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INVESTMENT PROTECTION: DETERMINATION OF LEGAL ASPECTS WITH REFLECTING TO
THE INNOVATIONS TO ENSURE SUSTAINABLE GROWTH OF THE SLOVAK REPUBLIC*

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Abstract. Ensuring sustainable growth of the Slovak Republic is not possible without effective state investment policy. The most important pillar of the analysis by investors is protection (guaranties, insurance) of investments. The research was based on analysis of main protection institutes of investments in Slovak Republic and member states of the European Union for example: multilateral and bilateral treaties on protection of investments, fair equitable treatment, full protection and security, non-discrimination standards, national funds guarantying investments, government guaranties and international, european and national legislation on investments, protection of investments by arbitration courts. Chosen decision of courts were subjects of analysis, their interpretation and common consent of their application. Base on research, the author proposed *de lege ferenda* for more effective legislation in investments and sustainable economic growth.

Keywords: investment; investment protection; legal aspects; sustainability

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1. Introduction

During last 70 years the Slovak Republic together with other 27 EU member-states created a single European economic space as well as Economic Union with the aim of a sustainable development of the European Union. In the authors' opinions, European inner single market is a unique international area of the equal investment opportunities with the high rate of investors' rights protection. The EU is permanently, methodologically, systematically, appropriately and effectively conducting a complex of organizational, technical and legal measures, aimed at the creation of stable and predictable conditions on the Economic Union's territory (Selivanova-Fyodorova et al. 2019; Zeibote et al. 2019). Such conditions are to facilitate investments' enlistment and maintenance, achievement of goals set while investing, effective investors' activities as well as protection of investors' legal rights and interests. Predictable, stable and clear investment environment in the EU has been formed. It has effective market principles of legal investment activities regulation (stated in the primary laws of EU as well as legal acts of the secondary law, e.g.: Investment plan for Europe and Acting plan for the creation of capital market union (CMU)); considering the territory of the EU member-states as one whole (as the territory of single economic area, based on four pillars: freedom of capital, people, goods and services movement).

It is worth to state that having used investment activities legal regulation, the EU public supervision subjects and EU member-states accumulate competencies concerning two legal institutions: institute of investment protection and institute of EU public interests protection (public safety, social rights, public health, consumers' rights protection and environmental protection). Aforementioned new tendencies have influenced the fact that in Slovakia and in the EU in general the concept of investors' rights protection and *de lege lata* of investment notion is completely changing.

The aim of this complex scientific and practical research is to determine the aspects of *ex lege* of investments protection within the EU taking into consideration innovations and analysis of modern tendencies *de lege lata* for the maintenance of the stable development in the Slovak Republic and European Union as well as preparation of conclusions and *de lege ferenda* concerning protection of intra-EU investments.

2. Literature review

The aforementioned problems were analysed by many authors. McLachlan, Shore and Weiniger state in their book "International Investment Arbitration" that "international common law did not prohibit distinctions between foreigners and nationals. To make up for this omission, the national treatment requirement, included in the majority of investment protection treaties, has the objective of finally providing an equal playing field for foreign investors (at least after they establish in the country)." The idea behind this standard is that states cannot stipulate differences between national and foreign investors, unless it is required for governmental public policy purposes. When this clause is present in a treaty, investors from a country have the right to receive the same treatment as local investors from the other BIT signatory country (McLachlan et al. 2007).

FDI are a global phenomenon whose share in international business is steadily rising and generates large capital injections. FDI has been and continues to be an important factor in the development of transition countries. They help to create new jobs, which can lead to an influx of new technologies, and in total they provide the necessary capital to restore a successful transition to the market economy. At the same time they enlarge economic power of investing country (Tvaronavičienė 2019; Globan 2018). Reinisch in his book examines the standards of treatment demanded by host states, which form the basis of contemporary international investment protection. It analyses the core standards commonly contained in bilateral and multilateral investment treaties, including 'fair and equitable treatment', 'full protection and security', and the non-discrimination standards. The burgeoning case law before arbitral tribunals has exercised a huge influence on how these standards are interpreted in practice. The

essays in this volume, by leading practitioners and scholars in the field of investment arbitration, analyze the case law and provide a framework for a common consensus to emerge on how the standards should be applied in the future (Reinisch, 2008).

The financial market is a set of entities, instruments and transactions with the instruments in question and between the entities in question, bringing an indirect intermediation of financing connected with a risk of return (Sidak, Duračinská et al., 2014). Masood et al. (2019) analyze interconnection of macroeconomic variable and performance of financial markets. According to Sidak, Slezáková et al. the objective of financial market supervision is to contribute to the stability of the financial market as a whole as well as to the safe and sound functioning of the financial market in order to maintain financial market credibility, protection of financial consumers and comply with competition rules (Sidak, Slezáková et al., 2014).

