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Contemporary legal challenges: EU – Hungary – Croatia

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Tímea Drinóczi, Mirela Župan,
Zsombor Ercsey, Mario Vinković (eds.)

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Contemporary Legal Challenges:
EU – Hungary – Croatia

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Foreword

The Proceedings 'Contemporary Legal Challenges: EU – Hungary – Croatia' are the results of a successful and fruitful cooperation between the respective faculties of law in Osijek and Pécs, which was established within the framework of the SUNICOP project (Strengthening University Cooperation Osijek – Pécs). The Proceedings represent the top efforts made by Croatian and Hungarian scientists for the purpose of creating a common regional research area in the field of law, which was one of the main objectives of the project. The content of the Proceedings covers a wide range of current issues falling into the scope of different legal disciplines and the number of authors and their contributions (i.e. 70 authors and 33 contributions) as well as the quality thereof show that the cooperation between the two cross-border faculties has indeed strengthened in comparison with the year 2011, when the previous proceedings were published, which marked the completion of the EUNICOP project (Establishing University Cooperation Osijek – Pécs). Therefore, the publishers and the authors deserve our sincere congratulations. In less than a year, Croatia is scheduled to become the 28th member state of the European Union. During the presidency of the EU, Hungary played a key role in finishing EU – Croatia accession negotiations. In February 2012, the Hungarian Parliament was among the first ones to ratify the Treaty of Accession of the Republic of Croatia to the European Union. Hungary and Croatia, as two neighbouring and friendly states, will also develop their future relations on their common European path. In such context, there is still much room for cooperation in the field of legal science. The application of the *acquis communautaire* in practice is one of the challenges for further comprehensive legal analyses, since the harmonisation of a legal system with the *acquis* is not sufficient for the realisation of its *ratio legis*. In times of economic crisis and frequent attacks on universal values such as human dignity, freedom, equality and solidarity, the role of scientists in improving the function of the legal system and the protection of fundamental human rights and freedoms is becoming increasingly important. Hence, future both individual and group study visits of Hungarian and Croatian scientists in the field of law should be directed in that way. Their previous cooperation awakens optimism. By supporting and co-financing projects of the two faculties of law within

the Hungary – Croatia Cross-Border Cooperation Programme, the European Union has given a chance to both Osijek and Pécs to assert themselves as regional centres of legal science. Actual results, including these Proceedings, are certainly encouraging and provide an excellent foundation for future scientific endeavours along the way of promotion and affirmation of European values.

Zagreb, 5 August 2012

Prof.dr.sc. Ivo Josipović
President of the Republic of Croatia

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Preface

Human activities are becoming borderless and the importance of the role of law in this area is unquestionable. Contemporary legal challenges obviously raise different and at the same time similar problems clearly and manifestly apparent in each state in various fields of law. In order to govern the legal effects of globalization, cooperation has no alternative. It entails the approximation of legal regulations and establishes joint operations in order to solve, among others, cross-border issues and matters having EU relevance.

Projects of cooperation between two neighbouring faculties (Pécs and Osijek) represent a bridge to a new and improved way of conducting research. That is why the Faculty of Law, University of Pécs and the Faculty of Law of Strossmayer University have found it inevitable to continue common research and student exchange program, institutionalized by EUNICOP project, in the framework of SUNICOP (**S**trenghtening **UNI**versity **C**ooperation **O**sijek – **P**écs, SUNICOP HUHR/1001/2.2.1/0003) project. SUNICOP, similarly to EUNICOP, is a one-year-long common research and curriculum development project being co-financed and supported by the European Union through the Hungary-Croatia IPA Cross-border Co-operation Programme and by the two participating law faculties. The SUNICOP project is operated in various interrelated areas and through different activities. One of these activities was the conference called 'Contemporary Legal Challenges: EU – Hungary – Croatia', organized by the Faculty of Law of Strossmayer University on 16-18 February 2012. The conference, where knowledge gained during the joint research activities was shared, successfully brought together researchers, and various fields of law were dealt with.

This volume contains all contributions written and presented in English during the conference. Two additional volumes, which include the Hungarian and Croatian versions of all conference materials, are published on the website of the project as well.

Pécs – Osijek, 13 July 2012

The editors

Legal theory and legal history

Antal Visegrády[*]
Ivana Tucak[**]

Hungarian and Croatian legal culture

The present paper endeavours to present the common and different features of the legal cultures of the two countries. Hungary and Croatia have a common past. They established and stayed in a commonwealth for more than eight centuries (1102-1918). In the 20th century, they struggled under communist regimes. Today, one of them has joined the European Union and the other is on the verge of joining it.

1. The notion of legal culture

Between culture and law there is continuous interaction and manifold interconnection,[1] which may be summed up in two fundamental propositions: firstly, law constitutes a component of the culture of the given society and secondly, there is no law or legal system that is not permeated by the culture of the society. Legal culture has developed through history just like political culture, and its characteristics and realization have been influenced, moreover, shaped by the latter.[2] Legal culture always stands between tradition and innovation. The development of legal culture is a long-term process, which does not only imply organic growth, but also the task of fostering the existing culture. Therefore, legal culture does not merely mean adherence to the values that have developed, neither does it mean change for the sake of change only.[3] Elements of legal culture include:

a) written and living law,
b) institutional infrastructure (court system, legal profession),
c) legally relevant models of conduct (e.g. litigation) and

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[1] Cf. e.g., Max Ernst Mayer, *Rechtsnormen und Kulturnormen* (Breslau, 1903) p. 24.; Karl M. Fezer, *Teilhabe und Verantwortung* (München, 1986) p. 22. et seq.

[2] Giovanni Tarello, 'Alteggiamenti dottrinali e mutamenti strutturali dell' organizzazione guiridica' *Materiali per una storia della cultura guiridica* Vol. XI. No. 1. guigno 1981. pp. 157-166.

[3] Heinz Schäffer, 'Társadalmi környezet és jogi kultúra' [Social Environment and Legal Culture], 2 *Magyar Jog* (1996)

d) legal consciousness.[4]

From a certain aspect, legal culture can be divided into *external* (lay) and *internal* (professional) legal culture.[5] Another approach speaks directly of *legal subcultures*. It mentions as an example that persons refusing army service for reasons of conscience are convicted by the courts in Northern and Southern Norway, while they are acquitted in Western and Central Norway.[6] Worldwide, one may distinguish between *regulative* (*Euro-Atlantic)* and *orientative* legal cultures.[7]

2. The main historical characteristics of Hungarian legal culture

The legal cultures of the societies of the Eastern and Central European region were also mainly of regulative character, although during their history some features of orientative legal culture also became mixed into them. This may be explained by two reasons. On the one hand, the legal systems of this region had strong regulative features in some respects, for example, with regard to the inclination to litigate, especially in Hungary. In other respects, however, the willingness to evade the law did not simply exist for centuries and exists even today but it also became an accepted form of behaviour in legal culture. Although the idea of the rule of law had an impact on royal law-making – as proven by Hungarian legal history – until the beginning of the 16th century royal law-making practically created legal rules lasting only for the length of the reign of the king. Until the 16th century neither court judgments nor charters referred to statutes, but to the ancient custom of the country (antique regni consuetudo). This circumstance diverted Hungarian legal development – together with legal culture – from Western legal systems to some extent, later re-raising the question of the need for adaptation.[8]

In Hungarian legal culture, the social standing of the court and, together with it, of the judge has remained ambivalent. It was only in 1869 that the Hungarian judicial organization was separated from public administration and, at the same time, the independence of the judiciary

[4] Cf. A. Visegrády, *A jog- és állambölcselet alapjai* [Foundations of the Philosophy of Law and State] (Budapest – Pécs, Dialóg Campus Kiadó 2001) p. 11.
[5] Cf. Lawrence M. Friedman, *Law and Society* (Prentice Hall, N.J. 1977) p. 76.
[6] Adam Podgórecki, 'Dreistufen-Hypothese über die Wirksamkeit der Rechts' in E. Hirsch-M. Rehbinder (Hrsg.): *Studien und Materialen zur Rechtssoziologie* (Köln/Opladen, 1967) pp. 40-43.
[7] K. Kulcsár, *Jogszociológia* [Legal Sociology] (Budapest, 1997) pp. 137-147.
[8] Kulcsár: op.cit. n. 7.

as a principle was laid down by statute. On the one hand, the role of the judge has never become so significant and prestigious in Hungary as it has, for example, in common law systems of law. On the other hand, the inclination to litigate manifested in Hungarian legal culture indicates the importance of the court as the institution participating in the resolution of legal disputes. In the 'socialist' era, unrestricted legislation became a dominant feature, the number of bureaucratic type legal instruments of symbolic and technical nature started to increase quickly, and as a result of the above – normativity was pushed to the background. All this led to a significant decrease in the social prestige of law and the legal profession, which was further damaged by artificially generated show trials serving political purposes.

3. Hungarian legal culture after the democratic political transformation

3.1. Written and living law

Looking at the historical past we must consider the question whether the changes within institutional and political cultures are a result of continuity or discontinuity. In Hungary the following spheres may be differentiated:

- the political institutions: *discontinuity*, a revolutionary new system of government,
- the legal system: *continuity*.[9]

Within this field, special attention must be paid to the famous decision of the Constitutional Court (1992), which amongst other things laid down clear statements in the sphere of what becomes rule of law and the legal importance of a change of regime.

> The classification of Hungary under the rule of law is both a clarification and a policy at the same time. The Rule of Law is established when a Constitution truly and unconditionally is put into practice. A legal change of regime is only possible if made compatible with the country's Constitution and in the same way, in the field of legislation, the whole legal system has to be in concordance. Not only the provisions of law but also the operation of government organizations has to be in strict harmony with the constitution and then the conceptual culture and value scale of the Constitution also has to affect the entire society. This is the reign of

[9] Cf. P. Paczolay: 'Constitutional Transition and Legal Continuity', 8:2 *Connecticut Journal of International Law* (1993) pp. 559-574.

> law; this is how a constitution is materialised. The achievement of the Rule of Law is a process.
> The change of regime took place on a legal basis and the principle of legality constituted the basis for the norms of the legal system to become effective unconditionally. The Constitution which induced revolutionary changes in the field of politics, and the fundamental provisions of law respecting the principles of the old legal system, were impeccable in form and this is the source of their strength. The former legal system also remained in effect. Because of its effectiveness, there is no difference between the law before or after the Constitution. The legitimisation of the different systems over the past 50 years in this sense is superfluous, and regarding the constitutionality of provisions of law, it is an un-interpretable category. Whatever their origins are, articles of law have to be in accordance with the new Constitution. There is no dichotomy in constitutional investigation – there are not two different yard sticks to measure them by. The date of application of an article of law is only significant when earlier articles become unconstitutional when a new Constitution came into effect.

The decision of the Constitutional Court also refers to the importance of changes in ways of thinking and attitudes within the legal (and therefore political) culture. This democratic political transformation, having taken place by way of a revolution to the rule of law and on the ground of legality and continuity, required masses of legislation. The emphasis in norm-making became shifted towards the apex of the hierarchy of sources of law, this is how more than one and a half thousand effective Acts of Parliament were created (the legal provisions in force at present comprise almost six thousand legal instruments).[10] Since the beginning of the 1990s the number of Acts of Parliament has been increasing continuously. Three fourths of the Acts have been passed since 1990; consequently, the most important level of the legal system became exchanged after the democratic transition. While, for example, Parliament passed 104 and 145 acts in 1990 and 2000 respectively, the number of acts passed by Parliament between May 2010 and May 2011 reached 200, including the new Fundamental Law replacing the Constitution of 1949. A high level of activity can be observed in the case of delegated legislation (legislation by decree) as well. The judges of the Constitutional Court exercise permanent control over legislation.

[10] Z. Fleck, *Változások és változatlanságok* [Changes and Continuities] (Budapest, Napvilág Kiadó 2010) p. 55.

As far as 'living law' is concerned, its most important field is judge-made law. Courts do not merely 'carry out' the orders of legal norms, but also interpret,[11] apply and thereby necessarily develop all branches of law. Accordingly, *praetor ius facit inter partes*. Therefore, the permanent and uniform practice of the courts as well as the precedent-setting law uniformity decisions, decisions in individual cases and some opinions of the Supreme Court developing this uniform practice may be considered norms in the way of sources of law. Just for the sake of example: 46 criminal, 37 administrative and 24 civil precedents were born between 2008 and 2010.[12]

3.2. The legal profession

Before the democratic transition the Hungarian legal profession had been characterised by two traits basically. On the one hand, their prestige had decreased and on the other hand, in spite of the four decades of 'socialist' – and under its cover: Eastern – influence, they had preserved continuity of traditional Hungarian legal thinking to a significant degree. This latter characteristic proved to be of decisive importance during the Hungarian democratic transformation.[13] After the first elections, Parliament was to a great extent filled with lawyers, independent intellectuals and philosophers.

The attractive force of the legal career increased suddenly – corresponding to Hungarian development into a democratic state governed by the rule of law. Instead of the approximately 4,000 people pursuing a traditional career in law at the time of the democratic political transformation, today in these fields there work 15,000 lawyers, more specifically: 2,800 judges, 1,729 prosecutors, approximately 10,000 attorneys and 313 notaries. Instead of the earlier four law faculties, training takes place at nine law faculties. At the beginning of the 1990s there were 3,000 law students; today there are more than 18,000. On graduation most of them choose to become attorneys.

3.3. Litigation

The inclination to litigate, which has always characterised Hungarian legal culture throughout its history, as a matter of course, has increased

[11] Cf. Marek Zirk-Sadowski, 'Court as Judges' Interpretative Community', 1 *JURA* (2011).
[12] Cf. A. Visegrády, *Judge-Made Law in Hungary* (under publication).
[13] Kulcsár, op. cit. n. 4, at p. 135.

even further in the conditions of market economy, and courts have had difficulty in coping with the burden of the increasing numbers of cases. While, for example, in 1998 the number of cases filed with local and county courts amounted to 402,884, in 2010 this number increased to 456,188. The number of resolved cases was 410,810 and 453,325 in the respective periods.
Hungary is closer to the countries of short lawsuits, but on average all types of lawsuits last somewhat longer in Hungary, than in Germany (6 months) or in France (4 months). Although Hungary can boast – in proportion to the population - the second largest judiciary (2,800 judges) after Germany, first-instance and second-instance proceedings last one year on average, and in the most overloaded courts the length of proceedings may reach even two years (e.g. Pest County).[14]

3.4. Legal consciousness

Changes in the legal consciousness of the Hungarian population following the democratic political transformation are excellently demonstrated by the main results of the analysis conducted in 1997-98 on a sample of 219 persons.[15] Out of the branches of law, criminal law proved to be known the best and administrative law and procedural law were known the least. 90% of those questioned knew that the court does not accept it as a defence from the litigant or the accused that they were not aware of the legal rules based on which the court wants to condemn them. Compared with the survey of 1965, there was a 15% increase in the number of those who gave the right answer mentioned above. A fortunate consequence of Hungary being a democratic state governed by the rule of law is that 30% more people think that it is just to enforce this fundamental principle. In other words, there has been a change in the quality structure of legal consciousness.
87% of the population involved in the analysis knew that in Hungary acts are passed by Parliament, 10% did not answer the question and 3% gave wrong answers. At the time of the survey of 1965, the percentage of people that chose Parliament was only 45%! The reason for the remarkable difference also lies in the democratic transition, since the

[14] Cf. Pokol Béla, *Jogszociológiai vizsgálódások* [Legal Sociological Analyses] (Budapest, Complex 2003) pp. 46-49.
[15] A. Kormány, 'Jogismeret és jogtudat a mai magyar társadalomban' [Legal Knowledge and Legal Consciousness in Modern Hungarian Society], *De Jure* March 1999.

weight and power of Parliament has increased significantly and citizens follow – may follow – the work of Parliament. It is regrettable, however, that to the question as to how it is possible – without any preliminary permission - to participate at a public court hearing, the proportion of right answers was altogether 33%. This may be explained by citizens' apathetic attitude toward the courts and by the fact that confidence in the system of administration of justice has greatly deteriorated in recent years.

Finally, mention should be made of the dichotomy that while three quarters of the 219 people asked recognized the difference between homicide and attempted homicide, they mixed up the notions of legislation and administration of justice and they were not able to distinguish between natural and legal persons either. In consideration of all this, while being content to observe the consolidation of Hungarian legal culture we must not forget about spreading information about the law and developing legal consciousness either.

4. The impact of EU-membership on Hungarian legal culture

The paper provides space only to give short answers to two questions. Firstly: was Hungarian legal culture ready for the accession in 2004? Secondly: can Hungary bring any positive additions to the legal culture of the EU? The law of the EU is not "European legal culture", but the product of European legal cultures.[16] The new "European legal culture" is evolving now, which is indicated by, for example, the proliferation of technical laws and at the same time, the increasing unification and vertical plurality of the legal system. One must proceed from the fact that, besides national endeavours, some harmonisation factors have always been present in Hungarian legal development looking back for a millennium. The main forces behind this harmonization process have been: the similarity of Hungary's economic and social structure to the Western European one and endeavours to catch up with the European standard of living. In this respect, therefore, the legal harmonisation dimension of Hungary's accession to the EU is not the first challenge in Hungarian history.

Since the democratic transition it has been possible to observe several positive tendencies in the development of Hungarian legal culture pointing towards Euro-conformity. Such include, for instance, the fact of

[16] Cf. e.g., A. Febbrajo and W. Sadurski (eds.): *Central and Eastern Europe after Transition* (Cornwall, 2010).

the legality of the democratic political transformation as well as the advantageous influence exercised by the consistent practice of the Constitutional Court on Hungary's legal culture. On the other hand, the approximation of laws plays a significant role in consolidating Hungary's regulative legal culture. Let us only refer to the fact that the Union legal instruments laid down in the White Paper were harmonised by Hungary between 1990 and 2003. The further training of judges and civil servants in languages and European law has taken place, but obviously, the final solution may be expected of the mass employment of the new generation graduating from universities.

However, it must be emphasized that Hungary's integration into Europe does not exclude the preservation of the individuality of the country's legal culture. Integration has a double aim. On the one hand, it has to guarantee the realization of some common effects; on the other hand, for this purpose it has to build guarantees into the processes in order to ensure that similar resultants would lead to similar results. 'All this translated into law means that only those elements of our legal culture can – and in some cases: must – be unified that, caused by their sine qua non role, are of instrumental importance with regard to the fundamental aims to be achieved by all means.'[17]

Therefore, when working to make Hungarian legal culture Euro-conform, attention should also be paid to fostering the existing Hungarian culture! I do not think that it is an exaggeration to claim that Hungarian legal culture could also make a contribution to the development of European Union legal order if Hungarian legal politics could initiate the adoption and utilization of some Hungarian legal solutions for improving legal institutions still unelaborated in the Community *acquis*. Such a solution might be, for example, the Hungarian Ethnic Minorities Act.

5. Main historical features of the Croatian legal culture

This chapter is focused on the development of the Croatian legal culture by going into various legal systems, which have had effect on the territory of the current Croatian state. The contemporary Croatian legal system has emerged from long-lasting development, which can be denoted as 'periphery' and 'belated' with respect to Western European

[17] Cs. Varga, 'Európai integráció és a nemzeti jogi kultúrák egyedisége' [European Integration and the Individuality of National Legal Cultures], 10 *Jogtudományi Közlöny* (1992) p. 446.

centres.[18] The legal system of the Croatian-Hungarian Union was based on traditional foundations and relied on a collection of rules of customary law called Tripartitum.[19] Having existed within the Habsburg Monarchy and the Austro-Hungarian Empire, this system was subject to modernization and radical reforms, particularly in the second half of the 19th century.[20] The crucial period of the shaping of the Croatian legal culture and 'civil-type living culture', as agreed by most theoreticians, lasted from the mid-19th century to the fall of the Austro-Hungarian Empire in 1918. At that time, Croatian institutions went through the formation stage, which included their development and seeing the state as a stable institution.[21] In this period, a number of laws were adopted and these laws introduced, through their principles and scope, modern institutions of a liberal state into the Croatian legal system and thus modified its nature. The most significant of these laws is definitely the General Civil Code.[22] According to Croatian legal historian Dalibor Čepulo, it was the time, when the Croatian legal system acquired

[18] See D. Vrban, 'Croatian Law Theory at the Doorstep of the 3rd Millenium', in Gy. Andrássy and A. Visegrády, szerk., *Közjogi intézmények a XXI. században: Jogfilozófiai és politikatudományi szekció* (Pécs, PTE ÁJK 2004) pp. 129-144.; D. Čepulo, 'Tradicija i modernizacija: "Iritantnost" Općeg građanskog zakonika u hrvatskom pravnom sustavu' [Tradition and Modernization: the "Irritability" of the General Civil Code in the Croatian Legal System], in I. Gliha, et. al., eds., *Liber amicorum Nikola Gavella* (Zagreb, 2007) p. 3.

[19] See Čepulo, loc. cit. n. 18, at pp. 6-7.

[20] Čepulo, loc. cit. n. 18, at p. 5.

[21] D. Čepulo, 'Vladavina prava i pravna država – europska i hrvatska pravna tradicija i suvremeni izazovi' [The Rule of Law and Rechtsstaat –European and Croatian Legal Traditions and Contemporary Challenges], 51 *Zbornik PFZ* (2001) pp. 1359 and 1354.

[22] The General Civil Code came into force in Dalmatia in the 1820s while on the territory of Croatia-Slavonia, it was applicable from 1853 to 1946. Due to its influence in central and Eastern European countries, the Code tends to be described as 'the focal point of the European legal culture'. See Čepulo, loc. cit. n. 18, at pp. 1-2. Čepulo finds the adoption of the Code to be a certain transfer of law within the framework of G. Teubner's theory on 'legal irritants' and hence investigates the conflict with the tradition, particularly with the institution of communal joint family. Communal joint family was part of the Croatian tradition founded on completely different ground from those laid down in the Code. This particularly refers to the concept of private property. The principles of property law had not been applicable for the majority of the Croatian population until the mid-20th century. Čepulo, loc. cit. n. 18, at pp. 45-47. Cf. A. Uzelac, 'Survival of the Third Legal Tradition', 49 *S.C.L.R.* (2010) p. 378. n. 6.

features of Western law: *rationality*, *positivism*, *secularism* and *professionalism*.[23] The Croatian legal culture underwent major changes with Viceroy Ivan Mažuranić's reforms (1873-1880), when the judicial system was separated from the government and when judges were granted a permanent position. Also, it was the time, when the independent organization of state attorney was established.[24] However, these solutions were not in force for a long time. As soon as in 1884, the Croatian Parliament abolished the permanence of the position of a judge. This was to be restored not before 1917.[25]

The situation changed to a great extent after 1918. From 1918 to 1991, the Croatian legal culture was being developed in 'instable systems of government' and within the scope of 'instable models of institutions'.[26] A fair number of systems of government were present on the territory of the current Croatian state within only one century. In the period from 1918 to 1941, Croatia was part of the first Yugoslav state, which was initially called the Kingdom of Serbs, Croats and Slovenes and later the Kingdom of Yugoslavia. During World War II, Croatian territories were dominated by the Independent State of Croatia, but also by the rule of partisans.[27] The last era, the era of federal state of Yugoslavia, lasted

[23] In Čepulo's opinion, the crucial period of the shaping of the Croatian legal culture lasted from 1848 (resolution of the Croatian Parliament on abolition of feudalism and serfdom and on equality before the law) to 1918. See Čepulo, loc. cit. n. 21, at p. 1347. Čepulo, loc. cit. n. 18, at p. 6. See also A. Uzelac, 'Pravo na suđenje u razumnom roku' [The Right to a Fair Trial within a Reasonable Period of Time], in D. Vujadinović et al., eds., *Između autoritarizma i demokratije, Srbija, Crna Gora, Hrvatska*, Knjiga II [Between Authoritarianism and Democracy, Serbia, Montenegro, Croatia, Volume II] (Beograd, CEDET 2004) p. 381. 'The Croatian legal system is based on a new normative paradigm by the 1848 proclamation of the principle of equality of citizens and by transfer of the General Civil Code and a number of Austrian, at that time contemporary laws referring to the period of pseudo-constitutionality and Habsburg absolutism (1849-1860).' Čepulo, loc. cit. n. 18, at p. 47.

[24] Čepulo, loc. cit. n. 21, at p. 1346.

[25] The 1890 Act on Personal Relations, Official Duties and Disciplinary Proceedings against Judicial Officials provided the government with the power to freely dislocate judges. The 1917 amendment of this Act terminated this possibility. Due to the relation between the judiciary and administrative authorities, Čepulo denotes Austro-Hungarian Empire as well as Croatia as an 'administrative' and not as a 'judicial' state. Čepulo, loc. cit. n. 21, at p. 1347 n. 8.

[26] Čepulo, loc. cit. n. 21, at p. 1359.

[27] Čepulo, loc. cit. n. 21, at p. 1355 n. 23.

from 1945 to 1991. Although this state was the successor of the Kingdom of Yugoslavia from the viewpoint of international law, its system of government represented a radical change with respect to the former state.[28]

Čepulo points out that all the constitutions following the year 1918 were imposed while their enactment was conditioned by political reasons. This is why they can be characterized as short-term and of limited importance.[29] The resolution of issues by frequent constitutional amendments prevented the rule of law in the sense of self-restriction of the power of government and legal security.[30]As far as the status of the judiciary in the first Yugoslav state was concerned, the conditions for the appointment of judges match those for the appointment of clerks, which enabled the authorities to exercise their influence on the judicial system and election of 'eligible judges'.[31]

The second Yugoslav state was the socialist one. The socialist legal tradition had special features, which made it different from both the tradition of civil law, which the former had been derived from, and from the tradition of common law.[32] The socialist legal tradition used law for instrumental purposes. Law had to serve new economic and social policies, i.e. it should remedy the injustice done by bourgeois capitalistic law.[33] Law as an "instrument of the ruling political class", at that time the proletariat, should primarily protect its interests. Jurists primarily needed to be 'skilful technicians' who were supposed to shape and protect the interests of the new ruling class defined by the Communist Party.[34] The Yugoslav legal system contained numerous experimental and unique solutions, out of which the system of self-management socialism was the most significant one. This system of self-management

[28] Vrban, loc. cit. n. 18.

[29] In Čepulo's opinion, the attitude towards the constitution was 'voluntaristic', 'experimental' and 'overpoliticized'. Čepulo, loc. cit. n. 21, at p. 1355.

[30] Čepulo, loc. cit. n. 21, at pp. 1359, 1343 and 1344.

[31] Čepulo, loc. cit. n. 21, at p. 1348.

[32] See J. H. Merryman, *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, Stanford University Press 1985) p. 1. quoted by Uzelac, loc. cit. n. 22, at p. 377.

[33] Uzelac, loc. cit. n. 22, at p. 377. According to Uzelac, the thesis that law is an instrument of economic and social policies is ideologically neutral. Law is an instrument of economic and social policies which can be differently defined by regimes of different ideologies. Uzelac, loc. cit. n. 22, at p. 380.

[34] Uzelac, loc. cit. n. 22, at p. 382.

socialism also served as the role model for many leftists in the West.[35] In reality, this system facilitated unlimited and excessive legislation as well as frequent amendments of legal documents, including both legal documents of the lowest rank – by-laws and those, which had a permanent character – constitutions.[36]

In terms of the status of the judiciary, the socialist Yugoslavia, like other socialist states, adopted the doctrine of the unity of state power.[37] It means that the independence of the judiciary did not exist in reality. The election of judges was affected by the politics and people's representative bodies. Membership in the Communist Party was a condition precedent to their appointment.[38] Also, during the entire communist reign in Yugoslavia, there were various forms of influence on judicial decision-making.[39] Nevertheless, it should be noted that Yugoslavia differed from other socialist regimes in liberality and openness to the external (non-socialist) world.[40] Repression was not such an obvious thing as it was in other socialist states since there was no *prokuratora*.[41] In compliance with the above lines, one can say that judges in the socialist Croatia did not have the reputation of professional, independent and impartial officials. Croatia in its long history has not been featured by consistence of judicial independence as one of the prerequisites of the rule of law.[42]

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[35] Čepulo, loc. cit. n. 21, at p. 1350. In the former Yugoslavia, the concept of social property was coined in the 1950s and it was a form of public property. As considered by Padjen and Matulović, this was an alternative to the soviet model of statist socialism. In compliance of the self-management doctrine, public property is defined as a socio-economic relationship wherein means of production belong to every single member of society and, at the same, to all of them jointly. I. Padjen and M. Matulović, 'Cleansing the Law of Legal Theory', 1 *Croatian Critical Law Review* (1996) p. 31.

[36] Notably, four constitutions and a number of constitutional amendments were adopted from 1945 to 1990. Čepulo, loc. cit. n. 21, at pp. 1352 and 1355 n. 23.

[37] Uzelac, loc. cit. n. 22, at p. 386 n. 20.

[38] Čepulo, loc. cit. n. 21, at p. 1350.

[39] Tito's words that a judge must not strictly adhere to the law are often cited. Accordingly, judges were supposed to interpret laws in a creative fashion. Uzelac, loc. cit. n. 22, at p. 382, Čepulo, loc. cit. n. 21, at p. 1351.

[40] Uzelac, loc. cit. n. 22, at p. 381.

[41] E. Blankenburg, et al., eds., *Legal Culture in Five Central European Countries* WRR Working Documents no. W111 (The Hague, 2000) p. 14.

[42] Cf. Čepulo, loc. cit. n. 21, at p. 1358.

6. Croatian legal culture after the democratic political metamorphosis

The following subsections are focused on the evaluation of the contemporary Croatian legal culture by means of the above mentioned indicators.

6.1. Written and living law

With the fall of the Berlin Wall and communist/socialist regimes at the end of the 1980s in Europe, the socialist legal tradition should have met its end. The Republic of Croatia's Constitution of 1990 adopted liberal and democratic standards and was based on the principles of separation of powers and the rule of law. The rule of law and other related values, such as the respect for human rights, freedom, equality, non-discrimination on the basis of nationality, were established as the foundations for the interpretation of the Constitution.[43] However, since no change of legal and political culture is instantly possible and this being a long-term process, to denote the situation Croatia and other Eastern European countries found themselves in at the time, the term of 'countries in transition' was coined.[44] Croatia faced, due to insufficient legal and cultural foundations, a gradual and lengthy process of adopting new values and behaviours.[45] After a long-lasting constitutional-political crisis, Croatia was to face another particularly aggravating circumstance. That was the dissolution of the Socialist Federal Republic of

[43] Article 3 of the Constitution. The Constitution of the Republic of Croatia – consolidated text (Off. Gaz. 85/10). Čepulo has detected certain disharmony between the fact that the Croatian legal culture was shaped in the 19th century under the influence of the German and Austrian legal culture that both preferred the concept of the legal state (*Rechtsstaatprinzip*) and the fact the 1991 Constitution was based on the Anglo-Saxon concept of the rule of law. The constitution makers were aware of their choice of terminology. The term of 'legal state' implies negative connotations among Croatian people since it is often connected with 'repressive use of force' for the purpose of implementation of legal regulations. See Čepulo, loc. cit. n. 21, at p. 1340 and 1338. The term of the rule of law refers not only to respecting laws but also to deeper meta-juristic principles. Duško Vrban depicts the rule of law as 'an idea of human freedoms applied to the constitutional-legal order and related to protection of personal freedoms, respect for human rights and the appertaining role of courts'. D. Vrban, *Država i pravo* [State and Law] (Zagreb, Golden Marketing 2003) p. 43.

[44] Uzelac, loc. cit. n. 22, at p. 378.

[45] Cf. Čepulo, loc. cit. n. 21, at p. 1358.

Yugoslavia. Based on a binding referendum, the Croatian Parliament adopted the Declaration of the Sovereignty and Independence of the Republic of Croatia in June 1991.[46] Article IV of the Declaration prescribed that 'in the territory of the Republic of Croatia only those laws shall be in effect as passed by the Parliament of the Republic of Croatia, and until the disassociation is ended those federal regulations that have not been repealed as well'.[47] The military aggression against the Republic of Croatia, which lasted until 1995, was an immediate consequence of the declaration of independence. In a very short period, Croatia went through a transition from a federal unit to an internationally recognised state. However, with regard to 'living law', some theoreticians argue that the declarative adoption of the principle of divided power and independent judicial system has failed to bring any major shifts compared to the previous authoritative state practice. Alan Uzelac sees remnants of the socialist tradition in the fact there is still a prevailing opinion in Croatia that important political goals should have precedence over law. In this context, he finds no differences between the statement of former Yugoslav president Josip Broz Tito claiming that jurists should not strictly adhere to the law and the statement of Mr Franjo Tuđman, the first Croatian president, asserting that the main task of courts is to defend national interests.[48] These two statements undoubtedly represent features of 'legal voluntarism'.[49]

[46] The issue of human rights granted by the constitution appeared immediately after Croatia had become independent. During the military aggression against the Republic of Croatia or precisely at the end of 1991, the president of the Republic of Croatia enacted, within the framework of his constitutional powers, a number of emergency decrees, out of which some denied constitutional human rights. For more details see Padjen and Matulović, loc. cit. n. 35, at p. 50.

[47] See Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia. http://narodne-novine.nn.hr/clanci/sluzbeni/254485.html

[48] What is worth noting is a novelty generated by the Constitution of the Republic of Croatia referring to the manner of election of judges and state prosecutors by the body mostly constituted of judges and prosecutors (National Judicial Council and National Prosecutorial Council). Furthermore, particular association of judges were established for the purpose of protection of the independence of Croatian courts. See Uzelac, loc. cit. n. 22, at p. 382 and 395.

[49] Čepulo, loc. cit. n. 21, at p. 1351. However, the Croatian legal culture shows signs of change even in this area. Namely, the Association of Croatian Judges has promptly reacted to the statement of the deputy Prime Minister Mr Radimir Čačić relating to the appointment of Mr Srećko Ferenčak as a member of the Supervisor Board of JANAF (Adriatic Oil Pipeline). Mr. Ferenčak has been pronounced by a

In that respect, Croatia's Constitutional Court played a significant role of using its special powers to make up for the weakness of a political culture. The Constitution awarded the Constitutional Court with a jurisdiction comparable to that of the German and Austrian models.[50] Interpretations (of constitutionality) by the Constitutional Court are binding upon ordinary courts. Even though the institution of constitutional court was known in the former Yugoslavia since 1963, the Constitutional Court of the Republic of Croatia gained its role of 'the guardian of the Constitution' only with the foundation of the independent Croatia.[51] In that respect, its role in deciding constitutional complaints for breaches of constitutionally guaranteed human rights is especially important.[52] Judicial activism is essential for the realisation of the rule of law, and for the realisation of human rights in particular.[53] The Constitutional Court has proved by its decisions that the rule of law is 'more than a mere requirement to act in accordance with a law: it also involves requirements that concern the contents of the law'. [54]

non-final court judgement guilty for illegal acquisition of property. Mr. Čačić stated that he believed that Mr Ferenčak was going to prove his innocence in a political show trial. This Association has seen it as an attack to the independence of Croatian courts. See S. Abramov, D. Ciglenečki and J. Marić 'Suci: Izjave političara narušavaju povjerenje javnosti u pravosuđe' [Judges: Politicians' Statements Shake the Public Reliance in the Judicial System], *Glas Slavonije*, 4 and 5 February 2012, pp. 4-5.

[50] Matulović and Padjen analysed and criticized early judgments of judges of the Constitutional Court of the Republic of Croatia (in the period from 1990 to 1994) since they had neither created nor adhered to existing human rights doctrines. At that time, the Constitutional Court made a number of decisions which entailed reaction of scholars and professionals as well as of a broader public. These decisions concerned the conditions for getting Croatian citizenship, eviction from flats owned by the former Yugoslav People's Army, violation of human rights by means of emergency decrees enacted by the Croatian president and freedom of press. See Padjen and Matulović, loc. cit. n. 35, at pp. 28 and 42. See also J. Omejec, 'Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova' [The new European Transitional Constitutions and Transformative Role of Constitutional Courts], in A. Bačić, ed., 'Dvadeseta obljetnica Ustava Republike Hrvatske' (Zagreb, HAZU 2011) p. 77.

[51] Blankenburg, et al., eds., loc. cit. n. 41, at p. 47.

[52] Blankenburg, et al., eds., loc. cit. n. 41, at pp. 47 and 75.

[53] See Padjen and Matulović, loc. cit. n. 35, at p. 28.

[54] The decision of the Croatian Constitutional Court: U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000, t. 11. See more about judicial activism in A. Blagojević, 'O ulozi ustavnih sudova post-komunističkih

6.2. The legal profession

Judicial independence is one of the prerequisites for the rule of law and valuation of judicial authority.[55] Under socialism, judges enjoyed neither independence, nor renown, as already indicated, their re-election depended upon various political bodies. In practice, their 'political and moral suitability' was examined.[56] Decisions of importance were not made by courts, but by the leadership of the Communist Party.[57] The relevance of their work was minimised also by the fact that private ownership was limited and most companies were state-owned.[58] According to Croatian civil and procedural law expert Alan Uzelac, an outside observer would hardly notice the difference between the positions of judges and other civil servants in the state administration.[59] The number of judges in the former Yugoslavia corresponded to the average high in Austria and Germany.[60] The profession of attorneys as private professionals, who enjoyed freedom and were not subjected to strict state control, was also maintained in existence.[61]

europskih država u tranziciji prema demokraciji: hrvatski slučaj' [On the Role of Constitutional Courts of Post-communist European Countries in Transition to Democracy: the Croatian Case] in A. Bačić, ed., *Ustavi i demokracija: strani utjecaji i domaći odgovori* [Constitutions and Democracy: International Influences and National Responses] (Zagreb, HAZU 2012 under publication).

[55] Čepulo, loc. cit. n. 21, at p. 1359.

[56] Uzelac, loc. cit. n. 23, at p. 383. See arts. 11, 75 and 87 of Law on Regular Courts (Off. Gaz. 5/77, 17/86, 27/88, 32/88, 16/90, 41/90, 14/91 and 66/91) See Uzelac, loc. cit. n. 22, at p. 386 n. 22.

[57] Uzelac, loc. cit. n. 22, at p. 385.

[58] Uzelac, loc. cit. n. 22, at p. 386. In a society having usually been dominated by the 'collectivistic doctrine', judicial procedure was reduced to the level of a 'second class mechanism of social regulation' aimed at resolution of secondary issues and regulation of 'private delicts' such as personal and property disputes. Uzelac, loc. cit. n. 23, at p. 382.

[59] Uzelac, loc. cit. n. 22, at p. 386.

[60] Uzelac, loc. cit. n. 22, at p. 387. In 1989, there were 1,615 judges in Croatia administering justice at regular courts, commercial and misdemeanour courts. Also, there were 372 public prosecutors and their deputies and 115 state attorneys and their deputies. One should emphasize that at that time, Croatia also involved a Court of associated labour of the Republic of Croatia and nine basic courts of associated labour. See Statistical Yearbook of the Republic of Croatia (Zagreb, Republički zavod za statistiku Republike Hrvatske 1990) pp. 345-347.

[61] Being an attorney was often considered a family tradition in Croatia. In the former Yugoslavia, advocacy was regulated by special laws (1946, 1957 and 1970 Act). A

At the end of 2010, in all Croatian judicial bodies there were a total of 10,292 employees, 2,464 of whom were judicial officials, i.e. 1,887 judges and 577 public prosecutors and their deputies.[62] The number of attorneys in Croatia is on a major rise today. While they counted 737 in 1979, their number rose to 3,733 in 2009 and to 4,155 in 2012.[63] The reasons for this increase are various. Some think that the rise has resulted from an increasing need for lawyers' services whereas others attribute it to the collapse of large companies having operated in the era of workers' self-management and relating dismissal of a great number of workers as well as to the fact that university enrolment quotas include too many future jurists which are currently not needed on the labour market and hence young jurists are forced to start a carrier as attorneys.[64]

As far as the legal profession is concerned, Croatia has, like in the period preceding its independence and transition, four law faculties. The legal science, just like other social sciences and humanities in Croatia, has been linked with Western European standards thanks to prominent jurists since the era of the Socialist Federal Republic of Croatia.[65] The overall number of students enrolled in Croatian law colleges in the

Professional Code of Ethics was adopted too (1967). The Socialist Republic of Croatia included the 1972 Act on Lawyers and Legal Aid, the purpose of which was to diminish the social importance of advocacy. See Ž. Bartulović, 'Iz povijesti odvjetništva' [From the History of the Legal Profession], 74 *Odvjetnik* (2001) pp. 26-32.; Uzelac, loc. cit. n. 22, at p. 387. See also the web-site of the Croatian Bar Association http://www.hok-cba.hr/Default.aspx.

[62] Statistical review of the Croatian ministry of justice 2010, www.pravosudje.hr/lgs.axd?t=16&id=2381 p. 2.

[63] See M. Matasović, 'U dvadesetak godina broj odvjetnika u Hrvatskoj povećan za čak 400 posto' [In Twenty Years the Number of Attorneys in Croatia Increased by 400 Percent] http://www.glas-slavonije.hr/vijest.asp?rub=1&ID_VIJESTI=115965, October 29 2009.

[64] Ibid. As stated by Mr Leo Andreis, president of the Croatian Bar Association, the Croatian Constitution does not allow rejection of registration in the Bar to those who have met the formal requirements for the Bar membership. In Croatia there are also 317 notaries public. Notaries were an unknown entity at the time of SFRY. They were introduced into the Croatian legal system on the 1st January 1995. See the web-site of the Croatian Civil Law Notaries Chamber: www.hok-cba.hr/Default.aspx.

[65] Padjen and Matulović, loc. cit. n. 35, at p. 17.

academic year 1989/1990 totalled 5,458 while in the academic year 2008/2009, this figure jumped to 11,113.[66]

6.3. Litigation

One of the most significant indicators of a judicial crisis is the lengthiness of court proceedings.[67] Under socialism, judicial efficiency was not a political priority, and judges were guaranteed protection from political persecution by long and 'formalised' court proceedings.[68] Thus, in 1989 Croatian courts had 1,240,000 new cases, 485,000 of which were backlogs. After gaining its independence, the number of backlogs almost doubled by 1998, when there were 1,006,000 new cases and 895,000 unresolved cases. After becoming a member of the Council of Europe and being subjected to the jurisdiction of the European Court of Human Rights as the highest judicial body for the interpretation of the European Convention on Human Rights, Croatia lost its initial cases specifically for breaching the right to trial within reasonable time limit.[69] Thus, solving the backlogs problem became a priority. To that end, changes to procedural laws were made.[70] There are different explanations for court backlogs. From the inefficiency of judges themselves, slow transition to the insufficient number of judges.[71] The latter is certainly not the case in Croatia. Uzelac claims that the problem of long court proceedings has its roots in legal and political culture, primarily that which evolved during socialism. It is considered that socialist judges, due to the insecurity of their position and in fear from retribution, developed special methods of avoiding responsibility for decisions made. This was facilitated, as Uzelac indicates, by the almost absolute constitutional right to complaint, which had come into the legal

[66] See Statistical Yearbook of the Republic of Croatia, 1990, p. 308, Statistical Yearbook of the Republic of Croatia, 2009, p. 468.
[67] Uzelac, loc. cit. n. 23, at p. 379.
[68] Uzelac, loc. cit. n. 23, at pp. 382-383.
[69] See cases, *inter alia*, Rajak (49706/99), Mikulić (53176/99). For an analysis see Uzelac, loc. cit. n. 23, at p. 380.
[70] Numerous procedural acts have been amended: Misdemeanour Act, Criminal Procedure Act, Administrative Dispute Act, Civil Procedure Act and Execution Act. From the document Judicial reform 2011- 2015 (Official Gazette 145/10) V. 4.
[71] Compare survey of the legal culture in Slovenia which is facing the same problems as other transitional countries. N. Tromp, 'Republic of Slovenia' in E. Blankenburg, et al., eds., *Legal Culture in Five Central European Countries*, WRR Working Documents no. W111 (The Hague, 2000) p. 69.

system via Article 214 of the 1974 SFRY Constitution, which has survived until today in an almost identical form under Article 18 of the Croatian Constitution.[72] Still, it is obvious that a significant step forward regarding justice efficiency has been made in the last years. The total number of unresolved cases at courts amounted to 1,640,365 as of 31 December, 2004 while this figure went down to 795,722 cases as of 31 December, 2009 and to 785,561 cases as of 31 December, 2010.[73]

7. The impact of EU membership on Croatian legal culture

The Treaty of Accession of the Republic of Croatia into the European Union was signed in Brussels on 9 December, 2011. Croatia put great efforts in the accession procedure in terms of harmonization of its legislation with the *acquis communautaire* of the European Union.[74] In 2010, the Croatian Parliament introduced a new chapter (Chapter VIII) of the Constitution entitled 'European Union' regulating, among other things, the legal basis for the membership and the status of EU law in the national legislation. However, the harmonization of the Croatian legal system with the legal heritage of the EU does not only encompass harmonization of legal rules but also harmonization of the meaning of

[72] Yugoslav constitution (Official Gazette 9/1974). Notably, Uzelac singles out the following methods which help judges stay anonymous, i.e. not to make and take responsibility for their decisions: deconcentrated proceedings, excessive formalism, the pursuit of material truth, lack of procedural discipline, multiplicity of legal remedies that delay enforceability. Even appellate judges, in Uzelac's opinion, possess their own strategies, out of which the most important one is forwarding a case to a lower instance court for a retrial. Uzelac, loc. cit. n. 22, at p. 390 and 385. The ratio between retrial and finally resolved cases by the appellate courts numbered 3.5:1 in the period from 2006 to 2008. Uzelac, loc. cit. n. 22, at p. 393. n. 38.

[73] From the document Judicial reform 2011-2015 (Official Gazette 145/10) V. 4. at p. 3. According to the data published in the Report of the European Commission for the Efficiency of Justice (CEPEJ), the average time needed for resolution of a civil and commercial dispute at first instance courts in Croatia amounted to 498 days while the equivalent figure in Hungary totalled 170 days. See European Judicial Systems, Edition 2010 (data 2008): Efficiency and Quality of Justice (Croatian edition, Zagreb, Ministarstvo pravosuđa Republike Hrvatske 2011) p. 149.

[74] The integration of EU law in the Croatian legal system can be compared with the influence of the General Civil Code on the Croatian legal culture. Čepulo, loc. cit. n. 18, at p. 2-3.

these rules.[75] It is not a wonder that Croatian scholars and experts are concerned about the following matter: Will Croatian courts be able to apply treaties, European legislation and principles established by the European Court?

In Siniša Rodin's view, the starting points of Croatia and new members of the EU, i.e. mostly members of the former communist bloc, significantly differ from the starting points of its old members. According to Rodin, the legal and political cultures of old EU member states are traditionally based on 'democratic pluralism', whereas those of the 'post-communist member states' still possess features of their communist heritage – authoritarian acceptance of one 'ultimate truth'.[76] The culture of the latter states is reflected in the role of courts. The Croatian legal system does not find judges very relevant for the development of law.[77] Croatian judges do not have 'creative powers' when resolving cases.[78] The willingness of judges to directly apply the constitution and ratified international treaties is a good indicator of the status of courts within a constitutional order.[79] With respect to the Croatian legal order, it happens very rarely at ordinary courts, which base their judgments mostly on laws and bye-laws.[80] Therefore, the

[75] S. Rodin, 'Diskurs i autoritativnost u europskoj i postkomunističkoj pravnoj kulturi' [Discourse and Autoritarianism in European and Post-communist Legal Culture], XLII *Politička misao* (2005) p. 60.

[76] Rodin, loc. cit. n. 75, at pp. 42 and 47.

[77] In Rodin's opinion, the Croatian judicial practice has no effect on the legislators. Unlike other European countries that support codification of judicial practice by legislators, Croatia does the opposite, the legislators often pass regulations which are contrary to the judicial practice. Moreover, these regulations consequently delete the judicial practice. See S. Rodin, 'Interpretativna nadležnost Vrhovnog suda RH po novom Zakonu o sudovima' [Interpretative Jurisdiction of the Supreme Court of the Republic of Croatia Under the New Law on Courts], authorized presentation at the 10th panel of the Faculty of Law of the University of Zagreb and Zagreb Lawyers Club, Zagreb, 19th April 2006.
http://www.pravo.unizg.hr/_download/repository/INTERPRETATIVNA_NADLEZNOST_VS_RH_PO_NOVOM_ZAKONU-31-01-06.pdf, at p. 11. See also T. Ćapeta, 'Interpretativni učinak europskog prava u članstvu i prije članstva u EU' [Interpretative Effect of European law in and before EU Membership], 56 *Zbornik PFZ* (2006) pp. 1443-1494; T. Ćapeta, 'Court, Legal Culture and EU Enlargement', 1 *Croatian yearbook of European law & policy* (2005) pp. 23-53.

[78] Ćapeta, 2006, loc. cit. n. 77, at p. 9.

[79] Rodin, loc. cit. n. 75, at p. 50.

[80] Rodin, loc. cit. n. 75, at pp. 50-51.

constitution makers felt an urge to explicitly stipulate by Article 118 paragraph 3 of the 2010 Constitution that judges shall administer justice based on the Constitution, laws (acts), international treaties and 'other valid sources of law'.

The strictly linguistic interpretation of legal provisions is a wide-spread occurrence in the Croatian legal practice. When making decisions, judges rely on legal logic and do not take the political background into consideration, probably just to avoid the connection with the communist past.[81] Justification of judgments is derived from the text of a respective provision and not from its meaning and purpose.[82] The resolution of the described issue would be significantly facilitated by establishment of a Judicial Academy, priorities of which should include vocational training of judges and state prosecutor deputies.[83]

No comprehensive empirical survey on the legal consciousness has been conducted in the Republic of Croatia since it became independent. Instead, there was a recent survey of the level of familiarity and acceptance of EU institutions and law by Croatian citizens. According to the results, Croatian citizens possess an average knowledge of European institutions and treat them neutrally.[84] In the end, it is important to bring up that now, when accessing the EU, Croatia should keep on

[81] Rodin, loc. cit. n. 75, at pp. 56 and 58. See also I. Padjen, 'Izvori prava po prijedlozima promjene Ustava RH 2009' [Sources of Law in the Proposed Changes of the Constitution of the Republic of Croatia of 2009], in O. Cvitan, *et al*, ed., *Ustavne promjene Republike Hrvatske i Europska unija* [Constitutional Changes in Croatia and the European Union] (Split, Pravni fakultet u Splitu 2010) pp. 13-18.

[82] Rodin, loc. cit. n. 75, at p. 58.

[83] See Uzelac, loc. cit. n. 22, at p. 396 n. 42. See also the web-site of Judicial Academy http://www.pak.hr/eng/.

[84] L. Burazin and M. Krešić, 'U kojoj mjeri hrvatski građani poznaju i vrijednosno prihvaćaju institucije i pravo europske unije? - važnost empirijskih istraživanja za teoriju prava' in I. Šimonović, ed., *Poznavanje i vrijednosno prihvaćanje europskog i međunarodnog prava u Republici Hrvatskoj* [Knowledge and Acceptance of European and International law in the Republic of Croatia] (Zagreb, 2012, under publication). The Croatian public opinion was pro-European even prior to the democratic transition. That fact is clearly indicated by a survey comprising 2, 608 examinees in 13 municipalities who were asked to opt for two out of eight political values which should be supported by the party of their choice at the first parliamentary elections in Croatia in 1990. The biggest number of citizens chose pro-European orientation (72, 61%) followed by Croatian independence (44, 37%). See I. Grdešić, *et al*., *Hrvatska u izborima '90* (Zagreb, Naprijed 1991) p. 13., quoted by Padjen and Matulović, loc. cit. n. 35, at pp. 67-8.

maintaining and developing its constitutional order. The constitution represents a basis for every form of international integration and human rights protection. On the other hand, it should prevent unauthorized interference into internal affairs of a state as well.[85]

8. Concluding remarks

Legal institutions are part of legal cultures of states.[86] Numerous empirical surveys have shown that legal results differentiate between legal cultures in some way, but this 'some way' is not explicable by 'written law'.[87] Legal culture implies various historically rooted attitudes on the nature of law, its application, generation and studying.[88] It is not exclusively a result of current circumstances, but it is, to a great extent, subject to the legal-political traditions of the past.[89] Both Hungary and Croatia are successors of the Austrian legal tradition. During their long historical development, both countries have failed to establish independent judicial systems and hence their judiciary, unlike in Anglo-Saxon countries, has never had a proper reputation. Nevertheless, both countries have facilitated the adoption of two important constitutional decisions in the last 20 years. The first one refers to the return to the capitalistic ideology, while the second one relates to accession into European integrations.[90] These two resolutions have affected the legal awareness and culture of the two respective states. However, even today, many issues of the legal system arise from

[85] B. Smerdel, 'Apel eurorealista: sačuvati hrvatski Ustav' [Appeal From a Eurorealist: Preserve the Croatian Constitution], *Informator* 5949 (2011) p. 3. See also I. Padjen, *Project Proposal "Legal System: Croatian Identity and Croatian Value"* submitted to the Croatian Science Foundation on 27 May 2011 and supplemented on 6 June 2011.

[86] Cf. Blankenburg, et al., eds., loc. cit. n. 41, at p. 11.

[87] L.M. LoPucki, 'Legal Culture, Legal Strategy, and The Law in Lawyers' Heads', 90 *Nw. U. L. Rev.* (1995-1996) p. 1555.

[88] Uzelac, loc. cit. n. 22, at p. 379.

[89] Čepulo, loc. cit. n. 18, at p. 1137.

[90] On fundamental constitutional decisions and 'constitutional choices' see B. Smerdel, 'Zadaće pravne znanosti i pravničke struke na dvadesetu obljetnicu 'Božićnog ustava'' [Tasks Before the Legal Science and Legal Profession on the 20th Anniversary of the "Christmas Constitution" – Constitutional Choice and Processes of Realization of Highest Constitutional Values and Strategic Goals of the Republic of Croatia] in A. Bačić, ed., *Dvadeseta obljetnica Ustava Republike Hrvatske* [Twentieth Anniversary of the Croatian Constitution] (Zagreb, HAZU 2011) p. 47.

the authoritarian legal culture originating from the communistic period. The Croatian legal science includes various issues, such as numerous unresolved cases, long-lasting judicial proceedings and the perception of courts as bare applicators of law possessing no creative powers. Regardless of the current differences between the two states (for instance, Croatia belongs to the group of countries featured by long-lasting judicial proceedings, while Hungary is characterized by short judicial proceedings), they have both shown great advancement in the development of institutions of the rule of law.

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Dissolution of the Austro-Hungarian Empire – reflections on the Croatian and Hungarian statehood and legal status

I. Hungary after the dissolution of the Austro-Hungarian Monarchy

As soon as Hungary stopped being a member of the Austro-Hungarian Monarchy in 1918, two years had to pass to get the state's organization stabilized because until 1920 two revolutionary governments followed each other in Hungary having absolutely different constitutional ideology about the future organization of the state. The first part of the article wants to describe the constitutional and administrational organization of the state after the dissolution of the Austro-Hungarian Monarchy summarizing essentially the main constitutional milestones on the basis of the approved acts of law and legal and historical literature.

1. Changes in the form of government after the dissolution of the Austro-Hungarian Monarchy

The dissolution of the Austro-Hungarian Monarchy in 1918 was a consequence of several factors influencing each other that made the dissolution of the until then existing state formation based on personal union inevitable. The dissolution of the multinational Monarchy wasn't a new idea, since many people predicted it along the 19th century, moreover Oszkár Jászi, a politician at the beginning of the 19th century characterized this region as a powder keg filled with 'the pent-up unsolved national and social problems'.[1]The First World War and the

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[1] O. Jászi, *A Habsburg-Monarchia felbomlása* [The dissolution of the Habsburg Monarchy] (Budapest, Gondolat 1982) p. 75.

following economic and social crisis caused by it together with the signing of the Trianon Pact was only the detonator of this powder keg. Besides as cause of the monarchy's dissolution also the foreign and inner negative echo accompanying the politics of Charles IV and the revolutionary wave sweeping around in many countries of Europe can also be mentioned.

The detailed description of Charles IV's life and politics is not the aim of this article since many excellent works have already been dedicated to this topic, so here only those facts are detailed that directly anticipated the Hungarian revolutionary movement. The cause why Hungary was evaluated negatively during the First World War is to be found in the peace trials of Charles IV, because based on his inconsistent political behaviour not only Entente states, but also some of the Central Powers states withdrew their confidence from Charles IV. The inner political situation was sharpened by the manifesto issued on 16th October 1918 containing the dynastic concept of the king aiming the federal remodelling of the Empire. Since this manifesto did not bring an effective solution for the people of the monarchy, the establishment of the independent Czech Republic was proclaimed – just at the time of the issue of the manifesto – on 28th October 1918 and the Slovak National Council decided to unite with the Czech lands on 30th October, by which Czechoslovakia came to life. The Galician parts also decided to separate from the monarchy and they proclaimed their union with Poland and the establishment of the Kingdom of Serbs-Croats-Slovenians was also announced on 30th October 1918.[2] On 3rd April 1919 the Austrian national assembly dethroned the Habsburg dynasty annulling all their dynastic rights.

The National Council was established on 25th October 1918 in Hungary by the members of the independence party led by Mihály Károlyi and the members of the social democrats' and civil radicals' parties that set the goal to carry out bourgeois democratic reforms. As a consequence of

[2] See S. Hegedűs, *Az utolsó trónfosztás* [The last dethronement] (Budapest, Kossuth Könyvkiadó 1970) pp. 54-86; P. Schönwald, *A magyarországi 1918-1919-es polgári demokratikus forradalom állam- és jogtörténeti kérdései* [The constitutional and legal historical questions of the Hungarian bourgeois democratic revolution of 1918/1919] (Budapest, Akadémiai Kiadó 1969) pp. 11-24; Mezey Barna, szerk., *Magyar alkotmánytörténet* [Hungarian Constitutional History] (Budapest, Osiris 1995) pp. 231-232; I. Lajos, *IV. Károly élete és politikája* [The life and politics of Charles IV] (Budapest, A magyar nők szent korona szövetségének kiadványa 1935).

the bourgeois democratic revolution of 29/30th October, Mihály Károlyi was appointed to form a new government. It is remarkable that Mihály Károlyi took his oath to Charles IV as Head of the State and at this time there were no words about his replacement. The question of the government's form raised only in front of the Parliament that demanded the proclamation of the republic instead of the monarchy.

The royal power left off on 13th November 1918 in Hungary, when Charles IV signed in Eckartsau that he would resign from managing state affairs.[3] Under this declaration the Parliament decided to dismiss itself on 16th November and it delegated the supreme power over the state to the government led by Károlyi. Although according to the 'People's Decree' issued by the National Council the new constituent assembly would be entitled to elaborate the new constitution of Hungary, until the establishment of the assembly, the people's government, based on the general elections called on a newly promulgated act on the universal suffrage, was entitled to legislate the needful people's acts, by which authorization the people's government became also a legislative organ besides being the executive one.

The National Council put on the agenda of the Parliament the question of the form of government based on the debates on 1st November, so at the time of the Parliament's self-dismissal after the resignation of the King Hungary stopped being a monarchy and the People's Republic was proclaimed on 16th November 1918.[4]

The People's Government suffered a crisis after receiving the Vyx Memorandum on 20th March 1919 and resigned from power at the time of the Memorandum's rejection. After the resignation of the government the Hungarian Socialist Party got the power and proclaimed the

[3] The declaration had the following text: 'I was out to do since my accession to the throne to keep all my people away from the horrible of the war, in the breaking of which I had no part. I do not want my person to be the obstacle of the Hungarian nation's development towards which nation I am still full of unchanged affection. Hence I resign from every handling of the state affairs and I do confirm in anticipate any decision by which Hungary states its future form of government.' The preamble of Act I of 1920. Hegedűs, op. cit. n. 2, at p. 110; Schönwald, op. cit. n. 2, at p. 41; Lajos, op. cit. n. 2 at p. 521; E. Kovács, 'Krönung und Dethronization Karls IV., des letzten Königs von Ungarn im spiegel Vatikanischer Dokumente' in *Festschrift für Hans Hermann Kardinal Groër zum 70. Geburtstag* (Salterrae 1989) p. 415.

[4] In the proclamation of the republic also the proclamation of the Republic in Austria (12 November) and Czechoslovakia (13 November) played an immense role. Schönwald, op. cit. n. 2 at p. 39.

Hungarian Soviet Republic in the name of the Revolutionary Governing Council. The Hungarian Soviet Republic promulgated its constitution on 23rd June 1919 with the title 'The Constitution of the Hungarian Socialist Allied Soviet Republic'.[5] However, the Hungarian Soviet Republic was no constitutional state at all, but a full dictatorship characterized this period of time, in which the three branches of power were concentrated in the hand of the Revolutionary Governing Council. This period lasted for few months only because an insupportable war situation developed as a consequence of the former demilitarization of the Hungarian army by Mihály Károlyi and the occupational movement of the Romanian troops on 1st August 1919, so the government led by Béla Kun resigned and a new government was formed by Gyula Peidl for a short time (1-6 August 1919). The form of government turned to be again a People's Republic until the government of István Friedrich took over the power.

After the call of elections and the formation of the national assembly the Act I of 1920 was approved on 16th February 1920. According to Article 9 of this act, all acts of law and orders promulgated in the period of both the People's Republic and Hungarian Soviet Republic became overruled, they had to be erased from the National Collection of Statutes and the legal continuity with the state existing before 29th October 1918 was proclaimed.

The new form of government turned to be a constitutional monarchy again but only an interim decision regarding the Head of the State was made until the national assembly could settle the question of the state's supreme power definitely.[6] The act declared the royal power finished and overruled the Pragmatic Sanction of 1723. The governor elected by the national assembly became the chief of the executive power[7], but the definite decision on the form of the head of the state and form of government was put off to the times after the signing of the peace treaty.

2. The powers of the Head of the State

After the revolution of 1918 the People's Government indeed became the possessor of the supreme state power. Because of being entitled to legislation, its main function was characterized by its law-making

[5] Mezey, szerk., op. cit. n. 2 at p. 348.

[6] F. Pölöskei, *Horthy és hatalmi rendszere, 1919-1922* [Horthy and his system of power, 1919-1922] (Budapest, Kossuth Könyvkiadó 1977) pp. 92-98.

[7] Act I of 1920 detailed preamble.

process result, of which it proclaimed several people's acts and besides it also executed the power of head of state.

After the governmental crisis of 8th January 1919 the ministers belonging to the Social Democratic Party resigned and Mihály Károlyi was nominated as temporary Head of the State as President of the Republic. From this time acts of law could enter into force, if they were signed by him.

During the Hungarian Soviet Republic the Revolutionary Governing Council processed as both Head of the State and government. It had a chief and the people's commissars were the leaders of the administrative departments.

As previously mentioned, after proclaiming the legal continuity the power of the Head of the State was exercised by the governor. According to Act II of 1920, the members of the national assembly elected Miklós Horthy as governor of the state.[8] His election to governor was important, because of the King's resignation although the national assembly did not consider the declaration of Eckartsau valid just because it hasn't been countersigned by a minister, so Hungary became a 'Kingdom without a King' in 1920 only for this reason. There was also an idea about electing a Palatine who used to be the King's deputy in the former centuries, but the person of the Palatine could be nominated only on the proposal of the King - according to Act III of 1608 on Coronation - who did not exist at that time and there were no Palatines elected from 1867 on, so the idea was dropped. To elect a Palatine the remaking of the Act VII of 1867 regarding the Palatine would have been important.

[8] This article deals with the powers of the governor in general, so it does not contain any specific description of Miklós Horthy's governorship. Nevertheless it has to be remarked that many scientific researchers have been dedicated to the governorship of Miklós Horthy and one can choose from many legal historical and historical works wrote during the 20th century even until the very recent times, if one wants to find out more about this topic. Without the wish to enumerate all of them, the following works have been used as background literature to this article: G. Bencsik, *Horthy Miklós: a kormányzó és kora* [Governor Miklós Horthy and his age] (Budapest, Mercurius 2001); P. Gosztonyi, *A kormányzó Horthy Miklós és az emigráció* [Governor Miklós Horthy and the immigration] (Budapest, Százszorszép Kiadó 1992); Miklós Horthy, *Emlékirataim* [Memoires] (Budapest, Európa 2011); *Horthy Miklós – dokumentumok tükrében.* [Miklós Horthy – in aspect of documents] (published by Éva H. Haraszti) (Budapest, Balassi Kiadó 1993); T. Zsiga, *Horthy ellen a királyért* [Against Horthy for the King] (Budapest, Gondolat 1989); Pölöskei, op. cit. n. 6; I. Pintér, *Ki volt Horthy Miklós?* [Who was Miklós Horthy?] (Budapest, Zrínyi Katonai Kiadó 1968).

Neither the office of the governor was unknown for the politicians because governors were the officers of the state entitled to replace the King for his childhood also from the 15th century on. The rights and duties of the governor were remodelled on the basis of acts I, VI, VII, VIII, IX of 1446 referring to the position of the governorship of János Hunyadi.[9] Nevertheless, there were no other characteristics in common than the name between the governors elected in the 15th century and the governorship of Miklós Horthy.[10]

The governor had all those rights as head of state that the King used to have with the exception of some powers. The governor wasn't considered to be sacrosanct opposite the King, so he did not have the right of sanctioning a bill, but he was considered to be intangible, so his person fell under special criminal protection.

According to Act I of 1920, the governor had to right to convoke the national assembly, but he did not have the right of prorogation and neither could he dismiss the national assembly without restrictions, he could only do it, if the national assembly became constantly incapable of work even after the premonition of the governor and the chairman of the assembly could not re-establish its capacity to work according to the standing orders. If the governor exercised his right to dismiss the assembly he had to call elections as soon as possible, so the assembly could be reformed within three month from its dismissal. Acts XVII of 1920 and XXIII of 1933 altered these rules because the constitutional defence of the state required the extension of the governor's powers. So the governor's right turned to be equal to the King's right regarding the dismissal of the parliament, as it used to be regulated by Act X of 1867.[11] By this extension the governor could dismiss the national assembly even if either the new budget or the last year's appropriation accounts haven't been got through yet, but he was obliged to call elections right after the dismissal in order to have the term of three months kept for the forming of the new national assembly.

Instead of the right of sanctioning a bill, the governor had to sign and order the proclamation of the act within the terms of 60 days. One time

[9] Act I of 1920 detailed preamble.

[10] J. Bölöny, *A kormányzói jogkör kiterjesztésének kérdéséhez* [To the question of the extent of the governor's tether] (Budapest, Gergely R. Könyvkereskedése 1936) pp. 6-10.

[11] Art 1 of Act XVII of 1920; Art 1 of Act XXIII of 1933; Bölöny, op. cit. n. 10, at p. 16; Pölöskei, op. cit. n. 6, at p. 104.

he could refuse to sign it and send it back to the national assembly for being amended, but if the national assembly was attached to its standpoint and resisted to amend the bill the governor had to sign and have it proclaimed within the terms of 15 days. The governor had no right to reject or send back to the national assembly the bills referring to the Head of the State and the form of government. Act XIX of 1937 gave the right to the governor to withhold a bill for 6 month in two following occasions but he had to sign and have it proclaimed within 15 days at the third occasion. [12]

The governor represented Hungary in international relations. He could send and see deputies and he could sign international treaties in the name of the Hungarian state with the approval of the national assembly. In case of those international treaties that dealt with legislation the approval in anticipation of the national assembly was also needed to its signing. The governor also needed the previous approval of the national assembly if he wanted to deploy the army outside the frontiers or sign a peace treaty. But at the same time he could use the royal prerogatives of leading, commanding the army and determining its inner organization.[13] The Act XVII of 1920 gave the power to the governor to dispose of the army outside the country even with the additional approval of the national assembly.

The governor exercised the executive power through the government responsible for the national assembly. The orders and communications of the governor were valid with the countersigning of a minister, but he wasn't irresponsible according to the law opposite the King, because he was impeached by the national assembly in case he breached the constitution or the acts of law. His impeachment process could be started on the written initiative of at least 100 members of the national assembly and he could be found responsible, if the 2/3 majority of the national assembly voted for it. [14] When Act XXII of 1926 reorganized the upper house of the parliament, the rules of impeachment got also changed, so the lower house of the Parliament could initiate the impeachment process and a special court of law made up from the members of the upper house could found the governor responsible for committing breach of law. [15]

[12] Art 1 of Act XIX 1937.
[13] Art 13 of Act I of 1920; Pölöskei, op. cit. n. 6. at p. 105.
[14] Art 14 of Act I of 1920; Pölöskei, op. cit. n. 6. at p. 105.
[15] Art 47 of Act XXII of 1926.

Neither the former royal prerogative of ennobling, nor the exercising of the right of patronage was the governor entitled to wield – especially the latter could Miklós Horthy not exercise, because of being member of the reformed church -, moreover couldn't he exercise the right of mercy either.[16] Act XVII of 1920 extended the governor's prerogative of mercy, so he could apply it, but only with one condition, he could not grant mercy for ministers impeached and found responsible by the national assembly that neither could the King do according to Act III of 1848 and XVIII of 1870.[17]

The governor had to take an oath in front of the national assembly after his election and got paid for his office and he had a separate bureau, too. His remuneration according to Act II of 1920 reached the amount of 3.000.000 coronas per year. As governor he had to be addressed as 'lord governor'. [18]

The Act XXII of 1926 provided the governor the right to appoint 40 members at his will to the upper house of the parliament for life, which amount has been extended to 87 for the end of the 1930s, after the increasing of the country's territory according to the II Vienna Award. [19] Later Act XIX of 1937 declared the governor both intangible and irresponsible and gave him the right to nominate a successor to the governorship. The governor could nominate someone for this office in a closed and sealed envelope that could be opened in front of the parliament in case the vacation of the governor's position. The parliament would vote for the person of the new governor and if they did not agree with the person nominated by the governor they could set a new candidate. In this case the majority of the votes would decide about the governor. [20] The reason of such a late regulation on the filling of the governor's office was that the national assembly designed the function of the governor as a temporary solution and they didn't even drop the idea of the Kingdom either.[21] The rules of Act I of 1920

[16] Art 13 of Act I of 1920.
[17] Art 3 of Act XVII of 1920; Bölöny, op. cit. n. 10 at p. 17.
[18] Arts 15-17 of Act I of 1920.
[19] Arts 23-24 of Act XXII of 1926.
[20] Arts 2-6 of Act XIX of 1937.
[21] The legitimists fought for the replacing of Charles IV to the Hungarian throne even after the election of Miklós Horthy as governor. Although their struggles turned to be futile and after two unsuccessful attempts of Charles IV the parliament approved act XLVII of 1921 in which they declared the dethronement of Charles IV and the Habsburg Dynasty based on the Pragmatic Sanction of 1723. Hegedűs, op.

referring to the governor were created for only a single person, Miklós Horthy. By 1937 it became obvious that the office of the governor may be filled again in case of vacancy, so a new act had to be made because of this.
Act II of 1942 established the function of the deputy governor who was elected by the parliament based on the nomination of the governor. The deputy governor replaced the governor in case he was incapacitated to exercise his power because of illness or absence. According to this act the parliament elected István Horthy, son of Miklós Horthy as deputy governor.

3. The government

Along the People's Republic the People's Government used to be indeed the possessor of the state's supreme power. As it was mentioned before, after the resignation of the social democratic ministers Mihály Károlyi was both President of the People's Republic and Prime Minister of the People's Government.
At the time of the Hungarian Soviet Republic the Revolutionary Governing Council used to fill in the government's task just like the task of the Head of the State. It had a chief and the people's commissioners were the ministries. Because the Revolutionary Governing Council was a temporary organization, it was redesigned and named as Governing Council having 9 people's commissionaires who had the right of issuing orders. The Governing Council fell under the supervision of the legislative body named as the Nationwide Assembly of the Allied Councils and the Allied Central Syndicate. The latter replaced the Nationwide Assembly of the Allied Councils in legislation when it wasn't convoked.
During the period of the restoration the government form characterizing the age of the dualism has been re-established with such realignment that the government was completed with the Ministry of Foreign Affairs because there were no more Common Affairs, and with the Ministry of Work and Welfare, the Ministry of Public Sustenance and Ministry of National Minorities. After the dissolution of the Austro-Hungarian Monarchy the position of the Minister around the King's Person stopped existing, too. In addition to these ministries the Ministry of Economy was established in 1927 and the Ministry of Welfare and Public

cit. n. 2, at pp. 140-184; Z. Vas, *Horthy vagy a király?* [Horthy or the King?](Budapest, Szépirodalmi Könyvkiadó 1971).

Sustenance ceased to exist in 1932. In 1940 the Ministry of Public Attendance and in 1942 the Ministry of National Security and Public Relations came to life.[22]

The prime minister was appointed by the governor from the members of the winning party taking the majority in the parliament. The same rules that were binding during the age of the dualism referring to the impeachment process and the legal responsibility of ministers entered into force again. [23]

In the years before the Second World War the importance of the military organs increased and the governor's executive power and authority happened to increase. Act II of 1939 established the Supreme Council of National Defence. The governor was its head, but in his absence the prime minister had to preside over its meetings. Its members were the ministers, the Commander in Chief of the National Armed Forces and the Minister of National Defence had a decisive role in it.[24] Also the Secretariat in Chief was set up whose members were the reporters of the ministries and the reporters of the national defence's commandership and a general. Its task was to prepare the military administration of the country, public administration was replaced with one of warfare. [25]

[22] Mezey, szerk., op. cit. n. 2, at p.314.

[23]Act III of 1848 regulated first the causes for the minister's responsibility that remained binding also during the age of the dualism. As the basis of this act an impeachment process against the minister could be initiated either if he breached the constitutional statehood, the acts of law, the personal and property rights of the citizens by issuing an order, or he was default of taking an action he was obliged to take against such occurrences that could harm the constitutional statehood, the public welfare and the public interest, or the personal and property rights of the citizens, and nevertheless the minister could be impeached, if he committed defalcation.

[24] Mezey, szerk., op. cit. n. 2, at p.312.

[25] Act LXIII of 1912 provided the authority for this that entered into force in warfare or other special circumstances. Special circumstances were for example the war, revolution, acts of God that could put the functioning of the state at risk. On the basis of the special authorization the Head of the State had an increased executive power that could be extended to the restriction and inspection of the postal, telegraph and phone service, to the prohibition of the associations and right of assembly, to the introduction of the censure, to the establishment of new courts, to special legislative authorization (meaning the power of issuing orders in items that belonged to the parliament), to waive acts of law, governmental, ministerial or administrative orders, to organizational centralization and he could also appoint officers to get involved into the local administration, or he could also decide about restrictions on the field of foreign and security policy, or personal and passport

4. The national assembly and later parliament

Right after the Hungarian parliament had dismissed itself on 16th November, the Hungarian National Council and the new supreme organ of the revolution that had to act as a national assembly were convoked. The national assembly declared itself to be the trustee of national sovereignty and in the People's Decree authorized the People's Government to adopt the most important people's acts of law about the general suffrage, the freedom of the press, jury-trials and the freedom of assembly and association.[26] From that time on the People's Government filled in the role of the legislative body until the debacle of Károlyi's government.

During the time of the Hungarian Soviet Republic formally the National Assembly of the Allied Councils acted as a parliament. The members of this assembly weren't elected directly by the nation, but the local administrative and city councils sent one member to the assembly after each 50.000 inhabitants. These representatives could be withdrawn any time by the councils. 40 members of the National Economic Council and 80 members of the Syndicate of Budapest got membership in the assembly besides. [27]

First the right of suffrage had to be amended after the political restoration and the ground of which the new national assembly could be convoked. The law about the general suffrage got its name after Prime Minister István Friedrich and was issued on the fall of 1919 in the form of a Prime Ministerial order (order nr. 5985/1919 about the general suffrage and national and local elections). This order raised the minimum age-limit to vote to 24 years and set as a requirement a Hungarian citizenship longer than 6 years, a residency longer than 6 months and in case of women the ability to right and read.

The act on suffrage adopted after the temporary period got the name 'Lex Bethlen' from Prime Minister Bethlen István. It was also a Prime Ministerial order (order nr. 2200/1922 about general suffrage and national and local elections). According its rules only those men got the right to vote who reached the age of 24, were Hungarian citizens at least for 10 years, had at least 2 years of residency in the same parish and

control, controlling the carrying trade permissions, restricting the freedom to move freely and to set maximum prices.

[26] Mezey, szerk., op. cit. n. 2, at p. 233; Schönwald, op. cit. n. 2, at pp. 93-147.

[27] Mezey, szerk., op. cit. n. 2, at pp. 350-351.

successfully finished the 4th grade of the elementary school. In case of women the age limit was higher they could vote if they reached the age of 30 and finished the 6th grade of the elementary school. In the local regions the open vote was introduced.

The first act of law on suffrage of that period was the Act 26 of 1925, an act having very similar rules to the former Lex Bethlen. According to this act in the capital city and in big towns the parties stood as a candidate for elections with a list and the voting for this list was a secret-ballot and it was obligatory for everyone having right to vote. Meanwhile in the parishes and small cities the elections went on in individual boroughs and the voting was open.

The secret ballot for first was generally introduced by Act 39 of 1938. Setting up the individual boroughs was the obligation of the Minister of Inner Affairs and in these boroughs the 40% majority of the votes were enough to win the elections. According to this act both men and women could vote after reaching the age of 30, were Hungarian citizens at least for 10 years and in addition to this they had to confirm their family-supporting status. In the boroughs, where the elections according to lists was introduced, such as in the counties and county capital cities (in the latter there were no individual boroughs at all) all men had the right to vote who reached the age of 26, were at least for 10 years Hungarian citizens, had a permanent residency of at least 6 years and finished at least the 6th grade of the elementary school. Beside them all women could vote who reached the age of 30 and could confirm their family-supporter status or that they were the wife or widow of a man who had the right to vote. By this act the system of the plural suffrage was created in Hungary, by which the inhabitants of the villages got a double right to vote. The act also contained rules for the passive suffrage. The age of 30 and having a permanent job in the previous 10 years was demanded for being elected, or the candidates had to be former MP's, or members of the county committees or representatives of the parish council. All those people were excluded from being elected who had a bigger amount of tax-default, or were imprisoned for committing a crime, or deposed from office for unpatriotic conduct, or were people's commissioners, Prosecution's or Political Commissioners during the Hungarian Soviet Republic.

The general, equal, direct and secret ballot was introduced for first time in Hungary by Act 8 of 1945. [28]

After the general elections held in 1920 on the grounds of the Friedrich Prime Ministerial order only the lower house of the former Hungarian Parliament was convoked. The lower house declared itself as a national assembly and the restoration of the former upper house was declared to be its task for the future. The main rules regarding the national assembly and the representatives' right to immunity were regulated by Act 1 of 1920. [29]

The upper house of the parliament was reorganized by Act 22 of 1926. It preserved its previous form, but the Hungarian aristocracy didn't play an important role in it anymore, because mainly the organs characterizing the modern states appeared here, such as corporative organs, scientific corporations and lobby corporations, representatives of the counties, etc. The governor could also appoint members as it has already been mentioned before. Male members of the Habsburg family who reached the age of 24 also preserved their rights to be members of the upper house, but they had to be resident in Hungary. Based on office some high-officials got also membership to the upper house, such as the Hungarian Crown Guards, the Chief and Deputy Chief of the Hungarian Royal Curia and the Hungarian Royal Administrative Court, the Chief of the Court of Appeal in Budapest, the crown council, the Supreme Commander of the Hungarian Army, the Head of the Hungarian National Bank and the ecclesiarches of the traditional Hungarian churches. Based on elections all those people had a passive suffrage who were members of high-noble families, reached the age of 24 and paid at least 2,000 Forints as land-tax per year. Also the National 'Vitézi' Committee,[30] the Hungarian Academy of Science, the Universities and Colleges, the Hungarian National Museum and the Stock Exchange of Budapest could send its representatives to the upper house together with the representatives of the different chambers. [31]

[28] About the right of suffrage see the acts of law put into the Corpus Juris Hungarici and G. Béli, *Választójog 1848-tól az ún. rendszerváltásig (kézirat)* [Right of suffrage from 1848 until the political transitions (manuscript)]; Mezey, szerk., op. cit. n. 2, at pp. 256-262; Pölöskei, op. cit. n. 6, at pp. 84-85.

[29] Arts 1-4 of Act 1 of 1920.

[30] A title awarded by Miklós Horthy to some ex-servicemen.

[31] Arts 3-14, 19-22 of Act 22 of 1926 and I. Takács, 'A Horthy rendszer felsőháza' [The upper house of the Horthy regime], in *Tanulmányok a Horthy-korszak*

It is interesting to note that the bill passed by the lower house could be sent for approval to the governor without having it approved by the upper house, too and neither could the upper house vote for the budget. So it had a lower position against the lower house. Act 27 of 1937 increased the authority of the upper house, it got the right of initiative and from this time on both houses had to vote for each bill before sending it to the governor for approval. In case the two houses couldn't agree on the bill, they had to hold a common meeting. However, the upper house went on not having a right to amend on the budget, it could vote for or against it, without having any amending initiatives even from 1937 on. [32]

5. Sources of law

The people's acts approved in the period of the People's Republic and the orders issued during the Hungarian Soviet Republic were overruled according to Act 1 of 1920 and the acts of law of the times before 1918 entered into force again by the declaration of the legal continuity. The sources of law of the mentioned period have also been erased from the National Collection of Law nevertheless the ministries were authorized to keep in force some of the people's acts they agreed to be indispensable until the national assembly should adopt new ones instead. [33] The acts of law adopted by the national assembly and then by the parliament were considered to be the highest level sources of law that entered into force by being published in the National Collection of Laws.

6. The system of public administration

The revolutionary government of 1918 didn't leave the system of public administration untouched either. The government of Mihály Károlyi appointed government commissioners who had a strict hierarchy even until the very lowest administrative level. The government commissioners possessed of a wide authority, they had even the right to issue an order. They replaced the former Heads of the Counties. Local National Councils and Worker Councils were established beside them to manage law enforcement tasks, confiscation of alimentation and to

államáról és jogáról [Essays about the state and law of the Horthy regime] (Budapest, Közgazdasági és Jogi Könyvkiadó 1958) pp. 64-70.

[32] Arts 1-3 of Act 27 of 1937.

[33] Art 9 of Act 1 of 1920.

impose taxes. Also Military Councils were created with credential members who got political leadership in the military force.
During the Hungarian Soviet Republic a system of councils came to life on the whole territory of the country, such as the parish, city, township and county councils. They dealt with public administration and had a strict hierarchic structure.
The Horthy regime restored the dualism type public administrative system but with the amendment that during the two World Wars the administrational powers increased their authority against the local governmental organs. The end of the centralizing process was that the county and town officers and the village notary had to be appointed by the Minister of Inner Affairs, other officers of smaller towns by the mayor, village officers by the sub-prefect of the county who was considered to be a serious encroach in the local autonomy. The act on the reorganization of the public administration remodelled the local administrative committees existing in the counties and county capital cities. It created the local administrative small assemblies, reorganized the parish administration and changed the name of the towns having an organized council to county towns. It regulated in detail the authority of the public administrative committees, the legal remedy system of the administrative decisions and the educational requirements and disciplinary responsibility of the clerks of public administration.[34]

7. Summary

After the too fast political transition of 1918/1919, the legally continuous state under the governorship of Miklós Horthy existed until 1944, when Horthy resigned on 16th October 1944. Following the German occupation of 19th March 1944, Ferenc Szálasi took an oath in front of the extreme right representatives of the parliament convoked on 2nd November as Head of the dictatorial Hungarian state. After the Second World War Hungary belonged to the soviet field of interest determining the form of government until the political transitions of 1989.

[34] Act 30 of 1929; See in detail Mezey, szerk., op. cit. n. 2, at pp. 317-325.

II. Croatia after the dissolution of the Austro-Hungarian Monarchy

1. The establishment of the Yugoslav State

By declaring war to Serbia, Austria-Hungary wanted to affirm its status as an independent superpower, however, it proved the opposite - this war was to unveil all the weak points of the Monarchy and to bring it to its collapse. In addition to military defeat at the front, the national revolutionary turmoil in October 1918 would result in the secession of some of its parts which would systematically form the new national states with the new state government led by the principle of self-determination of the nation.

Only towards the end of the World War I did the idea of a common Yugoslav state begin to receive a real chance for realization. Even then the discussion started about the concrete plans of a Yugoslav unification. Even during the war the initiative for arranging the new state was taken by the government of the Kingdom of Serbia with Nikola Pasic as leader and the Committee of the Yugoslav political emigration, which was formally constituted on 30th April 1915 in Paris under the name of Yugoslav committee. The committee, however, moved its headquarters to London immediately after the constitution, believing that London was the headquarters where the Alliance made decisions about war and peace. [35]

The committee directed its activities towards realization of two goals. The first one was to free all Yugoslav countries and then to unite them with Serbia and Montenegro into one common state. The second goal was to oppose the imperialistic aspirations of Italy to Croatian coast which were the result of the London treaty. [36] In contrast, the Serbian government refused to recognize the Yugoslav Committee as a representative of the South Slavs of the Monarchy, but upheld it as

[35] H. Sirotkovic and L. Margetic, *Povijest država i prava naroda SFR Jugoslavije* [The history of state and law of the nations of SFR Yugoslavia] (Zagreb, Školska knjiga 1988) p. 218.

[36] London treaty was secretly concluded in London on 26th April 1915 between the Entente powers and Italy. By this treaty Italy was promised to get Trentin, Tyrol, Gorizia Gradiska, Istria, Cres, Losinj and smaller islands of Kvarner and greater part of central Dalmatia as well as part of Dalmatian islands, part of Albania, Dodecanese and some German colonies in Africa if it had entered into the war on the side of the Entente. Sirotković, op. cit. n. 35, at p. 219.

much as it suited its policy.[37] At the end of the war the Radical party, led by Nikola Pasic, had already prepared two possible resolutions for the unification of Serbian people. One of them, called 'the big resolution' suggested the unification of Serbs, Croats and Slovenians into one state with Serbs as leaders, which would have ensured Serbian domination in the new state. This would have been possible only in case of Austria-Hungary's military defeat. The second 'small resolution' was only about forming Great Serbia including Montenegro, Bosnia and Herzegovina, parts of Croatia and Vojvodina, and it would have been possible only in case of achieving a separate peace with Austria-Hungary.[38]

At the same time as the Corfu meeting was being planned at the end of May 1916, Croatian and Slovenian representatives in Vienna's Imperial Council, joined in the Yugoslav Club, announced the May Declaration in response to peace offer to the Austro-Hungarian ruler Charles IV and the members of the Entente. This peace would have enabled Austria-Hungary to sustain within present boundaries, and the interior ones would have become questionable. In contrast to that, the Yugoslav Club, which used the declaration, would not have required revision of the Dual Monarchy and the establishment of the third unit of the South Slavs within the Monarchy into '[…] one independent, free state body built on the basis of democracy.'[39] The echo of the declaration was extremely loud, and the political activity, caused by the very same declaration, was to establish National Councils in certain Yugoslav states as the foundation for the new state bodies as well as the Central National Council in October 1918 as the political representative of Yugoslav peoples in Austria-Hungary.

The overall situation in the first months of 1917 was beginning to change and for Serbia it was very inconvenient. The February Revolution removed the Russian Emperor from power, and the new interim government could not provide Serbia the support it used to have during the imperial regime. In addition to that, the entry of the United

[37] The Serbian government's policy is expressed in the Nis Declaration, which stresses the need for unification of the Serbs, Croats and Slovenians into one state, but as far as the interior structure was concerned, it advocated the unilateral annexation of Yugoslav countries of Austria-Hungary and their annexation to the Kingdom of Serbia.

[38] H. Matkovic, *Povijest Jugoslavije- hrvatski pogled* [History of Yugoslavia-Croatian review] (Zagreb, Naklada P.I.P. 1998) p. 36.

[39] N. Engelsfeld, *Povijest hrvatske drzave i prava* [History of Croatian state and law] (Zagreb, Pravni fakultet u Zagrebu 2006) p. 263.

States into the war could have repercussions on the future of south Slavic countries. All of this pressured Nikola Pasic to cooperate with Yugoslav committee, because if by the end of the war The Alliance had preferred the Yugoslav solution, Serbia would have been in a favourable position. Besides, this demonstration would have forced the powers of Entente to abandon their present attitude of upholding the presence of Austro-Hungarian Empire.

On 15th June Nikola Pasic summoned the conference on Corfu[40] between the representatives of the Serbian government led by the president Pasic, and the Yugoslav committee led by Ante Trumbic. The conference lasted until 20th July, and in that period there were 24 sessions whose main objective was the resolving of Yugoslav national question, thus many different resolutions were taken into consideration. Since the delegations had opposite standpoints about the subject matter, it was agreed that the text of the Declaration would consist of only those resolutions that were approved by both sides.

The Declaration was signed on 20th July 1917 by the president of the Serbian government Nikola Pasic and the president of the Yugoslav committee Ante Trumbic. The text of the Declaration is relatively short. It consists of a political introduction and thirteen articles in total, which are mainly incomplete and unelaborated. The introduction is about the principle of national self-determination and national unity of the nation with three names. In that sense there were efforts made in order to send the Alliance a request for the territorial determination of a future country, which was to encompass 'area where our peoples with three names live in a compact and continuous mass'. [41] The declaration was against the partial resolution of Yugoslav national question. The text of the declaration contains these resolutions: Serbs, Croats and Slovenians will join in one common state which will be called The Kingdom of Serbs, Croats and Slovenians. It will be a constitutional and parliamentary monarchy under the Karadjordjevic dynasty. Furthermore, it recognizes the equality of all national names, alphabets, national flags, coats of arms and other recognized religions.[42] The major discussion at the conference was about the form of government. Trumbic particularly

[40] Corfu is a Greek island which was occupied by the Allies and was set to be the headquarters of the Serbian government in exile. Matkovic, op. cit. n. 35, at p. 42.

[41] F. Čulinović, *Dokumenti o Jugoslaviji* [Documents about Yugoslavia] (Zagreb, Školska knjiga 1968) p. 47.

[42] Margetić and Sirotković, op. cit. n. 35, at p. 22.

advocated for a federal state,[43] but finally the idea of unitary state, proposed by Serbian politicians, was adopted. [44]

According to its content, the Declaration established two important facts: 1) decision to create a common state for all Yugoslav countries and 2) the final decision about its form will be passed by the Constituent Assembly by the majority of its qualified members. Trumbic did not succeed with his proposal to have the principal of dual qualification for passing the constitution, and Pasic later used the bylaws of the Constituent Assembly in order to replace the qualified majority with the absolute one, and thus to achieve in 1921 the centralist constitutional draft. Even though there were no guarantees that The Declaration would be followed by its signatories, it was still a mandatory, constitutional act, because it was notified by the government of the alliance, and for the Yugoslav committee it had both moral and political obligation to establish the future common life of Yugoslav people.[45]

The Declaration caused surprising interest in our countries as well as in the rest of the world, even though the Austro-Hungarian authorities sought to diminish its significance since it was primarily aimed at the destruction of the Austro-Hungarian monarchy in order to facilitate the unification of three nations in one common state.

The world political situation at the beginning of 1918 was quite a disadvantage, if one takes into account the need to establish the Yugoslav state. The heavy position of the Allied army, which was a result of Russia's exit from the war, the failure to call on general peace negotiations and the anti-war mood of the masses affected the English Prime Minister Lloyd George, so at the beginning of 1918 he declared that the breakup of Austria-Hungary was not included in the British war aims, and promised the autonomy to South Slavic people within the Monarchy. However on 28th of May 1918 the United States finally got committed to the destruction of the Monarchy and expressed its sympathies to national aspirations of the South Slavs. This caused a

[43] Trumbic was of the opinion that because of the Italian aspirations on the east coast of the Adriatic Sea, he had to reach an agreement with the Serbian government about the Yugoslav unification.

[44] Article 13(2) of the Corfu Declaration. Čulinović, op. cit. n. 41, at p. 47.

[45] According to its content the Corfu declaration was a compromise. Yet, the Yugoslav committee considered it as important document with which it exercises its program. The committee thought that with this declaration Pasic is deviating from his 'small resolution' i.e., creation of a Great Serbia.

significant activity of political parties in the Yugoslav part of the monarchy. It has come to creating national councils that act as the political leadership of the unification of three peoples. From the beginning of July 1918 until the end of September, the National Councils in Dalmatia, Istria, Croatian coast, Slovenia, Bosnia and Herzegovina were formed.

However, the most significant one, The Central National Council of Croats, Slovenians and Serbs was established on 6th October 1918 in Zagreb. It was a political representation of Yugoslav nations in Austria-Hungary. Anton Korosec was elected president, and the first vice-president was Ante Pavelic. The place of second vice-president remained vacant temporarily, though it was formally assigned to the representative of Croatian-Serbian coalition - Svetozar Pribicevic. [46] The moment of entering the coalition in the National Council coincided with the moment in which the fate of the Austro-Hungarian monarchy had already been sealed. The coalition as the largest party in the council soon became dominant in making new decisions.

The same day when the Presidency was elected, the Central National Council rejected the manifesto of Emperor Charles IV of the federalization of the Austro-Hungarian monarchy and sought the unification of Slovenes, Croats and Serbs on the basis of the principle of self-determination, and regardless of the former state borders.[47] Another attempt at reorganization of the state followed on 27th October 1918 in Vienna. It was this attempt that was the reason that the Central Committee on the session on 28th October 1918 passed its historical conclusion to declare secession of Croatia, Slavonia and Dalmatia of Austria-Hungary and their unification with the other Yugoslav countries in ‘ one common and sovereign State of Slovenians, Croats and Serbs’ – the State of SCS.[48] This emerging country included all Slavic countries of the former Austro-Hungarian Empire, except Trieste, the Slovenian Littoral, Istria, Rijeka and the part of Dalmatia, which was occupied by

[46] Since the Croatian-Serbian coalition did not take part in the meeting in Zagreb, it was not included in the process of national concentration until the establishment of the National Council. Matkovic, op. cit. n. 38, at p. 49.

[47] The declaration on the elimination of the manifesto was issued on 19 October 1918, and says that the National Council was empowered by all parties and groups to lead national policy and seek the unification of the Slovenians, Croats and Serbs throughout the ethnographic field. Engelsfeld, op. cit. n. 39, at p. 271.

[48] Čulinović, op. cit. n. 41, at p. 76.

Italian forces after the conclusion of the armistice with Austria-Hungary.[49]

This conclusion was inevitable as a result at which all relevant internal and foreign political factors indicated. The deterioration of the unsustainability of the Austro-Hungarian Empire, even before reaching a conclusion, was obvious. At the time of its adoption the Monarchy was in complete disorder. The government was passive, and the National Council was getting more independent as the de facto representative of the new situation that only required political sanction.

Having concluded its Assembly in Novi Sad on 25th November 1918, Vojvodina joined the Kingdom of Serbia, too.

2. The form and structure of government

The first one to be established at the Parliament in Zagreb was the Croatian State, and then the State of Slovenians, Croats and Serbs, which will later include the Croatian State as well, though, the final form of the State and its internal organization will be decided later by the Constituent Assembly.[50] In addition, at that same session, Dr. Ante Pavelic's proposal that the supreme power is transferred to the National Council[51] was adopted, whereby it became the supreme authority of the State of SCS.[52] Since the National Council was a cumbersome body to resolve all administrative problems efficiently and quickly, it entrusted its work related to 'the government of the South Slavic countries of the Monarchy' to its Presidency[53], i.e. The Presidency of the National Council of SCS. Therefore, the Head of the Presidency of the National

[49] These parts could not be found within the new state as they found themselves under the regime of Italian military occupation.

[50] F. Šišić, *Dokumenti o postanku Kraljevine Srba, Hrvata i Slovenaca 1914-1919* [Documents on the formation of the Kingdom of Serbs, Croats and Slovenes, 1914-1919] (Zagreb,Matica Hrvatska 1920) p. 195-196

[51] See B. Krizman, 'Osnivanje Narodnog vijeća SHS' [Establishment of the National Council of SCS], 1-4 *Historijski zbornik* (1954) pp. 23-32.

[52] Engelsfeld, op. cit. n. 39, at p. 272.

[53] 'Executive power of the new state of SCS, which included former South Slavic areas of the Dual Monarchy (Slavic countries, Triune Kingdom, Bosnia and Herzegovina and "Vojvodina"), with Zagreb as its capital, was then in the hands of "directory" of the National Council of SCS.', See M. Kovač, 'Rađanje Kraljevine SHS u svjetlu francuske politike' [The emergence of the Kingdom of SHS in the light of French politics], 1 *Časopis za suvremenu povijest* (2003) p. 149

Council was the Head of the executive government of the SCS State accordingly.[54]

The presidency of the National Council consisted of a president, two vice presidents and a few secretaries representing intermediaries between the National Council of the SCS and the provincial government.[55] Although the presidency of the National Council was an independent body making decisions for particular national problems, initially it carried out the conclusions of the Central Committee of the National Council made at the meeting of the Board. The responsibilities of the Presidency of the National Council were the following: issuance of regulations with legal force, the right of amnesty and the supreme military command, the appointment of provincial governments, installation and upgrading of higher-ranking state officials, changing the old legislation in a province with the countersignature of the Prime Minister of that province, i.e. management of internal and external policy of the state SCS.

The presidency of the National Council of SCS, as the Government of the State of SCS, jointly dealt with the issues of particular departments with the consent of the Central Committee of the National Council. Thus, it did carry out the function of the Government of the SCS, but the activities and the competencies were not divided into departments, except for the administration of military affairs, which was assigned to the Department of National Defence. The navy affairs were entrusted to the naval committee and diplomatic affairs were entrusted to the Yugoslav committee, unless the duties were carried out by the Presidency itself.[56]

In addition to those activities that were under the jurisdiction of the SCS National Council as the supreme authority, the Government of the National Council of the SCS carried out so called 'joint ventures' such as: foreign affairs, military affairs, financial affairs and 'agitation and

[54] I. Beuc, *Povijest institucije državne vlasti u Hrvatskoj (1527-1945)* [The history of government institutions in Croatia (1527-1945)] (Zagreb, Arhiv Hrvatske 1969) p. 324.

