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Immunity of EU Institutions in Judicial Proceedings in the EU Member States

1. Introduction

Recent developments in Slovenia have opened the need to (re)assess the immunity granted to the European Union and its institutions. A criminal inquiry was opened in Slovenia for aggravated fraud allegedly committed in the process of bank bail-in in 2012–2013 by the Slovenian Central Bank. Upon the request by the state prosecutor, the investigating magistrate issued an order to carry out investigations on premises of the Slovenian Central Bank. During the inspections, the police seized documents and correspondence issued by the European Central Bank (ECB). The ECB submitted remedies and claimed the infringement of its immunity. The case went to the Constitutional Court of Slovenia as the ECB submitted a constitutional complaint due to violations of its human rights by Slovenian authorities. The Constitutional Court unsurprisingly dismissed the constitutional complaint due to lack of standing, as the ECB is not a holder of human rights.[1] The issue started to some attention also at the European level in criminal proceedings based on the alleged bribing of the governor of the Latvian central bank.[2] The seizure of documents mentioned above is also a subject of pending infringement

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[1] Slovenian Constitutional Court, 19 April 2018, 19 April 2018, U-I-157/16, Up-729/16, Up-55/17, ECLI:SI:USRS:2018:U.I.157.16, http://odlocitve.us-rs.si.

[2] Cases *Rimšēvičs* and *European Central Bank v Latvia*, C-202/18 and C-238/18, ECLI:EU:C:2019:139 and *European Central Bank v Latvia*, C-238/18 R, ECLI:EU:C:2018:581. See also e.g. Sladič, Ukrepi v kazenskem postopku proti guvernerju nacionalne centralne banke članice Evrosistema (2018), p. 13–14.

proceedings under Article 258 TFEU before the Court of Justice of the EU (CJEU) in case *Commission v Slovenia.*[3] Consequently, the article shall assess the traditional doctrines of immunity of international organisations (Section 1). In the second step, the teleological reduction of immunity of an international organisation to a so-called functional immunity has to be considered as an autonomous term of EU law (Section 2). As the immunity of an EU institution is to be considered as an autonomous term of EU law it might also have different content as in general international law. The immunity of an institution or body of the EU also comprises the existence of a duty of sincere cooperation with national judicial authorities (Section 3). However, such a principle is to be based on the European version of *pacta sunt servanda* rule in the law of treaties. The EU applies the synallagmatic general principle of law of loyal cooperation between the institutions of the EU and its Member States. Such a principle casts its shadow also on the immunity of the EU institutions (Section 4). The article is concluded by an assessment of practical questions of inspections of premises and seizure of documents (Section 5).

2. Immunity of International Organisations in General International Law

"At present, the need to protect international organisations is still considered to be the main concern when it comes to the regulation of their immunities."[4] Courts in Belgium, France, Switzerland and Italy do not recognise immunity of jurisdiction for international organisations in certain conditions (especially in industrial disputes).[5] Some legal scholars believe there is no difference between State immunities and immunities of international organisations.[6] However, the standard *communis opinio doctorum* was stated in 2010 by the Swiss Supreme Court (*Bundesgericht*) as follows:

> "According to prevailing opinion, a State can claim immunity for sovereign acts performed as public authority (*acta iure imperii*) and is subjected to jurisdiction and coercive powers of other States for his nonsovereign acts (*acta iure gestionis*). However, international organisations are granted the immunity for all their acts. The principle of absolute immunity is based on the functional character of the legal

[3] Case *Commission v Slovenia*, C-316/19.

[4] Gaillard, Pingel-Lenuzza, International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass, (2002), p. 1.

[5] Krieger, Immunität: Entwicklung und Aktualität als Rechtsinstitut (2014), p. 250 and 251, Walter, Domej, Internationales Zivilprozessrecht der Schweiz, Ein Lehrbuch (2012), p. 77.

[6] Dupuy, Kerbrat, Droit international public (2016), § 127 ff., Lagerwall, Louwette, La reconnaissance par le juge belge d'une immunté à un Etat ou à une organisation internationale viole-t-elle le droit d'accès à un tribunal (2014), p. 43–48.

> personality of an international organization, all its actions must be closely connected with its organizational purpose".[7]

It is true that the very model of diplomatic privileges and States immunities served as the source of immunities of international organisations.[8] As far as States are concerned

> "State immunity protects a State and its property from the jurisdiction of the courts of another State. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity). It reflects the sovereign equality of States as a main pillar of the contemporary international legal order. State immunity is closely related to, but distinct from diplomatic immunity and the immunity of Heads of States as well as the immunity of international organizations."[9]

However, the distinction between *acta iure imperii* and *acta iure gestionis* as the basis of the restrictive approach to State immunity is not recognised in the framework of immunities of international organisations as was demonstrated by a recent decision of the Austrian Constitutional Court.[10] A request before the Austrian Constitutional Court for the annulment of a legal provision of the Headquarters agreement between Austria and the International Atomic Energy Agency concerning the exemption of the IAEA of jurisdiction was submitted in appellate proceedings before the Labour and Social Court in Vienna, where an order dismissing a legal action against the International Atomic Energy Agency as inadmissible was under appeal. The Austrian Constitutional Court rejected this request as inadmissible for procedural reasons, but the core of the statement of reasons is of extreme value to international law:

> "The IAEA's immunity does not comprise solely sovereign acts […] and is generally as in the case of international organizations already been set up in its statute. […] A detailed drafting of immunity already granted by the IAEO Statute can be carried out within the framework of special agreements with the State, in which the headquarters are established, as is usually the case by a headquarters agreement.