Kriebaum is the analyses of the possibility of courts and tribunals operating in the fields of human rights and international investment protection to take into account the concerns of the other field of law. It is difficult to generalize the effects of investment on the enjoyment of human rights of the population of the host State. It is today acknowledged that investment is capable of generating economic growth, reducing poverty, increasing demand for the rule of law and contributing to the realization of human rights. For many countries the impact of private foreign investment flows on development is more significant than development aid by States and international Organizations. On the other hand, a number of human rights violations related to foreign investment have arisen and are likely to arise in the future. Host States can intervene in investment operations to stop human rights abuses of an investor. But such measures may at the same time be an interference with the investor's rights protected under investment treaties. In such a situation the investor can bring a case before an investment tribunal. On the other hand host States can also remain passive and tolerate human rights abuses by investors. In such a situation an investment tribunal will not learn about the case, but the victims of the human rights violations may bring the case before a human rights court or treaty supervisory body. This special issue shed light on the interaction between human rights law and international investment law (Kriebaum, 2013).

The impact of European Union law on investment arbitration proceedings arising from intra-EU and extra-EU bilateral investment agreements (BITs) remains matter of considerable debate. In the last years several arbitral tribunals expressed their view on the subject matter, raising constant suspicion by the European Commission and certain EU-member states involved in such proceedings. The book hence analysis the potential objections regarding the arbitral tribunal's jurisdiction and the merits of the case resulting from the interference of European Union law with international investment law. Although such consequence is disputed by several arbitral tribunals, the author supports that in intra-EU proceedings the tribunals lack jurisdiction. However, in extra-EU proceedings, the author suggests to transpose the Bosphorus judgement rendered by the European Court of Human Rights to investment arbitration proceedings to reduce potential conflicts and satisfy the diverging interests (Investment Protection in the European Union: Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements. Nomos Verlag. 2017).

Sornarajah and Muthucumaraswamy explains that inclusion of this term in investment treaties “allows nationals from Member States party to the agreement to make use of the favorable treatment granted to third country nationals by some of the contracting states.” In other words, if one of the States that entered into a BIT or a MIT grants benefits to an investor from a third country, the companies from the other country that have signed the treaty can claim the same treatment for themselves (Sornarajah, Muthucumaraswamy, 2004).

Other authors deal with individual factors and investment impact on economic development, respectively economic growth, and motivation of investors, economic, legal and political conditions created in a host country (Fabuš, 2018; Mamojká 2016, 2018; Lysiná et al. 2016; Vicen, 2014, Vicen, Haviarová 2013).

3. Changes in *de lege lata* of the investment activities in Slovakia and the EU

During last few decades legal regulation and investments protection in Slovakia and the EU were conducted by the normative international bilateral and multilateral investment agreements or agreements concerning foreign investments protection. Bilateral and multilateral agreements (e.g. Agreement on Energetic Chart which the EU, EU member-states and majority of the third countries have signed), as a rule, included normative provisions which regulated investor's status (national status or special status in the regime of most favored treatment), conditions of fair and objective investors' treatment, free investor's capital movement, protection from investment nationalization, creation of *ad hoc* of international commercial arbitrage courts (which set disputes between the home country and the investor), conditions of state help provision to the investment project (benefits, facilitations, immunities, privileges concerning taxes and tax fees, free property usage etc.), system of compensation of investors' losses (according to the Directive of the European Parliament and Council of the EU 97/9/ES from 3.03.1997) and others. Over the last two decades bilateral and multilateral agreements together with the EU law have become parallel sources of investment relations in the European Union. During a few last years the Court of Justice of the European Union (CJEU) has accepted a list of decisions (C-284/16, *Achmea*, ECLI:EU:C:2018:158, 56, 58; C-67/08, *Block*, ECLI:EU:C:2009:92, 21; C-98/15, *Berlington Hungary*, ECLI:EU:C:2015:386, 28; C-197/11 a C-203/11, *Libert*, ECLI:EU:C:2013:288, 34; C-570/07 a C-571/07, *Blanco Pérez a Chao Gómez*, ECLI:EU:C:2010:300, 40; C-51/96 a C-191/97, *Deliège*, ECLI:EU:C:2000:199, 58, and others) concerning recognition as unjustified giving special legal status to investors and special legal regime for investments based on bilateral investment agreements (concluded by the EU member-states). For example, CJEU concerning *Achmea* case has conducted that contractual condition concerning the disputes between investors and the state which is fixed in the bilateral investment agreement within the EU violate the system of legal instruments of violated rights renewal fixed in the EU agreements as well as violate the autonomy, advantage and direct effect of the EU law and the principle of mutual trust between EU member-states. After a decision on the *Achmea* case has been made, September, 23rd, 2016, the European Commission has decided that bilateral investment agreements do not comply with the principles of the EU law and has sent to Slovakia (as well as Sweden, Austria, Holland and Romania) the demand of all bilateral agreements of investments protection termination.