[55] In the same way there were secretaries for Croatia, Dalmatia, Slovenia and Bosnia; Backa, Baranja and Banat did not have the provincial government.

[56] Beuc, op. cit. n. 54, at p. 324. The mentioned departments were federal ministries of the Government of the National Council of SCS. Besides them there were the following: Section for the organization and propaganda, Newspaper department and the Financial department.

propaganda', including the press office.[57] The Government of the SCS National Council entrusted all other tasks to the provincial authorities, i.e. the individual commissioners for the department in a particular province (Slovenia, Croatia and Slavonia with Rijeka and Istria, Dalmatia as well as Bosnia and Herzegovina). In addition to resolving the affairs of the department of internal government, teaching, theology and justice, the provincial governments were also responsible for trade, crafts, industry, railways, postal, telegraph and telephone, finance, food and national economy (agriculture and animal husbandry). Commissioners who led a certain department in a particular province represented the Trust Council i.e. the government of the province, and were appointed by the State Government of the SCS on the proposal of the National Council of the province, for which the Commissioner had jurisdiction. The Government of the Province would meet as necessary at meetings in order to make a conclusion for those matters which were important for the entire Province from the scope of the department.[58] Also, the governments of SCS appointed presidents of provincial governments (in Croatia it was a Ban), who chaired the sessions of their governments. The prime ministers have been delegated to pass legislative provisions with the consent of the Government of the State of SCS. They also had the right to appoint lower ranked officials unlike the commissioners who were entitled to appoint and move the minimum bureaucracy and bring important provisions only with the consent and order of the Government of the State of SCS.[59] Provincial governments were subordinated and responsible to the National Council and in order to perform all important tasks they required the approval of the National Council of SCS. Therefore, Provincial Governments delegated the actual jurisdiction whereas the National Council only partially and conditionally transferred the exercise of its dictatorial rule.[60] As administrative units within the provincial government, except for

[57] Also, joint ventures had Austria and Hungary according to the Settlement from 1867.

[58] From the archives of the National Council of the SCS, State Archives of Croatia, Zagreb.

[59] Organization and jurisdiction of the Province Government during the times of State of SCS were determined according to fund's holdings of the Provincial Government in Zagreb and funds of the National Council of the SCS. State Archives of Croatia, Zagreb.

[60] However, even in this case the jurisdiction of the Province Government was much wider than during the times of Austria-Hungary within the guaranteed autonomy.

commissions, there were other units, like the Presidential Office, Computer Office, Provincial Treasury, Journalism Department and other ancillary offices of the Provincial Government.

The situation in the SCS State itself, after the establishment, was becoming more and more revolutionary with regard to unresolved basic questions about the land, whereas the ruling class had neither will nor abilities and tools to resolve the problem.[61] On the one hand it was necessary to resolve the social question, i.e., the rebellions of the disgruntled peasants, and on the other hand the external position of the new state was not satisfactory since the powers of Entente and the United States were not in hurry to recognize the State of SCS for numerous reasons, thus there was a danger that the Italian government would exercise the London treaty from 1915. Being afraid that it may not come to unification of Croats, Slovenians and Serbs on the entire area of their residence, most civic politicians saw salvation in the rapid establishment of narrow ties with the Kingdom of Serbia, thus to unite with it as soon as possible. The first step of the politicians of the SCS towards the unification was taken on 9th November 1918 by adopting the Geneva Declaration.[62] The conference was held in Geneva from 6th until 9th November in 1918. The president of the Kingdom of Serbia, Nikola Pasic, was consulting on the modalities of the Yugoslav union with representatives of Serbian parliamentary opposition (Draskovic, Marinkovic, Trifkovic), the delegates of the National Council in Zagreb (Korosec, Cingri, Zerjav) and the members of the Yugoslav Committee (Vasiljevic, Stojanovic and Banjanin). Two crucial issues were concluded at the Geneva Conference: 1) establishment of the joint Yugoslav country and 2) giving rights to the future Constituent Assembly to adopt a final decision on the basic issues of the state (a form of governance and internal organization).[63] Since the Declaration was based on the establishment of the new Yugoslav country, of which form of the government was going to be determined only later by the

[61] F. Čulinović, *Jugoslavija između dva rata* [Yugoslavia between two wars] (Zagreb, Historijski institut Jugoslavenske akademije znanosti i umjetnosti 1961) p. 95.

[62] Šišić, op. cit. n. 50, at pp. 236, 237.

[63] The Presidency of the SCS National Council became aware of the result of the Geneva negotiations only on 16th November 1918 from Serbian sources. See: B. Krizman, *Hrvatska u prvom svjetskom ratu* [Croatia in the First World War: Croatian-Serbian political relations] (Zagreb,Globus 1989) p. 341

future Constituent Assembly (hence, the Dynasty was left uncertain) and as the hegemony of the ruling groups of Serbian politicians was not ensured, the Declaration failed. Likewise, for Nikola Pasic the Declaration represented a synonym for defeat, because it not only cancelled the Corfu Declaration, but also confirmed the dual, federal constitution, which he regarded as an atrocious scenario that revolted him.[64] The attitude of Zagreb was also significant, for the majority of the National Council was against the Declaration. The breakout of the Geneva Conference fully unveiled extreme differences between Yugoslav politicians. Since this attempt was unsuccessful, it was necessary to begin the Zagreb-Belgrade direct communication.

The first such attempt to speed up the preparations for unification with Belgrade was done by the National Councils of Dalmatia, and Bosnia and Herzegovina, thus pressuring the main leadership for mentioning the possibility of a unilateral act of union in the event of delay. A few individuals from the ruling class of the Kingdom of Serbia (Duke Misic) and many others from the National Council (especially Svetozar Pribicevic and other members of the coalition) also supported the idea that this request materialize as soon as possible. The decision to join a union with Serbia under the Karadjordjevic dynasty was adopted on 24th November 1918, whereas the Central Committee of the National Council appointed a delegation of 28 counsellors provided with the Instruction[65] to go to Belgrade to implement the unification with the Kingdom of Serbia. The only person that opposed the Instruction was Stjepan Radic who disapproved the way, in which the decision was brought, i.e. injudiciously, thus he refused to go to Belgrade.[66] Finally on 27th November 1928 the delegation of the National Council went to Belgrade where negotiations on unification started already the following day.

The agreement between the Croatian and Serbian 'oligarchy' about the unification of the SCS State and the Kingdom of Serbia, and the solemn proclamation of the first Yugoslav state eventually took place on 1st

[64] Kovač, op. cit. n. 53, at p. 159

[65] Čulinović, op. cit. n. 41, at pp. 89, 90.

[66] 'It is still not late! Do not rush headlong.' See I. Mužić, *Stjepan Radić u Kraljevini Srba, Hrvata i Slovenaca* [Stjepan Radic in the Kingdom of Serbs, Croats and Slovenes] (Zagreb, Nakladni zavod Matice hrvatske 1990) p. 285; T. Macan, *Povijest hrvatskog naroda* [History of the Croatian people] (Zagreb, Nakladni zavod Matice hrvatske 1992) p. 448.

December 1918. The act of the 1st December about the unification represented the proclamation not only of the unification of the SCS State and the Kingdom of Serbia itself, but it also meant that the new unified state was a Monarchy with a centralized state organization (in the Regent's proclamation of the 1st December act the new state is called 'The Kingdom of Serbs, Croats and Slovenians', and for the 'government' it is said that it would 'represent the entire unified motherland' and that the government would cooperate and respond to 'the National Representative').[67] This act also represented the end of the function of the National Council of the SCS as a sovereign authority of the SCS on the territory of the former Austria-Hungary, and it was taken over by Alexander as regent. This act also determined that the administrative bodies and the bodies of the Province remained in power until the new Constitution was passed, under the condition that the 'state government' i.e. central government in Belgrade had right to control them and that those autonomous administrative bodies of the Province also responded to the autonomous national representatives (parliaments).[68] However, the autonomous representatives, determined by the act, did not convene, which contributed to the strengthening of the autonomy of the provinces. Consequently, the governments of some provinces of the former state of SCS in early January 1919 gave their resignation and appointed the new provincial government, which no more included the commission for national defence, finance, railways and transport, trade, crafts and industry, and food. Those departments were under the direct supervision of the Ministries of the central government in Belgrade. The top of the ProvinceGovernment was the President, and in Croatia there was a Ban.[69] The Province Government was in charge of exercising all those activities of the autonomy as they were during the times of Austria-Hungary. Those activities were: internal affairs, jurisdiction, theology, teaching, national economy and social politics. But this responsibility was reduced over time and the Provincial Government was no longer the highest administrative instance in the province. It was responsible for its affairs on the territory of the Province to the Central Government in Belgrade and the appeal against its decisions could be submitted to the appropriate Ministry. Instead of representatives, which were cancelled, the central government

[67] Šišić, op. cit. n. 50, at p. 280-283.
[68] Beuc, op. cit. n. 54, at p. 331.
[69] Beuc, op. cit. n. 54, at p. 332.

formed its own instances, which were as regular and permanent offices responsible for the area of one province and directly subordinated to the competent ministry or a special department of the ministry in Belgrade, which was responsible for the province.

Entente and Serbian military victory, spread of Yugoslavian mood in Croatia, as well as in Serbia and political circles, Italian occupation, haste and improvisation, etc., it all contributed to creation of the Kingdom of SCS which as a result of these factors became a state ruled entirely by Serbian political and military caste. Yet, Belgrade never fully accomplished its 'mission of assimilation' because Zagreb did not consider it as attractive as Vienna or Budapest was previously. However, it is paradoxical that the cultural and industrial inferiority of Serbia, as well as new political and legal framework mostly went in favour of the interests of Belgrade, but it contained more democracy than the former Austro-Hungarian system, that enabled the articulation of the Croatian national movement, which 'completed the process of Croatian national consolidation, thus, ending a century that began with Illyrian awakeners.'[70]

[70] I. Banac, *The National Question in Yugoslavia: Origins, History, Politics* (Ithaca-Londreas, Cornell University Press 1984) p. 227.

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Corpus Iuris Civilis and *Corpus Iuris Hungarici* The influence of Roman legal tradition on the Hungarian and Croatian law

1. Introductory remarks

Traditional, in other words, pre-1848 Hungarian and Croatian law was not free from the influence of Roman law and other foreign laws. The formation of the Christian kingdom was connected with the organization of the Latin Church. Consequently, the Latin terminology was used for Hungarian and Croatian legal institutions regardless of whether they appeared in statutory legal rules or their individual elements were referred to and expounded as customary law. However, this did not lead to the prevalence of Canon law and, through it, Roman law. It is possible to show some influences of or correspondences with Canon law and Roman law, but they did not have a crucial impact on the basic institutions that had developed in Hungarian and Croatian law, more precisely, in nobiliary law, even more because the customary collection called *Tripartitum* (1514) was a powerful legal practice forming work that hindered any major legal transfer. The most powerful influence exerted on pre-1848 Hungarian and Croatian law by foreign law happened in the field of criminal law. This reception was a customary legal one, because the Hungarian courts of first instance having criminal jurisdiction started to use – as part of the Hungarian legal customs – in their practice a sample of the Criminal Code of Ferdinand III – given for the province of Lower-Austria along 1656 – translated into Latin, mainly because it has been attached to the materials of the Hungarian collection of decrees, called *Corpus Iuris Hungarici* along 1696.
Regarding the private law, it has to be pointed out that the Hungarian judicial practice and doctrine since 1848 onwards – due to the withering away of the feudal relations and consecutive failed attempts to pass

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modern national civil code – gradually elevated *ius commune*, i.e. received Roman law, to the level of a subsidiary source of law. In certain Croatian areas, to be more precise in Međimurje and Baranja, the Hungarian private law, based on Werbőczy's *Tripartitum*, as well as on the numerous later regulations that formed together *Corpus Iuris Hungarici*, was still law in force after the collapse of the Habsburg Empire. The Croatian doctrine between the two World Wars also supported the conceiving that *ius commune* is a subsidiary source of Hungarian private law. Thus, for example, legal doctrine resolutely emphasises that where '[…] there are no positive regulations, the principles of *ius commune*, i.e. Pandect law should be applied without hesitation, as they formed the basis of the Austrian civil code and […] Hungarian private law'. Such a situation with regard to the legal sources of the Hungarian private law did not change in Croatia until April 6, 1941, i.e. the day when the Second World War started on the territory of Croatia. Taking into consideration the aforementioned facts, the purpose of the second part of the paper is to analyse the significance and role of the *ius commune* as a source of law on the Croatian territories belonging to the former Hungarian legal area until 1941 and its contemporary importance.

2. The influence of Roman law and other foreign legal systems on Hungarian and Croatian law in the pre-1848 period

The institutional foundations of traditional Hungarian and Croatian law were laid by the peculiar system of nobiliary property. Its roots may be traced back to the first royal decrees. Chapter 6 of St. Stephen's Decree I guaranteed the owner's right to disposition *('[…] uniusquisque habeat facultatem sua dividendi, tribuendi uxori, filiis, filiabus atque parentibus sive ecclesiae, nec post eius obitum quis hoc destruere audeat')*, then, Chapter 26 of the same Decree relating to widows and orphans laid down the order of legal succession in connection with the widow's usufruct, namely, that the estate of the estate-leaver (free property owner) shall pass to his children (descendants), in their absence to his collaterals, and in the absence of collaterals to the king *(si autem vidua sine prole remanserit et se innuptam in sua viduitate permanere promiserit, volumus, ut potestatem habeat omnium bonorum suorum et quidquid velit inde facere, faciat. Post obitum autem eius eadem bona ad suos redeant parentis mariti, si parentes habet, sin autem, rex sit heres)*.[1]

[1] J.M. Bak et al., *The laws of the medieval Kingdom of Hungary I. Decreta regni mediaevalis Hungariae I. 1000-1301*. (Idyllwild, California, MCMXCIX) p. 3., 6.

Then, Chapter 2 of St. Stephen's Decree II extended the right to disposition over donated property *('[…] unusquisque propriorum simul et donorum regis dominetur, dum vivit, […] ac post eius vitam filii simili dominio succedat').*[2]

It is wills and alienations of property preserved from the 12th century made by the elite based on descent and dignity, the *nobiles* – the indication of status encountered in decrees connected with the name of St. Ladislaus I – that serve to prove the application of these rules and that also render it possible to provide a more precise interpretation of the rules created by St. Stephen.[3] The owner's power of disposition did not mean free disposition taken in a modern sense either between the living or in case of the dead. This right was restricted, on the one hand, by the right of relatives and on the other hand, by the right of the king *(jus regium).* Therefore, in the decrees of St. Stephen, disposition over one's own property *(sua, proprium)* and donated property *(donum)* was stressed as an essential tangible element of property, and property itself was defined so.

This right to property of the *nobilis* was recognized by Andrew II's Golden Bull of 1222 in relation to the *servintes regis* as well. *('Si quis serviens sine filio decesserit, quartam partem possessionis filia obtineat, de residuo, sicut ipse volverit, disponat. Et si morte preventus disponere non poruerit, propinqui sui, qui eum magis contingunt, obtineant. Et si nullum penitus generationem habuerit, rex obtinebit').*[4] Its interpretation is still debated today. Construers have typically attempted to prove – based on the text containing contradictory states of affairs – the obviousness of the recognition of free disposition expressly as a rule of succession.[5] As opposed to this, Act 1222:4 was intended to declare the

[2] Bak, et al., op. cit. n. 1, at p. 9.

[3] The correct order of creation: St. Ladislaus III. (First Half) 12., II. 11., I. 41. Bak, et al., op. cit. n. 1, at p. 19., 11., 59.

[4] Bak, et al., op. cit. n. 1, at p. 32.

[5] G. Bónis, *Magyar Jogtörténet II.* [Hungarian Legal History] (Kolozsvár, Cluj, 1942) p. 197.; G. Bónis, *Középkori jogunk elemei* [The Elements of Our Medieval Law] (Budapest, 1972) p. 94-95.; A. Degré, *Magyar alkotmány-és jogtörténet* [Hungarian Constitutional and Legal History] (Pécs, 2010) p. 160.; F. Eckhart, *Magyar alkotmány-és jogtörténet* [Hungarian Constitutional and Legal History] (Budapest, 2000) p. 303.; J. Holub, 'A leánynegyedről' [On the Girls' Quarter] 42 *TURUL* (1928) p. 6, J. Illés, *A törvényes öröklés rendje az Árpádok korában* [The Order of Legal Succession in the Era of the Árpád Dynasty] (Budapest, 1904) p. 23.;

right of disposition of the *serviens regis* in accordance with the meaning of St. Stephen's decrees discussed above.[6]

Beginning from the second half of the 13th century, those members of the former elite who had fallen behind the barons, the narrow group of worldly dignitaries and dominant noble families, together with those having the legal status of *serviens regis*, started to be organized into a unified nobility (definable already in terms of feudal estates as a matter of fact). At their assembly held in Esztergom in 1267, these noblemen *('nobiles regni […], qui servientes regales dicitur')* laid down in their petitions the right of disposition alongside the application of the right of relatives. Although this referred to the case of noblemen killed in military campaigns, it defined a generally applicable principle *('[…] si aliquis ex nobilibus non habens in exercitu mortuus fuerit, possessiones ipsius quocumque modo acquisite ad manus regias non devolvatur, sed cognato vel generationi decedentis in exercitu cedere debeant, ita videlicet, quod possessiones ipsius hereditarie generationi sue remaneant, emtitie vero vel acquisite, cuicunque in vita sua conferre voluerit, relinquantur')*.[7] When in 1351 Lewis I rewrote and confirmed Andrew II's decree of 1222, and in accordance with the meaning of the provisions of the decree granting the petitions of Esztergom, he deleted from it the archaic element of the definition of free property, which had lost its meaning by that time and which is perceived today as free disposition without any restrictions, he laid down the family's (relatives') right limiting the owner's power of disposition, the principle of aviticity. *('[…] videlicet nobiles homines sine herede decendentes possint et queant ecclesiis vel aliis, quibus volunt, in vita et in morte dare vel legare, possessiones eorum vendere vel alienare, ymo ad ista facienda nullam penitus habeant facultatem, sed in fratres, proximos et generationes ipsorum possessiones eorundem de jure et legitime, pure et simpliciter absque contradictione aliquali devolvantur […]')*.[8]

A. Murarik, *Az ősiség alapintézményének eredete* [The Origin of the Basic Institution of Aviticity] (Budapest, 1938) p. 108-109.

[6] G. Béli, *A nemesek négy bírója. A szolgabírók működésének első korszaka* [The Four Judges of the Nobility. The First Period of Activity of Administrative District Magistrates] (Budapest–Pécs, 2008) p. 28-32.

[7] Bak et al., op. cit. n. 1, at p. 41.

[8] G. Bónis and V. Bácskai, *Decreta regni Hungariae. Gestze und Verordnungen Ungarns 1301-1457* (Budapest, Akadémiai Kiadó, 1976) p. 130.

The right of relatives always prevailed over the owner's right. The father as owner and his sons born of a lawful marriage stood in the same line, in other words, the father and his sons were co-owners of the inherited family property *(bona hereditaria).* In the undivided co-ownership of the father and his sons, the father had only one additional right: the right to administer the family property for his own and his son's benefit and to allocate his sons' share of it still in his life.[9] The father was not allowed to alienate any part of the property without his sons' consent. At the same time, if the sons still lacked the capacity to make a legal declaration, in other words, they had not reached the legitimate age *(legitima aetas),* the father was entitled to alienate any part of the property only if this did not harm his sons' pecuniary interests or damage or decrease the family property. Division *(divisio),* which terminated undivided co-ownership, was carried out in the order of succession and as a result, the property claim of the relatives between whom the property had been divided *(fratres condivisionales)* to each other's share did not cease even after the division. The owner had the obligation to offer his share first *(praemonitio)* to his relatives between whom the co-owned property had been divided.[10] In the noble family that may be derived from the free extended family community of the period preceding the establishment of the Christian kingdom (the era of clans), in the legal and consanguineous community of male relatives defined by a common ancestor *(communio juris et sanguinis),* which often included relatives being third or even fourth generation descendants having undivided co-possession of the family property, the order of succession was determined by principles of equality within the community of descendants. From the estate-leaver father his sons inherited in equal shares, the place of the (deceased) son that had fallen out from among the same-ranking heirs being taken by that son's descendants, who in turn received equal shares of that son's share of the inheritance. On the other hand, where there were no descendants, the collaterals were the next in the order of succession, the closer relative excluding the more distant relatives, and where there

[9] G. Béli, 'A vagyonmegosztás különös módja az Árpádkorban' [The Peculiar Way of Division of Property in the Era of the Árpád Dynasty], in Sz. Kokovai and É. Pohánka ed., *Ünnepi Tanulmányok Móró Mária Anna tiszteletére.* [Festive Essays in Honour of Mária Anna Móró] (Pécs, Pécsi Tudományegyetem Könyvtára, 2009) p. 40-44.

[10] G. Béli, *Magyar jogtörténet. A tradicionális jog* [Hungarian Legal History. Traditional Law] (Budapest – Pécs, Dialóg-Campus, 1999) p. 72.

were several same-ranking relatives as possible heirs, out of them the one to inherit as a matter of fact (or the ones to inherit in equal shares) was (were) the relative(s) who shared the property with the estate-leaver or his ancestor later, in other words, who maintained undivided co-ownership with the estate-leaver or his ancestor longer.[11]

By the second half of the 14th century, the nobiliary legal system developed around the institutions of nobiliary property and succession had already become national law, the customary law of the country. As a result of the provisions of Chapters 11 and 12 of the Decree of 11 December 1351, unfolding nobiliary customary law became generally applicable *de jure* as well by the abolition of the existing burdens of the nobles of Požega (Pozsega) and Valpovo (Valkó) living between the Drava and Sava, in other words, by the elimination of differences between them and the nobles of Hungary *('[…] universi veri nobiles intra terminos regni nostri constituti, etiam in tenutis ducalibus sub inclusione terminorum ipsius regni nostri existentes sub una et eadem libertate gratulentur', and '[…] ab omni exactione aliarum quarumlibet collectarum hactenus persolvi consuetarum exempti penitus, tamquam ceteri regni nostri nobiles aliarum partium, immunes habeantur').*[12]

The evolution of the country's (nobiliary) customary law led to the development of a peculiar notional system. For example, the term *possessio* familiar from Roman law functioned, on the one hand, as a synonym for real property, *praedium*, *terra*, *fundus*, but on the other hand, in the same way as in Roman law, it also meant the fact of possession, and in general the right of possession and also land owned by someone, which, as opposed to the *dominium* in Roman law, ensured to the owner a right limited by relatives, neighbours and the *jus regium*.[13] Peculiarly, *possessio* as the fact of possession became part of the Hungarian and Croatian

[11] Eckhart, op. cit. n. 5, at p. 283.; Illés, op. cit. n. 5, at p. 48., 51., 55-57.; G. Béli, 'Osztatlanság és osztály az Árpádkorban' [Undivided Co-Ownership and Division in the Era of the Árpád Dynasty], in M. Homoki-Nagy and E. Balogh ed., *Emlékkönyv Dr. Ruszoly József egyetemi tanár 70. születésnapjára* [Memorial Volume in Honour of Dr. József Ruszoly on the Occasion of His 70th Birthday] (Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Karának tudományos bizottsága, 2010) p. 1-64, 140-141.

[12] Bónis and Bácskai, op. cit. n. 8, at p. 135-135.

[13] A. Degré, 'A feudális tulajdonjog egyik jellemző vonása' [A Characteristic Feature of Feudal Property Law] *Millenniumi Magyar Történelem. Historikusok. Degré Alajos. Válogatott tanulmányok.* [Hungarian History at the Millennium. Historians. Alajos Degré. Selected Essays.] (2004) p. 344-346.; Béli, op. cit. n. 10, at p. 71-73.

system of legal terminology only quite late and due to Werbőczy *('[…] duplici ratione atque via dominium aliquorum bonorum quis habere. Primo, jure possessorio, dum quis reale pacificumque dominium, tam in fructibus percipiendis, quam etiam servitiis per colonos exhibendis, bonorum aliquorum aperte tenet')*.[14] In old Hungarian and Croatian law, *praescriptio* was not merely used as a term meaning lapse of time or negative prescription but also adverse possession. However, unlike *usucapio* in Roman law, the person who possessed the property beyond the prescription period did not acquire ownership of it, he was merely provided special legal protection, since the owner could not enforce his right against him in a court action, in other words, the owner could not lawfully eject the adverse possessor from the possession of the property. On the other hand, the adverse possessor was able to defend his possession against a third person only if he applied to the king for a new donation with reference to his long and peaceful possession.[15] *Donatio* meant both a gift and the free or partially free transfer of real property by the king, the governor, then the palatine or a private individual as a repayment for the loyalty and service provided by the person in his service and in expectation of future loyalty and services *('privilegialis collatio juris possessionarii')*.[16] *Donatio regia* was but the transfer of property with the retention of the king's right. Based on the *jus regium*, if all of those entitled to inherit designated in the donation by the determination of the order of succession died, reversion took place, the donation reverted to the king or the Holy Crown. As the order of succession laid down in the donation usually corresponded to the order of legal succession of descendants, the internal relations between the donee's heirs were also governed by the rules of aviticity, consequently, in respect of the *bona donatalia* the owner's right was limited by double restriction. From the end of the 15th century, royal donation also functioned as the original way to acquire nobility, if the donee of the royal donation was not a nobleman. *Donatio palatinalis* meant a limited donation and did not have any effect on legal status as only nobles were entitled to re-

[14] I. Gazdag, *Werbőczy István: Tripartitum* (translation of 1984 by Kálmán Csiky) (Budapest, 1990) p. 67. 180.

[15] Degré op. cit. n. 5, at p. 149-151, Béli, op. cit. n. 10, at p. 70-71, G. Béli, 'Die Verjährung (*praescriptio*) und die Ersitzung (*usucapio*) im alten ungarischen Recht' 49 *Rechtsgeschichtliche Vortäge/Lectures on Legal History* (2007) pp. 3-4.

[16] I. Frank, *Specimen elaboratum institutionum juris civilis Hungarici* (Cassoviae, 1823) p. 79.; Béli, op. cit. n. 10, at p. 75.

ceive such a donation. *Donatio privata* was a special way of acquisition of property that existed until the 15th century. Lords had the opportunity to meet their obligation of support and maintenance toward the person obliged and owing service to them by a private donation, which for the donee meant ownership that was free from any restrictions.[17]

These few selected terms represent already to the required degree the simmilarities and differences between the content of Roman legal terminology and that of Hungarian and Croatian legal institutions. At the same time, similarly to the case of other Western Christian states, Canon law, based on Roman legal tradition, had an impact as a matter of course on the evolution of some important legal institutions. The influence exerted by Canon law was profound in matrimonial law, in the formal requirements of wills, concerning women's property rights etc.[18]

The first Hungarian legal textbook, the *Ars Notaria* edited in the middle of the 14th century, which contains several hundred document forms in different variations, already confirms the existence of a national customary law with fully-fledged foundations. The editor, whom research at the end of the last century identified with János Uzsai – a person educated at university – commented on the presented sample document forms based on his knowledge of Roman or Canon law, if he considered it important in connection with the given legal institution.[19]

Roman law was adopted where as a concomitant of political division no uniform national law had developed by the 15th-16th centuries, where 'compatibility' between the particular laws required the application of an intermediary, auxiliary law.[20] In Hungary and Croatia the division of

[17] Bónis 1942, op. cit. n. 5, at p. 180.; Degré, op. cit. n. 5, at p. 152-154.; Eckhart, op. cit. n. 5, at p. 286-287.; G. Béli, 'A magánadományozás a XIII. században' [Private Donation in the 18th Century], in Hamza Gábor, et. al. ed., *Tanulmányok Benedek Ferenc tiszteletére* [Essays in Honour of Ferenc Benedek] (Pécs, JPTE Állam- és Jogtudományi Kar 1996) p. 65.; Béli op. cit. n. 10, at p. 75., 76., 80., 83.

[18] G. Béli, 'Women's Acquisition of Property during the Era of the Arpad Dynasty in Hungarn', 10 *Jogtörténeti tanulmányok* (2010) pp. 29., 39-41., 44-46.

[19] Bónis 1972, op. cit. n. 5, at pp. 30-32. The only publication of the Ars Notaria: M. G. Kovachich, *Formulae sollenes styli in cancellaria, curiaque regum, foris minoribus ac locis credibilibus authenticusque regni Hungariqae potissimum practicae ante-Werbőczianae a coaevis codicibus manuscriptis collectas I. Anonymi ars notarialis formularia sub Ludovico I. rege Hungariae conscripta.* (Pesthini, MDCCXCIX) pp. 1-154.

[20] I. Szászy, 'Werbőczy és a magyar magánjog' [Werbőczy and Hungarian Private Law], 2 *Acta Juridico-politica* (1941) p. 98-99.; J. Illés, 'Werbőczy és a Hármaskönyv' [Werbőczy and the *Tripartitum*], 22 *Magyar Jogászegylet Könyvtára*

the country's (nobiliary) customary law by the end of the 15th century was prevented by the creation of the *Tripartitum*. The *Tripartitum* realized two objectives basically. On the one hand, it confirmed that with respect to their fundamental rights and, relating to them, freedoms and, consequently, property rights, there was no difference between nobles and prelates and barons, *('Per nobiles […] generaliter universos dominos praelatos, barones, caeterosque magnates, et alios regni hujus proceres intellige, qui […] una, ejusdemque libertatis praerogativa semper muniuntur')*, on the other hand, it systemized the country's (nobiliary) customary law.[21]

In connection with the *Tripartitum* the question of the reception of Roman law rises inevitably. With regard to showing the influence of Roman law, the most heated debate unfolded between the end of the 19th century and the first decade of the 20th century concerning a proposition, according to which the editor might have used some civil law work, namely, the *Summa legum*, which had been created in Lower Austria in the 14th century.[22] Apart from the fact that the editor divided his work into parts based on the pattern of the *Institutiones (personae, res, actiones)*, besides some version of the *Institutiones* and the *Decretum Gratiani*, for the *Prologue* he also probably used some textbook, *collectio* compiled based on the *jus civile*, and based on them he also incorporated significant Roman law elements. However, the *Prologue* have no direct impact on the systemized material of the country's customary law, it constitutes an introduction containing historical and theoretical explications about the world of law.[23]

In the private law institutional system of the *Tripartitum*, the influence of Roman law may be shown, for example, in the case of guardianship. By incorporating the father's right to appoint a guardian by will into the

[Library of the Hungarian Lawyers' Society] (Budapest, Magyar Jogászegylet 1942) p. 5.

[21] I. Gazdag, op. cit. n. 14, at p. 9., 74.

[22] B. Schiller, 'A Hármaskönyv egyik állítólagos főforrásáról' [On an Alleged Main Source of the *Tripartitum*], No. 283. Vol. XXXVI., Part 7. *Magyar Jogászegyleti Értekezések* (1908) pp. 297-300.; J. Illés, *Bevezetés a magyar jog történetébe. A források története* [Introduction to the History of Hungarian Law. The History of Sources] (Budapest, 1930) pp. 229-233.

[23] G. Béli, 'Degré Alajos és a régi gyámsági jog' [Alajos Degré and Old Guardianship Law], in A. Molnár ed., *Levéltáros elődeink. Degré Alajos és Szabó Béla munkássága* [Our Archivist Ancestors. The Work of Alajos Degré and Béla Szabó] (Zala Megyei Levéltár 2006) pp. 33-34.

system of guardianship – besides, it is to be noted that it had happened in the 15th century that the testator father appointed a guardian for his child or children in his will – Werbőczy implemented a careful innovation that was intended to protect the rights of the person under guardianship against the pecuniary interests of relatives claiming legal guardianship.[24]

The materials of the three substantial parts of the *Tripartitum* provide a summary primarily of nobiliary private law institutions, including the institutions of property and succession law and the relating procedural law institutions, while having regard to the set political objective. The *Tripartitum* concerns institutions of the law of obligations only in so far as they are connected with the institutions of the law of property and succession. Contracts are also mentioned only because of aviticity restrictions in the case of the alienation or mortgaging of immovable property. Criminal law provisions had been included in the material of the *Tripartitum* also only relating to the personal liberty of nobles and the property law implications of committing an offence.

After István Werbőczy finished his work entitled *Tripartitum opus juris consuetuninarii inclyti regni Hungariae* in 1514, which the king had commissioned him to compile after 1500 but before 1504, a committee appointed by the national assembly consisting only of representatives of the lesser nobility examined his work and concluded that it contained laws and approved customs '*recto ordine'* and '*debito modo'*. Then they petitioned the king to assent to the country's laws which had been laid down in writing *('jura regni scripta')*, and send them out to every county under his seal (Act 1514: 63). However, this royal confirmation did not take place because the party of barons had seized power in the meantime.[25]

After Werbőczy had the *Tripartitum* published in Vienna in 1517, it was followed by repeated publications in Vienna in 1561. In Hungarian it was published for the first time in Debrecen in 1565, the translation being incomplete and abridged. Its later Hungarian version was issued in Kolozsvár (Cluj) in 1571, followed by a Latin edition in the same place in the following year. The publication of 1572 of Vienna was succeeded

[24] A. Degré, 'A magyar gyámsági jog kialakulása a dualizmus korának gyámsági kódexéig' [The Development of Hungarian Guardianship Law until the Guardianship Code of the Dualistic Era] in *Jogtörténeti Értekezések* 8 (1977) pp. 11-14.; Béli, op. cit. n. 23, at pp. 35-38.

[25] Illés, op. cit. n. 22, at pp. 200-202.

in 1574 by a Croatian ('Slovenian') language edition printed in Nedelišće (Nedelic).[26] Due to this early and the numerous later editions, the *Tripartitum* had preserved the country's customary law and saved it for the era following the Ottoman rule in Hungary and Croatia.

As early as 10 years after the first publication, the idea of the revision of the country's decrees was raised, followed by that of the revision of the country's law *(jura regni)* in the order of Act 1548: 21, and in accordance with this statutory provision a committee was set up, the members of which included Bishop of Zagreb Pál Gregorináci, Bishop of Győr Ferenc Újlaki (later as Royal Governor), Royal Representative Mihály Mérei, Royal Counsellor Gergely Szarvaskendi Sibrik, Deputy Chief Justice Tamás Kamarai, Administrator of Royal Affairs János Pókateleki Zombor, as well as Vienna law professor Márton Bodenarius, *doctor utriusque juris*. As a result of their efforts a draft was prepared in 1553 using the *Tripartitum*. The draft differed from Werbőczy's work in so far as it divided the first part of the *Tripartitum:* into personal law and nobiliary private law, and supplemented it with 94 new articles. This law material, which became known as *Quadripartitum* because of its four parts, made only insignificant changes to the substance of the work serving as its foundation. Its revision was postponed for decades. At the beginning of the 17th century the question of its revision was raised again, then it fell into oblivion, finally the material was published in Zagreb in 1798 for private use.[27]

After the driving out of the Turks, Act 1715: 24 again provided for the improvement of statutes and for this purpose it ordered the delegation of a committee. In 1719 the delegates came up with a draft which referred to the underlying legal material in its title already: "*Novum Tripartitum consuetudinarii inclyti regni Hungariae"*. The proposal revised mainly the first part of the Tripartitum, supplementing the individual titles with the provisions of later Acts, but it did not make substantial changes to it, therefore, the *Novum Tripartitum* also failed. Following this, no further attempts were made at reforming the *Tripartitum*.[28]

[26] I. Csekey, '*Tripartitum* bibliográfiája' [The Bibliography of the *Tripartitum*] 2 *Acta Juridico-politica* (1941) p. 157-187.

[27] Illés (1930), op. cit. 22 p. 265-271., Illés (1942), op. cit. n. 20 p. 6.

[28] Réti, Illés Elemér: A büntetőjog kodifikációjának első kísérletei Magyarországon. Kollonics javaslata és a Novum Tripartitum. [The First Attempt at the Codification of Criminal Law in Hungary. Kollonics' proposal and the Novum Tripartitum] In:

Neither the Acts passed under Charles III's rule nor later statutes managed to break through the customary law system of the *Tripartitum*. But some regulations of Roman origin became embedded, for example, the institute of *fideicommissum*, the creation of which was rendered possible for the higher nobility by Act 1687: 9 and for lesser nobles by Act 1723:50, however, it is to be noted that there had been precedents for permitting *fideicommissum* even prior to the first statutory provision.[29]
The dominant role and significance of the *Tripartitum* is illustrated by the fact that the first collection of laws published in 1696 under the title *Corpus Juris Hungarici* was placed at the head of the 'statute-book'. The publisher, Márton Szentiványi used the Vienna edition of 1628 of the *Tripartitum*, which was the corrected version of its second edition published by Sámboky in 1581 also in Vienna.

Árpád Bogsch (ed.): *Angyal-szeminárium kiadmányai 2.* [Publications of the Angyal Seminar 2.] Budapest, 1916 = Réti (1916) p. 33-36.

[29] Degré, op. cit. n. 5, at p. 161-162.; Zs. Peres, 'A magyarországi hitbizományok 16. századi gyökere' [The 16th Century Roots of Fideicommissum in Hungary], 8 *Jogtörténeti Tanulmányok* [Studies on Legal History VIII] (2005) p. 389-405.; Zs. Peres, 'A családi hitbizomány intézményének megjelenése Magyarországon' [The Appearance of the Institution of Fideicommissum in Hungary], in B. Mezey and T.M. Révész, ed., *Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére* [Essays in Honour of Gábor Máthé on the Occasion of His 65th Birthday] (Budapest, Gondolat 2006) pp. 415-429.; Zs. Peres, 'Sei es ihm ein Pokal für seine Heldentat gegeben… (Die Belohnung von Miklós Pálffy während des Türkenkrieges)', in R. Szekeres, K. Korsósné Delacasse, M. Steppan, E. Cs. Herger Hrsg., *Recht ohne Grenzen. Festschrift zum 15. Jubileum der Zusammenarbeit der Grazer und Pécser Rechtshistoriker* (Pécs, Pécsi Tudományegyetem, Jogtörténeti Tanszék 2007) p.. 83-108.; Zs. Peres, 'Kötött öröklési rendnek alávetett birtokok jogi természete Magyarországon a 17-18. században (a Pálffy – család birtokai tükrében)' [The Legal Nature of Estates under a Set Order of Succession in Hungary between the 17th-18th Centuries (as Reflected in the Estates of the Pálffy Family)], in Sz. Kokovai and É. Pohánka ed., *Tanulmánykötet Móró Mária Anna tiszteletére* [Collection of Essays in Honour of Mária Anna Móró] (Pécs, Pécsi Tudományegyetem Könyvtára 2009) pp. 232-245.; Zs. Peres, 'The right of disposal referring to the acquired noble properties in the period after the battle of Mohács (1526) in Hungary' 10 *Jogtörténeti Tanulmányok* (2010) pp. 167-168.; Zs. Peres, 'Legal transfer of Spanish regulatory enactments referring *fideicommissum* to the Hungarian Law of Successions', in L. Beck Varela, P. Gutierrez Vega, A. Spinosa, ed., *3rd Yearbook Young Legal History* (Munich, Martin Meidenbauer Verlag, 2009) pp. 349-364.; Zs. Peres, 'Österreichisch-ungarische Beziehungen der Aristokratie und ihre rechtlichen Wechselwirkungen', in G. Béli, D. Duchonová, A. Fundárková, I. Kajtár and Zs. Peres, ed., *Institutions of Legal History with special regard to Legal Culture and History* (Bratislava-Pécs, Publikon, 2011) pp. 345-361.

One may regard as the first *"Corpus Juris Hungarici"* the work edited by Bishop of Pécs Miklós Telegdy and Bishop of Nitra Zakariás Mosóczi and published in Trnava in 1584 under the title *Decreta, constitutiones, et articuli regnum inclyti Regni Hungariae ab anno Domini millesimo trigesimo quinto ab annum sesquimillesimum octogesimum tertium publicis comitiis edita*, which contained the national laws utilizing and extending the material of Ilosvay's manuscript.[30]

Szentiványi's *Corpus Juris Hungarici* of 1696 contained several additions apart from the decrees and the *Tripartitum*. Such additions included the '*Newe peinliche Landgerichtsordnung'* issued by Ferdinand III for Lower Austria in 1656, which Archbishop of Esztergom Lipót Kollonich ordered to be translated into Latin and published in Trnava in 1687 under the title '*Forma processus judicii criminalis seu praxis Criminalis'* so as to serve as a suitable norm to be followed by the courts in their criminal jurisdiction. As Szentiványi suggested that his *Corpus Iuris Hungarici* should have the title '*Forma processus judicii criminalis, seu praxis criminalis. Serenissimo regi apostolico Hungariae Josepho I. dicata, sumptibus eminentissimi fprincipis cardinalis a Kollonicz'* written on its title page, later when under the rule of Charles III this code covering criminal procedural and substantive law was published as a 'special edition' supplemented also with the Acts of 1723, in the first half of the 18th century, apart from the most common designation of '*Praxis Criminalis'*, proceeding courts referred to it for short as '*Kollonichiana'* or '*Praxis Criminalis Kolonicziana'*, as well as '*Josephina'*, '*Praxis Criminalis Josephina'*, or '*Praxis Criminalis Carolina'*.[31]

Kollonich urged the adoption of the *Praxis Criminalis* in vain, the nobles refused to put it on the agenda in the national assembly, because they declared it incompatible with their privileges. At the same time,

[30]G. Wenzel, A magyar és erdélyi magánjog rendszere. [The system of the Hungarian and Transylvanian private law.] (Buda, 1863) 24-26. o., Illés (1930), 272-275. o.

[31] Réti (1916), op. cit. n. 28. pp. 7-8.; G. Béli and I. Kajtár, 'Österreichische Strafrecht in Ungarn: Die "Praxis Criminalis" von 1687', 4 *Zeitschrift für Neuere Rechtsgeschichte* (1994) pp. 325-328.; G. Béli, 'Der Einfluss des deutschen Rechts auf die ungarische Strafpraxis. Die Rolle des *Corpus Juris Hungarici* in der ungarischen Starfrechtsprechung zwischen dem Anfang des XVIII. und der Mitte des XIX. Jahrhunderts', in G. Jarouschek, H. Rüping and B. Mezey ed., *Strafverfolgung und Staatsraison. Deutsch-ungarische Beiträge zur Strafrechtsgeschichte.* 6 *Rothenburger Gespräche zur Strafrechtsgeschichte* (Gießen, Psychosozial-Verlag, 2009) pp. 103-107.

they considered it suitable for application in criminal matters relating to non-nobles besides the national rules. Since as the annexed part of the *Corpus Juris Hungarici*, the *Praxis Criminalis* was easily available, it was put into use at the county and manorial courts from the first decade of the 18th century. As a result, the reception of the code into customary law had been completed generally by the middle of the 18th century.
The reception of the *Praxis Criminalis* deepened existing differences between nobles and non-nobles even further, in consideration of the fact that the commission of an offence based on the same facts, for example, homicide, in the case of a noble, could be qualified as *delictum privatum* punishable by pecuniary punishment based on the country's customary law, as opposed to this, a non-noble could be punished for the same offence even with the most serious penalty for the commission of *crimen.*
The most powerful influence exerted on pre-1848 Hungarian and Croatian law by foreign law - regardless the described influences of Roman legal tradition - was the adoption of the *Praxis Criminalis.* On the other hand, the country's system of (nobiliary) customary law built on the *Tripartitum* prevented wider application of foreign law in accordance with the political interests of the nobility. For the transformation of legal system, which maintained the nobility in their economic and power position until 1848, the nobility's reform movement was needed.

3. The influence of Roman private law in the form of ius commune on Hungarian and Croatian law in the post-1848 period

Although Hungarian law, as it was seen, resisted the more profound reception of Roman law for several centuries,[32] the Hungarian judicial practice and doctrine has since the second half of the 19th century onwards – due to the withering away of the feudal relations and consecutive failed attempts to pass a modern national civil code[33] – gradually

[32] On the reasons for resisting the reception of Roman Law in Hungary, see e.g., I. Zajtay, 'Sur le rôle du droit romain dans l'évolution du droit hongrois', in *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker* (Milano, A. Giuffré 1954) p. 183 sqq.; G. Bónis, 'Einflüsse des römischen Rechts in Ungarn', V, 10 *Ius romanum medii aevi* (1964) p. 1 sqq., 111 sqq.; A. Földi, 'Living Institutions of Roman Law in Hungarian Civil Law', 28 *Helikon* (1988) p. 364 sqq.
[33] On various attempts, proposals and drafts of the codification of civil law in Hungary in the 19th century and the first half of the 20th century see e.g., J. Zlinszky, 'Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert', in *Studia in honorem Velimirii Pólay septuagenarii. Acta universi-*

elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law[34].

In the aforementioned context, the attention should primarily be drawn to the fact that the Hungarian private law – based on Werbözy's *Tripartitum*, as well as on the numerous later regulations that together formed *Corpus Iuris Hungarici* – was law in force in certain areas (Međimurje, Baranja) of the present-day Republic of Croatia until World War II. In the time of socialist Yugoslavia, owing to the acceptance of the legal-political principle of 'the unity of law',[35] individual segments of Hungarian private law were applied as subsidiary law on the entire Croatian territory until the independence of the Republic of Croatia in 1991. Following the Croatian independence, the judicial practice continued to apply certain rules of Hungarian private law as the subsidiary law (e.g. in the area of land-registry law)[36]. The legal basis for contemporary judicial use of these rules is the *Law on the Application of Legal Rules passed before April 6, 1941* (*Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine*) (hereinafter: ZNPP), which came into force on December 31, 1991. According to the provisions of the ZNPP, legal regulations that were in force on April 6, 1941 (i.e. the day when the Second World War started on the territory of Croatia, causing the legal discontinuity in the occupied territories) are to be applied in the Republic of Croatia as legal rules in the relations that are not regulated by positive legal order of the Republic of Croatia, provided

tatis Szegediensis. Acta juridica et politica, (Szeged, JATE, Tomus XXXIII., Fasciculus 1-31 1985) p. 433 sqq; cf. E. Heymann, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn* (Tübingen, Mohr, 1917) p. 9. sqq; G. Hamza, *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn* (Budapest, Andrássy Gy. Deutschsprachige Universität Budapest 2002) p. 135. sqq.

[34] On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian private law system, see e.g. G. Hamza, 'Sviluppo del diritto privato ungherese e il diritto romano', in *Ivris vincvla. Studi in onore di M. Talamanca*, (Napoli, Jovene 2001) p. 357. sqq. Cf. Heymann, op. cit. n. 30, at p. 12. sqq; Földi, op. cit. n. 29, at p. 366. sq; Hamza, op. cit. n. 30, at p. 134sq.

[35] On the principle of 'the unity of law', see N. Gavella, 'Građansko pravo u Hrvatskoj i kontinentalno-europski pravni krug' [Civil Law in Croatia and Continental European Legal Family], 43 *Zbornik Pravnog fakulteta u Zagrebu* (1993) p. 358. sq.

[36] See T. Josipović, in N. Gavella et al., *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [Croatian Civil Law Order and Continental European Legal Family], (Zagreb, 1994) p. 130. n. 354.

that they are in conformity with the Croatian constitution. The basic *ratio* of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia (e.g. no civil code has been passed) by the application of legal rules that were in force on the present-day territory of the Republic of Croatia on April 6, 1941.[37]

Considering the subject of the article, it is very important to note that *Corpus Iuris Hungarici* contained as its part the final title of the last book of Justinian's *Digesta* (D. 50, 17), which is entitled *De diversis regulis iuris antiqui.* This title, undoubtedly one of the most significant parts of Justinian's codification (*Corpus Iuris Civilis*), contains 211 short fragments by Roman lawyers, summarising in the form of *regulae* those basic Roman legal principles, on which subsequent European legal culture and the European private law systems were based on to a relevant extent[38]. The aforementioned title of the *Digesta* was included in the edition of *Corpus Iuris Hungarici* from 1581 by its editor, Hungarian humanist *Iohannes Sambucus* (János Sámboky),[39] and thus the legal rules contained in it became source of law in Hungarian-Croatian Kingdom. *Digesta* 50, 17 continued to be an integral part of Hungarian private law,[40] and thus it was also primary source of law until World War II on the Croatian territories belonging to the former Hungarian legal area (Međimurje, Baranja). Therefore we consider that they should still be treated – taking into consideration the aforementioned principle of 'the unity of law' – as potential subsidiary law in the Republic of Croatia in the sense of norms of the ZNPP.

In that context, it is particularly interesting to note that the Supreme Court of the Republic of Croatia – after the Croatian independence – in the reasons for judgments explicitly referred to the certain *regulae* contained in the aforementioned title of Justinian's *Digesta*, e.g. *quod ab initio vitiosum est, non potest tractu temporis convalescere* (D. 50, 17,

[37] On ZNPP see Gavella, et al., op. cit. n. 33, p. 170 sq.

[38] On the title *De diversis regulis antiqui*, its structure, contents and significance in the European legal tradition, see amplius P. Stein, 'The Digest Title, *De diversis regulis iuris antiqui* and the General Principles of Law', in R. A. Newman ed., *Essays in Jurisprudence in Honor of Roscoe Pound* (Indianapolis, Bobbs-Merrill 1962) p. 1 sqq., with instructions for further reading.

[39] See M. Mora, 'Über den Unterricht des römischen Rechtes in Ungarn in den letzten hundert Jahren', 11 *Revue internationale des droit de l'antiquité* (*RIDA*) (1964) p. 413.; Hamza, op. cit. n. 33, at p. 133.

[40] Cf. M. Lanović, *Privatno pravo Tripartita* [Private Law of *Tripartitum*] (Zagreb, 1929) p. 96.

29),[41] *nemo plus iuris ad alium transferre potest, quam ipse haberet* (D. 50, 17, 54)[42] or *res iudicata pro veritate accipitur* (D. 50, 17, 207),[43] which undoubtedly proves that the legal rules in question have been accepted as relevant normative contents in the Croatian judicial practice. However, the aim of the analysis of the *Digesta* 50, 17 conducted here is to point to the fact that the Croatian judicial practice could certainly take a step further, meaning that the legal rules contained in the aforementioned title should not be applied as a mere argument in the explanation of judicial decisions, but that this part of Justinian's *Corpus Iuris Civilis* can be – via *Corpus Iuris Hungarici* and under the conditions determined by the ZNPP – applied as a source of positive law in the Republic of Croatia.

According to the authors' opinion, the applicability of Roman private law in the form of *ius commune* within the contemporary Croatian legal system – owing to the fact that the Hungarian private law system was in force on the Croatian territories on April 6, 1941, and that therefore it still represents a potential source of subsidiary law – is not limited only to the rules from the *Digesta* 50, 17, but that the rules of *Corpus Iuris Civilis* could be applied to a much wider extent. As it was seen, the *Digesta* 50, 17 represented the primary source of law in the Hungarian private law system. It was mentioned above that the Hungarian judicial practice and doctrine has since the second half of the 19th century onwards gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. The Croatian doctrine between the two World Wars also supported the understanding that *ius commune* is a subsidiary source of Hungarian private law and should be emphasised in the context of determining the scope of the possible application of rules of *Corpus Iuris Civilis* in the Republic of Croatia today. Thus, for example, I. Milić resolutely emphasises in the very beginning of his work *A Survey of Hungarian Private Law in comparison with the Austrian Civil Code* that where '[…] there are no positive regulations, the principles of *ius commune*, i.e. pandect law should be applied without hesitation, as they formed the basis of the Austrian civil code and […]

[41] I Kž 545/1991-3; on the rule in question, see M. Petrak, *Traditio iuridica*, vol. I., (Zagreb, 2010) p. 116.
[42] II Rev 26/1993-2; Rev 2749/1993-2; Rev 1822/1993-2; cf. U-III-1107/1994. See, Petrak, op. cit. n. 38, at. p. 90.
[43] Rev 1396/1993-2; Revt-80/02-2. See Petrak, op. cit. n. 38, at. p. 120.

Hungarian private law'.[44] Such a situation with regard to the legal sources of the Hungarian private law did not change until April 6, 1941, the day when the Second World War started on the territory of Croatia.
Based on the previously conducted analysis, it can be emphasized that rules of *ius commune* – via *Corpus Iuris Hungarici* and under conditions determined by the ZNPP – could be applied as a source of contemporary law in the Republic of Croatia through two different 'channels'. Firstly, owing to the fact that the *Digesta* 50, 17 was a primary source of law on April 6, 1941 on the Croatian territories belonging to the former Hungarian legal area, the principles contained in the aforementioned title of the *Digesta* are still applicable in the Republic of Croatia - in the sense of provisions of the ZNPP - and this was confirmed by the judicature of the Supreme Court. Secondly, since the ZNPP makes no difference between the primary and secondary sources of the law on April 6, 1941, and proceeding from the fact that Roman private law in the form of *ius commune* was a subsidiary source of private law in the former Hungarian legal area of Croatia, it should be concluded that the entire corpus of *ius commune* can represent a potential source of contemporary Croatian law. As the second 'channel' is much more extensive than the first one, and that it absorbs it in their entirety, it is necessary to finally conclude that all the *ius commune* rules – and not just the legal rules contained in the *Digesta* 50, 17 – can have the status of the source of Croatian law under the conditions defined by the ZNPP.
In this context, it is interesting to note that the Republic of Croatia is the only state in which it is still possible to apply *Corpus Iuris Hungarici*, since private law regulations contained in the collection in question were derogated long ago in Hungary and Slovakia by the civil codes passed after World War II[45].
Based on the conducted analysis, it seems that sufficient arguments were offered to statement that the *ius commune* rules, according to the provi-

[44] Quoted I. Milić, *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code] (Subotica 1921) p. 1.; on the life and work of Ivo Milić (1881-1957), professor of Roman Law, Private International Law and Civil Procedural Law at the Faculties of Law in Subotica and Zagreb, see M. Apostolova Maršavelski, 'Rimsko i pandektno pravo na Pravnom fakultetu u Zagrebu' [Roman and Pandect Law at the Law Faculty in Zagreb], 2 *Pravni fakultet u Zagrebu* [Law Faculty in Zagreb] (1996) p. 237.
[45] Civil code was passed in Hungary in 1959, and in the Czechoslovakia in 1950. Cf. Hamza, op. cit. n. 30, at p. 139. sqq; 184.

sions of the ZNPP, can have the status of a source of contemporary Croatian private law. Their application is possible, as it was seen, primarily owing to the fact that *ius commune* was legal source on April 6, 1941 as a subsidiary law on the territory of Croatia in the areas belonging to the former Hungarian legal area. Although the *ius commune* rules have, in the formal sense, only the status of a subsidiary source of law, in the terms of the content they can be of fundamental importance for the contemporary legal system, as a series of these rules contain in themselves the basic legal principles, on which a range of the most important legal institutes are founded on.[46] Therefore the reception of the *ius commune* rules as a subsidiary law by the judicial practice and legal doctrine could to a relevant extent contribute to a correct interpretation and application of contemporary legal regulations, and the legal practice could directly apply the legal principles contained in these rules to a much larger and more precisely defined extent than it was the case so far, especially in the case of legal gaps.[47]

Proceeding from the fact that the *ius commune* rules formulated as the Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture, the final question arises to what an extent could their more extensive application contribute to the further Europeanization of national legal systems? In the recent detailed analyses of the application of the *ius commune* rules by the judicial bodies of the EU, both in the cases of the existence of legal gaps in the European legal order, as well as with the aim of providing a more precise interpretation of its existing legal norms, it is particularly emphasised that a systematic application of those rules as general legal principles common to all national European legal systems that belong to the *ius commune* tradition represents, together with the different types of legislative acts, one of the ways to further harmonisation and/or unifica-

[46] Thus, for example, the *superficies solo credit* rule as a fundamental principle of the contemporary Croatian law of real property is relevant for the legal regulation of almost all institutes of the law of real property today, including those that did not originate under the Roman legal tradition (e.g. *condominium* ownership, land-registry books etc.).

[47] Generally on the significance of the *ius commune* rules that incorporate the general principles of law see e.g. A. Wacke, 'Sprichwörtliche Prinzipien und europäische Rechtsangleichung', 5 *Orbis iuris romani* (1999) p. 174. sqq; J. Kranjc, *Latinski pravni reki* (Ljubljana, 1998) p. 5.

tion of the European legal area.[48] Moreover, it should be mentioned that certain authors of the already famous *Principles of European Contract Law*, one of the most significants recents projects directed towards the Europeanization of private law, determined in their detailed analyses that the principles in question are, in their essence, a modern reformulation of the traditional *ius commune* rules.[49] Taking into consideration all the aforementioned facts, a possible wider scope of the application of the *ius commune* rules in the national judicial practice would not represent just a nostalgic quest for the hidden treasure of the European legal tradition, but a part of a long-term creative effort for the Europeanization of the contemporary legal orders on the firm foundations of the common legal culture, *e.g.*, *Corpus Iuris Civilis* and *Corpus Iuris Hungarici*.

[48] Thus, for example, the following rules were applied: *alterum non laedere*; *audiatur et altera pars*; *dolo petit qui petit quod statim redditurum est*; *ne bis in idem*; *nemo auditur propriam turpitudinem allegans*; *nemo censetur ignorare legem*; *non contra factum proprium*; *nulla poena sine culpa*; *nulla poena sine lege*; *nullum crimen sine lege*; *pacta sunt servanda*; *patere legem quam fecisti*; *venire contra factum proprium*; *vim vi repellere licet*; see. R. Knütel, '*Ius commune* und Römisches Recht vor Gerichten der Europäischen Union', 9 *Juristische Schulung Heft* (1996) p. 768. sqq.; M. J. Rainer, 'Il Diritto romano nelle sentenze delle Corti europee', in D. Castellano ed., *L'anima europea dell'Europa*, (Napoli, Edizioni Scientifiche Italiane 2002); S.F. Andrés, 'Epistemological Value of Roman Legal Rules in European and Comparative Law', 3 *European Review of Private Law* (2004) p. 347 sqq., which papers provide further analyses of the individual cases in which the *ius commune* rules were applied in the judicial practice of the EU. Cf. also Wacke, op. cit. n. 44, at p. 174. sqq. who particularly emphasises the role of Latin legal maxims and the legal principles contained in them in the process of the Europeanization of private law.

[49] See R. Zimmermann, '*Ius Commune* and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', *European Contract Law: Scots and South African Perspectives* (2006) p. 1 sqq.

EU law

Siniša Rodin*

National identity and market freedoms after the Treaty of Lisbon**

1. Introduction

The aim of this paper is to explore the balance between market freedoms and national regulatory autonomy following the entry into force of the Treaty of Lisbon, particularly in the light of the rephrased national identity guarantee under Article 4(2) TEU. The paper will discuss whether the newly established obligation of the European Union to respect the national identities of its Member States has any consequences in the case law of the European Court of Justice. Arguably, defining the proper scope of application of the national identity guarantee is relevant to the application of EU law, since it disturbs the previously established balance between European and national law. If defined too broadly, it can undermine the uniform application and effectiveness of EU law. If defined too narrowly, it would be devoid of any useful effect.

With this objective in mind, I will firstclarify the concept of national identity and, more specifically, national constitutional identity. Second, I will discuss the case law of the ECJ preceding the entry into force of the Treaty of Lisbon. In this part, I will suggest that the development of national identity law before the Treaty of Lisbon went through three evolutionary phases: a phase of early and implicit national identity law; a phase in which the ECJ developed the margin of discretion doctrine; and a phase in which the ECJ started to differentiate national constitutional rules and accord them different levels of scrutiny. In the third part, I will explore whether there have been significant developments in the national identity case law of the ECJ after the entry into force of the Treaty of Lisbon, and suggest that the general approach of the ECJ has not significantly changed. I will also argue that the main developments related to Article 4(2) TEU have not taken place before the ECJ, but in national arenas, notably in France and Germany. In the fourth and final part, I will return to the issue of the differentiation of national identity claims and conclude that one category is understood by

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the ECJ as an ordinary justification of national measures restricting one of the market freedoms, while the other category of claims prompts the ECJ to defer to national authorities.

2. Defining national identity

As noted by Advocate General Maduro, national identity has been part of EU law from the beginning.[1] It has been present in the Treaties since the adoption of the Treaty of Maastricht, where it was introduced in Article F(1) of the TEU, which states that 'The Union shall respect the national identities of its Member States, whose systems of government are based on the principles of democracy'. The Article was subsequently renumbered and rephrased to become Article 6(3) of the Treaty of Amsterdam. The Amsterdam provision simply provided that 'The Union shall respect the national identities of its Member States'. Article I-5 of the Treaty establishing a Constitution for Europe rephrased the provision, the identical wording of which subsequently became paragraph (2) of Article 4 of the TEU. According to Article 4(2) of the TEU: [t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

When compared to earlier statements, Article 4(2) speaks about 'fundamental structures, political and constitutional, inclusive of regional and local self-government', while the earlier text generally referred to national identities. It would seem that an added value of the new wording, which is ascribed to the chairman of Working Group V of the European Convention, Mr Henning Christophersen, is the explicit reference to national constitutional identity, whatever this may be.[2] In a

[1] Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and YpourgosEpikrateias* [2008] ECR I-9999, Opinion of AG Maduro, para 31.

[2] The European Convention, which prepared the text of the Constitutional Treaty, discussed a number of proposals as to what should be explicitly mentioned as a part of national identity. Among the proposals, there were: 'constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies' (Altmeier) and also 'language, national citizenship, military service, the educational systems, the welfare systems, including the public health systems, the system for personal taxation, the right of abortion'. See

way, it was the semantic force of Article I-5 of the Constitutional Treaty that narrowed the discourse on national identity into discourse about national constitutional identity. The Treaty of Lisbon followed suit.

The Merriam-Webster dictionary defines identity as "sameness in all that constitutes the objective reality of a thing" and "the condition of being the same with something described or asserted". In brief, identity can be described as a state of being the same as one thing and, at the same time, differentiated from everything else. The word 'national' refers to nation Member States of the European Union. The words 'shall respect' and 'inherent in their fundamental structures' imply a normative claim that in certain essential areas of regulation, defined as 'fundamental structures, political and constitutional', the regulatory powers of the Member States should enjoy immunity from the encroachment of EU law.

Taken together, the wording of Article 4(2) TEU would appear to protect the right of the Member States and their citizens[3] to define, independently of EU law, such elements of their constitutional and political order which make them unique and at the same time different from any other Member State or, indeed, from the European Union at large. Such essential elements constitute the specific content of what is referred to as *national constitutional identity*. In a certain sense, from the Lisbon Treaty onwards, national identity as a technical term under Article 4(2) TEU largely coincides with national constitutional identity. Therefore, I shall use the two terms interchangeably

European Convention, Secretariat, Working Group V, Working Document 28, paper of the Chairman Mr Henning Christophersen on priority issues regarding complementary competence (circulated at the last meeting of WG V on 6 September 2002), Brussels 24 September 2002. Von Bogdandy and Schill name the clause, after the chairman of the Working Group, the Christophersen Clause. A von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the LisbonTreaty' 48 *CML Rev* (2011) p. 1417.

[3] Von Bogdandy and Schill distinguish between an objective and subjective understanding of national identity, the former being based on objectively discernible criteria, such as a common language, history or political institutions, and the latter being defined by the 'will of individuals to belong to a community'. Von Bogdandy and Schill, op. cit. n. 2, at p. 1430. The case law of the ECJ based on Article 4(2) TEU and its earlier forms appears to protect objective national identity as defined by national law and national institutions. If the interpretation were stretched to include the subjective element, the individual choice of belonging to a certain national identity would amount to an enforceable right under EU law.

2.1. Article 4(2) TEU identity and Article 2 TEU values

One part of the national identity of the Member States is construed in terms of the rest of the World. Namely, by being a Member State of the EU, a State is differentiated from all non-EU states.[4] Membership of the EU forms an inextricable part of the Member States' identity.[5] In normative terms, acceptance of certain EU-specific values contributes to what makes the national identities of the Member States unique. As a result of membership of the EU, the national identities of the Member States are understood to comprise the values of Article 2 TEU on which the EU is founded, in particular values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Respect for these values is a minimum requirement for EU membership. Once a State accepts these values by joining the EU, this becomes a rebuttable presumption that can be rebutted only subject to the procedure laid down by Article 7 TEU.

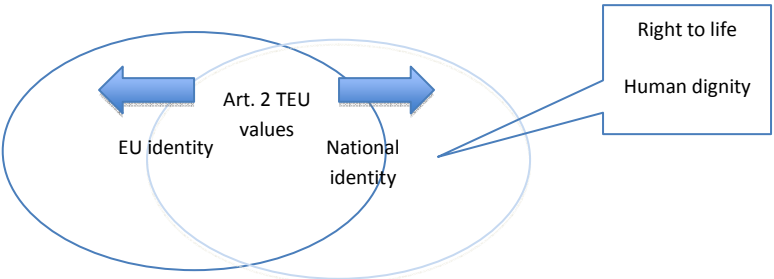
It can be said that Article 2 TEU defines those elements of national identity that are, at the same time, postulated by membership of the European Union and without which neither the Member States nor the European Union itself can claim legitimacy.

However, the concept of national identity is broader than the values enshrined in Article 2 TEU. Namely, the elements of national identity (constitutional identity included), such as Member States' fundamental political and constitutional structures, law and order, or national security, are construed independently at the national level. In other words, national identity and European values do not necessarily overlap. Nevertheless, it is a normative requirement of EU membership that even such elements of national identity which are constructed independently and regardless of the EU context, still have to comply with the values of Article 2 TEU. The history of the 20th century teachesus thatin the absence of this requirement, national 'fundamental structures, political and constitutional' would be capable of pursuing a variety of morally problematic ends.

[4] For the importance of otherness in the construction of identity, see eg W Sadurski, 'European Constitutional Identity?' *EUI Working Papers, LAW* No 2006/33, pp. 7-8.
[5] Von Bogdandy and Schill, op. cit. n. 2, at p. 1426.

That being said, one can conclude that not any kind of national identity would be tolerated within EU membership, but only the kind that promotes the values on which the Union is founded or which is at least neutral in respect of them.
In other words, the constitutional framework of the EU distinguishes between explicit 'good' and implied and dormant 'bad' national identities, the former being worthy of protection and the latter not.[6] This was, after all, implicit in ArticleF(1) of the Maastricht Treaty, which linked respect for national identity to respect for the principles of democracy on the part of the Member States.

Figure 1 – overlapping identities



2.2 National identity and other treaty values

A separate set of values, applicable to all areas of EU regulation, is laid down in Part I, Title II, Articles 9 and 10 of the TFEU. These provisions enshrine values that have to be respected in defining and implementing EU policies. They include a high level of employment, guaranteeing adequate social protection, fighting against social exclusion, providing a high level of education and training, protecting human health, and fighting against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The function of these provisions is anything but clear. The values enshrined therein may create restraints for supranational policy-making. Most of them have been granted constitutional protection at the national level and arguably may constitute part of national constitutional identity. The question, however, is whether reliance on Articles 9 and 10 TFEU may broaden

[6] Arguably, a national constitutional provision reserving the right to vote to men would not be protected by Article 4(2) TEU, since it contradicts the value of equality under Article 2 TEU.

the regulatory discretion of the Member States and change the balance between EU and national law.

Advocate General Cruz Villalon argued in his Opinion in *Palhota*[7] that the ECJ should recognise broader discretion for the Member States in the pursuit of the values listed in Article 9 of the TFEU, such as a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. Accordingly, mandatory requirements justifying a departure from market freedoms should no longer be interpreted narrowly. For example, the social protection of workers should be taken into account in the performance of aproportionality test when assessing whether national measures restricting the free movement of services are justified. The result of such reasoning would be that a Member State is allowed to maintain its own understanding of social policy, for example providing adequate social protection in such a way that it could narrow the scope of application of, for example, the free movement of workers. This is essentially no different from claiming that a high level of social protection constitutes part of the national identity of certain Member States and justifies a departure from market freedoms.

In *Palhota*, the issue was raised whether a national measure requiring an employer, established in one Member State and posting workers to the territory of another, to send a prior declaration of posting can be justified in the context of the free movement of services. After having presented its proportionality analysis in paragraph49, the ECJ went on to assess the appropriateness and necessity of the national measure. The ECJ found that there is a less restrictive measure for the employer, namely,„to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment".[8]

While the Advocate General"s suggestion may have provided discretion to the Member State to choose from among equally effective measures, and select one which serves the protection of workers better, the ECJ maintained the traditional test of the least restrictive alternative for the free movement of services.

[7] See Case C-515/08 *Palhota*, Opinion of AG Cruz Villalon, paras 51-53 [not yet reported].

[8] Palhota case, para 51.

*Palhota*is the first and only[9] post-Lisbon case so far where the existing free-movement case law was challenged by an Advocate General and survived. Accordingly, a fully developed proportionality test remains applicable to situations where Member States invoke the mandatory requirements mentioned in Articles 9 and 10 TFEU. After the entry into force of the Treaty of Lisbon, the ECJ has even strengthened the level of scrutiny by requiring national legislation allegedly promoting a high level of protection of human health to be applied in a consistent and systematic manner.[10]

2.3. National identity and regulatory competence

EU law restricts regulatory autonomy of the Member States in both the area of Union and Member State competence. The same holds for the national identity guarantee under Article 4(2) TEU.

First, as a part of Article 4 TEU, the national identity guarantee represents part of a more general system of co-operation between the Union and the Member States. Upon closer examination, Article 4 TEU lays down several different guarantees that have to be understood in the context of Article 5 TEU.

The first paragraph of Article 4 TEU is a competence rule.[11] It stipulates the residual powers of the Member States, and in this way complements the principle of conferral laid down by Article 5(1) TEU. The Union is based on the principle of conferred powers, the residue of which rests with the Member States. In this light, it is perfectly clear that, as a matter of competence, the national identity guarantee refers but, as I will shortly show, is not limited to the powers conferred on the EU. In its regulatory dimension, Article 4(2) TEU can be understood as a rule that delimits the exercise of the powers conferred. In other words, it can be

[9] A similar suggestion that national courts should be granted more discretion was introduced by AG Cruz Villalon and ignored by the ECJ in a procedural context. See Case C-173/09 *Georgi Ivanov Elchinov v Natsionalnazdravnoosiguritelnakasa* [not yet reported in the ECR].

[10] Joined Cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios* (C-570/07) and *Principado de Asturias* (C-571/07), para 94 [not yet reported in the ECR]. For an analysis of consistency and coherence in the case law, see G Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement', 47 *CML Rev* (2010) p. 1021.

[11] Art 4(1) TEU In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

interpreted as prohibiting the Union from acting even in areas where regulatory competences have been conferred, if the exercise of such competences would affect Member States' national identity. Arguably, the same would hold even in situations where the exercise of EU competence would 'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market' withinthe meaning of paragraph 84 of the *Tobacco Advertising* case.[12]
Furthermore, if national identity is to be distinguished from the principles of subsidiarity and proportionality enshrined in Article 5(3) and (4) TEU, then it cannot come under national parliaments' scrutiny under the Protocol on the application of the principles of subsidiarity and proportionality. A plausible interpretation would be that the national identity guarantee should be applicable even in cases where an act of the EU has already passed the national parliaments' muster, ie., despite it being in compliance with the principle of subsidiarity.
Alternatively, it could be argued that since national identity construction pertains to the Member States, it represents an inherent part of the subsidiarity principle. A consequence of this approach would be that once national parliaments have not objected to the adoption of a rule on subsidiarity grounds, it is presumed that the rule in question respects national constitutional identity. There is no support for either interpretation in the parliamentary practice of the Member States so far.
Secondly, Article 4(2) TEU also plays a role in the area of Member State exclusive competence. While one could expect that in this area the national identity guarantee is uncontested by the very nature of exclusive competence, it is not the case. Namely, it is well established in the case law of the ECJ that even in areas where the Member States have exclusive competence, such as when regulating civil status[13] or higher

[12] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-8419.
[13] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2007] ECR I-1757, para 55: 'civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination.' See also Case C-372/04 *Watts* [2006] ECR I-4325, para 92; Case C-444/05 *Stamatelaki* [2007] ECR I-3185, para 23; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, para 70; Joined Cases C-11/06

education,[14] their competence cannot be exercised against EU law. The most recent confirmation of this position can be found in *Rottman*, regarding the regulation of national citizenship.[15] As I will demonstrate below, in *Rottman*, which both the referring court and the Advocate General understood as a national identity case, the ECJ acknowledged the regulatory competence of the Member State concerned, but nevertheless asserted its case law, according to which the Member States are bound by EU law even in areas of their competence.[16] Thus, it becomes clear that Article 4(2) TEU is applicable in areas of Member State exclusive competence.

The obligation of the Member States to respect EU law is also present with regard to national procedural law, where it is conventionally understood that the Member States enjoy national procedural autonomy subject to respect for the principles of effectiveness and equivalence. However, as Bobek rightly points out, such national autonomy does not really exist, since even national procedural legislation is subject to the scrutiny of the ECJ.[17] Clearly any claims that certain features of national procedural law represent part of national constitutional identity are equally doomed to failure,[18] as was demonstrated in *Elchinov*.[19]

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and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, para 24; and most recently, in the context of higher education, Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* (2010) ECR I-2735, para 28.

[14] Bressol case.

[15] Case C-135/08 *Janko Rottman v Freistaat Bayern* (2010) ECR I-1449.

[16] Rottman case, para 41: 'Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'; and para 45: 'Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law'. See also the case law cited therein.

[17] M Bobek, 'Why there is no Principle Of "Procedural Autonomy" of the Member States', in B. de Witte and H. Micklitz eds., *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011, forthcoming).

[18] However, the ECJ is prepared to allow an implicit margin of discretion. For a recent example, see Case C-291/09 *Francesco Guarnieri&Cie* [(not yet reported], where the ECJ took the position that a national rule is 'purely procedural and its purpose is not to regulate trade in goods'. See para 16. Accordingly, the impact of the national procedural rule was 'too uncertain and indirect'. For the concept of an implicit margin of discretion see below in the text.

[19] Elchinov case.

A number of cases that deal with national identity values have been located in the sphere of Member State competence, such as the right to life, human dignity, the nationality of teachers and notaries, republican government, the use of national languages, the civic status of citizens and, indeed, the regulation of national constitutional procedures. Since national identity claims will typically be emphasised more in areas of Member States' exclusive competence, it can be reasonably expected that fine-tuning between market freedoms and national identity claims will take place along the lines sketched by Roman Herzog and LüderGerken in their comment published in 2008 following the contentious *Mangold*[20] judgment of the ECJ.[21] The tension can be summarised as follows: either the ECJ will start to exercise self-restraint, or national constitutional courts will have to take the protection of national constitutional identity more seriously.

3. National identity before the Treaty of Lisbon

Roughly speaking, national identity jurisprudence before the Treaty of Lisbon went through three evolutionary phases. In the first phase, national identity was not claimed as such, but was recognised in an implicit way by means of national insistence on constitutional standards for the protection of fundamental rights. The second phase followed in the early '90s and was characterised by the development of a margin of discretion. The third pre-Lisbon phase resulted in the concession that national constitutional identity is not absolute. This third phase heralded a subsequent differentiation of national constitutional rules into two classes: fundamental constitutional provisions 'worthy' of deferring to national authorities and other constitutional provisions treated like ordinary justifications.

[20] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

[21] R. Herzog and L. Gerken, 'Stop the European Court of Justice', *Zentrum für Europäische Politik* (2008). Published originally in *Frankfurter Algemeine Zeitung* (8 September 2008). See also EU Observer, 11 September at http://euobserver.com/9/26714 (8 August 2011). The core argument is as follows: 'both labor market policy and social policy are still core competences of the Member States. However, this case clearly demonstrates to what extent EU regulation and EU jurisdiction nevertheless interfere in the governing of these core competences.'

3.1. The 'old' national identity law

Judicial reference to national constitutional identity is well discussed in legal scholarship. Two well-known references are the early *Solange* dialogue between the German Federal Constitutional Court and the ECJ,[22] and the *Frontini* judgment of the Italian Constitutional Court establishing the theory of countervailing power to the supranational transfer of sovereignty, ieso-called *controlimiti*.[23] According to the *Frontini* reservation, the transfer of sovereignty, which is inherent in the Founding Treaties, cannot include the transfer of powers to Community institutions to „violate the fundamental principles of the Constitution or the inalienable rights of man."
German and Italian reactions were prompted by the evolving doctrine of supremacy, which after its inception in *Costa v ENEL*[24]was crystallised by the ECJ in the *Internationale Handelsgesellschaft*case where the Court boldly observed that:

> '[…] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.'[25]

The ECJ followed the same line of reasoning in its subsequent case law. For example, in the Belgian Flemish Government case,[26] the Flemish government attempted to justify discrimination on the grounds of a lack of regulatory competence in the matter, which according to the Belgian constitution belongs to the federal government. The ECJ shunned the argument by reiterating its earlier case law, stating that

> '[…]a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from

[22] *Solange I*, BVerfGE 37, 271; *Solange II*, BVerfGE 73, 339; *Maastricht*, BVerfGE 89, 155.
[23] Italian Constitutional Court Case no. 183/73 *Frontini v Ministero delle Finanze*, in A Oppenheimer ed., *The Relationship between European Community Law and National Law: The Cases* (CUP 2005); M Cartabia, 'Nuovi sviluppi nelle "competenze comunitarie" della Corte costituzionale, nota a sentenza n. 232 del 1989', *Giurisprudenza costituzionale* (1989) p. 1012.
[24] BVerfGE 37, 271, 2 BvL 52/71.
[25] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[26] Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* [2008] ECR I-1683.

> the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law'.[27]

Advocate General Sharpston rightly pointed to Article 27 of the 1969 Vienna Convention on the Law of Treaties, according to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[28] It is now widely accepted that the Vienna Convention also refers to national constitutional law.[29] Nevertheless, German insistence on high standards of protection of fundamental rights prompted the development of significant fundamental rights case law and ultimately to the adoption of the Charter of Fundamental Rights of the EU.

3.2. Second phase: margin of discretion

Margin of discretion is the power exercised by the Member States in areas of regulation falling within the scope of EU law. In such areas, Member States can justify derogations from EU law by demonstrating a

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[27] *Government of Communauté française and Gouvernement wallon v Gouvernement flamand*, para 58. See also Case C-87/02 *Commission v Italy* [2004] ECR I-5975, para 38; Case 69/81 *Commission v Belgium* [1982] ECR 163, para 5; Case C-323/96 *Commission v Belgium* [1998] ECR I-5063, para 42; Case C-236/99 *Commission v Belgium* [2000] ECR I-5657, para 23; Case C-111/00 *Commission v Austria* [2001] ECR I-7555, para 12.

[28] See *Government of Communauté française and Gouvernement wallon* (n. 26), Opinion of AG Sharpston fn 57.

[29] Concerning national constitutional law, André de Hoogh draws attention to the drafting history of Article 27 of the Vienna Convention which 'confirms that the reference to internal law comprises the constitution of a State party. In fact, the amendment proposed by Pakistan initially claimed "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty".' (Vienna Conference, Documents, p. 145; adopted: 55 in favour, none against, 30 abstentions (Vienna Conference, First Session, p. 158)). Though certain hesitations may be observed on the part of the participants in the Vienna Conference in 1968-1969 to support the resulting provision (adopted: 73 in favour, 2 against, 24 abstentions; Vienna Conference, Second Session, p. 54), as to this particular point, the provision did find favour and only two States (Venezuela and Iran) expressed their opposition suggesting the primacy of their constitutional law over treaties. Two states (Venezuela and Guatemala) specifically attached reservations on this point, against which objections have been raised by certain other States. A. de Hoogh, 'The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission', www.ejiltalk.org.

broadly defined legitimate regulatory aim.[30] To justify the aim as legitimate, a Member State can rely on a variety of self-defined interests that need not be shared by other Member States. However, such interests must not run against the values of EU law and must pass the proportionality test. Margin of discretion started to play a more significant role in the early 1990s following the judgment of the ECJ in *SPUC v Grogan*.[31]

For the purpose of the present discussion, it is useful to distinguish between two different types of discretion.

The first type is the discretion that Member States exercise in the implementation of EU law, notably, directives. Such discretion may pertain to the legislative authorities[32] or to the national courts when interpreting national law.[33] The *Van Duyn* situation, where national public authorities had to interpret public policy justification, also falls within this type. This first type of discretion does not give the Member States a licence to depart from compliance with EU law but, on the contrary, discretion to interpret national law in line with EU law.[34]

The second type of discretion is of constitutional significance and concerns potentially competing national and European values. In a case where a European and national rule or value does not coincide, one of the two has to give way to the other.In such situations, both the EU and Member State have normative claims that the European or national rule or value should control the other. When the two rules or values are

[30] In areas that fall outside the scope of EU law, one cannot speak about discretion, but Member States are still under an obligation to 'have a due regard to EU law'. In Hohfeldian terms, one could say that Member States enjoy immunity from application of EU law in areas where the EU has exercised its regulatory competence. WN. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', 26 *Yale Law Journal* (1916-1917) p. 710., 711.

[31] Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR 4685.

[32] See eg., Joined Cases C-482/01 and C-493/01*GeorgiosOrfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR 5257, para 114; Case C-271/91 *Marshall* [1993] ECR I-4367, para 37; joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer and others* (2004) ECR I-8835, para 105.

[33] Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181, paras 68 and 69. The ECJ allowed the discretion of the national court to be used to interpret national law in line with EU law.

[34] Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, para 18. See also 30/77, *Régina v Pierre Bouchereau* [1977] ECR 1999, para 34.

allowed to co-exist without an imminent resolution, one can speak about either an implied or an explicit margin of discretion.

The ECJ has so far recognised margin of discretion in explicit and implied ways. Examples of an explicit margin of discretion are *Schmidberger*[35] and *Omega*.[36] Implicitly, the ECJ granted a margin of discretion in *SPUC v Grogan* and *Melki and Abdeli*.[37]

Implied margin of discretion is best illustrated in *SPUC v Grogan*,[38] where the ECJ had to address the tension between a national constitutional rule defining the right to life and the free movement of services. As is commonly known, the tension was resolved on jurisdictional grounds and Community law was found to be inapplicable.

The significance of *SPUC v Grogan* is in highlighting the fact that national constitutional values may escape the scrutiny of EU law, as long as they are outside itsscope. Nevertheless, soon after the case had been decided, Ireland was able to introduce a specific protocol to the Maastricht Treaty, which granted immunity and according to which nothing 'in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland'.[39]

The Protocol amounts to a constitutional amendment, the purpose of which was to prevent the Grogan situation from re-emerging in an economic context and not being resolved by functional reasoning.

Indeed, jurisdictional rules may relieve the ECJ from passing its judgment on highly sensitive national constitutional choices, such as the prohibition of the public display of communist symbols in the *Attila Vajnai* case.[40] While it is easy to agree that the prohibition of the red star represents part of Hungarian post-communist identity, constructed

[35] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v RepublikÖsterreich* [2003] ECR I-5659.

[36] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

[37] Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli* [not yet reported].

[38] Stephen Grogan and others case.

[39] Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities.

[40] Case C-328/04 *Criminal proceedings against Attila Vajnai* [2005] ECR I-8577.

against negative historical experiences, the non-economic nature of the activity put the case outside the scope of EU law.

Implied margin of discretion is, as one can see, of a jurisdictional nature, and the ECJ controls it through functional concepts such as *economic activity*, *undertaking*, *official authority* or *internal situation*.

A more complicated situation arises when a conflict cannot be avoided by jurisdictional means. In such situations, one value has to prevail over the other. The ECJ has already dealt with such situations in *Schmidberger*, *Omega* and *Küçükdeveçi*.[41] In all such situations, the following general rule applies: once a case is brought within the scope of EU law, either by direct application of a Treaty rule or by a directive, a rule or general principle of EU law can have exclusionary effects. This is also an instance where the concept of national identity can have animpact and possibly restrict the exclusionary effects of EU law. *Hic Rhodus, hic salta*!

The three mentioned cases are, however, different as to the nature of the protected national values. In *Schmidberger*, it was freedom of assembly as a fundamental right, in *Omega*it was human dignity as a fundamental constitutional value,while in *Küçükdeveçi*it was an instrument of social policy.[42] Moreover, while freedom of assembly is a value endorsed by the EU and all the Member States, human dignity, was, before the entry into force of the Charter of Rights of the EU,[43] a specific characteristic of the German constitutional order that was compatible with EU values[44] but not necessarily recognised at the constitutional level by other Member States. The case is similar to social policy measures, where the Member States, by the very nature of the area and Treaty-entrenched choice, exercise wide discretion. Do these differences have any significance in respect of the breadth of the margin of discretion?

In all three cases, the ECJ insisted on the legitimate aim of national regulation.[45] As long as that aim is juxtaposed with a market freedom, it is legitimate, as it is compatible with the broader referential framework (general principles) of EU law. In two out of the three mentioned cases, this was the case, as national measures were found to be compatible or,

[41] Case C-555/07 *SedaKüçükdeveçi v Swedex GmbH & Co KG* [2010] ECR I-365.
[42] Küçükdeveçi case, para 36.
[43] The Charter guarantees human dignity in Article 1.
[44] Omega case, para 34.
[45] Schmidberger case, paras 79 and 80; Küçükdeveçi case, para 36; Omega case, para 35.

at least, reconcilable with general principles of EU law.[46] In *Küçükdeveçi*, the national measure was found to be in accordance with the social policy justifications provided for by Directive 2000/78,[47] but not in accordance with a broader referential rule: the general principle of non-discrimination. In other words, there was no compatibility between national law and EU law at the level of the broader referential framework of the EU, and so the national law had to be set aside.

If Article 4(2) TEU has aneffect, it should be tested in situations where an element of national identity does not coincide with the broader referential value framework of the EU. Neither *Schmidberger* nor *Omega*is such a case, bearing in mind that the protection of fundamental rights is an important element of identity of both the EU and its Member States.

Nor is *Küçükdeveçı*, though for different reasons. Policy, including social policy, is a variable of national government. It is at the discretion of the executive branch to formulate and implement various policies, and for that reason there can be no equation between policy and national constitutional identity. EU law does not prescribe any given direction in which Member States should frame their social policy and does not interfere with Member States' choice to constitute themselves as a welfare state. A genuine conflict between EU law and national constitutional identity would emerge only if EU law touched upon the fundamental constitutional choice of a Member State, for example, to constitute itself within a certain socio-economic or political framework.[48]

To conclude, the second period in which the national identity guarantee was framed did not bring about a meaningful definition of national identity or consequently aresolution of the tension between national identity and internal market freedoms.

3.3. Third phase: differentiation of constitutional rules

It was only after the signing of the failed Constitutional Treaty that the national identity guarantee was linked directly not to a vague concept of

[46] Schmidberger case, paras 71-73; Omega case, para 34.

[47] Küçükdeveçi case, para 36. See Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* L 303, 2 December 2000, 16-22.

[48] Arguably, such a conflict would emerge if a Member State opted to abandon a market economy, which is a condition of EU membership.

national identity but to a somewhat more concrete concept of constitutional identity. It was only after the entry into force of the Treaty of Lisbon that this linkage obtained legal significance.

Parallel with Treaty incorporation, an awarenessemerged that not every national constitutional claim automatically represents a constituent part of national constitutional identity. While AG Maduro suggested in *Michaniki* that a contested rule of the Greek constitution should be understood as an element of national identity,[49] the ECJ simply assessed the contested rule according to the usual proportionality test.[50] Its legitimacy depended on the extent it pursued the interests of transparency and equal treatment, which at the same time are principles defined by EU law.

The approach of the ECJ in *Michaniki* led Besselink to suggest that:

> more trivial provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – are not granted such priority [over EU law], and the normal *Costa* doctrine of the priority of directly effective EU law prevails.[51]

Von Bogdandy and Schill hold the same and suggest that 'only fundamental structures of the Member States are relevant'.[52] If this interpretation is correct, then the function of Article 4(2) TEU would be to create a referential framework for the ECJ when making a distinction between essential and non-essential elements of national constitutions. The described approach would require different intensities of judicial scrutiny.

In the case of non-essential elements, the ECJ would perform a proportionality test under which a national identity claim would not be an automatic justification for departure from economic freedoms. Provided a regulatory aim is legitimate, a national measure will still need to be appropriate and necessary, regardless of whether it can be characterised as an element of national identity or not.[53] Member States will enjoy a margin of discretion, however, only insofar as their

[49] Opinion of AG Maduro, Case C-213/07, para 33.

[50] See V. Kosta, 'Case C-213/07 *Michaniki A Ev Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias*' 5 *European Constitutional Law Review* (2009) p. 501.

[51] L. F. M. Besselink, 'National and Constitutional Identity before and after Lisbon' 6 *Utrecht Law Review* 3 (2010) p. 36., 49.

[52] Von Bogdandy and Schill, op. cit. n. 2, at p. 1431.

[53] Schmidberger case, paras 82-87; Kücükdeveçi case, para 37; Omega case, para 36.

measures can be reconciled with the broad referential framework of EU law.[54] In cases where essential elements are concerned, the ECJ would defer the decision to the national judicial or legislative authorities, with (*Omega*) or without (*SPUC v Grogan*) reserving a proportionality test for itself.

In support of such an interpretation is the fact that so far the ECJ has been more generous in grantinga margin of appreciation in cases involving fundamental right guarantees and national constitutional values than in cases involving ordinary national law, even in cases of well-established national civil law principles.[55]

AG Maduro himself implicitly recognised in paragraph 33 of his Opinion in *Michaniki* that some constitutional rules are capable of triggering the national identity guarantee under Article 4(2) TEU, while some are not.[56] The same thought was introduced by AG Kokkot in *UGT-Rioja*,[57] where she interpreted the ECJ"s position concerning the balance between respect for national constitutional principles and observance of EU Law.[58] According to AG Kokkot, while the ECJ

[54] As far as margin of discretion is concerned, in *Küçükdeveçı* (para 38), the ECJ restated its well-established position that Member States enjoy a wide margin of discretion in framing their respective social policies. In *Schmidberger* (para 89), a broad margin was allowed to national authorities in striking a balance between a fundamental right and market freedom. In *Omega* (para 31), again, the margin was decided as being broad.

[55] In *Traghetti del Mediterraneo*, the ECJ ruled that EU law precluded the application of a national law which excludes state liability for damages for breach of EU law for damage caused to individuals by an infringement attributable to a court adjudicating in the last instance, or which restricts liability for damages arising from erroneous application of EU law by a national court to cases of intentional fault, serious misconduct and denial of justice. In such a case, the Simmenthal mandate is fully applicable and the national court has to set the national legal rule aside. Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana* [2006] ECR I-5177, para 46.

[56] See para 33 of the Opinion: 'It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules.' The wording 'all national constitutional rules' implies that there may be some constitutional rules which automatically trigger deference.

[57] Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747, paras 56-57.

[58] The Advocate General referred to Case C-88/03 *Portuguese Republic v Commission of the European Communities* [2006] ECR I-7115.

respects local autonomy as defined by national constitutions, 'the Member States cannot hide behind their constitutional order and circumvent the prohibition on aid under Article 87 EC through a purely formal transfer of legislative powers'.[59] Whether this was the case or not was left to the national court to decide.[60]

As far as the ECJ is concerned, as early as 1996, in *Commission v Luxembourg*,[61] the ECJ recognised national identity as a legitimate aim, though subject to the application of a proportionality test.[62] Accordingly, a Member State may not invoke national identity in order to derogate from a market freedom as long as there is a less restrictive alternative to freedom of movement.

More recently, the ECJ supported the differentiation thesis in *Rottman*, decided in March 2010,[63] where the referring court suggested that„the effect of assuming that there existed, in European Union law, an obligation to refrain from withdrawing naturalisation obtained by deception would be to strike at the heart of the sovereign power of the Member States".[64]

In his Opinion in *Rottman*, AG Maduro suggested that the power to deprive a person of Member State citizenship represents an 'essential element' of a Member State's national identity, since it affects the composition of the national body politic. Accordingly, making national citizenship dependent on EU citizenship would contravene Article 6(3) TEU (now 4(2) TEU). This, however, follows, not from the national identity provision alone, but from the very architecture of Union citizenship, which is explicitly made secondary to national citizenship. Accordingly, the ECJ ignored the Advocate General's argument and decided the case on the grounds of the exclusionary effects of EU citizenship law.[65]

[59] Opinion of AG Kokkot, Portuguese Republic v Commission of the European Communities, para 57.
[60] UGT-Rioja case, para 144.
[61] Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, para 35.
[62] Commission v Luxembourg case.
[63] Opinion of AG Maduro, Rottman case, para 25.
[64] Rottman case, para 32.
[65] Rottman case, para 41. However the ECJ deferred the proportionality test to the national court.

Even more recently, national identity was claimed as a derogation in the 'Notaries' Cases', decided in May 2011.[66] The argument introduced by the Grand Duchy was that:

> since the use of the Luxembourgish languageis necessary in the performance of notarial activities, the nationality condition at issue is intended to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6(3) EU

(which was applicable at the material time).[67] However, the ECJ was not impressed by the argument, and invoked its earlier position according to which national identity can be 'effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States'.[68] What is noteworthy is that the ECJ, in paragraph 124 of the judgment, spoke about Article 4(2) TEU of the Treaty of Lisbon, but relied on the reasoning expressed in its 2006 judgment, indicating that there was no substantial change between the Maastricht, Amsterdam and Lisbon positions.

On balance, national identity claims had limited success in the pre-Lisbon era. On the one hand, Member States were successful in what can be called implied margin of discretion cases, where the ECJ refused to rule on national value choices on jurisdictional grounds. However, on the substantive count, justification on the grounds of national identity was argued a number of times in order to justify restriction of market freedoms but with limited success. When it comes to substantive conflicts, the ECJ treated national identity as a general justification and balanced it against market freedoms or other values of EU law.

4. National identity and the Treaty of Lisbon

As I have already mentioned in the introduction, the national identity provision was first introduced as part of Article I-5 of the Constitutional Treaty and was subsequently transposed into Article 4(2) of the TEU.

While the first Treaty defined the concept only in vague terms, Article I-5 of the Constitutional Treaty and the subsequent Article 4(2) TEU added some clarity to the concept, defining it as national 'fundamental

[66] Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08 *Commission v Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal* [not yet reported].

[67] Commission v Luxembourg case [1996], para 72.

[68] Commission v Luxembourg case [1996], para 124.

structures, political and constitutional'. Looking into the legislative history of the European Convention that originally framed the text of what has today become Article 4(2) TEU, Working Group V 'Complementary Competences', in its final report to the European Convention,[69] emphasised that 'the provision was not a derogation clause' and that 'the Member States will remain under a duty to respect the provisions of the Treaties'. Instead, the Working Group explained that the purpose of the provision is 'that the Union, in the exercise of its competence, is under an obligation to respect the national identities of the Member States', which is subject to the interpretation of the ECJ, which is the 'ultimate interpreter of the provision if the political institutions went beyond a reasonable margin of appreciation'.[70]

In addition, the newly phrased Article 4(3) TEU has introduced a more balanced approach to the duty of loyal co-operation. According to the new wording, 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 from the Treaties'.

This is not quite the same as the former Article 10 TEC, according to which the addressees of the duty of loyal co-operation were only the Member States. A long line of cases based on Article 10 TEC fashioned the provision so as to create concrete obligations on the part of Member States, such as the obligation of EU-friendly interpretation[71] or the obligation to make good damages for breach of EU law.[72] Now, for the first time, the duty of co-operation has become reciprocal, that is, binding on the EU and on the Member States at the same time.

Reading paragraphs (2) and (3) of Article 4 TEU together, two questions arise. First, to what extent can these provisions, taken together, be interpreted as creating an enforceable obligation for the EU to interpret national law while taking into account national identity?Second, to what extent do they authorise the Member States to derogate from EU law on the grounds of national identity?

[69] CONV 375/02 REV1 WG V 14, Brussels, 4 November 2002.
[70] CONV 375/02 REV1 WG V 14, p. 11.
[71] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.
[72] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and DanilaBonifaci and others v Italian Republic* [1991] ECR I-5357.

4.1. European Court of Justice

There are two recent cases referring to national identity which were decided after the entry into force of the Treaty of Lisbon: *Sayn Wittgenstein*, decided on 22 December 2010,[73] and *Runevič-Vardyn*, decided on 12 May 2011.[74] In both cases, the situation involved a tension between national constitutional identity on the one hand and freedom of movement under Article 21 TFEU and the right to privacy[75] on the other.

Sayn-Wittgenstein concerned an Austrian-born, German-adopted woman with Austrian citizenship, claiming the right to have her title (Fürstin von Sayn-Wittgenstein), acquired from her adoptive father, entered into the Austrian register of civil status. It was claimed that, as she was an estate agent, the impossibility of using the title of *Fürstin* would impair her freedom to provide services.According to the Austrian government, allowing registration of a noble title would be incompatible

> 'with the fundamental values of the Austrian legal order, in particular with the principle of equal treatment enshrined in Article 7 of the Federal Constitutional Law and implemented by the Law on the abolition of the nobility'.[76]

While the ECJ recognised that national identity may be taken into consideration in a proportionality analysis, it clarified that reliance on national identity should be treated as a public policy justification[77] that, in accordance with earlier case law,[78] has to be interpreted strictly as a 'genuine and sufficiently serious threat to a fundamental interest of society'.[79]
In addition, the ECJ allowed a margin of discretion, in accordance with paragraph 31 of its reasoning in *Omega*. Finally, in paragraph 93, the

[73] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [not yet reported].
[74] Case C-391/09 *MalgožataRunevič-Vardyn and ŁukaszPawełWardyn v Vilniausmiestosavivaldybėsadministracija and Others* [not yet reported].
[75] As guaranteed by Article 7 of the Charter of Fundamental Rights of the EU (hereinafter the Charter) and by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention).
[76] Sayn-Wittgenstein case, para 76.
[77] Sayn-Wittgenstein case, paras 83-84.
[78] Omega case, para 30; Case C-33/07 *Jipa* [2008] ECR I-5157, para 23.
[79] Sayn-Wittgenstein case, para 86.

ECJ performed the balancing test itself and concluded that Austria acted proportionately in pursuance of a legitimate constitutional aim. The ECJ paid attention to the right to privacy under the Charter and the Convention, but the issue was not discussed further.