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7 Swiss Supreme Court (Bundesgericht), case 5A_360/2010, BGE 136 III 379, p. 379 ff., https://www.bger.ch/, § 4.3.1.. The German text reads: "*Nach herrschender Auffassung genießt ein Staat für seine Hoheitsakte (acta iure imperii) Immunität und unterliegt er für seine nichthoheitlichen Akte (acta iure gestionis) der Gerichtsbarkeit und Zwangsgewalt des anderen Staates. Hingegen genießen internationale Organisationen für alle ihre Handlungen Immunität. Die grundsätzlich absolute Immunität erklärt sich daraus, dass infolge des funktionellen Charakters der Rechtspersönlichkeit einer internationalen Organisation alle ihre Handlungen eng mit ihrem Organisationszweck in Verbindung stehen müssen*".

8 Tauchmann, Die Immunität internationaler Organisationen gegenüber Zwangsvollstreckungsmassnahmen (2005), p. 40.

9 Stoll, State immunity, URL: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106?prd=EPIL.

10 See e.g. Novak, Reinisch, Privilegien und Immunitäten internationaler Organisationen in der Rechtsprechung österreichischer Gerichte, (2013), p. 498, see in favour of limitation of immunity Freedman, UN Immunity or Impunity? A Human Rights Based Challenge, (2014), p. 239 ff.

> The terms of headquarters agreements are *leges speciales* in relation to the general agreements, in this case the IAEA Statute. The provisions on immunity in general agreements, however, continue to be in force. […]. As the Federal Government rightly points out, the implementation of provisions on labour law is one of the core areas of the immunity of international organizations (see Article VII of the IAEA Statute), that is the reason why the applicant as an IAEA's employee is barred from access to national courts already by virtue of Article XV.A of the IAEA's Statute (and therefore not by virtue of the challenged headquarters agreement)."[11]

Legal basis of immunities of international organisations is not the reciprocity that can still be considered as the safety net of a State's immunity under the general principle of law *do, ut des.* Such a legal basis can be found in a multilateral treaty setting up an international organisation or in a (bilateral) headquarters agreement. The general principle of law *par in parem non habet imperium* is not to be applied in cases involving international organisations. Therefore, bearing the privity of international treaties in mind (*pacta tertiis nec nocent*, *nec prossunt*), a conclusion can be made there is no immunity in States which are not members of a particular international organisation. For those reasons, I contend that legally speaking, there should be a distinction made between State immunity and the immunity of international organisations.[12] However, analogies can be found between diplomatic immunities—especially immunities of diplomatic missions—and immunities of international organisations.[13] *De facto* both immunities play the same role and have the same meaning in a given *lex fori* of a State. Both immunities constitute an absolute bar to the jurisdiction of national courts. According to the International Court of Justice

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[11] Austrian Constitutional Court (Verfassungsgerichtshof), 25 February 2016, case SV 2/2015-18 ECLI:AT:VFGH:2016:SV2.2015, https://www.ris.bka.gv.at. The German text reads: "*Die Immunität der IAEO, die sich nicht nur auf hoheitliche Akte bezieht, wird, wie generell bei Internationalen Organisationen, bereits in ihren [...] völkerrechtlichen Statuten in Art XV festgelegt. Die nähere Ausgestaltung der bereits auf Grund der Statuten der IAEO eingeräumten Immunität kann im Rahmen besonderer Abkommen - mit dem Sitzstaat, wie im konkreten Fall, in der Regel durch Amtssitzabkommen - erfolgen. Diese Amtssitzabkommen stellen leges speciales im Verhältnis zu den allgemeinen Abkommen - im vorliegenden Fall den Statuten der IAEO - dar. Die immunitätsrechtlichen Regelungen der allgemeinen Abkommen bleiben daneben aufrecht. Der Vollzug arbeitsrechtlicher Vorschriften gehört zum Kernbereich der Immunität internationaler Organisationen, weshalb der Antragstellerin als Dienstnehmerin der IAEO der Rechtszug zu den innerstaatlichen Gerichten somit (nicht erst durch die angefochtene Bestimmung des Amtssitzabkommens, sondern) schon auf Grund des Art XV A. der Statuten der IAEO verwehrt ist.*"

[12] Tauchmann, op. cit. (2005), p. 41.

[13] Dupuy, Kerbrat, op. cit. (2016), para. 189.