It is worth to state (in order to avoid the wrong interpretation) that after termination of bilateral and multilateral agreements concerning investments protection the European Union lacks material and legal norms and mechanisms of investments protection, on the contrary, the EU law and EU institutions are normative and institutional pillars of investment protection: a) normative protection is based on the EU primary law, the Charter of the EU main rights, EU secondary law, legal systems of the EU member-states as well as the international law; b) institutional is based on the creation of judicial authorities of the European Union and the EU member-states.

It is also worth to state that taking into consideration the Agreement on European Economic Area, the EU main rights and EU normative and legal acts are also being used on the territory of the countries which are not the EU member-states, for example: Norway, Iceland, Liechtenstein (on the basis of the principle of investment protection the EU legal norms by the usage of *mutatis mutandis* regulate relations between the EU and aforementioned countries).

Therefore, the interim conclusions are to be made:

a) European Union having created the Economic Union, Monetary Union, Customs Union, Banking Union and others, are undergoing through natural stages of development, the highlight of which is the increase of the EU institutions competencies. This, in our opinion, is relevant and maximally necessary for the effective and stable development of the European Union with the aim of achievement of the ambitious and high goals stated in the norms of law (concerning stable economic development, high level of social provision, price stability, low rate of unemployment etc.);

b) making the alternative system of setting disputes impossible by creating *ad hoc* of the international commercial courts as well as by creation of the system of the EU administrative and judicial authorities (concerning investments protection). This is the only right way as to setting disputes (using EU law and principles). It gives EU national judicial authorities the opportunity to appeal to the EU judicial authorities with prejudicial matters (based on Article 267 of the Treaty on the Functioning of the European Union) which is the basis for the appropriate application of the European Union legal norms (in the investment sphere as well).

4. Analysis of the current conditions *de lege lata* of the investments within the EU

The EU law, as a rule, does not use the notion “investment” or “investor” but rather uses more general notions as: resident and non-resident etc. In this context it is worth to state that based on the analysis of the CJEU decisions (C-452/04, Fidium-Finanz, ECLI:EU:C:2006:631, bod 32. C-281/06, Jundt, ECLI:EU:C:2007:816, bod 33) under *terminus technikus* “investment” it is necessary to understand economic activity which is conducted using one or a few main economic freedoms of the EU (without the necessity of gaining profit). In practice investment activity is based on four main freedoms in the EU: capital, people, goods and services movement (it is meant: investment actions, acquisition and creation of partnerships and companies, right to acquire real estate into property, conduction of activities with securities, gain of dividends and profit percent, commercial credits granting, acquisition of shares in investment, mortgage and credit funds etc., acquisition of patents and copyright, based on C-483/99, European Commission/France, ECLI:EU:C:2002:327, 36; C-578/10; C-580/10, Van Putten, ECLI:EU:C:2012:246, 28-36; C-255/97, Pfeiffer, ECLI:EU:C:1999:240). From 2019 European Union started to use the category “direct foreign investment” (having stated the legal definition of the aforementioned category), especially adoption of European Parliament and Council Regulation 2019/452 from 19.03.2019. Under *terminus technikus* “direct foreign investment” it is worth to determine any investment from the side of the foreign investor which creates long-term and direct relations between the foreign investor and the subject of entrepreneurship with the aim of conducting economic activity.

The EU law protects investments within the European Union during their whole investment cycle irrespective from the form of investment. It is considered that protection in the field of investments is conducted in three fields: A) *investor's (or investments') entry to the single European market (according to the Articles 49, 63 of the Treaty on Functioning of the European Union)*; B) *conduction of investment activities on the European inner market*; C) *completion of the investment activity on the EU market*.