Runevič-Vardyn concerned the case of a woman who wanted to have the spelling of her family name amended in her birth and marriage certificateswith letters not existing in the Lithuanian alphabet.[80] The ECJ first emphasised in paragraph 66 that a 'person's forename and surname are a constituent element of his identity and of his private life', protected both under the Charter and the Convention, and continued by finding that the free movement guarantee under Article 21 TFEU applied to the case.

However, protection of a State's national language, as a part of national identity protected by Article 4(2) TEU, is a value that the European Union must respect (para 86). Accordingly, national identity had to be balanced with both free movement and the right to private life.

With regard to the first point, the tension between the Article 21 TFEU free movement guarantee and Article 4(2) TEU national identity provision, the ECJ followed the *Sayn-Wittgenstein* argumentation. If it is within the scope of Article 21, a national restriction on the freedom of movement can be justified only subject to a proportionality test. However, unlike in *Sayn-Wittgenstein*, where the ECJ performed the balancing itself, in *Runevič-Vardyn* the proportionality test was deferred to the national court.[81]

With regard to the second point, the ECJ ruled on the relationship between individual rights and national identity. Again, it is upon the national court to establish whether the national rule leading to the refusal of amendinga personal name in a person's relevant documents

[80] It follows from para 22 of the judgment that the name 'Malgožata Runevič' was to be changed to 'Małgorzata Runiewicz', and on the marriage certificate from 'Malgožata Runevič-Vardyn' to „Małgorzata Runiewicz-Wardyn'.

[81] Runevič-Vardyn case, para 83: 'In the event that the national court finds that the refusal to amend the joint surname of the applicants in the main proceedings constitutes a restriction of Article 21 TFEU, it should be noted that, according to settled case-law, a restriction on the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions (see, *inter alia*, *Grunkin and Paul*, paragraph 29, and *Sayn-Wittgenstein*, paragraph 81).' However, in civil law tradition, it is questionable to what extent a national court will be prepared to interpret black-letter law.

'causes serious inconvenience to them and/or their family, at administrative, professional and private levels'. Accordingly, the national court will have to decide whether a fair balance between the interests at issue has been struck.[82]

As can be seen, in both cases, which now appear to be settled case law, the national identity guarantee was interpreted narrowly but remained an element of the balancing analysis. The question remains why, in the former case, the balancing was performed by the ECJ, while it was left to a national court in the latter. One of the obvious reasons lies in the fact that a republican form of government is not a negotiable issue and it would not be reasonable to expect from the national court to set it aside on account of freedom of movement. On the other hand, while language does indeed represent an element of national identity, it is not unthinkable for a national court to allow for exceptions in the case of personal names. However, when it came to the assessment of a fundamental right against national constitutional identity, the ECJ deferred to the national court.

What appears to have come out of the two mentioned cases is that the ECJ will either recognise national constitutional identity itself or defer the final judgment to a national court.

While in preliminary reference cases the ECJ has a choice either to balance national identity and an EU freedom itself or to defer to a national court, in infraction proceedings there is no such choice. Deference in infraction proceedings would entail leaving the final judgment to national legislative authorities and solving the case in favour of a Member State. However, as we have seen from cases involving Luxembourg official authorities,[83] the ECJ has preferred to do the job on the grounds of it being the least restrictive alternative.[84] In both cases, just as in *Sayn-Wittgenstein* and *Runevič-Vardyn*, national identity was understood as a legitimate aim which, as an exception to the freedom of movement, had to be interpreted restrictively and subject to a proportionality test.

In addition, it has to be recognised that both the pre-Lisbon Luxembourg cases discussed above dealt with the exercise of official authority, an

[82] Runevič-Vardyn case, para 91.

[83] Commission v Luxembourg case [1996] and Commission v Luxembourg case [not yet reported].

[84] Commission v Luxembourg case [1996] para 35 and Commission v Luxembourg case [not yet reported] para 124.

area of law in which the ECJ insists on a uniform approach. Being an exception from market freedoms, the official authority exception not only has to be interpreted narrowly, but also has to be given 'uniform interpretation and application throughout the Community and cannot therefore be left entirely to the discretion of the Member States'.[85]

It would appear that the approach of the ECJ has not changed and still relies on a narrow interpretation of official authority, even in the face of national identity arguments. Preliminary reference cases dealing with the concept of official authority also follow this pattern.[86] Such a position would appear to confirm Besselink's claim that constitutional identity, though inherently national, is in fact a concept of EU law.[87] In other words, Article 4(2) TEU has made the discourse about the relationship between EU law and national constitutional law a part of EU constitutional law. While it is easy to agree with Von Bogdandy and Schill that '[t]here is now a common European discourse on this most sensitive issue',[88] it is still less clear who, if anyone, has the final say. Or to put it in Paul Feyerabend's terms, the unresolved and possibly unresolvable puzzle lies in the fact that the common European constitutional discourse does not take place in the form of a guided exchange.[89]

Admittedly, the ECJ has no jurisdiction to interpret national law, even less so national constitutional law.[90] On the other hand, national constitutional courts do not have jurisdiction to interpret Article 4(2) TEU. Besselink suggests a solution according to which national constitutional courts would first determine the substance of national constitutional identity, while the ECJ would determine the meaning of

[85] Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, para 38. See also Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 5; Case 149/79 *Commission v Belgium* [1980] ECR 3881, paras 12 and 18.

[86] For recent practice, see eg., joined Cases C-372/09 and C-373/*09 Josep Peñarroja Fa* (17 March 2011) [not yet reported]. For earlier case law see, eg., Case C-42/92 *AdrianusThijssen v Controledienstvoor de verzekeringen*[1993] ECR I-4047.

[87] Besselink, loc. cit. n. 51, at p. 37.

[88] Von Bogdandy and Schill, op. cit. n. 2, at p. 1441.

[89] According to Feyerabend, guided exchange is a form of communication in which 'some or all participants adopt a well specified tradition and accept only those responses that correspond to its standards'. P. Feyerabend, *Science in a Free Society* (London, NLB 1978) p. 29.

[90] Feyerabend, op.cit. n. 89, at p. 44.

the relevant EU law. Indeed, national identity is primarily[91] constructed at the national level, not only as a matter of law but also as a matter of common sense.[92]

This does not make national identity absolute. If this were the case, application of the Article 4(2) TEU guarantee could be triggered by a mere claim that a certain value represents a part of national identity, in which case the ECJ would have to exercise self-restraint. In other words, it would provide for the immunity of national law from the application of EU law, which is obviously not the case.

There are only a few hints so far that the ECJ is prepared to defer to national authorities. Most recently, this was the case in *Runevič-Vardyn*, where the ECJ left it to the national court to balance individual rights against national constitutional identity. An earlier example can be found in *UGT-Rioja*, which was discussed above.[93]

This may be a signal indicating the approach of the ECJ in future cases. Namely, apart from national identity cases, the ECJ is in the habit of leaving it to national courts to establish the relevant facts and balance their finding with a relevant national regulatory interest. An example of such practice is well illustrated by *Familiapress*,[94] where freedom of the

[91] Iris Marion Young has demonstrated how a dominant culture can impose its identity on minority social groups, thus creating a phenomenon of double identity. See IM Young, *Justice and Politics of Difference* (Princeton University Press 2011). Therefore it does not seem unthinkable that national identity can be constructed by external actors.

[92] For the same argument, see C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] ECR I-7213, Opinion of AG Maduro, para 40: 'Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect.' The ECJ, however, ignored the argument.

[93] *UGT-Rioja case*, para 144: 'It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra-State bodies by the Constitution and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC.'

[94] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-03689.

press and press diversity stood in the way of the application of national and EU competition rules. Therefore, *Runevič-Vardyn* looks rather like a continuance of earlier practice than a venture into a new one.

4.2. National developments

As can be seen, the ECJ firmly defends the position that the national identity guarantee under Article 4(2) TEU may not preclude the application of EU law, even in cases of conflict with national constitutional rules. If national identity does prevail, it prevails only because the ECJ has forged the balance in such a way. The same rule, (according to which States may not invoke their constitutional rules in order to justify their failure to comply with a treaty) which is based on the Vienna Convention on the Law of Treaties, holds in infraction proceedings[95] and preliminary reference cases.

Yet, constitutional identity has become a beloved theme in the legal orders of certain Member States. Interestingly, the battlefield on which the supremacy of EU law over national constitutional rules was challenged took place not on substantive, but on procedural grounds. In this way, the dilemma has been transformed from the question of which rule prevails to that of who decides, or even better, who decides last.

It is probably too simple to ascribe a revival of national constitutional identity awareness to the new wording of the national identity clause in Article I-5 of the Constitutional Treaty and the subsequent entry into force of the Treaty of Lisbon. In fact, the involvement of France, which has recently elevated the national identity idea to the status of a constitutional principle, was modest at the time when the provision was discussed within the European Convention. As can be seen from the documents of the Secretariat of the European Convention,[96] the proposed amendments to the then definition of national identity included that 'national identity comprises, as appropriate, the Constitutional "structures"/organisation of public authorities at local and regional

[95] For a good example of how a national constitution may not justify non-implementation of a directive, see Case C-323/97 *Commission v Belgium* [1998] ECR I-4281, para 8: The Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-107/96 Commission v Spain [1997] ECR I-3193, para 10).

[96] Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, CONV 574/1/03 REV 1, Brussels 26 February 2003.

level/selection of languages/local autonomy/status of churches'. However, French input was negligible.[97]

Michel Troper suggests that French constitutional doctrine was directly triggered by the concept of constitutional identity, as introduced by the Constitutional Treaty and later on embraced by the Treaty of Lisbon.[98] It would appear thatthe French constitutional reform of 1 March 2010 was motivated by an intention to insulate the French constitution against European law having the last say.[99] Again, Troper puts it succinctly. Since EU law prevails over national constitutional law 'a French court wishing to avoid acknowledging the supremacy of European law must use another argument than the fact that some principle of French law is a constitutional norm. This is where "constitutional identity" comes into play.'[100]

The doctrine was also embraced by the *Conseil Constitutionnel*, which in 2006 adopted a position according to which 'transposition of a directive may not run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power

[97] According to the Summary provided by the Secretariat, the amendments were introduced by 'Mr Michel + 5 Belgian members of the Convention + observers + Lopes + Hübner + Einem + Kiljunen + Vanhanen + Cushnahan + Olesky + Tiilikainen + Peltomäki + Costa + 3 Portuguese + Santer + 2 Luxembourgers + Lequiller + Frendo + Bonde + 8 members of the Convention + Wittbrodt + Fogler + Brok + 12 EPP members of the Convention + Katiforis + Serracino-Inglott (+ Inguanez) + Chabert (observer) + 5 members of the Convention (observers)'.

[98] M Troper, 'Sovereignty and Laïcité', 30 *Cardozo Law Review* 6 (2009) p. 2561, 2573. This is also confirmed by Josso, who writes that before the Constitutional Council's decision, there were no other statements of any specific elements of national constitutional identity; S Josso, 'Le caractère social de la République, principeinhérent à l'identité constitutionnelle de la France', report to the Paris Congress of Association française de droitconstitutionnel, 5. See http://www.droitconstitutionnel.org/congresParis/comC1/JossoTXT.pdf.

[99] See B. Kostadinov, 'Prethodna pitanja ustavnosti u nacionalnom pravu i pravo EU', in T. Ćapeta, I. Goldner Langand and S. Rodin, ur., *Prethodni postupak u pravu Europske unije* (Narodne novine 2011). Kostadinov refers to V. Bernaud and M. Fatin-Rouge Stéfanini, 'La réforme du contrôle de constitutionnalité une nouvelle fois en question? Réflexion autour des articles 61-1 et 62 de la Constitution proposé par le comité Balladur', *Revue francaise de Droit constitutionel, no hors-série* (2008) p. 190.

[100] Troper, loc. cit. n. 98, at p. 2572.

consents thereto'.[101]

In order to avoid repeating the emerging literature on the point,[102] suffice it to say that the main effects of the French constitutional reform and, in particular, the newly established abstract constitutional review and 'priority preliminary reference' to the Constitutional Council, run against the well-established supremacy law of the ECJ. First, if a law is declared unconstitutional by the *Conseil Constitutionnel* as being contrary to EU law, the power of an ordinary court judge to disapply it is pre-empted. Second, an ordinary judge is instructed not to address a preliminary reference to the EJC before the *ConseilConstitutionnel* has spoken on the matter.

The answer of the ECJ came in *Melki and Abdeli*,[103] and not surprisingly follows the existing case law. The ECJ took the effort to explain in great detail what requirements a national interlocutory constitutional review has to meet in order to be compatible with EU law. As the ECJ clarified in paragraph 57 of the judgment, Article 267 TFEU precludes national legislation establishing an interlocutory constitutional review, insofar as the procedure prevents 'all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling'.

In this way, the ECJ maintained the judicial dialogue with ordinary courts, and rendered the legal opinions of the *Conseil Constitutionnel* adopted in interlocutory constitutional review procedures irrelevant from the perspective of the supremacy of EU law.[104]

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[101] Constitutional Council decision no 2006-540DC, July 27, 2006. In such a case, it would be the national law implementing the directive that would be held unconstitutional.

[102] See F. Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation', 10 *German Law Journal* (2008) p. 1297; S. Rodin, 'Back to Square One: The Past, the Present and the Future of the Simmenthal Mandate', in Beneyto and Pernice, eds., *Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011).

[103] Joined cases of Aziz Melki and Sélim Abdeli. For a more detailed discussion see Rodin, loc. cit. n. 102.

[104] It should be noted that the judgment in *Melki and Abdeli*, similar to the judgment in *Elchinov*, supports the *Rheinmühlen* case law, according to which a referring court is not bound by the legal interpretation of the national appelate court. This is an important procedural element of the supremacy of EU law. See 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139. The same follows from C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-09641, paras 93-98.

The main problem of the French approach to constitutional identity is that it sweeps too broadly and fails to provide for its protected core.

Germany has a long record of dialogue with the ECJ. The German Federal Constitutional Court (BVerfG) triggered the evolution of the protection of fundamental rights in the EU by insisting on standards of protection substantially comparable to those under the Basic Law.

However, so far, the BVerfG has never addressed a preliminary reference to the ECJ. Instead, its influence has always been exerted through its position as the 'court of last say' in the European judicial dialogue. Namely, even after the ECJ has spoken on a matter of EU law, the BVerfG is still in a position to pass judgment on issues of national constitutional law, and in that way protect national constitutional identity.

In 1992, in its decision in the *Maastricht* case,[105] the BVerfG resorted to two powerful devices: the essential contents guarantee, under which the BVerfG acts as guardian of the core of fundamental rights under Article 19(2), which are also protected by the constitutional eternity clause under Article 79(3) of the Basic Law, and the *ultra vires* doctrine, according to which it can review and refuse to apply acts of the Union which exceed the transferred powers.[106] According to the BVerfG in *Lisbon* (inferring from the *Maastricht* judgment), constitutional identity is guaranteed by Article 79(3) of the Basic Law, and 'the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution'. [107] As the BVerfG clarified:

> The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to.[108]

[105] BVerfGE 89, 155.

[106] The BVerfG applied this doctrine in BVerfGE 58, 1 (30-31); 75, 223 (235, 242); 89, 155 (188), and notably in the *Lisbon* judgment, BVerfG, 2 BvE 2/08 of 30.6.2009. See M Mahlmann, 'The Politics of Constitutional Identity and its Legal Frame: The Ultra Vires Decision of the German Federal Constitutional Court', 12 *German Law Journal*, 11 (2010) p. 1407.

[107] Lisbon judgment, para 218.

[108] Lisbon judgment, para 235.

Accordingly, any act of the Union which would impinge on national constitutional identity would be *ultra vires* and thus inapplicable in Germany,[109] and it is for the BVerfG to refuse to apply it.[110]
In July 2010, the BVerfG significantly narrowed the *ultra vires* doctrine in the *Honeywell* judgment,[111] where it held that before an act of the EU can be scrutinised on *ultra vires* grounds, the ECJ should be given an opportunity to rule on the matter, either in an annulment action or as a matter of preliminary reference. When it comes to a constitutional review, the BVerfG can declare an act of the EU *ultra vires*. However:

> the act of the authority of the European Union must be manifestly in violation of competences and […] the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.[112]

While the BVerfG has never addressed a preliminary reference to the ECJ, paragraph 60 of the *Honeywell* decision indicates that it is prepared to do so. No less importantly, a national court is under a constitutional obligation to refer to the ECJ, and failure to do so may lead to a violation of the constitutional right to a lawful judge under Article 101(1) of the Basic Law.[113]
In short, the BVerfGhas linked German constitutional identity to the eternal and entrenched status of fundamental rights and the core of their protection under Article 79(3) of the Constitution. By doing so, it has ensured it has the last say in cases involving fundamental rights but, at the same time, it has allowed enough space for the ECJ to rule on the interpretation and validity of EU law. Importantly, the BVerfG has wrapped its doctrine in the principle of sincere co-operation under Article 4(3) TEU and maintained its doctrine of co-operation between the two courts and alsoa doctrine of friendliness to EU law.[114] Being fully aware of the ECJ's position, according to which national identity

[109] Lisbon judgment, para 241.
[110] Lisbon judgment, para 240.
[111] BVerfG, 2 BvR 2661/06 of 6.7.2010. See C Möllers, 'Constitutional *Ultra Vires* Review of European Acts only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*', 7 European Constitutional Law Review (2011) p. 161.
[112] Honeywell judgment, paras 60-61.
[113] Honeywell judgment, paras 88-90.
[114] Lisbon judgment, para 240.

can justify a departure from market freedoms only if it cannot be safeguarded in any other way,[115] the BVerfGhas reserved its position as protector of national constitutional identity forsituations in which fundamental political structures 'cannot be safeguarded in any other way'.[116]

5. Conclusion

The identities of the Member States are older than the Founding Treaties and exist separate from and regardless of EU law. Moreover, just as individual or group identities continue to exist in different settings of governance, the national identities of the Member States will continue to exist regardless of what form or substance the EU takes in the future. In this sense, Article 4(2) TEU reiterates the truism that national identities do exist. Having said that, it begs an answer to the question of what the legal consequence is of such a recognised existence of national identities.

The Treaty of Lisbon has not significantly affectedthe national identity jurisprudence of the ECJ. Even before its entry into force on 1 December 2009, the ECJ had developed a main interpretative strategy how to address Member States' constitutional claims. As I have demonstrated above, the pre-Lisbon case law can be grouped into three evolutionary phases. As a result, the ECJ developed its doctrine of margin of discretion, implied and explicit, and made it clear that national identity cannot be absolute. The ECJ also made a distinction between claims that can be called *national identity small*, which are treated like ordinary public policy justification, and claims which can be called *national identity large*, that trigger some kind of deference to national judicial or regulatory authorities. Accordingly, a viable national identity claim makes a regulatory aim legitimate *per se*, which in national identity smallcases results in the application of the least restrictive alternative test, and in national identity largecases leads todeference.

The Treaty of Lisbon has added more clarity to the concept of national identity. As far as the Treaties are concerned, the Treaty of Lisbon was the first one to make clear that national identity refers to national constitutional and political structures. In a way, Lisbon accommodated

[115] Commission v Luxembourg case [1996] para 35; Commission v Luxembourg case [not yet published], para 124.
[116] Lisbon judgment, para 240.

national claims to the Vienna Convention rule that States may not claim an internal law in order to justify a violation of a treaty.

The situation is quite different if a treaty itself allows some discretion to the States, and this is exactly what Article 4(2) TEU did. However, the question remains: what counts as a viable national identity claim? Is national constitutional identity, as Besselink puts it, a concept of EU law, or is there a plurality of national concepts which have to be respected as a matter of law? A plausible first-hand answer would be that a viable national constitutional identity claim has to rely on an entrenched constitutional rule, value or fundamental choice. It must not be a mere policy choice, or grant of jurisdiction to local authorities, but has to be essential for the recognition of a national constitutional order, and differentiated from other constitutional orders.

The post-Lisbon era has brought about developments at both the European and national level. While the Treaty has not significantly affected the approach of the ECJ described above, France and Germany have started to increasingly rely on constitutional identity, challenging the claim that it is an exclusive concept of EU law.

In the national identity smallcases, the ECJ has maintained its public policy approach, combined with the least restrictive alternative test. Under this approach, national identity cannot justify restriction of market freedoms if there is an alternative, less restrictive, way to protect national identity. This is well illustrated by the *Commission v Luxembourg* cases, which although decided in different stages of European integration, follow the same pattern of analysis.

The situation is different in national identity largecases, where the ECJ has showna readiness either to recognise a national identity claim out of hand (*Sayn-Wittgenstein*) or defer to the national court (*Runevič-Vardyn*). What qualified the two last mentioned cases as national identity largecases? In the first case, it appeared to be a fundamental constitutional choice of a republican form of government. In the latter case, it was the recognition of the ECJ that a national court is better equipped to do the balancing test in a sensitive language case. This approach, however, is not prompted by the Lisbon Treaty, but follows the same line of reasoning and deference which the ECJ adopted in *UGT-Rioja* back in 2008.[117] Arguably, as early as 2008, the same provision was already present in the aborted Constitutional Treaty and

[117] UGT-Rioja case.

was an anticipated part of the incoming Treaty of Lisbon. However, it remains unclear whether deference to the national court is motivated by the wish to defer a value choice or by a more practical reason, that is, to allow a national court to establish the relevant facts, as the ECJ did, for example, in *Familiapress*.[118]

Another tendency that can be seen in cases decided by the ECJ is that it will be less ready to concede a national identity claim in cases where there is a well-established interpretation and a need for uniform interpretation of EU law.[119]

More substantive developments have taken place on the side of the Member States, notably in France and Germany. France implemented a constitutional reform that resulted in a Kelsen-like system of interlocutory constitutional review. The new mechanism was introduced in an attempt to give the *Conseil Constitutionnel* a voice at the European level and possibly pre-empt conflicts between French and EU law before they reached the ECJ in the form of a preliminary reference. However, by focusing on a procedural instrument of interlocutory constitutional review, the newly introduced system not only set a collision course with the well-established preliminary reference case law of the ECJ,[120] but also fell short of defining the substantive core of a French constitutional identity that could serve as a countervailing force in Article 4(2) TEU cases.

The German approach appears to be more sober. It is based on the principle of co-operation and a clearly defined constitutional identity core. The relationship with EU law is understood as one of co-operation, and the role of the BVerfG is a complementary and subsidiary one. National constitutional identity is asserted, but dormant, allowing the BVerfGthe final say in critical cases, but not interfering in national identity smallsituations.

Article 4(2) TEU has arguably created the potential for a new balance between national identity and market freedoms, and Article 4(3) TEU has re-defined the duty of loyal (or sincere) co-operation. Under the new provision, the obligation of sincere co-operation has become reciprocal, and it is for the Union and Member States to assist each other in the performance of the Treaties.

[118] Familiapress case.

[119] Colegio de Oficiales de la Marina Mercante Española case and the case law cited therein.

[120] Rheinmühlen-Düsseldorf case; more recently, see Cartesio case paras 93-98.

In the context of Article 4(2) TEU, this can mean that Member States are at liberty to define the core of national constitutional identity, while the ECJ retains the power to interpret the broader normative framework within which national identity operates in the EU. Too extensive an interpretation of the national identity clause has the potential to block or even reverse the course of European integration. On the other hand, too narrow an interpretation would render Article 4(2) devoid of its useful effect.

The role of Article 4(2) TEU is twofold. As a competence rule, it imposes limits on EU regulation, even in cases where such regulation would otherwise be permissible. As an interpretative rule, it provides guidance for the ECJ and national courts on how to interpret the relationship between EU and national law.

As the law appears to stand today, the Member States are under an obligation under Article 2 TEU not to construe national identity in a way that is in confrontation with the fundamental rules, principles and values of the EU. On the other hand, the ECJ, within the limits of its jurisdiction, determines to what extent the Treaties are to be interpreted as allowing a margin of discretion in national identity claims, or as treating such claims as an ordinary public policy justification. Certainly, national constitutional courts retain the right to rule on the application of national constitutional law even after the ECJ has spoken, and this can lead to a collision between national constitutional and EU law. However, we have not witnessed such a development yet.

Ivana Goranić*

The importance and role of judicial training institutions – Judicial Academy of the Republic of Croatia

1. Judicial training as one of the conditions for the protection of human rights and freedoms of all citizens

Life-long professional training is an essential prerequisite for carrying out any activity insofar as we want to carry it out properly, successfully, efficiently, in accordance with the latest scientific achievements and continual changes in the globalised world. It encompasses increasing specialisation, however, also the broadening of education and knowledge, having in mind what is happening in other areas of science, politics and even art. Maybe the time of specialisation and being closed off into narrow frameworks, in which we operate well and about which we know a lot, has been replaced by a time where this specialised knowledge must be integrated and interconnected with other wider, sometimes at first glance unrelated knowledge, so that its implementation may be optimal. Maybe it could be concluded that the era of the „Renaissance" man of broader interests, universal knowledge and quest for understanding is returning once more.

The judiciary is an exceptionally important area in the lives of all citizens, the final tool for protection of human rights and fundamental freedoms, defence of their dignity, so – aside from being independent, objective and professional – it must be humane and just. Also it has to be seen in the public that it executes justice without exception, that it is equally accessible to and equal for all, and that it is – contrary to the prevailing perception in the Republic of Croatia today – a protective instrument in the service of every human being and its rights, rather than a tool in the hands of the state. It must exist and work for and to the benefit of citizen in such a manner that public awareness of this is without any doubt.

In this regard I believe that the implementation of justice is actually the strongest motivation and fundamental task of all of us, and especially of the judiciary in all contemporary democratic states.

Learning and knowledge are not only important, because laws which apply thereto are increasingly frequently changing (because the world is

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becoming a small place), but rather also because they give a judge and state attorney the security and independence necessary to carry out their jobs in accordance with the prerequisites of a rule of law, justice and maximum protection of human rights of every citizen equally, therefore the realisation of justice – which are the main tasks and objectives of the judiciary in every democratic state.

Through the need for life-long learning, whose importance is evident not only for scientists but rather for everyone working in today's continuing changing world, full of challenges and civilisational upheavals, European institutions dealing with judicial continous training have developed over the last few decades. In Western states they emerged gradually as an expression of the needs of judiciary, society and citizens, they adapted slowly and systematically with social changes and demands. On the contrary, in new EU member states and in South-eastern European countries (including Croatia), they were established as the fulfilment of the benchmark in the EU negotiations, so, maybe paradoxically these institutions were often experienced by those for whom they actually came into existence, judges and state attorneys, as imposed and unnecessary. Despite this, we should be aware of the need to continue to adapt to circumstances, but at the same time to build upon, advance, develop the institution and fulfill the needs of the judiciary and citizens as the end users, for whom we at the Judicial Academy, but also every member of the judiciary, should serve and work.[1]

2. National institutions for professional training in 'old' and 'new' democracies

Upon reviewing the structure, competency, organisation and role of institutions for judicial training in Europe (not only in the EU, but also in member states of the Council of Europe), one could – by the principle of the lowest common denominator – make a large number of groups connected by some similar or identical characteristics. Actually, each legal system formed its best-suited institutions.

If we analyse them individually, we can conclude that each of them have elements, which would be applicable and practical, but also those, which

[1] From research of the Judicial Academy (Kingdom of Spain, Kingdom of the Netherlands, Kingdom of Belgium, Federal Republic of Germany, Republic of France, Czech Republic, Republic of Portugal, Republic of Hungary, Republic of Macedonia, Republic of Poland, Republic of Slovenia), September 2011.

could not be logically incorporated into the methodology and functioning of the Judicial Academy of the Republic of Croatia.

However, it is possible and most logical to divide them into centres in old and new democracy states, where the latter are often more dynamic, adaptable, quickly developing, but under much more difficult and demanding conditions.

In western democracies, judicial training institutions were established after longer period of public discussion and they were the result of it, developed and improved gradually, adapting to the legal system and legal culture of the particular country, the needs of the judiciary, but also supported by the citizens. They went through gradual and mindful reforms based on pilot projects (for example, a large number of institutions – France, Sweden, the Netherlands – are now going through changes and introducing programmes and institutes, which are already being more or less successfully implemented/which we have already been more or less successfully implementing). Therefore in these countries the training institutions are accepted and supported by all participants in the process, especially by its beneficiaries, that is, target groups (judges and/or state attorneys), who are exponents and proponents of reforms and the cooperation with the institutions for education is an honour and an acknowledgement of their expertise and status. This status and reputation of institutions is to be achieved by better results with less energy and time.

In 'new' democracies, judicial training institutions have been established as the fulfilment of recommendations of EU and as part of the reforms of judiciary, professionalization, objectivity and efficiency of their judicial systems. Here the higher level judicial officials see institution mostly as a politically imposed, administrative body and usualy do not support or even hinder their autonomous development, independence and advancement. They tend to believe that this type of life-long learning is either unnecessary or that they are capable of organising it for themselves. Institutions for judicial education also often threaten some interests contrary to the independence and professionalism of the judiciary or the lack of transparency in the process of the nomination of judges. However, at least they often have the financial, political and other support of the EU institutions.

New EU documents clearly indicate the direction, in which judicial training institutions should develop, but also the importance given by

the European Union to these institutions, their independence and activities[2].

3. The Judicial Academy in the Republic of Croatia

The Judicial Academy in the Republic of Croatia was founded in 2003 as a directorate of the Ministry of Justice, while from 1 January 2010, with the Judicial Academy Act, it became an independent public institution.[3] It belongs to the above mentioned category of institutions founded through EU projects and has developed despite the great challenges and demanding tasks, while its full organisational development represents one of the fundamental tasks for all of us, employees. The direct, visible and strong support of all segments of society, law faculties, politics and the judiciary are still required for this. The institution is only two years old, reforms and changes are difficult, while the judiciary, conservative in its core, attempts to return to familiar ground and does not easily accept fast changes, often any changes at all. Therefore, the task of institution is demanding, but sensitive. Target groups should accept this form of continuous training, support it and understand that life-long learning is essential for the professional and independent judicial official. Administrative bodies (Managing Board and Programme Council) of the Judicial Academy consist of the highest ranking judicial officials in the Republic of Croatia. However, the intention of the legislator to support the newly established institution by the authority and reputation of these judicial officials, exepecting their support to the development of it, its strengthening and the improvement in the quality of its programmes, has not always been realised.

However, all activities must be conducted through continually developed and mutual communication and confidence of target groups, but also judges' associations, law faculties, attorneys, lawyers in commerce and other partners and users. The institutions for education exist to respond to the needs of the judiciary, not only enable better quality functioning and independence, but also to ensure that the

[2] Ivana Goranić, 'Professional training of judges as one of the prerequisites for independence and impartiality of judicial authorities' 5935 and 5936 *Novi Informator* (2011).

[3] Judicial Academy Act (Official Gazette 153/09, 127/10), Statute of the Judicial Academy (adopted 24 March 2010); Act on trainees in judicial bodies and Bar examination (Official Gazette 84/08, 75/09).

perception of the public regarding the work of the judiciary and its independence and serving the interests of all citizens become better and different. They need to be a link between the judiciary and sciences that is law faculties, which should enable continual exchange and communication towards judges and state attorneys, the State Judicial Council and State Attorney Council, but also towards faculties and their method of work.

I believe also that these are the institutions that in the future should have a specific role in the evaluation of the work of judicial officials and in this way contribute to the objectivity, transparency and measurability of criteria for their appointment and later advancement. Of course it is to be expected that this role of the Judicial Academy will face obstacles, therefore it must be approached gradually, with the support of young judicial officials who, along with citizens, have the greatest interest in the objectivity and predictability of career advancement of judges or state attorneys, which is one of the guarantees of a quality of judiciary. Paradoxically, in the independent development of these educational institutions in 'new' democracies, more often than not, they receive more support from the ministries of justice than the highest level judicial officials. This may be due to the importance that the EU places on education in the judiciary and the strengthening of national institutions.

It is encouraging that the Programme of the Government of the Republic of Croatia for the mandate 2011-2015 in the chapter dealing with the judiciary lists objectives, which directly refer to the Judicial Academy: '9. Strengthen the authority and role of the Judicial Academy, and additionally ensure objective and transparent criteria for nomination of judges; 10. Train quality judicial officials through a unique training system throughout the entire period of their professional career. Begin with selection already during studies, and then through the Judicial Academy.' However, in the programme the achievement of a large number of listed objectives in this chapter is linked with the work of the Judicial Academy (for example 'Undertake measures for the purpose of strengthening the authority of judges – both through amendments in process laws and through additional education [...]'). The Judicial Academy is impatiently waiting for the realisation of these goals.

4. The importance of the education of judicial officials

Numerous international documents deal with the matter of professional training as an essential prerequisite and guarantee of the independence

and impartiality of judicial authorities. Along with the UN and its councils[4], this area has also be dealt with by the Council of Europe (particularly the Venice Commission and Council of Ministers),[5] however we shall only list some of the recent documents of the European Union, which have in the last few years placed the judicial training in the focus of its interest, and set it as one of the important tasks in the realisation of its objectives and strategies for development to 2020.

The official identification of insufficient knowledge of judges and prosecutors in EU law was clearly expressed for the first time in the Resolution on the role of the national judge in the European judicial system, which was adopted on 9 July 2008 by the European Parliament,[6] and emphasises that the acquis communitaire is perceived as complicated and inaccessible to national judges and points out the need to secure that the EU acquis is made understandable and implemented by national judges. It is considered that the national judge is the basis of the EU judicial system, and that he should be more actively included and encouraged to apply the acquis. On the basis of the Treaty of Lisbon, Articles 81 and 82, the Stockholm Programme and Action plan,[7] which highlights the need that 50% of judicial officials should by 2020 participate in training activities in the area of EU laws organised by national institutions, which will be supported by institutions dealing with education in the EU area (ERA, EIPA, EJTN, VE, etc.). The Treaty of Lisbon gives the EU competency in 'upporting the training of judicial officials and clerks'. The European 2020 strategy[8] calls for effective investment into training activities and a coherent legal context at a European level. The letter of the European Commission to the Head Secretary of the EJTN (European network of institutions for professional training of judicial officials) states that 'the EU must invest effort to support and financially assists national institutions, but at the same time established its mechanism which would supplement the work

[4] ECOSOC 2006/23, UN General Assembly (A/HRC/14/26), Universal Charter of the Judge (Central Council of the International Association of Judges, 1999) etc.

[5] Study No. 494/2008, CDL-AD (2010)004, Strasbourg, 16.3.2010. Recommendation of the Council of Ministers of the Council of Europe CM/REc(2010)12, Magna Carta of Judges, 17.11.2010. etc.

[6] C50/00 P UPA (2002) ECRI-6677.

[7] Council of Europe, 2.12.2009., 17024/09, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, annex, Action plan.

[8] COM(2010)2020 final.

and efforts of national institutions. It is necessary to intensify learning about EU law even in initial, as well as activities in life long learning'.[9] Therefore support is given for the strengthening and influence of national judicial training institutions that are considered to be the proponents of the activities. However, the support of the EU also contains the establishment of complementary mechanisms to support national institutions. In doing so, great attention will be given to the preservation and strengthening of the ethics and independence of judges, in which great emphasis is also placed on the importance of national institutions for education. This promotes international cooperation and exchange, and strengthening of mechanisms within the established structure/network of cooperation of institutions.[10] A very important document, recalled in many EU documents to follow, is the Resolution of the European Parliament on the role of the national judge in the European judicial system.[11]

In the European network of judicial training institutions (EJTN – EU and Lisbon network – CoE), representatives of the Judicial Academy play an active role. From inclusion in the working bodies of the institutions at a European level, to promoting and lobbying, which resulted in enabling access to activities of EU Members States, which was otherwise only open to institutions and the judiciary of Members states.

5. Projects, in which the Judicial Academy participates

Although Croatia is still not EU member State, the Republic of Croatia and Judicial Academy has the right to participate in a certain number of projects [in all EU projects in the field of judicial training, by signing the Memorandum on understanding about participation of the Republic of Croatia in EU programmes in the area of criminal law[12] and the same Memorandum in the area of civil law[13] (December 2011)], which are already being conducted in Member States. The Judicial Academy is

[9] JUST.B2/ECM-AL dated 28.01.2010.

[10] In this very specific Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Building trust in EU-wide Justice – A new dimension to European Judicial Training', COM(2011)551 final.

[11] 2009/C 294 E/06.

[12] Decision No 2007/126/JHA.

[13] Decision No 1149/2007/EC.

already receiving offers for seminars and activities, which are being organised and held in Member States in 2012, and which refer to EU law and are open to Judicial Academy and judges and state attorneys from the Republic of Croatia. At the same time, the Judicial Academy plans to organise at least one activity this year that will be open for EU member state participants and judges and prosecutors from the region. This year in May the Judicial Academy plans to organise its second International conference 'Judicial training centres – step forward', which shall convene representatives of national institutions from EU member states in Zagreb, but also institutions from the region and Eastern Europe. We expect the participation of the representatives from institutions like the Academy for European Law, the European Judicial Training Network, the Council of Europe, the European Institute for Public Administration, the German foundation for international legal cooperation, etc.

From the very founding of the Judicial Academy, the EU through its projects has shown confidence and supported its development and the broadening of its activities and status. For example this year, all the remaining funds from the IPA 2008 projects, according to a decision of the Head of the EU Delegation in the Republic of Croatia upon consultations with the European Commission, were directed towards the strengthening of the programme of the State School within the Judicial Academy, even though, already in April 2012, the implementation of the Twinning project worth 1,050,000Euros dedicated to the strengthening and improvement of programmes for advisors and programmes of the State School is set to commence. Therefore, the establishment, but also the continual support and assistance to the Judicial Academy may be attributed to the strategy and support of the EU and its recognition of this institution as one that was seen as very important for closing Chapter 23 in negotiations of the Republic of Croatia with the EU, but also as an exceptionally important element in the further implementation of reforms started in the judiciary in the Republic of Croatia. The Judicial Academy in Zagreb is also selected as a pilot center for combating cyber crime in the CoE and an EU project for the Balkans.

It should be kept in mind and even we who work in it often forget that the Judicial Academy has been independent for barely two years and despite all the new activities and great number of tasks it has conducted in this time period, also at the same time it has developed and continues to develop a structure, which enables it to function and work better.

Actually it is developing into a sustainable institution, for which it neither has the sufficient support, nor the understanding of its managing body.

The projects set to begin implementation with in 2012, and in which the Judicial Academy is the beneficiary, are IPA 2009 'Professional training of advisors and candidates for judges and state attorneys with the aim of establishing a self-sustainable teaching system', IPA TAIB 2008 'Strengthening of the work of the State School for judicial officials through the advancement of its programmes of professional training and work/business processes' and MATRA FLEX Support to the Judicial Academy in the development of programmes in laws of the European Union and project in cooperation with UK and Assotiation of Judges 'Strengthening of courts in relation to the media'. In eleven other EU projects, which shall be conducted during this year, the Judicial Academy is a participant.

The purpose of the projects, in which it has participated to date, and two with the EU that shall commence implementation in 2012, do not have the objective of only those activities and results, which are noted in the agreement and pertaining documentation thatensues in the procedure, which to us who are not participating in this procedure often seems in a technical sense detailed, prolonged and bureaucratic. Their objective is rather to assist in finding and realising those solutions, which will help the judiciary to continue developing in the right direction, and also that the Judicial Academy, despite obstacles it faces sometimes, becomes a self-sustainable institution. In this sense, to date, we have experience with partners for various EU states, whose experts have an understanding and desire to become acquainted with our system and will find the best solutions in cooperation with us, which fit in it, strengthen it and further build upon it. Therefore, the implementation of projects is primarily joint, intense work, dialogue and exchange of good practices and experiences, from which solutions are identified in a given area that are best suited to our needs and which are sustainable.

The Judicial Academy also participated in university projects as a partner to law faculties (this year in a project with the Faculty of Law in Zagreb about criminal justice aspects of the European Convention for the protection of human rights and fundamental freedoms) and the Centre for Excellence Jean Monet (Faculty of Law in Zagreb and Rijeka).

6. Programmes of the Judicial Academy

The programmes of the Judicial Academy are made up of two initial/beginning ones and a life-long one.

- Initial professional training of trainees in judicial bodies – preparation for the Bar exam (Act on Trainees in Judicial bodies and Bar examination).
- Initial professional training of candidates for judicial officials (organisational unit of the Judicial Academy – State School for judicial officials – Judicial Academy Act).
- Continueing professional training of judicial officials and advisors in judicial bodies.

In 2011, the Judicial Academy participated with 4,921 attendees through 237 activities in life-long professional training. It should be emphasised that the activities for the most part were of the workshop type, interactive for about 25 attendees, and trainers are almost always judges and state attorneys. Along with this, 300 one-day workshops were organised in 5 regional centres of the Judicial Academy for 81 trainees in judicial bodies and also twenty day-workshops for 55 candidates for judges and state attorneys divided into three groups in the State School.[14]

7. International cooperation

The Judicial Academy is a member of the Academy for European Law (ERA) in Trier, and its representative participates in meetings of its managing board and programme council. The Judicial Academy has a very intensive cooperation with the EIPA, and is part of the Lisbon network and a member of its steering committee (network of centres for professional training of judicial officials of the Council of Europe), as well as an observer in the EJTN (in which the members are only related institutions of EU Member States, but also the Republic of Croatia relating to the already mentioned memorandums, through which it acquired full rights to opportunities to participate in programmes). Along with a large number of projects, in which the Judicial Academy is a beneficiary or participant, and the recently signed Memorandums on understanding, which will enable the participation of Croatian judicial officials in numerous projects and activities in institutions for education of EU Member States, the Judicial Academy regularly participated in

[14] Annual report on the activities of the Judicial Academy, 2011.

joint activities with related European institutions. Along with all of this, we are well aware of the importance of cooperation in the region, central European, but also in the South-eastern European region. Therefore we pay special attention to the implementation of agreements signed with these states, such as: Partnership Protocol concluded on 21 June, 2011 in Budapest (the signatories are the academies/institutions for professional training of judicial officials from the Republic of Croatia, the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic), International treaty concluded on 7 April, 2011 in Zagreb (the signatories were academies/institutions for the professional training of judicial officials from the Republic of Croatia, the Republic of Hungary, the Republic of Poland, Slovak Republic, Republic of Slovenia, Bosnia and Herzegovina, Republic of Montenegro, Republic of Macedonia and the Republic of Kosovo), Memorandum on mutual cooperation concluded on 22 November, 2011 in Skopje (the signatories were academies/institutions for the professional training of judicial officials from the Republic of Croatia, the Republic of Macedonia, the Federal Republic of Germany, Bosnia and Herzegovina, the Republic of Montenegro, the Republic of Serbia, the Republic of Bulgaria, the Republic of Kosovo, the Republic of Albania and the Republic of Turkey).[15]

The Judicial Academy is also the pilot centre for education on combating cybercrime, but also the centre for the publication of documents and education on the rights of asylum seekers and migrants. Along with this, we see our important role as a link between related EU institutions and similar partner centres in the South-eastern European region (especially due to the similarity in languages). In this area, the Judicial Academy is developing as an institution, which will assist partner institutions in the region in the demanding procedure of EU accession and negotiations with the EU, in which the work and development of the Judicial Academy was one of the significant benchmarks whose fulfilment was one of the conditions to close the Chapter on the Judiciary and Fundamental Rights.

The reason for cooperation with countries in the region, but also institutions in EU Member States, is not only the exchange of programmes, professionals, good practices, but rather also joint experiences and strategies, which refer to possible ways of strengthening

[15] Ibid.

institutions and their independence and the sustainability of their development despite various challenges and frequent changes in the relationship between the government and the judiciary towards them. In this too it becomes evident that the problems faced by these institutions are possibly different in intensity, however in terms of content they are very similar in all states.

The Judicial Academy in the Republic of Croatia has a comparative advantage and opportunity to become a central place for learning EU law and international law in the region, and its materials and ability to participate in its activities should – in accordance with budgetary and organisational capacities – also be offered to EU Member States, in particular neighbouring ones, but especially states in the region and even further (great interest for cooperation has been shown by Azerbaijan, Georgia, Turkey and some other countries).

The basic objective of all forms of cooperation is the development of confidence in one's own but also the justice system of other states, to become acquainted with them, to exchange experiences and build the rule of law area in this part of the world. This is an ambitious goal but it can be reached with small steps and the foundations for this have already been set for by EU documents and programmes, our task is to fit into this system and actively work to support future members, but also to states under the EU neighbourghood policy.

We are perfectly aware that continuity and strengthening, as well as the improvement of the quality is conditioned by the networking and cooperation with partner institutions, which may assist our work within our countries, so we have cooperation agreements with: law faculties in the Republic of Croatia, the Croatian Bar Association, Croatian Chamber of Notaries Public, Association of Croatian Judges, Faculty of Education and Rehabilitation Sciences in Zagreb, Faculty of Humanities and Social Sciences in Zagreb, Croatian Association of Criminal Law Sciences and Practice, Faculty of Economics and Business in Zagreb, the Croatian Academic and Research Network – CARNet and others.

A total of 1,958 participants, of which about 400 through video conferences on the foundations of the EU and introduction to EU law, have participated in activities, which we have organised in the area of EU law in the life-long training of judges and state attorneys from 1 January, 2010 to 31 December, 2011. So, we could say that our goal is to have all the judicial officials participate in at least one EU law activity till 2015.

Keeping in mind the cooperation with institutions within Croatia, we believe that one of the roles of judicial training institutions is also their impact on the work of law faculties, whereupon they should support greater interaction of practice and sciences, but also create mutual trust between practitians and scientists, which is often missing and which is detrimental to both faculties and centres for life-long learning and in the end proves most detrimental to the justice system as a whole. An important role of cooperation with other institutions, along with faculties, is also the gradual impact on the perception of the public in relation to the judiciary and the need to improve public confidence in the role of the judiciary. We know that it's not enough to have an exceptionally well functioning judiciary, which is the ultimate goal of all of us, but rather it is necessary for citizens to feel and see that it works like this and that justice is done and that this judiciary exists and functions for the citizens and their well-being.

8. Some of the objectives of the Judicial Academy to 2020

The fundamental issue is transparency and objectivity in every procedure concerning the entry of a judicial career. It does not depend on the Judicial Academy and is the most important for the independent judiciary in the Republic of Croatia. It requires full objectivity in judges and state attorneys nomination procedure as well as in advancement, objective disciplinary proceedings and the establishment of an objective and clear system of assessment of the work of judicial officials. It must be ensured that the best experts, but also persons with integrity, broad education and sense of justice, enter this profession.

Similarly, it is necessary to create mechanisms, which will additionally ensure objective advancement for them while they conduct their duties. In that part it is possible to envisage the important role of the Judicial Academy. Ensuring objective entry into traineeship in the judiciary, setting up mechanisms, which will identify the best already during their studies at law faculties, objective bar exam, objective entry exam to the State School, final exam and nomination – these are points in the procedure and decisions, in which it is essential to reach the maximum possible objectivity and enable the selection of the best.

It is impossible to do this only by testing, written exams and structured interviews. It should be possible to achieve by raising the awareness and complete dedication by those making decisions in those stages of the carrier. The best choices and the best people in the judiciary are in the

interest of not only the Croatian judiciary, but also every Croatian citizen, EU Member States, as well as countries in the region and their citizens.

On the other hand, the state needs to ensure best possible working conditions (and salaries) for this profession, which would correspond to the highly set demands and conditions, as well as the reputation, which this profession should enjoy.

When this prerequisite has been met – an objectivity which ensures that truly the best are given the opportunity to enter the judiciary at all levels – the other objectives set before the Judicial Academy for 2020 shall be more easily achievable:

- Gradual positioning as the central regional institution for education about EU law, international and humanitarian law, as a link between institutions in EU Member States and the South-eastern European states.
- Active role in connecting and cooperation between law faculties with practitioners – judges and state attorneys. Through projects and activities for strengthening the flow of information and cooperation of scientists with practitians.
- The role and contribution of Judicial Academy in the process of nomination of judges and state attorneys (assessment during implementation of the programmes of the Judicial Academy, developing a network of mentors and leaders, uniform evaluation criteria, impact of evaluations of attendants of Judicial Academy on their carrers).
- Changes to the system from law faculty degrees to the end of the career of judicial officials through a number of amandments (previously tested through pilot programmes) – Judicial Academy as an institution with a verified programme.
- Developing a clear organisational structure, which would facilitate the efficiency and expertise, continual education of employees, the maximal inclusion of judges and state attorneys, as well as external professional advisors.
- Publishing activities with materials, which are part of the programmes of the Judicial Academy, publishing professional and academic articles about topics which are part of the annual programmes of the Judicial Academy, publishing the journal of the Judicial Academy in electronic form, which would provide

information about activities and announce important events in the work of the Judicial Academy.

- Stronger promotion of the activities of the Judicial Academy to the judiciary and Croatian public, whereby directly effecting an improvement in the perception of work and the role of the judiciary by citizens of the Republic of Croatia.
- Organizing a large number of joint activities open for the other countries participants.
- All judicial officials should participate in at least 5-day-activities at Judicial Academy activity in the area of EU law until 2015.
- External evaluation.
- Developing existing databases and websites.
- Establishing an assessment system, which will contribute to the objectivity of criteria applied when appointing judges and state attorneys, as well as for their advancement (checks and balances system).
- Widening target groups to all lawyers and clerks in courts and state attorney offices.

Ivana Goranić*

The importance and role of judicial training institutions – Judicial Academy of the Republic of Croatia

1. Judicial training as one of the conditions for the protection of human rights and freedoms of all citizens

Life-long professional training is an essential prerequisite for carrying out any activity insofar as we want to carry it out properly, successfully, efficiently, in accordance with the latest scientific achievements and continual changes in the globalised world. It encompasses increasing specialisation, however, also the broadening of education and knowledge, having in mind what is happening in other areas of science, politics and even art. Maybe the time of specialisation and being closed off into narrow frameworks, in which we operate well and about which we know a lot, has been replaced by a time where this specialised knowledge must be integrated and interconnected with other wider, sometimes at first glance unrelated knowledge, so that its implementation may be optimal. Maybe it could be concluded that the era of the „Renaissance" man of broader interests, universal knowledge and quest for understanding is returning once more.

The judiciary is an exceptionally important area in the lives of all citizens, the final tool for protection of human rights and fundamental freedoms, defence of their dignity, so – aside from being independent, objective and professional – it must be humane and just. Also it has to be seen in the public that it executes justice without exception, that it is equally accessible to and equal for all, and that it is – contrary to the prevailing perception in the Republic of Croatia today – a protective instrument in the service of every human being and its rights, rather than a tool in the hands of the state. It must exist and work for and to the benefit of citizen in such a manner that public awareness of this is without any doubt.

In this regard I believe that the implementation of justice is actually the strongest motivation and fundamental task of all of us, and especially of the judiciary in all contemporary democratic states.

Learning and knowledge are not only important, because laws which apply thereto are increasingly frequently changing (because the world is

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becoming a small place), but rather also because they give a judge and state attorney the security and independence necessary to carry out their jobs in accordance with the prerequisites of a rule of law, justice and maximum protection of human rights of every citizen equally, therefore the realisation of justice – which are the main tasks and objectives of the judiciary in every democratic state.

Through the need for life-long learning, whose importance is evident not only for scientists but rather for everyone working in today's continuing changing world, full of challenges and civilisational upheavals, European institutions dealing with judicial continous training have developed over the last few decades. In Western states they emerged gradually as an expression of the needs of judiciary, society and citizens, they adapted slowly and systematically with social changes and demands. On the contrary, in new EU member states and in South-eastern European countries (including Croatia), they were established as the fulfilment of the benchmark in the EU negotiations, so, maybe paradoxically these institutions were often experienced by those for whom they actually came into existence, judges and state attorneys, as imposed and unnecessary. Despite this, we should be aware of the need to continue to adapt to circumstances, but at the same time to build upon, advance, develop the institution and fulfill the needs of the judiciary and citizens as the end users, for whom we at the Judicial Academy, but also every member of the judiciary, should serve and work.[1]

2. National institutions for professional training in 'old' and 'new' democracies

Upon reviewing the structure, competency, organisation and role of institutions for judicial training in Europe (not only in the EU, but also in member states of the Council of Europe), one could – by the principle of the lowest common denominator – make a large number of groups connected by some similar or identical characteristics. Actually, each legal system formed its best-suited institutions.

If we analyse them individually, we can conclude that each of them have elements, which would be applicable and practical, but also those, which

[1] From research of the Judicial Academy (Kingdom of Spain, Kingdom of the Netherlands, Kingdom of Belgium, Federal Republic of Germany, Republic of France, Czech Republic, Republic of Portugal, Republic of Hungary, Republic of Macedonia, Republic of Poland, Republic of Slovenia), September 2011.

could not be logically incorporated into the methodology and functioning of the Judicial Academy of the Republic of Croatia.

However, it is possible and most logical to divide them into centres in old and new democracy states, where the latter are often more dynamic, adaptable, quickly developing, but under much more difficult and demanding conditions.

In western democracies, judicial training institutions were established after longer period of public discussion and they were the result of it, developed and improved gradually, adapting to the legal system and legal culture of the particular country, the needs of the judiciary, but also supported by the citizens. They went through gradual and mindful reforms based on pilot projects (for example, a large number of institutions – France, Sweden, the Netherlands – are now going through changes and introducing programmes and institutes, which are already being more or less successfully implemented/which we have already been more or less successfully implementing). Therefore in these countries the training institutions are accepted and supported by all participants in the process, especially by its beneficiaries, that is, target groups (judges and/or state attorneys), who are exponents and proponents of reforms and the cooperation with the institutions for education is an honour and an acknowledgement of their expertise and status. This status and reputation of institutions is to be achieved by better results with less energy and time.

In 'new' democracies, judicial training institutions have been established as the fulfilment of recommendations of EU and as part of the reforms of judiciary, professionalization, objectivity and efficiency of their judicial systems. Here the higher level judicial officials see institution mostly as a politically imposed, administrative body and usualy do not support or even hinder their autonomous development, independence and advancement. They tend to believe that this type of life-long learning is either unnecessary or that they are capable of organising it for themselves. Institutions for judicial education also often threaten some interests contrary to the independence and professionalism of the judiciary or the lack of transparency in the process of the nomination of judges. However, at least they often have the financial, political and other support of the EU institutions.

New EU documents clearly indicate the direction, in which judicial training institutions should develop, but also the importance given by

the European Union to these institutions, their independence and activities[2].

3. The Judicial Academy in the Republic of Croatia

The Judicial Academy in the Republic of Croatia was founded in 2003 as a directorate of the Ministry of Justice, while from 1 January 2010, with the Judicial Academy Act, it became an independent public institution.[3] It belongs to the above mentioned category of institutions founded through EU projects and has developed despite the great challenges and demanding tasks, while its full organisational development represents one of the fundamental tasks for all of us, employees. The direct, visible and strong support of all segments of society, law faculties, politics and the judiciary are still required for this. The institution is only two years old, reforms and changes are difficult, while the judiciary, conservative in its core, attempts to return to familiar ground and does not easily accept fast changes, often any changes at all. Therefore, the task of institution is demanding, but sensitive. Target groups should accept this form of continuous training, support it and understand that life-long learning is essential for the professional and independent judicial official. Administrative bodies (Managing Board and Programme Council) of the Judicial Academy consist of the highest ranking judicial officials in the Republic of Croatia. However, the intention of the legislator to support the newly established institution by the authority and reputation of these judicial officials, exepecting their support to the development of it, its strengthening and the improvement in the quality of its programmes, has not always been realised.

However, all activities must be conducted through continually developed and mutual communication and confidence of target groups, but also judges' associations, law faculties, attorneys, lawyers in commerce and other partners and users. The institutions for education exist to respond to the needs of the judiciary, not only enable better quality functioning and independence, but also to ensure that the

[2] Ivana Goranić, 'Professional training of judges as one of the prerequisites for independence and impartiality of judicial authorities' 5935 and 5936 *Novi Informator* (2011).

[3] Judicial Academy Act (Official Gazette 153/09, 127/10), Statute of the Judicial Academy (adopted 24 March 2010); Act on trainees in judicial bodies and Bar examination (Official Gazette 84/08, 75/09).

perception of the public regarding the work of the judiciary and its independence and serving the interests of all citizens become better and different. They need to be a link between the judiciary and sciences that is law faculties, which should enable continual exchange and communication towards judges and state attorneys, the State Judicial Council and State Attorney Council, but also towards faculties and their method of work.

I believe also that these are the institutions that in the future should have a specific role in the evaluation of the work of judicial officials and in this way contribute to the objectivity, transparency and measurability of criteria for their appointment and later advancement. Of course it is to be expected that this role of the Judicial Academy will face obstacles, therefore it must be approached gradually, with the support of young judicial officials who, along with citizens, have the greatest interest in the objectivity and predictability of career advancement of judges or state attorneys, which is one of the guarantees of a quality of judiciary. Paradoxically, in the independent development of these educational institutions in 'new' democracies, more often than not, they receive more support from the ministries of justice than the highest level judicial officials. This may be due to the importance that the EU places on education in the judiciary and the strengthening of national institutions.

It is encouraging that the Programme of the Government of the Republic of Croatia for the mandate 2011-2015 in the chapter dealing with the judiciary lists objectives, which directly refer to the Judicial Academy: '9. Strengthen the authority and role of the Judicial Academy, and additionally ensure objective and transparent criteria for nomination of judges; 10. Train quality judicial officials through a unique training system throughout the entire period of their professional career. Begin with selection already during studies, and then through the Judicial Academy.' However, in the programme the achievement of a large number of listed objectives in this chapter is linked with the work of the Judicial Academy (for example 'Undertake measures for the purpose of strengthening the authority of judges – both through amendments in process laws and through additional education [...]'). The Judicial Academy is impatiently waiting for the realisation of these goals.

4. The importance of the education of judicial officials

Numerous international documents deal with the matter of professional training as an essential prerequisite and guarantee of the independence

and impartiality of judicial authorities. Along with the UN and its councils[4], this area has also be dealt with by the Council of Europe (particularly the Venice Commission and Council of Ministers),[5] however we shall only list some of the recent documents of the European Union, which have in the last few years placed the judicial training in the focus of its interest, and set it as one of the important tasks in the realisation of its objectives and strategies for development to 2020.

The official identification of insufficient knowledge of judges and prosecutors in EU law was clearly expressed for the first time in the Resolution on the role of the national judge in the European judicial system, which was adopted on 9 July 2008 by the European Parliament,[6] and emphasises that the acquis communitaire is perceived as complicated and inaccessible to national judges and points out the need to secure that the EU acquis is made understandable and implemented by national judges. It is considered that the national judge is the basis of the EU judicial system, and that he should be more actively included and encouraged to apply the acquis. On the basis of the Treaty of Lisbon, Articles 81 and 82, the Stockholm Programme and Action plan,[7] which highlights the need that 50% of judicial officials should by 2020 participate in training activities in the area of EU laws organised by national institutions, which will be supported by institutions dealing with education in the EU area (ERA, EIPA, EJTN, VE, etc.). The Treaty of Lisbon gives the EU competency in 'upporting the training of judicial officials and clerks'. The European 2020 strategy[8] calls for effective investment into training activities and a coherent legal context at a European level. The letter of the European Commission to the Head Secretary of the EJTN (European network of institutions for professional training of judicial officials) states that 'the EU must invest effort to support and financially assists national institutions, but at the same time established its mechanism which would supplement the work

[4] ECOSOC 2006/23, UN General Assembly (A/HRC/14/26), Universal Charter of the Judge (Central Council of the International Association of Judges, 1999) etc.

[5] Study No. 494/2008, CDL-AD (2010)004, Strasbourg, 16.3.2010. Recommendation of the Council of Ministers of the Council of Europe CM/REc(2010)12, Magna Carta of Judges, 17.11.2010. etc.

[6] C50/00 P UPA (2002) ECRI-6677.

[7] Council of Europe, 2.12.2009., 17024/09, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, annex, Action plan.

[8] COM(2010)2020 final.

and efforts of national institutions. It is necessary to intensify learning about EU law even in initial, as well as activities in life long learning'.[9] Therefore support is given for the strengthening and influence of national judicial training institutions that are considered to be the proponents of the activities. However, the support of the EU also contains the establishment of complementary mechanisms to support national institutions. In doing so, great attention will be given to the preservation and strengthening of the ethics and independence of judges, in which great emphasis is also placed on the importance of national institutions for education. This promotes international cooperation and exchange, and strengthening of mechanisms within the established structure/network of cooperation of institutions.[10] A very important document, recalled in many EU documents to follow, is the Resolution of the European Parliament on the role of the national judge in the European judicial system.[11]

In the European network of judicial training institutions (EJTN – EU and Lisbon network – CoE), representatives of the Judicial Academy play an active role. From inclusion in the working bodies of the institutions at a European level, to promoting and lobbying, which resulted in enabling access to activities of EU Members States, which was otherwise only open to institutions and the judiciary of Members states.

5. Projects, in which the Judicial Academy participates

Although Croatia is still not EU member State, the Republic of Croatia and Judicial Academy has the right to participate in a certain number of projects [in all EU projects in the field of judicial training, by signing the Memorandum on understanding about participation of the Republic of Croatia in EU programmes in the area of criminal law[12] and the same Memorandum in the area of civil law[13] (December 2011)], which are already being conducted in Member States. The Judicial Academy is

[9] JUST.B2/ECM-AL dated 28.01.2010.

[10] In this very specific Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Building trust in EU-wide Justice – A new dimension to European Judicial Training', COM(2011)551 final.

[11] 2009/C 294 E/06.

[12] Decision No 2007/126/JHA.

[13] Decision No 1149/2007/EC.

already receiving offers for seminars and activities, which are being organised and held in Member States in 2012, and which refer to EU law and are open to Judicial Academy and judges and state attorneys from the Republic of Croatia. At the same time, the Judicial Academy plans to organise at least one activity this year that will be open for EU member state participants and judges and prosecutors from the region. This year in May the Judicial Academy plans to organise its second International conference 'Judicial training centres – step forward', which shall convene representatives of national institutions from EU member states in Zagreb, but also institutions from the region and Eastern Europe. We expect the participation of the representatives from institutions like the Academy for European Law, the European Judicial Training Network, the Council of Europe, the European Institute for Public Administration, the German foundation for international legal cooperation, etc.

From the very founding of the Judicial Academy, the EU through its projects has shown confidence and supported its development and the broadening of its activities and status. For example this year, all the remaining funds from the IPA 2008 projects, according to a decision of the Head of the EU Delegation in the Republic of Croatia upon consultations with the European Commission, were directed towards the strengthening of the programme of the State School within the Judicial Academy, even though, already in April 2012, the implementation of the Twinning project worth 1,050,000Euros dedicated to the strengthening and improvement of programmes for advisors and programmes of the State School is set to commence. Therefore, the establishment, but also the continual support and assistance to the Judicial Academy may be attributed to the strategy and support of the EU and its recognition of this institution as one that was seen as very important for closing Chapter 23 in negotiations of the Republic of Croatia with the EU, but also as an exceptionally important element in the further implementation of reforms started in the judiciary in the Republic of Croatia. The Judicial Academy in Zagreb is also selected as a pilot center for combating cyber crime in the CoE and an EU project for the Balkans.

It should be kept in mind and even we who work in it often forget that the Judicial Academy has been independent for barely two years and despite all the new activities and great number of tasks it has conducted in this time period, also at the same time it has developed and continues to develop a structure, which enables it to function and work better.

Actually it is developing into a sustainable institution, for which it neither has the sufficient support, nor the understanding of its managing body.

The projects set to begin implementation with in 2012, and in which the Judicial Academy is the beneficiary, are IPA 2009 'Professional training of advisors and candidates for judges and state attorneys with the aim of establishing a self-sustainable teaching system', IPA TAIB 2008 'Strengthening of the work of the State School for judicial officials through the advancement of its programmes of professional training and work/business processes' and MATRA FLEX Support to the Judicial Academy in the development of programmes in laws of the European Union and project in cooperation with UK and Assotiation of Judges 'Strengthening of courts in relation to the media'. In eleven other EU projects, which shall be conducted during this year, the Judicial Academy is a participant.

The purpose of the projects, in which it has participated to date, and two with the EU that shall commence implementation in 2012, do not have the objective of only those activities and results, which are noted in the agreement and pertaining documentation thatensues in the procedure, which to us who are not participating in this procedure often seems in a technical sense detailed, prolonged and bureaucratic. Their objective is rather to assist in finding and realising those solutions, which will help the judiciary to continue developing in the right direction, and also that the Judicial Academy, despite obstacles it faces sometimes, becomes a self-sustainable institution. In this sense, to date, we have experience with partners for various EU states, whose experts have an understanding and desire to become acquainted with our system and will find the best solutions in cooperation with us, which fit in it, strengthen it and further build upon it. Therefore, the implementation of projects is primarily joint, intense work, dialogue and exchange of good practices and experiences, from which solutions are identified in a given area that are best suited to our needs and which are sustainable.

The Judicial Academy also participated in university projects as a partner to law faculties (this year in a project with the Faculty of Law in Zagreb about criminal justice aspects of the European Convention for the protection of human rights and fundamental freedoms) and the Centre for Excellence Jean Monet (Faculty of Law in Zagreb and Rijeka).

6. Programmes of the Judicial Academy

The programmes of the Judicial Academy are made up of two initial/beginning ones and a life-long one.

- Initial professional training of trainees in judicial bodies – preparation for the Bar exam (Act on Trainees in Judicial bodies and Bar examination).
- Initial professional training of candidates for judicial officials (organisational unit of the Judicial Academy – State School for judicial officials – Judicial Academy Act).
- Continueing professional training of judicial officials and advisors in judicial bodies.

In 2011, the Judicial Academy participated with 4,921 attendees through 237 activities in life-long professional training. It should be emphasised that the activities for the most part were of the workshop type, interactive for about 25 attendees, and trainers are almost always judges and state attorneys. Along with this, 300 one-day workshops were organised in 5 regional centres of the Judicial Academy for 81 trainees in judicial bodies and also twenty day-workshops for 55 candidates for judges and state attorneys divided into three groups in the State School.[14]

7. International cooperation

The Judicial Academy is a member of the Academy for European Law (ERA) in Trier, and its representative participates in meetings of its managing board and programme council. The Judicial Academy has a very intensive cooperation with the EIPA, and is part of the Lisbon network and a member of its steering committee (network of centres for professional training of judicial officials of the Council of Europe), as well as an observer in the EJTN (in which the members are only related institutions of EU Member States, but also the Republic of Croatia relating to the already mentioned memorandums, through which it acquired full rights to opportunities to participate in programmes). Along with a large number of projects, in which the Judicial Academy is a beneficiary or participant, and the recently signed Memorandums on understanding, which will enable the participation of Croatian judicial officials in numerous projects and activities in institutions for education of EU Member States, the Judicial Academy regularly participated in

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joint activities with related European institutions. Along with all of this, we are well aware of the importance of cooperation in the region, central European, but also in the South-eastern European region. Therefore we pay special attention to the implementation of agreements signed with these states, such as: Partnership Protocol concluded on 21 June, 2011 in Budapest (the signatories are the academies/institutions for professional training of judicial officials from the Republic of Croatia, the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic), International treaty concluded on 7 April, 2011 in Zagreb (the signatories were academies/institutions for the professional training of judicial officials from the Republic of Croatia, the Republic of Hungary, the Republic of Poland, Slovak Republic, Republic of Slovenia, Bosnia and Herzegovina, Republic of Montenegro, Republic of Macedonia and the Republic of Kosovo), Memorandum on mutual cooperation concluded on 22 November, 2011 in Skopje (the signatories were academies/institutions for the professional training of judicial officials from the Republic of Croatia, the Republic of Macedonia, the Federal Republic of Germany, Bosnia and Herzegovina, the Republic of Montenegro, the Republic of Serbia, the Republic of Bulgaria, the Republic of Kosovo, the Republic of Albania and the Republic of Turkey).[15]

The Judicial Academy is also the pilot centre for education on combating cybercrime, but also the centre for the publication of documents and education on the rights of asylum seekers and migrants. Along with this, we see our important role as a link between related EU institutions and similar partner centres in the South-eastern European region (especially due to the similarity in languages). In this area, the Judicial Academy is developing as an institution, which will assist partner institutions in the region in the demanding procedure of EU accession and negotiations with the EU, in which the work and development of the Judicial Academy was one of the significant benchmarks whose fulfilment was one of the conditions to close the Chapter on the Judiciary and Fundamental Rights.

The reason for cooperation with countries in the region, but also institutions in EU Member States, is not only the exchange of programmes, professionals, good practices, but rather also joint experiences and strategies, which refer to possible ways of strengthening

[15] Ibid.

institutions and their independence and the sustainability of their development despite various challenges and frequent changes in the relationship between the government and the judiciary towards them. In this too it becomes evident that the problems faced by these institutions are possibly different in intensity, however in terms of content they are very similar in all states.

The Judicial Academy in the Republic of Croatia has a comparative advantage and opportunity to become a central place for learning EU law and international law in the region, and its materials and ability to participate in its activities should – in accordance with budgetary and organisational capacities – also be offered to EU Member States, in particular neighbouring ones, but especially states in the region and even further (great interest for cooperation has been shown by Azerbaijan, Georgia, Turkey and some other countries).

The basic objective of all forms of cooperation is the development of confidence in one's own but also the justice system of other states, to become acquainted with them, to exchange experiences and build the rule of law area in this part of the world. This is an ambitious goal but it can be reached with small steps and the foundations for this have already been set for by EU documents and programmes, our task is to fit into this system and actively work to support future members, but also to states under the EU neighbourghood policy.

We are perfectly aware that continuity and strengthening, as well as the improvement of the quality is conditioned by the networking and cooperation with partner institutions, which may assist our work within our countries, so we have cooperation agreements with: law faculties in the Republic of Croatia, the Croatian Bar Association, Croatian Chamber of Notaries Public, Association of Croatian Judges, Faculty of Education and Rehabilitation Sciences in Zagreb, Faculty of Humanities and Social Sciences in Zagreb, Croatian Association of Criminal Law Sciences and Practice, Faculty of Economics and Business in Zagreb, the Croatian Academic and Research Network – CARNet and others.

A total of 1,958 participants, of which about 400 through video conferences on the foundations of the EU and introduction to EU law, have participated in activities, which we have organised in the area of EU law in the life-long training of judges and state attorneys from 1 January, 2010 to 31 December, 2011. So, we could say that our goal is to have all the judicial officials participate in at least one EU law activity till 2015.

Keeping in mind the cooperation with institutions within Croatia, we believe that one of the roles of judicial training institutions is also their impact on the work of law faculties, whereupon they should support greater interaction of practice and sciences, but also create mutual trust between practitians and scientists, which is often missing and which is detrimental to both faculties and centres for life-long learning and in the end proves most detrimental to the justice system as a whole. An important role of cooperation with other institutions, along with faculties, is also the gradual impact on the perception of the public in relation to the judiciary and the need to improve public confidence in the role of the judiciary. We know that it's not enough to have an exceptionally well functioning judiciary, which is the ultimate goal of all of us, but rather it is necessary for citizens to feel and see that it works like this and that justice is done and that this judiciary exists and functions for the citizens and their well-being.

8. Some of the objectives of the Judicial Academy to 2020

The fundamental issue is transparency and objectivity in every procedure concerning the entry of a judicial career. It does not depend on the Judicial Academy and is the most important for the independent judiciary in the Republic of Croatia. It requires full objectivity in judges and state attorneys nomination procedure as well as in advancement, objective disciplinary proceedings and the establishment of an objective and clear system of assessment of the work of judicial officials. It must be ensured that the best experts, but also persons with integrity, broad education and sense of justice, enter this profession.

Similarly, it is necessary to create mechanisms, which will additionally ensure objective advancement for them while they conduct their duties. In that part it is possible to envisage the important role of the Judicial Academy. Ensuring objective entry into traineeship in the judiciary, setting up mechanisms, which will identify the best already during their studies at law faculties, objective bar exam, objective entry exam to the State School, final exam and nomination – these are points in the procedure and decisions, in which it is essential to reach the maximum possible objectivity and enable the selection of the best.

It is impossible to do this only by testing, written exams and structured interviews. It should be possible to achieve by raising the awareness and complete dedication by those making decisions in those stages of the carrier. The best choices and the best people in the judiciary are in the

interest of not only the Croatian judiciary, but also every Croatian citizen, EU Member States, as well as countries in the region and their citizens.

On the other hand, the state needs to ensure best possible working conditions (and salaries) for this profession, which would correspond to the highly set demands and conditions, as well as the reputation, which this profession should enjoy.

When this prerequisite has been met – an objectivity which ensures that truly the best are given the opportunity to enter the judiciary at all levels – the other objectives set before the Judicial Academy for 2020 shall be more easily achievable:

- Gradual positioning as the central regional institution for education about EU law, international and humanitarian law, as a link between institutions in EU Member States and the South-eastern European states.
- Active role in connecting and cooperation between law faculties with practitioners – judges and state attorneys. Through projects and activities for strengthening the flow of information and cooperation of scientists with practitians.
- The role and contribution of Judicial Academy in the process of nomination of judges and state attorneys (assessment during implementation of the programmes of the Judicial Academy, developing a network of mentors and leaders, uniform evaluation criteria, impact of evaluations of attendants of Judicial Academy on their carrers).
- Changes to the system from law faculty degrees to the end of the career of judicial officials through a number of amandments (previously tested through pilot programmes) – Judicial Academy as an institution with a verified programme.
- Developing a clear organisational structure, which would facilitate the efficiency and expertise, continual education of employees, the maximal inclusion of judges and state attorneys, as well as external professional advisors.
- Publishing activities with materials, which are part of the programmes of the Judicial Academy, publishing professional and academic articles about topics which are part of the annual programmes of the Judicial Academy, publishing the journal of the Judicial Academy in electronic form, which would provide

information about activities and announce important events in the work of the Judicial Academy.

- Stronger promotion of the activities of the Judicial Academy to the judiciary and Croatian public, whereby directly effecting an improvement in the perception of work and the role of the judiciary by citizens of the Republic of Croatia.
- Organizing a large number of joint activities open for the other countries participants.
- All judicial officials should participate in at least 5-day-activities at Judicial Academy activity in the area of EU law until 2015.
- External evaluation.
- Developing existing databases and websites.
- Establishing an assessment system, which will contribute to the objectivity of criteria applied when appointing judges and state attorneys, as well as for their advancement (checks and balances system).
- Widening target groups to all lawyers and clerks in courts and state attorney offices.

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The legal nature of EU citizenship: perspectives from international and EU law

I. Introduction

EU citizenship is a unique concept – never before has an international organization attempted to create a legal status similar to nationality. Even if Union citizenship is an additional status, it deserves attention not only from the point of view of EU law, but from the perspective of public international law as well. Thus in our article, first we aim to evaluate EU citizenship from an international law viewpoint, comparing it also with the traditional concept of nationality. Following that we turn our attention to the interpretation of the nature of Union citizenship and the rights associated by the Court of Justice of the European Union (CJEU), with special emphasis on recent developments in its case law.

II. Nationality in public international law

The concept of nationality has traditionally been positioned between the internal laws of individual states and public international law. Nationality is primarily an institution of the internal law of each State, particularly its constitutional and administrative law.[1] It is a relationship of mutual rights and obligations of the individual and the state, standardized by state regulations. Therefore, on the basis of nationality, an individual enjoys many rights, such as the right to a passport (which allows him to travel abroad), voting rights or right of employment in certain professions (e.g. in the diplomatic service).[2] On the same basis an individual also has duties, such as compulsory military service. Since the content of the rights and obligations of nationality is in the internal jurisdiction of states, it varies from state to state. State regulations also specify the manner of acquisition and loss of nationality. The role of

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[1] V. Ibler, *Rječnik međunarodnog javnog prava* [Dictionary of International Public Law] (Zagreb, Informator 1987) p. 69.
[2] M. N. Shaw, *International Law* (New York, Cambridge University Press 2008) p. 659.

public international law is in setting the legal framework, which internal law should not pass.[3] However, the role of public international law in the context of nationality is not limited to the role of a corrective of internal legislations. According to classic international law, under which individuals are not considered to be its subjects, nationality is the link between the individual and international law.[4] Individuals enjoy the benefits of international law only indirectly, through the state whose nationals they are. In case of violation of the rights of nationals of one state abroad it is, in principle, the exclusive right of their country[5] to seek the protection of those individuals at the level of international law (the so-called diplomatic protection).[6] By the development of international legal protection of human rights at the universal and regional levels individuals are, however, gaining more rights in terms of directly appealing to international institutions, but this does not diminish the importance of the institution of nationality, at least not at the present stage of development of the international community. This is supported by The Universal Declaration of Human Rights of 1948[7] according to which '[e]veryone has the right to a nationality' [Article 15(1)].[8]

It is necessary at the beginning to clarify some terminological issues. When covering this subject matter it is often with the terms 'nationality' (fr. *nationalité*) and 'national' (fr. *national*) that we come upon the notions of 'citizenship' (fr. *citoyenneté*) and 'citizen' (fr. *citoyen*). In most states two given terms are used interchangeably, although many authors today advocate a preference for the term 'citizenship'. They justify this by the evolution of legal and political understanding of the legal relationship between the government and the individual, in the direction: subject – national (in the sense of belonging to the state) –

[3] Ibler, op. cit. n. 1, at p. 69.

[4] R. Jennings and A. Watts, eds., *Oppenheim's International Law, Vol. 1: Peace* (New York, Oxford University Press 2008) p. 849.

[5] States have a right, but they do not have an obligation to give diplomatic protection to their nationals. See P. Okowa, 'Issues of Admissibility and the Law on International Responsibility', in M.D. Evans, ed., *International Law* (New York, Oxford University Press 2011) p. 476-479.

[6] See *The Mavrommatis Palestine Conccessions Case*, Judgement No. 2, 1924, PCIJ, Series A, No. 2, p. 12.

[7] United Nations General Assembly Resolution no. 217 A(III) of 10 December 1948.

[8] International Covenant on Civil and Political Rights of 1966 (*United Nations Treaty Series*, vol. 999, p. 171.), however, does not contain such provision emphasising only that '[e]very child has the right to acquire a nationality'. Art. 24(3)

citizen (as a recipient of the rights and obligations).[9] However, in some countries, these two pairs of terms do not have the same meaning. Here are some examples which are listed in *Oppenheim's International Law*.[10] In some Latin American countries, the term 'citizenship' is used as a set of political rights which an individual can lose as a result of sanctions or otherwise and thus may lose even the 'citizenship'. In situations like this, however, he does not lose the 'nationality' as the basis of belonging to that country. In the United States, these terms also have different meanings, though, they are often used interchangeably. Thus, the 'citizen' is that individual who enjoys all the personal and political rights, while by the term 'national' are regarded individuals who, according to national legislation, do not enjoy all such rights. These are individuals from certain areas that do not make federal units of the United States. In both these examples for public international law the concept of 'nationality' is relevant, as used in those countries.

We have already mentioned that the nationality is primarily an institution of domestic law of the individual states. Under Articles 1 and 2 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930[11] '[i]t is for each State to determine under its own law who are its nationals' and '[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State'. The above stated rules can be regarded as a statement of general customary international law.[12] However, international law, in this regard, nevertheless imposes certain restrictions on the internal legislations. In line with this it is often quoted an excerpt from the advisory opinion of the Permanent Court of International Justice on the *Nationality Decrees Issued in Tunis and Morocco* from 1923:

> '[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends

[9] See V. Čok, *Pravo na državljanstvo* [The Right to a Nationality] (Beograd, Beogradski centar za ljudska prava, Dosije 1999) p. 255-256. and D. Grubiša, 'Lisabonski ugovor i europsko građanstvo' [Lisbon Treaty and the European Citizenship], 47 *Politička misao* (2010) p. 189-190.

[10] Jennings, Watts, op. cit. n. 4, at p. 856-857.

[11] *League of Nations Treaty Series*, vol. 179, p. 89, No. 4137, available at: http://www.unhcr.org/refworld/docid/3ae6b3b00.html.

[12] V. Đ. Degan, *Međunarodno pravo* [International Law] (Zagreb, Školska knjiga 2011.), p. 467.

> upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain [of the State]. [...] [T]he right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.'[13]

Thus, according to mentioned advisory opinion, nationality is in the internal jurisdiction of states, but it is possible that the state arbitrarily submits to the rules of international law, usually by signing a bilateral or multilateral international treaty. Furthermore, under Article 1 of the aforementioned Hague Convention from 1930 '[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. According to this rule, which today can be considered an expression of general customary international law, a significant role is given to public international law in a kind of control of the internal laws. The reason is the possibility of undesirable consequences of the conflict of the substantially different unilateral acts of states at the international level.[14] The question of the role of international law in regulating citizenship was engaged in the 1955 judgment of the International Court of Justice in the case of *Nottebohm.*[15] It was said that

> 'a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States (p. 23.)'.

Thereby the Court has defined nationality in this way:

> 'Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely

[13] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923, PCIJ, Series B, No. 4, p. 24.
[14] Jennings and Watts, op. cit. n. 4, at p. 853.
[15] *Nottebohm Case (second phase)*, Judgement, *I.C.J. Reports* 1955. p. 4.

> connected with the population of the State conferring nationality than with that of any other State. (p. 23.)'

In other words, the States are not obliged under public international law to accept the validity of nationality that is given by another state in any case, despite the fact that the legal regulation of nationality is in the internal jurisdiction of the state. However, the judgment in the case of *Nottebohm* and her demand for genuine link should not be taken for granted. It seems that it does not have general support in State practice or in theory.[16] In any case, international law nevertheless plays a role in regulating the institution of nationality, although perhaps a bit narrower than specified in the *Nottebohm* judgment. The extent of control exercised by the international law performed in this context is not specified, but there is a consensus that definitely covers cases of fraudulent conduct, discrimination and violations of generally recognized principles of jurisdiction.[17] It should be emphasized that bringing into question the legal validity of nationality under international law does not affect the legal effects of that nationality in the internal law of the state which granted it.[18] Such a situation only empowers other states not to recognize the nationality acquired in contravention of international legal rules.

Public international law, as we have seen, leaves the regulation of nationality to the internal laws of the states, including the determination of modes of acquiring and losing nationality. These rules can therefore vary from state to state. According to mentioned judgment of the International Court of Justice in the case of *Nottebohm*

> 'the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations (p. 23.)'.

However, in state practice a number of typical modes of acquiring and losing nationality have nevertheless been developed. The most common ways of acquiring nationality are by: birth (known two modalities: *ius sanguinis* and *ius soli*), naturalization, redintegration (return to previous nationality), annexation and cession.[19] The most common ways of losing

[16] See Okowa, loc. cit. n. 5, at pp. 481-482.
[17] Okowa, loc. cit. n. 5, at p. 480.
[18] Jennings and Watts, op. cit. n. 4, at p. 856.
[19] Jennings and Watts, op. cit. n. 4, at pp. 868-877.

nationality are: release, deprivation, expiration (by longer stay abroad), renunciation and substitution.[20] The conflict of different rules on the acquisition and loss of nationality at the international level can lead to an individual being a national of two (dual nationality) or more states, or not being a citizen of any state (statelessness). Such situations can cause some problems both for individuals and for states[21] and they are as such subject of many bilateral and some multilateral international treaties.[22]

III. The concept of nationality and EU citizenship compared

The institution of 'EU citizenship' was introduced into European law by the Treaty on European Union, signed on 7 February 1992 in Maastricht (Maastricht Treaty).[23] The provisions of „EU citizenship" were laid down in the second part of this Treaty which contained provisions amending the Treaty establishing the European Economic Community (Rome Treaty) of 25 March 1957 (Articles 8-8e). Under Article 8(1) of that Treaty, EU citizenship was given to every individual who was a national of one of the Member States. In subsequent articles there were given specific rights and obligations, in the above manner defined, 'citizen' of the European Union, on the territory of any of the Member States: freedom of movement and residence, right to vote and stand as a candidate at the local level, right to vote and stand as a candidate for the European Parliament, right to diplomatic and consular protection and right to submit petitions to the European Parliament and addressing the European Ombudsman. The concept of EU citizenship remained essentially unchanged, with some additions to the content of rights which are guaranteed to the 'European citizen', in subsequent amendments to the Treaty on European Union and the Treaty establishing the European Community (hereinafter the Treaties).

This new concept raises the question of the relation between the institution of EU citizenship and the traditional notion of nationality. More precisely, whether the EU citizenship can be equated with the

[20] Jennings and Watts, op. cit. n. 4, at pp. 877-881.

[21] See more in J. Andrassy et al., *Međunarodno pravo 1* [International Law 1] (Zagreb, Školska knjiga 2010) pp. 354.-358.

[22] See, for example, already mentioned Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930, as well as Convention on the Reduction of Statelessness of 1961 (*United Nations Treaty Series* , vol. 989, p. 175.) and European Convention on Nationality of 1997 (*Council of Europe Treaty Series*, No. 166).

[23] *Official Journal of the European Communities*, C 191, Vol. 35, 29 July 1992.

institution of nationality, as it is defined in international law and internal laws of the states. We shall try to answer this question by comparing and analysing several aspects of the two institutions. The first aspect that we are going to examine is the terminology used by the Treaties – the use of terms 'nationality' and 'citizenship' in a different context. Secondly, we are going to analyse the subjects of these relationships. Thirdly, we are going to look into the manner of acquisition and loss of these statuses. And fourthly, we shall compare the relationship between the content of rights and obligations contained in nationality and EU citizenship.

The Treaties, as we have seen, have been using the terms 'nationality' and 'citizenship'. Without entering into the debate concerning whether or not the two mentioned terms normally relate to the same type of legal relationship or not, the fact is that the Treaties are using them to emphasize the difference between the two types of legal relations. The term 'nationality' in the Treaties is explicitly used as a legal term, which means the legal relationship between the individual and a Member State of the European Union. This is the traditional concept of nationality determined by internal law of each State and, to a lesser extent, the rules of public international law, in which the Treaties in its provisions do not enter.[24] On the other hand, the term „citizenship" is used as a legal term which denotes a legal relationship between the individual and the European Union itself, and as such is legally standardized by the Treaties. This terminological distinction tells us in itself nothing about the legal nature of these legal relationships and their eventual difference. However, the fact that the drafters of the Maastricht Treaty have decided to use different terms (which are retained in subsequent amendments to the Treaties) at the very least indicate the existence of some differences.

Another aspect of our analysis are the subjects of legal relationships of nationality and EU citizenship. The subjects of the legal relationship contained in the concept of nationality are an individual on one side and state on the other. With EU citizenship it is a different matter. EU citizenship is a specific legal relationship between the individual and that international organization. The European Union is not, of course, a classic international organization. It has supranational features and seeks

[24] See K. Hailbronner, 'Nationality in Public International Law and European Law', in R. Bauböck et al., eds., *Acquisition and Loss of Nationality, Vol. 1: Comparative Analyses, Policies and Trends in 15 European Countries* (Amsterdam, Amsterdam University Press 2006) p. 89.

to further integration of the Member States[25], but nevertheless, it still cannot be considered to have crossed the 'whole path' of development from international organization to some form of a complex state (e.g. a confederation).[26] Such a stance is supported by the fact that in the Lisbon Treaty from 2007[27] there were omitted provisions from the rejected Treaty establishing a Constitution for Europe from 2004,[28] governing the state symbols of the Union: flag, anthem, motto, currency and Europe Day. Any reference to a „European Constitution" was also rejected. In line with this, the issue can also be viewed from the aspect of sovereignty. Since the right to awarding the status of a national of a state belongs exclusively to that state it can be concluded that this right derives from the sovereignty of the state. Despite the fact that European Union Member States are transferring to it a part of their sovereignty, it cannot be said that the European Union as such has sovereignty because, as we said, it (still) has not emerged from supranational international organization into some form of complex state.[29]

The Treaties prescribe a specific requirement for the 'acquisition' of EU citizenship: every national of any of the European Union Member States is also a citizen of the European Union. It can be said that the EU citizenship is 'added to' the existing nationality.[30] The relationship of nationality of a Member State of the European Union and EU citizenship could therefore be labelled as a special case of dual nationality.[31] Consequence of this is that the foreigners in the EU Member States would also be considered foreigners in the broader context of the European Union itself.[32] Since the EU citizenship is automatically linked to the nationality of a Member State, European law

[25] Andrassy et al., op. cit. n. 21, at p. 357.

[26] D. Lapaš, *Pravo međunarodnih organizacija* [The Law of International Organizations] (Zagreb, Narodne novine 2008) p. 233. See also M. Herdegen, *Europsko pravo* [European Law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2002) pp. 54-57.

[27] *Official Journal of the European Union*, C 306, Vol. 50, 17 December 2007. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 83, Vol. 53, 30 March 2010.

[28] *Official Journal of the European Union*, C 310, Vol. 47, 16 December 2004.

[29] See Čok, op. cit. n. 9, at p. 257.

[30] Čok, op. cit. n. 9, at p. 254.

[31] Andrassy et al., op. cit. n. 21, at p. 357.

[32] Čok, op. cit. n. 9, at p. 258.

does not contain the rules on the acquisition and loss of that status, which are typical for the traditional institution of nationality. Therefore, the acquisition and loss of citizenship of the European Union depends on internal legal rules of Member States on the acquisition and loss of their nationality. However, it seems that, according to the practice of the Court of Justice of the European Union, there are certain limits to Member States in determining these rules.[33]

An important distinction can also be found in the content of nationality and EU citizenship. Nationality provides a broad set of rights and obligations that individual states provide for their nationals in domestic law, while EU citizenship provides only a narrower set of specific (additional) rights and obligations, which the European Union provides for its 'citizens', through the status of a national of a Member State of the Union.[34] Of course, it is possible that the scope of rights and obligations of citizens of the European Union will increase in the further development of European law. The more important such rights and obligations would be, the more EU citizenship would become a more important legal status in relation to the nationality of Member States.[35] With regard to this, it is important to note that the Amsterdam Treaty from 1997[36] supplemented the formula of EU citizenship by saying that 'Citizenship of the Union shall complement and not replace national citizenship' (Article 17 of the Treaty establishing the European Community). The expression 'shall complement' as used in the Amsterdam Treaty has subsequently been replaced in the Lisbon Treaty from 2007 by the expression 'shall be additional' (Art. 20 of the Treaty on the Functioning of the European Union).[37] This provision goes further than the terminological distinction between nationality and citizenship in the Treaties, putting it clear that the concept of EU

[33] See infra, at IV. 1.

[34] See Andrassy et al., op. cit. n. 21, at p. 357. and Čok, op. cit. n. 9, at p. 258-259.

[35] Hailbronner, loc. cit. n. 24, at p. 86.

[36] *Official Journal of the European Communities*, C 340, Vol. 40, 10 November 1997.

[37] Article 17 of the EC-Treaty used the expression 'shall complement and not replace' – a clarifying provision added by the Amsterdam Treaty, as the original wording of the Article introduced by the Maastricht Treaty did not state this explicitly. Currently, owing to the Lisbon Treaty, the provision is contained in Article 20 TFEU, now using the expression 'shall be additional to and not replace'. The Hungarian language version of the Treaty used the same expression before and after the Treaty of Lisbon as well ('kiegészíti és nem helyettesíti').

citizenship cannot be compared with the traditional concept of nationality and considered as a step towards the creation of European federation.[38] It seems however that this provision is relativized by the practice of The Court of Justice of the European Union, according to which EU citizenship is destined to be a fundamental legal status of nationals of the Member States.[39] Another argument also suggests that EU citizenship is not to be equated with nationality. Hailbronner notes that the most important rights of citizens of the European Union are not directed against the European Union (like the rights of a national are directed against his state), but against its Member States.[40]

With this brief comparative analysis of several aspects of nationality and EU citizenship, we have shown that there are significant differences between the two institutions. Firstly, EU citizenship is not a legal relationship between the individual and the state. Secondly, European law does not contain its own rules on the acquisition and loss of that status – it depends on the relevant rules on the acquisition and loss of nationality of the Member States. Thirdly, the content of the rights and obligations of the 'citizen' of the European Union is specific, since he already has certain rights and obligations as a national of a Member State. For these reasons, the EU citizenship cannot be brought under the equal sign with the traditional concept of nationality, although it to a large extent relies on it. It can be said that EU citizenship is a special form of nationality, just like the European Union is a special kind of political community.

IV. The role of the Court of Justice in defining EU citizenship

As stated above, EU citizenship is a legal status of an additional nature – according to the Treaties, it is a special status "additional to" national citizenship, establishing additional rights and obligations for citizens. The Court of Justice of the European Union has, especially in recent years, handed down a line of judgments of vital importance regarding EU citizenship, providing a quite 'dynamic interpretation'[41] of the status

[38] Hailbronner, loc. cit. n. 24, at p. 86.
[39] See infra, at IV. 2.
[40] Hailbronner, loc. cit. n. 24, at p. 95.
[41] E. Szalayné Sándor, 'A mellőzéstől a dinamikus értelmezésig – gondolatok a bírói gyakorlat szerepéről az „európai polgár" intézménye kapcsán' [From negligence to dynamic interpretation – thoughts on the role of judicial practice regarding the concept of European citizenship] in Zs. Csapó, szerk., *Ünnepi tanulmánykötet*

and the rights associated with it. In the following we will focus on the CJEU's findings regarding links between nationality and EU citizenship, and the recent trend of case law in which the CJEU increasingly refers to the status of EU citizenship as an autonomous point of reference.

1. Links between national and European citizenship

One of the defining characteristics of EU citizenship is that it is only attainable indirectly, as a consequence of national citizenship: every national of a Member State of the Union is an EU citizen, and only Member State nationals can be EU citizens. The status of EU citizenship cannot be acquired or lost independently of national citizenship. As it is up to the Member States alone to determine who their nationals are, they act as the 'gatekeepers'[42] of EU citizenship – this status, although undoubtedly a European concept is anchored in the various nationality laws of the Member State.

Determining who its nationals are is a fundamental element of the sovereignty of every state, as nationality represents the unique relationship of solidarity between an individual and a state – this is recognized by public international law as well.[43]

The CJEU has however introduced the requirement that the competences of the Member States regarding nationality – including laying down the conditions for the acquisition and loss of national citizenship – shall be exercised with 'due regard' to EU law in situations that have EU law relevance.[44] The discretion of the Member States is thus not unlimited, but the Court has not yet sufficiently clarified the scope of that obligation.[45]

Bruhács János professor emeritus 70. születésnapjára (Pécs, PTE ÁJK 2009) p. 334.

[42] D. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge, Cambridge University Press 2008) p. 36.

[43] See for example Article 3 subsection (1) of the European Convention on Nationality (1997) according to which each State shall determine under its own law who its nationals are. The International Court of Justice made a similar declaration in the Nottebohm case [Liechtenstein v. Guatemala (ICJ Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4., paras 20-23.].

[44] See *inter alia* the judgment in Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* [ECR 1992 Page I-04239], para 10.

[45] Case C-135/08 *Janko Rottmann v Freistaat Bayern*. Opinion of Advocate General Poiares Maduro delivered on 30 September 2009, para 21.

Looking to the case law of the CJEU, we can infer a number of considerations regarding the granting and withdrawal of national citizenship.

- A Member State must not restrict the effects of the grant of the nationality of another Member State by laying down an additional condition for recognition of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty.[46]
- Member States need to have due regard to EU law in connection with decisions withdrawing naturalisation provided that the withdrawal results in the loss of EU citizenship as well.[47]
- In a situation where an EU citizen has lost this status as the result of the withdrawal of naturalisation, the Member State of which the individual has previously been a national of must also have regard to EU law (and more specifically the principle of proportionality) when considering the possibility of the recovery of the 'original' citizenship.[48]

Regard to EU law must thus be had in cases of Union law relevance even regarding granting nationality and withdrawing naturalisation – the decisional freedom of the Member States is thus limited by EU law-related considerations originating from the case law of the Court of Justice.

On a related note, it has to be stated that EU citizenship does not depend on territorial considerations, as it is defined by primary EU law as being an inseparable corollary of Member State nationality. In the Eman & Sevinger case, which concerned the question of whether the limitation of EU citizenship rights (more specifically European Parliament voting rights) is permissible, the Netherlands government submitted *inter alia* that EU citizenship status does not apply regarding its nationals who live in Aruba or the Netherlands Antilles, parts of the Kingdom of the Netherlands which are considered 'overseas countries and territories' under EU law,[49] and where EU law does not, in general, apply. The Court of Justice however reaffirmed that as every person holding the

[46] Micheletti and others case, para 10. This is repeated *verbatim* in Case C-148/02 *Carlos Garcia Avello v État belge* [ECR 2003 Page I-11613], para 28 and Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen* [ECR 2004 Page I-09925], para 39.
[47] Janko Rottmann case, para 62.
[48] Ibid.
[49] See Arts 198-204, Art. 355 (2) and Annex II of the TFEU.

nationality of a Member State is a citizen of the Union, it is in this regard totally irrelevant where that national of a Member State resides, be that an 'overseas territory' or a third country.[50] In the same case, however it was also stated that European Parliament electoral rights are not conferred unconditionally on the citizens of the Union, and that requirement to reside within national territory to be able to vote is a requirement which is not, in itself, unreasonable or arbitrary and which is justified for several reasons.[51] Thus the possibility to exercise certain political rights emanating from EU citizenship can become detached from Union citizenship as a status, as the only requirement to possess the latter is to hold the nationality of one of the Member States.

2. EU citizenship status as an autonomous point of reference

As we have seen, the case law of the Court of Justice of the European Union continuously interprets and shapes the status of Union citizenship. The subject deserves close attention at present too, as a number of judgments recently handed down by the Court of Justice bring forward the question whether EU citizenship can be a decisive point of reference, irrespective of whether the rights associated with this status have already been exercised or not. The cases examined below are chiefly connected to the rights of free movement and residence.

In the earlier stages of European integration, the free movement of persons was above all considered an economic issue: free movement was bound to economic intentions, existing primarily as a necessary element of the free movement of workers, the freedom of establishment and the freedom to provide services. The introduction of the status of EU citizenship with the Treaty of Maastricht has brought about a fundamental change, as nationals of the Member States were given the right to free movement and residence independent of economic intentions. Since then, according to primary EU law, Union citizens have the right to move and reside freely within the territory of the Member States (albeit in accordance with the conditions and limits defined by the Treaties and by the measures adopted according to them).