> "[T]he law of immunity is essentially procedural in nature. It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[14]

Picking on the procedural nature, the Advocate-General at the CJEU Ruiz Jarabo Colomer then developed a doctrine according to which:

> "[I]mmunity is created as a procedural bar which prevents the courts of one State from giving judgement on the liability of another, since, […] *par in parem non habet imperium* ('an equal has no authority over an equal'), at least with regard to acts *de iure imperii*".[15]

However, differences in legal bases shall not obscure the fact that both types of immunities are closely intertwined. The practical consequence of the close intertwining can be seen in the identical treatment of both immunities. For this reason, they are dealt with by courts in the European states in national *lex fori* as a single, albeit not entirely identical, "immunity based on international law".

The legal theory applies two doctrines on the immunity of international organisations. Under the older one, an unlimited absolute immunity is emphasised, whereas a newer doctrine sticks to a relative immunity. "International organisations are set up to pursue a specific common goal that a single State alone cannot achieve."[16] Immunities of an international organisation serve the smooth and unhindered performance of competencies and tasks assigned by founding members and contracting States.[17] However, it is also possible to argue *a contrario* that the grant of immunities only proves the scope of the tasks conferred upon the international organisation by the founding Member States. Such a limited immunity shall then be referred to as the functional immunity of an international organisation. Functional immunity is, however, still an absolute immunity yet limited solely to the narrow scope of tasks conferred to an international organisation.[18] As far as the EU is concerned, the primary law of the EU accepted such a position in Protocol No. 7 on the Privileges and Immunities of the European Union. In different terms: the scope *ratione materiae* of immunity of an international organisation is narrower than the scope of immunity of a foreign State. This finding, however, shall not obscure the fact that immunity of jurisdiction and immunity of enforcement also belong to this narrower scope of limited immunity of international organisations.

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[14] Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgment, I.C.J. Reports 2012, p. 99, para. 58. See for influences of that opinion on Slovenian law Sladič, Conditions of Admissibility and Access to Justice – A Slovenian Perspective, (2017), pp. 225–227.

[15] Opinion of the Advocate-General Ruiz-Jarabo Colomer, case C-292/05 *Lechouritou and others*, ECLI:EU:C:2006:700, § 76.

[16] Sato, Immunität Internationaler Organisationen (2004), p. 51.

[17] Sato, op. cit. (2004), pp. 54 and 55.

[18] Tauchmann, op. cit. (2005), p. 44.

The limitation to the minimal core of functional immunity of the EU can then be found in the case law of the CJEU. Therefore, Article 8 of the Protocol No. 7 on the Privileges and Immunities of the European Union must be interpreted, according to the CJEU, to the effect that a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations, does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision. Unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties. It is for the national courts to determine whether those conditions have been satisfied in the case in the main proceedings.[19]

3. Immunity of the EU: A Teleological Reduction to a Strict Functional Immunity of an Autonomous Term

The significance of case law on immunities based on international law and the immunities of international organisations can, e.g. be seen in the case law of the European Court of Human Rights. In the case *Michaud v. France*, the European Court of Human Rights qualified the EU as an international organisation.[20] This case law seems to call for the application of the doctrine of immunity of international organisations also to the EU. The structure of the founding treaties also seems to follow that doctrine in Protocol No. 7 on the Privileges and Immunities of the European Union.

It can, however, be said, that the reduction of the immunity of international organisations to functional immunity is inherent to the EU. The reduction of immunity to the performance of specific tasks is the culmination of the definition, according to which international organisations, including the EU, are based on the conferral of normative competencies in certain narrowly defined areas by the Member States. In Slovenia, this doctrine was implemented by the Slovenian Constitutional Court according to which the EU Member States have mutually agreed that they will consider specific competencies as matters of common interest, as the performance of such competencies is more effective or more useful by the EU as if they had performed them themselves.[21] Seen from that perspective, the preamble to the Protocol No. 7 on the Privileges and Immunities of the European Union must necessarily contain the following phrase:

> "considering that, in accordance with Article 343 of the Treaty on the Functioning of the European Union and Article 191 of the Treaty establishing the European Atomic Energy Community ('EAEC'), the European Union and the EAEC shall

[19] Case *Patriciello*, C-163/10, ECLI:EU:C:2011:543, para. 41.

[20] Case *Michaud v France*, ECLI:CE:ECHR:2012:1206JUD001232311, para. 102.

[21] Sladič, Der Verfassungsgerichtshof der Republik Slowenien und das EU-Recht, (2014), p. 146.

enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks".

This wording of the preamble has then been construed by the CJEU especially in cases concerning authorisations to serve a garnishee order on the institutions of the EU under Article 1 of the Protocol No. 7 on the Privileges and Immunities of the European Union. The purpose of that provision is to ensure that there is no interference with the functioning and independence of the EU.[22]

> "As is clear from the Court's case-law, the functioning of the Communities may be impeded by measures of constraint which affect the financing of common policies or the implementation of action programmes established by the Communities."[23]
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> "It follows from that construction of Article 1 of the Protocol that the Communities' immunity is not absolute and that a measure of constraint such as a garnishee order may be authorised if it is not liable to interfere with the Communities' functioning."[24]
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> "The functional, and therefore relative, character of the privileges and immunities of the Communities is, moreover, expressly embodied in the provisions of the Protocol; Article 1 provides that the Court may authorize administrative or legal measures of constraint with regard to the property and assets of the Communities, and Article 17 provides that the privileges, immunities and facilities are accorded to officials and other servants of the Communities solely in the interests of the Communities."[25]
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> "Such a construction complies with the rules of general international law applicable in the area of the immunity of States and international organisations."[26]

However, there are two bones of contention in that this can create uneasy friction between international law and EU law. The first point is the role and position of international law within the framework of EU law. The second point is the nature of the EU. EU law has an autonomous meaning that is not to be construed by applying methods of interpretation of national and international law. The terms of EU law also require an autonomous meaning and the primary law requires autonomous interpretation also in relation to international law.