Ad. A) Entry to the single European market can be conducted in several ways: creation of a new legal entity on the territory of the EU, creation of the separate structural unit of the legal entity on the territory of the EU member-state, capital movement from the EU member-state to other member-states, change of entity's location, acquisition of the legal entity, creation of the subject in the country different from the country of origin (based on the Court of Justice of the European Union decision (C-221/89, Factortame, ECLI:EU:C:1991:320, bod 20.), participation in public auctions (government procurements) for the state provision of the EU and EU member-states public authorities activities (based on Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014.), participation in public concessions (public purchase and public concessions must be conducted based on the principle of transparency, objectiveness and non-discrimination (based on the CJEU decision C-458/03, Parking Brixen, ECLI:EU:C:2005:605, 72; C-380/05, Centro Europa 7, ECLI:EU:C:2008:59, 120; C-458/14 a C-67/15, Promoimpresa, ECLI:EU:C:2016:558, 64-65), etc.

Ad. B) Conduction of investment activities on the European inner market. Creation of a new subject of economic entity or conduction of activities by the created separate structural units on the territory of the EU *host country* is regulated, first of all, by the EU law and only, second of all, by the inner legislature of the country in which activities are conducted. An important aspect of the legal application is the impossibility to use legal public

norms. This, in its turn, restricts the freedom of people's and capital's movement (even if equal rights are distributed to the national subjects of the country in which activities are conducted (based on the CJEU decision C-55/94, Gebhard, ECLI:EU:C:1995:411, 27; common aspects C-52/16 та C-113/16, SEGRO, ECLI:EU:C:2018:157, 65; C-179/14, European Commission, Hungary, ECLI:EU:C:2016:108), for example: qualification of the person (C-342/14, X-Steuerberatungsgesellschaft, ECLI:EU:C:2015:827; C-76/90, ECLI:EU:C:1991:331, 21.), licensing (C-496/01, ECLI:EU:C:2004:137, 65.), complex obligations concerning notification of the control authorities about the activities conducted (C-577/10, „Limosa“, ECLI:EU:C:2012:814, 47; C-490/04, ECLI:EU:C:2007:430, 89), social welfare of the employees (C-272/94, Guiot, ECLI:EU:C:1996:147, 14-15), etc). Investors have the right to: 1) establish the economic entity in any EU member-state; 2) create separate structural unit in another member-state (C-212/97, Centros, ECLI:EU:C:1999:126; C-167/01 Inspire Art, ECLI:EU:C:2003:512, bod 105); 3) change the entity's location; 4) conduct reorganization by association, annexation, division or transformation (Directive 2017/1132 of the European Parliament and of the Council), based on the freedom of people's movement. In aforementioned cases the EU member-state is obliged to admit legal creation or entity's location change, based on C-106/16, Polbud, ECLI:EU:C:2017:804, 65 (in the frame of the possibility to participate as a side in the legal dispute, based on C-208/00, Uberseering, ECLI:EU:C:2002:632; 9) It is worth to state that entity's location change with the aim of the EU member-state more loyal legal regulation usage is not a violation, based on C-106/16, Polbud, ECLI:EU:C:2017:804, 62.

It is also worth to consider three more aspects: 1) with the aim of people's (labor force) free movement it is worth to determine legal norms of the Directive 96/71/EU of the European Parliament and of the Council of 26 February, 1996. Directive 2014/67/EU of the European Parliament and of the Council of 15 May, 2014.; 2) the European Union by creating a single economic area (EU Economic and Customs Union) has provided rights of the investors who take part in real production industry according to Article 45 of the Treaty on Functioning of the EU; 3) the EU law regulates tax aspects of investments (value added tax, consumer taxes chosen and energy taxes). It is worth to mention here that creation and realization of tax policy is the competency of the EU member-states. The EU normative and legal acts determine the limits of the member-states competencies, for example, to reinforce restrictive rules or to use basis for double non-taxation, based on Chapter 1 Article 5 Directive 2011/96/EU from 30.11.2011 and decisions C-504/16 та 613/16, Deister Holding, ECLI:EU:C:2017:1009, 51b 52, C-493/09-EK/Portugal.

Ad. C) *Completion of the investment activity on the EU market.* Investors' rights (which are regulated by the EU law) also include the freedom to determine the form, content and volume of investments (these freedoms can be limited only by using legal basis and in a certain way (C-201/15, AGET Iraklis, ECLI:EU:C:2016:972, 53)).

To conclude this part of the scientific research we will state that:

- 1) the EU law protects investors' rights from unwarranted limitations and discrimination. Investment discrimination and limitations can have different forms;
- 2) subjects of the EU member-states public administration must *a priori* follow the EU law while setting limits.

