the potential of the international protection of the human rights.[95]

[95] *Michaud v France* App No. 12323/11 [2013], para 112-115

Conclusion

The present thesis provided a comparison of the three distinct jurisdictions of the European Court of Human Rights, the Court of Justice of the European Union and the Slovak Constitutional Court through focusing on the protection of the right to property. These three Courts differ historically, by purpose of establishment, and scope of jurisdiction. For this reason it is not a big surprise that the three approaches to the protection of the right to property in their jurisdictions are not exactly the same.

However, the interesting conclusion is that the ECtHR approach differs to such an extent. The CJEU or the former ECJ did not develop satisfactory protection to right to property, which would meet the standard established by the case law of the ECtHR. As was analyzed, the CJEU is struggling with the protection of the right to property mainly in the area of considering the legitimacy of the aim, proportionality criteria and the just remedy in the form of a compensation for interference. The cases analyzed showed discrepancy in the CJEU application of these concepts. Although the ECtHR considered in *Bosphorus* the protection of the fundamental right as equivalent within the EU legal system to that provided under the Convention, it had to at the same time explain that the protection is comparable but not the same. This should be considered as very weak criteria mainly because this observation created the so-called "equivalent" presumption. Despite the *Bosphorus* presumption being later limited by the *Mss* and *Michaud* cases, the problematic feature of this presumption remains, for the cases when it is applicable. In general this complicates the situation of protection of the right to property, when the right to property is interfered with by the Union legislation, as it requires higher level of interference with the right to property.

The Slovak Constitutional Court showed its willingness in the area of the right to property to comply with the standards of the ECtHR case law and Convention. The relation between the Constitutional Court and ECtHR is clearly established, as the decisions of the ECtHR are also binding for the Constitutional Court. The overall protection of the right to property by the Constitutional Court could be seen as appropriate.

The problematic feature remains the relation between the Constitutional Court and CJEU. On the one hand, the CJEU case law established the primacy of Community law over national constitutional law, although it was not much accepted by the Member States Constitutional Courts. The Constitutional Court of the Slovak Republic is in a similar position; however, it did not clearly express itself on this legal question. This problem would arise if there were interference of the EU regulation with the right to property or other fundamental right protected by the Constitution.

However, the actual CJEU approach towards national protection of the fundamental rights, as pointed out by the very recent cases in *Fransson* and *Melloni*, is bit radical, despite it allows applying national standards for the protection of fundamental rights, provided that such protection is equivalent to the protection provided by the Charter, but it still has to respect the primacy, coherence and effectiveness of the Union law. In other words, if there are national provisions or measures implementing the Union law, the national court may apply a national standard of protection of fundamental rights, but only to the extent that it is compatible with the effective protection of fundamental rights of the individual under the concept, which is governed by the Union law.

This approach creates a problem, when the Constitution provides better protection of the fundamental right. This might be the case of interference with the right to property, as the

discrepancy between the two approaches has been already shown. On the other hand, mainly the judgment from *Meloni* shall be pointed out. The CJEU seems automatically presumes that the adoption of the EU legislation is in compliance with the fundamental rights and freedoms and give primacy to the EU secondary legislation over the Member States' possible higher protection of the of the fundamental rights, than provided by the Charter. This undermines the possibility for the Member States to give protection of the fundamental rights, afforded by the member states courts and even the Constitutional Courts, if they would follow this judgment. This is shows a tendency of the CJEU towards establishing itself in a strong position in protection of the fundamental rights within EU area. This seems to be too ambiguous approach when considering the previously mentioned failures in the Courts approach in this area.

The final question which arises is how to ensure that the three systems of the protection of fundamental rights, which are in permanent evolution, do not cross each other and not exclude but rather appropriately complement each other. The fact that one day the Union will accede to the Convention, as foreseen in Article 6(2) of the TEU,[96] might partly diminish the discrepancy and confrontation between them. The EU has already adopted the Charter of Fundamental Rights of the European Union, which has become a part of Union primary law, but as was mentioned, its scope is limited. For the clarification of the protection of the right to property and other fundamental rights within this multilevel system of protection, it would be more than convenient if the European Union would accede to the ECHR and the ECHR would become legally binding for the whole European area. This would set a general standard under which the CJEU would be forced to bring its case law in line with the ECtHR and it might even adopt a similar doctrinal approach towards such protection.

[96] Consolidated Version of the Treaty on European Union 2010 O.J. C 83/01

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