Regarding the position of international law, "the rules of international law are superseded in the area of the internal organization of the EU, as well as for the organization of the relations between the EU, its member states and persons in the EU and replaced

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22 Case *Antippas v Commission*, C-1/02 SA, ECLI:EU:C:2003:187, para. 12.

23 Cases *Tertir-Terminais de Portugal v Commission*, C-1/04 SA, ECLI:EU:C:2004:803, para. 14, and *Antippas v Commission*, C-1/02 SA, ECLI:EU:C:2003:187, paras. 14 and 15.

24 Case *Tertir-Terminais de Portugal v Commission*, C-1/04 SA, ECLI:EU:C:2004:803, para. 11.

25 Case *Zwartveld*, C-2/88 Imm, ECLI:EU:C:1990:315, para. 20.

26 Case *Tertir-Terminais de Portugal v Commission*, C-1/04 SA, ECLI:EU:C:2004:803, para. 12.

by EU law."[27] Where there is a conflict between the primary law of the EU and international law (the same scope of application *ratione loci*, *temporis*, *materiae* and *personae*), the very core of EU (the primary law) even prevails over general international law. Perhaps, one could even speak of an extreme dualism in EU law.[28] As far as the secondary law of the EU is concerned, the General Court of the EU and the Court of Justice of the EU concluded that:

> "EU legislation must be interpreted, so far as possible, in the light of international law, in particular where such legislation is specifically intended to implement an international agreement concluded by the Community".[29]
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> "Furthermore, the Court has held that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements."[30]
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> "The European Community must respect international law in the exercise of its power It is therefore required to comply with the rules of customary international law when adopting a regulation".[31]
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> "International law to be applied and complied with by the EU is an integral part of Union law, without the need for an adoption of a legal act of transformation or application by the EU."[32]

Within this framework, the rules on the privileges and immunities of international organisations are a part of international law, or to be more exact, customary, international law *in statu nascendi* as a legal source in the hierarchy under EU primary law.[33] Although an integral and intrinsic part of the EU's legal order, such rules cannot be applied in the relationship between the EU and its Member States.[34] This controversial conclusion then leads to the finding that privileges and immunities of the EU and its Member States are exclusively a term of EU law. Although they may be similar or even analogous to the same terms under international law, they cannot be considered as identical. Under the standard case law since the beginning of the European integration:

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27 Oppermann, Classen, Nettesheim, Europarecht, (2016), p. 138.

28 Van Raepenbusch, Droit institutionnel de l'Union européenne (2016), p. 427, Haratsch, Koenig, Pechstein, Europarecht (2016), para. 439.

29 Case *Since Hardware v Council*, T-156/11, ECLI:EU:T:2012:431, para. 108.

30 Case *Commission v Germany*, C-61/94, ECLI:EU:C:1996:313, para. 52, case *Bellio*, C-286/02, ECLI:EU:C:2004:212, para. 33.

31 Case *Racke*, C-162/96, ECLI:EU:C:1998:293, para. 45.

32 Haratsch, Koenig, Pechstein, op. cit. (2016), para. 438.

33 Van Raepenbusch, op. cit. (2016), p. 426 and 427.

34 Cases *Commission v Italy*, 91/79, ECLI:EU:C:1980:85, para. 7, *Commission v Italy*, 92/79, ECLI:EU:C:1980:86, para. 7 and *Whitehead v European Central Bank*, F-98/09, ECLI:EU:F:2011:156, para. 75.

> "[I]n the absence of any express reference to the laws or customs of a third country a Community provision must be interpreted in relation to and in the context of its own sources."[35]

EU law created an independent and autonomous legal order.[36] For this reason, legal writers also refer to the concept of the autonomous interpretation of EU law "which is derived from the principles of autonomy and the uniform application of the EU law."[37] When confronted with questions of EU's immunities, national courts are therefore required to assess whether the term of immunity in Protocol No. 7 on the Privileges and Immunities of the European Union has a different meaning when compared to that in general international law. This article shall make only a slight hint at the possible application of Article 267 TFEU. A Slovenian court should, therefore, determine in the application of EU law (keyword: interpretation of the national procedural law in compliance with EU law) whether national proceedings involving the EU, interfere with the EU's functioning. Solely, if national proceedings, be they administrative, criminal or civil, interfere with the functioning of the EU or one of its institutions can immunity be granted. In criminal proceedings, e.g. the interpretation of the Member States' law of criminal procedure in compliance with EU law must be emphasised. Where there is a conflict between national law on criminal procedural and EU law, national procedural law must not be given priority; it must be interpreted as being in harmony with EU law.