5. *Ex lege* basis of investors' rights limitation based on the institute of public interest in the EU law conception

Inner state limitations should be justified. Main rights and market freedoms are not absolute rights; that is why bodies of public authorities are obliged to compare them with public and legal goals while restricting them (public

policy, public safety and public health) according to Article 52 of the Treaty on Functioning of the EU. Based on the analysis of the Court of Justice of the European Union decisions reasons justifying *ex lege* of the institute of public interest (in the EU law concept) one can add: a) environmental protection (C-400/08, EK/Spain ECLI:EU:C:2011:172, 74; Article 3 Clause 3 of the Treaty on European Union and Articles 11 and 191 of the Treaty on Functioning of the EU); b) consumers' protection (C-342/14, X-Steuerberatungsgesellschaft, ECLI:EU:C:2015:827, 53); c) creditors' and shareholders' protection (C-106/16, Polbud, ECLI:EU:C:2017:804, 53); d) integrity of tax system (C-204/90, Bachmann, ECLI:EU:C:1992:35, 28.) struggle with avoidance of paying taxes (C-72/09, Etablissements Rimbaud, ECLI:EU:C:2010:645, 33, etc.); e) employees' protection (C-341/05, Laval, ECLI:EU:C:2007:809, 103), etc.

All limitations must be made according to main principles and freedoms of the European Union law (which are stated in the EU legal acts):

- *The principle of proportionality* (restrictive legal norms must serve public goal, be systematic and methodological). Restrictive limitations will not be proportional and, therefore, legal if there exists alternative legal regulation which limits the freedom of people's movement (C-452/01, Ospelt, ECLI:EU:C:2003:493, 41), etc. It is worth to state that analyzing proportionality the Court of Justice of the European Union researches all the factual and legal aspects of the case. The obligation to prove the principle of proportionality compliance lies on the bodies of public authority of the EU member-state. Arguments, used by EU member-state as to the accordance of the inner legislation to the principle of proportionality, must be based on relevant adequate proofs or analysis of correspondence and proportionality of the restrictive norms (C-333/14, Scotch Whisky, ECLI:EU:C:2015:845, 53; C-52/16 a C-113/16, ECLI:EU:C:2018:157, 85.).
- *The principle of reasonable expectations* (C-17/03, VEMW, ECLI:EU:C:2005:362, 73-74.). It is possible to use this principle if investors act based on the principle of good faith (C-316/88, Krücken, ECLI:EU:C:1988:201, 23-24; C-5/89, Commission/Germany, ECLI:EU:C:1990:320, 14.), responsibly and with competency (C-310/04, Spain/Council, ECLI:EU:C:2006:521, 81). This does not mean that investors can expect that investment activities legal regulation, legal regime of investments and investor's legal status will be unchanged (C-17/03, VEMW, ECLI:EU:C:2005:362, 81; C-201/08, Plantanol, ECLI:EU:C:2009:539, 53). If legal regulation changes, EU and EU member-states must take into consideration the current investors' activities, except cases when justification is determined by the institute of public interest (C-17/03, VEMW, ECLI:EU:C:2005:362, 81; C-201/08, Plantanol, ECLI:EU:C:2009:539, 49).
- *The principle of legal confidence* is a general principle of the EU law. It means that normative and legal acts of the EU and EU member-states must be clear and predictable concerning their actions (especially with negative consequences (including financial ones as well) with the private entities, based on C-318/10, SIAT, ECLI:EU:C:2012:415, 58; C-17/03, VEMW, ECLI:EU:C:2005:362, 80; C-347/06, ASM Brescia, ECLI:EU:C:2008:416, 69; C-362/12, Test Claimants in the Franked Investment Income Group Litigation, ECLI:EU:C:2013:834, 44; C-17/01, ECLI:EU:C:2004:242, 34).
- *The principle of healthy economic competition*. On the EU single market must be provided competition and equal conditions for the business subjects, that is why EU member-states do not have the right to give public help to the economic entities as this does not correspond to the principles of the EU single market, based on Articles 107 and 109 of the Treaty on Functioning of the European Union.