[50] Case C-300/04 *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag* [ECR 2006 Page I-8055], paras 27-29.

[51] Ibid, paras 52-54, with reference to the judgment of the European Court of Human Rights in *Melnychenko vUkraine* (no. 17707/02, ECHR 2004.-X, § 56-57). Such requirements must, however, comply with the principle of equal treatment (M.G. Eman case, paras 59-61).

Regarding secondary EU law, Directive 2004/38/EC[52] was adopted in the relatively recent past, taking the place of various earlier legal instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, aiming *inter alia* to achieve a less fragmented regulation of the right of free movement by simplifying and strengthen it at the same time.[53] The directive echoes the sentiments of the Court of Justice as far as it also postulates in its preamble that EU citizenship should be the fundamental status of Member State nationals. However, by stating that it should be the fundamental status of nationals of the Member States *when* they exercise their right of free movement and residence, it adds a requirement that they need to exercise these rights in order for the fundamental character of this status to be invoked. The earlier case law of the Court of Justice has also followed this line of reasoning, and only more recently have changes begun to unfold in this regard.

Union citizenship (and EU law in general) was not meant to be called upon in purely internal situations: Union law relevance is necessary for the application of EU law, thus the situation in question must fall within the scope *ratione materiae* of Union law. This was the reason why 'static' EU citizens who have not made use of their right to free movement could not successfully rely on EU citizenship provisions in legal disputes.[54] European law is not meant to regulate strictly internal situations were no cross-border element exists. In purely internal situations, even unequal treatment can be justified, as that question is up to the national law of a member state and not to European law – a phenomenon usually referred to as reverse discrimination.[55]

Thus, in landmark citizenship cases like Martinez Sala or Metock, the rationale behind applying EU law was justified by previously exercised

[52] *OJ* 2004 L 158., p. 77.

[53] The Directive amended Regulation 1612/68 (OJ 1968 L 257., p. 475) and repealed Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[54] J. Lim, 'The Dark Knight: On the role of the ECJ and purely internal situations', *Durham Law Review* (2011), p. 2. http://durhamlawreview.co.uk/files/EUIM.JonathanLim.edited_1.pdf.

[55] The earliest references to the principle of reverse discrimination are to be found in Case 115/78 *Knoors* [ECR 1979, p. 399] and Case 175/78 *Saunders*, [ECR 1979 Page 1129]. Regarding the genesis of the principle see in detail A. Tryfonidu, *Reverse discrimination in EC law* (Alphen aan den Rijn, Wolters Kluwer 2009) pp. 3-18.

free movement and thus residence in another Member State. According to the Martinez Sala judgment[56], all EU citizens lawfully resident in the territory of another Member State are allowed rely on the principle of non-discrimination in all situations, which fall within the scope *ratione materiae* of EU law.[57] In the Metock case, the CJEU reaffirmed that a national of a non-member country who is the spouse of an EU citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of directive 2004/38/EC, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.[58] In the much discussed Zhu & Chen case, free movement was also involved, although in a quite unique situation: the EU citizen intending to move freely was an infant, who has attained Irish nationality by being born in Ireland as the child of a Chinese couple. The right of residence of the non-EU citizen mother was seen by the CJEU as a necessary accessory without which the EU citizen in question could not have exercised its right of free movement and residence. The right of residence of the child in the UK was based solely on her EU citizenship (then Article 18 of the EC-Treaty).[59] (It is interesting to note that the Court of Justice did not attach any real relevance to the fact that the situation could have been deemed an abuse of rights, as the mother gave birth in Ireland with the sole intention of securing Irish nationality for her offspring, and consequently secure UK residence rights for herself.[60]

A considerable shift in the reasoning came about with the Zambrano judgment, that, once again, involved minor EU citizens. Mr. Zambrano and his wife are Colombian nationals residing in Belgium. They entered the country originally in 1999 seeking asylum – their claim has been rejected, however, the order included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country. In 2000, Mr. Zambrano submitted an application to have

[56] Case C-85/96 *Martínez Sala v Freistaat Bayern* [ECR 1998 Page I-02691].

[57] H. de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential', 12 *European Journal of Migration and Law* (2010) p. 324.

[58] Case C-127/08 Meto*ck and Others v Minister for Justice, Equality and Law Reform* [ECR 2008 Page I-6241], para 99.

[59] Kunqian Catherine Zhu and Man Lavette Chen case, paras 26-27.

[60] A. Arnull, *The European Union and its Court of Justice* (Oxford, Oxford University Press 2006) p. 531.

his situation regularised under the relevant Belgian law, which was also rejected. Even though he had no work permit, Zambrano obtained employment in 2001. His wife gave birth to two children (in 2003 and 2005), both of whom became Belgian nationals. Mr. Zambrano has subsequently lost his employment for economic reasons, his application for unemployment benefits and the couple's renewed submission for the regularization of their status were both rejected. Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, he has held a special residence permit valid for the entire duration of that action. Mr. Zambrano went to court against the decision rejecting his claim for full-time unemployment benefits, and the Belgian court asked for a preliminary ruling from the CJEU, essentially asking (referring to the Zambrano children) whether primary EU law conferred a right of residence upon an EU citizen in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States.[61]

Belgium, and all other governments submitting opinions put forward that a situation such as that of Zambrano's Belgian-born children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedom of movement and residence guaranteed under European Union law.

Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the *genuine enjoyment* of the substance of the rights conferred by virtue of their status as Union citizens, and that a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.[62] The Court has thus ascertained a right of residence based exclusively on EU citizenship status, and it has done so in a situation that is – from the perspective of EU law fully internal. It is important to note that this reasoning also circumvents the application of the sufficient resources requirement contained in the Directive, requiring EU citizens to demonstrate the availability of adequate resources in order to reside in another Member

[61] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [Judgement of the Court of 8 March 2011, not yet reported], para 35.
[62] Ibid., paras 42-43.

State for longer than three months: in this respect the CJEU departed from the Chen case, where the requirement of having sufficient resources was considered to be applicable to an infant Union citizen, even if it could be satisfied by relying on the resources of the parents.[63] Does this judgment signal the end of the reverse discrimination rule? In her opinion, Advocate General Sharpston suggested that the CJEU rule that Article 18 TFEU does prohibit reverse discrimination too, but *only* in situations where discrimination is caused by the interaction of Article 21 TFEU (free movement and residence) with national law, entails the violation of a fundamental right protected under EU law and in the absence of equivalent protection under national law.[64] Even though the national court asked for guidance regarding this matter as well, the CJEU did not even touch upon this question – though it was probably evident that it would have to do so rather sooner than later.

Indeed, not long afterwards, the judgment of the Court in the McCarthy case[65] signalled a reaffirmation and a refinement of the Zambrano decision at the same time. Mrs McCarthy, a dual Irish-UK national attempted to rely on EU citizenship rights in order to justify a right of residence for her husband – a Jamaican national – in the UK. She has never resided in another member state, and has never been employed, is not self-sufficient and relies on social welfare benefits. Following her marriage to a Jamaican national with no right of residence in the UK, she applied for and received an Irish passport for the first time, and relying on her status as an Irish citizen resident in the UK she sought a right of residence in the UK as an EU citizen based on Directive 2004/38/EC for herself and her husband. Mrs McCarthy's request was refused on the grounds that she did not qualify for permanent residence under the Directive neither as a worker, a self-employed person nor a non-economically active person possessing sufficient independent resources. Following appeals by the applicants, the Supreme Court of the United Kingdom requested a preliminary ruling on an interpretation

[63] A. Wiesbrock, 'The Zambrano case: Relying on Union citizenship rights in 'internal situations'', *EUDO Citizenship Forum* (2011), http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations

[64] Gerardo Ruiz Zambrano case. Opinion of Advocate General Sharpston delivered on 30 September 2010, para 144.

[65] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [Judgment of the Court of 5 May 2011, not yet reported].

of the Directive from the CJEU.[66] Although the questions were limited to the Directive, the CJEU reformulated them somewhat in order to include a reference to the applicability of Article 21 TFEU as well.

As in Zambrano, the applicability of the Directive was quickly dismissed, as its applicability is limited to a right of residence, which is linked to the exercise of the freedom of movement for persons. Regarding Article 21 TFEU, the CJEU differentiated the facts of the present case from the Zambrano case: in the case of Mrs. McCarthy, the national measure at issue did not have the effect of depriving her of the *genuine enjoyment of the substance of the rights* associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States – in such circumstances, there is no factor linking the situation at hand with any of the situations governed by European Union law.[67] The 'genuine enjoyment' concept was echoed in the recent Dereci judgment[68] as well, and specified further: the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by EU citizenship refers to 'situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.'[69]

The purely internal rule and the previous case law on reverse discrimination are therefore not overturned, only to some extent modified: only if the genuine enjoyment of the substance of rights stemming from EU citizenship is in question, even a situation with no

[66] S. Coutts, 'Shirley McCarthy v. Secretary of State for the Home Department', *EUDO Citizenship News* 10 May 2011, http://eudo-citizenship.eu/citizenship-news/475-case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department

[67] Shirley McCarthy case, paras 49 and 55. In this case, the deciding factor was that Mrs. McCarthy did not depend on her husband in the way that Katherine Chen or the Zambrano children relied on their parents.

[68] Case C-256/11 *Dereci et al v. Bundesministerium für Inneres* [Judgment of the Court of 15 November 2011, not yet reported]. The case concerned inter alia Mr Dereci, a Turkish national, who wanted to join his spouse and children in Austria, and based a claim for residence on Article 20 TFEU. In paragraph 32 of the judgment, the CJEU stated: 'However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.'

[69] Ibid., para 66.

traditional cross-border element may fall within the scope of Union law.[70]

V. Concluding remarks

As we have seen, there are significant differences between the traditional institution of nationality and EU citizenship. EU citizenship differs from traditional nationality primarily, because it is not a legal relationship between the individual and a state, but a legal relationship between the individual and a (supranational) international organization. According to the Treaties, the EU citizenship is additional to the nationality of a European Union Member States. Consequently, European law does not have its own rules on the acquisition and loss of EU citizenship, but the acquisition and loss of that status depends on the internal legal rules on the acquisition and loss of nationality of the Member States. EU citizenship differs also from nationality by the content of the rights and obligations it contains. Certain rights and obligations are added to the EU citizen upon those, which he already has under domestic legislation as a national of EU Member State. Thus, EU citizenship cannot be equated with the traditional institution of citizenship, despite the fact that it to a large extent relies on it. It is a special form of nationality, just as the European Union is a special form of political community. By introducing the concept of EU citizenship, rules of European law are becoming extremely important not only for EU citizenship, but also for the nationality of its Member States. The reason for this is the described close connection between EU citizenship and the nationality of Member States. The internal regulations of the Member States on nationality and their use may, in fact, come into conflict with the purpose of the institution of EU citizenship, manifested in the content of the rights it guarantees to EU citizens. In this way, European law necessarily appears in the role of a kind of a corrective for domestic law on nationality of Member States, just like public international law, but only in questions of EU law relevance.

It seems that the status of Union citizenship is in constant flux: not only are the relevant primary and secondary sources of EU law changing, the judgements of the CJEU are also continuously shaping the concept of supranational citizenship and the rights associated therewith. The judgments of the Court regarding EU citizenship can even have a

[70] Coutts, loc. cit. n. 66.

beneficial effect on the situation of third-country nationals residing in EU territory, as demonstrated for example by the Chen, Metock and Zambrano cases.[71]

It is remarkable that EU citizenship is slowly becoming a point of autonomous reference for the CJEU irrespective of the actual (preceding) exercise of the rights conferred by the status, and that even a distant, indirect and even potential connection can be sufficient to classify a legal problem as an issue falling within the scope of EU law. In the Garcia Avello case, the Court relied on the fundamental nature of Union citizenship when ruling that a Spanish-German couple should be allowed to decide freely on the composition the surname of their children.[72] The connection with EU law was in this case quite tenuous, as the Court saw the relevant cross-border dimension in the fact that if the children, in the future were to migrate to Spain, confusion could potentially arise as to the identity of their lawful parents.[73] The link with EU law was also indirect in the Rottmann case, where the situation in question was primarily related not to EU citizenship status or rights conferred by it, but to the loss of the nationality of a Member State by an EU citizen (entailing also the loss of EU citizenship and statelessness for the concerned individual).[74] EU citizenship becoming an autonomous

[71] With a further example being Case C.60/00 *Mary Carpenter v Secretary of State for the Home Department* [ECR 2002 Page I-6279], where the Court pronounced that in the light of the fundamental right to respect for family life, Article 49 of the EC Treaty is to be interpreted as precluding (in circumstances such as those in the main proceedings) a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

[72] Case C-148/02 *Carlos Garcia Avello v. État belge* [ECR 2003 Page I-11613]. The parents, following Spanish custom, requested the Belgian authorities to change the surname of their children to Garcia Weber, but their application was refused as contrary to Belgian practice: according to Belgian law, the child takes the surname of their father, while under Spanish law children take the first surname of each of their parents. In the course of the ensuing legal dispute, the Belgian Conseil d'Etat referred a question to the CJEU as to whether the refusal was contrary to Community law.

[73] De Waele, loc. cit. n. 57, at p. 325.

[74] Janko Rottmann case. For a detailed analysis of the judgment see *inter alia* Á. Mohay, 'A Rottmann-ügy: újabb adalékok az uniós polgárság és a tagállami állampolgárság összefüggéseihez' [The Rottmann-case: new insights into the correlation between Union citizenship and Member State nationality], 2 *Jogesetek*

point of reference for the CJEU is not that surprising however in the light of the Court's much repeated mantra that Union citizenship is intended to be the fundamental status of nationals of the Member States, first postulated in the Grzelczyk judgment a decade ago.[75]

It is somewhat questionable whether this interpretation is indeed fully compatible with written primary law, as the Treaties define this status as having an additional nature – a status can be either fundamental of additional, but hardly at the same time. According to Joseph Weiler this statement by the Court could be considered a legal realist prediction, a political desideratum or a statement of judicial intent, but it nevertheless contradicts the express provisions of the Treaties.[76] It wouldn't be the first time for a *contra legem* interpretation by the CJEU[77] either – the question is to what extent this interpretation by the Court of Justice in is justified by systematic and teleological considerations: the evolutive definition of EU citizenship rights in primary law, and the ever increasing interconnection of the need for the 'seamless protection of fundamental rights'[78] with the legal status of Union citizenship seem to provide the rationale for the current trend in the case law of the CJEU. It is a difficult question however whether written 'constitutional' guarantees should be circumvented on a case-by-case basis by the judiciary, even if essentially in favour of individual rights – a question that would demand increased political and legal attention at the highest level of EU decision- and policy-making.[79]

Magyarázata (2011) pp. 50-58.; G.N. Toggenburg, 'Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?' *European Law Reporter* 2010 pp. 165-172.; G.R. de Groot and A. Seling, 'The Consequences of the Rottman Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', 7 *European Constitutional Law Review* (2011) pp. 150-160.

[75] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [ECR 2001 Page I-06193], para 31.

[76] J.H.H. Weiler, 'Individuals and Rights – The Sour Grapes (Editorial)', 21 *European Journal of International Law* (2010) p. 277.

[77] For the probably most obvious example see Case 294/83 *Parti écologiste „Les verts" v Parliament* [ECR 1986., p. 1339], concerning the status of the European Parliament as a defendant in annulment proceedings.

[78] Zambrano case. Opinion of Advocate General Sharpston delivered on 30 September 2010, para 170.

[79] For a thought-provoking discussion paper regarding inter alia this problem, see N. Nic Shuibhne, *(Legal) Limits to EU Citizenship*, Presented at EUSA Biennial Conference 3-5 March 2011. http://euce.org/eusa/2011/papers/6b_nicshuibhne.pdf

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Freedom of establishment in EU Law with special respect to Hungarian Law and Croatian Law

I. Introduction

The freedom of establishment has been in the focus of attention of the legal profession in the EU since the European Court of Justice (hereinafter ECJ) judgement in the *Centros* case. The European Union (hereinafter: the EU) law rule, according to which undertakings from one Member State can perform their business activities in another Member State, opened a number of dilemmas to which the EU law has yet to find proper answers

The aim of the rule on the freedom of establishment was to enable and to pursue the mobility of undertakings in the internal market in the same way as it is regulated for natural persons. However, in short time it became obvious that the freedom of establishment for undertakings on EU level would be hard to achieve in practice. The reason for that are national company law rules which are often protective of domestic undertakings and hostile towards foreign undertakings. Besides that, company law rules among Member States still significantly differ, despite the undertaken measures of harmonization. There are other problems too, such as tax law issues, application of laws governing companies (*lex societatis*), labour law provisions etc.

In this paper, the authors are analysing the EU rules on the freedom of establishment in light of the ECJ case law. Also, different implications of those rules on the Croatian and Hungarian law are discussed.

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II. Freedom of establishment in the EU Treaty – defining the problem

The legal regulation of the freedom of establishment at the EU level started in 1957, when the Treaty of Rome was signed.[1] Article 52 of the Treaty of Rome, as the legal predecessor of the current Article 49 of the Treaty on the Functioning of the European Union,[2] envisaged a graduate abolition of Member States' national rules which prohibited the freedom of establishment for nationals of different Member States. Article 58 of the Treaty of Rome prescribed equal legal treatment for domestic and foreign undertakings. And finally, Article 220 of the Treaty, rather ambitiously, having in mind the time in which it was enacted, demands from Member States the recognition of legal personality for all undertakings established in any Member State.[3]

These norms, which were later on re-numerated, were the cornerstone for further harmonization of company law at the EU level.[4] They were the principal support to the ECJ, which gradually developed interesting case law on the freedom of establishment.[5] Based on the ECJ case law and broad interpretation of the aforementioned rules, it is nowadays quite clear that the freedom of establishment, primarily regulated by Article 49 of the TFEU, covers the following: 1) freedom of establishing a company or branch office in any Member State, 2) freedom to provide service in the foreign Member State under the same conditions as for nationals of particular Member State 3) transfer of the corporate seat

[1] The Treaty Establishing the European Community, Rome 25 March 1957, http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf.

[2] The Treaty on the Functioning the European Union, *OJ* C 115/47, 9. 5. 2008., http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF.

[3] See Impact assessment on the Directive on the cross-border transfer of registered office, Commission Staff Working Document, Commission of the European Communities, Brussels, 12/2007, SEC(2007)1707, pp. 8-9.

[4] See more on that S. Deakin, Regulatory Competition Versus Harmonization in European Company Law, *Working Paper No. 163*, (ESRC Center for Business Research, University of Cambridge 2000) pp. 4-22.

[5] Impact assessment on the Directive on the cross-border transfer of registered office, pp. 10-11. See also Guide to the Case Law on the ECJ on Articles 43 et seq. EC Treaty, Freedom of Establishment, European Commission 1/1/2001.

from one Member State to another, 4) and corporate mergers and takeovers.[6]

From the above it is quite clear that the concept of «freedom of establishment» covers a broad range of rights and it applies to different factual situations of companies' «migrations».

Thus, for example, the freedom of establishment refers to the situation of the establishment of a company or branch office on the territory of a foreign Member State. But it also covers the situations of both primary and secondary establishment.[7] Primary establishment refers to the possibility for an employee in one Member State to work in a self-employed capacity in another Member State. Secondary establishment includes the right to maintain more than one place of work within the Community. Furthermore, the freedom of establishment also covers the situation of company migrations. This includes both companies' immigration and emigration. Company immigration refers to situations where a company is changing its corporate seat from one Member State to another. Company emigration refers to situation where a company leaves the home country (emigrates) and moves its principal place of business to another country. And finally, the concept of establishment also refers to the situations of cross-border mergers. In this case, at least one of the companies participating in merger operations changes its corporate seat and moves it from one Member State to another. The realization of the above rights in business practice was not always an easy task. The main obstacle to the freedom of establishment at the EU level were and still are Member State company law rules, which are often protective towards domestic companies. This particularly refers to the situations of transfer of central management and change of corporate seat to another Member State. This problem, according to the opinion of most legal theorists, has its roots in different legal regimes for law applicable on companies. In Europe, there are two main approaches

[6] See Report of the Reflection Group On the Future of EU Company Law, European Commission, Brussels, 5 April 2011. E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', *Working Paper No. 08/2003* (European Corporate Governance Institute, March 2003); F. Mucciarelli, *Companies' Emigration and EC freedom of establishment*, (School of Economics, New York Law School 2007), http://ssrn.com/abstract=1078407.

[7] W.G. Ringe, 'No Freedom of Emigration for Companies?', *16 European Business Law Review* 3 (2005) pp. 2-3.

regulating *lex societas* or law applicable to companies,[8] which are part of legal legacy. According to the first approach, the law applicable to a company is the law of the country in which the company was first established (the so-called incorporation theory). According to the second approach, the law applicable to a company is the law of the country in which the company has its principal place of business (the so-called real seat theory). In countries where the theory of incorporation is in force (for example, the UK or the Netherlands) companies are allowed to move their registered offices to another Member State. The transfer of registered office has no legal consequences for the future life of a company. It will be subordinated to legal order of the state in which company is incorporated. In countries where the real seat theory is in force, the transfer of corporate seat has multiple consequences for the future life of a particular company.

The basic presumption is that a company which transfers its corporate seat to another country 'changes its nationality'. It becomes a company of another Member State. It will be subordinated to the legal regime of the country to which it transferred its registered office. The real seat theory is in force in Germany and most other European countries which follow the German legal tradition.[9] The national company law rules of those countries either prohibit corporate migration or do not regulate corporate migration at all. In both of the addressed cases we face with obstacles to the freedom of establishment because companies cannot move freely from one jurisdiction to another. This brings companies from some Member States in a less favourable position compared to companies from other Member States. The problem is recognized at the EU level. The European Commission, along with the ECJ, has used different legal instruments and measures to diminish and minimize the

[8] See E. Wymeersch, 'The Transfer of the Company's Seat in European Company Law', *Working Paper No. 08/2003* (European Corporate Governance Institute, 2003); A. Frada de Sousa,' Company's Cross-border Transfer of Seat in the EU after Cartesio', *Jean Monnet Working Paper 07/09* (The Jean Monnet Center for International and Regional Economic Law & Justice, 2009); W. G. Ringe, 'The European Company Statute in the Context of Freedom of Establishment', *Legal Research Paper Series, Paper No. 25/2008,* 7 *Journal of Corporate Law Studies* 185 (University of Oxford, 2007).

[9] See J. Schmidt, 'The New Unternehmengesellschaft and the Limited – A Comparison', 9 *German Law Journal* (2008); N. Kuehrer, 'Cross- border company establishment in the EU and Austria', 12 *European Business Law Review* 116 (2001).

problem discussed here. But there is no clear-cut or simple solution. As things stand, this problem is far from being solved. However, the Commission has not given up. Harmonization through directives has yielded some results, as will be further discussed herein

III. Freedom of establishment in secondary legislation –regulations-success or failure?

The harmonization of company law in the EU started relatively early. This is quite understandable if we know that establishing a single market was one of the main goals of the EU integration. In order to establish a single market it was of utmost importance to remove national barriers and obstacles to free trade in the EU market.

The first company law Directive was enacted in March 1968.[10] Until nowadays, different fields and aspects of corporate law have been covered by harmonization, such as corporate governance, corporate takeovers and mergers, takeover law etc.[11] The freedom of establishment and corporate mobility is one of the issues covered by harmonization. There are a few Council and Commission documents worth mentioning in the context of the freedom of establishment. It is the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State,[12] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies[13] and, finally, the Proposal for a 14th Company Law

[10]The First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968L0151:EN:NOT.

[11] See on that K. Hopt, *Modern Company Law problems: A European Perspective* (Hamburg, Germany, Max Planck Institute 2000). See also Report of the Reflection Group On the Future of EU Company Law, European Commission, Brussels, 5 April, 2011.

[12] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, *OJ* L 395., 30. 12. 2989.

[13] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border merger of limited liability companies *OJ* L 310, 25. 11. 2005.

Directive on the cross-border transfer of the registered office of limited companies.[14] There are two company law regulations which also have significant influence for the discussed topic. It is the Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

1. Eleventh Council Directive 89/666/EEC

Eleventh Council Directive was enacted in December 1989. Although it doesn't directly cover the issue of company migration, it is important in the context of this paper since it deals with the establishment of branch offices. Doing business through branch office is one of typical ways of doing business abroad. Accordingly, the elimination of restrictions for setting up branch offices in foreign countries is in direct connection with exercising the freedom of establishment. Before the Directive was enacted, there were significant differences between Member States' laws concerning powers of representation of branches, names and other legal requirements for setting up a branch, disclosure requirements, financial reports, etc. All this was a serious burden for undertakings with international business. It took a lot of time and effort to find out what are formal requirements and legal standards for establishing a branch office in a particular Member State. Thus, what the Directive aimed at was to harmonize Member States laws concerning formal requirements for setting up and running a branch office in any EU Member state. In that sense, the 11th Directive cannot be considered as an ambitious document or project which will have major impact or significant influence on the domestic legislations of the EU Member States. This was merely an attempt to establish common standards and common rules for doing business through branch offices at the EU level.

[14] In February 2004 the Commission launched an open consultation (that is to say, a consultation on the basis of an on-line, largely multiple choice questionnaire) on an outline of the planned proposal for a Directive on the right of limited companies to transfer their registered office from one Member State to another. See IP/04/270 of 26 February 2004 (Company law: Commission consults on the cross border transfer of companies' registered offices). The outline was not laid down in a separate consultation document. The outline was only published as an integrated part of the Commission's internal market website: http://ec.europa.eu/internal_market/index_en.htm.The consultation closed in April 2004. See IP/04/270. The results of the consultation have been published on the Commission's internal market website.

2. Directive 2005/56/EC

The Directive 2005/56/ EC or Directive on cross border mergers is another piece of the EU legislation regulating corporate migration. The creation of the internal market has encouraged cross-border mergers and acquisitions. Since this area of law was mainly regulated on national level, it was important to enact a document addressing mergers with a European dimension. In that sense, the main aim of the Directive 2005/56/EC[15] was to create conditions for and facilitate mergers between companies from different EU Member States. The Directive applies only to the merger of limited liability companies as the most widely represented company type in business practice. Other forms of companies were not covered by the Directive.

As stressed in Article 4 of the Directive, it regulates conditions relating to cross-border mergers,[16] and in particular it regulates the following: publication requirements, duties of management or administrative bodies in case of cross–border merger, independent report of merger, approval of merger by general assembly, pre-merger certificate, cross-border merger entry into effect, consequences of cross-border merger, employee participation and other relevant issues. The Directive does not directly deal with the transfer of corporate seat, which is a typical consequence of cross-border merger. However, the Directive affects this indirectly. By regulating cross border mergers it creates conditions for the change of corporate seat, in order to enforce such mergers in practice.

3. Proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies

The last and, in the context of this paper, the most important Commission's document dealing with corporate migration is the Proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies.[17] The enactment of this document, has not entered into force to date, is surrounded by a number

[15] More about directives: A. Kecskés: *Felelős társaságirányítás* (Corporate Governance); (Budapest, HVG Orac 2011) p. 181.

[16] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border merger of limited liability companies, Article 4.

[17] See G. J.Vossestein, Transfer of the registered office The European Commission decision not to submit a proposal for a Directive, 4 *Utrecht Law Review* 1 (2008).

of controversies.[18] The adoption of the Directive[19] on cross-border transfer of the registered office of limited companies was part of the Commission's Action Plan on Modernising Company Law (2003). In the implementation of this Action Plan, the Commission published an outline of the planned proposal (draft proposal). According to the draft proposal, a company transferring its registered office would be registered in the host Member State and would acquire a legal identity or legal personality there, while at the same time being removed from the register in its home Member State and giving up its legal identity (personality) there. If necessary, companies would have to adapt their structures and assets in order to meet the substantive and formal conditions required for registration in the host Member State. However, they would not be obliged to go through liquidation proceedings in their home Member State or to create a new company in the host Member State. The essence of the transfer of a company's registered office would be that the applicable company law changes. It should be noted that the Commission, in describing the transfer of the registered office, regularly refers to the 'acquisition of a legal identity or legal personality' in the host Member State. This expression is not entirely accurate for the operation the Commission has in mind. In the case of a transfer of registered office – as envisaged by the Commission – the company in question ceases to be a company under the law of the home Member State and becomes a company under the law of the host Member State. During this operation, legal personality is retained; the assets and liabilities of the legal person, therefore, are not transferred in any way, but remain belonging to it. In other words, there is a change in nationality (of the legal form), not in the (identity of the) person as such.
As we can see from above, the draft proposal of the Directive dealt with the all the most problematic issues concerning the transfer of corporate seat. Therefore, it came as a surprise when in July 2007 the Commission announced that it had decided not to proceed with the 14th Company Law Directive. This is remarkable in view of the fact that the adoption of this Directive was a short-term priority of the Commission's Action Plan on Modernising Company Law. The Commission explained its

[18] See Impact assessment on the Directive on the cross-border transfer of registered office. See also P. Vargova, *The Cross –Border transfer of a Company's Registered Office within the EU* (Central European University 2010) pp. 38-40.
[19] More about directives: V. Halász and A. Kecskés, *Társaságok a tőzsdén* (Budapest, HVG Orac 2011) p.74.

decision using the following explanations. Firstly, it said that there are no economic arguments to pursue the idea of enacting a separate legal document dealing with the transfer of registered office only. Secondly, the Directive on Cross-Border Merger was enacted, so the Commission concluded that companies in cross-border transactions can use the possibilities offered by that Directive. And finally, the Commission stressed that companies already had legal means to effectuate cross-border transfer, by the Statute for a European Company.[20]

4. Statute for a European Company (SE)[21] and European Economic Interest Grouping (EEIG)[22]

The creation of what is today called the 'European law'[23] was one of the major outcomes of the European integration. The Statute for a European Company and European Economic Interest Grouping belong to the group of codes which are considered to be the genuine EU law.[24] Both regulations enable the creation of originally European companies with the main purpose to contribute to the achievements of Community objectives such as the creation of the common market, free movement of goods and capital. It was in 1986 that the European Council first enacted a Regulation on the European Economic Interesting Grouping (EEIG). EEIG was at the time a new form of legal entity based on the European law, created with the purpose to facilitate and encourage cross-border cooperation. Today most, if not all Member States have incorporated rules on EEIG in their national legislations. Since EEIG is in all Member States formed in accordance with the rules prescribed by the Council Regulation, there is no significant difference between EEIGs established in different Member States. An EEIG must have at least two members from different Member States. A contract for the formation of an EEIG must include its name, its official address and objects, the name, registration number and place of registration, if any, of each

[20] Vossestein, op. cit. n. 16, at pp. 58-61.
[21] Council regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ* L 294/1, 10. 1. 2001 (SE).
[22] Council regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping.
[23] W. Weidenfeld, *Europe from A to Z: A Guide to European Integration* (Office for Official Publications of the European Communities,1997); W. Cairns, *Introduction to EU Law* (Cavendish Publishing ltd. 2002) pp. 71.
[24] J. McCahery and E. Vermeulen, 'Does the European Company Prevent the Delaware Effect', 11 *European Law Journal* 6 (2005) pp. 785-801.

member of the grouping and the duration of the grouping, except where this is indefinite. The contract must be filed at the registry designated by each Member State. Registration in this manner confers full legal capacity on the EEIG throughout the EU. When a grouping is formed or dissolved, a notice must be published in the Official Journal of the EU (C and S series). A grouping's official address must be within the EU. It may be transferred from one Member State to another subject to certain conditions. Each member of an EEIG has one vote, although the contract for its formation may give certain members more than one vote provided that no one member holds a majority of the votes. The Regulation also lists those decisions for which unanimity is required. The EEIG must have at least two organs: the members acting collectively and the manager or managers. The managers represent and bind the EEIG in its dealings with third parties even where their acts do not fall within the objects of the grouping. An EEIG may not invite investment by the public. An EEIG does not necessarily have to be formed with capital. Members are free to use alternative means of financing. The profits of an EEIG will be deemed to be the profits of its members and will be apportioned either according to the relevant clause in the contract or, failing such a clause, in equal shares. The profits or losses of an EEIG will be taxable only in the hands of its members. As a counterweight to the contractual freedom which is at the basis of the EEIG and the fact that members are not required to provide a minimum amount of capital, each member of the EEIG has unlimited joint and several liability for its debts.

Fifteen years later, in year 2001 a new form of company was introduced in EU law. Enactment of the Statute for a European Company was again surrounded by a number of controversies.[25]

The European Company also known as ‘Societas Europea’ came into force 30 years after the initial proposal was presented to the public. The first proposal failed to obtain the countries' approval since it threatened the Member States’ lawmaking autonomy. Hence, it was not until 1989

[25] See on that W.G. Ringe, ‘The European Company Statute in the Context of Freedom of Establishment’, *Legal Research Paper Series, Paper No. 25/2008*, 7 *Journal of Corporate Law Studies* 185 (University of Oxford, 2007); W. Bratton, W. McCahery, and E. Vermeulen, ‘How Does Corporate Mobility Affects Lawmaking? A Comparative Analysis’, *Law Working Paper No. 91/2008* (European Corporate Governance Institute 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1086667.

that the Commission published a new draft Statute in order to expedite its adoption. A report, produced by a group of experts, outlined a compromise solution regarding labour participation, which was a major obstacle to enactment of the Statute. The Council finally adopted the SE Statute in December 2000 and it entered into force in October 2004. In main outlines, the Statute for a European Company regulates the following: company formation, minimum capital, registered office, law applicable, registration and liquidation, statute requirements, annual accounts, taxation and finally provisions on winding-up SE.

a) Company formation

Concerning company formation there is a provision for four ways of forming a European company: merger, formation of a holding company, formation of a joint subsidiary, or conversion of a public limited company previously formed under national law. Formation by merger is available only to public limited companies from different Member States. Formation of an SE holding company is available to public and private limited companies with their registered offices in different Member States or having subsidiaries or branches in Member States other than that of their registered office. Formation of a joint subsidiary is available under the same circumstances to any legal entities governed by public or private law.[26]

b) Minimum capital

The SE must have a minimum capital of EUR 120 000. Where a Member State requires a larger capital for companies exercising certain types of activity, the same requirement will also apply to an SE with its registered office in that Member State.[27]

c) Registered office

The registered office of the SE designated in the statutes must be the place where it has its central administration, that is to say its true centre of operations. The SE can easily transfer its registered office within the Community without - as is the case at present - dissolving the company

[26] Statute for a European Company, Arts 1-4 and 15-38.
[27] Statute for a European Company, Art 4.

in one Member State in order to form a new one in another Member State.[28]

d) Registration and liquidation

The registration and completion of the liquidation of an SE must be disclosed for information purposes in the Official Journal of the European Communities. Every SE must be registered in the State where it has its registered office, in a register designated by the law of that State.[29]

e) Statutes

The Statutes of the SE must provide as governing bodies the general meeting of shareholders and either a management board and a supervisory board (two-tier system) or an administrative board (single-tier system). Under the two-tier system the SE is managed by a management board. The member or members of the management board have the power to represent the company in dealings with third parties and in legal proceedings. They are appointed and removed by the supervisory board. No person may be a member of both the management board and the supervisory board of the same company at the same time.
However, the supervisory board may appoint one of its members to exercise the functions of a member of the management board if a vacancy arises. During such a period the function of the person concerned as a member of the supervisory board shall be suspended. Under the single-tier system, the SE is managed by an administrative board. The member or members of the administrative board have the power to represent the company in dealings with third parties and in legal proceedings. The administrative board may delegate only the management to one or more of its members. Statute also regulates which operations require the authorization of the supervisory board or the deliberation of the administrative board.[30]

f) Annual accounts

The SE must draw up annual accounts comprising the balance sheet, the profit and loss account and the notes to the accounts, and an annual

[28] Statute for a European Company, Art 7.
[29] Statute for a European Company, Art 12.
[30] Statute for a European company, Arts 38-51.

report giving a fair view of the company's business and of its position; consolidated accounts may also be required.[31]

g) Taxation

In tax matters, the SE is treated the same as any other multinational, i.e. it is subject to the tax regime of the national legislation applicable to the company and its subsidiaries. SEs are subject to taxes and charges in all Member States where their administrative centres are situated. Thus, their tax status is not totally satisfactory as there is still no adequate harmonization at the European level.

h) Winding-up

Winding-up, liquidation, insolvency and suspension of payments are in large measure to be governed by national law. An SE which transfers its registered office outside the Community must be wound up on application by any person concerned or any competent authority.[32]

IV. ECJ case law on freedom of establishment

In exploring the issue special attention must be given to the European Court of Justice (ECJ) case law. The ECJ has in a series of decisions established some principles of law in the context of freedom of establishment and the transfer of company's de facto office to another Member State.

The first such decision was brought in 1986, in the so-called *Segers* case. It was later on followed by a number of landmark decisions.[33] Therefore, it is often argued that the ECJ had profound impact in developing the Community history. It is seen as having undertaken the task of giving a "flash and substance" to an outline Treaty and as having developed a particular vision of the kind of Europe it has sought to promote.[34]

[31] Statute for a European company, Arts 61-63.
[32] Statute for a European company, Arts 63-66.
[33] See on that for example A. Frada de Sousa, 'Company's Cross-border Transfer of Seat in the EU after Cartesio', *Jean Monnet Working Paper 07/09* (The Jean Monnet Center for International and Regional Economic Law & Justice 2009).
[34] P. Craig and G. De Burca, *EU Law* (Oxford University Press 2003) p. 87.

1. Segers[35]

In the respective case, Mr. Segers, a Dutch national, had set up a private limited company in the UK, of which he was the sole shareholder and director. This company did not carry out any business activity in the UK, where it had its registered office, and all the business activity was carried on by a subsidiary established in the Netherlands. The relevant Dutch authority had rejected Mr. Segers' application of a sickness insurance scheme which, according to the Dutch legislation, was reserved to the directors of companies established in the Netherlands. Following the rejection by the court of first instance, which supported the arguments of the relevant Dutch authority, Mr. Segers appealed to *Centrale Raad Van Beroep*. *Centrale Raad Van Beroep* took the view that the Court's arguments had some force and that an interpretation of the Community law was required. Therefore, it referred to the ECJ for a preliminary ruling. On that request, the ECJ found that the fact that the company did not carry out any business activity in the Netherlands was insubstantial on the ground that the company, having its registered office in the UK, met one of the conditions established by Art. 5436 for enjoying the right of establishment. Furthermore, the ECJ concluded that

> 'legal conditions for affiliation to such a scheme must be the same for employees of a foreign company as for employees of companies formed under the law of Member State concerned. To refuse to apply to the security legislation to the directors of companies formed in another Member State must therefore be regarded as contrary to the principle of freedom of establishment'.[36]

However, in its explanation the ECJ raised another dilemma. Against the Dutch authority's arguments according to which Mr. Segers intended to circumvent the Dutch national rules, the ECJ – by using both the word 'abuse' and the word 'fraud', and by concluding that 'the need to combat fraud may [...] justify a difference of treatment in certain circumstances […]', but 'the refusal to accord a sickness benefit […] cannot constitute an appropriate measure in that respect' – indirectly suggested that there could be, in certain circumstances, cases of circumvention amounting to abuse or to fraud and which could be

[35] Case C-79/58 *D.H.M. Segers v Bestuur van deBedrijfsvereniging voor Bank* [10 July 1986].
[36] Segers case, p. 11.

contrasted through appropriate measures. Whereas the *Segers* ruling did not offer a reply to the question as to what would constitute 'certain circumstances' and 'appropriate measures', the subsequent *Centros* and *Inspire Arts*[37] rulings showed transactions which the ECJ regarded as representing circumventions without abuse of rights and offered indications as regards the circumstances when the circumvention would amount to abuse.

2. Centros[38]

In *Centros*, Danish nationals had set up a private company, again in the UK, and this company had opened a branch in Denmark, where all business activity was deemed to be carried out. Although the relevant Danish authority had refused to register the branch on the ground that the Danish founders of the UK company had circumvented the provisions of the Danish company law requiring a minimum share capital for the purpose of protecting creditors, the ECJ rejected this position. The ECJ found that the refusal to register the branch would prevent the company established in the UK by the Danish nationals from exercising its freedom of establishment guaranteed by the Treaty, but – in its reasoning leading to this conclusion – it highlighted two decisive points. First, the ECJ, on the basis of its previous case-law concerning both the exercise of fundamental freedoms and the access to rights granted by the EU law, specified that Member States

> 'are entitled to take measures designed to prevent some of their nationals from attempting, under cover of the rights created by the Treaty, *improperly* to circumvent national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law'.

The wording '*improperly* to circumvent' indirectly suggests that – as opposed to cases of abuse – there may be cases of '*proper*' (intended as *not abusive)* circumvention of national rules via the fundamental freedoms. As a result, it could also suggest that individual Member States should not contrast these cases without contravening the purpose of the Treaty's provisions granting the fundamental freedoms themselves. In fact, in this respect, the ECJ held that national courts,

[37] See on that more Case C-167/01 Kam*er van Koophandel en Fabriken voor Amsterdam v Inspire Art* [2003].
[38] Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999].

whilst able to take account of the abuse or fraudulent conduct on the part of the persons concerned to deny them the benefit of the EU law provisions on which they seek to rely, must assess such conduct in light of the purpose pursued by the EU law provisions at stake.
Second, the ECJ took into consideration the fact that the rules which the parties sought to avoid were rules concerning the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses and had regard to the specific purpose of the Treaty's provisions granting the right of establishment. On these grounds, it held that the fact that a national of a Member State wishing to set up a company chooses to form it in a Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member State cannot, in itself, constitute an abuse of the right of establishment. Moreover, by restating a conclusion of the *Segers* ruling, the ECJ also found that the fact that a company does not conduct any business in the Member State in which it had its registered office but only in the Member State where the branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny the company the benefit of the right of establishment.

3. Cartesio[39]

The last, and one of the most recent ECJ cases on freedom of establishment, which is particularly interesting in context of this paper since it deals with a Hungarian limited partnership is the ECJ judgement in the *Cartesio* case, delivered on 17 December 2008. Cartesio was a company which was incorporated in accordance with the Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary, but transferred its seat to Italy and wished to retain its status as a company governed by the Hungarian law. Under the relevant Hungarian law, the seat of a company governed by the Hungarian law is to be the place where its central administration is situated. Because of that, Cartesio's request for a transfer of the de facto head office was refused. In this case, the ECJ discussed whether Articles 43 EC and 48 EC were to be interpreted as precluding legislation of a Member State

[39] Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* See also, V. Korom and P. Metzinger, 'Freedom of Establishment for Companies, The ECJ confirms and refines its Daily Mail Decision in the Cartesio Case', 6 *European Company and Financial Law Review* 1 (2009).

under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation. On the issue, the EJC ruled that:

> 'As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation'.

A critical part of the judgment reads as follows:

> 110 Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganize itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.
> 111 Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.
> 112 In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.[40]

[40] Cartesio case.

4. Case in progress: C-378/10 VALE Építési Kft.

In this case, the company VALE CONSTRUCIONI Srl., founded in Italy, with a registered seat in Rome, wanted to transfer its seat to Hungary and it also wanted to abolish its economic activity and existence in Italy and intended to operate furthermore in Hungary under the name of VALE Építési Kft. The owners wanted to represent VALE CONSTRUCIONI Srl. as a predecessor of VALE Építési Kft. The Hungarian Court of Registry rejected the application for registration of the VALE Építési Kft. stating that according to the Hungarian Act on Company Registration, it was not possible to register a company which was founded under the Italian law as a predecessor of a Hungarian business association. The case was transferred to the Supreme Court of Hungary, which asked the European Court whether Articles 43 and 48 EC must be interpreted in such a case as meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State. A hearing was held on 14 October 2011 and the opinion of the Advocate General was presented on 15 December, 2011. According to the Opinion of the Advocate General: a Member State can only deny transferring the seat of a company which was established lawfully in the European Union if this kind of restriction can be applied only without any discrimination, can be justified with a compelling reason based on public interest and is capable to assure the aim which would be accomplished by it, and it does not exceed the proper measure accomplishing this aim. Advocate General Niilo Jääskinen concluded that such legislation or practices which refuse transferring the seat and the operation under the law of the host Member state to a company which was lawfully established in another Member State are contrary to the regulation of the European Union. However, the company is required to be able to deliver proof that the previous company is its legal predecessor. Nevertheless, the phenomenon that a company claims the registration of its predecessor in the host Member State cannot be the basis for the rejection of the application for registration.

V. Hungarian law on corporate seat and implications of EU law on Hungarian law

In Hungary, the effective rules regarding the freedom of establishment are contained in the Act IV of 2006 on Business Associations (hereinafter Gt.), and in the Act V of 2006. on Public Company Information, Company Registration and Winding-up Proceedings. The criteria which are the aim of the Hungarian Act on Business Associations are the most important regulations regarding the freedom of establishment. To accomplish these aims

- Fast and low-cost establishment of companies must be provided.
- Regulations on companies shall be separate, but flexible too.
- Reasonable and proportionate regulation referring to creditor and investor protection must be provided within the framework of the European Union's company law.
- Provide the use of modern communication devices in the setting-up and running of companies (e-administration, volunteering).

On the whole, the most important principle is to provide the competitiveness of the domestic regulation concerning business entities.
With regard to the freedom of establishment, the concrete legal guarantees are contained in the Act on Business Associations, namely in the rules which refer to the personal and objective scope of the Gt. According to this:[41]
The act shall regulate the foundation, organization and operation of business associations with a registered office in Hungary, the rights, obligations and responsibility of the founders and members (shareholders) of business associations, as well as the transformation, merger and demerger of business associations and the winding up of such associations without legal succession. The Act shall apply to cooperative societies vested with legal personality, such as groupings; furthermore, the Act shall regulate the foundation and operation of recognized groups of companies. Business associations may only be founded in the forms regulated in this Act.
Associations lacking legal personality in Hungary are general partnerships (kkt.) and limited partnerships (bt.). Business associations

[41] See Act IV of 2006 on Business Associations, Arts 1-55.

with legal personality are private limited-liability companies (kft.) and public and private limited companies (rt.).
Each business association shall have a corporate name. Business associations lacking legal personality also have legal capacity under their corporate names, they may obtain rights and undertake commitments, such as acquire property, conclude contracts, and may sue and be sued.
Certain specific economic activities may be restricted by law to be pursued only in specific company forms. Business associations may be founded by non-resident and resident natural persons, legal persons and business associations lacking legal personality to jointly engage in business operations, and such persons may join these business associations as members or acquire participation (shares) therein.
With the exception of private limited-liability companies and public or private limited companies, at least two member s are required for the foundation of a business association.
Business associations may also be created by way of transformation (converting from one company form to another, merger and demerger.
International treaties may contain regulations in derogation from the provisions of the Gt. in respect of the participation of non-residents in business associations. Non-resident and resident natural persons, legal persons and business associations lacking legal personality can establish business associations. These persons can not only be founders of business associations, but they also can jointly engage in business operations, and such persons may join these business associations as a member, or acquire participation therein. In order to know who can be regarded as a resident or non-resident person we have to examine the Act XCIII of 2001 on Abolishing Foreign Exchange Restrictions and the modification of certain relating acts.[42] The involvement of non-resident persons in founding may be regulated otherwise by an international treaty when compared to the Gt. In judicial procedure, the opinion of an authorized Ministry shall be asked according to the practice of reciprocity for international treaties. The regulations of the Law-Decree No. 13 of 1979 on International Private Law (hereinafter Nmj.) cannot be used in questions which are under the scope of the Directive593/2008/EC.[43] The law of a legal entity is the law of the state in the territory of which the legal entity was registered. If a legal entity

[42] See Act XCIII of 2001, Art 2(1)-(2).
[43] See Law-Decree No. 13 of 1979 on International Private Law, Art 18.

was registered according to the laws of several states, or no registration is required according to the law applicable at the place of its seat indicated in the charter, its governing law shall be the law applicable at the place of its seat indicated in the charter. In the absence of the preceding information, the legal person's governing law shall be the law of the state in the territory of which its central management is located. According to Section 26 of the Nmj., a contract of association shall be governed by the law of the country where the company pursues its activities. A memorandum of association resulting in the foundation of a legal person shall be governed by the law of the country where the founder is incorporated. According to Section 27, obligations arising under equity securities shall be governed - in terms of transfer, termination and enforcement - by the law of the country where the legal person is established. The same rules are applicable to general partnerships and limited partnerships, even though they lack the status of legal persons, as they are registered in the company register,. According to the Act XXIV of 1988 on the Investments of Foreigners in Hungary, a foreign national shall mean a non-resident as defined in the Act on Abolishing Foreign Exchange Restrictions. It lays down the definition of investments of foreign nationals in Hungary, foreigners' economic establishment and independent enterprise of a foreign national. The Act states that undertakings operating with foreign participation may take part in the foundation of other business associations, may themselves found other business associations, and may acquire participation in existing business associations and cooperatives. Since these business associations are registered in Hungary, they are under the competence of the Court of Registry. Where an international treaty or a directly applicable European Union legislation that is binding in its entirety contains provisions in derogation from the Act, the provisions contained therein shall apply.

VI. Croatian law on corporate seat and implications of EU law on Croatian law

The modern Croatian company law developed in the early 1990s, after Croatia gained its independence. The transformation from one political and economic model to another resulted in significant changes, particularly visible in the area of corporate law.

In 1993, a new Croatian Companies Act[44] was enacted. This marked the beginning of a new era in the legal environment for business. The 1993 Companies Act was modelled after the German company law. This influence, apparent even in the present time, until, smoothed the subsequent harmonization of the Croatian law with the EU law.

The 1993 Companies Act has been changed several times in order to comply with *acquis communautaire*.[45] Interestingly, those changes did not address relate the issue of corporate seat.

The rules on corporate seat in the Croatian Companies Act have remained unchanged since the original version of Companies Act was published. According to those rules, a company established in Croatia can have only one seat.[46] The company seat is the place of central management or a place where the company is doing most of his activities.[47] This means that company founders can choose between two places, they can either choose to register in the place where central management will reside or the place where most company activities are done. In case when it is not clear whether a company seat is in one or another place, it will be considered that the company seat is the one where company is registered at the Court Registry.[48] The Companies Act also regulates that a company can change its seat[49]. This decision must be brought by company members and the change of company seat must be predicted by the company statute. The issue of change of company seat abroad is regulated by a single rule in the Companies Act. Article 38(2) states that for a transfer of company seat abroad a company needs a written consent of the Ministry of Finance. The Court Registry must be notified about such change.[50] It is obvious from the above that the change of corporate seat abroad is technically possible, but in practice a company willing to relocate its seat to a foreign country will face a number of problems. There is a number of unsolved issues, such as what happens with a company that transfers its seat abroad? Is it still governed by the Croatian law or will it become a host state company? Furthermore, it is also unclear whether a company that

[44] Companies Act, *Official Gazette* 111/93.
[45] Amendments have been published in *OG* 34/99, 52/00, 118/03, 137/09.
[46] Companies Act, Art. 37 (2).
[47] Companies Act, Art. 37(1).
[48] Companies Act, Art. 37 (4).
[49] Companies Act, Art. 38 (1).
[50] Companies Act, Art. 38 (3).

transfers its seat abroad must go through a process of liquidation (winding -up) or it can continue its life in another member state? The question is also where such company will pay tax in the future, in its home country or host country? And finally, it is important to stress that a change of corporate seat to foreign country does not only depend on Croatian authorities, but also on the legal order of the foreign country in question. If the rules of such country do not allow a transfer of company seat, the change of company seat will not be possible.

In the above considerations, reference was made only to the situation of company emigration, such case being when, for example, a Croatian company wants to move its company seat to a foreign country. But what about *vice versa* situations where, for example, a foreign company wants to transfer its seat to Croatia (immigrate in Croatia), due to different reasons.

The Croatian Companies Act is silent on that. It does not regulate such situations at all. This leads us to the conclusion that under the current Croatian law this is not possible.

We cannot say that this is forbidden, but the current Croatian legislative framework contain no substantive or procedural rules which would enable foreign companies to immigrate to Croatia. Foreign undertakings who want to do business in Croatia are, of course, able to do that, but they can do it only *via* branch offices or toned to set up a company in Croatia under the rules prescribed by the Companies Act.

This situation will not last much longer. As soon as Croatia becomes a full member of the EU, the rules on the freedom of establishment along with the ECJ case law will apply. As is the case with other Member States, we will have to adapt to the rules and standards applied in the EU for decades now.

This means that we will soon face another legislative change in the area of the Croatian corporate law.

VII. Freedom of establishment after Lisbon. 'Quo vadis' right and freedom of establishment? Conclusion

Narrowly interpreted, the freedom of establishment means the following freedoms for business associations:

- the founder has the right to establish a company in any Member State.
- the owner of a business association has to right to maintain economic activity in any given Member state, through domestic or foreign associations

- the free choice of founding subsidiaries or branches with the purpose to maintain economic activity through these
- equal treatment of domestic and foreign business associations and their owners.[51]

Articles 49-55 of the Lisbon Treaty (Articles 43-48 of the former EC Treaty) are regulating the issue of the right of establishment.[52] According to these provisions, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

The freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital. (Article 49)

In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;
c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements

[51] See T. Nochta: *Társasági jog* (Budapest – Pécs, Dialóg-Campus Kiadó 2011) p. 32-33-

[52] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF.

previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);
f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;
h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States (Article 50).

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities (Article 51).

The provisions and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. The European Parliament and the Council shall, acting in accordance

with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions (Article 52).
In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.
In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States (Article 53).
Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making (Article 54).
Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties (Article 55).
The 14th Directive, regulating the field of company law (which is now being prepared) and concerning the transfer of the registered office and the practice of the European Court will probably restrain the Member States' intention to monopolize their own company laws.[53] Regulations governing the transfer of registered office will not be regulated in the Gt. until after the acceptance of the Directive, during the implementation period.[54]

[53] S. Grundmann, *European Company Law* (Intersententia 2007) pp. 116.
[54] See G.J. Vossestein, 'Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive', 4 *Utrecht Law Review, Volume* 1 (2008) pp. 53-65. or E. Wymeersch, *Is a directive on Corporate Mobility needed?* (Financial Law Institute, Universiteit Gent 2006).

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Providing EU information in libraries – experiences from member states and candidate countries

I. Introduction: access to information and libraries in the 21st century

1. Access to information

The 20th century – among many other developments in human rights – brought about the widespread recognition of various 'information' rights: the right to privacy, on one hand, and the right of accessing public information, on the other. These rights have been recognised in national legislation as well as international treaties, such as the European Convention on Human Rights:

> Article 10 – Freedom of expression
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises

The European Union also has imposed on its institutions an obligation to function as openly as possible, giving citizens and residents of the Member States a right of access to documents:

> Article 15
> 1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. […]
> 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies,

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> whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph'.

The above-mentioned information rights are served by the active provision of information by states and international organisations via official publications, government websites etc. as well as the 'passive' side of having a mechanism to answer queries from citizens. In addition to providing the base minimum of information proscribed in laws, modern states and organisations also try to hand out information on their structure and policies in all available forms to reach the widest possible audience, using every media type and communication technology available.

2. The role of libraries

Libraries have provided documents and information, as well as access to information, as one of their fundamental functions, from the beginnings of their existence. Since the establishment of the public library model, this mission statement has included the widest possible audience, that is, giving information to all the people. 'For the library and information professions no value is more fundamental than a commitment to providing the people with access to information.'[1]
This ultimate role of libraries has been recognised in the International Federation of Library Associations and Institutions (IFLA)'s Guidelines for Public Libraries:

> 'The primary purposes of the public library are to provide resources and services in a variety of media to meet the needs of individuals and groups for education, information and personal development including recreation and leisure. […] It is a basic human right to be able to have access to and an understanding of information, and there is now more information available than ever before in the world's history. As a public service open to all, the public library has a key role in collecting, organising and exploiting information, as well as providing access to a wide range of information resources. In providing a wide range of information the public library assists

[1] B. J. Turocka, G. W. Friedrich, 'Access in a Digital Age' in M. J. Bates M. N. Maack, eds., *Encyclopedia of library and information science* (Boca Raton, CRC Press 2010) p. 23.

> the community in informed debate and decision making on key issues.'[2]

EBLIDA, the European Bureau of Library, Information and Documentation Associations, which is an independent, non-profit umbrella organisation of national library, archive and information sectors associations and institutions in Europe, also established in its mission statement 'unhindered access to information in the digital age and the role of archives and libraries in achieving this goal'.[3] There remains little doubt that libraries are widely considered to be a uniquely suited tool to aid access to information. This principle is known and made use of by the European Union, whose information policy we will discuss in the next chapter.

II. European Union and information: information and communication policy of the EU

1. The past and the present of information policy

The first point to be made when talking about the European Union's information policy is that the European institutions, especially the European Commission, have since their earliest incarnations provided information on the functioning and activities of the Communities and later the Union. Parallel to this, both the Commission and the Parliament have semi-regularly issued documents that were usually aimed at creating a coherent approach to these information activities. (The same can be said of communication, or more precisely, the possibilities available for the European citizens to directly influence EU policy.) None of the documents, however, dealt with the use of the complete array of existing information/communication tools. In this article, we will mention both some of the most important tools for and documents about the information/communication policy, in a chronological order of appearance. The information policy documents (Commission communications, EP resolutions) published in the first decades of integration were treating the policy as more of an administrative issue than one of high politics: they were mostly annual public relations plans or strategies for activating the citizens to participate in the European Parliament elections. The information policy documents, however, gained more weight as the 'democratic deficit' crisis hit in the late

[2] http://archive.ifla.org/VII/s8/proj/gpl.htm#2.
[3] http://www.eblida.org/.

1980s, and at the referendums on the Maastricht Treaty it became apparent that the European citizens no longer accepted the functioning of the EU without very serious doubts. As the new millennium began, the main problem turned from a lack of information to a lack of communication: beside easily understandable and readily available information on EU activities, the citizens also wanted to have a real chance at influencing EU policy. In lieu of this, they expressed their opinion in referendums, the most notable of which were the French and Dutch votes on the Constitutional Treaty. The year of 2005 was a turning point in the development of the European Communication Policy, but this does not mean that no actions were taken before. The European institutions, especially the European Commission, were well aware that more needed to be done in this field ever since 1992, and issued several documents to alleviate the problems[4]. In this era, the significant 'access to documents' legislation[5] and case-law have also been developed. After the Constitutional Treaty referendums and in a response to the period of reflection declared by the European Council the Commission re-evaluated its communication activities and put forward three documents to create a new framework, in which the people of Europe would be able to get pertinent information about the EU and express their opinions in connection with it. The first of these documents was the Action Plan to improve communicating Europe[6], which was issued by the Commission to summarise the measures to be taken inside the Commission, to 'put its house in order'. The second document issued was Plan D,[7] aiming at 'stimulating a wider debate' between the institutions and the citizens. Although prompted by the need of deciding the fate of the Constitutional Treaty, its main purpose

[4] Information, communication, openness. Luxembourg, Office for Official Publications of the European Communities, 1994; A new framework for co-operation on activities concerning the information and communication policy of the European Union, COM(2001)354; An information and communication strategy for the European Union, COM(2002)350; Implementing the Information and Communication Strategy for the European Union, COM(2004)0196 and European Parliament resolution on the implementation of the European Union's information and communication strategy, 2004/2238(INI).

[5] Regulation 1049/2001/EC.

[6] Action Plan to improve Communication Europe by the Commission: SEC(2005)985.

[7] Plan D for Democracy, Dialogue and Debate: the Commission's contribution to the period of reflection and beyond, COM(2005)494.

is to be able to define Europe, based on the expectations and needs of citizens; this naturally means that it is not restricted to the period of reflection: the Plan D gives a foundation for a long-term consultative method of operation. This method is based on the assumption that European citizens would like to have their voice heard by the institutions, and that forums are needed for them to express their views. These forums, in all Member States, would provide a place for 'broad ranging national debates on the future of Europe'. Although assistance was provided by the Commission and the European Parliament, through Representations and Offices respectively, the responsibility of organising the debates was on the Member States; this was augmented by 13 Community-level initiatives. Plan D involved a feedback process from Member States: the first stage of this ended in April, 2006. Two documents were drafted on basis of the feedback results: the first was a Citizens' Agenda,[8] summarising the Commissions' proposals and commitments to a 'Europe of results', which should respond to the citizens' needs and expectations. The other document adopted by the Commission on the basis of the first feedback from Plan D national debates was the Communication from the Commission to the European Council on the Period of reflection and Plan D.[9] As follows from its title, this document is more closely concerned with the outcome of the reflection period and the results of national forums organised. In 2007, the period of reflection came to an end; instead of the Constitutional Treaty, a Reform Treaty was drafted, and the ratification process begun anew. Reflecting the passing of the stage which has given birth to Plan D, the Commission adopted a document that evaluated this initiative, but also proposed a continuing process, especially with regard to the Lisbon ratification and the European Parliament elections in 2009.[10] The continuing initiative, dubbed Debate Europe after the Plan D discussion website, will concentrate on the 3rd D, democracy, by conducting citizens' consultations and debates with politicians about the position papers prepared at the consultations. It also focuses on promoting active citizenship (here cooperation with all European institutions is essential), taking into account all already existing programmes to this end. The third of the original three documents introduced by the European

[8] A Citizen's Agenda: Delivering Results for Europe, COM(2006)211.
[9] The Period of Reflection and Plan D, COM(2006)212.
[10] Debate Europe – building on the experience of Plan D for Democracy, Dialogue and Debate, COM(2008)158.

Commission, the White Paper a European Communication Policy[11], adopted on 1st February 2006, launched a consultation on the introduction of a new communication policy for the EU. This would stem from the dual principles that every European citizen, regardless of nationality, social or educational background or any other defining factor, has a right to both receiving 'fair and full information' about the European Union, and, in return, to be heard by the EU institutions, when he or she wishes to express his/her opinions. Besides establishing these rights for the individuals, the White Paper also suggests building a 'European public sphere' to ensure that EU-related topics have a pan-European forum of their own, where they can be discussed. The document identified five areas for action in relation to establishing the new policy: developing the principles of communication, empowering citizens, better media connections, better use of Eurobarometer surveys and more cooperation. The first tangible effects of the efforts to find a solution were presented to the public in October 2007, albeit in a provisional form, by the Commission. The several documents made public at this time were based on the results from the consultation process described in the White Paper on the European Communication Policy, and the findings of two Eurobarometer surveys conducted in 2006 on the communication policy preferences and habits of citizens[12] and decision makers[13] of the EU. The European Commission issued a document on Communicating Europe in Partnership,[14] a proposal for an Inter-Institutional Agreement (IIA)[15] on the same topic, plus the impact assessment documents[16] attached to these two on the 3rd of October 2007. In these the Commission outlined its new proposal for a communication policy, emphasized the importance of the coherent and integrated approach to communication; pointed out the necessity of empowering citizens so they would be able to participate in the EU discussions. It also put forward new ideas to aid the development of a

[11] White Paper on a European Communication Policy, COM(2006)35.
[12] Flash Eurobarometer 189a EU Communication and the citizens. General Public Survey 2006.
[13] Flash Eurobarometer 189b EU Communication and the citizens. Decision Makers 2006.
[14] Communicating Europe in Partnership, COM(2007)568.
[15] Proposal for an Inter-Institutional Agreement on Communicating Europe in Partnership COM(2007)569.
[16] Accompanying document to the Communication Communicating Europe in Partnership Impact Assessment SEC(2007)1265.

European public sphere, such as involving politicians and journalists in internet discussions and meetings (Pilot Information Networks), re-designing the EUROPA portal, and placing more weight on public opinion surveys. Finally, the Communication, in addition to proposing the IIA (thus working together with other institutions), also mentions forms of cooperation (e.g. management partnerships) with Member State governments. The draft IIA text contained the enshrinement of the objectives (taken from the White Paper) of giving everyone 'access to fair and diverse information about the European Union' and enabling 'everyone to exercise their right to express their views and to participate actively in the public debate on European issues'. It recognises and details the tasks and duties of the (already existing) Inter-institutional Group on Information (IGI), lays down the procedure of adopting a common annual work plan, and the actions to make real the principle of going local. Finally, the IIA establishes monitoring, assessment and review procedures. These proposals were soon followed by communications from the Commission on the better use of the Internet[17] (while recognising the importance of the Internet, this mostly details the reform of the EUROPA website) and audio-visual media[18] (use of the existing and possibility of new television and radio networks) in addressing citizens. These strategies are significant in allowing for the use of the most available and democratic, also most popular information sources in Europe. The draft IIA put forward in 2007 was adopted almost a year later, in 2008, in the form of a political declaration[19] of the Commission, the Parliament and the Council, with softer language, no reference to the Charter of Fundamental Rights and no details on the tasks of the Inter-institutional Group on Information. This document is now the legal basis of the cooperation of the three institutions on information provision.

2. Information networks and relays

In all Member States and, in the case of larger countries, significant regions, the European Commission operates Representations, which fulfil the role approximating to that of a foreign embassy. (This role is even more pronounced in the case of Delegations functioning in third

[17] Communicating about Europe via the Internet. Engaging the citizens, SEC(2007)1742.
[18] Communicating Europe through audio-visual media, SEC(2008)506/2.
[19] Communicating Europe in Partnership, *Official Journal* C 13, 20.1.2009, pp. 3-4.

countries.) The European Parliament also has established a network of information offices (altogether 34).[20] The role of the Representations includes provision of information on the national or regional level, in various forms and methods (press contacts, organisation of events, publishing, etc.) but experience shows that information is required – and best provided – locally. For various purposes, therefore, several information networks were established by the European Commission in general and various DGs in particular. The first, in 1963, was the European Documentation Centres network, aimed at providing information and resources to research and education conducted at universities. Other general networks include Team Europe, consisting of expert speakers, and the Europe Direct relay, which developed from Info Points Europe and Rural Information and Promotion Carrefours, but also includes a toll-free telephone and e-mail answer service, and has the goal of informing the general public. Specialised networks and relays are almost impossible to list, especially because in addition to the ones founded by the DGs, several Member States established their own with or without aid from the EU. These are almost always related to a certain policy of the EU and endeavour to ensure that European citizens have access to all their rights stemming from Community legislation. Most networks and relays receive support from the Commission in being supplied with publications, opportunities for training and sometimes direct financial assistance. In addition to and independently from all the networks and relays, European Union information can be found in libraries all over Europe.

III. Information networks and relays in Hungary

1. Pre-accession

In the 1990s and as Hungary was drawing closer and closer to the possibility and probability of EU membership, various information offices opened in Budapest and other cities and towns: both as members of the Europe-wide information networks and established specifically for Hungary by the government. In these years, up to 2004, one task for all these networks was to help in the preparation for membership, to

20 http://www.europarl.europa.eu/parliament/public/nearYou/completeList.do?language=EN.

familiarise people with the EU, and to promote opportunities already available.

a) European Documentation Centres

EDCs were the first information network established in Hungary: the Faculty of Law of the Eötvös Loránd University in Budapest hosted one since 1988. Up until the accession, 11 more were established, including the EU Depository Library in the Parliament Library. EDCs mainly focused on providing information to university and college faculty and students, helping in setting up EU-related curricula, and establishing the theoretical and empirical background for EU reference work in libraries.

b) European Information Points

The Hungarian Ministry of Foreign Affairs, then responsible for accession negotiations, established in 2000-2001 a network of European Information Points to provide information to the general public. The plan was to have an EIP in all counties, where these could establish satellite offices. Financing was provided by the Ministry and the county councils.

c) EU public libraries

Also as part of the Ministry of Foreign Affairs' public information programme, public libraries of Hungary were given an opportunity to apply to become members of the EU Public Libraries network in 2001. Selected libraries were, in return for financial support, expected to establish a visible special collection on EU affairs, provide reference services, also organise events on the topic for the local public.[21] The initiative also included training for the librarians designated as responsible for the special collection.

d) Other Networks and Relays

In addition to the ones mentioned above, other, mostly specialised EU relays were established in Hungary in this period: the Team Europe, an

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http://www.mfa.gov.hu/kum/hu/bal/eu/eu_tajekoztato_szolgalat/EU_kozkonyvtari_program.htm.

Euro Info Centre, an Innovation Relay Centre and PHARE coordination/management offices, to name a few.[22]

2. Post-accession

Already existing information networks and relays generally continued to work after Hungary became a Member State in 2004. There was little doubt that EU information was more necessary than ever; experience gained in the years of preparation was still useful. Both EDCs and EU Public Libraries still operate, both networks having gained new members. European Information Points mostly became a part of the Europe Direct network in 2005. The Representation of the European Commission in Hungary manages, helps and coordinates the work of all EU information providers, by providing opportunities for contact, learning and networking.

IV. Information networks and relays in Croatia

1. Accession of Croatia to the European Union

International recognition of the Republic of Croatia as an independent and sovereign state on 15th January 1992 also resulted in the establishment of relations with the European Union. Since then, these relations have developed gradually; they have been intensified after the year 2000 and through a series of steps they have lead Croatia to the negotiations about its accession to the European Union. Through the contractual relation formed by the Stabilisation and Association Agreement, signed on 29th October 2001, Croatia has assumed the status of associate member and potential candidate for full membership in the EU. The request for full membership of Croatia was submitted in 2003. After the Council of Europe had entrusted the European Commission with the drafting of an opinion (avis) about the Croatian request, and after the Commission had given a positive opinion, in 2004 Croatia was given the official status of candidate for the membership in the EU. The negotiations officially started on 3rd October 2005 with phase one – the analysis of the coordination of the legislation of the Republic of Croatia with European regulations (so-called screening). The negotiations focused on the conditions under which Croatia will acquire, implement

[22] Á. Koreny, 'Az EU információs és dokumentációs rendszere' [Information and documentation system of the EU], 5 *Európai tükör* (2000) p. 85.

and perform the acquis communautaire.[23] After six years of negotiations, the Republic of Croatia and the European Union signed the Accession Treaty in Brussels on 9th December 2011. According to the Accession Treaty, the Republic of Croatia is supposed to become the 28th member of the European Union on 1st July 2013.

2. Providers of information about the EU in Croatia

The making of such an important decision that concerns the further direction of development and the future of Croatia and its citizens, has already at the start of the negotiations raised the question of whether each citizen, following his constitutional right[24] of access to information in possession of the bodies of public authority, has been sufficiently informed about the advantages and disadvantages as well as about the rights and duties arising from the accession to the EU? The Stabilisation and Association Agreement has emphasized the importance and necessity of the development of an information network infrastructures on all levels of the society, so that the citizens may better understand all aspects of the accession to the EU. As a result, in October 2004 the Government of the Republic of Croatia has adopted its first Communication strategy for the informing of Croatian public about the accession of the Republic of Croatia to European integrations[25], thus having set the strategic guidelines for the informing of Croatian citizens about the European integration process. As the dynamics of approaching to the EU intensified, in 2006 the Croatian Government issued a new Communication strategy for the informing of Croatian public and preparations for membership.[26] These documents will be discussed in this paper.

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[23] K. Brigljević et al., *Hrvatska na putu u Europsku uniju: od kandidature do članstva* [Croatia on its way to European Union: from candidacy to membership], (Zagreb, Ministarstvo vanjskih poslova Europskih integracija 2008), accessible at: www.mvep.hr.

[24] Art. 38 of the Constitution of the Republic of Croatia, Official Gazette No. 85/10.

[25] M. Pejčinović Burić, ed.,: *Komunikacijska strategija za informiranje hrvatske javnosti o približavanju Republike Hrvatske europskim integracijama = Communication strategy aimed at informing the Croatian public about the European integration process of the Republic of Croatia* (Zagreb, Ministarstvo za europske integracije 2002). Also available at: http://www.mvpei.hr/ei/download/2002/06/11/Komunikacijska_strategija.pdf.

[26] M. Horvatić, ed., *Komunikacijska strategija za informiranje hrvatske javnosti o Europskoj uniji i pripremama za članstvo = Communication strategy aimed at*

a) Project 'Europe in Croatia – a Network of Euro Info Spots'[27]

In 2001, the Ministry of Foreign Affairs and European integrations initiated the project "Europe in Croatia – a Network of Euro Info Spots". Euro info spots consist of an Internet kiosk and an information stand with information materials. They have been mainly set up in town libraries and county centres, as well as in other larger towns, in faculties and in other academic institutions. Their purpose is to inform the citizens about the EU and about the activities performed by the Government of the Republic of Croatia for the entry into the full EU membership, to provide better communication with citizens and to facilitate access to information and promote the Internet as the means of general communication. So far, as the result of the project, a strong and quality infrastructure of 105 Euro Info Spots have been created. This is in keeping with the general attitude of the Croatian Government that all citizens of Croatia are equal partners in the complex process of accession of the Republic of Croatia to the European Union that as such they have the right to be accurately and objectively informed about the course of the process itself.[28]

b) The European Union Information Centre

'The European Union Information Centre has been established by the Delegation of the European Commission in the Republic of Croatia in order to ensure thorough facts-based informing of the Croatian public about the process of integration into the European Union.'[29] The aims of its foundation are to raise the understanding of and the knowledge about the European Union and its mechanisms in the Croatian public thus contributing the recognition and acceptance of the values, on which the EU is based. There is a permanent event forum with the Delegation of the European Union in Croatia.[30]

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informing the Croatian public about the European Union and preparations for EU membership (Zagreb, Ministarstvo vanjskih poslova i europskih integracija 2006). Also available at: http://www.mvpei.hr/ei/download/2006/08/31/Komunikacijska_strategija.pdf.

[27] mei.multilink.hr/projekt-eu-r-full.html.

[28] Communication strategy, op. cit. n. 26, at p. 14.

[29] www.delhrv.ec.europe.eu/?long=hr&content=2850.

[30] Delegation of the European Union in the Republic of Croatia is a permanent diplomatic mission representing the executive body of the European Union – the European Commission. The Delegation has been established after the parliamentary

c) EU *i* – Documentation Centre at the Institute for International Relations[31]

EU *i* – Documentation Centre at the Institute for International Relations in Zagreb has been working since 1991 and is the only one in the Republic of Croatia. The Commission of the EU establishes such centres in universities or research institutes to provide support for studying, teaching and conducting research work about European integrations. Centres are organized as information networks of European Commission and they are founded in member countries and beyond that. They provide all sorts of information about the EU, participate in the promotion of access to information and politics of the EU for the academic community and for the general public. 'Following the Agreement about the EU *i* – Documentation Centre between the European Commission in the Republic of Croatia and the Institute for International Relations in 2008, the EU *i* – Documentation Centre becomes a part of the communication strategy of the European Commission Delegation and the European Documentation Centre, which was under the jurisdiction of the European Commission General Administration for Communication Strategy has been transferred into the jurisdiction of the General Administration for Expansion. […] On the occasion of the signing of the Agreement, Degert said that through the EU *I* – Documentation Centre the European Union intends to come closer to Croatian citizens and he emphasized that the Centre will allow direct access to more than 25,000 publications and 15,000 documents of the European Union. When Croatia becomes a member of the EU, EU *i* – Documentation Centre will join EUROPE DIRECT – the network of information providers that includes the EU information relays, European documentation centres and the EUROPE TEAM – a group of expert lecturers specialized for various topics about the EU.'[32] The Centre publishes the bimonthly journal Euroscope and maintains and upgrades

elections in Croatia in March 2000 when it was decided to promote the Office of the Special Emissary to Delegation.

[31] *Vodič kroz mjesta za informiranje o Europskoj uniji u Republici Hrvatskoj* [Guide through EU information spots in the Republic of Croatia] (Zagreb, Hrvatska gospodarska komora 2005) p. 7.

[32] http://www.entereurope.hr/cpage.aspx?page=clanci.aspx&pageID=138clanakID=2658.

the portal EnterEurope.[33] The Centre has at its disposal the complete EU legislature since 1952, which has been announced in the Official Journal of the European Union European Commission series L and C, COM documents, reports and opinions of the European Parliament's Economic and Social Committee and the Regions etc.

d) Public libraries

In a modern democratic society it is expected that information that the Government disposes of are transparent and publicly available. "The source of this understanding is found in the simple and logical assumption that the public authority, based on the modern conception of sovereignty of the nation understood as a political community of citizens, is nothing else but the performing of certain operations based on the mandate, and that, consequently, it is precisely the citizens that have the right to be informed about the conduct of these operations."[34] On the basis of the above, in the execution of its Communication strategy the Government will "in communicating with the public cooperate with partners who have influence on the shaping of the public opinion: civil society organisations, economic and social institutions, bodies and associations as well as with other participants in the communication process. The list of the most important partners of the Government in the communication with citizens also includes libraries.[35] In early 2005 Croatian Librarian Society (HKD), supported by the National Foundation for the Development of the Civil Society, started the three-year project *Information about the European Union in Public Libraries*. The project included the participation of 10 regional librarian societies covering the entire territory of the Republic of Croatia

[33] Accessible at: www.entereurope.hr.

[34] Đ. Gardašević, 'Pravo na pristup informacijama u akademskoj zajednici' [Right of access to information in t he academic community], in A. Belan-Simić and A. Horvat, eds., *4. i 5. okrugli stol Slobodan pristup informacijama* [Fourth and Fifth round table: Free access to information] (Zagreb, Hrvatsko knjižničarsko društvo 2007) p. 1.

[35] S. Ramljak, et al., 'Povezivanje narodnih knjižnica u virtualnu mrežu za informiranje o Europskoj uniji u Hrvatskoj' [The Connecting of public libraries into a virtual network for information about the European Union in Croatia], in A. Belan-Simić and A. Čar, eds., *Program Informacije o Europskoj uniji u narodnim knjižnicama: pregled provedbe programa 2005.-2007* [Program: Information about the European Union in public libraries: review of the realization of the program 2005-2007] (Zagreb, Hrvatsko knjižničarsko društvo 2007) p. 142.

and of the Dutch Association of Public Libraries, which allowed the users of the program to exchange experiences about providing information and use the newly acquired knowledge in their own surroundings.[36] Thus the project was *ab initio* raised to international level. Harmonized with the procedure of Communication Strategy, the Program tried to realize several goals:

- expanding the knowledge of librarians, as the 'first lines' of cultural and democratic development of the society in relation to the European Union and its information sources and contributing to the development of national libraries as information centres, in which the local community is being educated about European information and in which concrete information about the European Union are being offered about areas of special interest for particular regions of the Republic of Croatia […];
- providing education that promotes intellectual initiative and high librarian standards and that prepares the users of national libraries for life and work in the community according to European standards;
- using the network of public libraries to foster the culture of inspiration, innovation and courage to work on changes aiming at life as partners in the European, multicultural family.[37]

The Program has been carried out through 25 workshops organized in all counties with the following topics: human rights, freedom of expression and free information access, with special emphasis on the children's right on information, the work of IFLA and EBLIDA, Directive of the Council of Europe about the library legislation and politics in Europe, the role of libraries in information society, cooperation of libraries with other public institutions and non-governmental associations. Through practical work on the Internet the participants were instructed about the information politics and

[36] A. Čar, *Izvori informacija o Europskoj uniji* [Sources of information about the European Union] (Zagreb, Hrvatsko knjižničarsko društvo 2006) p. 5.

[37] Ž. Barišić-Schneider and A. Belan-Simić, 'Program Informacije o Europskoj uniji u narodnim knjižnicama' [Programme of Information about the European Union in public libraries], in A. Belan-Simić and A. Čar, eds., *Program Informacije o Europskoj uniji u narodnim knjižnicama: pregled provedbe programa 2005.*-2007. [Program: Information about the European Union in public libraries: review of the realization of the program *2005-2007*] (Zagreb, Hrvatsko knjižničarsko društvo 2007) p. 16.

information networks, about official publications of the EU, institutional structure of the EU and about the mode of usage of legal and other databases as well as of the sources of information about the European Union in Croatia. The workshops were accompanied by announcements and ads in the means of public information. The publishing and promotional activities resulted in the setting up of a web site[38] in Croatian and English language on the pages of the Croatian Librarian Society (www.hkdrustvo.hr/euinfo). After the program had finished the said website has been regularly updated. The fact that almost all people's libraries in the Republic of Croatia have put a link to the site on their web pages speaks for itself about the quality of that web site. The brochure of the authoress Aleksandra Čar '*Sources of Information about the European Union*' brings a review of the availability of information sources about the EU in Croatia, and in a simple way guides the user through the huge quantity of European documentation. Education and training about the European Union for librarians from national, and other kinds of libraries, have continued even after the Program had ended. The Head Committee of the Croatian Librarian Society (HKD) has decided that the information basis should continue to be updated through the national libraries project *Portal* (www.knjiznica.hr) and also that the Centre for Permanent Professional Improvement of Librarians should pay special attention to information sources about the EU.[39]

e) Other libraries in Croatia

ea) National and University Library in Zagreb

We must, however, mention other libraries as well, such as the National and University Library (Nacionalna i sveučilišna knjižnica – NSK), which is the roof scientific library in the Republic of Croatia. As a national library, it is included in many forms of international cooperation, of which we will only mention a few.

With the introduction of the '*European library*'[40] – a project of digital libraries in Europe in 2005, the National and University Library, having joined the project and participated in its creation, has become a part of the European cultural space relating to books. Through its formal membership in the foundation of the Conference of European National

[38] Barišić-Schneider and Belan-Simić, loc. cit. n. 37, at p. 51.
[39] Barišić-Schneider and Belan-Simić, loc. cit. n. 37, at pp. 19-21.
[40] Accessible at: http://theeuropeanlibrary.org.

Librarians CENL, the Library is included in regular cooperation with the European Commission, the Council of Europe, UNESCO and other organizations. The most important purpose of this foundation is the establishment of cooperation among national libraries and setting up of an efficient network for the presentation of national collections of cultural heritage securing permanent access to these materials. The National and University Library possesses the largest collection of official publications and documentation of foreign governments and international organizations in this part of Europe. Among other documents, thanks to donations and agreements about exchange, the Library also possesses official publications of the Council of Europe and the European Union, which are all publicly available.

eb) The Library of the Croatian Parliament

The Library of the Parliament is a special library which, among other services, performs thematic searches of legislation and other topics of interest for users and that also includes information about the EU accession of the Republic of Croatia to the Union.
Under the auspices of the European Parliament and the Parliamentary Assembly of the Council of Europe the Library of the Croatian Parliament has been included into the internal network of research and documentation services of the European Centre for Parliamentary Research and Documentation – ECPRD. The processing of the materials has started in the year 2000 with the publication of the Glossary EUROVOC.[41] Together with the Croatian Information and Documentation Reference Agency (Hrvatska informacijsko-dokumentacijska referalna agencija – HIDRA, publisher of the Croatian version of the Glossary) the Library of the Croatian Parliament cooperates with the Bureau for Official Publications of the EU, working on suggestions for new entries and changes in the existing EUROVOC Glossary. Since 2005, Croatian Parliament has been included in the IPEX project – *Interparliamentary EU Information Exchange*[42], the purpose of which – as its name implies – is the exchange of EU related

[41] A multilingual, multidisciplinary glossary consisting of 21 articles and 127 paragraphs, which includes all activities of the European Union and serves as the indexing system of the Croatian legislation compatible with the legislation of the European Union, it is accessible at the following Internet address: http://eurovoc.europa.eu.
[42] Accessible at: http://www.ipex.eu/ipex.

information between national parliaments of the member states as well as of the states that are candidates for membership in the EU. The head of the Library is an IPEX correspondent and, in cooperation with other employees of the Library, she is also responsible for the maintenance and updating of the IPEX web pages with documents and information passed by the bodies of public authority of the Republic of Croatia and by the institutions of the EU as well as with the documents relating to the accession of the Republic of Croatia to the European Union since the year 2001.[43]

ec) Information Centre for European Law – EU-*i*, Library of the Faculty of Law in Zagreb

In 2008 the European Commission established the EU-*i* Centre for European Law in the Library of the Faculty of Law in Zagreb. With its work and activities the Centre has an important role in bringing the European Union closer to a wider public, and it is of great and reliable help for the academic community in Croatia, especially for the Faculties of Law in Rijeka, Split and Osijek. The head of the Centre provides permanent professional perfection for information experts and offers undergraduate students in Zagreb, who are attending courses on European integrations a much simpler and easier access to information about and from the EU. The web address: http//:euinfo.pravo.hr provides access to a review of reliable and accurate information about the law and the politics of the EU. Users interested in specific areas of the European law can find relevant information in the Europa Info Bulletin, which is published by the Centre twice a year and which is also accessible from the Europa Info web site.

V. Specific Examples: Pécs and Osijek

1. The European Documentation Centre in Pécs

a) Organisational Background

Most of the 14 Hungarian EDCs function in the organisation of a university or college, more specifically, in the university or college

[43] K. Grošek and S. Ramljak, *'Informacijska suradnja Knjižnice Hrvatskoga sabora s institucijama i tijelima Europske unije'* [Information Cooperation of the Library of the Croatian Parliament with Institutions and Bodies of the European Union], presentation at the conference 12th Days of Special and Academic Libraries: *Libraries: Where to Go Further?*, held in Opatija from 11th to 14th May 2011.

library. This has many advantages, since the EDC's functions are that of a specialised research library: developing and maintaining a collection and services, with the emphasis on reference services. In Pécs, although physically the EDC operated in the Faculty of Law Library from the beginning, organisationally it belongs to the Faculty, not the University Library. This affords closer contact with the Faculty's lecturers and students; it also oriented the EDC's collection towards the legal aspects of European integration.

aa) The University of Pécs, the Library and the Faculty of Law

The modern University of Pécs was founded on 1 January 2000 through the merger of Janus Pannonius University, the Medical University of Pécs and the Illyés Gyula Teacher Training College of Szekszárd. However, its roots go back to 1367 when the Anjou king of Hungary, Louis the Great established the first Hungarian university in Pécs. With its ten faculties the University of Pécs plays a significant role in Hungarian higher education.

The University Library serves the whole institution with its Central Library and Faculty and Departmental Libraries. The predecessor of the library, which was the first public library in Hungary, was established by György Klimo, Bishop of Pécs, in 1774. The neoclassical building erected by Bishop Ignác Szepessy has been housing the library since 1830. To foster the establishment of the new university library of the Royal Erzsébet University fleeing from Bratislava to Pécs Bishop Gyula Zichy put the bishop's library at the disposal of the University in 1923. In 2010, the University Central Library and the Benedek Ferenc Law and Economics Library, together with the Csorba Győző County and City Library, moved into the newly built Regional Library and Centre for Learning, a modern building constructed as one of the key projects of the Pécs 2010 – Cultural Capital of Europe programme. The goal of the project was to establish a Knowledge Centre in the region that corresponds to modern requirements and meets the expectations of users. The institution satisfies the information and documentation needs of people living in the region, matches professional standards set up by the European Union and provides a place for cultural and social events.

The contemporary Faculty of Law of the University of Pécs began its work as the Royal Erzsébet University of Bratislava, from where it was relocated after the First World War. Throughout the 20th century, the Faculty has continued its work and formed a basis of the developing

higher education project in Pécs: from 1982, as a faculty of the Janus Pannonius University, and since 2000, in the framework of the University of Pécs. Education and research on European affairs and European integration started in earnest in the 1990s at the University of Pécs, when several faculties established training programmes and courses on the history, law, politics and economics of the European Community / European Union, or integrated this aspect of their subjects into other curricula. The Centre for European Research and Education was founded in 1996 by the Senate of the University to function as an independent university institution whose main aim has been the organising and maintenance of European studies education and training. Today, the Centre is a part of the Faculty of Law.

ab) Other organisations in Pécs

Information provision on the European Union in Pécs other than the University can be connected mostly to institutions of the Baranya County Government: the Csorba Győző County and City Library, functioning as a member of the EU public library network, and the Europe Direct relay that started its operation in 2000 as a European Information Point. Independently operating, the Chamber of Commerce and Industry of Pécs-Baranya is an Enterprise Europe Network partner, providing services to small- and medium-sized enterprises in the county.

b) The history of the EDC

The EDC, functioning as a part of the Department of Public International Law and European Law of the University of Pécs, Faculty of Law has been receiving the documents published for the institutions and bodies of the European Union by the Publications Office of the EU since 1992, when it was established as the second European Documentation Centre in Hungary. Placed in the Library of the Faculty, the EDC had a separate room and developed a classification system based on the one used in the library of the European University Institute in Florence. The EDC, while keeping its status as a part of the Faculty of Law, moved together with the Faculty of Law: in 2003, to a new location in the same building in the newly established Library of the Faculties of Law and Economics, and in 2010 to the Regional Library and Centre for Learning. Over the course of its history, at any given time there have been two separate librarians associated with the EDC,

although in some cases either or both of them had other responsibilities in the Faculty Library as well.

c) The collection

The main part of the EDC collection has always been the selection of documents supplied by the Publications Office: official publications and others. In the first years, the Official Journal of the European Union, the Reports of Cases before the Court of Justice, COM documents, the annual General Report on the activities of the European Union, the Bulletin of the European Union the documentation of the Economic and Social Committee and the Committee of the Regions were all received in printed form. Due to changes in technology, more specifically the widespread availability of the internet and databases like EUR-lex, today these are seldom consulted on paper, and make up a less significant part of the collection, mostly kept for archival purposes.

The Publications Office also produces several hundred non-official publications every year for its 'author services' (the institutions and bodies of the EU), many of which are also sent automatically to all EDCs. With the establishment of EU Bookshop, the online bookstore of the Publications Office, we also have a chance to order (mostly free of charge) a copy of the other publications, or download them in a pdf format. The Pécs EDC takes advantage of this system especially because the number and quality of publications received automatically has been steadily decreasing in recent years.

The acquisitions budget of the Faculty of Law Library has also made it possible for the EDC to buy the relevant literature published by commercial publishers: acquisitions policy mandates that we buy or otherwise acquire all books published on European integration in Hungarian, while providing a selection of the English and German language literature, mostly focusing on EU law and politics. The EDC also subscribes to several periodicals relevant to its collection. The collection increased significantly in 2010, when during and after the move into the new Library and Centre for Learning, the collections of the libraries involved were harmonised, and several thousand volumes were moved from closed stacks to open shelves – many to the EDC. The EDC also makes good use of the electronic databases available on the internet or subscribed to by the University of Pécs, thus extending the collection with e-books and electronic journals, mostly in English. All acquisitions are done in coordination with the Faculty of Law Library

and the Central Library of the University of Pécs, to avoid unnecessary duplication and to afford a better collection overall.

d) Services

The EDC is open to the public from 8 am to 8 pm on every day of the week. All of the physical collection is on open shelves, available for consultation, some books for circulation. Reference services are available in person, by phone or via e-mail. The EDC produces a bibliography on EU affairs, issues a bi-monthly electronic newsletter, has participated in compiling an online research guide on the EU. The EDC reference librarians also teach courses on EU reference work, the use of EU databases.

2. EU *i* – Information Centre in Osijek

The European Commission is establishing information centres with non-member states within the 'EU *i*' network in the framework of the information strategy 'EU in the world' in order to ensure better informing of citizens about the European Union. Upon the signing of the Contract with the European Commission, in early 2011, the Faculty of Law in Osijek acquired the status of EU *i* – information centre. Since the EU *i* – centre is now in the process of establishment, an action plan has been designed for conducting work and various activities. Through systematic access to EU *i* – info, the Faculty of Law in Osijek will promote, develop, teach, research into and disseminate information about the recognizing of values on which the European Union is based and it will raise the level of understanding of the advantages and challenges of the Accession to the EU both for the academic and for the entire community with special emphasis on the local and regional levels.

a) Access to information and information availability

aa) Collections

Publications Office of the European Union, domiciled in Luxembourg, distributes and delivers its publications to the Centre. So far, not many titles have arrived. Most of those that have been sent belong to the so-called 'grey literature', under which librarians and researchers understand publications that are not accessible through usual, commercial channels, but that are authentic and topical. Publications, which the Centre has received, are mainly printed studies and reports of EU organs and institutions for particular areas of EU politics that are

also accessible on-line. The received materials have been organized as a separate collection within the framework of the existing library fund of the Library of the Faculty of Law in Osijek. Bibliographic data referring to these materials are catalogued according to international standards of bibliographic control for the processing of library materials and they are searchable in the integrated library information system CROLIST. They may be used in the reading rooms of the Centre. The budget of the Faculty intended for the acquisition of library materials is also used for the purchasing of editions of scientific and professional literature in the field of European Law in Croatian, English and German for the purposes of scientific staff and students. The users of the services of the Centre have at their disposal a number of computers with free access to official information sources of the EU and to legal data bases (*EUR-Lex, PRE-Lex, OEIL-Legislative Observatory, CURIA etc.)* through the Europa server and through other on-line sources with professional search assistance. The Centre has been given access to the European Sources Online (ESO) database. ESO offers simple access, professional and wide coverage with quality integral texts and bibliographic data referring to books, academic magazines, documents of European Union institution and also to court practice. The web site is currently under construction. Once finished, these web pages will provide access to information relating primarily to the local community with links to the County Council for European Integrations, to bodies of regional and local self-government responsible for European integrations, to information about events taking place at the Centre and to other local events, that are useful for the region and for the users of the library and of the Centre. The web pages will also provide information about the EU in the Croatian language.[44]

ab) Education

A quality way to achieve maximum usability of the found and existing sources is the development and implementation of a program of

[44] S. Ramljak, 'Izgradnja učinkovite mreže za informiranje građana o Europskoj uniji u narodnim knjižnicama' [Development of efficient European Uninon information network for the citizens in public libraries], in A. Belan-Simić and A. Čar, eds., *Program Informacije o Europskoj uniji u narodnim knjižnicama: pregled provedbe programa 2005-2007*. [Program: Information about the European Union in public libraries: review of the realization of the program 2005-2007] (Zagreb, Hrvatsko knjižničarsko društvo 2007) p. 148.

education of users through seminars, workshops and panel-discussions. The Centre will organize professional workshops in cooperation with the Department for European Law. These workshops would qualify the students to independently search the databases for required contents, which is in keeping with the Bolognese process of studying that expects students to be able to independently find relevant information and evaluate the found sources following the recommendations of the European Union. Professional workshops would be based on the concept of the outcome of learning, which includes the feedback about what the attendant is expected to know, what he is supposed to understand and how education has helped him acquire the planned level of knowledge. The education would also include the searching of the Library's online catalogue and other legal and interdisciplinary databases, to which the Faculty has access. (The practice in the work with the students of the Faculty of Law has shown that, regardless of how much students are individually trained for searching the materials they need, it is still necessary to systematically raise their level of knowledge and improve their IT literacy). Furthermore, the planned activities include the organization of panel-discussions and seminars about the thematic aspects and the politics of the European Union on the county and local levels, with participation of competent experts for targeted users: academic community (through libraries of other faculties within the University and through the Town and University Library), young people (libraries in secondary schools – program EU and youth), experts, (business people), citizens (Europe for citizens).

3. Possibilities for cooperation

One of the principal missions of the Centre of ideas is that the EU *i*-info of the Faculty of Law should – through partnership and cooperation – become the centre and mediator for the flow of information about events and activities of institutions that are – through projects and programmes – related to European integrations on county and local community level (Regional agency for the development of Slavonia and Baranya, town institutions etc.), and all these information are planned to be uploaded to the Centre's website. Cooperation with the Info-centre for youth in Osijek through programmes that concern young people. Cooperation should certainly be established with the Delegation of the European Union in Croatia, and especially with the EU *i* – info centres in the Croatia. Continuation of the successful cooperation with the EU *i*

– Information Centre for European Law at the Faculty of Law in Zagreb is also necessary. In this regard, the cooperation in the EDC network of Hungary could be a role model. As to cooperation between the Pécs and the Osijek Centres, this could be based on the fact that the two Faculties of Law are in close cooperation via various cross-border programmes and the City and University Library in Osijek also has a continuing professional and cultural collaboration with the Pécs County and University Libraries. Via exchanging best practices, sharing experiences and knowledge and designing means to providing easier access to each other's collections all participating institutions will gain.

VI. Conclusions

In conclusion, we can see that on one hand libraries are well suited for the provision of European information to both the academic and the general public and that the European Union, especially the Commission, has extensively made use of this ability since the earliest years of the integration. Library-based EU information centres can exist in different situations and provide a valuable contribution to their host organisations in research and education.

Governance

Sanja Barić*

Principles of good governance and the Republic of Croatia

I. Introduction

The purpose of every legal order is to organize a stabile and peaceful coexistence of human beings in any given socio-political community by honouring certain fundamental material and formal values. Legal orders of European countries have as their focal value rights of persons (individuals), while the main idea and goal of such orders became creation of adequate social environment for a complete and free development of every single person. As the Declaration of Independence put it, it is exactly the 'life, liberty and pursuit of happiness' that defines core values of contemporary Western European/Anglo-American type of civilization. Every organized political community has a sort of governance, i.e., a set of rules, processes and behaviours that (in) formally organize and shape the way in which powers are exercised. The system of governance that seems to promote to the best the above described values is often labelled as 'liberal democracy', 'constitutional democracy' or simply 'good (decent) governance'. The issue here is how to define such a democracy and, even more important, which are its main features that can serve as relevant measures of its 'adequacy' or 'decency'.

Although the terms freedom and democracy are often used interchangeably, the two are not synonymous. Democracy can be seen as a set of practices and principles that institutionalize and ultimately protect freedom. Even if a consensus on precise definitions has proved elusive, most observers today would agree that, at a minimum, the fundamental features of a democracy include government based on majority rule and the consent of the governed, the existence of free and fair elections, the protection of minority rights and respect for basic human rights. Democracy presupposes equality before the law, due process and political pluralism. A question arises whether reference to these basic features is sufficient for a satisfactory concept of democracy.

There is no consensus on how to measure democracy, definitions of democracy are contested and there is an ongoing lively debate on the subject. At present, the best-known measure is produced by the US-

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based Freedom House organization.[1] It measures a narrow concept of democracy, the so called 'electoral democracy'. However, in order to evaluate the state of affairs in our country, the Republic of Croatia, we have chosen to present and use a more inclusive and, to our mind, more informative standards. The measure used is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. The five categories are inter-related and form a coherent conceptual whole.
In that view this paper presents the newest, 2010 and 2011 Economist Intelligence Unit's Index of Democracy results. It then continues by tackling the EU standards on good governance, which are of even higher importance for our discussion. Furthermore, we focus on those standards that have, under previous criteria, been demonstrated to be significantly hampered in Croatia, i.e., principles of transparency and popular participation, coupled with general underdevelopment of political culture.