In the end, also the following argument could be proposed: the immunity of the EU in national proceedings under national procedural law is an exception under the doctrine of functional and relative immunity. However, exceptions must be interpreted strictly (*exceptiones sunt strictissimae interpretationis*). Both procedural immunities, i.e. immunity of jurisdiction and immunity of enforcement, only apply where interference with the functioning of the EU exists. If the EU is not hindered by the ongoing national proceedings in the performing of its tasks and duties, no immunity can be granted.

4. The Question of the Existence of a Duty of Cooperation with National Judicial Authorities Based on General International Law

The examination of the legal status of international organisations in national proceedings would be incomplete if the other, albeit more hidden side of immunity, was ignored. It could be argued that immunity is a privilege also entailing certain obligations. Where immunity is granted to international organisations either by virtue of founding treaties or the headquarters agreement, it can be argued that such an organisation, even

35 Case *Muras*, 12/73, ECLI:EU:C:1973:100, para. 7.

36 See in the framework of immunities in criminal proceedings case *Zwartveld I*, C-2/88 Imm, ECLI:EU:C:1990:315, para. 15.

37 Borchardt, Auslegung, Rechtsfortbildung, und Rechtsschöpfung (2015), para. 32.

if only implicitly, assumes the respect of the principle of international law, *qui habet commoda, ferre debet onera et contra*,[38] i.e. the obligation to respect the legal order of the headquarters State. In rather drastic terms, if criminal law is taken as an example, not to commit criminal offences under general criminal law or to hide criminal offences under general criminal law.

However, neither any general international organisation nor the EU is a state. Although international civil service and the EU officials and servants are granted certain privileges and exemptions, yet they do not have the identical status as national diplomats. Under Article 11 of the Protocol No. 7 on the Privileges and Immunities of the European Union, officials and other servants of the Union, shall in the territory of each Member State:

(a) Be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written;
(b) Together with their spouses and dependent members of their families, not be subject to immigration restrictions or to formalities for the registration of aliens;
(c) In respect of currency or exchange regulations, be accorded the same facilities as are customarily accorded to officials of international organisations;
(d) Be exempt of custom's duties and levies, etc.

However, there is no general immunity of jurisdiction as in cases of diplomats. This important difference is to be explained by the differences between international organisations and states. Therefore, special provisions of Article 17 of the Protocol No. 7 on the Privileges and Immunities of the European Union deal with the question of immunity in criminal proceedings. Under Article 17 of that act, privileges, immunities and facilities shall be accorded to the officials and other servants of the EU "solely in the interests of the Union". Each institution of the Union shall be required to waive the immunity accorded to an official or other servants wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union. National criminal proceedings among others against the EU officials are not contrary to the interests of the Union. The purpose of Article 17 is the duty of the EU institutions to assess the interests of the Union and cooperate with national authorities while assessing the interest of the Union. Where criminal proceedings are pending against the EU officials, the EU institutions are required to cooperate with the national police and judicial service in criminal justice when assessing the immunity of that official and the national criminal persecution. The CJEU already elaborated detailed guidance for such cases in the criminal proceedings before national courts against the Members of the European Parliament.[39]

[38] Kolb, La maxime "qui habet commoda, ferre debet onera et contra" (celui qui jouit des avantages doit supporter aussi les charges et vice versa) en droit international public (2004), pp. 19 and 20.

[39] Case *Gollnisch v Parliament,* T-346/11 and T-347/11, ECLI:EU:T:2013:23, case *Gollnisch v Parliament,* T-42/06, ECLI:EU:T:2010:102.

The case law in cases such as *Gollnisch v. Parliament* indicate the extent of the application and the examination of national criminal law in the assessment of the contrariety of the interests of the EU. The General Court assessed in detail the French criminal legislation in a criminal case against Bruno Gollnisch, a Member of European Parliament, member of the far-right French *Front national*, lawyer and professor of Japanese culture and civilisation in the Université Jean-Moulin-Lyon-III based on the denial of Holocaust.[40] On the other hand, the lifting of immunity of the EU officials and servants is still quite a virgin territory.

However, even if there is an assessment of the interests of the Union to be performed, the immunity granted "confers an individual right on the persons concerned". The General Court clearly stated in case *Gollnisch v. Parliament*:

> "[W]hile the privileges and immunities conferred on the European Communities by the Protocol have a functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities, the fact remains that they have been expressly accorded to Members of the Parliament and to officials and other staff of the Community institutions. The fact that the privileges and immunities have been provided in the public interest of the Community justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the Community exclusively and not also to its officials, to other staff and to Members of the Parliament. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the system of rights of recourse established by the Treaty."[41]
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> "Given the Parliament's wide discretion in that respect, a decision to require that a prosecution be suspended is not a necessary consequence of the submission of a request addressed to it for that purpose".[42]

5. The Synallagmatic General Principle of Law of Loyal Cooperation and the EU's Immunity of Jurisdiction

It is suggested that the correct construction of the immunity under Articles 1 and 2 of the Protocol No. 7 on the Privileges and Immunities of the European Union cannot be understood, without the interplay with the general principle of EU law, of the sincere and loyal cooperation now codified in Article 4(3) TEU.[43] The CJEU used that principle

[40] Case *Gollnisch v Parliament,* T-42/06, ECLI:EU:T:2010:102.