Therefore, being based on the analysis *de lege lata*: 1) *all inner state restrictions must be made in accordance to the general rights of the EU Charter*. It is worth to mention here that foreign subjects (investors) use main rights and freedoms of the EU Charter and the EU law while conducting their investment activities (C-685/15, Online Games Handels, ECLI:EU:C:2017:452, 56). The right to contractual freedom of investor, the right to be the owner of the property (this is the point where the right for compensation while nationalizing it and having public

interest comes from), the right for justice security, the freedom for entrepreneurship conduction and others are very important for all investment activities entities. 2) *General EU rights and freedoms are not absolute and therefore, do not correspond to certain reasonable limitations* (accepted and appropriate that do not change the content of these rights and freedoms) if they are conducted with the aim of public interest protection which is stated in the EU law and are proportional (C-44/79, Hauer, ECLI:EU:C:1979:290, 15, etc.; C-5/88, Wachauf, ECLI:EU:C:1989:321, 18). 3) *Investors can demand to admit as non-legitimate inner state normative and legal acts, taking as an argument the fact that it violates the rules of economic competition.*

6. Mechanisms of investors' rights protection in the Slovak Republic and the European Union

Investors' rights protection is conducted on the territory of the EU *using different mechanisms for rights protection and setting disputes connected with their violation by public authorities* (rule making, justice or administrative authorities): *A) prevention of violations and non-judicial setting of disputes; B) renewal of investors' rights in the judicial way; C) investments protection by the European Commission.*

Ad. A) Mechanisms for violations and non-judicial setting of disputes:

1) Prior approval of the content of inner normative and legal acts by the EU member-states with the European Commission as to their correspondence to the EU law. Based on the Directive of the European Commission and the EU Council 2015/1535 from 9 September 2015, all projects of the normative and legal acts that regulate matters of freedom of goods and services movement must undergo through the analysis of the European Commission as to their correspondence to the EU law. The conclusion of the European Commission concerning legitimacy of the projects of normative and legal acts (by the EU member-states) is obligatory for the member-states according to the Treaty on Functioning of the EU, Directives of the EU Council 96/67/EU from 15.10.1996 and Directives of the European Parliament and EU Council 2010/13/EU from 10.03.2010. Prior analysis of the inner-state normative and legal acts which can limit entities' rights (freedom of goods and services movement, based on C-443/98, Unilever, ECLI:EU:C:2000:496, bod 40 a nasl.) based on the EU law (informing of the European Commission concerning adoption of the normative and legal acts and their analysis as to the correspondence with the EU law is also conducted). In this context it is worth to state that the aim of this institution is to provide equal conditions for the economic entities on the EU single market, based on Article 108 of the Treaty on Functioning of the EU. Authorized bodies of the European Commission for giving conclusions to the projects of normative and legal acts are a separate legal institution. It is separate from the institution of examination by the Court of Justice of the European Union of EU member-states violations while regulating social relations.

2) Application of the legal norms by the authorities of public administration in correspondence with the EU law. Bodies of public administration most often enter into administrative legal relations with investors. That is why, the aforementioned authorities are obliged to use the EU and EU member-state law norms appropriately in intentions determined by the EU. In case of violation, urgently and proportionally restore violated rights, freedoms and protected by the law investors' interests. Beside this, based on Part 3 Chapter 4 of the Treaty of Functioning of the EU and Decisions in cases C-476/1-Pepic, C-103/88, Costanzo, ECLI:EU:C:1989:256, 32; C-224/97, Ciola, ECLI:EU:C:1999:212, 30; C-341/08, Petersen, ECLI:EU:C:2010:4, 80, in case of the EU law violations by the inner normative and legal acts, the authorized bodies of the EU member-state are obliged to abrogate or derogate such normative and legal acts. Abrogation or derogation is conducted by the competent bodies for the appropriate and active usage of the EU norms and freedoms. It is worth to mention that legal institutions of abrogation and derogation are used by the competent authorities by their own initiative and without investor's appeal to the court to admit as non-legal the inner-state normative and legal act. Each investor has the right to provide proofs and arguments during decision-making process of the EU member-state public administration authorities. Authorities of public administration are obliged to adhere to the principles of objectiveness, non-discrimination and appropriately justify them (C-55/94, Gebhard, ECLI:EU:C:1995:411, 37;

C-19/92, Dieter Kraus, ECLI:EU:C:1993:125, 40; C-34/17, Donnellan, ECLI:EU:C:2018:282, 55). In case of violation of rights, freedoms and protected by the law interests, the member-state is obliged to return illegally received payments and percent for their usage (C-10/97 and C-22/97, IN.CO.GE.90, ECLI:EU:C:1998:498, 24; C-591/10, Littlewoods Retail a.O., ECLI:EU:C:2012:478, 25 – 26; C-69/14, Dragoş, ECLI:EU:C:2015:662, 24).

3) *with the aim of appropriate and quick non-judicial resolution of trans-border problems with the EU law application on the territory of the EU member-state, the European Commission and EU member-states have created SVOLIT system in 2002.* The main task of SVOLIT system is to propose pragmatic decisions to physical and legal entities of the EU and European economic area while resolving disputes of rights and freedoms adherence by the public administration authorities.