II. Measuring democracy worldwide: the 2010 EIUID and 2011 reports

The global record in democratization since the start of its so-called third wave in 1974, and acceleration after the fall of the Berlin Wall in 1989, has been impressive. According to the Economist Intelligence Unit's Index of Democracy (hereafter: the EIUID),[2] one-half of the world's

[1] The average of indexes on a 1 to 7 scale of two factors: a) political freedom (based on 10 indicators) and b) civil liberties (based on 15 indicators). The index is available for all countries since the early 1970s. For details see http://www.freedomhouse.org/.

[2] The third edition of the Economist Intelligence Unit's democracy index reflects the situation as of November 2010. The first edition, published in The Economist's *The World in 2007*, measured the state of democracy in September 2006 and the second edition covered the situation towards the end of 2008. The index provides a snapshot of the state of democracy worldwide for 165 independent states and two territories, which covers almost the entire population of the world and the vast majority of the world's independent states (micro states are excluded). In addition to experts' assessments the EIUID uses, where available, public opinion surveys mainly the World Values Survey. Other sources that can be leveraged include the Eurobarometer surveys, Gallup polls, Asian Barometer, Latin American Barometer, Afrobarometer and national surveys. Indicators based on the surveys predominate heavily in the political participation and political culture categories, and a few are used in the civil liberties and functioning of government categories. Economist Intelligence Unit, *Democracy index 2010: Democracy in retreat - A report* (The

population now lives in a democracy of some sort. The EIUID classifies countries in four types of regimes: full democracies (26 countries); flawed democracies (53 countries); hybrid regimes (33 countries); and authoritarian regimes (55 countries).[3] However, there has been a decline in democracy across the world since 2008. The decades-long global trend in democratization had previously come to a halt in what Diamond[4] called a 'democratic recession'. Now democracy seems to be in retreat.

Economist Intelligence Unit Ltd. 2010), http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf.

[3] Full democracies: Countries in which not only basic political freedoms and civil liberties are respected, but these will also tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracy. Flawed democracies: These countries also have free and fair elections and even if there are problems (such as infringements on media freedom), basic civil liberties will be respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation. Hybrid regimes: Elections have substantial irregularities that often prevent them from being both free and fair. Government pressure on opposition parties and candidates may be common. Serious weaknesses are more prevalent than in flawed democracies--in political culture, functioning of government and political participation. Corruption tends to be widespread and the rule of law is weak. Civil society is weak. Typically there is harassment of and pressure on journalists, and the judiciary is not independent. Authoritarian regimes: In these states political pluralism is absent or heavily circumscribed. Many countries in this category are outright dictatorships. Some formal institutions of democracy may exist, but these have little substance. Elections, if they do occur, are not free and fair. There is disregard for abuses and infringements of civil liberties. Media are typically state-owned or controlled by groups connected to the ruling regime. There is repression of criticism of the government and pervasive censorship. There is no independent judiciary. The EIUID report, op. cit. n. 3, at pp. 32-33.

[4] L. Diamond, 'The Democratic Rollback - The Resurgence of the Predatory State', *Foreign Affairs* (March-April 2008) p. 2: '[…] But celebrations of democracy's triumph are premature. In a few short years, the democratic wave has been slowed by a powerful authoritarian undertow, and the world has slipped into a democratic recession. Democracy has recently been overthrown or gradually stifled in a number of key states, including Nigeria, Russia, Thailand, Venezuela, and, most recently, Bangladesh and the Philippines. In December 2007, electoral fraud in Kenya delivered another abrupt and violent setback. At the same time, most newcomers to the democratic club (and some long-standing members) have performed poorly.

According to the EIUID the dominant pattern in all regions over the past two years has been backsliding on previously attained progress in democratization. The global financial crisis that started in 2008 accentuated some existing negative trends in political development. For example, France, Italy, Greece and Slovenia dropped from the category of full democracies to flawed democracies.[5] Reversals in or erosion of democracy and rising disenchantment with the results of some political liberalizations appear to have a variety of causes.[6] A key factor in non-European and non-American countries is the delegitimation of much of the democracy-promotion agenda, which has been associated with military intervention and unpopular wars in Afghanistan and Iraq. A combination of double standards in foreign policy (autocrats can be good friends as well as foes) and growing infringements of civil liberties has led to charges of hypocrisy against Western states. In the US, there has been an erosion of civil liberties related to the fight against terrorism. Problems in the functioning of government have also become more prominent. In the UK, there has also been some erosion of civil liberties, but the main feature is an exceptionally low level of political participation across all dimensions (voting turnout, membership of

Even in many of the countries seen as success stories, such as Chile, Ghana, Poland, and South Africa, there are serious problems of governance and deep pockets of disaffection. In South Asia, where democracy once predominated, India is now surrounded by politically unstable, undemocratic states. And aspirations for democratic progress have been thwarted everywhere in the Arab world (except Morocco), whether by terrorism and political and religious violence (as in Iraq), externally manipulated societal divisions (as in Lebanon), or authoritarian regimes themselves (as in Egypt, Jordan, and some of the Persian Gulf monarchies, such as Bahrain).'

[5] See detailed analysis of these four European countries in 'The EIUID report', op. cit. n. 3, at pp. 17-18.

[6] 'The pace of democratization was bound to slow after the "easy cases", i.e., eager-to-liberalize east-central Europe after the fall of the Berlin Wall and African regimes susceptible to outside pressure for political change. "Hard cases" such as China and Middle East autocracies were always going to be a more difficult proposition. Autocrats have also learned how better to protect themselves; many of them preside over energy-rich states and have been strengthened by sustained high oil prices.' The EIUID report, op. cit. n. 3, at p. 3. However, the direction of causality between democracy and income is also debatable. The standard modernization hypothesis that economic development leads to, and/or is a necessary pre-condition for democracy, is no longer universally accepted. Instead, it has been argued that the primary direction of causation runs from democracy to income. Ibid., op. cit. n. 3, at p. 17.

political parties and willingness to engage in and attitudes to political activity). Thus, the US and UK are near the bottom of the 'full democracy' category in the EIUID.

Eastern Europe was the region with the largest decline in its average score between 2008 and 2010, although in only one country was the difference large enough to precipitate a change in the regime type categorization (Slovenia).[7] There are a number of possible reasons for this fragility. Most important is that although democratic forms are in place in the region, much of the substance of democracy, including a political culture based on trust, is absent. This is manifested in low levels of political participation beyond voting (and even turnout at elections is low in many countries), and very low levels of public confidence in institutions.[8] The newest EIUID report 2011[9] reflects the situation as of the beginning of December 2011 demonstrating further

[7] Out of the 28 countries in Eastern Europe, 19 recorded a decline in their democracy scores between 2008 and 2010. The deterioration has affected all sub-regions. The most significant decline in scores took place in Ukraine, where some of the democratic gains stemming from the 'Orange Revolution' of several years ago are under threat, and in the Balkan countries. Slovenia was previously one of only two countries in Eastern Europe that was considered a full democracy (in addition to the Czech Republic). In 2008 Slovenia ranked 30th out of 167 countries, putting it at the bottom of the list of full democracies. Slovenia's relatively strong position owes much to its high scores in the electoral process and civil liberties categories. In these areas it compares well with some long-established democracies. However, political participation in Slovenia has been declining and there is widespread popular apathy and disaffection with the political elite. In recent years, there has been an extraordinary deterioration in a range of attitudes associated with democracy. In particular, surveys show a sharp decline in public confidence and trust in political institutions (political parties, government and parliament). Scarcely more than one-third of Slovenes are satisfied with the way democracy functions in their country – a significantly lower proportion than in any West European state.

[8] Levels of public trust are exceptionally low in the Eastern Europe-12 (the 10 new EU member states and EU candidate countries Croatia and Macedonia). Less than 10% of people in this sub-region trust political parties and less than one fifth trust their governments and their parliaments. The proportion that is satisfied with the way democracy functions in their countries fell from 40% in 2007 to only 33% in 2009. See further details in 'The EIUID report', op. cit. n. 3, at pp. 19-20.

[9] Economist Intelligence Unit, *Democracy index 2011: Democracy under stress* (The Economist Intelligence Unit ltd. 2011) http://tinyurl.com/bu8djnw.

decline in democracy throughout the world and in particular in Eastern Europe.[10]

Taking a closer look on our two neighbouring countries, Hungary and Croatia, both are placed in a 'flawed democracies' category. In 2010 Hungary was placed on 43rd and Croatia on 53rd place among 165 surveyed countries,[11] while in 2011 Hungary dropped to 49th place.[12]

Table 1. Excerpt from the EIUID report 2010 in relation to Hungary and Croatia
(Scale: from 0 to 10, 10 representing the best possible result)

Country	Electoral process and pluralism	Civil liberties	Functioning of government	Political participation	Political culture	Average score
Hungary	**9.58**	**8.53**	**6.07**	**5.00**	**6.88**	**7.21**
Croatia	**9.17**	**8.24**	**6.07**	**5.56**	**5.00**	**6.81**

Source: Econimist Intelligence Unit, 2011.

[10] Key developments in 2011 include: Popular confidence in political institutions continues to decline in many countries. Mounting social unrest could pose a threat to democracy in some countries. US democracy has been adversely affected by a deepening of the polarisation of the political scene and political brinkmanship and paralysis. The US and the UK remain at the bottom end of the full democracy category. There has been a rise in protest movement. Problems in the functioning of government are more prominent. Although extremist political forces in Europe have not yet profited from economic dislocation as might have been feared, populism and anti-immigrant sentiment are on the rise. Eastern Europe experienced another decline in democracy in 2011. In 12 countries of the region the democracy score declined in 2011. Rampant crime in some countries – in particular, violence and drug-trafficking – continues to have a negative impact on democracy in Latin America.' The EIUID 2011, op. cit. n. 10, pp. 1-2.

[11] The EIUID report, op. cit., n. 3, pp. 3-8.

[12] The EIUID 2011, op. cit., n. 10, pp. 3-8.

Table 2. Excerpt from the EIUID report 2011 in relation to Hungary and Croatia
(Scale: from 0 to 10, 10 representing the best possible result)

Country	Electoral process and pluralism	Civil liberties	Functioning of government	Political participation	Political culture	Average score
Hungary	**9.58**	**8.24**	**6.07**	**4.44**	**6.88**	**7.04**
Croatia	**9.17**	**8.24**	**5.71**	**5.56**	**5.00**	**6.73**

Source: Economist Intelligence Unit, 2012.

As it has already been pointed out in introduction, the EIUID report is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Both countries reflect unsatisfactory political participation (especially declining in Hungary, as well as the level of civil liberties), somewhat weak functioning of government, while Croatia proved to be significantly low in political culture. 'Political culture' feature includes citizens' views on value and content of democracy, including state-church relationship, while 'political participation' measures, *inter alia*, literacy, interest for politics, openness of political process to civil society organizations and readiness of citizens to engage in political process outside the mere voting procedure.

Some negative trends have recently become worse. Hungary is the prime example among the EU's new member states in the region. In the April 2010 election, an extreme nationalist party, *Jobbik*, gathered almost as many votes as the former ruling Socialists. Since winning a two-thirds parliamentary majority in the election, the centre-right *Fidesz* party has systematically been taking over the country's previously independent institutions (Hungarian national bank, State auditors' office, constitutional court, etc.), consequently enacting new Constitution (introduced by private bill procedure) and broadly criticized legislation (e.g., media law).[13]

Prior to more detailed analysis of governance in Croatia we now proceed to presentation of the EU definition of 'good (decent) government' and its elements.

[13] Details on situation in Hungary are elaborated in several papers within this edition.

III. Principles of good governance: the EU perspective

The European Commission has adopted in 2001 the *White Paper on European Governance* (hereafter: the White Paper)[14] with the original aim to commence a wide discussion on reforming EU governance 'addressing the question of how the EU uses the powers given by its citizens'. It was about 'how things could and should be done'.[15] Doubtlessly, the White Paper looks well beyond Europe and contributes to the debate on global governance.[16]

Five principles underpin good governance and the changes proposed in this *White Paper*: *openness, participation, accountability, effectiveness* and *coherence*. Each principle is important for establishing more democratic governance. They are basic principles of democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local. It is made clear that the functioning of these principles is underlined by the further two quintessential EU standards: *proportionality* and *subsidiarity,*[17] on which we do not need to elaborate in this paper. Thus, it can fairly be

[14] European Commission, *European Governance: A White paper*, COM (2001) 428 final, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf.

[15] A White paper, op. cit. n. 15, at p. 8.: 'The goal is to open up policy-making to make it more inclusive and accountable. A better use of powers should connect the EU more closely to its citizens and lead to more effective policies.' Moreover, the White Paper sets down markers for the future of Europe and identifies where new ways of working will be held back without corresponding changes to the EU Treaties. See p. 3: 'The Commission cannot make these changes on its own, nor should this White Paper be seen as a magic cure for everything. Introducing change requires effort from all the other Institutions, central government, regions, cities, and civil society in the current and future Member States. The White Paper is primarily addressed to them. It proposes a series of initial actions.'

[16] The Commission underlines even the EU responsibilities on international level: 'Global governance. The Union should seek to apply the principles of good governance to its global responsibilities. It should aim to boost the effectiveness and enforcement powers of international institutions.' A White paper, op. cit. n. 15, at p. 5. See also pp. 26-27.

[17] A White paper, op. cit. n. 15, at pp. 10-11.: 'From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically (a) if public action is really necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.'

said that these explicitly named seven principles of good governance derive from a common European legal tradition.

What we wish to draw readers' attention to is the importance attributed to civil society organizations in the modern explication of the term 'governance'. Civil society[18] plays an important role in giving voice to the concerns of citizens and in delivering services that meet people's needs.[19] Of course, the Commission emphasizes that civil society itself must follow the principles of good governance, which include accountability and openness. The Union has encouraged the development of civil society in the applicant countries, as part of their preparation for membership. Non-governmental organizations play an important role at global level in development policy. They often act as an early warning system for the direction of political debate.[20] In the ambit of Croatian path toward the EU, civil society organizations are mentioned in the Accession Treaty in the context of monitoring procedures, most notably regarding judiciary reform, human rights protection and fight against corruption.[21]

[18] Civil society includes the following: trade unions and employers' organizations ('social partners'); nongovernmental organizations; professional associations; charities; grass-roots organizations; organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. For a more precise definition of organized civil society, see the Opinion of the Economic and Social Committee on 'The role and contribution of civil society organizations in the building of Europe', *OJ* C329, 17.11.99 p. 30.

[19] The organizations which make up civil society mobilize people and support, for instance, those suffering from exclusion or discrimination.

[20] Trade unions and employers' organizations have a particular role and influence. The EC Treaty requires the Commission to consult management and labour in preparing proposals, in particular in the social policy field. Under certain conditions, they can reach binding agreements that are subsequently turned into Community law (within the social dialogue). The Economic and Social Committee plays a role in developing a new relationship of mutual responsibility between the Institutions and civil society, in line with the Article 300(2) of the TFEU: The Economic and Social Committee shall consist of representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas. *OJ* 2010/C 83/47.

[21] *The Accession Treaty: Treaty Concerning the Accession of Croatia*, Art 36(1.1), last sentence: '[…] Throughout the monitoring process, the Commission shall also draw on input from Member States and take into consideration input from international and *civil society organizations* as appropriate. (emphasis S.B.)' http://tinyurl.com/7bnmc2n.

In the Commission's view organized civil society presents 'a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest. […] Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role.'[22] It continues to emphasize the need for a reinforced culture of consultation and dialogue, but also explains the way it should be done: **'**Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of *ad hoc* consultations.' Not wishing to analyse to what extent the EU has managed to establish a more inclusive and participatory model of governance (and there is some serious criticism in that respect),[23] it is doubtlessly important to point out a necessity of developing such practices on a national level.

IV. The Republic of Croatia: analysis of 'weak points'

Keeping in mind all of the above, we continue by examining governance in the Republic of Croatia focusing on two criteria: openness and participation. Clearly, a state's legitimacy today depends on involvement and participation. It would seem that both the EIUID reports and *the White paper* draw our attention to these features as particularly interesting[24] and still partly problematic in our county. The

[22] White paper op. cit. n. 15, at p. 15.

[23] C. Shore, ''European Governance' or Governmentality? The European Commission and the Future of Democratic Government', 17 *European Law Journal* (2011) pp. 287-303.

[24] There are other issues emphasized by the White Paper that are also crucially hampering Croatian legal order (e.g., what the level of quality, effectiveness and simplicity of regulatory acts really is and how it in turn adversely affects coherence of the normative system). See our earlier papers on these aspects, e.g. S. Barić and D. Švabić, 'Organski zakoni i antinomije u hrvatskom pravnom poretku - primjer zabrane diskriminacije po osnovi spola i spolne orijentacije' [Organic laws and antinomies in Croatian legal order – case of antidiscrimination laws related to

best understanding of these two criteria emerges from analysis of a normative procedure in the Republic of Croatia.

1. Openness/transparency

Under the United Nations Public Administration Network standards,[25] transparency of a public administration, especially of executive and legislature (government and parliament) is reflected in:

- application of laws on access to information,
- transparency of normative procedures,
- broadcasting of parliamentary sessions,
- publishing of auditing reports on parliament's and government's activities.

On the other hand, transparency is endangered by:

- discretional decisions,
- untimely publishing of decisions rendered by public bodies,
- insufficient resources for publishing of information,
- non-accessibility of information to persons with disability,
- lack of political culture of civil servants in institutions that are providing public services to citizens.

Let us analyse the performance of the Government of the Republic of Croatia in light of the above said.

In the Republic of Croatia the functioning of the Government is regulated in details by the *Law on Government*,[26] however there is neither a special mentioning of a principle of transparency, nor are there any particular norms on that issue, apart from art. 31. para. 1 that explicitly demands the publishing of regulations and rules of procedure in the Official Gazette of the Republic of Croatia (*Narodne novine*). Nevertheless, it is interesting and - from the standpoint of the principle of transparency - even disputable, to note a further article that enables publishing of decisions, conclusions and other individual acts, meaning they *may* be published, but *do not have to be* published, depending on a

gender and sexual orientation], *Ustavni vidici (4) Informator* no. 5797 of 26. 9. 2009 and S. Barić, 'Sistematizacija pravnih propisa u usporednoj i hrvatskoj normativnoj praksi' [Systematization of legal regulations in comparative and Croatian legal practice], *Informator* no. 5939. of 5. 2. 2011.

[25] See further details on www.unpan.org.

[26] *Zakon o Vladi* [Law on Government], *NN* [Official Gazette] 101/98, 15/00, 117/01, 199/03 and 77/09.

discretionary decision of the Government.[27] It is impossible to examine how this provision is being implemented, i.e., whether unpublished individual acts are only those falling under a certain category of secrecy provided by the law.

Rules of Procedure of the Government of Croatia[28] in articles 48, 49 and 50 provide for a public operation of the Government. These articles regulate public sessions of the Government enabling presence of the media representative to whom order of the day must be delivered prior to the sessions together with relevant working materials. The Government may during a public session decide to exclude media representatives from the discussion on certain issues, while all the materials declared to be secret according to a special law (official, military or state secret) are not made available to the public.

Public Relations Office of the Government informs the public on the issues discussed and decisions taken during governmental sessions closed for public within one hour of the closure of a session, unless the Government decides not to inform the public on a certain matter.[29]

A very well-known and respected NGO in Croatia, *GONG*, has been systematically following and analysing the functioning of the Croatian Government since 2008. It particularly examines open, closed and telephone sessions as well as distribution of budgetary reserves, and informs public on its findings by publishing yearly reports.[30] In that view it examines the Government's web page, press releases, news, laws, and it several times requested specific decisions rendered by the

[27] This provision is from original *Law on Government* from 1998 and it is still in force.

[28] *Poslovnik Vlade Republike Hrvatske* [Rules of Procedure of the Government of the Republic of Croatia], *NN* 138/99, 16/00, 36/00, 105/00, 107/00, 24/01, 154/04, 22/05, 68/07, 10/08, 102/09, 107/09, 140/09 and 144/09 (consolidated version).

[29] It should be kept in mind that art. 49. para. 2. of the *Rules of Procedure* enables the Public Relations Office of the Government to revoke accreditation of a media representative who inaccurately and falsely informs the public on materials or discussions during sessions. An extensive interpretation could enable revoking of accreditation based on the evaluation of a particular writing. In that respect, it seems that the Government has an indirect influence on the freedom of press. However, this provision has not been misused.

[30] GONG, *Izvještaj GONG-a o transparentnosti rada Vlade RH za pojedine godine* [Report on transparency of the Government of Croatia for a particular year – prepared by GONG], the last published is the [Report for 2010.] *Izvještaj za 2010. godinu*. See: http://www.gong.hr/news.aspx?newsID=3627&pageID=124.

Government, and also several clarifications of information published on the Government's official web page.

In 2008, the Croatian government held 52 public sessions (54,17% of the total number of sessions), in 2009 51 public sessions (47,67%) and in 2010 55 public sessions (50,93%). There is no track of sessions held over the phone (they cannot be found on the web page of the Government) and legal regulations on the Government do not mention these kinds of discussions. Namely, *Rules of Procedure* do not establish a possibility to hold the whole session over the phone (or other means of telecommunication) but regulate solely a case when the prime minister or the cabinet may decide to hold a session even without the physical presence of the majority, while absent members may cast their vote over the phone, fax or by e-mail. Furthermore, consultations may be held over the phone, but not full sessions. Nevertheless, the Government held in 2008 10, in 2009 9 and in 2010 4 full sessions over the phone. Similar practice has not been recorded in other countries. Pointless to emphasize, the Government should call and hold its sessions according to the prescribed procedure, while a clearly identified need for urgent deliberation should doubtlessly be regulated by adequate provisions of the law and/or *Rules of Procedure*.

Full orders of the day and documents to be discussed during sessions, as well as reports on discussion and decisions taken, are still not being published several days in advance not revealing public information on the matters that will be discussed and preventing timely reaction of interested parties.[31] Moreover, since order of the day of closed session is unavailable to public, which in itself presents a denial of basic information on its functioning, it is impossible to evaluate press release of closed sessions and reach a founded conclusion on the following: does the Government discuss and/or decide in its closed sessions solely on the matters reported in its press releases or does it tackle other issues, too? Although the information released to public related to closed sessions has become more inclusive after the first *GONG Report* of

[31] During 2010 Croatian government has not published on its web page, under heading 'Sessions and decisions of the Government of the Republic of Croatia', orders of the day and material from 12 of the total of 108 sessions. From *GONG Report 2010*.

2008, it is still unclear what the justification for closed session related to issues is, such as negotiation standards in the pre-EU accession period.[32] GONG has further analyzed reports on budgetary reserve usage in the period between 2007 and 2010.[33] The fact that the amount of 180,490,489.52 HRK was transferred exclusively in sessions closed for public seems quite disturbing.[34] Transfers continued to be performed in 2010 in a non-transparent manner, contrary to both good democratic practice and declared promotion of austerity measures, and, needless to say, without clear criteria of distribution.[35] For the purpose of this paper it is unnecessary to engage in detailed analysis of these transfers, however, it needs to be emphasized that transfers have been made without known criteria to regional and local self-government units (i.e., counties, cities and communes) mostly for 'financing of unexpected needs and other necessary tasks in their jurisdiction'. It is also indicative and worth comparing, what the structure of political parties in power is

[32] Press release related to closes sessions of the Government can be found on the following web page: http://www.vlada.hr/hr/naslovnica/priopcenja_za_javnost.
During 2010 the following issues have been discussed in closed sessions: appointment and removal from public offices, issuing state guarantees to a number of banks in favour of state owned company HAC (*Croatian highways*) for highway construction, sponsorship of the 12. International manifestation of olive and oil producers '*Noćnjak 2010*', budgetary transfer in the amount of 1,000,000 HRK to the Croatian Red Cross for victims of the earthquake in Haiti and in the amount of 200,000 HRK to the city of Vukovar for organizing a Memorial day to victims in Vukovar, and finally a number of sponsorships (World Congress of Humanists United 'Children of the world with wounded childhood', historical boat race between two islands Komiža and Palagruža, professional conference 'Professional rehabilitation of persons with disabilities – a door to world of labor' and celebration of the 85th anniversary of the Croatian hunting alliance).

[33] See the Croatian Parliament's web page: *Hrvatski sabor*, http://www.sabor.hr/Default.aspx?art=33527 and http://www.sabor.hr/Default.aspx?art=39519.

[34] See the Croatian Parliament's web page: *Hrvatski sabor, Izvješće o korištenju sredstava proračunske zalihe državnog proračuna za siječanj – lipanj 2008. godine* [Report on the use of budgetary reserve, for January-June 2008], http://www.sabor.hr/fgs.axd?id=12378.

[35] Namely, the web page of the Government does not list all the decisions on budgetary reserve transfers, only those made for humanitarian purposes, rewarding sportsmen and similar. Data on all the other transfers may only be found in general reports on State Budget.

on local and state level. The vast majority of the units receiving transfers had the same ruling political party.[36]

Within its project research 'Implementation of the *Law on Right of Access to Information*', GONG requested a copy of all the orders of the day of closed governmental session during the mandate of the previous government (2007-2011). It received the answer that all of these relate to matters designated with different level of secrecy under the *Rules of Procedure*. However, art. 50 of the *Rules* provides that *materials* shall not be made public if they are marked as official, military or state secret under the appropriate law. The issue here is, whether the term 'materials' includes order of the day itself. In our opinion, this provision of the *Rules* should be interpreted narrowly as to apply only to the *content* of materials or *content* of discussions, not to the very information that the Government deliberated on a *certain issue*.

In mid-January 2012, the Croatian Journalists' Association (hereafter: CJA) sent a public appeal to the new Croatian Government demanding that it abandons bad and unacceptable practice of holding sessions closed for public, a practice that was established in 2004 by the ex-Prime Minister Ivo Sanader and his Spokesman's office led by Ratko Maček. The CJA warns that in that way journalist do not have the possibility to ask questions after regular governmental sessions. Moreover, the CJA demanded the publication of the orders of the day and the decisions reached in closed sessions, according to the standards of good democratic practice.[37]

[36] Thus in 2007 133 communes, cities and counties received budgetary reserve transfers and almost all of them were ruled by parties forming coalition in power on the state level. The Government also made transfers in 2010, a year after local elections. Out of 24 units that received transfers only two were not ruled by a leading party on the state level and its coalition partners: Pula (ruled by left-wing opposition) and Punitovci (ruled by independent politicians). Moreover, it can only be inferred that all the presented transfers where decided on sessions closed for public, since there is no mentioning of any such transfer neither in orders of the day, nor in press releases of the Government.

[37] 'A grotesque practice was introduced: the Government before cameras demonstrates only those activities that it chooses to show without giving possibility to journalists to question members of Government on decisions taken or future plans; this practice was continued by the Government of Jadranka Kosor. We expect from the new Prime Minister, Zoran Milanović, and his government to return to the practice existing during the period of Prime Minister Ivica Račan, when journalists had opportunity to pose questions to, and demand clarifications from the Prime Minister and other ministers both on decision and issues discussed during the

Standards of good practice would direct the Government to explicitly set criteria for closing its sessions to the public coupled with the publication of the orders of the day and reasons, for which the session is closed to the public before the session, and finally publication of more inclusive press releases after the sessions containing necessary information on topics discussed and decisions reached. In reality, as we demonstrated, the operation of the Croatian Government is open and transparent up to the level it chooses itself. Closed sessions should be held exceptionally and certainly should not be a standard of operation which, as it would seem, the Croatian Government has adopted to a significant degree.

2. Participation

Citizens and civil society organizations (hereafter: CSOs) should be able to co-operate with state bodies (executive and legislative) through active participation, and not only periodically and passively in the period of national parliamentary elections. Participation is deemed to present a higher level of two-way process: citizens are actively involved in public policy creation (e.g., membership in law-drafting working groups), while a government remains responsible for the final decision on policy choices and their efficient implementation. A decision-making political process consists of six different steps: creation of agenda (a list of goals to be attained), policy drafting, decision-making, implementation, monitoring procedure and policy reformulation.

The need to establish rules of good practice in relation to public consultation was clearly identified on regional/European level. It is interesting to analyse efforts undertaken by the Council of Europe (hereafter: CE) in that ambit. In June 2007 on the CE *Forum for the Future of Democracy* held in Stockholm, the International Non-Governmental Organizations Conference (hereafter: INGO Conference; it is one of the CE institutions) has been called to prepare the *Code of Good Practice for Civil Participation in the Decision-Making Process*.[38]

session and on other important issues pertaining to their department after each and every regular session. […] We wish for the Public Relations Office of the Government, which during last eight years ignored most of the journalist's questions or responded by hollow phrases, to become a true information providing service on the Government's actions,' states the open letter sent by the CJA to the Croatian Government. See New Portal Net.Hr, www.net.hr, 13th January 2012.

[38] See details on the following web page:
http://www.coe.int/t/ngo/code_good_prac_en.asp.

The main purpose of this document is meant to be a major contribution for creation of enabling environment for an active civil society. It provided for a set of general principles and directing rules on the all-European level, related to CSO participation in the political decision-making process. The *Code* is applicable on both national and local levels of power in the CE member states and Belarus.

The Draft *Code* had been prepared in summer of 2008 followed by four regional consultations with the NGOs.[39] The INGO Conference adopted the *Code* on October 1st, 2009. The most important parts of the *Code* describe decision-making process and different levels of participation followed by a summary cross-table comparing and matching two variables, i.e., steps of decision-making and level of participation recommended.

Let us now analyse the situation in the Republic of Croatia.

The *National strategy for the creation of an enabling environment for civil society development 2006-2011*,[40] adopted on July 12, 2006 by the Croatian Government, states that the Republic of Croatia develops a democratic society relying, among other principles, on the principle of participatory democracy, in which citizens are participating in the whole of social and political processes. It then emphasizes that developed civil society requires efficient procedures of public consultation and participation (including citizens as individuals, their initiatives and CSOs) in defining, creation, implementation and monitoring of public policies. The *Rules of Procedure of the Government of the Republic of Croatia* contain in article 27 paragraph 5 an especially important provision to that effect: 'Ministries and state administration bodies shall, as a rule, in preparing draft laws and governmental opinions consult professional and other associations in whose competence fall the issues of these drafts by sending them draft proposals and collecting their viewpoints'. This provision presents a basis for CSOs involvement in the law-making process. However, until the end of 2011 it has too often been neglected by the competent state administration bodies.

Provisions of the *Rules of Procedure of the Croatian Parliament* regulate details of the legislative process and models of public participation. The main criticism is twofold, it relates to: a) the

[39] These were held in Stockholm (October 2008), Penza, Russian Federation (December 2008), Istanbul (January 2009) and Madrid (April 2009).

[40] Available on http://www.uzuvrh.hr/userfiles/file/Nacionalna_Strategija_ENG.pdf.

possibility of arbitrary decisions on excluding public from parliamentary sessions and b) election of external members of working bodies, who are supposed to present additional human resources in view of improving legislative quality. The criticism of the latter is especially significant in relation to parliamentary committees, their imprecise and diversified regulation (e.g., no explanation or justification why some of them have external members and others do not, and no clear procedure of their nomination and election).[41]

Furthermore, under Article 20(2) of the *Law on the right of access to information*,[42] 'public administration bodies competent for preparation of draft laws and by-laws, shall publish drafts of these acts and enable addressees of the right [of access to information] a reasonable period to give their opinions thereon'. The same recommendation is repeated in the Croatian *Code on practice of consultation with the interested public in procedures of adopting laws, other regulations and acts*, adopted by the Croatian Government on November 21st, 2009.[43] In the ambit of its mission, GONG has also analysed the implementation of the aforementioned article of the *Law on the right of access to information*.[44] After a draft law was prepared and sent to the Croatian Government in order to be discussed on its session, GONG has examined when, in what manner and content, and even whether at all, the draft would be published on the web-page of the relevant department. Results demonstrated that only eight draft laws were actually published, which makes only 8,5% of the total number of draft laws that were tracked.[45] Furthermore, during the research period only 3

[41] See also A. Vela, *Sudjelovanje organizacija civilnog društva u zakonodavnom procesu u Republici Hrvatskoj – Analiza stanja, problemi i preporuke* [Participation of the CSOs in legislative process in the Republic of Croatia – Analysis of present state, problems and recommendations] (Zagreb, Ured za udruge Vlade Republike Hrvatske 2008) p. 25.

[42] *NN* 172/03, 144/10, 37/11 (Decision of the Constitutional Court of the Republic of Croatia) and 77/11.

[43] *NN* 140/09. Detailed analysis of the *Code* see in D. Romić, 'Kodeks savjetovanja sa zainteresiranom javnošću' [Code of practice of consultation with the interested public], *Informator* no. 5844 of 10.3.2010., p. 14

[44] Implementation analysis of the *Law on right of access to information* in the period between November 2009 and September 2010 is available on the following web-page: http://www.gong.hr/page.aspx?PageID=69.

[45] Out of these 8 draft laws, 5 were published on the web page of the Ministry of Tourism, 2 of the Ministry of Justice and 1 Ministry of Culture.

calls for public consultations were launched, while a vast number of ministerial web pages proved to be extremely non-functional and/or complicated for public usage and search for relevant documents and other information. This research was the first one to prove that implementation of the 2010 *Law on the right of access to information* is still to a large extent problematic, pregnant with significant shortcomings.

Citizens' and CSOs' participation in policy making process of Croatian governments, as well as their involvement in its implementation, is still on quite a low level. During 2010 and 2011 public at large in Croatia witnessed the latest examples of unreasonable normative products enacted on different levels, normative acts that were adopted and published without sufficient elaboration, CSO participation and deliberation. Some of them were consequently rewritten, reversed or even quashed due to their evident low quality. In this instance we wish to specifically emphasize two cases: a) urgent adoption of the *Constitutional law on revisions of the Constitutional law on the rights of national minorities*[46] and subsequent adoption of the new electoral law,[47] and b) proposals of three laws forming the so called 'Scientific and higher education legislative package'. As it is well known, the former example resulted in the Croatian Constitutional Court's intervention, which declared a significant number of provisions unconstitutional and removed them from our legal system. Solutions adopted and afterwards quashed, were results of unacceptable and short-sighted political trade with the view of securing sufficient number of votes for the forthcoming constitutional revision.[48] The second case, involving three law proposals, demonstrated in an even more obvious manner the extent, to which public administration ignores rules of good normative practice and applies the *Code* in the very awkward way. Undoubtedly, this case marked the depths of misunderstanding in the actual implementation of the principle of participation. Namely, during

[46] *NN* 80/10.

[47] *Law on revisions of the Law on election of representatives in the Croatian Parliament*, *NN* 145/10.

[48] The Constitutional Court's decision also suffered a significant amount of criticism as to the timing since the Court eventually decided in the last year before the parliamentary elections although it did have enough time to decide well before. The main issue here was the right to vote of members of national minorities and whether they should have preferential treatment (two votes). The matter remains open for the new Government and requires cautious deliberation in many regards.

2010 the first drafts of three different pieces of legislation – directed toward a general reform of the system of scientific research and higher education in Croatia – were prepared by expert groups, in which only few members of the academic community participated, the 'sample' being non-representative and certainly not legitimate. Drafts were kept in secret and finally the competent Ministry called for a public consultation that lasted only 19 days. Due to numerous comments new groups were appointed, this time including members of academic community proposed by the individual universities. However, regardless of permanent and well founded criticism of the original drafts exposed and argued by the overwhelming part of the Croatian academics, the Ministry decided to send the proposals to the parliament before the ending of the summer parliamentary term of 2011, turning a deaf ear to most of the criticism, even risking the beginning of academic year 2011/2012. As it is well known, the bills were stopped in the parliamentary procedure (since they were not given 'green light' by the competent parliamentary committee), however, the fact remains that the Croatian Government was not willing to hear what the interested public had to say about the subject matter.

Experience of the CSOs points out that there are further unsettling facts in relation to the principle of participation in the Republic of Croatia. The main problems they face while attempting to actively participate in the legislative process are the following:

- inexistence of complete and timely announcement on timetable of future activities of law-drafting and other regulations-drafting public bodies, which in turn reduces the possibility for adequate preparation,
- non-publication of a draft law in advance, but only after a draft has been adopted into official proposal on the session of the Government,
- complete lack or very rare meaningful public consultation procedure, without clear criteria for its organization,
- limited access to information and existence of only minimal legal framework for cooperation formed primarily of declarative non-binding provisions/statements,
- adoption of a vast number of laws in shortened, emergent legislative procedure, which often allows for a non-quality legislation,

- general reduction of the actual role and influence of the parliament, and
- unreliability and lack of information on the actual legislative text to be adopted and published in the Official Gazette '*Narodne novine*'.

Here we need to mention the new *Law on impact estimation of legal regulations*,[49] that entered into force on the January 1st, 2012. It creates obligation to adopt a yearly Plan of normative activity introducing new legal obligation of public consultation for a number of state bodies when preparing draft laws, or preparing estimation of their impacts on economy, state finances, social status of citizens and environment. While the general goal of the impact estimation system for laws is stated to be 'consideration of possible non-normative solutions and creation of a number of possible normative solution when a regulation is being prepared, all in view of optimizing the final result with the highest possible level of economic efficiency and purposefulness', among special goals there is a following passage: 'encouraging co-operation and inter-departmental co-ordination of law drafting bodies for the purpose of simpler and faster integration of common goals, *fostering transparency of normative initiative phase of process by including public and interested public in the procedure of estimating the need for normative intervention, contributing to development of consultation with public and interested public in proposal and drafting procedures* (emphasis S.B.), and contributing to more efficient use of state budget' (Article 6).

As it has been shown, in the case of principle of participation we may detect the already well-known problem of the Croatian legal system: relatively good, or at least, acceptable regulation, but significantly problematic practice and doubtlessly insufficient political culture of both bearers of political power and civil servants in public administration bodies. These will eventually shape the positive potential of the new *Law on impact estimation*.

V. Concluding remarks

Democracy is more than the sum of its institutions. A democratic political culture is also crucial for the legitimacy, smooth functioning and ultimately the sustainability of democracy. The electoral process periodically divides the population into winners and losers. A successful

[49] *NN* 90/11.

democratic political culture implies that the losing parties and their supporters accept the judgment of the voters, and allow for the peaceful transfer of power.

Participation is a further necessary component, as apathy and abstention are enemies of democracy. A culture of passivity and apathy, an obedient and docile citizenry, are not consistent with democracy. In a democracy, government is only one element in a social fabric of many and varied institutions, political organizations, and associations. Citizens cannot be required to take part in the political process, and they are free to express their dissatisfaction by not participating. However, a healthy democracy requires the active, voluntary participation of citizens in public life. Democracies flourish, when citizens are willing to participate in public debate, elect representatives and join political parties. Without this broad, sustaining participation, democracy begins to wither and become the preserve of small, select groups. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels.

Accountable governments are inclined to enhance their transparency in order to improve citizen's confidence in their work, confidence in operation of all public bodies and in relation to public expenditures, having prevention of corruption as a final goal. Without trust in public bodies there would be no citizen's and public participation in public decision-making, which in turn reduces the quality of both rules enacted, and their implementation. Only a well-informed public may act as an efficient democratic mechanism of control over power, while the task of institutions in modern democracies is to educate public and to operate in as transparent as possible manner in order to enable information on public authorities. Knowing procedures, and good regulation of procedures themselves, are the main preconditions for adequate participation of the civil society organization in legislative and other relevant normative processes. In that respect, we believe a creation of a general regulation on normative procedures to be of utter importance. However, it can never be emphasized enough that the final result is mainly dependant on the level of legal and political culture that is to be demonstrated primarily by the elected officials and civil servants.

Nevertheless, and without subjectivity, it is fair to conclude this paper in a slightly optimistic tone. Namely, the new center-left coalition, that won the Croatian parliamentary elections in December 2011, seems to

demonstrate more sensitivity and readiness for improvement in this field. Commentators claim that the electoral defeat of a previously ruling center-right coalition led by the HDZ represents „a breakdown of a particular model of governance".[50] Namely, transparency, participation and accountability have been named as the core values of the new government's political program, at least on a declaratory level.[51] It is still far too early to give a significant evaluation of its course of action.

[50] See M. Kasapović, 'Drugi kritični izbori u Hrvatskoj – slom jednog modela vladanja' [Second critical elections in Croatia – breakdown of a particular model of governance], *Političke analize* 8 (December 2011) pp. 3-9.

[51] The new Prime Minister Zoran Milanović, in his speech on the night of elections (December 4th, 2011): '[…] never again shall we have a non-transparent governance', deputy Prime Minister Milanka Opačić on public TV channel 1 (*HTV1*), interviewed the day after elections (December 5th, 2011): '[…] We need clear, understandable laws, efficient and created in cooperation with civil society', and again, this same day, Prime Minister Milanović in further interviews always pointed out the need for 'transparency and participation'.

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Constitutional dialogue. Protection of constitutions – case studies: Hungary and Croatia

Constitutional dialogue theories have their roots in 'common law systems' where they focus on the role of judiciary. These theories are about how to solve the counter-majoritarian difficulty and how to give a proper normative account of the role of judiciary in the constitutional democracy and how to find the proper constitutional meaning, especially in the interpretation of human rights.[1] After the emergence of these constitutional dialogue theories, scholarship, mainly still in common law states, started to expand its possible meanings to the interactions of organs beyond legislature and courts, as it 'goes without saying that participants in the nation's constitutional dialogue include more than the major governmental actors and their activities'.[2] In this paper we attempt to enumerate and systemize dialogic theories and draw the attention to the possible existence of other kinds of constitutional dialogue in civil law states. The reason of this study is that the major issues of common law constitutional dialogue (counter-majoritarian problem and the role of judiciary) are more or less solved in civil law system, where Kelsenian theory of judicial review is acknowledged. Still, a revised or modified idea of constitutional dialogue may be used to study the existing dialogic mechanisms in civil law states, as the finality of the democratic decision-making process, here there and everywhere, is to find the proper meaning of the constitution. From a civil law perspective, this work necessarily starts with revealing what 'constitutional' and 'dialogue' mean, and what functions may have the constitutional dialogue in this sense. Defining this expression in this way may lead us to a more complex understanding of constitutional

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[1] Christine Bateup, 'The Dialogic Promise. Assessing the normative potential of theories of constitutional dialogue', 71 *Brooklyn Law Review* (2006) p. 1109.
[2] Michael Heise, 'Preliminary Thoughts on the Virtues of Passive Dialogue', available at: http://www.uakron.edu/law/lawreview/v34/docs/heise341.pdf p. 1, footnote nr. 1.

dialogue in constitutional democracies of the (post)modern and globalized age.
In this paper we specify the constitutional dialogue theories, and other dialogic interactions emerged in the scholarship (point 1.1) and indicate how these ideas may be extended to other constitutional organs and other (constitutional) procedures in constitutional democracies (point 1.2). We provide examples of constitutional dialogue at regulatory level (point 1.3) from the recent Hungarian and Croatian constitutional development (points 2 and 3).

1. Understandings of constitutional dialogue

1.1. 'Common law' constitutional dialogue is used to describe the relationship and interaction between at least two constitutional organs (judiciary and legislative power) keeping in mind the role of dialogue: giving a proper normative account of the role of judiciary and find the accurate constitutional meaning. There are different and congruent approaches developed by common law scholars. It is obviously impossible to summarize all of the theories, so here we provide just brief examples.
After the first experiences of the use of the Charter in Canada[3] *Peter W. Hogg and Allison A. Bushell* established their vision on the concept of constitutional dialogue. The dialogue consists of those cases in which a judicial decision striking down a law on Charter grounds is followed by some action – reversal, modification, avoidance – by the competent authority. In these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it.[4]

[3] In Canada it is possible for the legislature to overcome a judicial decision striking down a law for breach of the Charter, due to the following four features of the Charter: '(1) section 33, which is the power of legislative override; (2) section 1, which allows for "reasonable limits" on guaranteed Charter rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the Charter as articulated by the courts'.
[4] Peter W. Hogg and Allison A. Bushell, 'The *Charter*Dialogue between courts and legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)', 35 *Osgoode Hall Law Journal* (1997) p. 79., 82.

As *Christine Bateup* put it, constitutional dialogue metaphor 'is most commonly used to describe the nature of interaction between courts and the political branches of government in the area of constitution decision-making, particularly in relation to the interpretation of constitutional rights'.[5] Dialogue theories are to be understood as a tool for resolving the democratic legitimacy concerns associated with judicial review; thus this concept 'has been popularized to the greatest extent in countries, such as Canada',[6] New Zealand, United Kingdom.[7] In her valuable and very much cited work, she gives a complex understanding of different dialogue theories[8] revealing their advantages and critics; she concludes

[5] Bateup, loc. cit. n. 1, at p. 1109.
[6] Bateup, loc. cit. n. 1, at p. 1110.
[7] Bateup, loc. cit. n. 1, at pp. 1109-1110, pp. 1109-1110.
[8] 'Judicial advice-giving involve judges counseling the political branches of government through the use of broad non-binding dicta' (loc. cit. n. 1, at p. 1123 Process-centered rules 'seeks to ensure that the political actor who enact statutes and make public policy decisions take constitutional considerations into account' (p. 1128 Judges using judicial minimalism approach step back from 'deciding cases in order to allow increased space for democratic consideration and choice' (loc. cit. n. 1, at p. 1131). Coordinate construction theories as the oldest conception of constitutional interpretation belong to the structural theories of dialogue and are based on the idea of 'shared enterprise between the courts and the political branches of government' where judicial decision do not have a 'unique status, as the Constitution did not provide for any specific authority to determine the limits of the division of powers between the different branches'.(loc. cit. n. 1, at p. 1137.) The other structural theories are the theories of judicial principle; these ideas 'propose that judges perform a unique dialogic function based on their special institutional competence in relation to matters of principle' (loc. cit. n. 1, at p. 1143). Bateup analyses equilibrium as well as partnership theories and she finds the most promising vision of constitutional dialogue is when these two understandings are combined (loc. cit. n. 1, at p. 1174). For additional approaches to the judicial dialogic participation (active and passive) see Michael Heise, loc. cit. n. 2. Further critical analysis of these accounts can be found in the paper of Kent Roach. Kent Roach, 'Sharpening the Dialogue Debate: The Next Decade of Scholarship', 45 *Osgoode Hall Law Journal* (2007). Functioning of the Charter dialogue in Canada up to 2005 is analyzed by Rosalind Dixon who states that 'new understanding [of dialogue] reveals that the history of dialogue under the *Charter* to date has tended to be more real than skeptics fear and more contingent than dialogue scholars assure'. See Rosalind Dixon, 'The Supreme Court of Canada, *Charter* Dialogue, and Deference', 47 *Osgoode Hall Law Journal* (2009) p. 241. A firm objection is represented against the dialogue theories by Andrew Petter on the basis that there are many reasons to doubt the democratic character of Canadian political institutions. See Andrew Petter, 'Look Who's Talking Now: Dialogue Theory and the Return to

that 'the greatest potential for achieving a normatively satisfying understanding of constitutional dialogue emerges through the dynamic fusion of the equilibrium and partnership models of dialogue. […] [E]quilibrium theories focus on the role of the judiciary in facilitating and fostering society-wide constitutional discussion, […]; and partnership models draw attention to more distinct institutional functions that the judicial and legislative branches perform in dialogue with one another. The synthesis of these understandings highlights that dialogue should ideally incorporate both society-wide and institutional aspects; […] this provides the strongest normative vision of the role of judicial review in modern constitutionalism.'[9] This approach is then strengthened in another work expressing that "all systems of judicial review, both strong- and weak-form, should be understood as generating a broader form of *society-wide* dialogue between the judiciary, the political branches and the people about the meaning and interpretation of fundamental rights".[10]

The "institutional dialogue" theory says that courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate. For *Luc B. Tremblay* there are two conception of dialogue: dialogue as deliberation and dialogue as conversation.[11]

Joanne Scott and Susan Sturm consider the relationship between courts and governance as dynamic and reciprocal as well: courts draw upon the practice of governance in their construction of the criteria they apply to their judgments. They also provide an incentive structure for participation, transparency, principled decision-making, and

Democracy', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) pp. 524-526.

[9] Bateup, loc. cit. n. 1, at p. 1180.

[10] See Christine Bateup, 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights', (August 2008) Available at: http://works.bepress.com/christine_bateup/1 Abstract

[11] Luc B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3. *International Journal of Constitutional Law* (2005) pp. 617-648.

accountability which in turn shapes, directly and indirectly, the political and deliberative process.[12]

For *Matthew S.R. Palmer's* the constitutional dialogue is an interaction between the different branches of government; interactive discussion where each party genuinely listens, seeks to understand the others' points, and is prepared to modify own views; it underlines the ubiquitous principle of western legal systems: the rule of law.[13]

As it can be seen, these dialogue accounts are about organs (court and legislatures) cooperating in decision making, more precisely: adjudication and legislation; the relationship between judiciary and legislature in common law systems has been examined and explained by different kinds of constitutional dialogue theories. The most successful seems to be the one that involves as many relevant actors into the dialogue as possible in order to reveal the constitutional meaning.[14] By doing so, it gives the opportunity for the legislative power to make as adequate laws as possible avoiding in this way the negative result of the judicial review. On the other hand, it draws the attention to an increased study of the legislative role in dialogue and the involvement of other actors in the dialogue. As Kent Roach put it: Constitutional dialogue theories 'should not in the future focus solely on courts and legislatures, but should also examine the range of other bodies, including auditors general, human rights commissions, privacy and information commissions, complaints and audit bodies, and other review bodies, that can enter into a dialogue with the executive'.[15] The quasi adjudicative bodies 'mainly have powers of moral suasions and can call government to respond to their ruling without necessarily being able to force governments to comply with their rulings. Moreover, the dialogue concept may also be useful to understanding some forms of international law that rely more on persuasion then command'.[16] He offers three projects for the future researchers of constitutional dialogue. The first

[12] Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-thinking the judicial role in new governance', 13 *Columbia Journal of European Law* (2007)

[13] Matthew S.R. Palmer, 'The Language of Constitutional Dialogue: Bargaining in the Shadow of the People', Available at: http://works.bepress.com/matthew_palmer/9 p. 3., 4.

[14] See Roach, loc. cit. n. 8, at p. 181.

[15] The reason is the post-9/11 word, where the executive has increased power and the mechanisms of accountability have not caught up to the expanded state powers. Roach, loc. cit. n. 8, at p. 181.

[16] Roach, loc. cit. n. 8, at p. 182.

and the second remain in the field of the 'original constitutional dialogue': he suggests the idea of i) a comparative testing of the convergence thesis about the weak and strong forms of judicial review;[17] ii) study the dialogue in times of crises, involving the understanding of administrative responses to court decisions.[18] By suggesting the need of studying how the quasi-judicial bodies are involved in dialogue and expressing that 'democratic dialogue is not simply the matter for courts and legislatures'[19] he extends the idea of constitutional dialogue to other actors beyond legislature and courts. His iii) third proposed project is to examine the legislative reforms as 'dialogue theory can be seen as part of the new process movement in legal scholarship that paid increased scholarly attention to the legislature'.[20]

And indeed, the book,[21] which Roach refers to in connection with the third suggested project, contains some other kind of extended (constitutional) dialogue approaches: 'Contributors consider […] how legislatures can engage in productive dialogue with citizens and courts at home and peer institutions in other countries'. This approach is taken by, among others, *Jennifer Nedelsky*, who stresses that legislators should be in an 'ongoing interaction with all forums of public deliberation about the meaning of the core values'.[22] Thus, besides the role of courts that of the legislature, as central constitutional organs representing popular sovereignty, is emphasized as they share a common responsibility for the continued existence of the constitutional order.[23] Similarly, in searching for the new American constitutionalism, *William N. Eskridge, Jr. and John Ferejohn* establishes that the process by which

[17] Roach, loc. cit. n. 8, at pp. 185-186. See Bateup, loc. cit. n. 10.
[18] Roach, loc. cit. n. 8, at pp. 186-189.
[19] Roach: pp. 188-189
[20] Roach: p. 189
[21] Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. ix.
[22] Jennifer Nedelsky, 'Legislative Judgments and the Enlarged Mentality: Taking Religious Perspective', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 95.
[23] Ruth Gavison, 'Legislatures and the Phases and Components of Constitutionalism' in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 213

fundamental new or revised commitments (such as negative and positive liberties) are named and elaborated is a *dialogic one* in which democratically accountable legislatures and agencies play a larger role than courts.[24] In connection with the importance of legislatures in the field of interpretation of the constitution, *Andrée Lajoie, Cécile Bargada and Éric Gélineau* point out that all legislation that is not challenged in the courts is an interpretation and application of the constitution, 'which has both the first and the only word in the matter, in a process that involves two dialogues: one with the courts, exceptional and institutional; and the other with the constituent public, constant and universal'.[25] *Daphne Barak-Erez* suggests that institutional dialogue can be found in the international/transnational arena as well: i) judicial dialogue is the result of mutual influences between courts in different countries in the field of application of international and constitutional law; ii) dialogue of cooperation is brought about by human rights activists from different countries; iii) communication between legislatures – either at international or national level – is described as a dialogue based on the community of professionals (legal advisors, experts) and community of activists and interest groups or the dialogue between individual legislators when dealing value issues.[26]

[24] This larger role is realized by adopting super-statutes that 'seeks to introduce or consolidate a norm or principle as fundamental in our polity; […] [s]uch laws are a response to a normative social movement or a popular demand for change, and a legislatures enacting them understand that they are propounding a fundamental normative commitment'. Super-statutes are: the Sherman Act of 1890, the Civil Rights act of 1964, and the Endangered Species Act of 1973. William N. Eskridge, Jr. and John Ferejohn, 'Super-statutes: A New American Constitutionalism', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 333., 337. The life circle of a super-statute can be understood as a society-wide dialogue; or as put by the authors: 'an ongoing administrative – judicial – legislative trialogue' (p. 349.).

[25] Andrée Lajoie, Cécile Bargada and Éric Gélineau, 'Legislatures as Constitutional Interpretation: Another Dialogue', in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 391.

[26] Legislatures as a community do not engage in dialogue with one another: 'The dynamics of legislation influencing foreign legislative initiatives should rather be described as based on inspiration without community'. Daphne Barak-Erez, 'An International Community of Legislatures?', in Richard W. Bauman and Tsvi

Catherine Powell speaks about *dialogic federalism* because a dialogue about rights can be detected between national and subnational governments, particularly when there are differences in the extent to which these governments incorporate human rights obligations. The adoption of 'human rights treaties and standards at the states and local levels largely represents a form of communication through which people and communities, […] signify the need for the federal government to play a more active role in human rights lawmaking'. Therefore there is an 'assumption that dialogue among various levels of government is critical to meaningful implementation of international human rights law in the United States'. This dialogic approach is both 'descriptive in that it theorizes by looking at existing intergovernmental collaboration and dialogue' and prescriptive as it 'encourages state and local participation even where none exists and posits a constitutional analysis about this participation'.[27]

Bradley M. Bakker, taking an approach that constitutional dialogue is encompasses the idea that 'different governmental branches and the people interact in ways that shape the dominant views of constitutional interpretation over time',[28] proves that *blogs* 'can effectively advance constitutional dialogue in three ways: (1) engaging people directly in dialogue about constitutional issues, (2) by galvanizing people to participate in the political processes in a way that makes them better informed and better capable of applying pressure to the political branches in order to effectuate constitutional change, (3) by pressuring

Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press 2006) p. 545., 533.

[27] Federalism (intergovernmental) dialogue proceeds along at least three tracks: i) there is 'state and local adoption of international human rights standards where the federal government has failed to ratify a treaty' (see the case with CEDAW); ii) there are 'state and local efforts to implement international obligations that the federal government has adopted through ratification or other acknowledgement that is bound […] but not fully implemented' (see 'the case with the consular notification requirement for foreign national arrested and detained'); iii) there are 'state and local efforts to apply human rights principles contained in treaty provisions for which the United States has entered a reservation'. Catherine Powell, 'Dialogic federalism: constitutional possibilities for incorporation of human rights law in the United States', 150 *University of Pennsylvania Law Review* (2001) p. 249., 250., 252, and pp. 273-274.

[28] He cites Christine Bateup's work (loc. cit. n. 1). Bradley M. Bakker, 'Blogs as constitutional dialogue: rekindling the dialogic promise?', 63 *NYU Annual Survey on American Law* (2007) p. 216.

other institutional actors (namely, the conventional media) to focus more substantively on constitutional issues […]'.[29]

Besides all the above mentioned types of (constitutional) dialogues, the *use of precedents* – as a means of courts' involvement and communication[30] – may be understood as a kind of dialogue between courts; this dialogue should be uphold by the discussion regarding the reasons for restricting or overruling a precedent.[31]

1.2. We may conclude here that the notion of 'constitutional dialogue' is mainly used for describing the dialogic interaction between judiciary and legislature in common law states; for some theorist this interaction necessarily includes other constitutional organs such as some agencies of executive power, people (blogs). For others, dialogic interaction arises between legislatures and between the judiciary, at subnational, national, inter- and transnational level. Consequently, is it is not exclusively the legislative procedure in which dialogic effect may be recognized.

Whatever the actors are for these theorists, the main scope is to find the proper constitutional meaning. For a civil law state, it is unfolded mainly by legislatures with the additional "assistance" of the constitutional courts. Due to the different nature in competence of constitutional courts and common law supreme courts, the dialogic relationship between these organs and their respective legislatures/constitution-making powers may be different as well. Due to the prominent role of legislature in the civil law Rechtstaat, one may reasonably suggest that a dialogue exists not only between the abovementioned organs but may occur between others that are involved in the democratic decision-making process as well because legislative impetus is generated not only by court decisions or even constitutional organs.[32]

That is why it may be interesting to examine the expression of 'constitutional dialogue' and define what 'constitutional' and *'dialogue'*

[29] Gerhardt, loc. cit. n. 28, at pp. 218-219.

[30] Jan Komárek, 'Judicial Precedent and European Constitutional Pluralism: How the Two Relate?' http://denning.law.ox.ac.uk/news/events_files/Komarek.pdf p. 2.

[31] See Michal J. Gerhardt, 'The Role of Precedents in Constitutional Decision-making and Theory', 980 *The George Washington Law Review, Faculty Publications Paper* (1991) p. 147.

[32] Binding effects of these inputs may be different depending on the authority issuing it; there is a clear difference between a binding court decision and a recommendation of the ombudsman or other monitoring agencies, and NGOs.

may mean. An interaction is dialogic when at least two equal (that is not subordinated) actors are communicating or interacting[33] on the same subject matter. In law this concept of dialogue is realized in the field of normative decision-making, either be legislation or adjudication. A dialogue is *'constitutional'* when it occurs in a constitutional democracy among constitutional[34] or non-constitutional[35] actors in constitutional procedures.[36] Hence, we may mean under the notion of *constitutional dialogue* a flexible system that refers to interactions between constitutional organs and other constitutional and non-constitutional actors such as political parties, trade unions, social organizations, individuals etc. in the following constitutional procedures: legislation, constitutional review by the constitutional courts or supreme courts, and other procedures connected to these two. The *scope* of this account of constitutional dialogue is the realization of the constitution in the frame of the given constitutional establishment by involving as many actors as possible.

Constitutional dialogue *may occur* at regulatory or judicial level among the following actors. *At regulatory level* constitutional dialogue may be detected [37] between i) national judiciary and national legislature: just as in common law state, the judicial review accomplished by constitutional courts may have dialogic effects; ordinary courts may influence the legislature as well; ii) quasi adjudicative (such as ombudsman) and international bodies, NGOs and national legislature; iii) people, experts, interest groups etc. and national legislature: this refers to the consultation that is an element of quality legislation. At judicial level it

[33] The message of the sender is considered by the recipient and this consideration is materialized in a reply that influences the choices of the sender, and so forth. In this context, depending on the legal backgrounds a dialogic result may range from a mere acknowledgment to a real consideration.

[34] An actor is 'constitutional' when its creation and competences are regulated by the constitution.

[35] 'Non-constitutional' here means that an actor is not contained in the constitution; it does not refer to the status of being anyhow contrary to the constitution. Here belong for instance NGOs and other international or supranational organs.

[36] A procedure is constitutional when its elements are regulated at constitutional level.

[37] These interactions may be seen as regulatory conversation that is a communicative interaction that occurs between all involved in the regulatory space. Julia Black, 'Regulatory Conversation', 29 *Journal of Law and Society* (March 2002) pp. 163-196.

can be found between international and supranational and national judiciary; among national judiciaries, including the role of precedents.
The *overall scopes of constitutional dialogue may be* to i) find the proper constitutional meaning, including the creation of a proper balance between constitutional principles, rights and public policies, ii) maximize the effect of implementation of the functions of different state organs, be either legislative (parliament), (quasi) adjudicative (e.g. ombudsman, constitutional court), or independent (head of state) bodies, mainly in the field of decision-making.[38] At regulatory and judicial levels, there may be *different scopes* of the dialogue, such as i) solving counter-majoritarian difficulty in common law states; ii) fostering national quality legislation, mainly in human rights cases; iii) 'changing ideas' among constitutional courts; iv) promoting common European human right practice;[39] v) assisting to build common democratic values into new pieces of legislation (e.g. Venice Commission).
1.3. Now we focus on the interaction at regulatory level and we intend to present the ways the decision-making process may have dialogic aspect beyond its interactions with judiciary (constitutional courts). In general, there are several *factors* that may start up the legislative decision-making process. These are the following: i) campaign promises;[40] ii) cases of "obligatory" legislation: when international, supranational legislation or a constitution so require,[41] iii) decisions of

[38] In pluralist democracies, even if the concrete constitutional establishments differ, institutional involvement and dialogue allow combining each actors' competence so as a better and more legitimate decision can be taken. Komárek, loc. cit. n. 30, at pp. 10-11.
[39] See the interaction among Strasbourg, Luxemburg, and national (constitutional) courts.
[40] The constitutional dialogue occurs between the political party/politician and voters with a consequence of i) electing a candidate/voting for a list or not, ii) draft laws proposed by the elected representatives or the parliamentary group formed by them or the government based on their electoral promises and governmental programs. The reaction of voters can be tracked by checking on the electoral results of the following elections. This may be the widest understanding of a constitutional dialogue at regulatory level.
[41] Here the constitutional dialogue occurs between the international, supranational legislature and the pouvoir constituent, and national parliaments. The latter considers the possible ways of implementing what is required by the former organs provoking results in their or others monitoring and reviewing mechanism, including judicial and quasi-judicial actors as well.

constitutional courts stating the unconstitutionality of a law,[42] iv) decisions of ordinary or inter-, supranational courts;[43] v) cases of 'non-obligatory' legislation: impulses transmitted by national or international or supranational monitoring groups (e.g. ombudsman, Venice Commission), interest groups, media, public opinion, science etc.; vi) impulses realized by the legislature itself, such as a consequence of changes and developments in economic, social life, technology etc.[44] Impulses affecting the result of the legislative process can be encountered in pre-parliamentary, parliamentary and 'post-parliamentary' stages. We examine this latter phase as here appears another constitutional actor, the *head of state*, who may have role in constitutional dialogue at regulatory level, provided that s/he has 'political' and 'constitutional veto'. By these vetoes, depending on the concrete constitutional arrangement, the head of state has the possibility or may even have obligation to interact with the parliament and the constitutional court.[45] Dialogue between *other actors and procedures* can also be considered as constitutional dialogue even when there are no constitutional actors, but it affect a constitutional procedure, such as legislation.[46]

[42] Some jurisdiction knows the declaration of omission through legislation when the legislature, having due authorization, have not adopted a statute and by doing so, it causes unconstitutionality. As there are different competences of constitutional courts, these diverse competences may mean other ways or modes of dialogue, but the idea is the same: protect constitutionality and reach as high consensus on constitutional meaning as possible.

[43] The constitutional meaning or their understanding of a piece of legislation (setting aside, annulment, stating an unconstitutional omission, making declaration about the infringement of certain other measures, determining constitutional requirements) is communicated to the legislature; it may result in a legislative decision (modification, annulment, to legislate, not to legislate) that is reviewed again by courts.

[44] These refer to the need of consultation in the legislative process.

[45] By political veto the head of state does not choose the promulgation and publication of a statute but send it back to the parliament for reconsideration; by constitutional veto s/he sends it to the constitutional court for constitutional review. Actors response accordingly by reconsideration, adoption again without changing the text, modifying it, annulment, or declaration of unconstitutionality. All of these measures are capable to generate new 'dialogue'.

[46] See the work of the Venice Commission, for instance.

2. Constitutional dialogue in Hungary, and the Venice Commission

In this part, we expound constitutional dialogic interaction between on the one hand the Hungarian Parliament and constitution-making power and, on the other hand, the Constitutional Court, the people and the Venice Commission. By doing so, we can explore a new phenomenon of constitutional dialogue: by studying its features we may make conclusions about the current status or degree of democracy and rule of law of a state.

2.1. Dialogue between the Constitutional Court and the Parliament on retroactive taxation

In one of the modification to the Constitution (Act XX of 1949) during the summer of 2010 an exemption from the principle of the prohibition of retroactive legislation (the possibility of retroactive taxation) was inserted into the Constitution [Article 70/I(2)]. This was intended to be the constitutional basis of the retroactive taxation Act that was adopted by the Parliament and then annulled by the Constitutional Court in autumn 2010. On the same day of the announcement of this unfavorable decision for the leading political parties, Art 70/I(2) (on the possibility of retroactive taxation) was changed[47] and a modified retroactive taxation Act was adopted. Modifying Art 70/I(2) was accompanied by the restriction of the competences of the Constitutional Court.[48]

[47] The new text: 'For incomes paid from sources serving for public revenues as well as for incomes paid by organizations managing state assets or organizations owned or controlled by the state, starting from the fifth tax year preceding the given tax year, obligation may be compelled by statute to contribute to public revenues of a level less than the income.'

[48] 32/A. § (2) The Constitutional Court shall review the constitutionality of statues on the State Budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statues concerning uniform requirements on local taxes only if the petition refers exclusively to the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship under Article 69 of the Constitution. (3) The Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional. The Constitutional Court shall annul the statues on the State Budget and its implementation, on central taxes, stamp and customs duties, contributions, as well as on the content of the statues concerning uniform requirements on local taxes only if the content of these statutes violates the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and

With its decision 1747/B/2010 (adopted on 6 May 2011) the Constitutional Court annulled the Act based on Article 70/I(2), but in decision 61/2011 (adopted on 12 July 2011) it refused the constitutional review of constitutional amendments inserting the new Article 70/I(2) and the limitation of the competences of the Constitutional Court.

2.2. Dialogue during constitution-making via consultation

The constituent power adopted a new Fundamental Law[49] in 18 April, 2011 that was published in 25 April 2011 in the Official Gazette. In the election of 2010, the governing parties gained 2/3 majority in the Parliament and they decided to make a new constitution. In summer 2011, a parliamentary committee was established to prepare the Concept of the New Constitution (based on which the new constitution can be drafted). On 14 March 2011, the draft constitution was submitted to the Parliament, but until this date there was no information about its possible content and wording. It is indeed true that the Concept was adopted by the competent parliamentary commission in autumn 2010[50] but in February of 2011 it was suggested to be regarded only as a guideline.[51] Parliamentary parties were asked to submit their respective concepts to be negotiated in mid-February 2011.[52] Still, the final deadline for the voting of the new Constitution was 18th of April. This situation is interesting because during the process of making the Concept, a so called consultation – that was quite formal – was announced where several (social) organizations were invited by the

religion or the right connected to the Hungarian citizenship under Article 69 of the Constitution. The same restriction in subject matter remained untouched by the new constitution, called Fundamental Law of Hungary (Magyarország Alaptörvénye (2011. április 25) *Magyar Közlöny* [Official Gazette] 2011. évi 43. sz. 10656); see point 2.3.2.

[49] Magyarország Alaptörvénye (2011. április 25) *Magyar Közlöny* 2011. évi 43. sz. 10656

[50] After 2.5 months of working in the merit.

[51] On 7 March 2011 the Parliament adopted its resolution 9/2011. (III. 9.) on the preparation of the new constitution.

[52] Until 14 March 2011 it was uncertain whether the draft is based on the Concept or the drafts submitted by the parliamentary parties; and it was not clear or guaranteed that a genuine debate could be held on the drafts as during the spring session there was not too much sitting scheduled until mid-April when the voting was planned. In the meantime however it turned out that only one alternative draft was submitted (T/2628), which was not dealt with in merit by the plenary at all.

commission[53] to share their opinion about the new constitution.[54] During winter, a popular consultation was held as well: a questionnaire was sent to citizens who could express their view by answering a multiple choice 'test'. From a formal point of view there was popular as well as professional consultation; but several criteria of consultation[55] have not been met: e.g. there was not enough time provided for expression of opinion, there was no feedback; therefore we cannot consider this process as a substantive one. This is even truer, when we take into consideration the fact that the drafters of the Concept were laconic and hardy wrote helpful reasoning and used legal arguments. The same lack of substantive reasoning was applicable to the draft Fundamental Law.[56]

2.3. Dialogue between the Venice Commission and the Hungarian constitution-making power about the Constitutional Court

2.3.1. On 21 February 2011, the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary, requested the Venice Commission to prepare a legal opinion on three particular issues arising in the framework of the drafting of a new Constitution of the Republic of Hungary. The Venice Commission did not receive a draft of the Constitution before 21 March 2011, but three specific questions[57] for consideration.[58]

The Venice Commission, in its *Opinion on three legal questions arising in the process of drafting the new Constitution (25-26 March 2011)*, recognized and regretted that the abovementioned limitation of the competencies of the Constitutional Court as a result of the constitutional

[53] Others could also share their views as well.

[54] There is no figure about the rate these expert opinions were used in drafting the Concept, but reading the Concept, that is very brief and modest in terms of professionalism, the rate can be estimated.

[55] Patricia Popelier, 'Consultation on Draft Regulation – Best Practices and Political Objections', in Marta Tavares Almeida and Luzius Mader, eds., *Quality of Legislation. Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th-25th 2010* (Nomos, Baden-Baden 2011) p. 140.

[56] T/2627 that was then adopted as the new constitution.

[57] The relation between the EU's Charter of Fundamental Rights and the new Hungarian Constitution, the role and significance of the preliminary (ex ante) review and the actio popularis in ex post constitutional review.

[58] The Opinion is not a comment on draft new Constitution of Hungary. Opinion on three legal questions arising in the process of drafting the new Constitution (25-26 March 2011).

amendment adopted in November 2010 has not been repealed.[59] It concluded that the competence for *ex ante* review should be retained and specifically laid down, as well as all other prerogatives of the Constitutional Court, by the new Constitution. In order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the *ex ante* review should be limited to the head of state. The review should take place only after the adoption of the law in parliament and before its enactment and, for international treaties, before their ratification. In addition, wider non-binding *ex ante* review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures.

According to the Venice Commission, the removal of the *actio popularis*, to avoid the danger of overburdening the Constitutional Court and the misuse of the remedies before it, would not represent an infringement of the European constitutional standards. It nonetheless held advisable, in the light of the specific Hungarian constitutional heritage, to seek ways to couple this measure, if adopted, with alternative review mechanisms, e.g. to retain the indirect action via an intermediary actor, such as the ombudsman or other relevant bodies. The Venice Commission in addition recommended that the system of preliminary requests by ordinary courts be retained. The planned extension of the constitutional complaint to review also individual acts, in addition to normative Acts, is a necessary compensation for the removal of *actio popularis* and therefore a highly welcome development.

2.3.2. The *Fundamental Law* defines the Constitutional Court as the supreme body for the protection of the Fundamental Law and enumerates its competences as follows:[60]

- ex ante norm control that can be asked by the President of the Republic before promulgation, and by the Parliament upon the motion of the proponent of the bill, the Government or the Speaker of the Parliament after the final vote;
- review any piece of legislation applicable in a particular case for conformity with the Fundamental Law at the proposal of any judge,
- review any piece of legislation applied in a particular case for conformity with the Fundamental Law further to a constitutional complaint,

[59] See footnote nr 48.

[60] Art. 24 and 6 of the Fundamental Law.

- review any court ruling for conformity with the Fundamental Law further to a constitutional complaint,
- examine any piece of legislation for conformity with the Fundamental Law at the request of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights,
- examine any piece of legislation for conflict with any international agreement, and
- exercise further responsibilities and competences determined in the Fundamental Law and a cardinal Act.

Pursuant to Article 37(4) 'As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e),[61] only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for the drafting and publication of such legislation.'

The Fundamental Law contains some rules concerning the members and the President of the Constitutional Court. The Constitutional Court is a body of fifteen members, each elected for twelve years by a two-thirds vote of the Members of Parliament. Parliament elects with a two-thirds majority of the votes a member of the Constitutional Court to serve as its President until the expiry of his or her mandate as a judge. No member of the Constitutional Court shall be affiliated to any political party or engage in any political activity.

Detailed rules for the competence, organization and operation of the Constitutional Court are regulated in an Act adopted by two-third majority.

It can be concluded that in the Fundamental Law

- not all competences are enumerated, initiation of ex ante review is not restricted to the President of the Republic, the restriction on

[61] The two cases of constitutional complaint and the two ex post reviews.

subject matter of the review is not removed – even though these were suggested;
- actio popularis is changed by an ex post review on then proposal of Government, one-fourth of the MPs and the ombudsman;
- constitutional complaint is extended – as it was recommended.

2.3.3. In its *Opinion on the new Constitution of Hungary (17-18 June 2011)* the Venice Commission placed some important remarks in connection with the status of the Constitutional Court in the Fundamental Law. It made recommendations for some content elements of the new Act on the Constitutional Court.

The Venice Commission noted with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system.

In the light of the 2010 curtailment of the Court's powers, confirmed by the new Constitution the Commission is concerned that a number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order. The Constitution, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, it gives a special power of intervention in this domain to the new Budget Council. This limitation of the Court's competences also covers the State Budget 'implementation', which may expand even further the number and scope of acts that will not be subject of constitutional review. It is strongly recommended that the cardinal law regulating the competences, organization and operation of the Constitutional Court provide all clarifications needed in this respect.

The Commission also laid down that the constitutional court should be entitled to assess the compliance of all laws with the human rights guaranteed in the constitution, and especially with human rights of such a particular importance: the right not to be discriminated and the right not to be unduly deprived of its possessions.

The Venice Commission acknowledged that election of the Constitutional Court's president by a political actor, and not by the Court itself, is a widely accepted phenomenon. It however notes that, according to the Constitution of Hungary (Act XX of 1949), the judges have elected the president from their own ranks, a system which is seen, in general, as a stronger safeguard for the independence of the Constitutional Court. Regarding the duration of term of office of the Constitutional Court's judges, which is prolonged to twelve years, the

Constitutional Court Act should preferably state that it is non-renewable, to further increase their independence.
Article N(3) of the new Constitution, impose the Constitutional Court the obligation to respect the "principle of balanced, transparent and sustainable budget management" in the course of performing its duties. The Commission wished to understand this obligation as a requirement applicable to the administrative management of the Constitutional Court as a public institution, and not as an interpretation principle to be enforced in the context of its constitutional review task. In addition, it considered that this principle should not be applied in a way that adversely affects the financial autonomy and the overall independence of the Court in its functioning.
2.3.4. The *Hungarian Government replied*[62] – not in each regard adequately – to this Opinion. According to the Government it should be pointed out that the competence of the previous Constitutional Court was by far the widest in Europe. The competences, procedures, organization and operation of the Constitutional Court will be regulated in detail by cardinal law, giving further clarification to the matters raised by the Venice Commission. But this does not appear in the new Act on the Constitutional Court.[63] The Act establishes such competences of the Constitutional Court that the Fundamental Law itself does not contain.[64] It contravenes to the Opinion of the Venice Commission and the Constitutional Court itself that has already expressed that all competences should be regulated at constitutional level. The Act,[65] on the other hand, declares that judges cannot be re-elected. The insert of this rule into the constitution has been long recommended. The Venice Commission even in 1995 expressed that '[t]o ensure that judges are completely independent of the bodies which elect them, it would be

[62] Position of the Government of Hungary on the Opinion on the new Constitution of Hungary (Transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011).
[63] Act CLI of 2011 on the Constitutional Court.
[64] It is true, that the Fundamental Law stipulates that 'exercise further responsibilities and competences determined in the Fundamental Law and a cardinal Act' [Art 24. (2) point f)] but is should be interpreted as a provision referring to 'special competences' of the Constitutional Court, being beyond the normal competences. For instance the interpretation of the Constitution or the declaration of unconstitutionality caused by omission in legislation is contained only by the Act and not the Fundamental Law.
[65] Art 6(3).

preferable if their term of office – provided it is sufficiently long – were not renewable.'[66]

According to the Government, the members of the Constitutional Court receive their mandate directly from the Parliament which elects the members on the basis of a broad consensus, i.e. by a two-third majority of the votes cast. The 12-year long mandate and the prohibition of any party affiliation or political activity constitute important constitutional guarantees for the independence of the members of the Constitutional Court. The election of the President of the Constitutional Court by the Parliament should strengthen the independence of the President from any eventual play of interests within the body itself. We have to remember, however, that this 'broad consensus, i.e. by a two-third majority' may be abused, especially when the governing parties have 2/3 majority in the Parliament. The argument of the Government concerning the changed method of election of the President cannot be taken seriously.

To the concerns of the application of Article N (3) of the Fundamental Law, the Government is in a position that this rule is strictly applicable to the administrative management of the Constitutional Court as public institution and it cannot be understood as an interpretation principle to be applied in the context of carrying out their genuine tasks. Article N) is however difficult to be understood like this as it read as follows: (1) Hungary shall enforce the principle of balanced, transparent and sustainable budget management. (2) Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in Paragraph (1). (3) In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in Paragraph (1). It is up to the Constitutional Court to decide about the interpretation of this clause; but it does seem to be an interpretation rule, whatever position is taken by the Government.

3. Constitutional dialogue in Croatia, and the Venice Commission

In this part, we analyse constitutional dialog in the Republic of Croatia. In this sense, we study constitutional dialogic interaction between the relevant Croatian authorities (Croatian Parliament (*Hrvatski sabor*) and

[66] CDL(1995)073 Regulatory concept of the Constitution of the Republic of Hungary: Draft consolidated opinion http://www.venice.coe.int/docs/1995/CDL% 281995 % 29073- e.asp.

the Government) and the Croatian Constitutional Court, and between the Croatian Government and the Venice Commission**.** We can use this analysis to make similar conclusion as we made in the Hungarian part: the status or degree of democracy and rule of law of a state.

3.1. Dialogue between the Constitutional Court of the Republic of Croatia and the Croatian Parliament and Government

In the consideration of the dialogue between the Constitutional Court of the Republic of Croatia[67] and the Croatian Parliament and Government, and consequently the role played by the Constitutional Court in protecting the Constitution, i.e. protection and promotion of democracy and the rule of law, the basic quantitative indicators of the Court's work from 1990 until present have to be taken into account.

According to the statistics available at the Court's official website, in the period before 31 December 2010, the Constitutional Court received a total of 58,733 cases, of which 50,993 were decided. Even a fleeting observation of the received cases statistics shows two constants. The first constant is a continuous increase of the total number of received cases (e.g. in 1991, 180 cases were filed, 1992 – 374, 1993 – 507, 1998 – 1114, 2001 – 2567, 2008 – 5768, 2009 – 6041, 2010 – 7453; the only two exceptions were 2006 and 2007 when 4296 and 4846 cases were received, respectively, i.e. less than the 5232 received in 2005). The second constant is related to the pronouncedly high percentage of constitutional complaints filed compared to other cases, as well as a constant increase of that number each subsequent year. Within the relevant time period, in the process of concrete protection of human

[67] The Constitutional Court of the Republic of Croatia was constituted pursuant to Articles 125, 126 and 127 of the Constitution of the Republic of Croatia from December 1990, supplemented by the Constitutional Act on the Constitutional Court of the Republic of Croatia and the Rules of Procedure of the Constitutional Court of the Republic of Croatia. Besides controlling the constitutionality of laws and the legality of other regulations with regard to the Constitution and law, pursuant to Article 129 of the Constitution, the Constitutional Court also carries out other tasks: decides constitutional complaints, monitors the realisation of constitutionality and legality and reports any observed non-conformities with the Constitution and illegalities to the Croatian Parliament, decides on the responsibility of the President of the Republic, supervises the constitutionality of political parties' programmes and activities, supervises the constitutionality and legality of elections and national referendum, resolves electoral disputers and carries out other tasks as stipulated by the Constitution.

rights and basic freedoms as guaranteed by the Constitution, the Constitutional Court received no less than 44,887 constitutional complaints, 38,175 of which were decided. For comparison, there were 5,165 petitions and proposals for the review of the conformity of laws with the Constitution, there were 2,669 proposals to review the constitutionality and legality of other regulations, there were 159 supervisions of the constitutionality and legality of elections and referendums, etc.[68] Not entering into a more detailed analysis of the available statistics, even at this moment we can agree with the conclusion of *J. Crnić* (from 2001) that the statistics of the Constitutional Court work 'show a continuous effort by the Constitutional Court to – from early 1991 until today – conscientiously and bravely use its constitutional powers to protect the constitutionality and legality and basic human rights and freedoms guaranteed by the Constitution. The totality of decisions in those cases constitutes a real contribution by the Constitutional Court in the protection, and even promotion of the rule of law in the Republic of Croatia.'[69]

The above conclusion is supported by a substantial number of Constitutional Court decisions with actual contributions to preserving democracy and the rule of law. Just a few examples of those decisions are presented below.

3.1.1. ... concerning the constitutional right to the freedom of public assembly

Throughout its case law, the Constitutional Court on several occasions examined the conformity with the Constitution of the legal regulation of public assembly in Croatia.[70] The most recent significant decision

[68] Further, while only 125 constitutional complaints were received in 1991, that number rose to 550 in 1997, then to 1,579 in 2000, 3,148 in 2005, while in 2010 the Court received no less than 5,626 constitutional complaints. The table of received and decided cases during the period from 1990 until 31 December 2010 is available at the Constitutional Court's official website: http://www.usud.hr/uploads/Pregled%20primljenih%20i%20rije%20predmeta%20u%20razdoblju%20od%2019990%20do%2031%20prosinca%202010.

[69] Jadranko Crnić, 'Ustavni sud Republike Hrvatske: iskustva i perspektive', *Politička misao*, Vol. XXXVII, no. 4. (2001) p. 129.

[70] The first Public Assembly Act in the Republic of Croatia was adopted in 1992 (*Official Gazette* 22/92). By the Constitutional Court Decision no. U-I-241/1998 of 31 March 1999 (*Official Gazette* 38/99.) Article 3 para 3 of the Act was cancelled (which read: 'Bodies of local self-government may designate places where any

concerning this matter was rendered by the Court this year in July. In its Decision no. U-I-295/2006 and U-I-4516/2007 of 6 July 2011,[71] rendered five years following the proposal to review the conformity with the Constitution of the amendments to the Public Assembly Act,[72] the Constitutional Court reviewed the conformity with the Constitution of Article 1 paragraph 3 of the Changes to the Public Assembly Act from 2005, in the part that prohibits the holding of public assemblies within the circle of 100 m from the premises where the highest bodies of state authority have their seat, namely, the Croatian Parliament, the President of the Republic of Croatia, the Government of the Republic of Croatia and the Constitutional Court of the Republic of Croatia.

Considering the relevant amendments, the Court has requested a draft law of the amendments to the Public Assembly Act from the Parliament. The Court also requested a statement of the Government. In its statement of 16 July 2009, the Government has assessed the intention of the legislature as legitimate, because '[…] proposed amendments […] significantly contribute to more effective work of the police and security services, both from the standpoint of insurance plans, as well as from the standpoint of their implementation.' This standpoint was supported with the appropriate solutions in the relevant laws of Austria, Germany and Slovenia.

Referring to the national law and the case law of the member states of the Council of Europe concerning the right to freedom of public assembly, and to the opinion of the Venice Commission and other international organisations on the right to freedom of assembly,[73] the

public assembly may be held.') due to non-compliance with the Constitution. The Court found that the disputed provision restricted the right from Art. 42 of the Constitution, because the right to designate the place where public assembly may be held was given to local self-government bodies without any restrictions that would conform to the provision of Art. 16 of the Constitution. In it Decision no. U-I-3307/2005, U-I-3309/2005, U-I-3346/2005, U-I-3359/2005 of 23 November 2005 (*Official Gazette* 139/05.), the Constitutional Court cancelled the Changes to the Public Assembly Act (Official Gazette, no. 90/05.) due to formal non-conformity with the Constitution, i.e. because the amendments and revisions were not adopted by a required majority of vote by all the representatives in the Croatian Parliament.

[71] *Official Gazette* 82/11.

[72] The proponents of the relevant proposal from 2005 were the Croatian Independent Trade Unions and the Civil Initiative Matija Gubec.

[73] The relevant document of the Venice Commission, Office for Democratic Institutions and Human Rights (ODIHR) and the Organization for Security and Co-operation in Europe (OSCE) in the field of the right to the freedom of public

Constitutional Court concluded the followings. The legal ban on public assembly in the area of at least 100 m from the premises where the Croatian Parliament, the President of the Republic, the Government and the Constitutional Court *hold their sessions* is not in compliance with Article 42 of the Constitution because it, in relation to any *a priori* unknown concrete location and object, cancels the essence of the constitutional right to the freedom of public assembly with no reason (interests of state security and the protection of rights and freedoms of others) acceptable under constitutional law that could justify it. The legal ban on public assembly in the area of at least 100 m from the premises *accommodating the Croatian Parliament, the Government and the Constitutional Court* has a legitimate aim and is proportionate to that aim, but, notwithstanding, is 'not necessary in a democratic society', because there is no 'pressing social need' for its existence, which is supported by the fact that in this area (St. Mark's Square/Markov trg) it is not prohibited to organise public events that require special security measures, as well as other forms of gatherings (at realising economic, religious, cultural, humanitarian, sports, entertainment and other interests). The legal ban of public assembly in the area of 100 m from the building *accommodating the President of the Republic*, has no legitimate aim or reasonable and objective justification and thus it constitutes prima facie violation of the constitutional right to freedom of public assembly guaranteed in Article 42 of the Constitution.
Therefore, with this decision the Constitutional Court cancelled the ban on public assembly in the area within the circle of 100 m from the President's Office, while the ban on public assembly at St. Mark's Square (where the Croatian Parliament, the Government and the Constitutional Court are located) will remain in force until 15 July 2012, which means that the legislator was given the opportunity to amend the disputed statutory provisions and regulate them in compliance with the Constitution.

3.1.2. ... concerning dual voting rights for national minorities

In its Decision no. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011 and U-I-994/2011 of 29 July 2011,[74] the Constitutional Court cancelled Article 1 of the Constitutional Act Amending the

assembly is OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly) of 9 July 2010.
[74] *Official Gazette* 93/11.

Constitutional National Minorities Rights Act (hereinafter Act), according to which national minority members which participate in the population of the Republic of Croatia with more than 1.5% (meaning only the Serb minority) were guaranteed at least three seats in the Croatian Parliament, elected on the basis of the general right to vote (Article 1 paragraph 2 of the Act[75]). The Court found that the relevant amendment was in discord with Article 1 paragraphs 2 and 3 of the Constitution,[76] having considered it in the light of equal rights, national equality and a democratic multiparty system, the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution[77]).

In the relevant case, the Constitutional Court accepted the standpoint that by Article 1 paragraph 2 of the Act one minority group of citizens was singled out from the overall body of 'the people' according to the criterion of nationality and 'acknowledge and recognised' as a separate 'part of the people', which is in discord with the constitutional tenet of a 'one and uniform' people which, as a community of citizens, exercises authority in the Republic of Croatia.[78]

[75] *Official Gazette* 80/10.

[76] Art. 1. para 2 of the Constitution reads: 'Power in the Republic of Croatia derives from the people and belongs to the people as a community of free equal citizens'. Art. 1. para 3 of the Constitution reads: 'The people shall exercise this power through the election of representatives and through direct decision making'.

[77] Pursuant to Article 3 of the Constitution: 'Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect of human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpretation of the Constitution'.

[78] In that sense, the Decision quotes an expert opinion from *S. Barić*, which reads: 'Any singling out of any group of Croatian citizens from the total body of „the people under any criterion, so also under the criterion of national affiliation, and creating a mechanism by which such a group is specially represented through general and equal voting rights, I consider unacceptable in constitutional law, i.e. contrary to the basic letter and meaning of the Constitution of the Republic of Croatia, to the fundamental concept of "the people" "from which derives power and to which power belongs". This kind of mechanism presumes that there are different, constitutionally acknowledged and recognised parts of the people, which is to be reflected in the representation of certain parts of the general and common concept of the people. This is not the case with the Constitution of the Republic of Croatia. The people is one and in the meaning of constitution law it is formed of all the citizens of

Furthermore, the Constitutional Court found that the solution contained in Article 1, paragraph 2 of the relevant Act directly disrupts the basic constitutional demand for equal voting right of all voters-citizens within the framework of the general electoral system. Namely, according to the standpoint of the Constitutional Court, the system of a priori guaranteed and secured representative seats pre-supposes special measures which will ensure that national minority candidates-members are actually elected to the pre-guaranteed representative seats in the Croatian Parliament. This, however, 'presupposes favouring "minority" lists of candidates, and thus also the unequal weight of the votes of voters within the framework of the general electoral system, which the Constitution does not allow'.

Finally, the Constitutional Court observed that the guarantee of 'at least three seats' for members of a large-sized (i.e., Serb) minority within the frame of the general electoral system, in the manner as stipulated by the impugned provisions 'leads to confusion from the aspect of constitutional law in the structure of representatives to the Croatian Parliament'. Namely, if (at least) three representatives of the Serb minority are elected by all the voters-citizens of the Republic of Croatia (i.e., 'the people'), then there are grounds to ask what the difference is between these (at least) three representatives of the Serb minority and the other representatives, especially those of Serb nationality who are also elected by the same circle of voters ('the people') within the framework of the general electoral system, but are not candidates from the lists of candidates put forward by the political parties that represent the Serb minority or the lists proposed by voters of Serb minority, but candidates from the lists of candidates put forward by other political parties, i.e. from independent (general) lists of candidates.

Regarding the matter of conformity with the Constitution of the solution contained in Article 1 paragraph 3 of the Act, that enables voters-members of national minorities to have a supplementary vote at the elections of representatives to the Croatian Parliament,[79] the

the Republic of Croatia, regardless of their personal characteristics, and thus also of national affiliation.'

[79] Article 1 para 3 of the Act reads: 'National minorities which participate in the population of the Republic of Croatia with less than 1.5%, in addition to the general right to vote, have the right to elect five representatives who are national minority members in special constituencies on the grounds of special voting rights, in

Constitutional Court pronounced that the introduction of two votes for national minority members at the elections for the Croatian Parliament is allowed according to the constitutional law. However, to introduce two votes into the electoral system, certain pre-requisites have to be met. The Constitution, namely, allows for members of national minorities to be, in addition to the general right to vote, provided with a special right to elect their own representatives in the Croatian Parliament (Article 15, paragraph 3 of the Constitution), but since there is no simultaneous definition of the scope and contents of those representatives' powers, the Constitutional Court holds that the matter has to be first regulated by a law with constitutional force, which, in other words, presupposes the adoption of a separate constitutional act.[80]

Further, with regard to the matter of the justification for applying Article 15 paragraph 3 of the Constitution,[81] the Constitutional Court – accepting the legal principles of the Venice Commission,[82] contained in its 2008 Report on Dual Voting for Persons Belonging to National

accordance with the law that regulates the election of representatives to the Croatian Parliament'.

[80] The Constitutional Court thereby cautions that the Constitutional Act on the Rights of National Minorities, despite its title, has no constitutional force, since it was not adopted in a procedure which is valid for passing and amending the Constitution. Thus, only when the Croatian Parliament passes such act could the issue of the method of election of minority representatives be regulated by an election act and then could the dual voting right be introduced.

[81] Namely, acknowledging a supplementary vote for national minority members must have its rational merit and reasonable justification based on factual substratum, and at the same time be legitimised from the aspect of proportionality. In other words, this means that 'the special voting right in Article 15 para 3 of the Constitution could only be justified if there were no other milder means for realising the desired objective, i.e. means that would encroach less on the equality of the voting rights of the other voters'.

[82] Namely, the Venice Commission deems it necessary to test the justification of introducing a supplementary vote because this is always an exceptional measure of an instrumental nature and is justified only, when the given aim (i.e. the integration of the minority in the political system) cannot be achieved by the application of other measures, less restrictive with respect to the equality of the voting rights of other voters. Therefore, the test of justification always centres on the principle of proportionality. The Venice Commission also deems that the right to a supplementary vote has a limited scope. Its recognition can be justified only if it refers to a 'small sized' minority and has a transitional, and therefore a temporary character.

Minorities[83] – found that the right to supplementary vote can hardly secure a greater degree of integration of national minorities in political life than what had already been achieved before the impugned provision came into force, while at the same time this right infringes the equality of voting rights to a far greater measure than statutory measures that were in force until the entry into force of the impugned provision. In the light of specific facts and circumstances (related to the level of participation of national minorities in the Croatian Parliament in the last three parliamentary elections – 2000, 2003 and 2007), the relevant measure from Article 1 paragraph 3 cannot be deemed proportionate. Therefore, the Constitutional Court cancelled the respective paragraph of the first article of the Constitutional Act Amending the Constitutional National Minorities Rights Act.

It should be noted that the Constitutional Court in its several decisions in 2011[84] also cancelled several articles (Articles 1, 5, 6, 7, 8, 9 and 10) of the Amendments to the Croatian Parliamentary Elections Act from 2010,[85] originally related to Article 1 of the Constitutional Act Amending the Constitutional National Minorities Rights Act. The Constitutional Court also decided for the current parliamentary elections (4 December 2011), unless the Croatian Parliament in the meantime passes new rules, rules that were in force until the enactment of the statutory amendments are to be applied.[86]

[83] Report on Dual Voting for Persons Belonging to National Minorities, adopted by the Council for Democratic Elections at its 25th meeting, Venice, 12 June 2008 and the Venice Commission at its 75th plenary session, Venice, 13-14 June 2008, Study No. 387/2006, CDL-AD(2008)013, Strasbourg, 16 June 2008

[84] Decisions: U-I-120/2011, U-I-452/2011, U-I-693/2011, U-I-746/2011, U-I-993/2011 and U-I-3643/2011 of 29 July 2011. *Official Gazette* 93/11.

[85] *Official Gazette* 145/10.

[86] Of course, the issue of changing election rules within a year before the elections can be raised here. The President of the Constitutional Court of the Republic of Croatia, *Jasna Omejec*, commented on the issue and said that this legal principle 'was self-imposed by the Parliament', specifically not to amend those parts of the election law related to the last amendments to the Constitution. Since no provisions related to the rights of minorities were amended at the time, then the Constitutional Court's decision is not subject to that principle and this only concerns the Croatian Parliament, and not the Constitutional Court as well. Quoted from: 'Hrvatski ustavni sud ukinuo dvostruko pravo glasa', *Hrvatska riječ*, available at: http://www.hrvatska-riječ.com/2011/07/hrvatski-ustavni-sud-ukinuo-dvostruko-pravo-glasa-za-manjine.

3.2. Dialogue between the Venice Commission and the Government of the Republic of Croatia concerning certain aspects of the 2002 Constitutional Act on the Rights of National Minorities

A brief history of the cooperation between the Republic of Croatia and the Venice Commission in relation to regulating the protection of the rights of national minorities (taking into account that the first act that regulated this topic was passed in 1991[87]) is as follows: to meet the requirements for accession into the Council of Europe, the Republic of Croatia in March 1996 agreed to apply the recommendations of the Venice Commission on the Constitutional Act on National Minorities, and one of the relevant recommendations was related to establishing the Council of National Minorities; in May 1997, the Government of the Republic of Croatia agreed with the Venice Commission concerning the foundation of the Council of National Minorities (the Council was founded in January 1998); in its report from March 1998, the Venice Commission reiterated the importance of passing the revised constitutional act and noted a negative (discouraging) influence that suspending a part of the Constitutional Act had on minorities and displaced persons.[88]

In April 1999, the Parliamentary Assembly of the Council of Europe adopted a resolution inviting the Government of the Republic of Croatia to pass a constitutional act which would revise the suspended provisions of the Constitutional Act from 1991, fully according to the recommendations by the Venice Commission and no later than the end

[87] The issues of the protection of national minority rights in the Republic of Croatia was regulated by the Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (*Official Gazette* 65/91), passed in December 1991 and amended in February 1992. That Constitutional Act was amended in 1999 and 2000, and in 2002 it was substituted by the Constitutional Act on the Rights of National Minorities, which guarantees a high quality of the protection of the rights of national minorities in compliance with European standards.

[88] This concerns the suspension of the provisions of the Constitutional Act from 1991 that guaranteed special status to certain districts where members of ethnic minorities were majority in the population (Serb districts), on the basis of demographic changes due to war. By amending the Constitutional Act in 2000, the previously suspended provisions were cancelled. Due to these circumstances, the Venice Commission found that suspension and subsequent cancellation could have a discouraging effect on minorities and displaced persons who lived in or wanted to return to Croatia.

of October 1999. However, the Croatian Government submitted the draft of the relevant act to the Venice Commission only in 2000, and the draft was positively reviewed by the Venice Commission in the sense of improvement in the protection of national minority rights.

Therefore, we can conclude that the Venice Commission was several times asked to concern itself with the revision of the constitutional act on the rights of national minorities, which ultimately resulted in the adoption of several relevant opinions.

The dialogue between the Venice Commission and the Government of the Republic of Croatia in 2002 was initiated by the request of the Deputy Prime Minister Goran Granić to the Venice Commission to issue an opinion concerning (new) draft of the Constitutional Act on the Rights of National Minorities.