[41] Ibid., para. 94.

[42] Ibid., para. 116.

[43] That provision reads as follows: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow

in the few cases concerning the cooperation of an EU institution with the national judiciary in criminal proceedings.[44]

Prima facie, the general principle of law of sincere cooperation could have a narrow construction and be applied solely to the vertical relationships between the EU and its Member States.[45] Such an interpretation is proposed by legal scholars in EU Members States not having any federal element in their national constitutional laws. However, it is contended that such a point of view is too influenced by international law, especially by the general principle of international law *pacta sunt servanda*, nowadays codified in Article 26 of the 1969 Convention on the Law of Treaties. By that principle, the States as contracting parties and perform their obligations arising out of treaties *bona fide.* Such a treaty is then to be considered as a *lex inter partes*. However, such an approach fails to acknowledge that the general principle of law of sincere cooperation is intrinsic to EU law, and EU legal order and cannot be considered solely as being identical to the general principle of international law *pacta sunt servanda*.[46] The sincere cooperation should be regarded as the European version of the federal *Bundestreue*. Thus, it is a general principle of law far transcending the international cooperation in international organisations. Such a position is defended by legal scholars from EU Member States having a federal constitution.[47]

The federally inspired interpretation of the general principle of law of sincere cooperation seems to be better adapted to the nature of the EU. Article 4(3) TEU is a synallagmatic provision, as "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". Such an interpretation is then also confirmed by Article 18 of the Protocol No. 7 on the Privileges and Immunities of the European Union. Under Article 18 "The institutions of the Union shall, to apply this Protocol, cooperate with the responsible authorities of the Member States concerned." Such a horizontal and synallagmatic interpretation was then used by the CJEU in both *Zwartveld* cases to confirm the functional immunity of the EU in the national criminal proceedings. The EU institutions are required to cooperate with courts in the EU Member States, even if there is a criminal case pending.[48]

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from the Treaties."

44 Cases *Zwartveld I*, C-2/88 Imm, ECLI:EU:C:1990:315, *Zwartveld I*, C-2/88 Imm, ECLI:EU:C:1990:440, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603, para. 93, see also cases *First and Franex*, C-275/00, ECLI:EU:C:2002:711, *Delimitis*, C-234/89, ECLI:EU:C:1991:91, *Mara*, C-200/07 and C-201/07, ECLI:EU:C:2008:579, *X*, C-429/07, ECLI:EU:C:2009:359, *Spain v Commission*, C-192/13 P, ECLI:EU:C:2014:2156 and also *European Central Bank v Latvia*, C-238/18 R, ECLI:EU:C:2018:581, *Rimšēvičs* and *European Central Bank v Latvia*, C-202/18 and C-238/18, ECLI:EU:C:2019:139.

45 Blumann, Dubouis, Droit institutionnel de l'Union européenne (2012), para. 133.

46 Lenaerts, Van Nuffel, European Union Law (2011), para. 7-042.

47 Oppermann, Classen, Nettesheim, op. cit. (2016), p. 24.

48 Lenaerts, Van Nuffel, op. cit. (2011), para. 7-047.

The said principle, however, was not used in the *European Central Bank v. Latvia* case.[49]

The case law seems clear enough:

> "[…] The Community institutions are governed, according to Article [4(3) TEU], by a principle of sincere cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings but also imposes on Member States and the Community institutions mutual duties of sincere cooperation."[50]

> "It is settled case-law that the principle of cooperation in good faith not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States".[51]

> "That cooperation is part of the general principle of sincere cooperation, referred to in Article [4 TEU], which governs the relationships between the Member States and the Community institutions. As the Court has held, the duty of sincere cooperation imposed on the Community institutions is of particular importance where that cooperation involves the judicial authorities of a Member State who are responsible for ensuring that Community law is applied and respected in the national legal system".[52]

> "The Protocol [No. 7 on the Privileges and Immunities of the European Union] therefore does not permit the Community institutions to neglect the duty of sincere cooperation with the national authorities, and in particular the judicial authorities, a duty which is, moreover, referred to in Article 18 of the Protocol itself."[53]

> "As regards the imperative reason put forward by the Commission relating to the need to avoid any interference with the functioning and independence of the Communities, namely the need to respect the division of powers between the Community authorities and the national authorities, it must be stated that the risk of such interference has not been established. The national court's request is intended solely to obtain the communication of certain information in the Commission's possession which it requires in order to exercise the powers conferred upon it by national law and does not involve any risk that the Commission will encroach upon the powers of the national authorities. […] the Community institutions are under a duty of sincere cooperation with the judicial authorities

[49] Cases *Rimšēvičs* and *European Central Bank v Latvia*, C-202/18 and C-238/18, ECLI:EU:C:2019:139.