Ad. B) Renewal of rights in the court is just one of different variants of dispute setting.

1) *Based on Part 1 Article 19 of the Treaty on European Union and Articles 6, 13, 47, 52 of the EU Charter concerning main rights (norms of law of which have a direct action), the EU member-states are obliged to create a system of authorities for the fair protection of physical and legal entities' rights and freedoms* (C-414/16, Vera Egenberger, ECLI:EU:C:2018:257, 78; C-64/16, ECLI:EU:C:2018:117, 29). It is also worth to state here that the Court of Justice of the European Union and European Court of Human Rights are convinced that judicial authorities are built on the principles of *independence, quality and effectiveness* (C-64/16, ECLI:EU:C:2018:117, 41; C-64/16, ECLI:EU:C:2018:117, 41).

2) *Inner-state procedures must provide effective usage of investors' rights which is based on the EU law.* Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December, 2012 reinforces regulation, which aim is to weaken and fasten the access to justice, especially by setting rules and competencies for the Court of Justice of the European Union in trans-border disputes. Procedural aspects of setting disputes is in the competency of the EU member-states, based on Directive 2007/66/EU. (C-612/15, Koley, ECLI:EU:C:2018:392, body 70 až 72; C-279/09, DEB, ECLI:EU:C:2010:811, bod 59; C-362/12, Test Claimants in the Franked Investment Income Group Litigation, ECLI:EU:C:2013:834, 31). It is worth to state that procedural aspects are based on the principle of equivalence and effectiveness (C-169/14, ECLI:EU:C:2014:2099, 31).

3) *Investors have the opportunity to use a wide spectrum of instruments for their rights renewal juridically and in the inner-state court.* The instruments for rights renewal include: the judge's obligation to explain inner-state normative and legal acts; the judge's obligation not to take into consideration any activities which do not correspond with the norms of the EU law; recognition of losses reimbursement for the investor's rights violation; elimination of violation consequences as well as obstacles in the usage of their rights by the investor etc. (based on C-106/89, Marleasing ECLI:EU:C:1990:395; C-91/92, Faccini Dori, ECLI:EU:C:1994:292; C-188/10 and 189/10, Melki a Abdeli, ECLI:EU:C:2010:363, 43, 44; C-689/13, Puligienica, ECLI:EU:C:2016:199, 38; C-6/90 a C-9/90, Francovich, ECLI:EU:C:1991:428; C-224/01, ECLI:EU:C:2003:513; C-503/04, ECLI:EU:C:2007/432, 33.; C-276/07, Plantanol, ECLI:EU:C:2008:282, 23). Juridical rights renewal according to the EU law is possible even in case of violation EU member-states' constitutional norms according to the Decision C-213/89, C-46/93 and C-48/93, Brasserie du Pêcheur a Factortame. In this context it is worth to mention that minimal demands concerning non-contractual responsibility of the state for the violation of the EU law stated in Article 340 of the Treaty on Functioning of the European Union and Decisions *ex multi* C-46/93 a C-48/93, Brasserie du Pêcheur a Factortame, ECLI:EU:C:1996:79, 40, 41, 42.

4) *Consideration of cases by the Court of Justice of the European Union (CJEU).* According to Article 19 Treaty of the European Union, the CJEU has the competencies to provide observance of the EU law on the whole territory of the European economic area and has a central place in provision of effectiveness and unity of the EU

rules. The EU member-states' courts conduct their activities as the courts of the European Union. They are obliged not to use the norms of inner legislature if they contradict the EU law. If it is impossible to use the norm of the EU law appropriately in the court of the EU member-state, then the EU member-state court addresses the CJEU and asks it to make a prejudicial decision. The CJEU decision in prejudicial order is obligatory for usage by the national court of the EU member-state (C-689/13, Puligienica, ECLI:EU:C:2016:199, 38). And all bodies of public administration must accept to urgent implementation the CJEU prejudicial decision (C-231/06, C-233/06, Jonkman, ECLI:EU:C:2007:373, 38). The court is obliged to accept the decision without using the appropriate norm of national legislature if the decision of the EU Court has stated it as non-legitimate. The body of public administration which has accepted this normative and legal act, must conduct abrogation or derogation of the legal act (C-689/13, Puligienica, ECLI:EU:C:2016:199, 40). And if the case has been filed to the EU member-state court, and this case is impossible to file to the national court because of the absence of instruments and procedures in the national legislature of the member-state, then the national court will delegate this case to the consideration of the CJEU, based on Article 267 of the Treaty on Functioning of the EU. Before delegating the case to the consideration of the EU national court has to fulfill certain criteria: whether the judicial body is created based on the normative and legal act or is a constantly active body, whether its competencies are obligatory, whether its activity is *inter partes*, whether it's independent, whether uses legal norms (C-54/96, Dorsch Consult, ECLI:EU:C:1997:413, 23).