In its Opinion no. 216/2002 of 12 September 2002,[89] based on the Draft of the Constitutional Act on the Rights of National Minorities of 22 July 2002, the Venice Commission recognised the positive aspects, within the meaning of a contribution to building a comprehensive framework for the protection of national minorities in Croatia. However, the Commission also pointed out that 'not all concerns expressed and questions raised by its previous consultations and opinions had been adequately answered, especially not on the issue of voting rights and voting procedure in relation to the representation of national minorities in Parliament'. This is also the matter we will analyse for the purposes of this paper.[90]

Namely, with regard to the provision regulating the right of national minority members to be represented in the Croatian Parliament, the Venice Commission notes a 'certain lack of specificity and elaboration' and therefore requested a clarification whether minorities were allowed dual voting rights,[91] i.e. 'whether the needs of minority protection may

[89] Opinion no. 216/2002 of 12 September 2002, Draft Opinion on the Constitutional Law on the Rights of National Minorities in Croatia.

[90] Some of the other questions of the Venice Commission are related to defining the expression 'national minority', powers of the Council for National Minorities, representation of national minorities in bodies of local and regional self-government.

[91] Namely, both the Constitution (Art. 15 para 3: 'Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law'.), and the Constitutional Act on the Rights of National Minorities (Art. 3 para 1: 'The rights and freedoms of persons who belong to national minorities, as basic human rights and freedoms, are an inseparable part of the democratic system of the Republic of Croatia and shall

justify a derogation from the principle "one man, one vote"", adding that 'any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of census)'.

The response of the Government of the Republic of Croatia (i.e. its Work Group for the Preparation of the Draft of the Constitutional Act on the Rights of National Minorities) of 21 November 2002[92] in regard to the right of national minorities to representation in the Croatian Parliament was that 'the manner of exercising this right, including the possibility of recognising the special right for persons belonging to national minorities to elect their representatives (dual vote right), will be regulated by the law which regulates the elections of representatives into the Croatian Parliament'.[93] Invitation to resolve several important issues by electoral legislation, including the matter of supplementary voting right for national minority members, was repeated by the Venice Commission in its Opinion No. 216/2002 on the Constitutional Law on the Rights of National Minorities in Croatia of 25 March 2003.[94]

4. Conclusion

In this paper after attempting to give a manifold understanding of constitutional dialogue we focused on the dialogic interaction mainly between constitutional courts and the legislative powers both in Hungary and Croatia, and another dialogue that could be experienced between state power and the Venice Commission in both countries. Each dialogue was about to find a (proper) meaning of constitutions

enjoy necessary support and protection, including statutory measures for the benefit of national minorities'), allow for the interpretation that minorities are permitted dual voting rights.

[92] Response of the Government of the Republic of Croatia to the Venice Commission's Opinion on the Draft Law on the Rights of National Minorities, Opinion no. 216/2002, Strasbourg, 3 December 2002.

[93] Recalling the above analysed case of the Constitutional Court related to acknowledging the supplementary voting right to members of national minorities (point 3.2.), we can observe that the recent parliamentary elections were implemented without 'consummating' the said right.

[94] Opinion no. 216/2002 on the Constitutional Law on the Rights of National Minorities in Croatia, adopted by the Venice Commission at its 54th Plenary Session, Venice 14-15 March 2003.

concerning constitution making or legislative processes which intended to unfold in details the constitutional provisions.

Through this very brief overview on the Croatian constitutional dialogue, we come to the conclusion on the positive contribution of this relevant factor in the protection of democracy and the rule of law. The above conclusion applies particularly to the Croatian Constitutional Court, whose substantial number of decisions has actual contribution to protecting the Constitution, preserving democracy and the rule of law in Croatia. In the case of Hungary, however, we may conclude that the dialogic interactions may have had more positive effects – at least in the case of the utilization of the opinions of the Venice Commission – if the Hungarian state power had been more attentive and sensible to rule of law and democracy matters and concerns. The same applies to the functioning of the constitution changing power setting aside the well-reasoned and rule of law-based decision of the Constitutional Court and the constitution making power that was negligent in using substantial democratic decision-making standards in the course of preparing and adoption the new Fundamental Law of Hungary.

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Local self-governments in Hungary and in Croatia

I. Regulations in the Fundamental Law concerning local self-governments

1. The significance of the (old) transformed Constitution – from the perspective of local self-governments

In 1990, the establishment of local self-governments was of great importance in the history of Hungary: the half century old name of state administration system changed (from state administration to public administration), its uniform system was extended with a new subsystem (with the administrative subsystem of local self-governments), new organisation principles were introduced (e.g. real decentralisation, autonomy) and certain operational principles lost their significance (e.g. state guidance), while others became re-valued (e.g. the principle of legality). '*The most important legislative task of these months and of this year is framing the law of self-governments and having local elections.*' – said former Prime Minister József Antall, in the Parliament on 22 May 1990, and the last twenty years may have seemed to prove him right.[1]

Local communities – following the full revision of the Act XX of 1949, the Constitution of the Republic of Hungary (hereinafter Constitution) – gained independence, and they achieved the constitutional basic right to regulate and conduct – within the framework of the law – their local public affairs by themselves.[2] Autonomy created the possibility for local

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[1] The government programme of József Antall, delivered in the fifth session of the national assembly of 1990-1994 in 22 May 1990. Kiss Péter (szerk.): *Magyar Kormányprogramok. 1867-2002. 2. kötet. 1945-2002* (Budapest, Magyar Hivatalos Közlönykiadó 2004)

[2] *Act XX of 1949 the Constitution of the* Republic of Hungary Section 44/A. § (1) a); in effect until 1 January 2012.

interests and individualities to emerge as a result of legally correct proceedings and it allowed municipalities to attend their function and authority by themselves.[3] Besides, an economic independence was guaranteed by the Constitution.

Based on the provisions of the regime changing Constitution, a *fundamentally liberal* and a relatively *modern* locally governed institution system has evolved:

- the basic principles of European Charter of Local Self-government prevailed;
- democratic local authority could be exercised;
- the system gave way to self-regulating processes and to local legislation.[4]

A democratic mechanism developed – and this aspect has a highlighted significance from this study's point of view – in which 'centralisation for the sake of social aims can be considered to have general effects and for the sake for any other aims of public interest local self-governing (autonomy) can prevail'.[5]

The characteristics of the Hungarian local-self-government system, established the above mentioned way, originates from several sources: from Hungarian self-governing traditions, from the former Soviet type institutions of public administration, which were proper within the framework of the rule of law, as well as from West-European (specially South-German) local self-government systems. These are the basics, where modern Hungarian self-governing structures have sprung from.

Hungarian local self-governance stands on two pillars: local authorities (settlement) and county authorities (territorial). The duties of self-governing (and their financing) are concentrated at local authorities. County authorities have been searching their role in Hungarian municipal governing since 1990.

Although self-governing duties have dual characters, one can find services as well as official tasks (based on executive power), but it is indisputable that local self-governments are the providers of certain

[3] Laurence J. O'Toole, Jr. 'Local public administrative challenges in post-socialist Hungary', 2 *International Review of Administrative Sciences* (1994).

[4] Cf. Szabó Lajos, 'Az önkormányzati igazgatás korszerűsítése a gyakorlati igények tükrében' in Csefkó Ferenc and Pálné Kovács Ilona, szerk., *Tények és vélemények a helyi önkormányzatokról* (Budapest – Pécs, Dialóg Campus Kiadó 1993).

[5] Tamás András, *A közigazgatási jog elmélete* (Budapest, Szent István Társulat 1997).

local public services, municipal organs rarely participate in practicing local executive power.
On the one hand, the last two decades have proven that local goals and purposes, cooperation, mutual will, local patriotism and local identity can reach significant results, renewal and the preservation of values. On the other, it has become more and more obvious that the municipal system has been burdened by inconsistency. As a result of the continuously shrinking state contribution and the economic crisis it has become obvious that the system is non-sustainable and it is unjust from many aspects.[6]

2. General regulations of the new constitution concerning local self-governments

The Hungarian Government presented the (new) Fundamental Law (hereinafter Fund. Law) to the Parliament on 14 March 2011, which was passed by the Hungarian Parliament on 18 April 2011 and was signed by the President of the Republic of Hungary on 25 April. Before examining the regulations of the Fundamental Law that concerns local self-governments, coming into effect on 1 January 2012, let me put some remarks in advance.
The common feature of the modern European constitutions is that they pay special attention to the guarantees of the predominance and enforcement of constitutional institutions and to the protection of the constitution. Without these guarantees the constitution deteriorates to the collection of slogans and declarations. If the conditions required for the fulfilment of the aims, duties and responsibilities set out are not provided, the implementation is endangered.
Professional opinions differ concerning including the principles of state administration (within this, public administration) in the Constitution, or more specifically if it is justified to include them therein. Regulatory solutions vary. Some of the European constitutions contain basic principles on state administration, some of them do not. Within the Hungarian circumstances, the basic character of centralisation and decentralisation should have been detailed in the Fundamental Law. (Some constitutions go way further, for example the formulation of the

[6] Zongor Gábor, 'Húsz év után, változások előtt' in Kákai László, szerk., *20 évesek az önkormányzatok. Születésnap, vagy halotti tor?* (Pécs, Publikon 2010)

principles of subsidiarity or self-governing autonomy in the constitution.)

The Constitution is in effect until 1 January 2010 – within the international context – dealt with local governments in detail, in this respect it is (also) similar to the new Fundamental Law. (Altogether five articles and twenty-three paragraphs deal with local self-governments). Let us take a closer look at the provisions of the Fundamental Law that have changed compared to the previous one instead of studying the provisions of the Constitution concerning local self-governments.

The *territorial structure of Hungary* is detailed in the F. article of the *Basic Stipulations* of the Fundamental Law. Highlighting this from the regulations of local self-governments is not without an example; this cannot be considered as an unusual solution. The above mentioned article has two paragraphs: *(1) The capital of Hungary is Budapest. (2) The territory of Hungary shall be divided into counties, cities and municipalities. Districts may be formed in cities.*

This provision gives the semblance of endeavouring alteration at any price, since the latter enumeration leaves out the capital, which may make believe to a 'two Hungary' syndrome. (As if the Fundamental Law legitimated that the capital and the country can have different political and legal judgement.) A more significant change is that – different from the Constitution – the Fundamental Law does not mention the districts of the capital, as a settlement type (which is endowed with the power of self-governing rights).

Under the title of *public authority*, one can find the rules concerning local governments. The fact, that there are four references in this chapter to the so called cardinal law[7] with 'constitutional force' to be created later which will contain detailed rules and regulations concerning local self-governments, indicates that significant provisions will be formulated in the detailed laws.

This, however, does not prevent us from feeling the lack of something. For one thing, the indefiniteness of the subject of local self-governance causes vagueness. Since the territorial structure of the country and the rules of local self-governance have been divided in the Fundamental Law, we only know for certain that *'In Hungary local governments shall function for the administration of local public affairs and the exercise of*

[7] Cardinal Act shall mean an Act for the adoption or amendment of which the votes of two thirds of the Members of Parliament present shall be required. Fund. Law Article T)(4).

local public authority' and that fundamental rules are defined by cardinal law. [Fund. Law, Article 31(1)]

Thus we should wait until we see weather each settlement (village, town, city) would elect its own independent general assembly, and how the presently 'two-levelled' (including the capital as a whole as well as the twenty-three district self-governments) and strongly segmented municipal structure of the capital will be formed.

In the Fundamental Law – as opposed to the former Constitution – there is no reference to the content of the local self-governing, to local autonomy, and to the constitutional right of local self-governing which is a basic right of the voter. Of course local voters can continue taking part directly and indirectly in practicing local public authority. In the chapter *Freedoms and Responsibilities*, it says regarding this: 'All those entitled to vote in mayoral and local government elections shall have the right to vote in local referenda'. [Fund. Law, Article XXI(4)]

3. Scope of duties and authority of local self-governments [Fund. Law, Article 32]

The Fundamental Law declares that

(1) Local government shall with a view to managing local public affairs within the frameworks defined in law:

a) issue decrees,
b) make resolutions;
c) perform individual administration,
d) define its own organization and rules of procedure,
e) exercise proprietary rights with respect to local government assets,
f) establish its own budget and manage it independently,
g) independently manage local government assets and revenues and, without endangering its mandatory obligations, undertake entrepreneurial activities,
h) determine the types and rates of local taxes,
i) create symbols and emblems of local government, and establish local honours and titles,
j) may request information from authorities with jurisdiction, initiate a decision, articulate an opinion,
k) freely associate with other local representative bodies, may create local government associations for the representation of their interests, may co-operate with the local governments of other countries and may be a member of international organizations of local governments, and
l) may exercise other tasks and authority as set forth in law.

(2) A local government, acting within its remit, shall issue local government decrees in order to regulate local social relations not yet regulated by an Act and based on its authorization defined by an Act.
(3) Local government decrees may not be in conflict with other rules of law.
(4) The local government will send its resolution and the local government decree once published forthwith to the capital and county Government Office having jurisdiction. If the Government Office determines that the resolution or the local government decree or any of its decrees are contrary to the law, it may initiate a court review of the local government decree.
(5) The capital and county Government Office shall initiate at court the establishment of local self-government's neglect of its statutory legislative obligation. If such local self-government continues to neglect its statutory legislative obligation by the date determined by court's decision on the establishment of such neglect, the court shall order at the initiative of the capital and county Government Office, the head of the capital and county Government Office to adopt a local decree required for the remedy of the neglect in the name of the local self-government.
(6) The property of local governments shall be public property serving the performance of local government tasks.'

Comparing the text to the former regulation, it has minimal changes, the difference is almost negligible. The most important difference can be traced in the title of the article: instead of basic self-government rights, the above mentioned jurisdiction is named in the Fundamental Law as duties and the scope of authority of local governments, which name – as opposed to basic rights – undoubtedly better suits the features of a public authority body, such as a local government.
The content of point *k* is also unchanged. This is important, because the twenty years of the municipal lobby, which evolved on the basis of this point, illustrates the difficulties of the relation between the state government and self-governments, which was specially apprehensible in the reconciliations (or in omitting these reconciliations) concerning those parts of this year's approbation bill, which detailed the financing of self-governments.
Taking a look at the situation in Europe, one can see similar processes, in regard that besides their significant service activities, a municipal lobby implementing definite goals in a stabile system, which shows cooperative abilities and typically seeks cooperation with the government.
Most of Western Europe's municipal lobbies are strong, that is they gained (got) such government appreciations, by which (adding to proper financing and professionalism) they can be significant power-restricting

factors or at least they are equal to other organisations of interest spheres. They play important roles in central decisions, in influencing these decisions, in the complex system of society's reconciliations of interests in Western Europe, especially in Germany.[8] The Hungarian lobbies have never had such power-restricting roles for the last twenty years.

The Constitution contained only the following about issuing decrees: 'Local representative bodies may issue decrees, which may not conflict with legal statutes of a superior order'. [Section 44/A (2)] This rule was the widest and most general statutory authorisation concerning Hungarian self-government legislation, in addition to which it indicated the boundaries of municipal legislative autonomy as well,[9] *but it did not mention local legislation based on statutory authorisation.* The Fundamental Law has corrected this serious deficiency. The local government will send its resolution and the local government decree once published forthwith to the capital and county Government Office having jurisdiction. If the Government Office determines that the resolution or the local government decree or any of its decrees are contrary to the law, it may initiate a court review of the local government decree. [Fund. Law, Article 32 (4)]

The intervention possibility provided by this paragraph is far from modern surveillance methods (e.g. consultation, appeal), which aim at the prevention of local self-governments' from violating the law. The primary goal of state surveillance is to provide lawful operation of self-governments. State organs must promote the task management of municipalities, while they strive for enforcing the constitutional principle of lawful administration.

Other goals of state surveillance are to counsel local municipalities in their task management, to support and protect local communities and to increase the sense of responsibility of municipal organs.

The latter paragraph differs from the former constitutional regulation in assigning the competence of judicial supervision concerning local governments' decrees to the High Court of Justice instead of the Constitutional Court.

[8] See more: Csefkó,Ferenc and Fábián, Adrián, 'Önkormányzati érdekvédelem Magyarországon' 2 *Közigazgatási Szemle* (2007) p. 52.

[9] Cf. Jakab András, 'A jogszabálytan főbb kérdéseiről' (Budapest, Unió 2003) p. 138.

It is also the High Court of Justice's competence to decide on local government's legislative obligation based on the Act on Local Governments and on the basis of this act to order the country (capital) Government Office to adopt the necessary local decree on behalf of the local self-government. [Fund. Law, Article 32 (5)] This new "decree-substitution" right of the Government Office is by all means to be considered a strong surveillance competence.

4. The organs of local government [Fund. Law, Article 33]

On the organs of local government we find:

(1) The tasks and competences of a local government shall be performed and exercised by a body of representatives.
(2) Local representative bodies shall be governed by the mayor. The president of the county representative body shall be elected by the county representative body from its members for the term equal to the mandate of the representative body.
(3) The representative body may elect committees and set up its own local governmental office as laid down in a cardinal Act.

It can be stated that no significant changes took place in the organizational units of the local self-governments compared to the former Constitution, except for the fact that in the new Fundamental Law – as opposed to the former Constitution – the notary is not mentioned, thus this institution has lost its constitutional status. (Whether this change has further consequences is still uncertain until the framing of the new Local Government Act.)
The internal structure of the Hungarian municipalities is strikingly proportioned, it almost mirrors to scale the system of checks and balances. This means that based on the present statutory regulation, there are three organs in the focus of the municipal organisation and operation (body of representatives, the mayor and the notary), each of them in its own functions is irreplevisable, non-evadable and stabile as a result of legal regulation.

5. The functioning of local government [Fund. Law, Article 34]

On the functioning of local government we can read verbatim:

(1) Local governments and the State shall cooperate in order to achieve the aims of the community. Only an Act of Parliament may define mandatory tasks and competences for local governments. In order to perform their tasks and exercise their competences, local governments

shall be entitled to receive budgetary and other financial means proportionate thereto.

(2) An Act may prescribe that a mandatory task of a local government be performed within the framework of an association.

(3) Apart from local governmental tasks, the mayor and the president of a county representative body may also assume the tasks and competences of state administration in exceptional circumstances, on the basis of an Act of Parliament or of a Government Decree issued on the basis of authorization of an Act of Parliament.

(4) The Government shall ensure supervision of the lawfulness of the functioning of local governments through the Capital and County Offices of the Government.

(5) In order to preserve the balance of their budget, an Act of Parliament may prescribe that if a local government plans to contract a debt above a level defined by an Act of Parliament or to undertake any other commitment, it shall obtain the approval of the Capital or County Office of the Government.

It is entirely inevitable that when defining local governments the legislator bid farewell to the natural law like approaches. The clue is that the modern (local) government is part of the state, and that self-governing is traceable to several theoretical starting points.

- According to the French, local (governmental) authority is an independent part of state authority, it is the opposite pole of centralisation.
- According to the classic German approach, through directly elected bodies, the civilians can be involved in state affairs.
- According to the English 'local government' thesis there is no opposing municipal authority opposing state authority, but the former is an intermediate form between the state and society, which responsibly and independently rules and governs (locally) within the framework of the law.[10]

Modern local self-governments, despite of the fact that they have autonomy, are clearly state self-governments, they are not independent from the state. True cooperation with central (state) organs is inevitable token of their operation. The importance of this is constitutionally appreciated in the new Fundamental Law.

Hungarian local self-governments are in a position today, that the number and the order of magnitude of their compulsory duties greatly

[10] Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland. Bd. 1.* (Munich, C.H. Beck Verlag 1984) pp. 398-399.

surpass their income, their state contribution in the first place. The result of this process is that the debt-stock of the local governments have reached an extent that nobody is able to calculate, since not only local budgets suffer deficit (which is visible), but the self-government-owned ventures also (the deficit of these are mostly invisible). Properly speaking, the central budget tries to keep its own deficit in check by shoving greater and greater part of it on to the system of local governments.

The regulation, which says 'local governments shall be entitled to receive budgetary and other financial means proportionate thereto in order to perform their tasks and exercise their competences', basically, preserves present conditions. The greatest plea against 'proportionate' is not that this term belongs to the so called indefinite legal notions, but that it does not provide any guarantees on the merits for local governments. Deformed proportions, more precisely the disproportionateness from the self-governments' point of view are against the concept of self-governing, they undermine its essence.

Institutionalising the mandatory local government association, making it possible to provide it by law clearly serves modernisation: the former governmental practice (bringing many problems) – for the sake of managing tasks effectively – tried to prevail on local authorities by budgetary-financial tools to attend tasks jointly. Based on the Fundamental Law, this can be implemented by provisions of the law as well.

State surveillance (control) of local governments has been a cardinal issue of the Hungarian self-governing system in the last twenty years. The characteristic of this system is the multitudes of *correction and control mechanisms* and *at the same time this is its weakness* and contingency. This is not about having too few – external and internal – organs (government office, public prosecutor, State Audit Office, local government committees, notary and auditor) for controlling the lawful management of public authorities, but about the fact that the correction power of these organs is insignificant.

In my view, the requirement of lawful operation of local authorities is just as an important basic principle as to respect their autonomy. These two demands of a constitutional state, which are preferably not inconsistent but complementary with each other, must be balanced. The emphasis and predominance, in Hungary at present, is expressly on autonomy and on its safeguarding.

I agree with authors, who urge to shift to the other direction. Géza *Kilényi* formulates his opinion on this issue and says 'it would not harm to realise that the Republic of Hungary is not a loose federation of 3200 sovereign local governments and that the local governments – however important they are to democracy – are parts of the state organisation'.[11]
'Strong supervision of lawfulness and financing', covering practical purposes, has significance from the viewpoint of effective cooperation of self-governments and public administration.[12]
From time to time the majority of special literature urged the reinforcement of legal control and its conversion to legal supervision due to theoretical reasons.[13] The minimal expansion of competence was considered to be achieved by temporary execution of allegedly unlawful decisions and by substation of neglected decisions by means of an inspection body. (Other authors argued for a more serious supervision competence expansion.)
In my view, many aspects of the role and significance of the state surveillance over the operation of Hungarian local self-governments should be strengthened. Not necessarily because of West European countries, where the authority of the state surveillance organs is wider than in Hungary, and not necessarily because the rate of unlawful local government decrees would be outstandingly high. Greater interference opportunity is needed in order to *re-dress* the relatively low rate of *unconstitutional decrees (and other decisions) faster and in accordance with the rule of the law principles.*
Based on the above mentioned antecedents, the codification of state surveillance in the Fundamental Law is hardly a surprise. However the 'implementation' cannot be passed unnoticed.
According to the argument of the Fundamental Law 'the guardians of local governments' lawful operation in harmony with the Fundamental

[11] Kilényi Géza, 'A közigazgatás törvényességének garancia-rendszere' [Guaranties of legality of administration], in Csefkó Ferenc, szerk., *Szamel Lajos Tudományos Emlékülés* (Pécs, A Jövő Közigazgatásáért Alapítvány 2000).
[12] Balázs István, 'A magyar közigazgatás és a törvényesség' [Hungarian administration and legality], in Csefkó Ferenc, szerk., *Szamel Lajos Tudományos Emlékülés* (Pécs, A Jövő Közigazgatásáért Alapítvány 2000) p. 169.
[13] Foreign professional literature has also called the attention to the weakness of the state surveillance over the Hungarian self-governments: Herbert Küpper, *Verwaltungsrecht im Erneuerungsprozess Osteuropas* (Berlin Verlag Berlin 2001) p. 212.

Law are the capital and county Government Offices, which also control the local governments' decree enactment besides traditional judicial supervision in order to ensure the proper quality of legislation'. It is distinctly visible that the legislator, sadly enough, used the notions of supervision and control as synonyms.

The other supervision competence mentioned in the Fundamental Law is also debatable: *'In order to preserve the balance of their budget, an Act of Parliament may prescribe that if a local government plans to contract a debt above a level defined by an Act of Parliament or to undertake any other commitment, it shall obtain the approval of the Capital or County Office of the Government'*. [Article 34(5)]

The above mentioned provision is also a new element of the Hungarian constitutional law. Its goal is obvious: to prevent further indebtedness of local governments, which is so huge today that it imperils budget equilibrium, by the means of state supervision. (Regulatory enactments restrict the possibility of local governments' borrowings, yet these restrictions are easily evaded, that is why they have not fulfilled the expectations.)

Studying the issue from another angle, it is clear that local governments' borrowings less and less cover the financing of investments and developments, but they are assigned more to finance operation and attendance of compulsory tasks and duties. It is obvious that local governments' deficit arises traditionally, because the state contribution and their own incomes are insufficient to cover the financing of compulsory tasks and to provide local community services.

The new Fundamental Law has not solved the problem of financing. It is institutionalising a means with doubtful impacts, which strongly restricts the local administration autonomy. One must add that the impact of this rule is also violated by its lateness: financial institutions – aware of the huge problems of local governments' property management and financing –are less willing to finance local governments' operation independently from the consent or refusal of the supervising state organ (Government Office) on the borrowing.

6. The mandate of local governments [Fund. Law, Article 35.]

The mandate of local governments is an entirely new Article; it was not included in the former Constitution:

(1) Local government representatives and mayors shall be elected by direct and secret ballot by constituents with voting rights, based on

their universal and equal right to vote, in elections ensuring the free expression of the will of the voters, in the manner laid down in a cardinal Act.

(2) Local government representatives and mayors shall be elected for a term of five years as laid down in a cardinal Act.

(3) The mandate of the local representative body shall last until the day of the general local government elections. If elections cannot be held due to a lack of candidates, the mandate of the local representative body shall be extended until a by-election can take place. The mandate of an incumbent mayor shall last until the election of a new mayor.

(4) A local representative body may declare its dissolution in accordance with the conditions laid down in a cardinal Act.

(5) At the submission of a motion of the Government made following its request for an opinion of the Constitutional Court, the Parliament shall dissolve the representative body functioning contrary to the Fundamental Law.

(6) Upon dissolution of a local representative body, the mandate of the mayor shall also end.

The above mentioned provisions were regulated in different Acts. Their fundamental content has not been changed by raising them to constitutional level, except for lengthening the term of local government representatives and mayors from four to five years.

7. Conclusion

There was a provision in the regime changing Constitution, which stated that *'[t]he lawful exercise of the powers of local government is granted legal protection of the courts and any local government may appeal to the Constitutional Court for the protection of its rights'.* [Article 43(2)] This provision was omitted from the new Fundamental Law; there is no indication of constitutional protection regarding local self-governments.

This change, together with the above mentioned, explains well: the constitutional character of Hungarian local self-governments has radically changed in spite of the fact that the constitutional text on local self-governments has remained unchanged in the new Fundamental Law compared to the former Constitution.

The terminology of the former Constitution recalled the atmosphere of the 1989-1990 regime change: the central governing of settlement councils had been changed to local governing. Independence and wide scope of local autonomy were expressed in the Constitution. This manifested in the fact that local governing was approached as a

collective fundamental right of the community of local voters and the functions of local representative bodies were defined as basic rights.
The Fundamental Law seems to break with this approach, and expressly takes the stand on that local governments are institutions within the state, they are local administrative organs, which do not run counter to the state, but they are organic parts of it and they strengthen democratic legitimacy. A local government is not an 'anti-state' institution organised on a social basis, but it is an *autonomous administrative form relieving the state by decentralisation*, legitimated by the principle of democracy and by vertical function and authority sharing, in order to attend local affairs for own responsibility.[14]
The Hungarian constitution does not define the essence of local governing as the subject of special basic rights anymore or as the realization of local national sovereignty, but (based on German examples) as a constitutional (institutional) guarantee, based on which Hungarian local self-governments must exist and operate. The necessary legislative and financial conditions for the actual realisation of these guarantees must be provided by the Hungarian state. This constitutional basis is much closer to Western European standards and constitutional solutions than the former, but it also breaks with the centuries-old Hungarian public law traditions.

II. System of local self-government in the Republic of Croatia

1. Constitutional provisions on local self-government

The Constitution for the Republic of Croatia[15] (further: Constitution) in Article 4 paragraph 1 determines: 'In the Republic of Croatia government shall be organized on the principle of separation of powers into the legislative, executive and judicial branches, but also limited by the constitutionally-guaranteed right to local and regional self-government.' Accordingly, Organisation of government is stipulated (under IV, Article 70-125), separated from Community-level, local and regional self-government (under VI., Article 133-138).
The Constitution guarantees citizens the right to local and regional self-government. The right to local and regional self-government shall be exercised through local and/or regional representative bodies, composed of members elected in free elections by secret ballot on the grounds of

[14] Cf. Stern, op. cit n. 10. at p. 405.
[15] *Official Gazette* 85/10., consolidated text.

direct, equal and general suffrage. But citizens may directly participate in the administration of local affairs, through meetings, referenda and other forms of direct decision-making, in compliance with law and local ordinances (Article 133, para 1-3).

The Constitution determines the substance of the right to local and regional self-government. The right to local self-government includes affairs of local jurisdiction, by which the needs of citizens are directly fulfilled, and in particular affairs related to the organization of localities and housing, zoning and urban planning, public utilities, child care, social welfare, primary health services, education and primary schools, culture, physical education and sports, customer protection, protection and improvement of the environment, fire protection and civil defence. The right to regional self-government includes affairs of regional significance, and in particular affairs related to education, public health, zoning and urban planning, economic development, transportation and transportation infrastructure and the development of the network of educational, health, social and cultural institutions (Article 135 para 1 and 2).

Municipalities and towns shall be units of local self-government and their territories shall be determined in the manner prescribed by law. Other units of local self-government may be provided by law (Article 133 para 1).

Counties shall be units of regional self-government. The territory of a county shall be determined in the manner prescribed by law. The capital city of Zagreb may be granted the status of a county by law.[16] But larger cities in the Republic of Croatia may also be given the authority of a county by law (Article 134 para 1-3).

Affairs falling within the purview of local and regional self-government shall be regulated by law, therewith in administering the affairs within their jurisdiction, units of local and regional self-government shall be autonomous and subject only to the review of the constitutionality and legality by the authorized national governmental bodies. Units of local and regional self-government shall have the right, within the limits provided by law, to autonomously regulate, through their charters, the internal organization and jurisdiction of their bodies and adapt them to local needs and capacities (Article 135 para 3, 136 and 137).

[16] According to Article 13 of the Constitution, the status, jurisdiction and organization of the capital city Zagreb shall be regulated by law.

The Constitution, in Article 137, particularly provides that units of local and regional self-government shall be entitled to their own revenues and to dispose of them freely in the performance of the tasks under their purview; revenues of local and regional units of self-government shall be proportional to their powers as envisaged by the Constitution and law.
The Constitution also provides that forms of community-level self-government may be established in a community or any part thereof (Article 134 para 4).

2. Local self-government as regulated by law

The Croatian system of local and regional self-government is regulated by Law on local and regional self-government from year 2001.[17] (hereinafter: LLRSG) as general law. Local self-government is also regulated by other laws, from which the Law on counties, towns and municipalities,[18] Law on the City of Zagreb [19] will be highlighted.
Pursuant to the Constitution, LLRSG provides that the units of local self-government are municipalities and towns, and the units of regional self-government are counties (Article 3 para 1 and 2).
The municipality is a unit of local self-government, which is founded, as a rule, for the territory of several inhabited places representing a natural, economic and social whole, and which is connected by common interests of the inhabitants (Article 4 LLRSG).
The town is a unit of local self-government where the seat of the county is located, as well as any other place with more than 10,000 inhabitants, and which represents an urban, historical, natural, economic and social whole. The town as a local self-government unit can include the surrounding settlements that together with the urban settlement make up an economic and social whole and are connected with it through the movements of daily migration and everyday needs of the inhabitants of local importance (Article 5 para 1 LLRSG). Exceptionally, in case of special reasons (historical, economic, geographic and transit), a place that does not meet the abovementioned conditions may be declared a town (Article 5 para 2 LLRSG). The large town is a local self-government unit that is also economic, financial, cultural, medical,

[17] *Official Gazette* 33/01., 60/01., 129/05., 109/07., 125/08., 36/09., 150/11.
[18] *Official Gazette* 86/06., 125/06., 16/07., 95/08., 46/10., 145/10.
[19] *Official Gazette* 62/01., 125/08., 36/09.

transport and scientific centre of development of broader area with more than 35,000 inhabitants (Article 19a para 1 LLRSG).

The county is a unit of regional self-government whose territory represents a natural, historical, transit, economic, social and self-governmental whole, and it is organized for the purpose of performing tasks of regional interest (Article 6 LLRSG).

Pursuant to the Constitution, LLRSG provides that the territory of a municipality, town and county is regulated by a special law, but prior to any change in the territory of a local and regional self-government unit the opinion of the inhabitants of that area will be required (Article 7 LLRSG).

Municipality, town and county are legal entities and they have a statute (Article 8 and 9 LLRSG).

Municipalities and towns in their self-governmental scope perform the tasks of local importance, which directly address the needs of the citizens, and which are not assigned to state bodies by the Constitution or by law, and especially the tasks referring to organization of settlements and housing, town and urban planning, utility services, child-care, social welfare, primary health protection, education and primary-school education, culture, physical culture and sports, consumer protection, protection and improvement of natural environment, fire-protection and civil defence, and other specific activities regulated by special laws (Article 19 para 1 LLRSG).

Large towns, i.e. towns with more than 35,000 inhabitants, as well as towns that are centres of the counties, also perform the tasks of maintaining public roads, issuing building and location permits and other acts related to building, the implementation of documents for urban planning, and they are permitted in their territory to perform the tasks from the competence of the county (Article 19a para 2 LLRSG).

The county in its self-governmental scope performs the tasks of regional importance, and especially the tasks which refer to education, medical care, town and urban planning, economic development, transit and traffic infrastructure, planning and development of the network of educational, medical, social and cultural institutions, issuing building and location permits and other acts related to building, implementation of documents for urban planning for the territory of the county but outside the territory of large towns, and other specific activities regulated by special laws (Article 20 para 1 LLRSG).

The tasks of the government administration performed in the unit of local self-government and in the unit of regional self-government are established by special law. The costs of performing these tasks are covered from the state budget (Article 23 para 1 and 2 LLRSG).
The Provision of Article 22 LLRSG provides, with certain conditions, the possibility of transfer of certain tasks from the self-governmental scope onto the county or the local self-government, and the possibility of transfer of certain tasks from the county scope to the onto self-government units in the territory of the county.
The municipal council, town council and county assembly are representative bodies of citizens in the units of local and regional self-government (Article 27 to 38 LLRSG). Executive body in a municipality is the municipal prefect, in a town the mayor, and in a county the county prefect (Article 39 to 44, 48 LLRSG). The municipal prefect, mayor and county prefect are directly-elected by the citizens according to the special law.[20]
For the performance of tasks from the self-governmental scope of the units of local and regional self-government as well as the tasks of state administration transferred to those units, administrative departments and services (administrative bodies) are set up, so that in the municipalities and towns with less than 3,000 inhabitants a single administrative department is established for the performance of all tasks from their self-governmental scope. Two or more units of local self-government, especially those territorially connected (municipalities and towns on an island etc.), can jointly organize the performance of specific tasks from their self-governmental scope with special agreement in accordance with law and their statutes and general by-laws (Article 53 para 1 and 2, Article 54 LLRSG). The administrative bodies are run by heads of offices appointed by municipal prefect, mayor or county perfect after an open competition (Article 53a para 1 LLRSG). Representatives of national minority, pursuant to the Constitutional law on the rights of national minorities,[21] are entitled to proportional representation in the executive and administrative bodies of the units of local and regional self-government (Article 56a para 1 LLRSG).
The local self-government consists of the local committee, which is set up for a settlement, several inter-connected smaller settlements or for a

[20] Law on elections of municipal perfects, mayors, county perfects and mayor for the City of Zagreb, *Official Gazette* 109/07, 125/0
[21] *Official Gazette* 155/02.

part of a bigger settlement or town which, in relation to other parts makes up a special separate unit (a part of the settlement). The local committee is a form of direct participation of citizens in decision-making about local tasks of direct and everyday influence on the life and work of citizens (Article 57 LLRSG). But, the statute of a municipality or town can assign certain tasks from the self-governmental scope of a municipality or town to the local committee to perform, which have direct and everyday influence on the life and work of the citizens on the territory of the local committee (Article 60 LLRSG). The bodies of the local committee are the council of the local committee, of which members are directly-elected by secret ballot by the citizens for a period of 4 years from the territory of the local committee who have the right to vote, and the president of the council of the local committee, who is elected among its members by secret ballot, also for a period of 4 years (Article 61 LLRSG).

Funding the units of self-government – local and regional, is stipulated in Articles 68 to 72 LLRSG. One of those provisions determines the revenues of the unit of local and regional self-government (Article 68 Paragraph 3 LLRSG).

3. Basic data about units of local and regional self-government

Pursuant to valid constitutional and law provisions, in the Republic of Croatia today 429 municipalities exists with an average of 3,145 inhabitants, 126 towns with an average of 18,328 inhabitants, 20 counties with an average of 182,916 inhabitants, and the City of Zagreb with both status – county and town. Counties with the City of Zagreb have average of 211,308 inhabitants.[22]

According to administrative law specialists, local self-government in the Republic of Croatia is very complex (because of the two-instance structure, municipalities and towns as first, and county as second instance), unstable (because of the permanent increase of the number of municipalities and towns, especially towns because of special reasons), unbalanced (because of major differences in size and number of inhabitants in particular towns and municipalities), ineffective and not high quality enough.[23]

[22] See Ivan Koprić, 'Stanje lokalne samouprave u Hrvatskoj', *Hrvatska javna uprava* No. 3/10. p. 668 and further.

[23] See Ivan Koprić, 'Karakteristike lokalne samouprave u Hrvatskoj', *Hrvatska javna uprava* No. 2/10. p. 372 and further.

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Fairness and equity regarding personal income tax systems

The analysis of the rule of fairness in tax law should begin with the definition of fairness itself. The concept of fairness – like Takács points out – alludes to the social, legal, political order, which we collate with extant relations, often with a critical aim. That contains such ethical principles and rules, which could accede to form the correct order of human coexistence**.** In relation to tax law – according to Gábor Földes – this means that we should locate the tax burdens to the members of society, fairly and in consideration of their tax ability.[1] It should also be noted that both the mentioned author and a significant part of the literature accent that fairness is a multiple meaning concept, which can materialize in many ways. József Petrétei formulates in general: 'Fairness applies in each case like a requirement for the positive law, for the acts, like a requirement that prevails the positive right, as a higher-level requirement. Therefore the statutory regulations shall be formed according to the principle of measure and compensatory fairness'.[2] However, this statement is formulated differently by different ages and different law schools. The actually established legal standards represent, according to change of perspective, justice and injustice at once. In the modern state every tax and its elements are brought into the system by means of law. Accordingly, the fairness of any tax system is determined by the legislator. Financial theory has the concept of fairness interpreted in accordance with two principles: principle of usefulness, and principle of tax power. These principles are used by economists in their attempt of the justification and realisation of the rational tax system. The proportional layout of tax burden (in accordance with individual tax power) derives from complete tax system. Certainly, the most important role goes to taxation of employment income, which also encloses other

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[1] Földes G., szerk., *Pénzügyi jog I* [Financial law I.] (Budapest, KJK 1997) pp. 59-62.
[2] Kiss L. – Petrétei J., *A törvényhozástan alapvonásai* [*The basic features of the study of legislation*] (Pécs, JPTE ÁJK 1996) p. 104.

types of income, as well as an answer to which part of income is to be spent and which part is to be spared. According to representatives of the positivist school, no pieces of law can be unjust.[3] According to Hans Kelsen, the raise of the question of fairness is meaningless.[4] According to a representative of the Scandinavian realism, Alf Ross, referring to the truth is nothing, but slamming on the table, no rational debate can be expected with a person who refers to the truth. Contrary to these opinions, some principles of taxation as the minimum conditions of tax law may be established as the result of social consensus, as the burden sharing, the subsistence level tax exemption,[5] the personal privileges as tax barriers. Of these, Gábor Földes draws the attention to the subsistence level tax exemption,[6] which is the guarantee of the safety[7] of the individual's existence. In such cases the state gives up its taxation rights, because according to the aspects of fairness and equity, 'the individual cannot be expected to contribute to public expenditure in case his livelihood is threatened, public interest may not precede the basic requirements for life support'.[8] The Croatian positive tax system is justified by Article 51 of the Constitution, which states that everyone must participate in the settlement of public expenses in accordance with their capabilities, and that the tax system is based on the principles of fairness and equality.

One of the problems of the perception of fairness in taxation is that the individual has to come across with the fact that tax payment shall not acquire any direct right to compensation. The individual cannot claim additional rights – for example more financial support or certain privileges – for a greater amount of tax payment or for higher contribution to revenues than other persons.[9] The counter-service

[3] T. Hobbes, *Leviatán* [The Leviatan] (Budapest, Magyar Helikon 1970) p. 293.
[4] H. Kelsen, *Tiszta jogtan* [Pure Theory of Law] (Budapest, Bibó Szakkollégium 1988) pp. 7-9.
[5] See in more detail: Ercsey Zs., 'A létminimum adómentessége Magyarországon' [Tax Exemption for the minimum os substistance in Hungary], 2 *JURA* (2011) pp. 36-45.
[6] Földes G., *Pénzügyi alkotmányosság* [Financial Constitutionalism], 1 *Társadalmi szemle* (1996) p. 65.
[7] See more about safety: Bencsik A., 'Békéltető testületek a fogyasztói jogérvényesítésben' [Arbitration in Consumer Enforcement], in Ádám A., szerk., *PhD tanulmányok 10.* (Pécs, PTE ÁJK Doktori Iskola 2011) pp. 33-34.
[8] Földes, loc. cit. n. 6, at p. 65.
[9] Földes, loc. cit. n. 6, at p. 65.

received from the state for tax payment is indirect and shifts in time, however the taxpayer senses his obligation to pay promptly and fully, while the public goods only later, sometimes not at all realized by him. This image is overshadowed by Spicer's and Becker's research.[10] These show that the individual is able to assess more global tax relations and in his individual tax decisions the perception of individual judgement and injustice is extended to the entire tax system regarding the opinion on fairness and on the ideas of the others' honesty and activities of governments – as Triest and Scheffrin sum up the experiences of these researches.[11] It can be established based on the results of these researches, showed during their analysis that in the compliance the moral of paying taxes may be more important than the perception of injustice, so the status of social moral directly affects the individual moral ethics.

This approach – as it may seem – ignores the fact that the moral attitude of taxpayers also occurs as the result of several factors, so the perception of justice is an effect, not the cause. An important principle of fair taxation is the fair and proportionate burden. According to the author of an article of Encyclopedia of Economics published in 1900, a fair tax system is a prerequisite for a just criminal law duty.

Perhaps it is even more important, what Brickman called 'macro truth' and defined as the righteousness of society distribution. The taxpayer – he wrote – can appraise by different criteria, whether the social distribution is righteous. One of such factors may be the principle of social utility, thus the attempt that the tax is collected only to cover the needed amount of public goods, but not more than absolutely necessary. In this regard he aims the establishment of the same position of social strata. According to the German author, Kurt Miehler, the tax laws shall be enacted according to the principles of justice and equity, and the taxation shall be adjusted not to the needs of state bureaucracy, but the payment capacity of the taxpayers. He believes that „the citizens will be willing to fulfil the obligations imposed on them by law, if they are convinced that their contribution to the community expressed a fair amount.[12] The taxpayer, who is inherently selfish, considers his

[10] M. W. Spicer and L. A. Becker, 'Fiscal Inequity and Tax Evasion' 2 *National Tax Journal* (1980) pp. 171-176.

[11] S. M. Sheffrin and R. K. Triest, 'Can Brute Deterrence Backfire?', in A. Arbor ed., *Why People pay taxes?* (Michigan, University of Michigan 1992) pp.

[12] Földes, loc. cit. n 6, at p. 65.

participation in the tax payment process, which is not necessarily advantageous for him, but someone else will benefit thereof. However, the taxpayers identify not only the role of their own and other groups, but the government's as well.

Yankelovich, Shelly and White's research has shown – says Spicer – that amongst the American taxpayers it is a widely accepted notion that people would cheat on their taxes because they believe that the tax system is not fair. Much research had confirmed that the supporting attitude towards tax evasion is in correlation with how unfair they feel the taxation is. However, the perception of injustice, as a factor influencing the law abiding of citizens is strongly dependent on the power of motivating factors. The injustice of the tax system primarily influenced those, who had less fear of social stigma and legal sanctions due to failure associated with tax evasion. The Hungarian-born Anthony de Jasay says in his work called 'The State' that it can always be said about one group that they benefit well from something at the expense of another group.[13] Possibly those who are wealthy and actually pay their taxes are not members of such groups. The process of production of public funding, namely redistribution, interferes with the social justice already before taxes, so 'the government can be on the side of the masses against the few and on the side of the poor against the rich on the grounds that this balances the overall happiness or so to say social justice'.[14] This recognition will not rouse those individuals and companies who pay more taxes to legal compliance, unless we assume that they subordinate their financial and other benefits derived from it in the interest of the happiness of the whole society.[15]

The taxpayers, however, not only recognise the roles and the positions of their group, but the government's as well. According to Carragata, '[t]hey have recognised that the government levies different tax liabilities and tax regulations for the different strata of society rather than specifying all the taxpayers as a single class'.[16] The need of horizontal and vertical equality of taxpayer groups demands the

[13] A. De Jasay, *Az állam* [The state] (Budapest, Osiris Kiadó 2002) p. 146.

[14] De Jasay, op. cit. n. 5, at p. 147.

[15] Cf. Ercsey Zs., 'A személyi jövedelemadó fejlődési irányai' [The Development Trends of the Personal Income Tax], in Ádám A., szerk., *PhD tanulmányok 10.* (Pécs, PTE ÁJK Doktori Iskolája 2011) pp. 189-191.

[16] J. Carragata, *The Economic and Compliance Consequences in Taxation* (Melbourne, 1998) p. 3.

requirement that those with the same performance – the same tax ability should pay the same amount of taxes.[17] However, governments often feel the urge to provide certain occupational, regional or other benefits, which can, in many aspects, affect the fairness of taxation. The motives of the governments can be laziness, the acknowledgement of the failure of the tax system, but they can also be motivated by the current political situation.[18] There is no doubt that this phenomenon is general. The Greek authors Mavraganis and Agapitos reported that the growing number of tax exemptions constantly undermines the sense of justice of Greek taxpayers that the government offers these only to certain social groups. 'This level of undermining the principle of equity proves the basis of tax evasion.' The 1995 fiscal exemptions cost 1,000 billion drachmas to the government. This means that certain groups in society pay less in taxes than others with a similar income level, merely because they managed to obtain tax privileges from the state. 'The loss of tax revenues is obviously paid by other tax payers. It is understandable that in this unjust situation, those who cannot take any tax benefits would choose tax evasion even if they had been honest, law-abiding citizens. Tax evasion is seen as a means of restoring equity.'[19]

M.M. Guevara in the Philippines represents a similar process. The income tax system is unfair – he says – because the tax situation of businesses and employees is radically different and there is also a big diversity in their tax burden. 'While the employees' average tax burden is 10.6 %, the entrepreneurs only pay 1.4%'[20], as Guevara recalls the exact data. The Croatian author of this paper points out that the tax on personal income is the instrument of tax policy, which (with its inevitable fiscal objective) has a much more important objective of a social nature-alleviate regressivity of VAT.

The Hungarian tax system has similar differences, e.g. the difference in the tax burden between the public employees – public servants and the

[17] J. Martinez-Vazquez and M. Rider et al., *Tax Reform in Russia* (Cheltenham, Edward Elgar Publishing Limited 2008) p. 101.

[18] Halász V. and Kecskés A., *Társaságok a tőzsdén* (Budapest, HVG Orac 2011) p. 205.

[19] A. Mavraganis, 'The Case of Greece Bulletin of IBFD' 12 *Tax Evasion* (1995).

[20] M.M. Guevara, *The underground economy in the Philippines* (Paper of IBDF, 1992) pp. 46-47.

flat rate taxpayer self-employers, and between the possibilities of cost description and tax depreciation.[21]

One can state that the tax incentives used in the tax systems essentially threaten the realization of justice, as they restructure the tax burden.[22] There is a constant pressure amongst legislators when it comes to choosing the different methods of justice validation and exercising the retributive justice. They have to decide on the merits (give everyone what they deserve), utility (give the most useful to the community), the needs (give everyone what they need), legitimacy (give what they have a right for) and on other adjustment, family and other value criterion. The common and predictable application of these is impossible, that is why it could be an attractive alternative to the government to give tax incentives, and ergo they should reduce the subjective elements of the tax system. A significant part of society, however, claims the benefits associated with their personal conditions. The solution could be a relatively objective and predictable tax system without discounts operated in parallel and having regard to another social, educational and welfare redistribution system.

The other major issue of fair taxation is the problem of the optimal tax system, in other words, the shaping of optimal tax burden. The majority of legislators set this goal, at least formally, since the formation of the tax system itself, but unfortunately in practice it might never had succeeded. Adam Smith and David Ricardo defined the basic principle of taxation – simple, inexpensive, convenient etc. – but the emerging legal structures usually did not allow it to prevail. The amplification of the withdrawal feature of taxation often prevailed, and neitherthe Hungarian nor the foreign practice did consider this a specific character within approach, which was also represented by one of Hungary's first prime ministers, Bertalan Szemere. In one of his speeches in front of Hungarian Parliament in 1848 he said: 'I personally do not want a good tax system, but more taxes at any cost'.[23] It could often be observed that

[21] See Ercsey, loc. cit. n. 15, at p. 200.

[22] Cf. Ercsey Zs., 'A személyi jövedelemadó és az igazságosság egyes kérdései' [Some Issues of personal Income Tax and Fairness], in Bencsik A., et al., szerk., *Jogász doktoranduszok I. pécsi találkozója. Tanulmánykötet* [The First Conference of the Law PhD students in Pécs – Essay Book] (Pécs, PTE ÁJK Doktori Iskolája 2011) p. 309.

[23] Berend I. T. – Szuhay M., *A tőkés gazdaság története Magyarországon 1848-1919 között* [The History of the Capitalist Economy in Hungary between 1848-1919] (Budapest, Kossuth Kiadó 1975) p. 23.

the governments only took the nature of revenue into consideration and they did not adjust tax revenues to taxpayers' potential, but rather to the needs of the government. This could be – without doubt – a standpoint of taxation, but not exclusively and only besides the consensus of public goals.[24] The optimal tax system, in contrast with this, can be defined as a constant search of equilibrium, which has a legitimate and recognized public interest in its focus.[25] However, the exact definition is impossible according to the majority of the authors of this topic. Consequently, taxation should mean the lowest acceptable limit in property, for the most necessary public purposes with the utmost acceptable fiscal management rigor. The lack of common consciousness is obvious regarding the principles of fair income taxation. Almost certainly there will be some with the opinion that proportional tax is fair, while progressive taxes are unfair'.[26] (After all, the more the income, the more it takes away, merely because it is larger and punishes those with an additional performance.) Others, in contrast, consider progressive taxes fair (as it may help the disadvantage to catch up and promote social justice) and they find proportional tax unfair (since those with a higher income get a greater proportion of the benefits of public service). This point of view is arguable, because there is no direct correlation between taxes and the government's redistribution and also as we mentioned above, citizens are able to think at the macro level, on the level of total contribution – overall service. Progressive taxation rests on the fact, that a person who realizes higher income should pay higher tax. On the other hand, a person who earns a smaller income should pay smaller tax. That means that persons with different economic strength should pay different amounts of tax. This is called vertical tax fairness.[27]

[24] Cf. M.T. Crowe, *The Moral Obligation Of Paying Just Taxes* (Washington, D.C., The Catholic University of America Press 1944) p. 5.

[25] Cf. C. Colin, 'A közszolgálat és demokratikus elszámoltatás' [The Public Service and Democratic Accountability], in *Közszolgálat és etika* [Public Service and Ethics] (Budapest, Helikon Kiadó 1997)

[26] Cf. H. Vording and O. Ydema, 'The rise and fall of progressive income taxation in the Netherlands (1795-2001)', 3 *British Tax Review* (2007) pp. 255-279.

[27] O. Lončarić-Horvat, 'Pravedna i socijalna porezna država?' [Fair tax and social state?], in O. Lončarić-Horvat, ed., *Znanstveni skup Uloga države u socio-ekonomskom razvoju nacionalnog gospodarstva, Zbornik radova u povodu 80. godišnjice života prof. emeritusa Božidara Jelčića* [Scientific conference on the role of the state regarding socio-economic development of the national economy,

One difficulty is that the optimum of society's taxation based on public agreement cannot be determined generally. The difference in economic strength, social sensitivity and the goals of economic policy of the states resulted in various tax systems and tax burdens. When it comes to defining economic strength, both jurists and economists, although by different means, come to same conclusions. In fact, they both accent that the tax basis of income tax must be decreased for expenditure that is necessary for the assurance of minimal existential costs.[28]
One can neither find a general consensus on the level of minimum subsistence, nor on other forms of determining taxation criteria.[29] Neither the domestic law, nor international law was able to create generally accepted limits of tax law. Nation-states as well as member states of the European Union set an example of this, when they reject any initiative in direct taxes that could limit fiscal autonomy. Some progress is perceptible in the harmonization of direct taxes[30], in tax administration and in Customs Law. The prevalence of Social Rights, the new generation of Human Rights, could mean progress, but unfortunately it was a ruling of the Constitutional Court of Hungary[31] that showed that the consequences of these (see Right to Housing, Right to Unemployment Benefits[32]) could be rejected by the states, claiming that their application would be too expensive socially. Takács pointed out that the so-called consequentialist practice of the Constitutional Court of Hungary rejects the initiatives, simply because it is too expensive.[33]

Proceedings on the occasion of the 80th Anniversary of Prof. Emeritus Bozidar Jelčić] (Zagreb, Visoka poslovna škola Libertas Zagreb 2010) p. 192.

[28] Lončarić-Horvat, loc. cit, n. 27, at p. 189

[29] Cf. Ercsey Zs., 'Tax Exemption for Subsistence Level', 2-3 *Collega* (2007) pp. 277-280.

[30] Cf. Ercsey Zs., 'Some major Issues of Value Added Tax', in Ádám A., szerk., *PhD tanulmányok 9*. (Pécs, PTE ÁJK Doktori Iskolája 2010) p. 209.

[31] See the analysis of federal practices related to fairness in the German tax reform of 1997 in N. Bosch and J. M. Durán ed., *Fiscal Federalism and Political Decentralization* (Cheltenham, Edward Elgar Publishing Limited 2008) pp. 137-145.

[32] Cf. R. Vosslamber, 'How Much? Taxation on New Zealanders' Employment Income 1893-1984', 12 *New Zealand Journal of Taxation Law and Policy* (2009) p. 302.

[33] Takács P., *Emberi jogok. Jogbölcseleti előadások* [Human Rights. Lectures on Antropology of Law] (Miskolc, 1998) p. 234.

The fairness of taxation can be examined from a different point of view, namely that to what extent could taxation develop nationally-recognised and unified principles as a cultural phenomenon.

According to the principle of cultural relativism, a statement can be formulated,[34] which claims that Human Rights are a product of a certain culture, and the truth of the related statements are based on the accepted values. 'These values and the interests in connection with them determine the method of people's social coexistence, which leads to the adaption of certain rules,[35] including the recognition of specified needs.'[36] Tax law too can be incorporated into and examined in this system of ideas. In this approach the fairness of taxation can be defined as a consequential capability of the cultural value system of a given society. This means that this question can only be successfully examined in a given social situation and not in between the relations of a 'theoretical state'. Ergo the fairness of taxation is a product of society and culture, which came into existence due to the result of active, existing relations, and which can only be analysed in the light of currently prevailing other rights and opportunities. Hence, if society accepts that the government is able to determine the borders of taxation in an autonomous way, then the definition of justice can only be enforced in this vulnerable relation. One key element of the development and effectiveness of the fairness of taxation is expanding the second and third generation of human rights (social and economic rights) to taxation and also to note their consequences.

Another tool could be determining an optimal tax system and developing international standards of taxation.[37] Researchers already started to study the possible and optimal burden and structure of taxation in the beginning of the century. The search for the optimal tax system can also be understood as the minimum of fair taxation and as the required task of governments.[38]

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[34] M. Herskovits, *Cultural Relativism* (New York, Random House 1972) p. 198.

[35] Czirják L., et al., szerk., *Felelős vállalatirányítási és üzleti etikai szótár* [Glossary of Corporate Governance and Business Integrity Terms] (American Chamber of Commerce in Hungary 2011) p. 30.

[36] Takács P., op. cit. n. 28, at p. 232.

[37] Cf. M. Lykketoft, 'The Danish Model. A European success story' 12 *Internationale Politikanalyse* (2009) p. 8.

[38] The global revision of the state responsibilities was introduced recently by Magyary Zoltán Administration Development Project in Hungary. See in more detail

When Watkins wanted to define what a healthy tax system was, as a first step he raised the issue of the necessary use of the 'Capacity Factor'-efficiency index.[39] He suggested in this to compare the current tax results – the revenue – to the results of the best possible practice of the theoretical society. Wesley Mitchel in 1937 in the United States of America and Ackerman between 1923-1926 in Sweden examined the efficiency of the tax system according to the above mentioned. They and other experts, such as Bird, Carragata, and Gábor Földes and Csaba László in Hungary defined the coherence between the level of GDP's redistribution and the efficiency of tax systems. However, the level of redistribution does not tell how and on what proportion the different taxes are realised and how the vertical and horizontal distribution of tax burden of the occupational layer and taxpayers developed.

According to P. Bejaković, tax system should be simple, foreseeable and with less changes. In the Republic of Croatia, politicians like to explain these income tax changes as means to introduce elements of fairness into the tax system.

Income tax is one of the basic tax forms which is relatively easy to adjust to economic strength of citizens so that the wealthier ones pay relatively more tax, and poorer ones pay less, and by which it can be influenced on just and fair splitting of income so it can be said that income tax has attributes of progression. With income tax we try to fix 'injustice' that is brought by consumption tax (VAT and excise duties) that relatively more burden poorer citizens. Also, income tax has distinct and automated ability of adjustig to current economic state of any country (built-in flexibility).[40]

When examining the Hungarian tax system one can find the average of tax burden and government redistribution levels misleading, because it covers the differences between the personal income tax (which is sometimes over 40%), the VAT (standard 25%) and the corporate tax (18%). It also mantles the differences between the taxation levels of entrepreneurs and employees. László pointed out that according to the traditional point of view on the function of a state, the level of redistribution is 30-35% in the Anglo-Saxon countries, while it is over 50% in the Scandinavian states. But it only says a little about the

Bencsik A., 'Fejezetek a fogyasztóvédelmi (köz)jog hazai történetéből' [Chapters of the History of Domestic Consumer (Public) Law] *JURA* (2011) p. 162.

[39] Carragata, op. cit. n. 16, at p. 13.

[40] Lončarić-Horvat, loc. cit. n. 27, p. 295.

fairness of tax systems, because in the Nordic countries the traditionally developed welfare-social transfers balance out the high level of withdrawal. The reason of this is that the resource needs of a state and its services are higher than what the GDP would permit. This may explain the fact that a tax-free band is absent in the personal income tax systems in the eastern European Region almost without any exception.[41] A tax burned such as this would create tax evasion and overtaxation. The result of this will be the forced compulsory elimination of problems by the tax system, which problems would not exist, if more money stayed with taxpayers by reducing the level of taxation. The basic requirement, when creating new tax law is to limit it to the most necessary withdrawals, and that its policy is not governed by short-term interests.

The notion of fairness is difficult to define due to its abstract nature. History has shown us that the concept of fairness changes with the passing of time extremely and that each historical period has its own vision of fairness. Therefore it is impossible to determine the general definition of the term that has been elusive. There is no correct answer to the question, whether a tax is fair or unfair, which would be based on some generally accepted principles. Tax practitioners, however, whether they are lawyers or economists, do not attach any special meaning to the concept of fairness. In fact, any tax that achieves the desired and anticipated economic impact is considered as fair by them.[42] However, most financial scholars, whether they are lawyers or economists, agree that the principle of fairness is tried to be put into practise just by applying progressive tax rates on income.

Contemporary theses on tax fairness show that public interest for these types of questions is declining. The classical term of tax fairness is shifted from the sphere of allocation of tax burden to the care of how tax revenue shall be spent. The decrease of interest for the principle of fairness is understandable, because citizens perceive the tax system as unclear, tax payments are abstract and the consciousness of public consumption (how the revenue will be spend) becomes a more important area of public interest.

The question of fairness is not related to any specific structural principle that would apply only to taxes. The first and primary goal of taxation,

[41] *Meeting Tax Obligations in Central and Eastern Europe Deloitte Touche IBFD* (1994) pp. 17-23.

[42] Lončarić-Horvat, loc. cit. n. 27, p. 182.

which is achieved by actually paying taxes, is to secure the state financial means to coverpublic expenditure. However, it has often been accented that this fiscal goal should cede its place to another equally important goal – the just allocation of tax burden.[43]

It should be emphasised that there is no optimal fairness, and not all societies have the same concept of fairness. However, the moral aspect of taxation should equally apply both to the state and the taxpayer. That means that it is every state's duty to develop fair tax burden splitting, i.e. taxpayers should pay taxes in accordance with their economic strength and the state should rationally spend the collected means. On the other hand, it is every taxpayer's duty to bare fair amount of public expenditure in accordance with his or her economic abilities.

Fairness does not mean that income is taken away from the rich and given to the poor; it rather means that it should not create inequalities and additional problems in society. Accordingly, justice and fairness mean at least that the government determines the tax levels with self-restraint and limiting itself to the necessary minimum and distributes them equally to the sections of society, while putting them into an ethical, transparent, and efficient use with the help of the principles public finance.[44] This would be the full-value definition of fairness-accuracy.

[43] Cf. Lončarić-Horvat, loc. cit. n. 27, p. 187.

[44] See R. E. Wagner, *Fiscal Sociology and the Theory of Public Finance* (Cheltenham Edward Elgar Publishing Limited 2007) p. 200.

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Emina Jerković [**]

Personal income tax: provisions regarding fairness

I. Introduction

Whether a tax regime of a country is fair or effective depends on the applicability of the principles, proportionality, progressivity, and the exemptions provided.[1] Based on the ability to pay principle, thus higher tax is levied on the taxpayers realizing higher income, and the same amount shall be paid by the taxpayers of similar payment abilities.

II. The concept and types of the income

1. Hungarian regulation

The Hungarian legislator distinguishes between the different types of income according to the basic definition of the income itself.[2] Two major categories of income are specified by the Act on Personal Income Tax: income that belongs to the consolidated tax base and therefore has to be added, and types of income that are taxed separately. The first category is specified as income from self-employment activities, income from activities other than self-employment, and other income; whereas the separately taxed income is subdivided into business entrepreneurial income, income from the transfer of assets (movable and immovable property), income from capital investments, in-kind and other benefits, and miscellaneous income.

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[1] Deák D., 'Igazságos-e a magyar adórendszer? (Egy törvényhozási csapdahelyzet elemzése)' [Justice in Hungarian tax system: A case study of a legislative pitfall], 51 *Jogtudományi Közlöny* (1997/7-8) p. 317.

[2] The Personal Income Tax defines the concept of revenue in three ways depending on revenue. Article 4(1) of the law says that all taxable revenue received by a private individual from others shall be considered income, or the portion of such income with the fixed-amount expenses recognized in this Act deducted, or a given proportion thereof as set forth in this Act.

According to this referred provision, there are some types of revenue, in connection with which the related costs may be deducted. [3] The tax base of these types of revenue is deductible with the costs occurred directly in relation to the activity out of which the income derived. These costs can be proven either individually or can be set off by a lump sum cost amount.[4] In other cases only a certain proportion of the revenue shall be considered as income, therefore the tax base is narrower than the income. This is the case for instance regarding the income derived from the sale and purchase of the real property. This later type of income is taxed separately, and the tax base, as well as the amount of tax due, shall be determined by a decreasing tax base structure according to the years passed between the acquisition and the sale.[5]

This is completely contrary to the horizontal fairness, according to which taxpayers[6] with the same income and the source of income have to be handled equally. Thus, the salaries and other types of income – in accordance with the Hungarian regulation on Personal Income Tax contracted and separately taxed revenues – have to be taxed in the same quantity, measure, and way. Nonetheless, several contemporary Anglo-American authors reckon that due to its nature, personal income tax basically distinguishes between the taxpayers[7]. The standpoint, which takes into account the double taxation in legal sense is somewhat contradictory to this consideration, for example: taxation of an income,

[3] The system of personal income tax in Hungary traditionally separates income that is to be contracted and income that is taxed individually. These income types and their subtypes can be well separated also based on the three income groups defined by law.

[4] Any cost can be considered only once, on one occasion and with some exceptions to the maximum of income. Cost acknowledged without certificate instead of really spent and justified expenses can be calculated up to the extent defined by law and such cost shall be deemed as fully acknowledged in such as case. If a revenue/cost is defined as a flat fee or as a certain percentage of the income, the revenue cannot be reduced by any other cost.

[5] See Arts 62(4) and (6) of Act on Personal Income Tax.

[6] Cf. Tóth I. Gy., 'Gyermekek és eltartottak figyelembevétele a jövedelemadózásban' [Taking into Account Children and Dependants regarding Taxation], in Semjén A. szerk., *Adózás, adórendszerek, adóreformok.* (Szociálpolitikai Értesítő – Különszám 1993/1-2 Budapest MTA Szociológiai Intézet 1993) p. 264.

[7] Cf. R. Vosslamber, 'How Much? Taxation on New Zealanders' Employment Income 1893-1984', 12 *New Zealand Journal of Taxation Law and Policy* (2009) p. 302.

which was once already taxed as salary and produced by it, is not only unfair, but most likely it would be economically harmful. According to the Hungarian personal income tax under the principle of the ability to pay tax, taxpayers with the same paying capacity are forced to pay the same, the higher-income taxpayers have to pay higher amounts.

2. Croatian regulation

Certainly, the most important role goes to taxation of employment income, which also encloses other types of income, as well as an answer which part of income is to be spent and which part is to be spared.
In the Republic of Croatia there are 6 types of income as follows:

- employment income,
- independent personal services income,
- income from property and property rights,
- investment income,
- income from insurance,
- and category of other income.

The share of the employment income tax in the entire income tax system is of great value. Depending of the year in question it can exceed 80% and it should not surprise us, because the overwhelming numbers of taxpayers are employees. Dependent personal services represent the relation between employer and employee, in which the employee is obliged to work by the instructions of the employer. Retirees are being taxes as employees. The employment income is a contrast between receipts obtained in one taxable period and expenditures originated in the same taxable period, thus the related costs can be deducted.
In this paper we are going to elaborate the two most important types: employment income and independent personal services income.

a) Receipts based on dependent personal services

Receipts based on dependent personal services are the following:

- salaries,
- retirements,
- receipts based on consideration, support, award and other that are paid by employer or that are given to the employees above the amount prescribed in the employment contract,
- salary, which employee paid for another person instead of the employer,

- insurance premium, which employers pay for their employees dealing with life assurance, extra and private health assurance, voluntary pension fund contributions above prescribed amount and insurance of their assets,
- all other revenue that employer pays or gives to employee for services that had been done based on employment contract or any other act that regulates employment,
- entrepreneurial salary that is defined as an expenditure while establishing corporate income tax,
- salary of natural persons that work in the Republic of Croatia in domestic corporation on the mandate of a foreign employer,
- salary of members that work for representative and executive departments of state authority and departments of local and regional authority,
- salary for persons that help and care for military invalids of the Homeland War according to special regulation.

b) Independent personal services income

Independent personal services income is considered to be:

- Income derived from trade and with trade equalling services.
- Income derived from independent profession such as:
  - independent profession of health care employees, veterinarians, lawyers, public notaries, engineers, auditors, bankruptcy managers, architects, tax consultants, interpreters, translators, tourist employees, etc.;
  - independent profession of scientists, inventors, authors, etc.;
  - independent profession of lecturers, educators, etc.;
  - independent profession of journalists, artists and athletes.
- Income derived from agriculture, fishery and forestry.
- Income of other independent services, which are not the main service of tax payer, but are occasionally performed to earn income.

There is one significant regulation, Article 26, by which all tax payers referred to above can upon their request pay corporate income tax instead of personal income tax.

3. Comparative remarks

As it is visible from the above classification, the Hungarian regime makes a strong distinction between certain types of income, whereas such significant difference is not set forth by the Croatian provisions, in which all types of revenues regulated by the individual income tax regime are handled uniformly. This element makes the Croatian system more uniform. However, the Croatian provisions contain some relevant distinctions as well, which reads similar to the Hungarian provisions the way that the different types of income are grouped into certain categories. The main difference is that although both regimes handle these types of income the same way regarding the sources thereof and the activity from which the related income is derived, in Croatia all these groups shall be added in order to have the tax base established, whereas in Hungary separate provisions are applicable for, among others, independent personal services income, income from property, and investment income. This means that despite the classification of revenue types are very alike, the two systems handle them differently.

It is an essential difference that the consolidated tax base in Hungary generally cannot be deducted with the costs occurred in relation to the obtainment of the revenue deducted from the independent activity, whereas in Croatia the cost of the taxable tax year and certain insurances fees (life insurance of domestic individuals, private life insurance, voluntary life and private insurance not exceeding the amount of HRK 6,000, on condition that the paid insurances fees are not deducted from the income derived from other sources) maybe decline while establishing the tax to be paid upon the independent personal activities. The Hungarian taxpayer, who performs independent activities, shall fulfil the tax obligation thereof according to corresponding provisions of the act on personal income tax (the only exception to be pointed out is the private entrepreneur, who, regarding his independently provided services, is entitled to switch to simplified entrepreneurial tax payment according to his soul decision on condition that he totally meets the related legal requirements). Such enterprises in Croatia may generally choose to pay corporate income tax instead of personal income tax.

The separate tax types of income in Hungary maybe compare to the Croatian solution of the other, so called second income regarding deductable cost. The latter category albeit contains mainly such activities, which belong to either the income derive from independent activities (for instance the revenue of the members of parliament) or to

the dependent activities (e.g. activity of the members of the audit and control committee of enterprises).

III. Tax rates

1. Hungarian provisions

According to the social fairness, the tax systems shall be fair, as well as each type of taxes. This means, regarding the personal income tax,[8] that everybody shall contribute to the public expenses according to their income and wealth situation.[9]

The theoretical base of progressive income tax is that "increasing income is connected to declining margin of profitableness"[10]. Progressivity obviously favours those with a medium income level albeit many think it rather enhances justice[11], but it undoubtedly decreases the revenue of those with high revenue in a higher proportion. This, on the other hand can be achieved by an appropriate tax reduction system in a linear system too.

The recognition that progressive income tax has a negative effect on performance led to the practice of reducing and unifying tax rates, the relatively low and nearly proportionate income taxation. One of the most competitive practical forms of these is applying a flat tax rate.

The criticism regarding the previous regulation of progressive personal income tax is that it made an obstacle to revenue and wealth accumulation and the process of getting richer. In other words, higher percentage of the income was taken from the wealthier. This raised the issue of social fairness[12] for the group of society with higher amount of

[8] See Article 1(2) of the Act CXVII of 1995 on Personal Income Tax, stating that the purpose of the act is to secure – in due observation of the principles of proportionality and equity – the tax revenues necessary for the fulfillment of State responsibilities, and in special cases, to promote the implementation of certain social and economic goals.

[9] R. A. Musgrave and P. B. Musgrave, *Public Finance in Theory and in Practice* (New York, McGraw-Hill Book Company 1989) p. 227.

[10] Streissler E., 'Gazdaságelméleti kétségek a progresszív jövedelemadó ésszerűségét illetően' [Economic theory doubts in connection with the rationality of progressive income tax], 1 *Közgazdasági Szemle* (1990) p. 79.

[11] Cf. C. Heady, 'The Conflict Between Equity and Efficiency in Designing Personal Income Tax Systems' in *The Role of Tax Reform in Central and Eastern European Economies* (Paris, OECD, 1991) pp. 87-96.

[12] See Kecskés A., *Felelős társaságirányítás* [Corporate Governance] (Budapest, HVG Orac 2011) p. 44.

income: they took a bigger part of building the society and financing thereof, since they provided a higher amount for the public revenue both nominally and proportionally. However, they were entitled to less exemptions and/or credit and received less state transfers and government subsidies or financial support as the taxpayers realizing lower levels of income;[13] therefore they paid higher proportion of the costs of maintaining the society.[14]

Hungary used to operate a progressive personal income tax system, and recently introduced the flat individual income tax regime of a unified tax rate of 16 percent, effective from 1 January, 2011, in order to make the system more righteous, and to promote employment by the reduction of the marginal tax rate.[15] The flat tax rate system indeed favours the taxpayers of society who earn more, and this is the fundamental critic thereof. Considering that in comparison with the previous 17 per cent lower rate the current tax rate is no real decline, furthermore the tax burden of those whose income is low became higher due to the provisions of supplementary tax base, though the tax rate of 16 per cent is a significant change against the previous 32 per cent upper level rate, this statement seems to be justified. This decline produced serious tax revenue cut on the government budget side, but this was not balanced by the reduction of allowances, additionally, as the current study later states in detail, these allowances have even been extended, although the basic tax allowance for subsistence needs has been eliminated, so 'people pay taxes from the first forint they earn'.[16]

The amount of personal income tax paid by Hungarians in the same economic position may greatly differ. The tax base of contracted

[13] The former Hungarian constitution specified the protective care of those who need that as state responsibility. See Bencsik A., 'A fogyasztóvédelem alkotmányi szabályozásáról – az új Alaptörvény tükrében' [About the constitutional regulation of consumer protection - in the aspect of the new Basic Law], in Drinóczi T., szerk., *Magyarország új alkotmányossága* (Pécs, PTE-ÁJK 2011) p. 36.

[14] As Csaba Szilovics pointed out, the state is for the citizens, and the legal structure shall be established accordingly. Cf. Szilovics Cs., *Csalás és jogkövetés az adójogban* [Fraud and compliance in tax law] (Budapest, Gondolat Kiadó 2003) p. 191.

[15] Statement by Willy Kiekens, Executive Director for Hungary and Szilard Benk, Senior Advisor to the Executive Director January 18, 2012 pp. 3-4., http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf.

[16] IMF Survey online January 25, 2012 http://www.imf.org/external/pubs/ft/survey/so/2012/NEW012512A.htm.

revenues must be defined by tax base extension (by adding 27 per cent of the revenue to it, i.e. creating a gross revenue or as people say in Hungary a 'supergross' revenue for the annual income exceeding the sum of HUF 2,424,000). Thus, the real tax payment level is 20.32 per cent for revenues in the consolidated tax base, not respecting whether those arise from independent or non-independent activities or other sources. Revenues taxed separately, but are not taxed under this tax base extension; the real calculated tax of such revenues is 16 per cent of the income. Based on the above mentioned, the difference is not only the accessibility of reductions or the 4.32 per cent in figures, but also the opportunity to deduct allowances[17] and the non-identical status of other contributions. The lawmaker taxes certain revenue types differently depending on the actual business activity and taxpayers have different chances above these to optimize tax payment.

Within the flat tax system, all the groups and taxpayers of the society take part the same rate in contributing to public funds irrespectively of their amount of income. Obviously their nominal contribution differs, and the rich pay more, but the same proportion, which might sound fairer than taking more proportion of their income. This could lead to a more balanced and proportionate tax payment system: the taxpayers of higher amount of income pay more anyway, taking part in contributing to public funds according to their ability to pay.

The flat tax provides a stronger motive for the taxpayers to realize higher amount of income, since they can achieve a higher amount after tax in case they work more and make higher revenue. Thus despite their tax due is higher, still a higher amount can be used as per their sole decision.

In the progressive structure it is not worth for the taxpayer to invest more energy in obtaining a higher amount of income, since the amount taken as tax is proportionally higher as well. In other words, it establishes a psychological limit to the activities out of which income is derived. For instance, the taxpayers do not take an additional job, or apply for other grants or subsidies[18] if they get to a higher tax bracket

[17] Taxpayers can deduct costs in several countries, even if the revenue was earned by non-independent activity. E.g. in Belgium the revenue can be declined by a progressive flat amount. See more in detail: O. Boeijen-Ostaszewska, ed., *European Tax Handbook* (Amsterdam, IBFD 2010) p. 127.

[18] Contributions paid to citizens without tax burden have been stopped as of January 1, 2011. This used to be a revenue type belonging under the contracted tax base that

accordingly, and by paying higher amount of tax due to the applicable higher tax rate, and therefore they take less money home. The higher tax rate increases the level of redistribution, but decreases the employment rate. As John Stuart Mill[19] stated in 1848: the progressive tax levies a higher rate of tax on the higher income, therefore it definitely punishes the hard working taxpayers.[20]

The definition of tax amount in such a way and its codification as a legal regulation has been present in its current form in the developed world as a key element of competitiveness and eventually became a general international trend. I believe this is part of the universality and unification[21] process that has been marked and elaborated by Antal Ádám as 'some coordinated economic actions of developed countries as well as some important and well-designed financial activities of global or regional financial management concentration stimulators deserve acknowledgement'.[22]

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also arising from its category had to be considered, when the total revenue was calculated or when the tax base and the calculated tax were defined. According to these it was deemed as tax paying revenue with the exception that its tax did not have to be paid – the text of the personal income tax law Article 34 valid until December 31, 2010 (which has been outdated by law 123 Article 32(14) on January 1, 2011) said that calculated sum based on regulation on tax amount referring to the total sum of contributions that were not taxed would decline the calculated tax – but it could shift taxpayer's total revenue to a higher level in a progressive structure and thus the tax payment liability also increased. After the change, however, such revenues became perfectly and fully tax free (except for student labour fee, which is a taxable revenue of taxpayer as a revenue from non-independent activity and it is also part of the contracted tax base, thus it also enables taxpayer to gain the right to tax reduction, other reductions and social security contributions as well as counting as work status).

[19] See Kecskés A., 'John Austin gondolatai a jogról, a jogon kívüli tényezőkről és a szankciókról' [The thoughts of John Austin on law, the factors beside the law, and the sanctions], in Gál I. L. szerk., *Tanulmányok Dr. Földvári József professzor 80. születésnapja tiszteletére*, (Pécs, PTE ÁJK 2006) p. 114; 116. See also Kecskés A., 'John Austin félig megélt élete és félig megírt jogbölcselete' [The half lived life of John Austin and his anthropology of law written half], 61 *Jogtudományi Közlöny* (2007) pp. 345-346.

[20] J. S. Mill, *Principles of Political Economy* (London, Longmans, Green and Co., 1848) p. 78.

[21] Cf. Ádám A., 'A posztmodernitás jogi sajátosságairól' [About the legal characteristics of postmodernity], 4 *Társadalmi Szemle* (1996) p. 19.

[22] Ádám A., *Bölcselet, vallás, állami egyházjog* [Philosophy, religion, national canon law] (Budapest – Pécs, Dialóg Campus Kiadó 2007) p. 79.

The Hungarian tax system including the personal income tax system[23] was characterized by progressivity and complexity.[24] The first signs of the introduction of the flat tax rate were already marked by the trends of reducing the upper rates and the extension of the tax base. The legislator, in my opinion, observing the examples of other Eastern and Central European countries (e.g. Slovakia, Estonia, Latvia, Romania) believed that the goal of tax payment is easier to reach by defining a wider tax base and lower tax rates, because more people will be willing or at least become readier to pay tax, thus not only the constitutional[25] principle of tax payment, but also the basic principle of the personal income tax law[26] will be applicable at a much higher level and government revenues may also increase significantly.

Despite the huge criticism that is pointed out in this paper as well, the Hungarian government still believes that the flat tax personal income tax regime shall stay in force and, in order to establish a system that is stable and calculable, shall remain protected by being related to two-third majority vote of the Hungarian Parliament. They stated that the new regulation achieved its goal; it provided higher budgetary income (a sum of extra 60 billion HUF together with the social security contribution), stimulated the economy, and promoted employment.[27]

However, levying a progressive tax regime may be more advantageous from the point of fulfilling state obligations.[28] The projections of both the parliamentary opposition and the International Monetary Fund show that contrary to the governmental expectations a huge fall will be experienced in medium-term.[29] This argument seems to be correct, if we study the amounts collected from personal income tax payments.

[23] See more in detail Szilovics Cs., 'Stability and Calculability Regarding the Taxation of Natural Persons in the Period of 1998-2005', in Jakab A., Takács P., A. F. Tatham, eds., *The Transformation of the Hungarian Legal Order 1985-2005* (The Hague, Kluwer Law International 2007) p.169.

[24] Cf. L. Hauwe, 'German income tax policy between equity and efficiency' 5 *European Journal of Law & Economics* (1998). pp. 267-268.

[25] See Art 70/I(1) of Act XX of 1949 (former Hungarian Constitution).

[26] See Art 1(1) of the Act on Personal Income tax.

[27] http://www.piacesprofit.hu/kkv_cegblog/penz/marad_az_egykulcsos_szja.html.

[28] However, the tasks and responsibilities of the states are being transformed. See Bencsik A., 'Fejezetek a fogyasztóvédelmi (köz)jog hazai történetéből' [Chapters of the History of the Domestic Consumer (Public) Law], *JURA* (2011) p. 161.

[29] IMF Country Report No. 12/13, p. 31. Available at http://www.imf.org/external/pubs/ft/scr/2012/cr1213.pdf.

According to the Act CXXXIII of 2011 on the Execution of the Budget of 2010, 1,767,865 million HUF was collected from personal income tax payments.[30] In comparison, in the Act CLXIX of 2010 on the Hungarian Central Budget of 2011[31] a revenue plan of 1,362,977 million HUF is indicated, which is significantly less than fulfilled in 2010, and a sum of HUF 1,574,300 million is planned to be collected for the tax year of 2012 according to the Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.[32]

From the point of view of public finances, the additional argument and aim was to increase the revenue deriving from consumption taxes, however, this goal has not been reached yet significantly. Whereas in 2010 an amount of HUF 2,313,582.1 million was collected from VAT payments, and HUF 856,524 million from excise tax,[33] these amounts have not increased significantly in the year of 2011, when the VAT revenue was supposed to be 2,488,964.1 million HUF, and the excise tax is HUF 881,132.9 million.[34] These figures show that the measures taken by the Hungarian government 'have led to less than optimal economic outcomes'[35]. According to governmental expectations and ambitious budget though, the appropriation of 2012, 2,722,000 million HUF is to be collected from VAT, and 913,850 million HUF from excise duties,[36] which amounts, if fulfilled within the tax year of 2012, could prove the success of the modification of the tax system. In this regard it shall be pointed out that the consumption taxes have been increased in the tax year of 2012, out of which the most important change that affects all taxpayers is the raise of the standard VAT rate from 25 to 27 percent, which, in my opinion, together with the cut in

[30] See Appendix 1 of the Act CXXXIII of 2011 on the Execution of the Budget of 2010.

[31] Please do note that the official figure of the amount collected from individual income tax in 2011 is not available yet, that will be enacted by the legislation in the annual accounts of the budget.

[32] See Appendix 1 of Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.

[33] Appendix 1 of Act CXXXIII of 2011 on the Execution of the Budget of 2010.

[34] Appendix 1 of the Act CLXIX of 2010 on the Hungarian Central Budget of 2011.

[35] See IMF Survey online January 25, 2012 http://www.imf.org/external/pubs/ft/survey /so/2012/NEW012512A.htm.

[36] Appendix 1 of the Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012.

personal income tax (e.g. dismissing the tax base extension below the annual income of HUF 2,424,000) might make the tax system more just.
It is a fact that the reduction of the tax rate of individual income tax, as it can be seen from the recent experiences, does not result in a serious consumption increase (neither in 2011, when the VAT rate did not change and the wealthier taxpayers earned significantly more, since the tax burden dropped mostly for those who earned most,[37] nor in 2012 and not due to the higher VAT rate), because income owners will save some of the money that stays with them. It is of course likely that they would spend and consume more, but their total surplus will not be spent in its entirety.[38] The recent results show that consumption has in fact even radically decreased in the first quarter of 2012, according to Gfk Hungaria, the technical consumer goods market index fell radically.[39] In accordance with these, the system effective of January 1, 2011 resulted in rather promoting savings and mostly low risk small or medium range investments, but did not increase the level of consumption extensively.
Unlike the previous progressive personal income tax system, this solution, i.e. the decline of tax rates and competitive taxation and tax amounts[40] is on the one hand in harmony with the connecting international trends, albeit the introduction of flat tax rate is preferably used by East-Central European states, and hardly used in Western countries.
The parliamentary opposition emphasizes that the flat individual income tax is harmful for the fiscal growth and federalism, generates huge budgetary deficit, furthermore made the existence of millions of the

[37] Budgetary concept of LMP (the Hungarian Green Party, Politics Can Be Different). http://lehetmas.hu/wp-content/uploads/2011/09/Az-LMP-2012.-%C3%A9vre-sz%C3%B3l%C3%B3-k%C3% B6lts%C3% A9gvet%C3%A9si-javaslata. pdf p. 17.
[38] As Dr. György Surányi highlighted in his presentation on May 19, 2011 at 6 pm at CIB Bank Zrt. headquarters, the rich also have one dinner, therefore it doesn't matter if more money stays with them after tax payment, if they don't spend it.
[39] For more details see latest Gfk survey http://www.gfk.hu/imperia/md/content/gfk_hungaria/pdf/press_2012/press_eng/press_2012_03_16_eng.pdf.
[40] These government moves have been urged by several market players and analysts for many years. See e.g. B. Layman, *Az offshore halála* [The death of offshore] (Budapest, HVG 2010) pp. 272-274.

lower classes much harder and decreased the employment rate,[41] and basically this has been established by the International Monetary Fund as well: Hungary's design 'added to bureaucracy, and overly burdened the most vulnerable'[42].

In this regard it is important to note the solution too that several employers have used recently. Using the advantages of lower taxation level the gross salary of employees was reduced and the company saved some of its business costs. By this method it was not personal income taxpayers who got into a more favourable situation after the amendment effective of January 1, 2011, but enterprises and market players that could take this chance. Therefore, it was not defenceless employees who enjoyed the advantages of lawmaker's goal, but due to work contracts amended by 'joint agreement' it was actually employers that benefited, although they would not have been preferred by the legal regulation. Naturally the business effect of the personal income tax decline is undoubtedly positive even by this solution, also considering that the increase of employment and the decrease of unemployment under the EU average are only feasible by the reduction of tax and contribution levels.[43] These practical solutions show a good example of the two options used in the European Union: high personal income tax and low contribution level (see e.g. Danish model) or lower personal income tax rate for employees and high contribution burden for employers (e.g. in Germany and France).[44]

[41] See for example http://www.nepszava.hu/articles/article.php?id=464441 and http://adozona.hu/szja_ekho_kulonado/LMP_tobbkulcsos_adora_van_szukseg_UPU7YH.

[42] IMF Survey online January 25, 2012 http://www.imf.org/external/pubs/ft/survey/so/2012/NEW012512A.htm.

[43] The average unemployment rate of the Euro zone was 10 per cent by surveys in December 2010, while the EU average was 9.6%. This figure in Hungary has been on the rise since December 2009 and it reached 11.7% by the December 2010 official survey. See more in detail: Eurostat Newsrelease, 2011/18.

[44] Cf. M. Lykketoft, 'The Danish Model. A European success story', 12 *Internationale Politikanalyse* (2009) p. 5.

2. Croatian provisions

By most recent changes in the system of income taxation, the number of tax brackets has been reduced from 4 to 3. That automatically changes the range of receiving, which is related to each tax rate and its height. Contrary to that concept, there is a flat tax, where everybody is taxed with the same tax rate with no regard to tax payers' income amount, which is considered to be socially most unjust by many authors.[45]
The tax base on income for the taxation of income tax from employment and income from self-employment is divided into three tax brackets.
Income tax is paid at a rate of 12% on taxable income over twice the personal allowance (Monthly basis: below the amount of HRK 3,600; Annual basis: below the sum of HRK 43,200).
Income tax is paid at a rate of 25% of the difference between the tax basis of double and six times of the personal allowance (Monthly basis: HRK 3,600.01 – 10,800; Annual basis: HRK 43,200.01 – 129,600).
Income tax is paid at a rate of 40% on taxable income over six times the amount of the basic personal deduction (Monthly basis: above the sum of HRK 10,800; Annual basis: above the amount of HRK 129,600).
This essentially means that after the decline of the gross salary required to contribute to the basic personal allowance taxable income on a monthly basis is taxed as follows: up to HRK 3,600 pay tax at a rate of 12%; above HRK 3,600 to HRK 10,800 (i.e. further HRK 7,200) pay tax at a rate of 25%; and above the total amount of HRK 10,800 pay tax at the rate of 40%.

3. Comparative remarks

The essential issue is how business players react on taxes. High and progressive taxes cut back performance and will not stimulate

[45] Z. Perić, 'Osvrt na najnovije izmjene i dopune Zakona o porezu na dohodak: raspodjela poreznog tereta' [Review of the latest amendments to the Income Tax: Distribution of tax burden], in O. Lončarić-Horvat, ed., *Znanstveni skup Uloga države u socio-ekonomskom razvoju nacionalnog gospodarstva, Zbornik radova u povodu 80. godišnjice života prof. emeritusa Božidara Jelčića* [Scientific conference on the role of the state regarding socio-economic development of the national economy, Proceedings on the occasion of the 80th Anniversary of Prof. Emeritus Bozidar Jelčić] (Zagreb, Visoka poslovna škola Libertas Zagreb 2010) p. 302.

production.[46] Beyond not making the pursuing of activities appealing, high tax rates encourage taxpayers to search for legal and illegal ways of tax evasion (the back door methods, such as the permanent investment account,[47] the calculation of cost invoices for individual entrepreneurs, or when real estate or other property is sold[48]). I believe that tax planning performed by the taxpayer in such ways is by no means harmful, but its wide option much rather promotes that taxpayers accept tax law, because the taxpayer is happy to pay less tax feeling that implicitly he/she received more money or actually more stayed in his/her pocket. This will mean more revenue for the state or eventually in terms of the personal income tax for the central budget or as a final destination for the local municipalities,[49] than as if with regard to the high tax payment obligation or by some tax fraud techniques, such as black or grey employment, no revenue would flow in or the tax base would be significantly lower due to hidden incomes.

The study of Csaba Szilovics[50] shows that Hungarian taxpayers unilaterally vote against tax rises, especially that of the value added tax and the personal income tax (only 17 per cent of the interviewed would support the increase of personal income tax rates). In connection with the personal income tax taxpayers have a rather narrow field of options to plan their taxes (especially public sphere employees have an even narrower option to commit tax fraud), even though many authors represent a counter opinion.[51]

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[46] Streissler E., 'Gazdaságelméleti kétségek a progresszív jövedelemadó ésszerűségét illetően' [Theoretical economic doubts regarding the rationality of progressive income tax], *1 Közgazdasági Szemle* (1990) p. 79.

[47] See Art 67/B of the Act on Personal Income Tax.

[48] The effective regulation has retained taxpayers' opportunity to deduct three types of cost: the amount of income shall be established by deducting the expenditure related to the acquisition, the costs of value-added investments, and the costs in connection with the transfer can be deducted from the revenue.

[49] Based on the 2011 budget of the Republic of Hungary, i.e., Act CLXIX of 2010, Art 38(1) local municipalities in total are entitled to 40 per cent of the personal income tax declared for the year 2009 according to taxpayers' permanent addresses. 8 per cent of this sum based on administrative areas is actually going to the local municipality.

[50] See more in detail Szilovics Cs., *Adózási ismeretek és adózói vélemények Magyarországon (2002-2007)* [The knowledge and opinion of taxpayers on taxation in Hungary (2002-2007)] (Pécs, G & G Nyomda Kft. 2009).

[51] Brother Layman says for example that today only 10 per cent is really paid for personal income tax, and large personal revenues have long been tax free due to

The Hungarian tax system operates legally with a single flat tax rate, but practically with two levels of tax burdens. A progressive individual tax system is used in the Republic of Croatia, with three tax brackets and three different tax rates. The Croatian provisions in force, similarly to the former Hungarian ones,[52] indicate that the legislator believes that just taxation can be applied in a more effective way if the wealthier pay more not only regarding the volume of tax, but also proportionally. This approach is doubted by the current Hungarian government that has received huge criticism in this regard both from the opposition thereof, and the International Monetary Fund.

IV. Deductions, exemptions and tax allowances[53]

1. Allowances provided in Hungary

Some countries consider taxpayer's family composition, when personal income tax is calculated.[54] Thus besides personal taxation (where taxpayers are individual income earners) the opportunity of common tax payment is given as part of the fiscal sovereignty in several states (where taxpayer is a family unit). The majority of countries provide some kind of personal income tax reduction for families with children,

offshore or domestic non-existing accounts, because the actual revenue, after which personal income tax should be paid, is extracted from companies that way. Layman, op. cit. n. 40, at p. 331.

[52] The earlier system of personal income tax following the progressive method was used as follows: the tax payable for revenues creating the consolidated tax base (calculated tax), if the consolidated tax base did not exceed 5 million forints, 17 per cent of the consolidated tax base; if the consolidated tax base is higher than 5 million forints, 850,000 forints plus 32 per cent of the amount over 5 million forints. See Art 30 of the Act on Personal Income Tax in effect until December 31, 2010.

[53] On the tax free status of minimum of subsistance and minimum wage see in detail Ercsey Zs., 'Tax Exemption for the Minimum of Subsistence' in Ádám A., szerk., *PhD tanulmányok 6*. [PhD studies 6] (Pécs, PTE ÁJK Doktori Iskola 2007) pp. 169-184.

[54] Some countries treat children and spouse separately (e.g., Austria, where children and spouse are taxed separately), other countries may pay special attention to children and spouse in a combined way. In France, for example, which I believe is one of the best examples of family taxation, the personal income tax is levied on households and not on husband and wife individually. Married taxpayers get the chance to submit separate forms only in special cases determined by law. (See Boeijen-Ostaszewska, ed., op. cit. n. 17, at p. 273)

because the lawmaker respects the social necessity and advantages of children as well as the burdens they mean for families.[55]

Although there are various methods and countries to choose different policies, families with children are usually wholly or partly subsidized financially through the tax system.[56] I believe that this is an important subsidy method, although not satisfactory enough, because taxpayers will not have more children in order to get more tax reduction and tax or tax base reductions will not stimulate couples to get more children, but it is indeed an effective method of financial support. It is easy to understand that generally these reductions cannot be used by lower income realizing layers of society, because their income does not reach the taxed level, it is around the minimum wage or hardly reaches the minimum of subsistence or social minimum.

The Hungarian regulation also works like this. Those with higher revenue can apply more allowances and get greater advantage to use the subsidy opportunities offered by laws. The Hungarian system in force also received the name 'family taxation', because the new provisions brought new features in terms of family allowances.[57] I believe it is a positive initiative of the legislator that for the first time since the introduction of family allowance in 1988 now it can be applied after a single child too and regardless of income amount. This tax base allowance (instead of the previous tax allowance) can be used by

[55] As the number of children grows, the allowances grow in Belgium, Greece and Italy. The contrarian solution is, when the incomes of children are wholly or partly added to parents' tax base [see in detail e.g. the Netherlands; H. Vording and O. Ydema, 'The rise and fall of progressive income taxation in the Netherlands (1795-2001)', 3 *British Tax Review* (2007) pp. 255-279.] In the majority of countries (e.g. Belgium, France) children living in the same household are also differentiated by marital status. If the child in question has already got married, a smaller allowance can be applied after him/her, e.g. regarding the limit of allowance the total contracted income maximum is relevant for the married child (a vital difference is that Hungarian law connects this issue to the point of getting capacity to exercise rights).

[56] Bencsik A., 'A gazdaság igazgatása' in Fábián A. and Rózsás E., szerk., *Közigazgatási jog különös rész* [Administrative law special part] (Pécs, PTE ÁJK 2011) pp. 134-135.

[57] Since its introduction in 1988 the Hungarian personal income tax system went through serious amendment and development also in this respect. That time such reductions were available to a very limited extent only. Taxpayer had to have min. three children under 14 (or under 25, if that child was a regular higher education student) and the tax base reduction was HUF 12,000 per year per child.

married couples that are entitled to family benefit together as well, if they both earn an income. The family allowance – depending on the number of children in the family – will be HUF 62,500 per child and month, if the family has one or two children and HUF 206,250, if it has three or more children.[58]

The amount of allowance, I think, is to be criticized, because the principle of economies of scale[59] is valid for families too, therefore the much higher amount implicit contribution to families with three or more children will not reach the goal of the legislator had in mind due to all conditions; furthermore the higher allowance for the third child cannot be applied for families realizing lower level income. It is to be welcomed in the new regulation, though, that taxpayers who receive a disabledness contribution can also use the tax base allowance after themselves as subjects preferred by the law.

2. Tax allowances in Croatia

Excluded from the taxation is the part of the income that is necessary for taxpayer to fulfil his existential needs. This part of income is usually called existential minimum (poverty line). The term *non-taxable part of the income* is used in tax terminology, and in Croatian Income Tax Law the term *personal allowance* is used. Article 36 of the Income Tax Law prescribes that the full amount of realised income should be reduced for personal allowance in the amount of HRK 1,800 for each month of the taxable period. This amount of personal allowance is enlarged for dependent members of family and children. Income Tax Law presumes that the amount of HRK 1,800 is enough for a taxpayer to cover his basic existential needs.[60]

[58] See Art 29/A(2) of Act on Personal Income tax.

[59] P. M. Mieszkowski, J. A. Pechmann and J. Tobin, 'Is a Negative Income Tax Practical?', 1 *Yale Law Journal* (1967) p. 8.

[60] P. Sindičić, 'Načelo pravednosti u poreznom sustavu RH' [The principle of fairness in the tax system in Croatia], in O. Lončarić-Horvat, ed., *Znanstveni skup Uloga države u socio-ekonomskom razvoju nacionalnog gospodarstva, Zbornik radova u povodu 80. godišnjice života prof. emeritusa Božidara Jelčića* [Scientific conference on the role of the state of socio-economic development of the national economy, Proceedings of the occasion of the 80th Anniversary of Prof. life. Emeritus Bozidar Jelčić], (Zagreb, Visoka poslovna škola Libertas Zagreb 2010) p. 345.