[50] Case *Zwartveld I*, C-2/88 Imm, ECLI:EU:C:1990:315, para. 17, see also case *Zwartveld II*, C-2/88 Imm, ECLI:EU:C:1990:440, para. 10.

[51] Case *Spain v Commission*, C-192/13 P, ECLI:EU:C:2014:2156, para. 87.

[52] Case *X*, C-429/07, ECLI:EU:C:2009:359, para. 21.

[53] Case *Zwartveld I*, C-2/88 Imm, ECLI:EU:C:1990:315, para. 21.

> of the Member States, which are responsible for ensuring that Community law is applied and respected in the national legal system."[54]
>
> "In that context, the national courts, on the one hand, and the Commission and the Community Courts, on the other, act on the basis of the role assigned to them by the Treaty."[55]

Translated into the Slovenian context, the conclusion could be that the use of documents produced by the EU institutions in national criminal cases does not interfere with the EU's functioning.[56] National Slovenian criminal justice solely confiscated documents or copies of such documents that had been sent to the addressees by the EU institutions themselves. Therefore, one can hardly speak of any interference with the functioning of the EU. The CJEU even elaborated the principle according to which

> "[R]elations between the Member States and the Community institutions are governed, under Article [4 TEU], by a principle of loyal cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, but also imposes on the Community institutions and the Member States mutual duties of loyal cooperation. Therefore, if a national court needs information that only the Commission can provide, the principle of loyal cooperation laid down in Article [4 TEU] will, in principle, require the Commission when requested to do so by the national court to provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests."[57]

6. Immunity and Objects outside Protected Premises

However, the interesting part of immunities are documents, assets and writings that allegedly belong to a foreign state or international organisation. One of the few cases at the international level dealing with the question seems to be the UK case *Philipp Brothers v Sierra Leone and EC Commission*.

> "The English court ruled in *Philipp Brothers v Sierra Leone and EC Commission* that the assets of Sierra Leone, even if partly deriving from the European Commission's contribution, could not enjoy the protection of Protocol No. 7".[58]

Arguably, this is a British conclusion that might not apply to other jurisdictions.

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54 Case *Zwartveld II*, C-2/88 Imm, ECLI:EU:C:1990:440, para. 10.

55 Case *X*, C-429/07, ECLI:EU:C:2009:359, para. 22.

56 See e.g. Sladič, Listine in korespondenca EU v nacionalnih sodnih postopkih (2017), pp. 10–12; Avbelj, The European Central Bank in National Criminal Proceedings (2017), pp. 474–476.

57 Case *First and Franex*, C-275/00, ECLI:EU:C:2002:711, § 49.

58 Avbelj, op. cit. (2017), p. 481.

At the international level, the International Court of Justice had to deal with the issue in the *Timor-Leste v. Australia* case.[59] East Timor instituted proceedings, due to the seizure by Australian security agencies of East Timor documents in a law firm of the Timorese attorney intended for international arbitration. The documents refer to the preparation of Timorese memoranda in an arbitration. Perhaps the unfortunate element, in this case, refers to the legal professional privilege. Similar cases have been adjudicated by the CJEU. The central one seems to be the *Ordre des barreaux francophones et germanophone* case.

> "Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations."[60]

However, the ICJ *Timor Leste v. Australia* case never went beyond the interim measure. The ICJ's finding in that interim measure was simple:

> "[T]he right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents […] from the office of a legal adviser to the Government of Timor-Leste. In particular, the Court considers that there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration and in future maritime negotiations with Australia should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia. Any breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information."[61]

Both the ICJ and the CJEU dealt with the issue of documents held by the attorney, solely from the perspective of legal professional privilege. The logical conclusion of the silence on any issue of immunity of the assets and documents held by the foreign state in the *East Timor* case seemed to be that documents given to third parties by the State did not benefit of any immunity. Applying the principle of interpretation *inclusio unius exclusio alterius*, the conclusion could be that the documents sent from a foreign state or an international organisation cannot be considered as property of that state or international organisation. Therefore, the use of such documents and information contained in such documents in national judicial proceedings is admissible as evidence and is not barred by

[59] Case Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*).

[60] Case C-305/05, *Ordre des barreaux francophones et germanophone*, ECLI:EU:C:2007:383, § 32.

[61] Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147.

the immunity of jurisdiction. *A maiore ad minus*, such a conclusion also means that such documents can be used in any type of judicial proceedings, including in the preliminary criminal proceedings or a criminal trial.