Ad. C) Investments protection by the European Commission. According to Article 17 of the Treaty on the European Union, the European Commission does not carry responsibility for the active usage, fulfillment and widening of the EU law implementation. In this context it is worth to mention that European Commission analyses and provides conclusions as to the correspondence of the projects of national normative and legal acts to the EU law. This, in its turn, provides protection of the investors' rights on the EU inner market. In case, if EU member-states do not take into consideration recommendations or conclusions of the European Commission in the investment field, then European Commission addresses the Court of Justice of the European Union with the aim of imposing sanctions on the violator-state, based on Article 260 of the Treaty on Functioning of the EU. Individual cases of investors' rights violation or not correspondence of the national normative and legal act to the EU law, the European Union does not consider as it belongs to the competency of the national courts of the EU member-states or the CJEU.

7. Conclusions

According to the aforementioned and directed by *ex scientia vera*, analyzing *de lege lata*, Court of Justice of the European Union decisions and scientific researches of national and foreign scholars, the author has elaborated the following conclusions as well as *de lege ferenda*: 1) Investments protection is one of the main tasks of the EU Economic Union. 2) Change of tendencies and concept of investors' rights protection in the EU has lead to termination of bilateral and multilateral investment agreements within the EU and was conducted with the aim of balancing of investors' rights and the EU public interest as well as creation of a new equal system of legal protection in the EU with equal rights of all members of the investment process. 3) Creation of a new system of investors' rights protection is one of the goals of the EU law usage and gradual creation (on the base of the EU) of interstate union with a harmonized legal system on its whole territory. 4) In context of creation of institutional provision of the EU stable development, with the aim of provision of constant organizational, legal, informational, guarantee, financial and other ways of support of the investment activity in the EU, the European Parliament and the EU Council have adopted Regulation 2017/1601 from 26.09.2017 and have created *European Fund for Sustainable Development (EFSD)*. 5) With the aim of provision of the stable economic growth and provision of safety, according to Regulation of the European Parliament and the EU Council 2019\452 from 19.02.2019 control of direct foreign investments from the third countries to the EU is conducted. 6) With the aim of determination of financial responsibility and adoption of decisions in investment disputes by the courts the European Parliament and the EU Council adopted on 23.07.2014 the Regulation 912\2014. 7) Investors' rights

protection is conducted on the territory of the EU using different mechanisms and is aimed at protection of rights and setting disputes connected with their violation by the subjects (law violators) which are public bodies (law making, judicial or administrative bodies): prevention of violations and non-judicial setting of disputes; renewal of investors' rights in the courts; protection of investments by the European Commission. 8) *With the aim of appropriate and quick non-judicial setting of trans-border disputes using the EU law on the territory of the European economic area European Commission and EU member-states have created SVOLIT system* (for adoption of pragmatic decisions by the physical and juridical entities while setting the problems of compliance of rights and freedoms by the bodies of public administration). 9) Investors further during trans-border investing within the EU cannot use bilateral investment agreements that give investors special legal status which does not correspond with the EU law. 10) International commercial arbitration courts, national commercial arbitration courts or commercial courts created *ad hoc* (which were authorized by bilateral or multilateral investment agreements within the EU) do not have a status of the national judicial bodies, based on Article 267 of the Treaty on Functioning of the EU. Thus, they do not have a right to make any decisions concerning investment disputes. 11) EU member-states do not carry responsibility before the European Commission concerning the appropriate legal regulation of the investment sphere according to the EU law. 12) Member-states create their own system of investors' rights protection on the inner markets, for example in Slovakia in 2002 a public and legal cooperation – Guarantee Fund of Investments was created based on the law. This Fund has the aim to protect investors' rights on the financial market (to guarantee return of the investments to the volume of 50 000 euro). 13) After termination of bilateral investment agreements European Union conducts negotiation as to the signing of agreements with separate countries, for example with the USA the agreement concerning elimination of tariffs usage on the industrial goods – *TTIP* (Council Decision authorizing the opening of negotiations with the USA for an agreement on the elimination of tariffs for industrial goods, 6052/19, from 9 April 2019). EU and EU member-states and Canada have finished negotiation and on 21 September 2017 signed an agreement on fair trade - *CETA* (Comprehensive Economic and Trade Agreement).

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