3. Comparative remarks

There is no allowance, relief, or credit provided for taxpayers in Hungary due to their low level of income, not even the minimum wage is exempt from tax. In other words, every single Forint of revenue is taxed irrespectively of the level of subsistence[61] of the taxpayer -- the only relief is that the provisions of the supplementary tax base shall not applicable for certain annual revenues. This is contradictory to the modern principles of taxation, and makes the tax system less fair. The Croatian system, however, takes into account a minimum amount earned by the taxpayer, who is, in our opinion, a more just solution, the introduction of such personal allowance might be of value in the Hungarian structure as well.

Both countries use family allowance that can be applied irrespectively of the volume of income derived, which strengthens the level of fairness. The Croatian method, as a tax allowance, takes into account all dependent members of the family (e.g. spouses, parents of spouses, grandchildren, grandparents), and regulates in detail the personal allowance for children: the factor of personal allowance is specified from the first child with an increasing factor. However, Hungary offers a small tax-base deduction for the first and the second child, and a much higher volume for the third and ongoing children, but does not consider other dependants. Furthermore the additional amount for the third child is significantly higher, and this, as well as the applicability of the allowance for taxpayers earning less, raises doubtful matters.

The Hungarian personal income tax does not take into account the necessity of the fulfilment of the basic existential needs of the taxpayer, thus subsistance level tax exemption as the modern basic principle of taxation is not applied. Contrary tax allowances can be applied regarding the monthly salary in Croatia: according to the principle of tax exemption for subsistance level, HRK 1,800 of each taxpayers income (annual amount of HRK 21,600) is fully exempt from tax and forms a non-taxable part of the income. This can be observed regarding the pensioners as well for the monthly amount of HRK 3,200 and the annual sum of HRK 38,400.

Both states take into consideration the number of children of the household, but whereas the Hungarian regulation only establishes a tax

[61] The tax exemption for subsistence level is the guarantee for the financial security of the individual. See Szilovics, op. cit. n. 14, at p. 103.

base allowance for the children number one, two three, which is radically increased in case of the third child, the Croatian legislature handles the dependants the same way as children and a proportionately growing allowance is applied for each child precisely indicated until the fifth one.
We do believe that the allowance for disability, provided by both states, is an important measure of taxation, and shall remain enacted in the future as well.

V. Conclusion

It can be stated that the structure of revenue and types of income is very similar in both countries, and the related categories are defined more or less the same way. However, Hungary distinguishes certain revenues, for which different sets of rules shall be applied, and such distinction is not specified by the Croatian system, which handles these amounts uniformly. Therefore, on the one hand, Croatia
Accordingly, the difference regarding the determination of tax base arises from this measure and the supplementary tax base establishment provisions in the Hungarian system. In our opinion, the latter solution is not the kings' way of levying tax burden, but a step that makes the Hungarian flat personal income tax at least a bit more progressive.
There is no best scenario approved for the number and level of tax rates, therefore it cannot be stated whether the Hungarian or the Croatian solution fits the basic principles of taxation and equality requirements more. In fact, as discussed above, the flat rate of Hungary has been strongly criticized.
The Hungarian personal income tax system used to be a progressive scheme since its introduction, and turned into a flat tax rate system from the tax year of 2011 in order to follow the trends of the region and primarily to keep Hungarian economy competitive. The amendment aimed to promote employment, to raise government income by decreasing the level of black market, and to generate production through extending consumption. These could imply and effect higher level of employment, as well as more state revenue deriving from additional consumption taxes and corporate income tax payments[62].

[62] This projection of the Hungarian government can be seen in the budgetary act of 2012 (Appendix 1 of the Act CLXXXVIII of 2011 on the Hungarian Central Budget of 2012 indicates that in detail), in which the planned amount to be collected from corporate income tax is 356,200 million HUF, so much higher than in the previous

Therefore the Hungarian tax system operates legally with a single flat tax rate, but practically with two levels of tax burdens. A progressive individual tax system is used in the Republic of Croatia, with three tax brackets and three different tax rates. The Croatian provisions in force, similarly to the former Hungarian ones, indicate that the legislator believes that just taxation can be applied in a more effective way if the wealthier pay more not only regarding the volume of tax, but also proportionally. This approach is doubted by the current Hungarian government that has received huge criticism in this regard both from the opposition thereof, and the International Monetary Fund.

It is understandable that every amendment of a type of tax affects the entire tax system, and therefore should be handled accordingly, furthermore that all the outcomes of such modifications can be judged properly only in a long run. At this stage it is clear, that according to the recent results and the described critiques, the goals mentioned above have not been achieved yet through the new Hungarian structure. In spite of this, it is also unquestionable that some of the changes – such as the reduction of tax amount and the taxation level, as well as the simplification of due tax performance – offer many advantages for taxpayers, which can be used mainly by those who realize higher levels of income.

There is no allowance, relief, or credit provided for taxpayers in Hungary due to their low level of income, and every single Forint of revenue (even the minimum wage) is taxed irrespectively of the level of subsistence of the taxpayer. This is contradictory to the modern principles of taxation, and makes the tax system less fair. The Croatian system, however, takes into account a minimum amount earned by the taxpayer, who is, in our opinion, a more just solution, the introduction of such personal allowance might be of value in the Hungarian structure as well.

Therefore I do believe that further measurements and amendments are required in Hungary by taking into account the other types of taxes, as well as fiscal matters. Despite the tax to be paid after labour income has

years (an amount of 323,369.9 million HUF central budget revenue derived in 2010 according to Appendix 1 of Act CXXXIII of 2011 on the Execution of the Budget of 2010, which was reduced significantly to HUF 288,020.9 million in 2011 according to Act CLXIX of 2010 on the Hungarian Central Budget of 2011, so the tax cut of individual income tax was not compensated by the increase of the corporate income tax revenue either in 2011).

dropped, with regard to the provisions of tax base extension it remained higher than the tax of capital revenues and many taxpayers contribute more than they were obliged to. Taking into account the Hungarian characteristics and special features of personal income tax operation in Hungary, but also analysing international experiences, the system would be worth correcting, and in order to establish an optimal structure, a greater emphasis should be laid on the investigation of levels of compliance, the potential techniques of tax evasion, and primarily the operation of the entire tax system also from fiscal point of view.

Criminal law

Igor Bojanić*

Is the common concept of the participation in crime within the EU possible?

I. Introduction

The participation of more persons in committing a criminal offense represents one of the basic issues in the general part of the substantive criminal law. There are different approaches to its legal determination. The comparative analysis shows that there are two models within the EU: differentiated and unitarian. The differentiated model is the dominant one, which is based on the clear distinction between perpetration and accomplice and which already at the level of attribution takes into account the nature or degree of responsibility. According to the unitarian model, which is less represented, each causal contribution to the commission of a crime is considered to be a perpetration and the differences in the nature or degree of responsibility is becoming obvious only at the sentencing level.

The notion of the unique perpetrator, except in the case of Austria, has been already accepted in the Italian and Danish criminal law. It is rightfully emphasized that distinguishing between perpetrator and accomplice is a common European tradition,[1] thus it should be given an advantage. It is clearly stated in the *Corpus Juris* (Article 11) which differentiate a main perpetrator, instigator and aider, while the notion of the main perpetrator encompasses a direct perpetrator, co-perpetrator and perpetrator-by-means.[2] The stated distinction has been also accepted in the contemporary international criminal law.[3] The paper provides a review and an analysis of provisions on participation of more persons in committing a criminal offense in German, Spanish, French, English and

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[1] K. Tiedemann, 'Die Regelung von Täterschaft und Teilnahme im europäischen Strafrecht – Stand, Harmonisierungstendenzen und Modellvorschläge', in A. Eser, Hrsg., *Festschrift für Haruo Nishihara zum 70. Geburtstag*, (Baden-Baden, Nomos Verlagsgesellschaft 1998) pp. 500-501.

[2] *Corpus Juris* for the protection of the financial interests of the EU, in M. Delmas-Marty and J.A.E. Vervaele, eds., *Implementation of the Corpus Juris in the Member States* (Intersentia 2000) p. 192.

[3] K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot 2002) p. 546 et seq.

Austrian law.[4] Taking into consideration advantages and shortcomings of each model, the differentiated one is generally more acceptable for the further development of the European criminal law. Despite the differences and controversial questions which exist within dualistic system, particularly when it comes to the degree of dependence of the accomplice from the main act and the participation in special offenses,[5] it is possible to formulate a common concept of the participation.[6] Taking into account the efforts discussed in the criminal law literature so far, the paper suggests the guidelines for formulating provisions of the general part of the European criminal law on participation, which may serve as well for the harmonization of the national criminal law systems. The more recent development of the international criminal law (provisions of the Statute of the International Criminal Court on Parties to a Crime) shows that the consensus and/or compromise are possible on such important issues.

II. Participation in the German criminal law

It is worth to emphasize that German theory distinguishes three steps in analyzing criminal liability. The first step concerns the question whether a person has fulfilled each element of the statutory description of an offense (*Tatbestandmäßigkeit*). This includes both objective and subjective (e.g., intention or negligence) elements. In the second step, one asks whether the person's conduct was unlawful (Rechtwidrigkeit) or was justified because of exceptional circumstances. The third step of analysis is to ask for the person's individual accountability for the wrongdoing (*Schuld*). The strict distinction between wrongfulness, on the one hand, and the issues of blameworthiness, on the other hand, is a characteristic of the German law. According to the prevailing opinion,

[4] The paper offers a brief overview of the relevant provisions of criminal codes, literature and practice on participation in the selected states. This overview has been significantly based upon the contents of the valuable scientific contribution by H. Stein, *Die Regelung von Täterschaft und Teilnahme im europäischen Strafrecht am Beispiel Deutschlands, Frankreichs, Spaniens, Österreichs und Englands* (Centaurus Verlag 2002).

[5] K. Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible?' 12 *Maastricht Journal of European and Comparative Law* (2005) p. 186.

[6] Ibid., at p. 190.

the issue of participation belongs to the theory on fulfillment of the statutory description of an offense (*Tatbestandslehre*).[7]

The German Penal Code distinguishes perpetrators (Article 25), instigators (Article 26) and aiders (Article 27). It starts from the restrictive notion of the perpetrator which in principle limits the perpetration to the realization of statutory elements of particular criminal offense, while instigation and aiding are reasons for expanding punishability. The perpetrator is the «main character» (*Zentralgestalt*) or 'key figure' (*Shlüsselfigur*) in committing a criminal offense, while accomplices are secondary figures who participate in someone else's act by instigating or aiding it.[8] The legislator clearly states in the Article 25 about 'committing' an offense, while instigating and aiding makes dependant on existence of the intentional perpetration. According to the Article 25, one can distinguish three forms of perpetration: direct perpetration (personally committed criminal offense), perpetration-by-means (committing an offense through another person) and co-perpetration (joint perpetration). According to the prevailing opinion, in the majority of intentional criminal offenses committed by commission, the domination over the commission of the offense (*Tatherrschaft*) is the main feature of the perpetration and the criterion for making a distinction from the accomplice.[9] Other criteria are applied in the case of other criminal offences (offenses committed by omission, self-committed offenses, special criminal offenses and negligent offences). Theory of domination over the commission of the offense has been increasingly accepted by the German court practice, which is for a long time under the influence of the subjective theories.

The domination over the commission of the offence is realized in the certain forms of perpetration in various ways: in the case of direct perpetrations as the domination over an act (Handlungsherrschaft), in the case of the perpetration by means as domination over the will of another (Willensherrschaft), and in the case of co-perpetration as the functional domination over the offense (*funktionelle Tatherrschaft*). Dogmatically speaking, the theory of domination over the criminal

[7] H.-H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin, Duncker & Humblot 1996) p. 643.

[8] C. Roxin, *Strafrecht, Allgemeiner Teil, Band II, Besondere Erscheinigungsformen der Straftat* (München, Verlag C.H. Beck 2003) p. 9.

[9] See the list of German scholars who accept the theory of domination over the commission of the criminal offense in Roxin, op. cit. n. 8, at p. 16, n. 31.

offense is based upon understanding of perpetration as the 'fulfillment of the statutory description of the criminal offense in a substantive manner'.[10] It represents today a synthesis of once strongly opposed subjective and objective theories.

1. Perpetration

Direct perpetration, as the domination over an act, is always manifested as the personal fulfillment of the statutory description of the criminal Pindirect offense by the active act. In the case of or perpetration by-means the person from behind (*Hinterman*) uses direct perpetrator as a mean for accomplishing his criminal goals. In principle, there is a certain defect with the means (he/she does not fulfill the statutory description of the criminal offense, does not act intentionally, acts in accordance with the law, he/she is not blameworthy or his/her accountability is significantly diminished, acts against under the pressure, he/she does not have a special trait of perpetrator), but the indirect perpetration is also possible even when the direct perpetrator is fully responsible person (perpetrator by means without defect: perpetrator behind the perpetrator).[11] This lastly mentioned legal figure, which is often marked as the 'organizational power' (*Organizationsherrschaft*), is particularly important for the contemporary criminal law. This is the case in which the person from behind as a commander uses strict hierarchically established apparatus of power (state bodies or criminal organization) at his disposal, which through its flawless functioning guarantees a realization of all his criminal goals. Indirect perpetrator in this case does not generally know direct perpetrators, but he is aware that they will obey and carry out his orders or, in the opposite case, they will be replaced by others. Being so replaceable makes direct perpetrators means in hands of a person from behind, despite his personal perpetrating responsibility. Accepting instigation in this case would not reflect to the full extent the real position and responsibility of a person from behind and it is also difficult to talk about co-perpetrating because the joint decision on a criminal offense is missing. More recently, the German courts have extended this doctrine of perpetration through culpable agents to business leaders – an extension that has met with some criticism in

[10] Ibid., at p. 15.
[11] K. Kühl, *Strafrecht, Allgemeiner Teil* (München, Verlag Franz Vahlen 2008) p. 670.

academic literature. Despite the objections, such a concept has been today widely accepted among scholars and court practice, even beyond the German borders, as well as in the international criminal law.

According to Article 25, the co-perpetration exists when 'more persons commit the criminal offense jointly'. Joint fulfillment of statutory description of the criminal offense based on division of labor is specific for the co-perpetration. Domination of the co-perpetrator over the criminal offense arises from his/her function during the commission of the offense: he/she takes a part (function) which is substantial for realization of the common plan, which gives him/her the possibility to have domination over the complete offense. It is important for the co-perpetration the principle of direct mutual accounting of all contributions to the offense.[12] The joint decision can be explicit or non-verbal and can be made before or during the commission of an offense. The excess of one co-perpetrator has been taken into account only to him/her and not to others. In the case of criminal offences qualified by the sever consequence, it is increasingly understood that the negligent co-perpetration is possible related to this consequence.[13] The controversial question is whether the co-perpetration, as the functional domination over an offense, is possible only in the phase of execution (from the beginning of attempt to completing the offense) or is it already possible in the preparatory phase. Namely, it is considered that planning and organizing an offense, as a significant contribution in the preparatory phase, should be evaluated as co-perpetration.[14] The co-perpetrator does not have to be present at the place of the committing an offense. The co-perpetrator contribution to the offense must be substantial, but it does not have to cover the elements of the offense (e.g., holding the victim in order to break down her/his resistance while the other co-perpetrator stabs her/him with the knife). The importance of the contribution is evaluated *ex ante* (in the time of making a joint decision) and not *ex post* (e.g., keeping a watch which perpetrators considered an important function even tough nobody appeared in the time of committing an offense). The successive co-perpetration is also possible, i.e. subsequent involvement in the criminal offense that has already taken a place. By the consequent application of the theory of

[12] Jescheck, op. cit. n. 7, at p. 675.

[13] For accepting negligent co-perpetration see J. Renzikowski, *Restriktiver Tärerbegriff und fahrlässige Beteiligung* (Tübingen, Mohr Sibeck 1997) p. 288.

[14] Jescheck, op. cit. n. 7, at p. 680; Kühl, op. cit. n. 11, at pp. 688-689.

domination over an offense, the elements of the offense, which had happened, cannot be taken into account to the successive co-perpetrator.

2. Accomplice

The notion of the accomplice in the German law can be determined as the (non-perpetration) intentional participation in the intentional and wrongful act of the main perpetrator. It is extremely important for the accessory the principle of limited accessoriness. The accessoriness is understood as the 'dependence' of accessory of the perpetrator's main act and it is 'limited' because it related only to wrongfulness of his act and not of his/her guilt. The guilt of perpetrator is not important because – except in the provision on instigation and aiding – it clearly stems from the Article 29 according to which anyone who participates in committing of the criminal offense is punished 'according to his/her own guilt, regardless of the guilt of others'. According to the prevailing opinion in the literature, the punishability of accessory is derived from causing the wrongful main offense. This is the theory of causality oriented towards the accessoriness.[15] Due to the scope of application of the principle of limited accessoriness, the provision of Article 28(1) is quite important, as well as Article 28(2). The first provision prescribes the mandatory reducing the punishment for instigators or aiders who lack particular personal traits upon which the punishability of perpetrator is based on. The later provision determines that the special personal circumstances, which aggravate, mitigate or exempt the punishment, should only be considered for the perpetrator or accomplice showing them.

The instigation is intentionally causing the decision of another to commit intentionally and wrongful act. The instigator does not participate in the domination of the criminal offense. Possible types of instigation are not determined within Article 26. In principle, every kind of psychological impact which creates the perpetrator's decision to commit the offense is adequate for instigation (persuasion, gift, promise of payment, expressing wishes, abuse of power or position, request, causing mistake). It is also possible the instigation on instigation (chained instigation). The instigator must act intentionally. *Dolus eventualis* is sufficient. His/her intention must be directed to cause a decision on committing of an offense, as well as at the execution of the

[15] Kühl, op. cit. n. 11, at. p. 701.

main act of the perpetrator, included all (objective and subjective) elements of the criminal offense (so called 'double intention'). Instigator intent must be concrete: it must refer to a particular offender and offense. The instigation is excluded when circle of person to which it relates can not be determined. It is not necessary that instigation covers all circumstances of commission the offense in details (time and place, victim or way of fulfilling the elements of the offense), because they often depends on further development of the event. The intention of the instigator must still relate to the execution of the offense that is concretely specified in its essential characteristics. The act of instigation must create a decision on committing of the criminal offense by perpetrator (causality of instigation). If the main perpetrator has had already decide to commit an offense (*omnimodo facturus*), then the responsibility for attempt of instigation (Article 30) or psychological aiding is possible. The intentional and wrongful offense of the perpetrator must be completed or attempted. The instigator is responsible only within the limits of his/her intent but not for excesses of the perpetrator (qualitative or quantitative). To the instigators and perpetrators the same penal frame (minimum and maximum of prescribed punishment) is applied. According to the prevailing opinion, the instigation by omission is not possible.[16] The unsuccessful instigation is also punishable (attempt of the instigation). In this case the provisions on sentencing for the attempt are applicable. The mitigation of punishment is obligated.

The aiding is intentionally supporting another in his/her intentionally committed wrongful act (Article 27). The aider also does not participate in the domination of the criminal offense. It is common to distinguish intellectual (psychological) and technical (physical) aiding. The joint decision between aider and perpetrator is not necessary. The perpetrator does not need to know for aider (secretly aiding). The aiding is possible in the time span from the beginning of the preparatory phase to the moment when the criminal offense is completed. The attempt to aiding is not punishable. The contribution of an aider must be causal for committing the criminal offense. For causality of aiding it is sufficient that it enables, facilitates, accelerates or intensifies the main act of the perpetrator.[17] In any case the aiding must not be *conditio sine qua non* for committing the criminal offense. The aider, as well as the instigator,

[16] Jescheck, op. cit. n. 7, at p. 691.
[17] Ibid., at p. 694.

must act intentionally. The criminal offense must be completed or attempted. Aiding by omission is possible if the aider is obligated by guarantor's duty to act. The legislator prescribed the mandatory mitigation of punishment for aider. In the case of voluntary abandonment of participants in the criminal offense the punishment is excluded. According to Article 31, it is possible to distinguish several situations. The participant is not punishable if he/she withdraw from the attempt of instigation or he/she remove already present danger of the committing an offense. If the perpetrator has had already decided to commit an offense, he/she must give up such an intent or, if he/she has had agree to commit an offense or accepted the offer of another to commit an offense, he/she must voluntary prevent the commission of the criminal offense. Finally, if the commission of the criminal offense fails without his/her intervention or it succeeds independently of his/her prior contribution, it is sufficient for the excluding of punishment that participant makes voluntary and serious effort for the criminal offense prevention.

III. Participation in the Spanish criminal law

The Spanish *Código Penal* is strongly influenced by the German criminal law. The structure of the criminal offense is determined by three elements: fulfillment of the statutory description of the criminal offense (*tipicidad*), wrongfulness (*antijurídicidad*) and culpability (*culpabilidad*). According to the prevailing opinion, the question of perpetration and accessory belongs to theory on fulfillment the elements of the criminal offense.[18] The Spanish criminal law accepts the differentiated model of participation and distinguishes the perpetrators (direct perpetrator, co-perpetrators and perpetrator-by-means), accomplices which are considered as perpetrators and other accomplices.[19] When it comes to distinction between perpetrators and accomplices, objective criteria prevail in the literature. Some scholars advocate formal-objective attitude, which is not appropriate for the perpetration-by-means, while others consider that material-objective criterion is essential for the perpetration: importance or weight of the contribution to the commission of the criminal offense that leads to

[18] Stein, op. cit. n. 4, at p. 145.

[19] J. Cerezo Mir, 'Täterschaft und Teilnahme im neuen spanischen Strafgesetzbuch von 1995', Bernd Schünemann, et al., Hrsg., *Festschrift für Claus Roxin zum 70. Geburtstag* (Berlin – New York 2001) p. 549 *et seq*.

division of the main and secondary participants. More authors opt for the theory of domination of the criminal offense, which is also represented in the court practice in the recent years. The most often mentioned objection to this theory is that it can not explain participation in negligent criminal offenses. The earlier court practice has been dominated by the theory of the 'prior agreement', which is criticized for not taking into account the objective criterion of the realization of the offense and because this theory leads to the extensive notion of the perpetration.

1. Perpetration

According to the Article 28(1) of the Spanish Criminal Code, perpetrators are those who realize the criminal offense individually, jointly with others or through another person that they use as a mean (tool). This is traditional division within dualistic model which includes perpetrators, co-perpetrators and perpetrators-by-means. As in the German theory, at least controversial is a direct perpetration which implies personal fulfillment of the statutory description of the criminal offense.

Co-perpetration is determined as joint commission of the criminal offense. The co-perpetrators jointly fulfill statutory description of the criminal offense based upon the joint decision, and each of them is held accountable for the whole offense independently of their individual contribution. Participation in the preparatory phase is not sufficient. The co-perpetrator must act in the phase of the execution of the criminal offense (from the beginning of the attempt to completing the offense). It is not necessary that the parts of the statutory description of the offense are fulfilled at the same time or in spatial nearness. The essential contributions outside the scope of the statutory description of the criminal offense (e.g., keeping watch or waiting in the car for others to escape quickly after commission of the offense) are also considered as co-perpetration. The successive co-perpetration is possible, but contributions made prior to the inclusion in the commission are not taking into account. The co-perpetrators are not responsible for contributions of others that transgress the limits of the joint decision. Opposite to the German criminal law, the Spanish law accepts the legal figure of negligent co-perpetration.

The perpetration by means is explicitly regulated: the indirect perpetrator is the one who realizes the criminal offense through another,

using him/her as an instrument. The typical appearing forms of perpetration by means are similar to those described in the German literature, but the legal figure of perpetrator behind the (fully responsible) perpetrator is accepted only exceptionally. Indirect perpetration in the negligent criminal offense is also possible.[20]

2. Accomplice

The Spanish Criminal Code distinguishes accomplices that are considered perpetrators [Article 28(2)] and other accomplices (Article 29). The accomplices that are considered perpetrators are the instigator and accomplices which participate in the commission of the offense with their contribution, without which the criminal offense will not be possible (so called 'necessary aiders'). They are in their nature accomplices, but according to the mentioned provision the legislator treats them as perpetrators. As accomplices are punishable only those mentioned in Article 29. The foundation for the punishability of accomplices is co-causality of the criminal offense. Although the Criminal Code does not mention it, the limited accessoriness is accepted. According to the prevailing opinion, accomplice is also possible in the negligent criminal offense. Opposite to the German Criminal Code, it is not necessary for perpetrator to act intentionally. Related to the scope of limited accessoriness, it is worth to emphasize, that special personal circumstances that make punishment severe, mitigate or exclude it, are applicable only to those who met them. Such circumstances related to the offense (not to the person of the perpetrator or accomplice) are taken into account for all participants who are aware of them.

Article 28(2)(a) prescribes that the instigator is the one who incites another to commit the criminal offense. The instigation is objectively causing a perpetrator's decision on committing the criminal offense by psychological influence. The instigator must create a perpetrator's decision on the commission of the offense. He/she is the 'intellectual perpetrator' of another's offense. As in the German law, it is not possible to instigate a person who has already decided to commit the criminal offense (*omnimodo facturus*). The main difference between the instigation and psychological aiding is the fact whether the perpetrator has already decided to commit the criminal offense or not. If he/she has

[20] More about perpetration in the Spanish criminal law see Stein, op. cit. n. 4, at pp. 150-155.

made a decision, aiding is only possibility. Instigation must relate to the certain criminal offense (described in essential elements) and to the certain perpetrator. Possible are all means of instigation, as a psychological contact between the instigator and perpetrator, which are intensive enough to create a decision on commission of the criminal offense. Only creating the situation that should be stimulative for the making a decision is not sufficient. The instigation by omission is not possible. The instigator must act intentionally. So called 'double intent' is necessary: related to the act of instigation and related to the criminal offense that should be committed by perpetrator. The instigator intent serves as the limit of the punishability. He/she can be punished only within the boundaries of his/her guilt. The instigator is not responsible for excessive perpetrator behavior. Instigation on attempt is punishable, while the attempt of instigation, opposite to the German law, is not punishable. Instigation on instigation (chained instigation) and instigation on aiding are punishable as aiding.

What is the specific for the Spanish criminal law is the distinction between necessary aiders and aiders whose contribution is not so essential for the commission of the criminal offense. The first category is regulated in the Article 28(2)(b) that prescribes that aiders who have participated with the contribution without which the committed offense could not be realized ('necessary aiding'). The second category is determined by the Article 29. These accomplices are not embraced by the Article 28 and they participate in the commission of the criminal offense simultaneously or through other contribution in the preparatory phase. For those aiding acts, the possibility of mitigation of punishment is prescribed. The act of aiding must not be *conditio sine qua non* for the commission of the criminal offense, but still it must be useful for the perpetrator's plan in sense that it facilitates or improves the perpetrator act. As in the German law, common is the division on psychological and physical aiding, and these forms of aiding are possible prior or in the same time when commission of the criminal offense takes place. According to the prevailing opinion, aiding by omission is also possible. The aider must act intentionally. Aiding the instigation and aiding in aiding are considered as aiding. The principle of limited accessoriness permits the aiding in the attempt of the commission of the offense, while attempted aiding is not punishable.[21]

[21] For details about accomplice liability see Stein, op. cit. n. 4, at pp. 155-170.

IV. Participation in the French criminal law

While the question whether someone is a perpetrator or accomplice in the German and Spanish law belongs to the theory of statutory description of the criminal offense, French law initially enquire the existence of elements that constitute a criminal offense: substantive (material) and subjective element (*les élément constitutifs de l'infraction: elemént matériel, élément moral*). Only when it is determined the existence of the criminal offense, one asks who can be considered as a 'responsible person', i.e., who is 'not responsible' for certain reasons. Thus, perpetration and accomplice represent two various forms of responsibility. The French criminal law also accepts a differentiated model. Perpetrators and accomplices are punished in the same manner. Despite that, their distinction is necessary. The most common reason is the necessity of main offense in which the accomplice is possible. If there is no main offense, an accomplice cannot be punished, unless his/her contribution has not been evaluated as co-perpetration.[22] The distinction is necessary in the case of criminal offenses which require that a perpetrator has particular characteristics; so if one does not posses such characteristics; he/she can be hold responsible only as an accomplice. The objective criteria for this distinction dominate in the theory and practice. It is mostly considered that the perpetrator is the one who fulfill all the elements of the criminal offense, while others are being punished as accomplices. Others consider that the key issue is the role in committing a criminal offense: a perpetrator is the one who has a dominating role, while an accomplice is anyone who has a secondary role. The court practice increasingly abandons the strict objective criteria in favor of normative.

1. Perpetration

According to the Article 121-4 of CP, the perpetrator is who commits an incriminating act, but also the one who attempts to commit a criminal offense (*crime*) or, in cases determined by the law, attempt to commit a misdemeanor (*délit*). The law does not determine the prerequisites of perpetration in details. In the literature and court practice there is a unique understanding that a perpetrator at least has to personally fulfill

[22] More about perpetration and accomplice in French criminal law see Stein, op. cit. n. 4, at. pp. 69-103.; G. Stefani, G. Levasseur and B. Bouloc, *Droit pénal général* (Paris, Dalloz 2003) p. 257 *et seq*., 277 *et seq.*

substantive elements of the criminal offense. This is particularly true for direct perpetration. Due to the criminal-political reasons, the court practice evaluates other persons as perpetrators as well. The legal figure of co-perpetrator is generally accepted even tough the French Penal Code does not mention it as a form of perpetration. In general, it is required that co-perpetrator also fulfills all constituent elements of the criminal offense (formal-objective criterion), but a part of the literature and practice allows that someone is treated as a co-perpetrator also in the cases in which co-perpetrators do not fulfill all elements of the statutory description of criminal offense, but they contribute to its fulfillment by acting in a joint and mutually supporting act. Thus, there are cases in the practice in which 'keeping a watch' is evaluated as co-perpetration. There are also cases in the practice in which inducing to commit a criminal offense (psychological participation in the preparatory phase) are considered the co-perpetration. In that sense, the French law is moving closer to the approaches which can be found in the German law.

The general part of the French Penal Code does not have a provision on perpetration-by-means. It is explicitly mentioned in the case of particular criminal offenses in the special part (committing an offense through another). Thus, the punishment of typical cases of perpetration-by-means in the French law is generally possible by applying the provision on instigation, which is found in the Articles 122-127. However, the court practice makes also here certain exemptions. One who could be punished only as an instigator, but due to the lack of main offense, such punishment cannot be carried out, can be in principle only considered as perpetrator-by-means, if the perpetrator is in the hands of the person from behind. In such a context, a prerequisite for perpetration-by-means is above all impunity of perpetrator who has a certain defect due to which there is not main offense (e.g., self-defense, necessity, mistake about elements of the statutory description of an offense, etc.). If the perpetrator is punishable, he cannot be a mean in someone else's hands. If the perpetrator is punishable or he/she is not culpable, the person from behind is held responsible as an accomplice in the main offense. Should the person from behind be punished as a perpetrator, it can be done through qualifying him/her as the co-perpetrator (the main argument is a dominating role of the person from behind). The French law is not familiar with the construction of a perpetrator behind the perpetrator.

2. Accomplice

According to the Article 121 of the Penal Code, the accomplice is punished as a 'perpetrator'. The French law does not differentiate notions of instigator and aider, but they are content-wise encompassed by the provision on accomplice. According to Articles 121-127(1) of the Penal Code, 'an accomplice is – in the case of a criminal offense or misdemeanor – the one who intentionally facilitates their preparation or execution by supporting and aiding'. According to the Article 121-127(2), an accomplice is also one who 'has incites committing a criminal offense by giving gifts, making promises or threats, abusing the authority or power, as well as by giving instructions how to commit a criminal offense'.

According to prevailing opinion, punishability of accomplices depends upon the wrongfulness of the main offense. For an accomplice to be punished, it is necessary that he/she participates in the punishable main offense. Such a wrongfulness of the main perpetrator is shifted to all accomplices and makes a foundation for their punishability (the system of borrowing a crime, *emprunt de criminalité*). However, the accomplice is not accounted for the act of another, but such behavior is related to the wrongfulness, which in the relation with his/her own accomplice act leads to the punishability. This is mainly in congruence with limited accessoriness in German criminal law.

As expressed in the Article 121-127 of the Penal Code, causality of accomplice is principally necessary in the sense that it enables, facilitates, intensifies or ensures fulfillment of the statutory description of the criminal offense. Accomplice acts can be taken before or during the time of committing a crime. They are no longer possible after (formally) completing an offense, only in the case if they have not been promised in advanced. Acts undertaken after a criminal offense is completed can represent independent criminal offenses. Since the French law is not familiar with the wrongful criminal offenses of omission, according to prevailing opinion the accessory is possible only by active behavior. Only in exceptional cases one does acknowledge the possibility of aiding by omission because the formulation 'aiding or supporting' does not in any way expresses that they have to be done by a certain act. This relates mainly to the case of psychological aiding (the mere presence which morally supports the perpetrator while the offense

is committed). The accomplice by omission is considered also in the cases when the accomplice has a duty to eliminate/prevent the acts of misdemeanor. The Article 121-127 of the Penal Code in both its items precisely describes that must be a way of undertaking an accomplice act. Punishable are only listed forms of accomplice: 'aid or support', inciting an offense through 'gifts, promises, threats, commands or abuse of authority or power, as well as the accomplice by sending and giving advice'. Other forms of accomplice are not punishable, unless special part of the Penal Code does not prescribe such behavior as an independent criminal offense. The accomplice liability requires intent. One searches for the awareness about the main offense and the intention that such an offense is supported or provoked. The intention must exist prior to or during undertaking of accomplice acts. Negligent aiding is generally not punishable. Accomplices are not held responsible for the (qualitative) excess of perpetrator. An accomplice must act with intent in relation to relevant circumstances of the offense. Variations in the place, time or modality of the commission are not important. As far as the qualifying circumstances are concerned, it is sufficient to determine an indirect intent (*dolus eventualis*) of the accomplice. Intentional accomplice in negligent offense is clearly possible. One does not require that the perpetrator act intentionally. Accomplice in the attempt is also punishable, but the attempt of accomplice is not punishable. Punishability of the accomplice attempt is possible only if the legislator punishes it as an independent offense. If the accomplice, after undertaking an act, does not want any more to complete the offense, merely losing the will to complete the offense is not sufficient, but it is necessary to fully remove the consequences of his/her own contribution, which can often only be achieved through the prevention of criminal offense.

The accomplice is punished as the perpetrator. However, the question is how special circumstances, which may increase or reduce the punishment (mitigating or severing circumstances), influence on the punishability of each accomplice. There is a need to distinguish between circumstances that are associated with the person of the perpetrator and the circumstances connected with the offense itself. Personal severing or mitigating circumstances affect only the punishability of a person who has them. Everyone is punished according to his/her own subjective wrongfulness. Objective severing or mitigating circumstances are related to the objective wrongfulness of the main offense and the are not

connected to the person of the perpetrator, so that they always affect all accomplices, regardless of whether the accomplice was aware of their existence or not. There are various understanding on how to proceed in the case of mixed circumstances. According to one, one should examine what is the dominant (subjective or objective), and the second it is the objective circumstances that affect all accomplices.

V. Participation in the English criminal law

It is characteristic for English law to distinguish the *actus reus* (the objective elements of the offense) and *mens rea* (subjective prerequisite of punishability), and the reasons for excluding punishability that are designated by the generic notion of defense (mostly the reasons for justification and excuse of the European continental law). Because of the clear demarcation of objective criterion, the theory on perpetration and accomplice in the English criminal law belongs to the *actus reus.* The distinction between the perpetrator (principal) and the accomplice (principal in second degree, accessory or accomplice) in the English criminal law is achieved by purely objective criteria: the perpetrator is generally only the person who personally undertakes an act of committing a criminal offense.[23]

1. Perpetration

Besides the direct perpetration, the notion of the co-perpetration is determined by the objective criterion: the co-perpetrator (joint principal) is one who fulfills together with others action of committing a criminal offense, or at least a part of it. If one of accomplices holds a victim, and the other stabs the victim with a knife, only the latter is the perpetrator since holding a victim does not represent the fulfillment of the statutory description of a criminal offense of murder. Thus the term of co-perpetrator is much narrower than in the German law. According to prevailing opinion, the successive co-perpetration is possible.

The construction of perpetrator-by-means (Principal Using an Innocent Agent*)* is an exception to the rule that the perpetrator is only one who personally commits the criminal offense. The appearing forms are reduced to cases in which on the mean's side (innocent agent) there is a shortcoming. There are primarily cases, in which the mean does not act in compliance with requested intent, then the cases in which there are

[23] A. Ashworth, *Principles of Criminal Law* (Oxford, Claredon Law Series 1995) p. 410 et seq.

certain reasons for excluding unlawfulness or guilt on the mean's side, and cases in which the mean is without punishment because of the young age. However, in the literature perpetration-by-means is not discussed in more details.

2. Accomplice

Appearing forms of accomplice are substantially reduced to instigation and aiding. Accomplices are punished as perpetrators. The basis of accomplice punishability is mostly seen in the fact that accomplices are joining the perpetrator and his/her wrongfulness and guilt (the theory of participation). Appearing forms of accessory are: aiding, abetting, counseling and procuring. Terms aid and abet are often used together because they both describe the kind of acts that support the perpetrator during the commission of the offense. It is a prevailing understanding that the presence of accomplice at the place of criminal offense is a decisive criterion for making a distinction from other two appearing forms of accomplice. The term aid primarily includes any support provided to the perpetrator through the substantive or physical aid, while the term abet primarily includes moral or spiritual support provided to the perpetrator. The term counsel includes any encouragement before the offense is committed. The term procure is the most general of all the above mentioned and includes any behavior which in any way causes committing the offense.

VI. Participation in the Austrian criminal law

The Austrian criminal law accepts the system of unique perpetrator (*Eintheitstätersystem*) which does not distinguishes perpetrators and accomplices. Each causal contribution to the commission of the criminal offense is considered perpetration. This model leads to the extensive notion of the perpetrator.[24] Some scholars in this case speak about 'exclusive' notion of perpetrator, because the category of accomplices is unknown in the system of unique perpetrator. The question of perpetration belongs to the theory on fulfillment the statutory description of the criminal offense. The system of the unique perpetrator starts from the thesis that each who participate in the commission of the offense realizes his/her own wrongful act and each of them is punished according to his/her own guilt, what means that each participant can be

[24] D. Kienapfel and F. Höpfel, *Grundriss des Strafrechts, Allgemeiner Teil* (Wien, Manzsche Verlags- und Universitätsbuchhandlung 2009) p. 209.

punished independently of the legal evaluation of the contribution other participants. This approach denies any kind of accessoriness: participation in the criminal offense does not depend on intentional, wrongful and culpable act of another, neither on the phase of commission of the criminal offense which is entered by another participant (perpetrator). For all participants the same penal frame is prescribed and the evaluation of individual contribution to the commission of the criminal offense becomes prominent at the level of sentencing.

According to Article 12 of Austrian Penal Code, the punishable act does not commit only the direct perpetrator, but anyone else who cause/induce another to commit the criminal offense or otherwise contribute to the commission of the offense. It is clear that this provision treats all contributions as perpetration. In the formal system of unique perpetrator exists only the notion of the perpetrator which is applied on every kind of contribution to the commission of the criminal offense. Opposite to this approach is the 'functional' system which all participants encompasses as perpetrators that are submitted to the same punishment frame, but still accepts different forms of participation which can and must be distinguished.[25] Within this system one can distinguish direct perpetrator (*Täter*), perpetrator by inducing (*Bestimmungstäter*) and perpetrator by contribution (*Beitragstäter*). Despite differentiation in notions, all appearing forms of perpetration have legally equal value. Mentioned appearing forms of perpetration are possible in intentional as well as in negligent criminal offenses.

1. Direct perpetrator

Direct (single) perpetrator is in principle whoever personally fulfilled the statutory description of the criminal offense. This notion of the perpetrator some scholars expand on the situations in which person from behind (perpetrator-by-means) use another person as an instrument for commission of the criminal offense.[26] In that case, the person from behind is a 'hardly covered' direct perpetrator who personally does not fulfill the statutory description of the criminal offense. The mentioned notion, which corresponds to the notion of the perpetrator-by-means in German law, is not necessary in the functional system of the unique

[25] Ibid., at p. 215.

[26] O. Triffterer, *Österreichisches Strafrecht, Allgemeiner Teil* (Berlin-New York, Springer Verlag 1994) p. 400.

perpetrator, because perpetration by inducing is applicable independently of the legal evaluation of the direct perpetrator act.
Direct co-perpetrator is whoever just partially fulfills the statutory description of the criminal offense and whom the contributions of other co-perpetrators are taking into account. In accordance with Article 13 of the Criminal Code, each co-perpetrator is punishable according to his/her guilt, without respect to the guilt of others. This is important for the cases of co-perpetrators excessive acts. In the case of criminal offenses qualified with severe consequences, it is necessary to determine that each participant has acted negligently related to these consequences. Concerning to the demand that co-perpetrator must at least partially fulfill the statutory description of the offense, preparatory acts are not sufficient. The successive co-perpetration is possible in the phase of execution of the criminal offense.

2. Perpetrator by inducing

Perpetrator by inducing, in terms of the Article 12, is one who induces another to commit punishable acts. This independent form of perpetration is equally ranked as the direct perpetration. Unlike the direct perpetration, two elements are required here: the act of inducement and commission of the offense by another person. Perpetration by inducing is in fact connected to the commission of the offense because the completed perpetration by inducing is dependent upon completion of the main offense.[27] Perpetration by inducing is in no way dependant upon the legal quality of the main offense. It is not particularly necessary to be an intentional main offense. Hence, the perpetration-by-inducing the negligent criminal offense is possible. According to the prevailing opinion in the Austrian court practice and literature, one does not require unlawfulness of the main offense. For the punishment of perpetrator by inducing, it is important only the fact of committing the offense by the direct perpetrator.[28] Due to denying the limited accessoriness, the perpetration by inducing is wider concept than instigation in the German law, which requires intentional and unlawful main offense. Thus, perpetration by inducing encompasses those cases which are in the German law evaluated as the perpetration-by-means. It takes causality of the act of inducement in terms of making decision by the direct perpetrator. In the case of *omnimodo facturus*, it is not about

[27] Kienapfel, op. cit. n. 24, p. 233.
[28] Ibid.

perpetration by inducing, but it is possible an attempt to perpetration by inducing or psychological aid. Inducing must be directed to a specific or identifiable group of persons. As far as inducing means are concerned, one can take into consideration any behavior (psychological acting) which is causal for making a decision about committing a criminal offense by the direct perpetrator. Disputable is the possibility of inducing by omission. The authors who allow such possibility ask for a guarantor duty of inducer. For the intentional perpetration by means, it is necessary that the inducer acts with intent in relation to his/her act of inducing. Moreover, his/her intention must be directed to complete the offense to which he/she induces the direct perpetrator. If the offense, to which inducing is directed, contains a special subjective features, then the perpetrator by inducing must have the same features. There is a difference compared to the German law, in which it is sufficient that the instigator is only aware of such special subjective feature of the perpetrator. Intent of the perpetrator by inducing must include all important elements of the criminal offense. The perpetrator by inducing is held responsible within the limits of his/her intention. In the case of the qualitative excess, one considers an attempt of perpetration by inducing related to the desired offense, while in the case of quantitative excess the perpetrator by inducing can be punished for the basic criminal offense. The responsibility for a sever consequences is solves as in the case of direct co-perpetration (if there is a negligence in relation to more sever consequence). It is questionable is whether is possible to have a negligent perpetration by inducing: it is partly considered that the notion 'induce' suggests only intention, but still prevailing opinions is that it is possible to have negligent inducing since limiting to intentional inducement is not explicitly prescribed.[29] It is also possible to induce the perpetration by inducing, as well as to induce to perpetration by contribution. According to the Article 15(2), the punishable is the attempt to the perpetration by inducing, which opposite to the German law is not limited to more sever criminal offenses. The perpetrator by inducing is punished within the limits of phase obtained by the direct perpetrator (attempted or completed offense). Unpunishable voluntary abandonment is regulated similarly to the German law.

[29] Triffterer, op. cit. n. 26, at p. 413.

3. Perpetrator by contribution

According to Article 12 of the Austrian Criminal Code, punishable is whoever 'otherwise contribute' to the commission of the offense. This is independent appearing form of perpetration which punishability in principle does not depend upon the punishability of the direct perpetrator. Related to other appearing forms of perpetration, the legislator in this case uses a general clause which encompasses all intentional and negligent acts, which improve the commission of the criminal offense and are not covered with perpetration by inducing.[30] The direct perpetrator must not act intentionally, unlawfully or culpably (so called qualitative accessoriness is not necessary). The fulfillment of the statutory description of the criminal offense is sufficient. The perpetration by contribution is wider concept than aiding in German criminal law, because the intentional and wrongful main act is not necessary. Perpetration by contribution is possible in the negligent criminal offense. According to prevailing opinion, so called quantitative accessoriness is necessary for the perpetration by contribution because the attempt of perpetration by contribution is not punishable. For the punishability of the perpetration by contribution, direct perpetrator must enter the phase of attempt. There is a factual connection between perpetration by contribution and direct perpetration: punishment for perpetrator by contribution depends on the fact has the direct perpetrator only attempted to commit the criminal offense or completed it. The act of contribution must be causal in a way that it enables, facilitates or otherwise improves the commission of the criminal offense. The spatial and temporal nearness to the fulfillment of the statutory description of the criminal offense is not necessary. The perpetration by contribution is possible through psychological and physical supporting acts. For the psychological contribution characteristic is giving an advices how to commit the offense, but mere presence at the place of committing the offense is sufficient if such a contribution encourages the direct perpetrator. The perpetration by omission is also possible, if perpetrator has a guarantor duty to act. In the case of intentional perpetration by contribution the perpetrator must act with intent related to act of contribution and must have the intent directed to the completion of the

[30] Kienapfel, op. cit. n. 24, at. p. 239 et seq.

criminal offense. He/she must also fulfill special subjective elements which are characteristic for certain offences. The intent must cover all substantial elements of the criminal offense. Perpetrator by contribution is responsible only within the boundaries of his/her intent and not for the excessive acts of the direct perpetrator. Negligent perpetration by contribution is also possible. Prerequisites of the unpunishability of voluntary abandonment are determined in a same way as well as in the case of voluntary abandonment of the perpetrator by inducing.

4. The principle of autonomous responsibility of the participants and sentencing

In the system of the unique perpetrator one generally applies the principle of autonomous responsibility of all participants. Article 12 consistently implements the principle of guilt from Article 4 of the Penal Code, thereby determining that each participant is punished according to his/her own guilt. Because of the equivalence (equal value) of all forms of participation in committing the criminal offense and related independence of legal assessment of each participant contribution, it is possible that they – in any form of perpetration – are held responsible for various criminal offenses. By using the principle of autonomous responsibility one can avoid all problems that arise in the German law related to the principle of accessoriness. In the Austrian law, however, everyone is being punished based upon the statutory description of criminal offense which (personal) characteristics he/she fulfills. The only restriction for *delicta propria* is stated in the Article 14, according to which it is sufficient for the punishment for special criminal offenses that at least one of participants have personal characteristics of perpetrator. It should be noted that the perpetration by contribution is still accessory in quantitative terms because the perpetrator by contribution is punishable only if the direct perpetrator entered the phase of attempt. Even though in the system of unique perpetrator the same penal frame apply to all participants (appearing forms of perpetration), the legislator has within the framework of Article 33 and 34 emphasized certain circumstances relevant for sentencing in the case of participation. Thus, for example, an aggravating circumstance may be inducing greater number of people to commit a criminal offense or having a leading role among them, and mitigating circumstance that the offense was committed under the influence of third person or out of fear, as well as in the case of participation in the secondary role.

VII. Conclusion

The criminal law theory and the court practice in the states that follow differentiated model of participation tend to normative approach of perpetration which becomes prominent in the case of perpetration-by-means and co-perpetration. In the case of perpetration-by-means such approach is evident through gradually abandonment of customary principle that indirect perpetration is not possible in the case when direct perpetrator is fully responsible person. For co-perpetration is characteristic it's spreading on substantial contributions which stand outside the statutory description of the criminal offense, including contributions in preparatory phase. In that way the differentiated model comes closer to the system of unique perpetrator. By expanding the scope of perpetration through a normative interpretation (particularly through the theory of hegemony/domination of the criminal offense) traditional boundaries between different forms of participation are in many aspects dissolved.[31] Despite that development, a differentiated model deserves priority contrary to unitarian one, and its structure should be the basis to the guidelines for the common concept of participation within the EU. This model in an appropriate way from the outset (at the level of attribution) consider different degrees of involvement and weight of contributions, provided for less intensive forms of participation a mitigation of punishment (optional or obligated). Kind of participation is not just a circumstance which court must take into the consideration among many others in a process of sentencing. A need for distinction between forms of participation arises from the reality, as show so much examples of large scale and organized criminality in which primary and secondary roles/participation is evident. In this context, a principle of accessorial liability clearly point out that instigators and aiders only participate in something (criminal offense) that realize someone else as a key figure or perpetrator.

Considering the legislative regulation in the majority of EU member states, achievements of the criminal law theory, development of court practice and actual different forms of participation in modern criminality, the guidelines for European concept of parties to a crime, within a general part, that can be suggested are following:

[31] J. Keiler, 'Towards a European Concept of participation in crime', in A. Klip, ed., *Substantive Criminal Law of the European Union* (Antwerpen-Apeldoorn-Portland, Maklu 2011) pp. 187-188.

Participants in the offence (parties to a crime) are the perpetrator, the instigator and the aider. Each participant should be punished according to his own guilt without respect to the guilt of the other participants. The main appearing forms of perpetration are: direct perpetration, co-perpetration and perpetration-by-means. Direct (single) perpetrator commits the criminal offense alone by his/her own conduct. Co-perpetrators commit the offence jointly, with division of labor, based on common decision. The co-perpetration also includes essential contributions which stand outside the statutory description of the criminal offense, independently of the phase of the committing the criminal offense. Perpetrator-by-means commits the offense using another person as an instrument (tool), regardless of the responsibility of an instrument. Accessories are instigator and aider. The instigator intentionally induces another person to the commission of an intentional and unjustified act. He should be punished like a perpetrator. The aider is a person who intentionally by subordinate contribution aids another person in the commission of an intentional and unjustified act. The punishment of the aider can be mitigated. The attempt to instigation should be punishable if the attempt of the main offense is punishable. Attempted aiding is not punishable. Participants who voluntarily prevent the consummation of the offense should not be punishable. If the offense does not take place independently of the voluntary abandonment of the participant or if it is committed independently of his former contribution, his voluntary and serious endeavor to prevent the offense shall be sufficient to exempt from punishment. If special and personal qualities, conditions or circumstances are constituent for punishability, only a person showing these special circumstances may be a perpetrator. Further participants may be instigators or aiders of the offense, if they have knowledge of the special and personal circumstances of the perpetrator. The special offense-related and special perpetrator-related circumstances should be distinguished. Special offence-related circumstances are qualities, conditions or circumstances related to the injustice of the offense. Special perpetrator-related circumstances are qualities, conditions or circumstances related to the person of the perpetrator. If special offense-related circumstances are realized in the commission of the offense, they should be only considered for the participants who have knowledge of them. If special perpetrator-related circumstances that are constituent for punishability are realized in the commission of the offense, the regulations concerning participation in

special offenses should be applied. Special perpetrator-related circumstances that aggravate, mitigate or exempt the punishment should only be considered for the participants showing them. If an offense is committed negligently, each participant contribution to the realization of the result should be considered as perpetrator if he fulfills the other requirements of punishability.[32]

Finally, let me conclude: shaping the general part of the European criminal law, as well as provisions on perpetration and accomplice is not an easy task, and it is obvious that some compromises are necessary, but the history of making a Rome statute of International Criminal Court remind us that similar efforts at European level are not mission impossible.

[32] These guidelines are very close to the provisions on participation in the German Criminal Code and the proposal made by Stein, op. cit. n. 4, at pp. 396-400. The most important differences are related to perpetration by means and co-perpetration.

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The fight against corruption in Hungary and Croatia

I. Basic remarks on the nature of corruption

'Corruption is evil. It makes powerful people rich. It makes rich people powerful. It creates the impression that everything is for sale. It destroys the sense of justice and trust in government. It takes away hope from the poor and the helpless. Once established, it is placed among structures hard to destroy.'[1] This quote describes the problem of corruption and the erosion that it causes to the society. But to start from scratch, we should start with its definition. Then already we have a problem, since a universally accepted definition of corruption is yet to emerge. Depending on the point of view, which can be social, legal, economic, moral, psychological etc., and the area in which it occurs, we can get as many types/definitions of corruption. However, there are many authors that deal with this issue and they agree in its key determinants. For example, in a broader sense, corruption can be considered as any form of abuse of public authority for private gain of a person who performs a public service; or in the narrow sense, as a procedure in which at least two persons use the inadmissible exchange to achieve their own interests, acting to the detriment of the public interest, breaking the moral and legal norms, violating the funds of democratic development, legal state and the rule of law.[2] Transparency International defines it as the abuse of entrusted power for private gain. Suffice to say, everyone knows about the occurrence and extent of corruption, and certainly is aware of the damage it causes. Corruptive behaviours endanger the well-

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[1] J. Kregar, 'Korupcija je društveno zlo' [Corruption as Social Evil], in *Izgradnja institucija: Etika i korupcija* [Building Institutions: Ethics and Corruption] (Zagreb, Faculty of Law in Zagreb 2010) p. 15.

[2] *Rječnik kaznenog prava* [Dictionary of Criminal Law] (Zagreb, Masmedia 2002) p. 199; D. Derenčinović in his book *Mit(o) korupciji* [The Myth of Corruption] (Zagreb, Nocci 2001) p. 42., lists different types of corruption: individual, systemic, indirect, competitive, active and passive, street bargaining, political, transactional, nepotistic, investment and others.

being of societies fundamentally. Corruption is an 'evergreen' category, since it has retained its topicality over decades and there are but a few problems in Hungary that could be attributed greater actual political significance. The most comprehensive analysis of corruption in Hungarian academic literature was carried out by Mariann Kránitz,[3] who established as a result of her research that every society has to pay a 'price for democracy', into which one must 'count' – among others – an increase in the extent of crime and a change in its contents, as well as a peculiar situation concerning corruption.[4] The democratic transformation of the political system alone did not – could not! – eliminate corruption, but rather transformed and changed its character and direction. This can be explained by the fact that corruption is extremely closely linked to the economic, political and social milieu in which it is realized. Moreover: there are few social phenomena that follow changes going on in their medium of existence in such an 'up-to-date' way, within such a short reaction time, as corruption does. The ability of quick accommodation is apparent when considering both the years of the democratic political transition and the post-transition era. When discussing corruption, we would like to emphasize it as a principle – and we consider this as the 'poisoned apple' of this phenomenon – that corruption has the characteristics of an extremely efficient means of problem-solving and interest-assertion, therefore the discreet charm of temptation hovers over people all the time. The existence of a corruption-free civilization is unknown in the history of mankind; however, one cannot give up the dream of achieving this idyllic state. On the other hand, there are convincing data at our disposal proving that where a community has taken the fight against corruption seriously, the intensity of corruption has decreased there significantly as a matter of fact. However, it must also be noted that corruption reacts to changes in the legal environment extremely sensitively – similar to water or light – it finds a way and becomes activated immediately and is capable of triggering off a whole avalanche of corrupt acts. The problems are worsened by the fact that corruption has never particularly 'respected' borders between countries and continents. This phenomenon

[3] M. Kránitz, *A korrupció utolsó huszonöt éve Magyarországon* [The Past Twenty-Five Years of Corruption in Hungary] (unpublished essay) p. 1.
[4] M. Kránitz, 'A korrupció utolsó huszonöt éve Magyarországon' [The Past Twenty-Five Years of Corruption in Hungary], (posthumous essay) 5 *Ügyészek Lapja* (2006) pp. 26-28.

was probably among the first – if not the very first one– to become globalised.[5] A fight against an undesirable phenomenon can be successful if one knows the characteristic features of the given phenomenon. The problem concerning corruption lies in the very fact that there is too much 'fumbling in the dark'. Numerous studies on the perception on corruption show as a fact that the corruption today is a subject of debates and discussions because it is recognized as a major, if not the biggest social problem. Usually one can hear how depression is the leading illness today. Similarly, one can say that corruption is the depression of society. There is no area in life in which it does not occur and there is no country where corruption is not an issue to a lesser or greater extent. Because of that, there is no state that has not been trying to fight it in order to suppress it.

Corruption can be suppressed only by effective educational, preventive and repressive mechanisms, however, certainly with the awareness that is not possible to eradicate it, but is possible to reduce it to an optimal or acceptable level. It was already mentioned that corruption was a popular and exciting area. Today, we have numerous international and national studies that deal with it in certain time intervals to see its perception, causes, to see the comparison of countries and ultimately to contribute to raising the awareness. Two types of methods tend to be used to help to get to know the phenomenon better and more thoroughly and to understand its functioning mechanism: data obtained from perception researches, and the other is represented by criminal statistical data.

One of the most popular is surely the research carried out by the Transparency International known as the Corruption Perception Index.[6] This research creates a ranking of countries according to the assessment of corruption in them. The ranking score assigned to each state can be from 0 to 10, and is inversely proportional to the perception of corruption. Therefore, mark 0 is given to a state that is thought to be the

[5] M. Kránitz, op. cit. n. 3, at p. 5.

[6] Hereinafter CPI. Incidentally, Transparency International is a non-government organization dedicated to increasing government responsibility and combating international and national corruption. This is the only global, non-profit and politically non-partisan organization whose activities are aiming to combat corruption and its consequences. It has its headquarters in Berlin and was founded in 1993 initially to combat corruption in international business transactions. Later they created divisions in many countries, including Croatia, which has been the subject of research since 1999. TI enjoys a great support in the world and it has a growing number of members. More on www.transparency.org.

most corrupt and mark 10 is given to a state with the lowest perception of corruption. Although this study suffers many complaints, mainly because it is problematic to measure perception of corruption, one cannot deny the great value it has in assessing citizens' opinions about the level of corruption in their respective countries of residence where the and how often they encounter it. Nevertheless, since the perception index is based on perception, it is subjective; therefore, it is capable 'merely' of providing some orientation concerning the level of infection of individual countries. At the same time, a subjective scale is not suitable for measuring such an objective phenomenon as corruption, which is to such an extent connected with the fragments of economy, bureaucracy and power. On the other hand, the CPI triggers off a 'labelling effect', in other words, it sticks a positive or negative stamp on a given country. However, such labelling, in turn, also functions as a factor influencing corruption. This is how a country slightly or hardly concerned by corruption turns even purer, while a country infected by corruption becomes even more endangered. The CPI constitutes an internationally recognized standard, but it leads to strongly questionable results and consequences concerning the evaluation of the state of corruption in a given country.[7]

According to the CPI, in 2010, Croatia's result was4.1 ranking it at the 62nd place among178 countries participating in the research. In 2011, the score was 4.0 and the 66th place out of 183 countries.[8] Hungary occupied the 50th place with 4.7 points. However, the key message at the global level remains the fact that more than three quarters of the countries were rated below 5, which indicates that corruption is a global and serious problem.[9] Transparency International has created one other significant study entitled Global Corruption Barometer.[10] It has been made for the correction of results obtained by the CPI and measures the

[7] M. Kránitz, op. cit. n. 3, at p. 6.

[8] Incidentally, according to this research, the perception of corruption in Croatia has changed over the years: we achieved the best result in 1999 when it stood at 2.9. and the worst in 2008, when it stood at 4.4. Also, this enables a comparison of Croatia not only with the world countries, but also towards the countries in the region in 2011: Slovenia was at the 35th place, Slovakia and Montenegro were at the same position as Croatia (66th), Italy at 79th, Serbia 86th and Bosnia and Herzegovina 91st .

[9] The best-ranked countries were New Zealand (9.5) and Denmark (9.4) and the worst, traditionally, Somalia and North Korea (1.0 both).

[10] Hereinafter GCB.

level and area of corruption risk.[11] The CPI is determined by a comparison of the level of corruption in different countries, the GCB distinguishes the perception of social groups and areas of risk. According to GCB 2010 in Croatia, the judiciary is perceived as the most corrupt.[12] The same result was obtained also in 2007 and 2009.[13] Based on the criminal statistics data, one would have to conclude that corruption crime may be considered a rare bird in the Hungary and Croatia. It is an obviously mistaken diagnosis because of latency, since as a result of the community of interest between the provider and the recipient of an unlawful advantage, only an insignificant number of acts of corruption lead to criminal prosecutions.[14]

The small number of criminal proceedings[15] may be explained by the fact that the overwhelming majority of criminal proceedings are instituted following the reports of crimes by citizens – as established by László Korinek during his research into latency:[16] 'the law sees with the

[11] J. Kregar, 'Korupcija: Neznanje nije opravdanje' [Corruption: Ignorance is Not an Excuse], in *Korupcija i povjerenje* [Corruption and Trust] (Zagreb, Centar za demokraciju i pravo Miko Tripalo 2010), p. 26.

[12] www.transparency.org/policy_research/surveys_indices/gcb/2010/results. Croatia is here alongside countries such as Afghanistan, Bolivia, Cambodia, Peru, Ukraine. To the question: 'How much the situation in terms of corruption has changed over the last three years?' 57% of the respondents said that corruption has increased and 33% that it remained the same. Another interesting comparison is this: in Singapore the most corrupted are the media and in Denmark it is the private sector (business).

[13] In addition to these famous ones, there are other significant studies on the topic of corruption in Croatia, such as BEEPS (Business Environment and Enterprise Performance Survey), followed by research carried out by the World Bank Institute, Freedom House, Gallup International etc., but we will not elaborate further on these due to spatial constraints.

[14] It was a great success for the Hungarian police when they caught a parliamentary representative in the act of taking a bribe of 20 million forints (= 69,000 EUR). The representative's right to immunity was suspended by the Parliament and he was validly sentenced to serve 6 years of imprisonment and fined 9 million forints (= 31,000 EUR) as ancillary punishment.

[15] L. Korinek, 'A korrupció legfontosabb kriminológiai összefüggései' [The Main Criminological Bearings of Corruption], in F. Csefkó and Cs. Horváth, szerk., *Politika és korrupció – A törvényesség és a törvénytelenség határai* [Politics and Corruption – Limits of Lawfulness and Unlawfulness] (Pécs, PTE ÁJK Politikatudományi és Társadalomelméleti Tanszék, Pécs-Baranyai Értelmiségi Egyesület 2010) p. 270.

[16] L. Korinek, 'A bűnözés visszatükröződése. Latens bűnözés, bűnözésábrázolás, félelem a bűnözéstől' [Reflections of Crime. Latency, Portrayal and Fear of Crime],

eye of the citizen'– and in the case of corruption there is a low level of willingness to report it.[17] It is not an exaggeration to claim that the Hungarian indices relating to the extent of corruption crimes and their proportion to the total number of crimes are tragicomic.[18] (In 2010, the Hungarian criminal prosecution authorities registered 447,186 criminal offences and among these they recorded altogether 481 offences of corruption.) Even if we 'add up' the information obtained from the perception index and criminal statistics, we still cannot claim to know the whole extent of corruption. A principal problem of corruption in Hungary stems from the functioning disorder of the Hungarian economic system. While earlier, in the era of socialism, corruption was caused by the lack of products and services, today the 'cause to be blamed' is overproduction. The majority of market actors would like to sell services to the state and local government sector. In this case, a small gift to the mayor or a representative (e.g., a paid vacation) can leverage the decision in favour of one company. The two acts on public procurement adopted so far with the aim of purifying market relations have become deadlocked in practice, we would venture the remark that in the era of the so-called 'free-hand buying' that was in practice at the time, public funds were spent a lot more advantageously than today.

II. The criminal law regulation *de lege lata* relating to corruption in Hungary

Act 1978 on the Criminal Code of Hungary (hereinafter referred to as: Criminal Code) entered into force on 1 July 1979. The Hungarian legislator laid down offences of corruption in Chapter XV of the Criminal Code entitled 'Crimes against the Purity of State Administration, the Administration of Justice and Public Life'.[19]
These offences deserve great attention, since it is a question of fundamental importance for every society that the officials, the actors of social-economic and political life, in other words, the legitimate leaders

in K. Gönczöl, K. Kerezsi, L. Korinek and M. Lévay, szerk., *Kriminológia – Szakkriminológia* [Criminology – Specialized Criminology] (Budapest, Complex Kiadó 2006) p. 251.

[17] I. L. Gál, *Gazdasági büntetőjog közgazdászoknak* [Economic Criminal Law for Economists] (Budapest, Akadémiai Kiadó 2007) p. 78.

[18] M. Kránitz, loc. cit. n. 3, at p. 6.

[19] E. Erdősy, J. Földvári and M. Tóth, *Magyar Büntetőjog Különös Rész* [Hungarian Criminal Law. Specific Cases] (Budapest, Osiris Kiadó 2007) p. 293.

of the individual community perform their tasks without favour. This circumstance determines the extent of confidence citizens have in the various bodies of state and local government and, in the final analysis, the opinion they form about the political and social system. In consideration of the high-level demoralizing effect caused by offences of corruption, 15 sections are devoted to crimes against the purity of public life.

Crimes against the purity of public life include:

- Bribery (Criminal Code, Articles 250-255/A)
- Failure to report bribery (Criminal Code, Article 255/B)
- Trafficking in influence (Criminal Code, Article 256)
- Persecution of a conveyor of an announcement of public concern (Criminal Code, Article 257)

Crimes against the propriety of international affairs include:

- Bribery in international relations (Criminal Code, Articles 258/B-258/D)
- Profiteering with influence in international relations (Criminal Code, Article 258/E)
- Failure to report bribery in international relations (Criminal Code, Article 258/F)

The effective formulation relating to the two most typical crimes against the purity of public life – bribery and trafficking in influence – is as follows:

Bribery, Section 250

(1) Any public official who requests an unlawful advantage in connection with his actions in an official capacity, or accepts such advantage or a promise thereof, or agrees with the party requesting or accepting the advantage, is guilty of a felony punishable by imprisonment between one to five years.

(2) The punishment shall be imprisonment between two to eight years if the crime is committed

a) by a public official in a high office, or by one entrusted to take measures in important affairs,

b) by another public official in an important matter of great importance.

Trafficking in influence, Section 256

(1) Any person who – purporting to influence a public official – requests or accepts an unlawful advantage for himself or on behalf of another person is guilty of a felony punishable by imprisonment between one to five years.

(2) The punishment shall be imprisonment between two to eight years if the perpetrator

> *a)* purports to or pretends that he is bribing a public official,
> *b)* pretends to be a public official,
> *c)* commits the crime in a pattern of criminal profiteering.
> (3) Any person who commits the crime defined in Subsection (1)
> *a)* in connection with an employee or member of an economic organization or non-governmental organization is guilty of misdemeanour and may be punished by imprisonment not to exceed two years,
> *b)* in connection with an employee or member who is authorized to act in the name and on behalf of an economic organization or non-governmental organization is guilty of felony and may be punished by imprisonment not to exceed three years.
> (4) Any person who commits the crime defined in Subsection (3) in a pattern of criminal profiteering is guilty of a felony punishable by imprisonment not to exceed three years, or between one to five years, as consistent with the categories specified therein.

In our view, the Criminal Code lays down rather serious sanctions (imprisonment of up to 10 years in the given case) to be applied against the perpetrators of corruption crimes and court sentencing is also characterized by the imposition of executable sentences of imprisonment – even upon a person accepting a bribe of some ten thousand forints. One may consider thought-provoking a Mihály Tóth's argument that exaggerated prohibitions that are foreign to life may even have a contrary effect: if a part of legal norms cannot be complied with, law-abidance may also become questionable elsewhere.[20]

1. The instruments of criminal law in the fight against corruption in Hungary

The fight against corruption is a rather delicate issue, because prosecutors and the prosecuted, the persons calling and called to account are often members of the same power elite. Those in possession of power punish those who abuse their power; therefore, the matter can easily become transformed into a 'family affair', which in turn has an impact on the effectiveness of the fight against corruption.

[20] M. Tóth, 'Adalékok a kriminális korrupció megítélésének néhány újabb kérdéséhez' [On Some New Questions of the Evaluation of Criminal Corruption], in F. Csefkó and Cs. Horváth, szerk., *Politika és korrupció – A törvényesség és a törvénytelenség határai* [Politics and Corruption – Limits of Lawfulness and Unlawfulness] (Pécs, PTE ÁJK Politikatudományi és Társadalomelméleti Tanszék, Pécs-Baranyai Értelmiségi Egyesület 2010) p. 286.

The ambivalent attitude manifested by people toward this criminal phenomenon complicates action against corruption: on the one hand, they regard corruption as an organic part of the political system, on the other hand, they protest against it with all their might.[21]

Corruption phenomena are not unambiguous, consequently, neither is their legal evaluation. If in the case of an investment of several thousand million forints, a parliamentary representative should favour the interests of his own constituency against those of the country, would he have criminal responsibility?

Fight against corruption is dependent on the context: it is determined by power relations within the elite, and the relationship between the elite[22] and civil society determines whether anti-corruption strategies will, in high probability, be merely illusory strategies aimed at tranquilizing public opinion or constructive measures.

Legislators (politicians) launching an anti-corruption fight need - in addition to a system of legal instruments - moral legitimacy as well, so that their anti-corruption struggles can be crowned with success. [23] However, governments proclaiming zero corruption might easily become entangled in their promises and suffer a quick and irreversible loss of legitimacy.

Provided one regards moral weakness as a cause of the genesis of corruption, an anti-corruption strategy is to be implemented by combining penal policies with remuneration policies. This might justify, on the one hand, the introduction of an extremely harsh system of sanctions relating to acts of corruption and, on the other hand, a rise in average wages.

However, it should be noted that in the fight against corruption there exists an economically rational optimum. If the state (e.g., Singapore)

[21] G. Gulyás, 'A politikai korrupcióról' [On Political Corruption], in G. Gulyás, szerk., *Politikai korrupció* [Political Corruption] (Budapest, AULA Kiadó 2004) p. 40.

[22] I. L. Gál, 'A gazdasági vesztegetés, mint a gazdasági büntetőjog része és a politikai korrupció egyik kísérőjelensége' [Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption], in F. Csefkó and Cs. Horváth, szerk., *Politika és korrupció – A törvényesség és a törvénytelenség határai* [Politics and Corruption – Limits of Lawfulness and Unlawfulness] (Pécs, PTE ÁJK Politikatudományi és Társadalomelméleti Tanszék, Pécs-Baranyai Értelmiségi Egyesület, 2010) p. 307.

[23] G. Gulyás, op. cit. n. 21, at p. 41.

overpays its politicians, the state expenditure arising from this may exceed the damage caused to it by corruption, therefore, it is rather worth for the state from an economic, rather than moral aspect – assuming the damage resulting from corruption is less costly than the excess payment provided to politicians.

Concerning the reduction of corruption, numerous ideas have been provided by scholars in various disciplines in relation to their fields of activity and professional knowledge. As a person working in the field of criminal sciences, we would like to formulate a few proposals and ideas as follows.

First of all, a successful fight against corruption requires a simpler legal system. Outdated laws that have become obsolete need to be revised, bad laws must be sifted out. Legislation should be simplified and there should be no *lex imperfecta*. Legislation should not obstruct, but rather assist both the actors of economic life and citizens.[24]

The *ultima ratio* role of criminal law. The role of criminal sanctions relating to corruption must not be either under- or overestimated. It is neither a role nor a task of criminal law to solve the problems of social and political life. In Hungary since the democratic political transition, it has become habitual for the power of the day to attempt to cope with the functional disorders of society applying the instruments of criminal law. Matters in the field of corruption are not of a criminal law character primarily, but rather concern other branches of law.[25]

Making a better use of the possibilities relating to the protection of witnesses. In cases of corruption, the main witnesses might often be persons (e.g., secretary, car-driver) who are in the possession of information about almost all affairs of the given leader (e.g., mayor, company manager), but whose existential possibilities are at the same time limited. If persons capable of supplying information about cases of corruption could be provided protection as witnesses, 'willingness to

[24] L. Kőhalmi, 'Büntetőjogi eszközök a politikai korrupció elleni küzdelemben' [Criminal Law Measure in the Fight against Political Corruption.], in F. Csefkó and Cs. Horváth, szerk., *Politika és korrupció – A törvényesség és a törvénytelenség határai* [Politics and Corruption – Limits of Lawfulness and Unlawfulness] (Pécs, PTE ÁJK Politikatudományi és Társadalomelméleti Tanszék, Pécs-Baranyai Értelmiségi Egyesület 2010) p. 302.

[25] Z. Márki, 'Válasz a korrupciós kihívásokra' [Response to the Challenges of Corruption], in F. Csefkó and Cs. Horváth, szerk., *Korrupció Magyarországon* [Corruption in Hungary] (Pécs, Pécs-Baranyai Értelmiségi Egyesület, PTE ÁJK 2001) pp. 37-38.

testify' would presumably increase and the memory of witnesses might also improve. However, it is to be noted with regard to witness protection that the present regulatory system needs to be improved, since the level of income provided by the state to a witness issued with a new domicile and /or personal identity in a given case is not too attractive.

Witness protection often becomes intertwined with the application of plea-bargaining and the legislator's attempt at breaking up the community of intention and interest between the parties concerned in corruption cases by 'self-reporting' and the promise of exoneration from punishment (Criminal Code, Article 255/A).

The world of corruption offences is often characterised by deep conspiracy, contact-keeping through a chain of intermediaries, exchanges of 'encoded' (encrypted) oral and written messages (e.g., 'lobby-money', 'lard money', 'cake', 'favoured entrepreneurs' club', 'raisin' etc.). If detection results are to be improved, the application of undercover officers and means of intelligence cannot be avoided.

From time to time, both theoretical and practical experts mention the requirement that special rules of evidence should apply to perpetrators suspected of having committed corruption offences. The reversal of the burden of proof as a novelty in criminal procedure would mean that the accused would be obliged to prove the lawful origin of corruption assets and in case he failed to do so – for example, there was no taxed or duties income etc. behind the assets – it would constitute an incriminating circumstance (fact). In our opinion, the reversal of the burden of proof would provide opportunity for serious abuses of power among state bodies exercising penal power – e.g., the moral liquidation of political adversaries – and this innovation should be rejected.

Governments in power tend to come up with the recommendation that an independent authority/office (e.g., Office for the Defence of Public Order, Anti-Corruption Office) should be set up for the fight against corruption. we consider this idea completely flawed and professionally unfounded, because it would merely lead to a duplication of prosecution authorities, conflicting spheres of authority, loss of information and prestige fights (rivalry) between official bodies.

Swift accession to international and European criminal (political) anti-corruption conventions and the adoption of rules against corruption, as

well as the approximation (harmonization) to international standards[26] of Hungarian criminal substantive, procedural and enforcement laws.[27] Act LXXXIX of 2011 on the amendment of miscellaneous Acts relating to procedure and the administration of justice has entered into force recently and amended Act XIX of 1998 on Criminal Procedure. This change in legal regulation lays down special criminal procedural rules with the aim of accelerating procedure in so-called high priority cases – including corruption offences. In the history of the Hungarian criminal procedural law it can be considered almost unprecedented that in a high priority case the period of custody may last 120 hours instead of the 72 hours laid down by general rules and that contact between the accused and his lawyer may be prohibited by the prosecutor (!) during the first 48 hours of custody. This modification – combined with others included in the Act – caused such a serious indignation in professional circles that the President of the Supreme Court of the Republic of Hungary motioned the Constitutional Court of the Republic of Hungary for the subsequent establishment of its unconstitutionality and its review from the aspect of conflict with international treaties.

III. Fight against corruption in Croatia

A significant breakthrough in anti-corruption measures and reaction was made in 2002, when Croatia entered into a process of opening negotiations for the accession to the European Union. Then the first National Programme to combat corruption was made. Determination to combat corruption became stronger in 2005, at the beginning of the accession negotiations. It was then clear that in the fight against corruption we could no longer be satisfied with self-estimates of our own work in this area but that it was necessary to meet higher and more serious standards the fulfilment of which would be monitored by someone else. It was also clear that Croatia did not have sufficient legal regulations and institutions to deal with this problem. This does not imply that by then there were no legal frameworks or institutions, it was rather that they were not sufficient for an effective combat against

[26] R. Végvári, 'Nemzetközi fellépés a korrupció ellen' [International Action against Corruption], in 1-2 *Állam-és Jogtudomány* (2001) pp. 99-100.

[27] R. Végvári, 'Vesztegetés' [Bribery], in F. Kondorosi and K. Ligeti, szerk., *Az Európai Büntetőjog Kézkönyve* [Handbook of European Criminal Law] (Budapest, Magyar Közlöny Lap-és Könyvkiadó 2008) pp. 468-469.

corruption and for new standards to achieve.[28] New laws were made and various specialized institutions were established for corruption in different segments. Today, there are approximately 34 domestic laws and bylaws and 14 international documents that are relevant in this area[29]. Without a good institutional framework, as well as a complementary and coordinated work of the institutions within it, there can be no successful fight against corruption. For example: the Commission for Tracking the Implementation Measures against Corruption[30], the Anti-Corruption Division of the Ministry of Justice[31], the National Police Office for Combating Corruption and Organized Crime (established within the Administration of the Crime Police)[32], the Office for Combating Corruption and Organized Crime (specialized state attorney)[33], special departments at county courts in Zagreb, Split,

[28] In addition, Croatia had already been a member of the United Nations (UN), World Trade Organization (WTO) and Organization for Security and Cooperation in Europe as well as others, and thus adopted a number of documents that promote the fight against corruption. Through these, Croatia committed itself to an active fight against corruption. For example, the United Nation`s Convention against Corruption, the Council of Europe's Criminal Law Convention on, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention against Transactional Organized Crime... Croatia is also a member of GRECO - Group of States against Corruption, and the membership resulted from signing the Criminal Law Convention on Corruption. All this implied a need to harmonize the national legislative field, which is why a number of laws have been adopted and various institutions have been established.

[29] This information was obtained at www.antikorupcija.hr/Default .aspx?art=467&sec=475.

[30] '[...] is an executive body composed of the highest representatives of bodies responsible for implementing anti-corruption measures. The Commission's tasks are assessing the corruption risks and proposing and devising measures for its prevention, coordination of the implementation of the Anti-Corruption Strategy with the associated Action Plan, strengthening inter-institutional cooperation in the implementation of the Action Plan.' According to www.antikorupcija .hr/Default.aspx?sec=492.

[31] It is the 'internal unit of the Ministry of Justice responsible for data collection and analysis, as well as the implementation of the Anti-Corruption Strategy and Action Plan, supervision of the objectives of the Strategy, proposing strategic directions, cooperation and coordination with other bodies responsible for implementing anti-corruption measures and organization of promotional activities and education [...]' More: ibid.

[32] Ibid.

[33] This institution is aided by the Office for Prevention of Money Laundering and the Committee for Prevention of Conflict of Interest in Public Office. All three

Rijeka and Osijek, the National Council for Monitoring the Implementation of the Anti-Corruption strategy,[34] State Audit Bureau, State Commission for Supervision of public procurement. The key documents in this fight against corruption are the State Anti-Corruption Strategy (hereinafter: Strategy), the Action Plan, the revised Action Plan and the Anti-Corruption Programme for companies with majority state ownership for the period of 2010-2012. The Anti-Corruption Strategy was adopted by the Croatian parliament in 2008, which also served to revise the previously applicable National Plan for Combating Corruption from 2006. It was anticipated that the Strategy would be carried out through the Action Plan, which further defined the goals of fight against corruption. The principles of the Strategy are as follows: the rule of law, good practice, and the principle of responsibility, prevention, efficiency, cooperation, transparency, and cooperation with civil society. Nine general goals and priorities were stated: improving the legal and institutional framework, the affirmation of zero-tolerance approach to corruption, strengthening the integrity, responsibility and transparency in government bodies and strengthening the public confidence in state institutions, creating the preconditions for preventing corruption, raising the efficiency of detection and prosecution of corruption-related offences, public awareness, promoting cooperation between government bodies, international collaboration and cooperation with civil society.[35] The fight against corruption must be kept parallel in three different fields: education, prevention and repression. Mere repression, which is commonly used as the only anti-corruption strategy,

bodies and their work are regulated with special laws as follows: the Act on the Office for Combating Corruption and Organized Crime, Anti-Money Laundering and Terrorist Financing Act and the Act on Preventing the Conflict of Interest in Exercise of Public Service.

[34] According to the Decision establishing the Council, it is scheduled to supervise and monitor the implementation of the Anti-Corruption Strategy and Action Plan, systematically oversee the data of corruption and analyse the reports of competent institutions, proposes measures to increase the efficiency of the Strategy and Action Plan. It has 12 members and is headed by a member of the Parliament from the opposition ranks. See more Z. Malenica and R. Jeknić, 'Percepcija korupcije i borba protiv korupcije u Republici Hrvatskoj' [The Perception of Corruption and Fight against Corruption in the Republic of Croatia], in *Izgradnja Institucija: Etika i korupcija* [Building Institutions: Ethics and Corruption] (Zagreb, 2010) p. 30.

[35] The full text of this Strategy is available on www.antikorupcija.hr/Default.aspx?sec=502.

cannot provide long term results. In this context, the United Nations Convention against Corruption, signed by Croatia[36] , is a very important document because it is the first one that promotes this triple approach globally. To begin with, we should elaborate on the first two components of this triple approach for Croatia.

Education is primarily in charge of the Ministry of Justice. It should work through media, roundtables and seminars to facilitate the discussion and thus raise the awareness related to corruption. All government bodies should be engaged in this and should cooperate with NGOs. The Government Office for Associations monitors the work of individual civil society organizations and pleads for financial support for their projects that deal with corruption[37]. The education of public services on the problem of corruption is provided by the State Office for Administration and the education of justice area is carried out by the Judicial Training Academy.

Prevention is the key in combating corruption. Critical areas which are recognized as the most vulnerable and subject to corruption are today proclaimed by the Strategy. We believe that a comparative analysis of the critical areas in Croatia will not much differ from critical areas of other countries that are also struggling with problem of corruption. These areas are: conflict of interest in carrying out public duties, political party financing, access to information, public administration and public procurement. As previously mentioned, research has shown that the justice system in Croatia is perceived as the most corrupt, followed by the health system, public administration and private sector. It must be pointed out that the work of NGOs and civil society is of invaluable importance. A particular issue is the reluctance of citizens to report corruption and this is where we can expect their major influence. It is necessary to create an environment with more freedom in 'pointing fingers' at corruption without fear of job loss, harassment, retaliation, revenge and similar things that are happening today. In this context,

[36] The Croatian Parliament adopted the Act on the Ratification of the UN Convention against Corruption on 4 February 2005. For full text see *Narodne novine- međunarodni ugovori* [Official Gazette – International Agreements] 2/2005.

[37] Concerning education, the Strategy emphasizes the need to systematically educate students and pupils about the damaging effects of corruption, also the need to organize postgraduate specialist and doctoral studies that should deal with aspects of its prevention, and sensitize journalists to address the topics of corruption in their work.

'whistle blowers' come into the limelight.[38] Without their action, corruption is very hard to detect because it is a clandestine activity that benefits both sides. The Strategy states the value of whistleblowers' actions in the part that regulates the protection of victims and people who report corruption in good faith. Croatia is obliged to ensure their protection and the obligation is undertaken by being a party to the Criminal Law Convention on Corruption. Today, this protection must be evaluated as inadequate. It is at the level of proclamation without any real mechanisms that would indicate a more serious approach to the fight against corruption. While amendments to the Civil Servants Act provided whistleblowers with the right to be protected from unfair dismissal from civil service by the institution they have 'whistled' about, this does not live in practice. If they do not get dismissed after a public reveal of corruption and pointing to illegal action, they are leaving their jobs themselves, because of health problems, reduced wages and hindered advancement. The most famous Croatian whistleblowers are Ankica Lepej, Vesna Balenović, Krešimir Mišić, while at the global level these are Jeffrey Wigand, Stanley Adams, Joe Darby, Richard Convertino and others.[39] As a special additional problem here occurs secondary victimization to which they are exposed.

1. Criminal law repression in fighting corruption in Croatia

There is no effective fight against corruption without anticipated criminal offences related to corruption. As is often said: the punishment should always (even in this area) be the 'last resort' action, *ultima ratio*. Before repression we must act pre-emptively and educationally in recognized critical areas. In the Croatian Criminal Code,[40] which was adopted on 19 September 1997, and came into force on 1 January 1998, many of the corruption-related offences are provided in Title XXV, titled 'Criminal offences against official duty' and the *ratio legis* for most of these incriminations is combating corruption.[41]

[38] A whistle-blower is a person who is an employee, former employee or a member of an organization and reports illegal conduct to competent authorities.

[39] More at www.poslovni.hr/vijesti/zvizdaci-su-najvece-zrtve-72121.aspx, www.dalje.com/hr-hrvatska/zvizdaci---hrabri-ljudi-ili-izdajice-zeljne-slave/126472.

[40] *Narodne novine* [Official Gazette] 110/1997, 27/1998, 50/2000, 129/2000, 84/2005, 51/2001, 111/2003, 190/2003, 105/2004, 71/2006, 110/2007, 152/2008, 57/2011, 77/2011.

[41] See D. Derenčinović, in P. Novoselec, ed., *Posebni dio kaznenog prava* [Special Part of Criminal Law] (Zagreb, Pravni fakultet u Zagrebu 2007) p. 398.

However, corruption can be found in other chapters as well, such as Title XXI: criminal offences against the security of payment transactions and business operations and also in every other crime where, for instance, unpermitted means of pressure or other illegal methods are used, i.e. where a perpetrator may use corruption as a suitable vehicle in pursuit of his goal.
We should here mention several important criminal offences:[42]

- Accepting a bribe (Criminal Code, Article 347),
- Offering a bribe (Criminal Code, Article 348),
- Receiving and taking bribe in economic transactions (Criminal Code, Article 294b),
- Malpractice of bankruptcy proceedings (Criminal Code, Article 283),
- Abuse in performing governmental duties (Criminal Code, Article 338),
- Illegal intercession (Criminal Code, Article 343),
- Unfair competition in foreign trade operations (Criminal Code, Article 289) and
- Abuse of office and official authority (Criminal Code, Article 337).

Typical Croatian corruptive criminal offences, for the purpose of comparison to the Hungarian ones, are the following:

Accepting a Bribe, Article 347

(1) An official or responsible person, who solicits or accepts a gift or some other gain, or who accepts a promise to be given a gift or some other gain in order to perform within the scope of his authority an official or other act which he should not perform, or to omit an official or other act which he should perform shall be punished for one to eight years.
(2) An official or responsible person, who solicits or accepts a gift or some other gain, or who accepts a promise to be given a gift or some other gain in order to perform within the scope of his authority an official or other act which he should perform, or to omit an official or other act which he should not perform, shall be punished by imprisonment for six months to five years.

[42] Similarly, corruptive criminal offences are listed in publication M. Mrčela, et.al, *Koruptivna kaznena djela od 2002-2007* [Corruptive Criminal Offences], with the exception of money laundering (Art. 279 of the Criminal Code), since it is an issue primarily connected with organized crime, and secondary with regard to corruption, notwithstanding the complicity between these two concepts.

(3) An official or responsible person, who after the performance or omission of an official or other act referred to in paragraphs 1 and 2 of this article solicits or accepts a gift or some other gain a result of such performance or omission, shall be punished by fine or imprisonment up to one year.
(4) The gift or other material gain received shall be forfeited.

Offering a Bribe, Article 348

(1) Whoever gives or promises to give a gift or some other gain to an official or responsible person in order to perform, within the scope of his official authority, an official or other act which he should not perform, or to omit an official or other act which he should otherwise perform, or whoever mediates in bribing an official or responsible person in such a way shall be punished by imprisonment for six months to three years.
(2) Whoever gives or promises to give a gift or some other gain to an official or responsible person in order to perform, within the scope of his official authority, an official or other act which he should perform, or to omit an official or other act which he should not perform, or whoever mediates in bribing an official or responsible person in such a way, shall be punished by fine or imprisonment up to one year.
(3) The court shall remit the punishment of the perpetrator of the criminal offense referred to in paragraphs 1 and 2 of this article, provided that he gives the bribe on the request of an official person and reports the offense before it is discovered or before he learns that the offense has been discovered.
(4) The gift or the pecuniary gain given under the circumstances referred to in paragraph 3 of this article shall be restored to the person who gave a bribe.

Illegal Intercession, Article 343

(1) Whoever demands or receives a gift or any other gain, or receives an offer or promise of a gift or any other gain for himself or for another natural or legal person so as to intercede by taking advantage of his official or social position or influence, whereby an official or other act be performed which should be performed, or that an official or other act not be performed which should not to be performed shall be punished by imprisonment for six months to three years.
(2) The punishment referred to in paragraph 1 of this Article shall be inflicted on whoever, by abusing his official or social position or influence, intercedes so that an official or other act be performed which should not be performed or so that an official or other act not be performed which should be performed.

> (3) If, for the intercession referred to in paragraph 2 of this Article, the perpetrator has received a gift or some other gain, or if he has received an offer or accepted the promise of a gift or some other gain for himself or for another natural or legal person, while some other criminal offense is not committed for which a more severe punishment is prescribed, the perpetrator shall be punished by imprisonment for one to five years.
> (4) Whoever offers, promises or gives a gift or some other gain to another, meant for that person or for another natural or legal person so that by abusing his official or social position or influence he intercedes so that an official or other act be performed that should be performed, or so that an official or other act not be performed that should not be performed shall be punished by imprisonment for six months to three years.
> (5) Whoever offers, promises or gives a gift or some other gain to another, meant for that person or for another natural or legal person, so that by abusing his official or social position or influence he intercedes so that an official or other act be performed that otherwise should not be performed, or so that an official or other act not be performed which should be performed shall be punished by imprisonment for one to five years.

If we look at the prescribed punishments, they generally range up to the maximum of 5 years. In the case of receiving a bribe in business transaction, the imposed punishment can be up to 8 years and in the case of abuse of office and authority when a substantial financial gain is made up to 10 years in prison.[43] A new Croatian Criminal Code which will come into force in January 2013 will change the situation to a degree. It will introduce new criminal offences, summarizing several of those that are already in force or being completely new provisions. For instance, the new Code will prescribe the abuse of trust which will encompass the current offences of economic and business malpractice, abuse of authority in economic transactions, signing harmful contracts and abuse of office and authority.

The existing and planned criminal offences are sufficient for the repressive framework to fight corruption and also to comply with the international obligations that Croatia has undertaken in this area.

[43] According to the Croatian Bureau of Statistics data published in its 2010 Statistical Yearbook, of the total of 24,430 convicted persons, 529 of them (2.16%) were convicted for criminal offences against official duty and 166 of them for abuse of office and authority, while 50 were convicted for giving bribe. Retrieved from www.dzs.hr/Hrv_Eng/ljetopis/2011/SLJH2011.pdf.

The primary reaction to corruption in Croatia should act in two directions: the first is to improve the level of reporting cases of corruption. Today, there is a widespread tolerance to corruption as a phenomenon which is essential for doing business, because 'everyone does it'. One fact is ignored here: corruption rests and grows exactly on this kind of attitude, we can almost say '*qui tacet consentire videtur*'. The key is to work on creating an environment with a greater freedom of reporting, with less – and one day maybe even without! – fear. Croatia, like many other countries, has not yet reached this level, and the obvious example is the attitude towards whistleblowers, the few individuals who refuse to be corruption tolerant. We need to move away from merely proclaiming protection and provide it in reality. The current legislation is not as problematic as its implementation is.

The second direction indicates the issue of proving corruption offences. We can see it in the ratio of reported and ultimately convicted persons.[44] Here we have a large dark figure. These criminal offences are committed secretly, without witnesses, with both sides benefitting from illegal trade and their corruptive agreement. They have no interest in reporting it because it is profitable for them, and, on the other hand, they have the fear of self-incrimination. That leaves us with the so-called special evidentiary measures according to the Croatian Criminal Procedure Act (covert surveillance, wiretapping, agent provocateur…).[45] These actions impinge on basic human rights as they are conducted in secret, without warning, and to implement them the Criminal Procedure Act prescribes strict requirements (only if investigation is not possible

[44] Of 2221 reports for criminal offences against official duty, only 529 persons have been convicted. There is a large discrepancy between the perception of corruption and the statistics of prosecution and convictions. That points to a major 'dark figure' in this area. Derenčinović sees the solution in improving the systems of detecting such criminal offences and confiscating material gains, and also in giving up prosecution according to the principle of opportunity in cases of cooperating bribe-givers. See more in D. Derenčinović, 'Prilog raspravi o rasvjetljavanju velike "tamne brojke" kod korupcijskih kaznenih djela', in M. Benko, et al., eds., *Korupcija-pojavni oblici i mjere za suzbijanje* [Corruption-Manifestation and Prevention Measures] (Zagreb, Inženjerski biro d.d. 2008) pp. 175-185.

[45] See *Official Gazette* 152/2008, 76/2009, 80/2011 and B. Pavišić, *Commentary on Criminal Procedure Act* (Rijeka, Dušević i Kršovnik d.o.o. 2011). They are elaborated in Articles 332-340, and based on a) subsidiarity, b) proportionality, c) specified actions, d) list of criminal offences, e) judicial review, g) extraordinary right of state attorney to order them in short term with condition of subsequent judicial validation.

or would be much harder to carry out without them) and gives a list of enumerated offences for which they can be implemented. Corruption offences are classified here according to Article 334 paragraph 2 of the Criminal Procedure Act.

IV. Summary

An effective fight against corruption must be carried out at three different levels: education, prevention and repression. Every country chooses the way to satisfy each one of these levels through its legislation and the implementation thereof. We should have in mind that the real attitude towards fighting corruption can be seen not only in the number of prescribed criminal offences and fight proclamations but moreover in the prosecution statistics which are quite poor. A special problem that needs to be pointed out is the victimization of whistleblowers. Their protection can and must be stronger and at much higher level. We should not underestimate the role of civil society and NGOs because they can have big impact where the state cannot. In the overall system of fighting such a durable enemy as corruption is, criminal law plays an indispensable role, although it emerges and acts through its mechanisms only at the end of the story. It sends (or should send) a message that corruption does not pay off in the long term. The fight against corruption seems an interminable war and one should be aware that (often) even minimum success can only be seen after a very long time; nevertheless, one must not give up the persecution of corruption, because that would equal a silent compromise with guilt.

Daniela Hećimović*

Crimes of omission and the role of the guarantor in Croatian criminal law

I. Introduction

Ontologically speaking, omission is not an action. It does not exist in nature. In the physical world, it represents passivity and standstill. Humans react to external stimuli by active commission, doing what they are allowed to do and what they are forbidden to do. The alternative reaction is passivity. In this case, an individual avoids action even though he is supposed to act. Criminal law differentiates between commission and omission based on differences in human reaction. This reaction can be active or passive. In compliance with the aforementioned, criminal law includes both crimes of commission (Lat. *delicta commissiva*, Germ. *Begehungsdelikte*) and crimes of omission (Lat. *delicta omissiva*, Germ. *Unterlassungsdelikte*).

If an omission is seen as a human reaction regarding the expected action or commission, then this omission represents a failure to act. It becomes relevant, contains its real-world substrate and is of certain social importance. In the context of criminal law, an omission appears as a failure to undertake the expected action in accordance with a certain imperative norm (social, ethic, customary etc.).[1] *Ultra posse nemo tenetur* is the applicable principle when it comes to all punishable omissions. Whoever is capable of undertaking the obligatory action, without subjecting himself or another to serious danger, is liable for an omission. The difference between the crimes of commission and the crimes of omission also refers to the capacity of the perpetrator to act. In case no one would be capable of commission (general capacity for commission), then, from the criminal viewpoint there is no crime of commission. In terms of crimes of omission the individual capacity to act matters. If a person is not in position of undertaking the expected action (individual capacity to act) one cannot speak of a punishable omission.

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[1] See F. Bačić and Š. Pavlović, *Komentar Kaznenog zakona* (Zagreb, Organizator 2004) p. 89.

Qualification of omission as punishable is exceptional in practice. Justification can be found in the primary purpose of criminal law, i.e. prevention of conduct harmful to society. Such a formulation of the purpose of criminal law results in prevalence of crimes of commission over crimes of omission within the scope of the Croatian Criminal Code. The criterion of causality is applied in controversial cases when it is not certain whether a certain crime is commission or omission. Pursuant to this criterion, it always comes to a crime of commission if the action causes a consequence.

According to Article 25(1) of the Croatian Criminal Code[2] (hereinafter CC), a crime can also be committed by omission. Article 25(2) of the CC regulates assumptions about the time and the perpetrator of a crime. The possibility for mitigation of punishment for crimes defined in Article 25 of the CC is regulated in Section 3 of the same article.

This paper gives an overview of features of crimes of omission and explains the role of the guarantor in Croatian Criminal Code. It is divided into the following chapters: classification of crimes of omission into major groups and subgroups accompanied with their relevant features (II. Classification of crimes of omission); the classification is followed by an analysis of the significance of the role of the guarantor, by classification of the guarantor's obligations into major groups and subgroups and by the explanation of the relevance of these obligations within each subgroup (III. Guarantor); the fourth chapter describes the possibility of mitigation of punishment for omission (IV. Mitigation of punishment). The paper ends with Chapter V. Instead of a conclusion.

II. Classification of Crimes of Omission

In spite of the differences in the classification criteria for crimes of omission (Lat. *delicta omissiva*, Germ. *Unterlassungsdelikte*), in the Croatian law theory the distinction between authentic and inauthentic crimes of omission has been accepted.[3] The classification is based on the German model.

[2] *Official Gazette* 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/ 11.

[3] For the differences in the accepted classification of crimes of omission see B. Pavišić, et al., *Komentar kaznenog zakona* (Zagreb, Official Gazette 2007) p. 102 and further on. See also F. Bačić and Š. Pavlović, *Komentar kaznenog zakona* (Zagreb, Organizator 2004) p. 89.