The final question might be how to prove that a document as an object (*res* in Latin) is owned by an international organisation or a foreign state. The obvious solution seems to be the application of private international law, i.e. the *statutum reale*. Private international law deals *expresis verbis* with such questions.[62] The property of a physical document and in some legal orders also electronic documents as an object within the meaning of property law shall be determined by virtue of the general principles by application of the *lex rei sitae*.[63] However, the territorial scope of the *lex rei sitae* is necessarily identical to the territorial scope of the *lex fori* of the *forum* where immunity of an international organisation is claimed. Both connecting points (*lex fori* and *lex rei sitae*) are determined by the principle of territoriality. Where an international organisation claims in the proceedings before a national forum that a document, submission, writing or a letter or even any moveable object belonging to the international organisation is protected by the immunity, such an organisation will have to prove that it is the owner of the said documents. The proof of ownership of moveable objects is performed according to the rules of the property law of the forum where immunity is claimed or disputed. Legal orders based on the tradition of Roman law apply the presumption of ownership of the possessor of the moveable object.[64] Due to a brilliant concision, the French version of the rule will be cited as such: *En fait de meubles, la possession vaut titre*. Most modern civil law jurisdictions apply that rule. There is a rebuttable presumption of a possessor of a moveable being the owner such as in § 1006 of the German *Bürgerliches Gesetzbuch*, Article 2276 of the French *Code Civil*, Article 930 of the Swiss *Zivilgesetzbuch*, § 90 of the Estonian Code of Property Law and Article 11(2) of the Slovenian Code of Property Law.[65] The principle seems to be accepted also in common law jurisdictions. Australia referred in the ICJ case *East-Timor v. Australia* to the UK legal writing:[66]

> "If a State is required to determine ownership for international law purposes of an object not situated in its territory at the time, it will do so by reference to the municipal law of the State whose territory it is in."[67]

The old principle *mobilia sequuntur personam*, *immobila situm* is not applied any more.

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62 von Hoffmann, Thorn, Internationales Privatrecht (2007), p. 510.

63 von Hoffmann, Thorn, op. cit. (2007), p. 513, Kropholler, Internationales Privatrecht (2006), p. 554.

64 Concerning the German exception as far as electronic documents are concerned see § 90 BGB.

65 Krimphove, Das europäische Sachenrecht: eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik (2006), p. 198, Vrenčur, Posest (2007), p. 94 and 95.

66 *Timor-Leste v. Australia*, Counter-Memorial of Australia – volume I, p. 86, http://www.icj-cij.org/.

67 Staker, Public International Law and the *Lex Situs* Rule in Property Conflicts and Foreign Expropriations, (1987/88), p. 163.

7. Conclusion

Immunity of the EU and of its institutions is strictly a term of the primary law of the EU. It is used in the Protocol No. 7 on the Privileges and Immunities of the European Union. The terms of that protocol should be subjected to autonomous interpretation of EU law. Such an autonomous interpretation does not mean that there will be any differences compared to general international law, it solely means that the terms of international law cannot be used as such in the EU.

EU's immunity of jurisdiction is an exception in any procedural law. Exceptions must, however, be interpreted strictly (*exceptiones sunt strictissimae interpretationis*). Both procedural law immunities, i.e. immunity of jurisdiction and immunity of enforcement only apply where there is interference with the functioning of the EU. Where the EU is not hindered by the ongoing national proceedings in performing its tasks and duties, no immunity can be granted.

The CJEU applies the doctrine of functional immunity, developed for international organisations and the general synallagmatic principle of law of sincere cooperation between the EU and its Member States (Article 4(3) TEU) to set up duty of institutions to cooperate with national judiciary in national proceedings.

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Jorg Sladič

Imuniteta institucij EU v sodnih postopkih v državah članicah EU

Evropska unija in njene institucije uživajo na podlagi Protokola (št. 7) o privilegijih in imunitetah Evropske unije sodno in izvršilno imuniteto. Vendar je ta imuniteta izjema v vsakem postopkovnem pravu. Obe imuniteti se uporabljata zgolj, kadar obstaja nevarnost posega v delovanje EU. Če pa delovanje EU ni ogroženo zaradi nacionalnega sodnega postopka, imunitete ni dopustno odobriti. Sodišče EU uporablja teorijo o funkcionalni imuniteti, ki se je razvila za mednarodno organizacije, in sinalagmatsko splošno pravno načelo medsebojnega sodelovanja med EU in njenimi državami članicami (tretji odstavek 4. člena PEU) kot podlago dolžnosti institucij EU do sodelovanja z nacionalnimi sodišči v nacionalnih postopkih.

Ključne besede: EU, mednarodna organizacija, imuniteta, funkcionalna imuniteta, Protokol št. 7, nacionalni sodni postopki, načelo lojalnega sodelovanja, avtonomna razlaga pojmov prava EU.

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Jorg Sladič

Immunity of EU Institutions in Judicial Proceedings in the EU Member States

By virtue of Protocol on the Privileges and Immunities of the European Union and its institutions, the latter are granted immunity of jurisdiction and immunity of enforcement. However, such an immunity is an exception in any procedural law. Both procedural immunities only apply where there is interference with the functioning of the EU, insofar as the EU is not hindered by the ongoing national proceedings in the performing of its tasks and duties, no immunity can be granted. The Court of Justice of the EU applies the doctrine of functional immunity developed for international organisations and the general synallagmatic principle of law of the sincere cooperation between the EU and its Member States (Article 4(3) TEU) to set up duty of institutions to cooperate with national judiciary in national proceedings.

Keywords: EU, international organisation, immunity, functional immunity, Protocol No. 7, national judicial proceedings, principle of sincere cooperation, autonomous interpretation of term of EU law.