1. Authentic Crimes of Omission

Authentic crimes of omission (Lat. *delicta omissiva*, Germ. *echte Unterlassungsdelikte*) are committed by not undertaking the action prescribed by law. This group of crimes of omission is characterized by the fact that the result is not in the elements of the offense and therefore the perpetrator is not obligated to avert it. It is assumed that the perpetrator possessed the capacity for commission but he did not do what he could have done.

Due to the fact that the result is not in the elements of the offense, the authentic crimes of omission do not entail causality. The authentic crimes of omission are regulated in the Special part of the Criminal Code and the law defines situations in which there is duty to act and the range of that duty. An example of a typical crime of omission would be failure to render aid (Article 104, Sec. 1 CC). For example, a driver of a parked car who refuses to take a seriously wounded person to the hospital commits a criminal offense of not rendering aid).[4] Similar solutions with regard to the fundamental features of this category of criminal omissions are envisaged by the German criminal theory.[5]

When trying to define potential perpetrators of crimes of omission, it is necessary to take account of the exceptions indicated by the law when defining certain crimes. For example, the criminal offense of not rendering medical aid (Article 243 of the CC) is an authentic crime of omission since the result is not in the elements of the offense. The law defines that this punishable omission can be committed only by a physician, dentist or other health service provider, i.e., a person appearing as a guarantor.

With regard to the exceptions, one can say that anyone can be the perpetrator of an authentic crime of omission, but the guarantor's liabilities can arise from both authentic crimes of omission and from some formal crimes, in which the action is defined only as commission. In such formal crimes a perpetrator is a person who is obligated to

[4] Example taken from P. Novoselec, *Opći dio kaznenog prava* (Zagreb, Faculty of Law of the University of Zagreb 2009) p. 157.

[5] See H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (Berlin, Duncker & Humblot 1996) p. 605.

prevent a crime.[6] This liability refers only to a particular group of people.

2. Inauthentic crimes of omission

Considering their structure, the inauthentic crimes of omission (lat. *delicta commisiva per omissionem*, Germ. *unechte Unterlassungsdelikte*) are more complex than the authentic crimes of omission. The main characteristic of these crimes is breach of a specific duty to avert the occurrence of a result. The result is in the elements of the offense and that is the main difference in comparison to the authentic crimes of omission. In addition, the result is harmful and jeopardizes legal goods. The perpetrator of the inauthentic crimes of omission can only be a person in his capacity as a guarantor. A guarantor is a person who is legally obligated to avert the occurrence of a result, i.e. a person who guarantees that there will be no result.[7]
Inauthentic crimes of omission should be analyzed on the basis of significant classifications. Therefore, legally regulated inauthentic crimes of omission and legally nonregulated inauthentic crimes of omission are separately analysed in this paper.

a) Legally regulated inauthentic crimes of omission

There is a legal definition for this type of crime in the Special Part of the Criminal Code. It defines the perpetrator and the guarantor, the content of omission and the consequence. The example of such a crime is Article 236(2) of the Criminal Code, titled Endangering life and property by dangerous acts or means. However, the need to regulate the inauthentic crimes of omission more precisely is focused on the complicated problem of nonregulated inauthentic crimes of omission.

b) Legally nonregulated inauthentic crimes of omission

This group of crimes of omission consists of crimes with a consequence, the description of which does not include omission.[8] The legal definition includes only commission, but in certain circumstances, the perpetrator will be charged with omission. The aim of this solution is to prevent the violation of legal goods which could be committed by active conduct

[6] For more details see P. Novoselec, *Opći dio kaznenog prava* (the 3rd amended edition, Zagreb, Faculty of Law of the University of Zagreb 2009) p. 158
[7] Ibid., p. 159
[8] Ibid.

(commission) or by omission. It is noticeable that the same legal definition entails both prohibition and command. The provision of Article 25(2) of the General Part of the Criminal Code stipulates the situations in which the liability and punishment for the perpetrator of a crime of omission would be established. At the same time, it also eliminates a prohibited analogy regarding the interpretation of the legal definition which includes only commission. According to this provision, a crime is committed by omission if the perpetrator, who is legally obligated to avert the consequence of a criminal offense, fails to do so and such a failure is tantamount in its effect and significance to the perpetration of such an offense by an act. The obligation to avert the consequence is based on the idea that a certain person is obligated to protect endangered legal goods whereas the others can and have to rely on that person's active intervention. In this regard, there is a demand to equate omission with positive commission in terms of averting the consequence.[9] Provision of Article 25 (2) which defines that 'such a failure to act is tantamount in its effect and significance to the perpetration of such an offense by an act' contains the equality clause (Germ. *Gleichwertigkeitsklausel*). When omission has the same effect and significance as active commission, it is on the judge to decide whether or not the requirements of this provision have been fulfilled. The significance and role of this clause requires short analysis. On the one hand, it prevents a broad and an inappropriate perception of the legally nonregulated inauthentic crimes of omission. According to this clause, the omission should be equal to commission described in a concrete legal definition in order to be present. On the other hand, quality decisions by the judge make it possible for judicial practice to influence finding the best solution for potential theoretical problems or dilemmas regarding the legally nonregulated inauthentic crimes of omission.[10] At the same time, inappropriate and wrong interpretations by the judge could contribute to *nullum crimen sine lege certa***.**

[9] For more see Jescheck and Weigend, op.cit. n. 5, p. 620

[10] The analysis of the structure of criminal omissions in foreign law discloses similarities with the German model which has been accepted by numerous countries, including Croatia. The Austrian Criminal Code contains provisions on omissions, setting out certain requirements for the equality clause. In this context, Belgian and French criminal law seem to be highly interesting. French criminal law acknowledges only authentic crimes of omission whereas the inauthentic crimes of omission are recognized in exceptional cases as a type of legally regulated

III. Guarantor

The analysis of punishable omissions has tangentially touched on the issue of a guarantor (Germ. *Garant*). Despite the fact that the role of a guarantor may exceptionally appear in the authentic crimes of omission as well as in formal crimes of commission in which only the guarantor is liable for omission, the role of a person who guarantees for non occurrence of a result is the framework of liability in the inauthentic crimes of omission. In the legally regulated crimes of omission the law, in the elements of an offense, defines who can be a guarantor. Problems arise with the nonregulated crimes of omission. The provision of Article 25 (2) of the CC requires that a person should be legally obligated to avert the result. However, it does not define when such an obligation exists. The solutions are to be found in legal theory.[11] The following chapter presents theoretical solutions for this problem.

inauthentic crimes of omission. In such cases, the law in its formulation equalizes the causation of consequences by commission with the causation of consequences by omission. Such a legal solution leads to legal gaps, filling of which may cause legal insecurity. French judicial practice deals with this issue by conversion of intentional criminal omissions into negligent criminal omissions or, within economic criminal law, by application of the institute of the liability for action of others. Spanish and Italian legal theories are similar to German theory, but their legal solutions in this sphere differ from the German. Dutch law differentiates between authentic and inauthentic crimes of omission without the established guarantor's obligation. For more details see Jescheck and Weigend, op. cit. n. 5 at pp. 612-613. The same as P. Novoselec, *Opći dio kaznenog prava* (Zagreb, Faculty of Law of the University of Zagreb 2009) p. 160.

[11] German theory of criminal law tends to differentiate between the terms guarantor's position (*Garantenstellung*) and guarantor's duty. (*Garantenpflicht*). Accordingly, the position of a guarantor depends on the legal or actual relation of the perpetrator to the protected legal good. The duty of a guarantor refers to the obligation to act arising from his position as a guarantor. The importance of this distinction is relevant for dealing with the issue of culpability of the conduct. The guarantor's position is also important in terms of omission in relation to the element of the offense, whereas guarantor's obligation is important when it comes to unlawfulness and guilt. If the perpetrator has misconceptions about his position as a guarantor, he also has misconception about the elements of the offense. In the opposite case, if the perpetrator is aware of the circumstances which his position as a guarantor has arisen from, but he has misconceptions about his duty to act (he thinks that the action is obligatory), then he has misconception concerning the unlawfulness of the commission. For more details see S. von Coelln, *Das*

1. Classification of Guarantor's Obligations

The analysis of solutions provided by legal theory should be seen through two fundamental theoretical approaches:

- a formal theory of legal obligations or a theory of source,
- a functional theory of legal obligations.

As a traditional theory, the formal theory of legal obligations (theory of source) used the source out of which arises the legal obligation to act. It classifies the sources as follows: law; contract and a previously dangerous action.

The functional theory of legal obligations, as a more recent theory, defines the guarantor's legal obligation from the materialistic point of view. It takes into account the guarantor's capacity in relation to legal goods.[12] This theory is focused on the social content of obligations. According to this theory the guarantor's obligations are: protection of certain legal goods and obligation to supervise sources of danger.

Professor Novoselec advocates both theories in Croatian criminal law. In his opinion, '[…] within the framework of functional theories, a distinction between sources of legal obligations should be made'.[13] Similar solutions can be found in the German theory of criminal law.[14] In Croatian criminal law both theories have been accepted and the guarantor's obligations are classified as follows.

a) Obligation to protect legal goods

A person is obligated to protect legal goods. In this group there are three subgroups.

aa) Obligation to protect based on natural relationship

The obligation to protect certain legal goods such as life and limb can arise from a natural relationship. Such a relationship exists between parents and children, members of the immediate family and spouses. A natural relationship is the strongest legal cause for guarantor's obligations. For criminal effect, this relationship has to have a legal

"rechtliche Einstehenmüssen" beim unechten Unterlassungsdelikt (Berlin, Duncker & Humblot 2008) pp. 84-86.

[12] Armin Kufmann is considered the founder of the functional theory of legal duties. For more details see Jescheck and Weigend, op. cit. n. 5, at p. 621.

[13] See Novoselec, op. cit. n. 6, at p. 163.

[14] For more details see Jescheck and Wegend, op. cit. n. 5, at p. 622.

ground. Pursuant to Article 92(1) of the Family Act[15] (further: FA), parents are obligated to take care of their child's life and health. A mother, who deliberately refuses to feed her child and the child dies of starvation, is charged with omission pursuant to Article 25 of the CC. A legal obligation for not averting the occurrence of a consequence derives from the above provision of the FA. The obligation of spouses to mutual assistance is also based on the provisions of the FA.
The answer to the question whether and to what extent the range of potential guarantors can be expanded when determining the obligation to protect within this group, remains doubtful in both theory and practice.

ab) Obligation to protect based on life community

Life communities are based on mutual trust of their members. The members enter into a community in order to help each other in possible risk situations. The guarantor's obligations are significant in extramarital unions and homosexual communities, but also among participants of dangerous endeavours such as various expeditions, diving or alpine climbing team members and similar. A community based on coincidence is not sufficient for the existence of guarantor's obligations.

ac) Obligation to protect based on voluntary commitment

An individual has voluntarily incurred an obligation to take care of certain legal goods. That obligation can be based on the contract, conclusive acts and work relationships. These sources determine the content and range of the obligations. In that way a guarantor will be a mountain guide in relation to the tourists, a care giver, a baby sitter, a swimming or ski instructor or a night guard.

b) Obligation to supervise sources of danger

The guarantor's position is based on responsibility for certain sources of danger and on his control over these sources. Comparing the guarantor's obligation to protect certain legal goods and the one which is based on supervision of sources of danger, it is noticeable that the range of obligations based on supervision of sources of danger is narrower than the range of obligations which refer to the protection of certain legal

[15] *Official Gazette* 116/03, 17/04, 136/04, 107/07, 57/11.

goods. The latter case (protection of certain legal goods), the guarantor's obligation is focused on the protection of a facility whereas in the former case (supervision of sources of danger), the emphasis is on situations which could be a potential sources of danger and on the fact that the guarantor has to have sole supervision over them.
There are three subgroups within this group of obligations. The first one includes the guarantor's obligation to avert the harmful consequences that might affect another person due to a previously dangerous action. The second subgroup refers to the guarantor's obligations to supervise sources of danger controlled by the perpetrator. Finally, the third subgroup consists of obligations to supervise the third party which might be potentially dangerous.

ba) Obligation to protect based on a previously dangerous action

The obligation is based on prohibition to inflict harm on others. Whoever creates danger is obligated to do anything to prevent harmful consequences to others. The previously dangerous action has to present an immediate danger for occurrence of a result and it has to be culpable and based on violation of a legal norm which protects the endangered legal goods. An example of such an action would be a distribution of products for which the manufacturer knew they could be harmful to human health. This entails the manufacturer's liability to terminate the distribution of the product in order to prevent harmful consequences for human health. The guarantor may also be a person who gave heroin to another person (endangering that person's life) who later was in a life-threatening situation. The former is obliged to avert the occurrence of harmful consequences and render aid to the latter (call the doctor, take him the hospital as soon as possible or similar). For some legally regulated inauthentic crimes of omission the Croatian criminal law describes obligations based on a previously dangerous action. Best example is the criminal offense of not rendering aid to a person who suffers serious bodily injury in a traffic accident prescribed with Article 273 (1) of the Criminal Code.

bb) Obligation to supervise the sources of danger controlled by the perpetrator

The obligations in this subgroup are based on the fact that society can rely on the person who controls the sources of danger. Society expects that not only he controls the sources of danger, but also supervises them

and is capable to avert possible dangers arising from these sources. The range of the guarantor's obligations of supervision depends on the level of potential dangers. Regarding particular sources, the range of supervision can be precisely defined, e.g. regulations on nuclear power plants operation, working with radioactive substances, and radioactive material disposal. However, sources of danger such as dangerous facilities, animals, use of hazardous materials which involve risks, are also included. Thus, the owner has to extinguish the fire on his property in order to prevent it from spreading, despite the fact that he did not set it.[16]

bc) Obligation to supervise a third party

This subgroup involves supervision of potentially dangerous third parties. In this subgroup, a guarantor is a person who, in relation to other people, is in a position of authority. He is obligated to supervise potential dangers and prevent harmful actions by those he has authority over (e.g., a teacher in relation to students, parents and children, military commander and soldiers). Accordingly, if a father does not prevent his child from smashing a shop window, he will be charged with inflicting damage on other people's property.[17]

IV. Mitigation of punishment

According to Article 25(3) the punishment of a perpetrator who commits a criminal offense by omission can be mitigated, except in the case of a criminal offense which can be committed only by failure to act. The content of this article undoubtedly stipulates that the possibility of a facultative mitigation of punishment cannot refer to the authentic crimes of omissions and to legally regulated inauthentic crimes of omission which are defined only as an omission. On the other hand, the possibility of optional mitigation of punishment appears in all legally nonregulated inauthentic crimes of omission and in legally regulated inauthentic crimes of omission which can be committed by commission or omission. The reason for restriction of mitigation of punishment in situations implying only an omission lies in the fact that in such cases the law has already taken account of the omission when determining punishment frameworks. In case of crimes that can be committed by both omission and commission, it is possible that the omission is

[16] Example taken from Novoselec, op. cit. n. 6, at p. 164.
[17] Ibid.

characterized by a lesser degree of "right not do" and guilt than the commission. In such cases, the court assesses whether or not an omission is a milder form of a crime than commission. If this is the case, the provision of mitigation of punishment will be implemented. In compliance with the aforementioned, it is clear that judicial practice even in this segment contributes to the significance and relevance of the crimes of omission.

V. Instead of a conclusion

In the Croatian Criminal Code a prevalence of crimes of commission (commissive delicts) over crimes of omission (omissive delicts) is noted. Since the consequences of the authentic criminal omissions are not in the elements of the offense, they can be compared with formal crimes (Germ. *Tätigkeitsdelikte*). In this case, the violation of a duty to act is incriminated, i.e. violation of an imperative norm. The guarantor's obligations can also be found in the authentic crimes of omission, which justifies the classification of crimes of omission as authentic and inauthentic as compared to simple and those which involve a guarantor. Regarding the inauthentic crimes of omission, the occurrence of the result is necessary for the elements of the offense. The perpetrator is responsible for the consequences and therefore, these crimes of omission can be compared to the result crimes (Germ. *Erfolgsdelikte*) as a type of crimes of omission. It is certain that the inauthentic crimes of omission belong to the category of the so-called *delicta propria*, since only a person in the position of a guarantor can commit them. The position of a guarantor is a necessary feature of the inauthentic crimes of omission. Regarding Croatian criminal law, the prevalence of legally regulated inauthentic criminal omissions over legally nonregulated inauthentic crimes of omission is worth mentioning. This fact makes the Croatian Criminal Code one of the contemporary criminal codes which attempts to – thoroughly and in compliance with the legality principle – deal with the issue of criminal omission. Simultaneously, certain legal gaps remain and they need to be bridged by judicial practice in an appropriate way. The equality clause requires the equality of the relation between a failure to avert the consequences by omission and commission of a crime. It should be pointed out that the existence of an inauthentic crime of omission does not necessarily depend on equalization of the value of omission and commission. Such an approach might challenge legal security. One should also emphasize the

generally accepted standpoint that crimes implying only causation of the consequences without explicitly describing the commission require only the acknowledgment of a guarantor's obligation.[18]The equality clause only relates to crimes accompanied with an explicit description of the commission. This clause can serve as a guideline for practical solutions. Therefore, the request for equalization of the criteria for application of this clause as well as a very precise definition of existence of the liability of the perpetrator concerning legally nonregulated inauthentic crimes of omission are of exceptional importance for final practical solutions.

[18] Novoselec, op. cit. n. 6, at p. 165.

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The process of accusation and its judicial control – a comparative study

I. Introduction

The act of indictment is a key moment in every criminal procedure, because the existence of indictment is an essential condition, a *conditio sine qua non* for conducting the court proceedings, without indictment there can be no trial either. The indictment also determines the positive and negative framework of the court proceedings, since the court can only judge the criminal liability of a person, who was indicted, and only those actions of this person, he was charged with. The court is not allowed to overreach the charges. Accordingly, the judicial control of accusation is supposed to guarantee that the procedure continues based on a grounded and a lawful indictment. Comparison of several procedural models regarding the abovementioned institutions in other countries can bring important conclusions. The study therefore gives a brief review of the models for the process of accusation and the judicial control of indictment in the common law and in the continental legal systems, and introduces the current regulation on this topic in Croatia and Hungary. The paper pays special attention to the implementation of the judicial control of indictment in the new Code of Criminal Procedure of Croatia enacted in 2008. Regarding the Hungarian criminal procedure law, the study introduces the process of accusation, and analyses the definition and requirements of 'lawful indictment', which concept has been part of Hungarian law since 2006.

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II. The regulations on the process of accusation in several European legal systems

1. Germany[1]

If the public prosecutor in Germany has filed the indictment, it is not mandatory to make a decision on the accusations immediately in the framework of court proceedings. First of all, the independent court, which has the jurisdiction for conducting the court proceedings has to examine the indictment in the course of the closed session of the intermediate phase of the criminal procedure (*Zwischenverfahren*), whether the suspicion is reasonable (StPO[2] Articles 199-211). It is allowed only based on reasonable suspicion to expose the defendant to the trial, which can be harmful to his personality. After the indictment was filed (with this act the suspect becomes an accused) the head of the judicial chamber informs the defendant about the indictment and warns him, to make a statement within the given time, whether he wishes to submit motions on evidence or to file a complaint (StPO Article 201 para 1). If the defense is mandatory, and the defendant does not have a defense lawyer, the head of the chamber is obligated according to StPO Article 141. para 1 to appoint a defense counsel. The court decides about the motions and complaints submitted by the defendant (StPO Article 201 para 2). The court is allowed to order single actions to obtain evidence to clarify the facts of the case (StPO Article 202). There is no legal remedy against the abovementioned decisions of the court (StPO Article 201 para 2 and Article 202). Finally, the court decides in a closed session on the termination of procedure or opening the court proceedings.

2. England[3]

In England, after the police has started the procedure the public prosecutor's office (Crown Prosecution Service) has to take over the case. The most important feature of the English system is the discretionary indictment. After receiving the case file, the prosecutor

[1] Cs. Herke, *A német és az angol büntetőeljárás alapintézményei* [The Basic Institutions of German and English Criminal Procedure] (Pécs, PTE ÁJK 2011) pp. 69-70.
[2] Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319).
[3] Herke, op. cit. n. 1, at pp. 70-76.

makes a decision on continuing the procedure or on termination of procedure (under the section 23 of the Prosecution of Offences Act 1985, with a memorandum on 'Discontinuance of proceedings'). In the second case, the prosecutor simply gives notice to the court that he does not want the proceedings to continue. If the procedure was terminated under section 23, the suspect has the right to insist on the continuance of the procedure (e.g. he is confident of being acquitted on trial). There is no law in England, which would have a coherent regulation on the expected procedural steps between the indictment and the trial. But usually in this phase the mode of the trial is decided by the 'triable-either-way offences', where it is necessary to make a decision, whether the accused will be tried at the Magistrate's Court or at the Crown Court; decisions are made on the bail or on the detention (the magistrate decides these issues, in a public session, considering the arguments of the defense and the prosecutor); preliminary hearings are held (e.g. on the admissibility of evidence, or when the defense gives facts in response to the evidence of the prosecutor).

3. France[4]

The French criminal procedure is based on discretionary indictment as well. Starting the procedure is the task of the public prosecutor (CPP[5] Article 31), but he has to asses not only the legal aspects of the case, but the evidence as well. The defendant always has to be informed about the indictment, if the case is sent to trial, with the precise legal description of the charges. Still it happens, that the *ordonnance pénale* (criminal order) issued by the *tribunal de police* (police court) is delivered to the convict only after the decision. Whereas the procedure before the trial is conducted mainly through written documents (the examination is recorded in a written statement or report), the accused can explore the facts of the case by reading the case file. The CPP does not allow him to access the case file directly, the documents are sent to his lawyer usually. The decision on the case in France can be a) unilateral or b) multilateral.

a) Apart from those relatively rare cases, when the *tribunal de police* is reluctant to judge a *contravention* (misdemeanor) in an *ordonnance*

[4] Cs. Herke, *A francia és az olasz büntetőeljárás alapintézményei* [The Basic Institutions of French and Italian Criminal Procedure] (Pécs, PTE ÁJK 2011) pp. 71-76.

[5] Code de procédure pénale.

pénale, the main example for the unilateral decision is, when the public prosecutor terminates the case *classée sans suite* (without further instructions). It is similar, if the *juge d'instruction* (investigation judge) examines the case, and concludes, that the evidence against the *mise en examen* (detainee) are insufficient, and declares, that there is no reason for continuing the procedure (this is called *ordonnance de non-lien*, CPP Article 177.). In this case, the defendant has to be released, or, if he was bailed out, every measure against him has to be terminated.
b) There are three ways for the negotiation between the parties in France, which can alter the traditional course of the procedure or close the whole case: the first two ways (conditional classification – *classement sous condition* and mediation – *médiation*) is initiated by the public prosecutor and closes the case without trial; the third way (rating downgrade – *disqualification*) happens with the acquiescence of the judge, and leads to a milder punishment than prescribed by the law.

4. Italy[6]

The indictment (*richiesta di rinvio a giudizio*) is in writing in Italy as well. The principle of legality is controlled in two forms:

- the public prosecutor is not allowed to terminate the procedure (he just proposes the termination in a motion to the court);
- the harmed party can file a complaint against the public prosecutor's motion on the termination of procedure.

Actually, there is no intermediate phase in the Italian Criminal Procedure Act (ICPP). Despite this fact there is a phase in Italian criminal procedure as well, which shows multiple similarities with the intermediate phase. We can speak of intermediate phase in Italian criminal procedure in a sense that between the indictment and the trial there is a phase, in which a court organ reviews the indictment proposal in order to prevent to try the defendant based on ungrounded incitements. This review happens in Italy during a preliminary hearing with the attendance of the parties, which is led by a *giudici per le indagini preliminari* (investigative judge). This is the s. c. preliminary trial (*udienza preliminare*). The preliminary trial is not public, the attendance is obligatory for the public prosecutor and the defense lawyer (ICPP article 420. paragraph 1.), but not for the accused. The judge has a wide competence regarding the evidence in the *udienza preliminare*

[6] Herke, op. cit. n. 4, at pp. 76-78.

(ICPP Article 421-bis.). In the case, if the evidence presented before him is deficient, he can order additional investigative actions. After conducting the *udienza preliminare* the judge has two options: to terminate the procedure with a sentence called *sentenza di non luogo a procedere* (ICPP Article 424 para 1), or to send the case to trial (ICPP Article 424).

III. Procedure of accusation and judicial control of accusation in Croatia

1. Introductory notes

By accepting the new Criminal Procedure Act, which became effective on January 1, 2008[7] (hereinafter CPA/08) Croatia thoroughly reformed its criminal procedure. The tradition of preliminary criminal procedure headed by an investigative judge, where the public prosecutor held a central position cherished for decades, was abandoned. Briefly, court investigation was abolished, and the public prosecutor's investigation was introduced. This necessarily lead to the separation of the function of collecting data for the accusation, performed by the public prosecutor, from the function of deciding in the preliminary procedure, which is the right and duty of the court.[8] These modifications resulted in significant changes in the intermediate phase of the criminal procedure consisting of the process of accusation and its judicial control.[9] Unlike the earlier provisions of the Criminal Procedure Act of 1997[10] (hereinafter CPA/97), the regulation of the new act introduced mandatory judicial control of the accusation both in the regular and in the summary procedure. According to CPA/97, the review of the accusation was optional, i.e., it happened only as an exception and in two possible situations: following the complaint of the defendant or his lawyer; or at the request of the head of the judicial chamber, before whom the main hearing was supposed to be held when the complaint against the

[7] Criminal Procedure Act, 18 December 2008, *Narodne novine* 152/08, 76/09, 80/11.
[8] B. Pavišić, 'Novi hrvatski Zakon o kaznenom postupku' [The new Croatian Criminal Procedure Act], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2008) p. 515.
[9] D. Tripalo, 'Tijek kaznenog postupka – kontrola optužnice, rasprava, pravni lijekovi' [The course of the criminal procedure, review of the indictment, trial, and legal remedies], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2008) pp. 731-734.
[10] Criminal Procedure Act, 3 October 1997, *Narodne novine* 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03, 178/04, 115/06.

indictment was not submitted, or it was rejected.[11] Namely, accusation control is now mandatory, and it is only exceptionally that the court does not examine the grounds of the accusation: a) if the defendant abandons his right for the session of the accusatory committee and requires a trial with a definite statement submitted in written form within three days before the session of the accusatory committee (CPA/08 Article 348. para 4), b) in the summary procedure started on the basis of private prosecution (CPA/08 Article 527), c) and in the procedure on issuing the criminal order (CPA/08 Article 540). By accepting the concept of the court control of the accusation, the Croatian legislative has clearly prescribed that an independent and impartial court entity is supposed to decide on the possibility of initiating and conducting the criminal procedure, which protects the defendant from the ungrounded and unjust criminal prosecution. Since CPA/08 made the public prosecutor the master of the preliminary procedure there is no control of his decision on issuing the criminal prosecution. In other words, the defendant has no available legal means to initiate the review of the decision of the public prosecutor on the legitimacy of the proceedings in accordance with the principle of legality, and the court has no authority to do so except in cases when it decides some issues[12] during the procedure, by which it examines indirectly the existence of the conditions for conducting the criminal prosecution and investigation.[13] Subsequent to such organization of the preliminary procedure, in the so called intermediate phase of accusation the accusatory committee has become the entity which reviews for the first time whether there are existing conditions for initiating and conducting the criminal procedure. Thus planned control of the accusation represents a certain 'filter' which every indictment has to go through, in order to fulfill different purposes. On the one hand, the rights of every citizen are protected from ungrounded accusation this way, and for the court it is the phase in which it can prevent confronting the deficiencies of the preliminary procedure or the deficiencies in the indictment itself

[11] See also V. Ljubanović, *Kazneno procesno pravo – izabrana poglavlja* [Criminal procedure law – selected chapters] (Osijek, Grafika 2002) pp. 261-265.
[12] I.e., search, detention, pre-trial detention, seizure.
[13] See also Z. Đurđević, 'Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspect' [Judicial Control of Criminal Prosecution and Investigation: Comparative and Constitutional Aspects], 1 *Hrvatski ljetopis za kazneno pravo i praksu* (2010) pp. 15-18.

only at the trial.[14] Since, according to the new concept of the preliminary procedure, the criminal procedure does not begin with the investigation. It is only a possible phase[15] through which the preliminary procedure can proceed, it has become necessary to submit its result under court control. It should not be forgotten, that the activities in the investigation are undertaken by the public prosecutor[16] who, as a party in the procedure, will primarily present only those facts and collect only those evidence, which are in favor of the prosecution,[17] and since his procedural interests do not provide guarantee of the legality of thus collected evidence, it seems necessary to subject his activity under the control of the court. Consequently, after the completion of the preliminary procedure, the public prosecutor should have another duty, and that is to convince the court, in the procedure of accusation by presenting the results of his proceedings, that the probability, that a certain person committed a crime is so high, that it is more realistic to expect conviction rather than acquittal in the case so it is sufficient to

[14] See B. Pavišić, *Kazneno postupovno pravo* [Criminal procedure law] (Rijeka, Pravni fakultet 2010) pp. 325.

[15] Namely, CPA/08 prescribes that the investigation has to be conducted only for criminal offences for which the punishment of long time imprisonment (20-40 years) is prescribed, and it can be conducted for criminal offences in the jurisdiction of the county court, i.e., criminal offences for which the prescribed punishment is over 12 years of imprisonment. It is realistic to expect that the investigation would be a rare stage of the proceedings, and, regarding the trends in criminality in more than 90% of the criminal cases there will be a summary procedure.

[16] See also D. Novosel and M. Pajčić, 'Državni odvjetnik kao gospodar novog prethodnog kaznenog postupka' [The Public Prosecutor as the Master of New Preliminary Criminal Proceedings], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2009) pp. 445-460.

[17] The law, to some extent, mitigates the unilateral actions of the public prosecutor in the investigation where there is a possibility for the defendant to, after the receiving the order on conducting the investigation, proposed to the public prosecutor taking of certain evidence presenting activities which is guaranteed by the supervision of the investigative judge over that decision (CPA/08 Article 234. para 1 and 2, related to Article 213 para 3). Moreover, there is a significant article 213. para 4 which enables the defendant *de facto*, after finding out that there is a criminal indictment filed against him, or require his interrogation from the public prosecutor within the period of 30 days from the submitting of the indictment which gives him the possibility to perform the insight into the documents of the case and to explore the evidence which are available to the public prosecutor.

verify the indictment and send it to trial.[18] Because of the complexity of the topic, we introduce here only the essence of the accusation procedure and provide an overview of some practical issues deriving from the duty of exposing the evidence between the parties. We pay special attention to the exclusion of evidence obtained in illegal way and to the final verification of the indictment and sending the case to trial.

2. Filing the indictment, preliminary examination and response to the indictment

Before discussing the issue of filing the indictment and its formal control, it is necessary to point at the basic forms of the criminal procedure according to CPA/08. Namely, CPA/08 basically differentiates between two forms of criminal procedure. On the one hand, there is regular criminal procedure, which, according to the specific provisions of the act, is conducted on the account of all criminal offences for which the law prescribes the jurisdiction of the county court (CPA/08 article 203 para 1),[19] and on the other hand there is summary criminal procedure for the other criminal offences which are not in the jurisdiction of the county courts, and which are in the jurisdiction of the municipal courts.[20] On the basis of thus prescribed actual jurisdiction of the courts, functional jurisdiction for the preliminary examination of the indictment is regulated in the following way. Preliminary examination of the indictment for criminal offences, for which the regular criminal procedure is prescribed, is conducted by the judge of investigation, while for the criminal offences for which the summary criminal procedure is prescribed, an individual judge or the head of the judicial chamber has the jurisdiction.[21]

[18] See F. Feeney and J. Herrmann, *One Case – Two Systems, A Comparative View of American and German Criminal Justice* (New York, Ardsley 2005) p. 382.

[19] County courts are actually competent to trial for criminal offences for which there is a legally foreseen penalty of imprisonment of over twelve years or long time imprisonment (CPA/08 Article 19c para 1a).

[20] Municipal courts are actually competent to trial for the criminal offences for which there is legally prescribed main fine or imprisonment up to 12 years (CPA/08 Article 19a para 1).

[21] For criminal offences, for which there is a prescribed penalty of imprisonment of up to 8 years, formal control of indictment is conducted by an individual judge, and for criminal offences for which the prescribed punishment is between 8 and 12 years of imprisonment, the indictment is reviewed by the head of the judicial chamber (CPA/08 Article 19b. paras 1 and 2, related to Article 525. para 1).

The indictment[22] is filed by the public prosecutor, after the completion of the investigation. If the investigation is not mandatory, the public prosecutor is allowed to file the indictment without conducting any investigation, if the collected data referring to the criminal offence and the perpetrator provide sufficient grounds for filing the indictment (CPA/08 Article 341 paras 1 and 2). But, before filing the indictment the public prosecutor has to fulfill an important duty, and this is the mandatory formal questioning of the suspect. The interrogation of the suspect before filing the indictment is a key moment in the preliminary procedure. By fulfilling that duty, the public prosecutor does not only fulfill a legal obligation, but this is also a moment by which the defendant and his lawyer have a chance to get an insight into the documents of the case and come to know about the evidence available to the prosecutor.[23] The insight into the documents of the case is a necessary condition of the good preparation for the defense, because it is the only opportunity for the defendant and his lawyer to find out about the way in which the indictment is determined and limited. Considering the fact that fulfilling the right to get insight into the documents depends on the moment of the interrogation of the defendant, the logical question arises, when the defendant shall be questioned. The provision which prescribes that it should be done before filing the indictment is quite wide and unspecific. Namely, if the questioning came only at the end of the investigation or immediately before filing the indictment, it is clear that, the defendant could perform the insight into the documents too late and that would significantly limit his possibilities for preparing for the defense. However, we should expect that in the majority of the more difficult cases the defendant would relatively soon be able to perform the insight into the documents of the case, because after the arrest the public prosecutor has the duty to question the detainee within a short time of 16 hours from the notification of the custody police warden (CPA/08 Article 109. para 5).[24] On the other hand, in all other cases the

[22] About the content of formal accusation see CPA/08 Article 342.

[23] See also V. Drenški Lasan, J. Novak and L. Valković, 'Pravni i praktični problemi dobre obrane okrivljenika' [Legal and Practical Issues Related to Providing a Good Defence for the Defendant], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2009) pp. 524-527.

[24] See also M. Pajčić, 'Pravo okrivljenika na uvid u spis predmeta tijekom prethodnog kaznenog postupka u pravnim sustavima nekih europskih država i praksi Europskog suda za ljudska prava' [The right of the Accused to Inspect the Case File in the Preliminary Criminal Procedure in the Legal Sytems of some European States

law prescribes, that the defendant can require a questioning within 30 days from the day of filing the indictment or of performing the search of the suspect, his home or other premises used by him or any movable goods used by him, or from the seizure of the items of the suspect, performing the line up of the suspect or taking fingerprints and other body prints, taking biological samples or from the completion of the expert opinion about the suspect according to article 325 or 326 of the CPA/08. If the public prosecutor does not question the suspect within the time prescribed by law, the suspect has the right to get insight into the documents of the case after the expiration of that deadline (CPA/08 Article 213 para 4 related to para 5).

After the public prosecutor has submitted the indictment to the judge of investigation, there follows the preliminary examination of the indictment in order to decide whether it fulfills the legally prescribed formal conditions for filing it. The judge of investigation has the duty to examine whether the indictment was filed by an authorized prosecutor, whether before the filing of the indictment there was an investigation conducted if it was mandatory, whether the investigation was amended, thus the indictment has the legally prescribed elements, whether the documents contain evidence which cannot be the basis for the indictment, whether the indictment was submitted within the prescribed deadline, whether the public prosecutor has filed a new indictment within the period of six months from the withdrawal of the previous indictment (CPA/08 Article 344. para 1). An important remark has to be made to the so-formed formal control of the indictment. Namely, the law does not mention at all, whether the judge of investigation should consider any possible procedural obstacle, so called negative procedural condition (statute of limitation, amnesty, immunity). The cited provision does not allow us to conclude that the judge of investigation is allowed to reject the indictment based on a procedural obstacle, although we can come to such a conclusion by the logical interpretation of article 206, in relation to article 355 para 1 and Article 308 of CPA/08. Therefore, in order to eliminate the legal uncertainty, it would be *de lege ferenda* reasonable for the legislative to determine such competence of the judge of investigation. Regarding the fact, that checking of the minimum conditions is the essence of the preliminary examination of the indictment. Therefore, checking the formal conditions for proceeding, it

and in the Judicature of the European Court Of Human Rights], 1 *Hrvatski ljetopis za kazneno pravo i praksu* (2010) pp. 44-49.

is natural that the judge of investigation considers all the existing negative procedural conditions, and not only whether the indictment has been filed by an authorized prosecutor.[25] If the judge of investigation establishes the fact that the indictment is legally appropriate, it is served to the defendant to respond. The defendant can file a complaint within eight days from receiving the indictment. It is important to note that the defendant does not have the obligation to file a complaint so the judge of investigation shall, disregarding whether the defendant has filed a complaint or not, after the expiration of the deadline for submitting the complaint, forward the indictment, together with the documents of the investigation, if the investigation was conducted, to the accusatory committee.

3. The review of the grounds of the indictment before the accusatory committee

The procedure before the accusatory committee is the central phase of the intermediate procedure of accusation[26] which, in principle, is mandatory for all indictments.[27] The accusatory committee decides on the verification of the indictment in a closed session where, as a rule, the parties, the lawyer of the defendant and the damaged party are present (CPA/08 Article 349. para 2). We say that it happens as a rule because the session of the accusatory committee can be held without the presence of the aforementioned persons. CPA/08 enables in the summary procedure, conducted on the account of criminal offences for which the law prescribes a fine or imprisonment up to eight years, to hold the session of the accusatory committee without the presence of the parties (CPA/08 Article 526 para 2).[28] In that way, the legislator has, without any justified reason, drastically limited the right of the parties to be present at the procedural actions in the criminal procedure before the court decision. Therefore, we condemn this legal construction, because the parties are not able to get information about the evidence of the other

[25] See also A. Pavičić and M. Bonačić, 'Skraćeni postupak prema novom Zakonu o kaznenom postupku' [Summary Proceedings in the new Criminal Procedure Act], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2011) pp. 502-504.

[26] See M. Bradley Craig, *Criminal Procedure. A Worldwide Study* (Durham, Carolina Academic Press) England: pp. 175-180, USA: pp. 540-541, Germany: pp. 261-263, Italy: pp. 333-343.

[27] Cases in which there is no review of the indictment see ibid., p. 4.

[28] For criticism of this provision see more: Pavičić and Bonačić, op. cit. n. 25, at pp. 507-509.

party this way, so this regulation restrains them in practicing their procedural rights and breaks the principle of adversarial procedure as one of the foundations of the right to fair trial.[29] This provision is disadvantageous especially for the defendant, who cannot exercise his right to denounce all occurrent omissions in the preliminary procedure and all occurrent illegal evidence.[30] If the session of the accusatory committee is held in the presence of the parties, the head of the committee opens the session with the statement of the indictment. After the statement, the public prosecutor briefly presents the results of the preliminary examination, the evidence on which the indictment is based and which justify the filing of it (CPA/08 Article 350 para 2). The defendant and the lawyer are allowed to present the evidence in favor of the defendant, as well as to denounce the occurrent omissions in the investigation and the occurrent illegal evidence (CPA/08 Article 350 para 3). We can see from the introduced regulation, that the procedure of filing the indictment is closely connected to the legal obligation to expose the evidence[31] for the other party. However, even at filing of the indictment the public prosecutor has the obligation to attach a list of the evidence which is available to him, but he doesn't intend to present before the court, because they refer to the innocence of the defendant, to the lower degree of guilt, or to an alleviating circumstance (CPA/08 Article 342 para 2). This obligation of the public prosecutor is a logical consequence of the provision according to which both the court and state entities which participate in the criminal procedure are obligated to examine and establish the facts against the defendant and the facts which are in his favor with equal attention', and 'the public prosecutor's office […] with equal attention collects evidence on the guilt and on the innocence of the defendant (CPA/08 Article 4 para 2 and 3)'.

On the other hand, there is an obligation on the disclosure of evidence for the defense as well. Thus the defendant and the defense lawyer

[29] See also D. Krapac, *Prva knjiga: Institucije* [Criminal procedure law, Volume one: Institutions] (Zagreb, Narodne novine 2011) pp. 148-152.

[30] See also E. Ivičević Karas and D. Kos, 'Sudska kontrola optužnice' [Judicial Review of the Indictment], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2011) pp. 455-458.

[31] See M. Damaška, *Lica pravosuđa i državna vlast* [Faces of Justice and State Authority] (Zagreb, Nakladni zavod Globus 2008) pp. 137-140., M. Pajčić, 'Otkrivanje informacija i dokaza između stranaka u kaznenom postupku' [Disclosure of Information and Evidence between Parties in Criminal Proceedings], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2009) pp. 66-70.

notify the prosecutor on the evidence that they intend to present before the court referring to the existing alibi and to the mental disorder of the defendant (CPA/08 Article 352). But this provision is not very precise either. Does that mean that the defendant has the obligation or just is allowed to inform the prosecutor on the aforementioned circumstances? If we interpret it as an obligation, we certainly have a collision with a principle which is a *condicio sine qua non* for every modern criminal procedure, and that is the right of no self-accusation and the defendant's right to remain silent. If we understand it in a way that the defendant is only allowed to inform the prosecutor about this kind of evidence, we do not violate this basic principle, but there is a danger that a calculating defendant, by presenting his alibi at the last possible moment, only at the trial, might surprise the prosecutor and disable him from the effective challenging of the alibi.[32] Another significant characteristic of the accusation procedure is the decision on the exclusion of illegal evidence and the possibility for conduct a preliminary trial on the legality of evidence, if the accusatory committee doubts the legality of some evidence and without obtaining additional evidence this issue cannot be decided. In that case the committee has to postpone the hearing and immediately set a new one where they obtain the evidence, which are relevant in establishing facts on the legality of the evidence at issue. This is the so called preliminary trial on the legality of evidence (CPA/08 Article 351 para 1 and 2). It is necessary in every modern criminal procedure to prevent the possibility of sentences based on illegal evidence. Therefore, the CPA/08 declares, that the court's decisions cannot be based on evidence obtained in illegal way (CPA/08 Article 10) with the aim to prevent illegal evidence to influence the belief of the judge on the existence or non-existence of the facts. The CPA/08 mentions the obligation of the exclusion of illegal evidence in many places. Therefore even the judge of investigation, before finishing the investigation or during the preliminary examination of the indictment examines whether the file contains any illegal evidence. The same is performed in the procedure before the accusatory committee with the fact that the control of the legality of the collected evidence is increased by the provision that the court, in case of suspecting the illegality of some evidence, and without obtaining any additional evidence on that, cannot reach any decision. Consequently, a separate

[32] For comparative presentation as well as standpoints of ECHR on the issue of evidence disclosures see Ivičević Karas and Kos, op. cit. n. 30, at pp. 461-463.

hearing will be set during which the legality of the evidence shall be decided, and only then can the procedure on the examination of the indictment be continued. This provision has a special meaning in Croatian criminal procedure law if we interpret it in the light of the new provisions referring to illegal evidence which introduced the possibility of the 'weighing' of evidence. Namely, Croatian lawmaker has, for the first time, dared to accept the system of the so called relative exclusion of illegal evidence[33] and in spite of the system of absolute exclusion of illegal evidence, has allowed the court to assess, whether some evidence collected in an illegal way can still be used in the criminal procedure. Such radical twist is formulated by the lawmaker in a way that illegal evidence is not considered to be evidence obtained by violating of the Constitution, law or international right of guaranteed right of defense, right to dignity, reputation and honor, and the right to integrity of personal and family life, which is obtained by the activity for which by the criminal act there is no counter measure, and in the procedure for severe criminal offence for which the regular procedure is conducted, where the violations of rights, considering the extent and nature, is significantly smaller than the extent of the criminal offence (CPA/08 Article 10 para 2 subpara 2, in relation to para 3). On the basis of this provision, a possibility has been introduced that the court is allowed to 'weigh'[34] the interest of the state for the effective criminal prosecution. They also asses the interests of the defendant's defense which is manifested in the need of protection of basic human rights in the criminal procedure and may still exceptionally allow the use of the evidence obtained in an illegal way, if it is required by the public benefit.[35] Here we have to ask a question of how the trial court shall exercise the possibility of 'weighing' the evidence, since CPA/08 has on several occasions prescribed mandatory exclusion of illegal evidence and that thus excluded evidence cannot be used again neither at the review of the indictment nor at the trial. Ivičević Karas and Kos are of

[33] See also Ž. Karas and M. Jukić, 'Promjene u sustavu nezakonitih dokaza, s osvrtom na kretanja u poredbenom pravu' [Changes in the Exclusionary Rule in Croatia and Trends in Comparative law] 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2009) pp. 605-606.

[34] Krapac, op. cit., n. 29, at pp. 430-431.

[35] Ibid. pp. 619-620. See also I. Bojanić and Z. Đurđević, 'Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih prava' [Admissibility of Evidence Obtained by Infringing Fundamental Huma Rights], 2 *Hrvatski ljetopis za kazneno pravo i praksu* (2008) pp. 998-1001.

the opinion that the court entities which principally have the obligation to exclude the illegal evidence from the file, in order to restrain the trial court to encounter such evidence, do not have the obligation to do that in connection with the evidence which is subject to 'weighing' of the court of trial.[36] Therefore, this means that neither the judge of investigation nor the accusatory committee don't have the authority to decide on the legality of the evidence whenever there is the possibility of 'weighing' but they should, obviously, allow such evidence of questionable quality for the court to analyze it only at the trial.

4. Verification of the indictment and sending the case to trial

The essence of the judicial control over the accusation is to review all activities of the prosecutor undertaken in order to start the criminal procedure in the preliminary procedure, and consequently to decide on the justification of trying the defendant. Whether the indictment is justified, depends primarily on the existence of the necessary degree of suspicion in relation to the criminal offence and the perpetrator which the law demands is sufficient to start the procedure. But during the assessment of the justification of the indictment, the court necessarily has to consider the occurrent negative procedural conditions. In other words, the court has to check whether the offence which is subject of the indictment is a criminal offence, whether there are circumstances which exclude the guilt of the defendant, whether the request or the motion of the authorized prosecutor or the approval of the authorized person which is required by law is lacking, whether there are circumstances which exclude the criminal prosecution or whether there is sufficient evidence that the defendant is a reasonable suspect for the offence which is subject of the indictment (CPA/08 Article 355). According to that, when we examine the justification of the indictment we primarily think of its justification to a certain extent. That level of justification of the indictment is determined by the law. Thus, CPA/08 prescribes, that if the accusatory committee after the examination of the indictment decides that there are grounds for the indictment, they issue a decision on the verification of the indictment. Therefore, the justification of the indictment for starting the criminal procedure means its justification to the extent of reasonable suspicion. But, the court has to be very cautious during the review of justification of the indictment. Namely, the court

[36] Ivičević Karas and Kos, op. cit. n. 30, at p. 465.

control of justification for starting the criminal procedure cannot become a trial on the guilt of the defendant before the actual trial. The essential task of the accusatory committee is to decide whether the defendant can be tried, and if the defendant shall be convicted, this decision should be left to the trial. The most difficult task for the accusatory committee is undoubtedly to handle the legal situation and to assess the presented evidence without presuming the guilt of the defendant. The only right way for the court is not to engage in determining the authenticity and the evidentiary value of the contradictory evidence, but to leave this assessment to the trial, as a central stage of the procedure. At the determination of the existence of reasonable suspicion, that a certain person committed a crime, which is sufficient for the verification of the indictment, the court should limit itself to determine the completeness, the admissibility and the sufficiency of evidence. The assessment of the completeness of evidence means that all the legally relevant facts of the specific case are discovered and the presented evidence are substantiating these facts. The admissibility of evidence refers to the appropriate legal way for the collection and presentation of the evidence. Finally, at the assessment of the sufficiency of evidence the court has to decide whether on the basis of presented evidence there can be determined a certain degree of suspicion that a certain person committed a criminal offence which is sufficient for the verification of the indictment and sending the case to trial. If, on the basis of the collected evidence, such conclusion cannot be made i. e. the committee determines that in respect to the whole indictment there are deficiencies in the preliminary procedure or that the factual description of the offence does not derive from the previously gathered evidence, or that it is necessary to have better clarification of the facts, then the indictment shall be returned to the prosecutor to be amended (CPA/08 Article 356.). After the verification of the indictment, the accusatory committee is obligated to forward without delay the decision on the verification of the indictment together with the indictment itself and the trial documents to the office of the competent court.

IV. The process of accusation in Hungary and the concept of lawful indictment

1. The phase of accusation in the intermediate procedure

The intermediate procedure in Hungary consists of the phase of accusation and of the phase of trial preparation. These two phases are

placed between the investigation and the court proceedings in the course of criminal procedure. The Hungarian Criminal Procedure Act (Act XIX of 1998, hereinafter: HCPA) regulates the phase of accusation in a separate chapter, in the second part of the act called 'Investigation', albeit this phase actually comes only after the completion of the investigation. The investigative authority (usually the police), discloses the case file after the perfection of the investigation, and the suspect and the defense lawyer are allowed to examine the documents of the case [HCPA Article 193(1)]. After this examination, the investigative authority forwards the documents to the authorized public prosecutor within 15 days [HCPA Article 193(5)], this action is the proposal for accusation, which launches the phase of accusation. The public prosecutor reviews the case file in 30 days after receiving the documents[37] (the leader of the public prosecutor's office can allow 30 additional days, and his superior public prosecutor can allow altogether 90 days for the review). The public prosecutor has seven options depending on the result of the review of the case file:

- taking further investigative actions (or ordering them),
- suspending the investigation,
- termination of investigation,
- transferring the case to mediation,
- omitting pressing of charges partially,
- postponing the filing of an indictment,
- filing an indictment [HCPA Article 216(1)].

The accusation has four main forms in Hungary. In case of a crime, which is under public prosecution: bill of indictment (this is the most typical form); in case of subsidiary prosecution: motion for prosecution; in case of private prosecution: report; in summary procedure: verbal accusation of the public prosecutor (together with a written memorandum). Because of the limited extent of this study, we introduce only the first form of accusation. Main sections of the bill of indictment are: forepart; brief (facts of the case); section of law (the legal accusation itself and a subsection with declarations, motions); and date. The structure of the indictment is unusual compared to other resolutions in the criminal procedure, because the section of law comes after the brief. We introduce the essential and optional elements of the indictment according to the HCPA – together with the elements regulated in the

[37] If the aforementioned disclosure of the case file was done by the public prosecutor himself, the deadline starts with the date of this event. HCPA Art. 216(1).

Direction of the Attorney General Nr. 11 of 2003 – with the help of the following table.

Table 1. The structure and elements of indictment, HCPA Article 217(3)

	Essential elements	**Optional elements**
Forepart	- superscription - personal data of the accused	- if the accused is or was held captive, the name of the coercive measure and the dates - previous convictions of the accused
Brief	- description of the conduct - list of evidence	- if there are more criminal conducts, separate counts of indictment
Legal accusation	- the expression 'I accuse' - the precise name of the offence according to the Criminal Code, with reference to the articles and paragraphs	
Subsection	- reference to the rules, according to which the court and the public prosecutor has the jurisdiction - list of the persons to be summoned and notified to attend on trial, and a motion to read the statements of those witnesses, who will not be present at the trial - motion for punishment - motion for the chronological order of presenting the evidence at the trial	- procedural condition - claim of indemnification - motion to extend the coercive measure limiting personal freedom - motion for the termination of the parental custody of the accused over his children - motion for the continuance of the suspended procedure against a drug addict - reference to the records from the interrogation of the anonym witness - other motions
Date	- date, signature	

The public prosecutor submits the bill of indictment to the court; this is the act of accusation in Hungarian law. There is no legal remedy against the indictment. The indictment has to be submitted in more copies (one

for the court, for every defendant and for every defense lawyer). The investigative authority also gets one copy of the indictment, and if the accused is held captive, the public prosecutor has the obligation to notify the institution, which detains him about the filing of the indictment. The public prosecutor attaches all documents, which were previously disclosed to the accused and the defense lawyer in the procedure, and all material evidence to the written accusation, when he submits the bill of indictment to the court. If the accused cannot speak Hungarian, the bill of indictment (or the relevant part of it) has to be translated to his mother language.

2. The process on verification of the indictment in the framework of trial preparation

The process on verification of the indictment is conducted after the indictment was submitted, but yet before the trial. On the one hand, this phase is supposed to be a filter for the criminal cases, i.e. the defendant should be only tried based on a grounded and lawful indictment, on the other hand it has a practical function as well: to facilitate the quick and effective trial in the case (issuing subpoenas etc.).[38] The process on verification of the indictment is conducted in Hungarian criminal procedure by the trial court itself, in the framework of the trial preparation. The head of the judicial chamber (or the individual judge) reviews the case file in 30 days after receiving the documents, and examines, whether it is necessary to decide any of the questions which are listed in the HCPA,[39] after this the judge sends the defendant and the defense lawyer the indictment, and orders them to present the evidence of the defense to the court within 15 days. The head of the chamber examines the defendant's and the defense lawyer's motions on evidence within 30 days from the serving of the indictment, sets the date for the trial, and makes arrangements to prepare the trial, issues the subpoenas and notifications. Thus, according to the HCPA's rules, setting the date

[38] Cs. Fenyvesi, et al., *Új magyar büntetőeljárás* [New Hungarian Criminal Procedure] (Budapest – Pécs, Dialóg Campus Kiadó 2004) p. 453.

[39] These are the following questions: remittal; consolidation or severance; suspension of the procedure; termination of the procedure; actions for amending the indictment or discover evidence; decision on coercive measures limiting personal freedom; decision about an alternative legal assessment of the case; setting up a three-member judicial chamber for the case; setting up a five-member judicial chamber for the case. HCPA Arts 264-271.

for the trial means, that the court accepts the indictment of the public prosecutor, this is the 'judicial verification of the indictment' in narrower sense. This, naturally, does not mean that the court finds the defendant guilty, not even temporarily; it is only a decision on the procedural conditions of the case.[40] The judicial control of the accusation is conducted in this phase as well. If the indictment does not fulfill the requirements prescribed by the law (one or more from the essential elements listed in Table 1 is missing, that is the imperfect indictment), the court sends a request to the public prosecutor according to the HCPA Article 268(1), in order to amend the indictment. If the public prosecutor does not implement the indictment upon this request, the court terminates the procedure [HCPA Article 267(1) point k)]. The court also terminates the procedure during the trial preparation, if the indictment is not lawful (HCPA Article 267(1) point j)]. It is important to note, that contrary to the imperfect indictment mentioned above, in this case there is no legal way to rectify the indictment, the public prosecutor can perhaps file a new indictment in the case, but this possibility is questionable (see Section 3 para f). Of course, the court has to terminate the procedure likewise, if a procedural condition (e.g., private motion) is missing, or there is a procedural obstacle (e.g., *res iudicata*), or there is another ground (e.g., the public prosecutor withdraws the indictment) for terminating the procedure [HCPA Article 267(1)], but we cannot introduce these grounds here, because of the limited extent of the paper. The Hungarian regulation on the connection of the indictment and the evidence is unique, because the law does not really enable the court during the judicial control to filter out the indictments based on weak evidence. Albeit the HCPA declares among the basic principles, that criminal procedure (so court proceedings as well) against a person can be started only, if there is reasonable suspicion, that the person committed a crime [HCPA Article 6(2)], but de law does not allow the termination of the procedure grounded on insubstantial evidence in the phase of trial preparation. The court can send a request to the public prosecutor to discover additional evidence, and can require data from several organizations (HCPA Article 268), but if despite of these actions, the existence of the reasonable suspicion cannot be clarified, and the public prosecutor is unwilling to withdraw the indictment, the court has no other choice, than try the defendant.

[40] Fenyvesi, op. cit. n. 39, at p. 454.

3. The concept and requirements of lawful indictment

The Hungarian legislative enacted the concept of lawful indictment into the text of the HCPA on 1st of July 2006, but the Constitutional Court of Hungary has previously already summarized its elements in its resolution Nr. 14 of 2002, and the judicial practice also elaborated the concept. According to the HCPA Article 2(2) the indictment is lawful, if the prosecutor, who is entitled to press charges, initiates court proceedings against a definite person in a motion addressed to the court, because the conduct of this person, which is precisely circumscribed in the motion, violates criminal law.

Consequently, the concept of lawful indictment has formal and material requirements. Formal requirement is the motion to initiate court proceedings submitted by a prosecutor, who is entitled to press charges, the material requirements are: definite person; precisely circumscribed conduct; violation of criminal law. The lack of any of these requirements excludes the existence of the lawful indictment, so these conditions are all necessary. Beside the questions deriving from the several requirements, two problems are worth to mention in connection with this concept: if the public prosecutor does not give formal legal accusation on a conduct, which is circumscribed in the bill of indictment, can we speak of lawful indictment in relation to this conduct; as well as, whether the termination of procedure based on the lack of lawful indictment excludes the repeated indictment in the same case (does the decision on the termination have material legal force). After introducing the requirements of the lawful indictment one by one, we analyze these two problems.

a) The prosecutor's legitimacy to press charges

It can only be an exceptional problem during the judicial control of accusation, to decide, whether the prosecutor is entitled to press charges or not. If the indictment was filed by a public prosecutor, the legitimacy to press charges is given almost in every case, apart from a few special situations (e.g., the indictment against a juvenile defendant was submitted by a public prosecutor, who is not assigned to juvenile cases[41]). But when the prosecutor is the harmed party, the lack of

[41] T. Jagusztin, 'A törvényes vád mint a büntetőeljárás perjogi előfeltétele' [The lawful indictment, as a procedural condition of criminal procedure], 5 *Ügyészek Lapja* (2006) p. 59.

legitimacy to press charges can be more often: the indictment is unlawful, if a private prosecutor presses charges on account of a crime, which supposed to be under public prosecution, or the harmed party acts as a subsidiary prosecutor in a case, which is excluded from subsidiary prosecution by the law,[42] or the prosecutor was not harmed by the crime, eventually, the crime cannot have victims at all.[43]

b) Definite person

The requirement of 'definite person' demands, that the defendant is identified, i.e. the indictment contains personal data, which point at one person only. The personal information required by the law: name; birth name; former name; place and date of birth; the mother's name; address; registration number of the ID card; nationality. But according to OCD 1, the requirement of 'definite person' is fulfilled, if the indictment does not contain all of the aforementioned data, because the deficiencies can be eliminated in the court proceedings.[44] It is not at all unlikely in case of private prosecution, that the prosecutor reports an unidentified perpetrator to the authorities, but this report cannot be considered as a lawful indictment, thus the court procedure cannot be started, the authorities have to open an investigation first, to identify the perpetrator.[45]

c) Precisely circumscribed conduct

This element needs the most consideration from the court. According to the opinion of the Supreme Court

> 'the conduct is precisely circumscribed, if the statement of facts in the motion contains all the facts equivalent to the relevant statutory

[42] The opinion Nr. 1 of 2007 of the Criminal Divison of the Supreme Court on the interpretation of several rules of the act Nr. XIX of 1998 (hereinafter: OCD 1) 5 *Bírósági Határozatok* (2007).

[43] 'On the account of perjury subsidiary prosecution is not allowed; the motion for indictment filed in such a case does not fulfil the requirements of lawful indictment because the lack of legitimacy to press charges (...)' EBH 2010. 2125.

[44] OCD 1. I./2./a.

[45] 'The procedure has to be terminated, if from the report of the private prosecutor the court cannot identify the person, against whom the court procedure was initiated.' EBH 2006. 1395.

> provisions of the Criminal Code: the way the offence was committed, the place and the date of the conduct etc.'[46]

The judicial practice declared the violation of this requirement in accordance with this opinion in cases, when the indictment did not contain the place and the date of the commission, or other relevant facts in connection with the crime,[47] or there were only few facts in the indictment, and the court was not able to decide, whether the conduct violates criminal law or not.[48] But it is not an essential element of lawful indictment, to describe the conduct with the same words used in the Criminal Code, the requirement is fulfilled, if the description of the facts is adequate enough to decide, that the conduct violates criminal law.[49]

d) Violation of criminal law

The conduct described in the indictment evidently has to be an action, which 'violates criminal law'. This practically means that it has to realize the statutory definition of a crime placed in the Special Part of the Hungarian Criminal Code (Act IV of 1978, hereinafter HCC). There are only two cases in Hungarian law, when a conduct, which is not defined in HCC, can be prosecuted.[50] Apart from these two rare cases, if the conduct, described in the indictment is not defined in HCC, the indictment is unlawful. In connection with that, there is an overlap in the regulation: Article 267(1) point a) of HCP prescribes for the court to terminate the procedure, if the prosecuted conduct is not a crime (i.e. it does not violate criminal code), but at the same time, the lack of lawful indictment is also a ground for the termination of procedure [HCPA Article 267(1) point j]. Theoretically, the termination of procedure can be based on both grounds during the trial preparation. In our opinion, in the aforementioned case the court is not allowed to establish the lack of lawful indictment, it has to terminate the procedure based on the first ground, because it is special in relation to the second one. To decide,

[46] OCD 1. I./1./a.
[47] See BH2009.140.; BH2011.34.
[48] See BH2009.267; BH2011.60.
[49] BH2011.219.
[50] Namely, war crimes defined in Articles 11 and 13 of Decree 81/1945. (II. 5.) ME, enacted by the Act VII of 1945, as well as crimes of apartheid defined in the International Treaty on the Combat and Punishment of Crimes of Apartheid, adopted on 30 November 1973 by the General Assembly of the United Nations Organisation in New York, promulgated in Hungary by law-decree Nr. 27 of 1976.

whether the prosecuted conduct violates criminal law or not can be a problem for the court, if the description of the conduct in the indictment is not precise enough, in this case the indictment is unlawful even for this reason (see previous section) and, if the statutory definition of the crime in HCC is a framework statutory definition.[51]

e) Conducts in the indictment without formal legal accusation

The indictment is undoubtedly lawful, if there is an 'ideal cumulation of crimes', and the public prosecutor made only one formal legal accusation in the indictment, instead of naming all the crimes which were committed by the defendant through one single act. The conduct itself is prosecuted beyond question (the public prosecutor initiated the court proceedings on the account of it), and, according to the HCPA, the court is not bound by the public prosecutor's motions on the legal assessment of the prosecuted conducts [HCPA Article 2(4)]. In the opinion of the Supreme Court, the formal legal accusation is not an essential element of the concept of lawful indictment, because it can be amended in the court proceedings.[52] This opinion indicates a conclusion, according to which every conduct described in the brief section of the indictment (and violates criminal law) has to be considered as prosecuted, the lawful indictment is given in relation to them, so the court is allowed to judge them at the trial, independently of the fact, whether the public prosecutor made formal legal accusations regarding these conducts in the indictment or not.

f) The legal force of the termination of procedure based on the lack of lawful indictment

After the concept of lawful indictment was enacted, the Supreme Court took the position, that the legal nature of the court order, which terminates the procedure based on the lack of lawful indictment, is different from other decisions on termination of procedure. In this judicial order the court does not judge the merits of the case, so it has no material legal force from the aspect of criminal liability. Consequently,

[51] Framework statutory definitions are statutory definitions in the Criminal Code, which do not describe precisely the prohibited actions, but contain only the frames, and the frames are filled out with conent by the regulation of other laws. J. Földvári, *Magyar büntetőjog. Általános rész* [Hungarian Criminal Law. General Part] (Budapest, Osiris Kiadó 2003) p. 54.
[52] OCD 1. I./2./c.

there is no legal obstacle of filing a repeated indictment against the same defendant in the same case.[53] It is beyond debate, that the court does not judge the merits of the case in the order of termination, the court does not exhaust the charges; nevertheless this standpoint of the Supreme Court was criticized by legal scholars. In the opinion of Árpád Erdei, there is no special rule regarding the legal force of the order at issue, and from the interpretation of the rule of HCPA, according to which there is a possibility to demand compensation from the state for the coercive measures the defendant has suffered, after the termination of procedure based on lack of lawful indictment, he concludes, that this kind of termination is also of final nature.[54] Another counter-argument against the theory, which assumes the lack of material legal force is, that if the public prosecutor insists on his standpoint and submits the indictment to the court again without any changes, a legal recirculation can evolve without an end and without a solution. If we examine the question from the aspect of the basic principles of the criminal procedure, it is problematic, that the public prosecutor finds judicial suggestions in the order on termination of procedure, how to file the indictment again lawfully. This can result in the fusion of the function of the prosecutor and the function of the judge, which violates the principle of separation of functions in the criminal procedure. Nevertheless, the standpoint, which opposes the interpretation of the Supreme Court can also have negative consequences. After the termination of procedure based on the lack of lawful indictment, the legal situation is the following by the current law: subsidiary prosecution is not allowed according to the HCPA (in the case of a victimless crime, this would be no solution anyway), and the legal force of the order of termination cannot be eliminated by an extraordinary legal remedy either. If the public prosecutor made an actual mistake and the indictment is definitely unlawful, the revision (an extraordinary legal remedy in Hungarian law) submitted by the prosecutor against the defendant has to be rejected by the court, in turn, the material legal force excludes the possibility of filing the indictment again. It is not appropriate, if somebody – even a perpetrator of a serious crime – avoids being tried forever, because of a one-shot mistake made by the public prosecutor. However, in a country,

[53] OCD. 1. II./4./b-d.

[54] Á. Erdei, 'Dogmatika nélküli büntető eljárásjog – képtelenség vagy valóság' [Criminal Procedure Law Without Dogmatics – Nonsense or Reality], 8 *Magyar Jog* (2008) pp. 518-520.

where the consequences deriving from the failure of the criminal justice should fall upon the state, according to the principle of the rule of law, this interpretation is more acceptable.

V. Conclusions

After examining the regulations of the English and some of the important continental (German, French, Italian) criminal procedure acts we can restate that the indictment is everywhere an essential condition for conducting the court proceedings, and the court can only judge the criminal liability of a person, who was indicted, and only those actions of this person, he was charged with, the court is not allowed to overreach the charges. The judicial control of accusation guarantees, that the procedure continues based on a grounded and a lawful indictment. By accepting the new Criminal Procedure Act, which went into effect on January 1, 2008 Croatia thoroughly reformed its criminal procedure, the tradition of preliminary criminal procedure headed by an investigative judge was abandoned, the public prosecutor's investigation was introduced instead. In the new model of criminal procedure, the judicial control of accusation became mandatory in Croatia as well, it is only exceptional, when the court does not examine the facts of the case (if the defendant abandons his right for the session of the accusatory committee and requires a trial in written form within three days before the session of the accusatory committee, in the summary procedure started on the basis of private prosecution, and in the procedure of issuing of the criminal order). The paper gives an overlook on the theoretical and practical problems deriving from the aforementioned changes in Croatian law, (e.g., regarding the preliminary trial on the legality of evidence, the system of relative exclusion of unlawful evidence), and contains *de lege ferenda* proposals for the legislative (e.g., the investigative judge should have the competence to reject the indictment if there is a procedural obstacle). The verification of indictment happens in Hungary after filing the indictment, but yet before the trial (trial preparation). This procedure is a filter for the criminal cases, i.e. the defendant should be only tried based on a grounded and lawful indictment, but it has a practical function as well: to facilitate the quick and effective trial in the case (issuing subpoenas etc.). The Hungarian regulation on the connection of the indictment and the evidence is unique, because the law does not really enable the court during the judicial control to filter out the indictments based on weak

evidence. The concept of lawful indictment in Hungary has formal and material requirements. Formal requirement is the motion to initiate court proceedings submitted by a prosecutor, who is entitled to press charges, the material requirements are: definite person, precisely circumscribed conduct, violation of criminal law. Regarding the concept of lawful indictment the paper analyses two main problems: if the public prosecutor does not give formal legal accusation on a conduct, which is circumscribed in the bill of indictment, can we speak of lawful indictment in relation to this conduct; as well as, whether the termination of procedure based on the lack of lawful indictment excludes the repeated indictment in the same case (does the decision on the termination have material legal force).

Civil law

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Strict liability in civil cases with special regards to environmental damages

1. Introduction

The discussion about strict liability in civil cases has been going on for many years. However, there is still much uncertainty about the meaning and the boundaries of strict liability. Divergences in the scope and application of strict liability rules make it difficult to see where exactly and to what extent European tort systems differ from each other. These conceptual differences are likely to obstruct legislative harmonisation or unification as well as the fact that liability based on fault and strict liability are not completely separate categories and that it is difficult to establish a clear border line between these two liabilities. Nowadays, the field of liability for defective products is featured by the greatest achievements in terms of unification of strict liability in European law. To a great extent, these achievements have resulted from the 1985 Directive of the EC Council 85/374/EEC. Liability for defective products in the Croatian and Hungarian legislation has assumed a new dimension by adopting this Directive and now our tort law systems includes several relevant and very similar solutions for issues relating to this kind of strict liability. Similar strict liability solutions are also expressed in the area of liability for dangerous things and dangerous activities (in most European civil law systems called liability for ultra hazardous risks). Strict liability in the area of environmental damages is specific scope of strict liability that is worthy of special regard under these liability examinations.

Environmental protection at the European level began to develop in the late 1980s. Since then, a large number of regulations focusing on this area have been accepted, but we yet to see the adoption of legislation regulating civil liability in the sphere of environmental damages. The aim of this paper is to show the mutual origins of the Hungarian and Croatian regulation of strict liability and to provide comment on a recent

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tragic incident which occurred in Hungary and forced the lawmakers to think over the grounds of liability for environmental damages.

2. Strict liability for damages in civil law cases

If we look in the ancient times we will find that liability for damage used to refer to the criterion of causation. The reasons for such an interpretation undoubtedly included, under the condition that the proof of fault did not imply the liability, simple application of the criterion. Social development was accompanied by the development of legal liability for damage and thus one, when presuming a respective liability, started to take account of the fact if the damage was done with intent, by negligence or by accident. The degree of subjective contribution of the person having done damage to the emergence of harmful consequences gained more and more attention, so the liability based on the criterion of causation gave space to the liability pursuant to the criterion of fault (culpability).

When adopting the Civil Code (1804), culpability was the only indicator of liability in French law.[1] At the end of the 19th century, the French Court of Cassation[2] introduced a new basis for regulation of extracontractual liabilities: the liability of a person who has under their power or control an item or a person is not based on presumed culpability thereof but on the presumption of the liability itself *(la présomption de responsabilité)*. Since this resolution of the Court of Cassation, French law and legal theory have applied a particular regime of liability called strict liability *(la responsabilité du fait des choses)*. Its character is not subsidiary with respect to liability based on culpability. On the contrary, this represents an autonomous institute, relation of which towards the institute of strict liability cannot be interpreted as an exception to the rule.[3]

In the mid 19th century, Germany faced the growth of industry, particularly the development of railroad traffic, which encouraged

[1] Article 1382 and Article 1383 of the Civil Code still stipulate culpability for consequences of one's own act.

[2] This refers to the decision of the Court of Cassation, according to which the employer was liable for damage done to a worker caused by boiler explosion, although the employer's guilt was not determined in this concrete case.

[3] M. Karanikić Mirić, *Krivica kao osnov deliktne odgovornosti u građanskom pravu* [Culpability as the Basis for Tort Liability in Civil Law] (Beograd, Pravni fakultet Univerziteta u Beogradu 2009) pp. 70-71.

adoption of laws[4] regulating liability without determination of culpability. Adoption of the Civil Code required determination of a legal basis for regulation of absolute liability *(Gefährdungshaftung)*. This was followed by a logical issue which was to be dealt with by legal theory when the laws regulating liability for damage with no presumption of fault had already been adopted. This meant searching for a legal basis for regulation of liability with the respective legislation already existing.[5] Legal doctrine has developed a number of theories[6] aimed at finding solutions in cases where liability based on culpability was not seen as the best solutions.

Contemporary requirements in terms of technical and technological advancement, globalization of industry, modern traffic, free movement of goods, services and capital, generate complicated legal relations concerning damage compensation which cannot always be resolved by applying the liability criteria based on fault. Maximum protection of those suffering the damage often requires application of the criterion of causation. Therefore, strict liability for damage has been lately experiencing expansive growth within the framework of European tort law as well as within the legal systems of Croatia and Hungary. This is partly the result of acceptance of acquis communautaire, legal guidelines of the EU which have been implemented into the legal system of its current member Hungary and its future member Croatia, and partly of efforts of the legislation and judicial practice of these two countries. Almost all European countries deal with strict liability within the sphere of their legislature. There are more and more legal regulations and/or new provisions that foresee liability for damage based on the principle of causation. Beside this open development, strict liability is evolving as part of judicial practice too. We are witnessing particular unification of law wherein countries maintaining the tradition of civil law have realized the advantages of development of law by means of judicial precedents and hence tend to accept this concept of its expansion. Moreover, countries governed by common law have adopted numerous legal regulations lately. The development of law by means of accepting and honouring judicial practice and giving space for such a development in countries with the civil law tradition is often called the covert development of law.

[4] E.g., Railway Act, Act on the Liability for the State of Germany.
[5] P. Klarić, *Odštetno pravo* [Tort Law] (Zagreb, 2003) pp. 31-32.
[6] On these theories see more in ibid., pp. 32-45.

Strict liability in most jurisdictions predominantly seems to be based on singular rules rather than general, or least broader clauses. This is particularly noteworthy for civil law countries: while Austrian courts, for example, apply existing strict liability laws analogously (which to some extent reduces problems caused by a tardy legislature), German and Swiss practice so far deny the possibility of extending their statutory regimes in this way at all. This is not only a difference in legislative style, but obviously also affects the scope of strict liability altogether: a general clause by its nature tends to allow no-fault liability in more instances then those addressed by singular pieces of legislation focussing on very specific kinds of risks.[7]

The issue of the possibility of unification of European tort law has become a frequent topic of legal discussions in Europe. While the basic concept of particular types of strict liability (e.g. strict liability as a response to ultra-hazardous conduct) has been integrated in numerous legal systems, the ways of identification of real liability differentiate between systems. For instance, there are huge discrepancies between the modes how to consider a certain thing or activity hazardous. These differences mostly arise as a consequence of codification of liability rules within national legal systems. The practical consequences involve great differences in defining standards of the tortfeasor's liability as well as the fact that damage compensation which the damaged person is entitled to is dependent on a legal system. Within the EU, this might influence free movement of goods and services due to high costs of liability in some economies.

Liability based on fault and strict liability is not completely separate categories. Fault liability is a system where liability depends upon the requirement that the damage is caused by the faulty behaviour of a tortfeasor. In a system of strict liability no such requirement of faulty causation of damage exists. As the question what are the requirements to establish strict liability, the answer is that the exact requirement differ from case to case, and that different sorts or types of strict liability exist. As to the question how and when exactly the fault criterion is eliminated (and thus where the realm of strict liability begins) the answer is not

[7] European Group on Tort Law, *Principles of European Tort Law* (SpringerWien/NewYork, 2005) pp. 103-104.

always clear. Sometimes, it is not clear whether one is still in the realm of liability for fault, or already in the sphere of strict liability.[8]
It is difficult to establish a clear border line between the fault and strict liability. Many legal theorists said that strict liability and fault liability are alternatives in terms of convenient classification and exposition, but closer examination suggests that in terms of substance there is really a continuum rather than two categories. Undoubtedly, there are many cases in which it is possible to see "grey areas" between these two liabilities.

3. Strict liability as a response to ultra-hazardous conduct

To explain why strict liability may not only be socially desirable, but why it may also constitute an appropriate response, academic writers and legislators have traditionally based themselves on the concept of ultra-hazardous risk. This concept underlies many of the liability rules which exist in civil law systems and which impose strict liability for narrowly defined risks, such as those triggered by cars, railways, pipelines etc.[9]
The broad conception of liability as a response to ultra-hazardous conduct is based on the idea that those who have benefit from such conduct shall bear the costs which might arise therefrom. However, such a broad conception leads to, subtly said, doubtful issues. For example, the issue of a precise definition of the term 'ultra-hazardous', the need for reduction of this liability to things and activities, to the general notion of 'activities' or to the source of hazard in general. Another important issue emerges as a result of these challenges: what will be the action of the legislator and judges within the scope of this segment of tort law, i.e., should the legislator persist to draw up a comprehensive list of sources of hazard as the scope of strict liability or stipulation of these sources should be a task of courts?
The German tort law represents the best example of the narrowly regulated concept of strict liability as a response to ultra-hazardous conduct. In fact, this legal system includes the possibility to define the activities or sources of hazard which may be considered ultra-hazardous by courts. This role exclusively refers to the legislator who decides

[8] B. A. Koch and H. Koziol, *Unification of Tort Law: Strict Liability* (the Hague, London, New York, 2002) pp.45-46.
[9] F. Werro and V.V. Palmer, *The Boundaries of Strict Liability in European Tort Law* (Bern, Bruxelles, Durham, 2004) p. 17.

thereupon by enacting special laws. Such a peculiar approach has had effect on many other European systems of civil law. Nevertheless, not all those systems have adopted such a restrained role of courts. Austria has a totally different legal system which is characterized by the fact that judges play an important role in extending the list of conduct which can be qualified as ultra-hazardous.

The French and Portuguese have gone even further: their civil codes contain explicit provisions that give judges powers to qualify any activity which seems risky by its nature or serves as an instrument for carrying out a hazardous activity as hazardous.[10]

Generally speaking, European legal systems offer various solutions with regard to this part of strict liability. Specific differences appear when new laws are enacted or when the existing laws are supplemented with new provisions based on a various approach to qualification of hazards and risks arising therefrom, on the manners of extension of the hazardous conduct list and its specification and on the fashion of making decisions on a respective liability. Due to these concerns, the need for unification of European tort law in the area of strict liability is often in the spotlight. The unification should be implemented by maintaining the respective appropriate solutions of member states and by creating fundamental guidelines aimed at closing the huge gap between some legal systems regarding solutions belonging to the field of tort law.

Still, analysis of this kind of strict liability in different legal systems may bring to the conclusion that today most legal systems include rules for strict liability referring to the following activities: railroad, motor vehicles, oil pipelines, aviation, nuclear plants, genetic engineering and some activities connected with environmental concerns.

4. Liability for dangerous things and dangerous activities

Neither the Croatian nor the Hungarian legal system defines dangerous things and dangerous activities. It is up to the judicial practice to determine in each concrete case under which conditions a thing or an activity can be considered dangerous.

Generally speaking, in order to qualify a certain thing as dangerous, its application, properties, place and ways of usage shall constitute a higher level of danger, so this thing shall be paid special attention. An activity is characterized as dangerous if its regular course and technical nature as

[10] Ibid., pp. 401-404.

well as ways of its performance can be harmful to people's health or property, hence this risk requires special attention of people performing it and of people who has contact with it.[11]

According to the Croatian judicial practice, dangerous things can be cars in motion, wild animals, explosive devices, devastated buildings, weapons, industrial machinery etc. while dangerous activities may refer to railroad and tram-related activities, activities leading to harmful emission, mining, hunting and fireworks activities etc.

Numerous European legal theoreticians agree that courts tend to avoid making decisions on the culpability of the tortfeasor in a way that their qualification of certain things as dangerous enables application of the rules for strict liability providing, on one hand, maximum protection of the injured person while, on the other hand, courts sometimes, by avoiding making decisions on the culpability of the tortfeasor unnecessarily broaden the rules regulating strict liability. The positive and negative effects of such broadening require comprehensive analysis, but one thing is certain - this gap needs to be carefully approached by courts in every concrete case when deciding thereupon, taking account of all the consequences of a decision on the type of liability.

Damage done by a dangerous thing implies the liability of its owner whereas liability for damage done by a dangerous activity refers to the person performing it. Instead of the owner of a thing, person having illegally deprived the owner thereof, the person having been entrusted it or the person who is obliged to supervise it but is not the owner's employee shall be liable for the thing. However, the owner shall be liable for a thing if the thing has been entrusted to the person who is not competent for or entitled to operating it. Nevertheless, if damage has resulted from a hidden flaw or property of a thing, this shall imply, beside the liability of the person who has been entrusted it, the owner's liability as well, of course under the condition that the owner failed to warn the former thereabout.

The tortfeasor can be released from their liability if they prove that one of the presumptions of liability is not applicable in a certain case, if damage has resulted from force majeure or solely from action of a third party which could not be anticipated and consequences of which could not be eliminated. If the third party has only partially contributed to the

[11] These definitions have resulted from joint efforts of judicial practice and legal theory. See P. Klarić and M. Vedriš, *Građansko pravo* [Civil Law] (Zagreb, Official Gazette 2009) p. 615.

emergence of damage, the tortfeasor shall not be released from liability but shall, with the third party, face joint liability for the damage.

5. Liability for damage caused by a motor vehicle in motion

Damage suffered by third parties with respect to being driven in a motor vehicle implies the liability of its owner. The holder of the registration certificate is considered to be the owner of the vehicle. A third party is an injured person who is neither the owner of the motor vehicle nor an unauthorized user of the motor vehicle nor the person involved with manoeuvring the motor vehicle. These can be pedestrians, bicycle riders, passengers etc.

Pedestrians as participants in traffic are treated as potential injured persons,[12] so they are subject to unconditional application of the principle of strict liability.

The Directive 2005/14/EZ[13] primarily regulating compulsory motor car liability insurance is based on the fact that material and non-material damages suffered by pedestrians, bicycle riders and other non-motorized traffic participants, in most cases also being the most exposed party to injuries in car accidents, shall be covered by compulsory motor car liability insurance if the national civil law grants them the right to compensation of damage, which, pursuant to national legislation, neither excludes civil liability nor influences the amount of decreed compensation.

The rules for liability of the operator (driver) for physical injuries or death of passengers as well as for loss or damage of luggage used to be prescribed by international conventions, but recently they have evoked large interest of the European legislator.[14] Accordingly, in the last 15 years, a fair number of regulations on the operator's liability for damage suffered by passengers (death, body injuries, loss and/or damage of luggage) have been adopted.

[12] Same B. Matijević, 'Pješaci – kroz propise i sudsku praksu' [Pedestrians – through Regulations and Judicial Practice], 7-8 *Osiguranje* (2010) p. 71.

[13] Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0014:0014:EN:PDF.

[14] S. Petrić, 'Usklađivanje europskog odštetnog prava' [Harmonization of European Tort Law], in *Collection of Works – Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, no. 7* (Mostar, 2009) p. 132.

In Croatia, according to Law on Obligatory Relations (i.e., Civil Code),[15] the law foresees joint liability of the vehicle owner for damage done to third parties caused by motion of two and more motor vehicles. Every owner is obliged to fully compensate for damage done to the injured person and the injured person may require from a joint debtor to fully meet the respective liability. The question of possible exclusive culpability of one of the motor vehicle owners considering damage done to a third party can only be dealt with in a recourse claim initiated by one of the involved parties.

When it comes to damage done to one of the motor vehicle owners (car accident participants) by the other vehicle owner, the rules for culpability for damage are applied despite the fact that motor vehicles are considered dangerous things.

When motor vehicle owners do damage to each other, their roles involve both the tortfeasor and the injured person. If one of them is solely blamed for the harmful event, this person shall be liable for all the emerged damage, i.e. damage done to both vehicles, while if they have both caused the accident, either owner shall be liable for damage proportionally to the degree of their blameworthiness. In case nobody is to be blamed for the accident, the total damage is divided into equal shares. However, the court might make a different decision. The Hungarian rules are a bit different from this solution: if the cause of damage is a malfunction that occurred in the sphere of both parties' activity involving considerable danger and, furthermore, if such malfunction cannot be attributed to one of the parties, each party shall, since individual responsibility cannot be established, bear liability for his own loss.

Cases of unauthorized exploitation of a motor vehicle that are not approved of by the owner imply releasing the owner from the liability for compensation of damage to third parties and this damage shall be compensated for by the unauthorized user. The owner of the vehicle shall also take joint liability if their action or the action of the person who was supposed to take care of the vehicle has enabled the unauthorized exploitation of the motor vehicle.

[15] Law on Obligatory Relations (*Narodne novine* 35/05 and 41/08).

6. Liability for defective products

Nowadays, the field of liability for defective products is featured by the greatest achievements in terms of unification of strict liability in European law. To a great extent, these achievements have resulted from the 1985 Directive of the EC Council 85/374/EEC stipulating equalization of the right of member states with respect to liability for defective products. This Directive has been amended by the 1999 Directive 1999/34/EC (hereinafter: Directive). The latter Directive has been integrated into the legal systems of all the member states of the EU and has had major effect on numerous other legal systems such as the Australian, Japanese and Swiss legal system.

The manufacturer's liability for defective products in the Croatian and Hungarian legal system has assumed a new dimension by adopting this Directive and now our tort law includes several relevant and very similar solutions for issues relating to this kind of strict liability.

Accordingly, the Directive stipulates that the injured person is obliged to – concerning damage compensation – prove the damage, defect and the link between the defect and the damage. If two or more people are liable for the damage, their liability shall be joint and several. A product is, in compliance with the provisions of the Directive, defective if it does not meet the expectations in terms of its safety, taking into consideration all the circumstances, including: presentation of the product, exploitation of the product, i.e. its reasonably expected purpose and the time of its commercialization. A product shall not be considered defective only because a better product is subsequently put into circulation.[16] As well, Directive determines that liability include only material damage, namely damage caused by death or by personal injuries, damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property: is of a type ordinarily intended for private use or consumption, and was used by the injured person mainly for his own private use or consumption.[17]

The producer shall not be liable if he proves:

a) that he did not put the product into circulation; or
b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was

[16] Arts 4, 5 and 6 of the Directive 85/374/EEC.
[17] Art 9 of the Directive 85/374/EEC.

put into circulation by him or that this defect came into being afterwards; or

c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.[18]

The Directive was adopted with the declared objective of improving the protection of the product liability cases. Liability was to be based on an assessment of the product condition rather than on an evaluation of the producer's behaviour. However, if one takes a closer look at the notion of 'defect' which lies at the heart of the Directive, it seems less clear how strict the Directive really is. Another reason why this may be a matter of doubt is that most Member States have availed themselves of the option, expressly offered by the Directive,[19] to exclude for development risk.[20] Nevertheless, the degree of harmonisation reached by the Directive is limited, and the different conceptual devices that were developed in national legal systems prior to the adoption of the Directive remain important in many areas.

7. Civil law measures in environmental protection

Civil law can only play a secondary role in the field of environmental protection. The reason for this is that environmental protection is a very complex field of regulation where the emergence of administrative law is much more significant. In spite of this fact, it is necessary here to outline the framework of civil law measures which can play a role in the prevention and mitigation of environmental damage.

In Hungary, the standards of civil liability for environmental damage are regulated by the provisions of the Civil Code referring to hazardous

[18] Art 7 of the Directive 85/374/EEC.

[19] Op. cit. n. 9, at p. 437.

[20] Recent case law by the European Court of the Justice and by national courts suggests that the exact scope of the development risk defence is controversial as ever.

actions. According to these, a person who carries out activities involving considerable environmental hazards shall be liable for any damage caused thereby. Being able to prove that the damage occurred due to unavoidable circumstances that are in no relation to the person's activities shall relieve such person from liability. These provisions shall also apply to persons who cause damage to other persons through activities that endanger the human environment.[21] The Environmental Protection Act[22] (hereinafter Ktv.) defines the activity that endangers the human environment as a measurable and significantly unfavourable alteration that occurs directly or indirectly in the environment or in a component of the environment or as a direct risk of an alteration which is measurable and directly or indirectly harmful to the environment occurring as a component of the environment.

According to Section 345 of the Civil Code, if someone causes damage to other persons through activities that endanger the human environment, he can't be relieved of liability provided he is able to prove that he has acted in a manner that can generally be expected in the given situation. If the one who caused the damage would like to be relieved, he must fulfil two cumulative conditions: that the damage was caused by a reason which was unavoidable and that it does not fall in the realm of activities involving considerable hazards. There are some similarities between strict and fault liability: the injured party has to prove the wrongful act, the damage and direct causal link between the wrongful act and the damage suffered. The other similitude is that strict liability has a relieving character: if the tortfeasor can prove without any doubt that the damage was caused by an external and unavoidable reason, he will be relieved from liability. The category of unavoidability has been established by case law. According to this, an event or a cause must be regarded as unavoidable if there is no possibility to prevent it, taking into account the given level of technical development and the carrying capacity of the economy. Consideration of the carrying capacity of the economy means that a reason can be regarded as an unavoidable one if it were avoidable only through absurd financial measures. External and unavoidable reason can be force majeure, the injured party's unavoidable behaviour, third party's unavoidable action or other external and unavoidable force's impact that cannot be regarded

[21] Act IV of 1959.on the Civil Code, Section 345.
[22] Act LIII of 1995 on the General Rules of Environmental Protection.

as force majeure.[23] In the followings, we would like to clarify on force majeure and third party's unavoidable action.

In the case of force majeure, we can state that the reason of damage not falls in the tortfeasor's realm of activities; hence there is no direct causal link between the wrongful act and the damage suffered. In this case we should presume that there is no liability because the direct link between the wrongful act and the damage suffered is a condition of civil liability. With regard to force majeure, it is essential to establish whether damage could have been avoided. If yes, there can be no talk about force majeure since liability falls on the tortfeasor who failed to neutralize the danger. If it could not be eliminated, we can talk about force majeure, and the tortfeasor cannot be challenged. In legal theory and practice, force majeure has an objective and a subjective character depending whether the interfering reason is avoidable or unavoidable. According to the objective opinion, force majeure are reasons which cannot be avoidable with any human effort; according to the subjective opinion, force majeure is constituted of all causes that were a given person could not have avoided using his abilities and options, even if such avoidance were realistically possible. An extremely objective opinion is dangerous, because it interprets the limits of force majeure too closely, rendering it non-existent in practice. In this case, liability would approach absolute liability. An excessively subjective interpretation would result in strict liability turning into fault liability, and this phenomenon would annul the legislative aim.[24]

Force majeure is a circumstance, a factor which cannot be avoided by human effort. It is an objective and relative category - relative because its scope is narrowing due to technological advancement, while it also contains phenomena the effect of which can be avoided, however, only with extreme financial costs. Generally, the forces of nature are regarded to be force majeure which causes damage with its power or sudden appearance. We have to state that a force of nature which is

[23] Gy. Eörsi, *A polgári jogi kártérítési felelősség kézikönyve* [Reference book of civil law liability] (Budapest, Közgazdasági és Jogi Könyvkiadó 1966) p. 286-289.

[24] Gy. Eörsi, *Kártérítés jogellenes magatartásért* [Liability for damages caused by violation of the law] (Budapest, Közgazdasági és Jogi Könyvkiadó 1958) pp.106-107

unavoidable, but predictable, is not categorized as force majeure (fatigue, rusting).[25]

Third party's unavoidable and external action is very close to force majeure: it is a condition which becomes unavoidable because of its unpredictable character, although it can be avoided by objective measures. The precondition for unavoidability in the case of third party's action is the unforeseeability of the event. This is its main difference with regard to force majeure: in most cases, force majeure is unavoidable even though it is foreseeable. Accordingly, we can talk about third party's unavoidable action if it fulfils a subjective and an objective condition: the injured party could not have foreseen the third party's interference, and this interference could not have been avoided.[26]

In case of environmental damages, significant criticism has appeared against civil law liability, namely that it is not easy to simply define the injured party or the extent of damage.

In such situation it is really difficult to narrow down the circle of the injured parties, which is why the most significant aim of environmental protection is the 'polluter pays' principle. This means that if the subject of defence is damaged, the usage of an administrative sanction will be valid. If somebody carries out environmentally harmful actions on his own land, he causes damage to his own property. According to the civil law principle *casum sentit dominus*, the damage will encumber him; however, according to the provisions of the Environmental Protection Act regarding the harm of the environmental component, authorities can impose penalty on him.

There is another civil law measure which can be used in the name of environmental protection:[27] law relating to neighbours. In case of environmental damage, law relating to neighbours stipulates that an environmentally harmful action can have effect in an area at a distance of up to several hundred kilometres. Therefore, the Civil Code's provisions[28] relating to neighbours could prevail only if they can be

[25] Gy. Eörsi, *Kötelmi jog. Általános rész* [Tort Law. General provisions] (Budapest, Nemzeti Tankönyvkiadó 1997) p. 290.

[26] Eörsi, loc. cit. n. 24, at pp.109-112.

[27] L. Czirják, et al., eds., *Glossary of Corporate Governance and Business Integrity Terms 2010/2011* (Budapest, AmCham 2011) p. 19.

[28] According to Section 100 An owner is obliged, while using a thing, to refrain from any conduct that would needlessly disturb others, especially his neighbours, or that would jeopardize the exercise of their rights

interpreted so widely as to cover every relationship between humans.[29] 'Unnecessary disturbance' also means that a 'neighbour' has to bear 'necessary disturbance'. This provision of the Civil Code originally presumed that neighbours would disturb each other equally, so that over a long term their harmful actions will be compensated. Practice has shown that this presumption cannot be materialized in the case of environmental pollution. It is evident from the above that in the modern age of environmental impacts and pollutions at the industrial level law relating to neighbours can give only a slight defence to injured parties.[30]
The new Civil Code which was accepted in 2009, but has never come into effect, contains regulations on liability for environmental damages as an individual form of civil law liability. According to this, if one causes environmental damage due to a reason that cannot be avoided and does not fall into the realm of activities of the tortfeasor or has been caused by the behaviour of the injured party, such person shall be relieved from liability. Liability for environmental damage or for any risk to the environment shall fall joint and severally – pending proof to the contrary – upon the person who is registered as the owner or possessor (user) of the property after environmental damage or threat to the environment has occurred on the property where the activity resulting in damage to the environment or posing imminent threat to the environment was carried out. The period of limitation for claiming environmental damages shall be thirty years. It can be derived from the above that the law maker recognized the aim which appears in civil rights protection in the field of environmental damage, which is why it is regulated separately from damage originating from hazardous operation.
This problem raises some interesting questions, e.g. would it not be reasonable to prescribe absolute liability in case of environmental damages, especially as it is prescribed, for example, in cases of nuclear accidents. However, with reference to the above considerations regarding force majeure or third party's action, we can see that the prescription of absolute liability would impose enormous costs upon industry (which is the biggest polluter) in the area of prevention. This phenomenon would increase the prices of manufactured goods and create many other problems which can be derived from this.

[29] L. Sólyom, *Környezetvédelem és polgári jog* [Environmental protection and civil law] (Budapest, Akadémiai Kiadó 1980) p. 16.
[30] Ibid., at p. 17.

Arguably the biggest environmental disaster in Hungary occurred on the 4th of October 2010. On that day, a sludge reservoir owned by MAL Hungarian Aluminium Production and Trade Company Limited by Shares' (hereinafter MAL Zrt.) in the vicinity of the town of Ajka gave away and approximately one million cubic meters of red sludge suffused the lower level parts of Kolontár, Devecser and Somlóvásárhely. This corrosive fluid with alkaline effect covered 40 square kilometres, which has resulted in unforeseeable ecological and economic consequences. Ten people were killed by the muck — most from drowning — and more than 120 had chemical burns from the highly alkaline mud, and the wildlife of the creek Torna was destroyed. According to certain calculations, the catastrophe has cost the government approximately 35 billion forints so far. To date, the real direct reason of the disaster has not been cleared: some experts have pointed to the sinking of the reservoir or the soaking of the wall of the embankment; according to Zoltán Illés, State Secretary for the Environment, intentional behaviour of the cooperation having overfilled the reservoir can be added to these previous facts.[31] A new expert opinion states that the direct cause of the accident was the circumstance that the solid embankment was built to a soft, clay land, and therefore was not able to sustain the natural movement of the soil.[32] According to MAL Zrt., the disaster occurred because a corner of the sludge reservoir's slipped into clay soil. This has never happened previously in other cases when the aluminous earth was produced by this technique, rendering this situation unforeseeable. The tragedy was caused by the defects that occurred during the phases of planning and building the reservoir, at a time when the firm was state-owned.[33] An interesting circumstance in this case is that the firm's emergency plan, which had been confirmed by the authorities, only stated three possible cases, whereby the embankment could be destroyed: a strong earthquake, terrorist attack, or war bombing. The compound and the amount of the spilled material were underestimated too: they expected only 400 thousand stere of water and 100 thousand stere of red sludge spill; the corrosive material which caused the actual damage was not even mentioned.[34]

[31] http://hvg.hu/itthon/20111222_illes_zoltan_iszapomles.
[32] http://hvg.hu/itthon/20111222_kolontar_gat_mernok.
[33] http://hvg.hu/itthon/20110915_mal_birsag_fellebbezes.
[34]http://hvg.hu/itthon/20101015_hatosagok_engedely_mal_katasztrofavedelmi.

There are multiple options to mitigate the consequences of an accident in a legal way. It is obvious that persons bearing certain responsibilities can be held liable through criminal procedure. The public prosecutor's office is in possession of the documents of the investigation dated 23 December 2011. It has thirty days to decide whether it intends to charge the accused persons (this deadline can be prolonged with 30 more days, if reasonable).

Both the Ktv. and the Civil Code contain regulations to enforce indemnification liability. Environmental damage caused to other parties by virtue of activities or negligence entailing the utilization or loading of the environment shall qualify as damage caused by an activity endangering the environment, and the provisions of the Civil Code on activities entailing increased danger (hazardous operation) shall be applied.[35] According to this, the MAL Zrt. can only be relieved from its liability if it can prove that the accident was caused by an external and unavoidable reason that falls beyond the realm of activities involving considerable hazards. The company referred for a long time to the unusual amounts of rain and unusually strong wind which had resulted in the slipping of the reservoir. The appointed experts will play a significant role to clarify these circumstances. But it is clear that the company does not have much chance to prove such an unforeseeable and unavoidable event, as important as the unequally distributed load which was the clear cause of the catastrophe. Due to this, it is also vital that the experts are unable to find any mistake or abuse during damage remediation and mitigation.

In Croatia, issues of environmental protection are mostly regulated by the Environmental Protection Act of 2007. Since Croatia and Hungary have largely similar environmental protection legal solutions (due to, inter alia, their acceptance of the *acquis communautaire*) and due to the limited extent of this paper, we will not make a special reference to the Croatian legislature.

Since Hungary is a member of the European Union and Croatia is soon to become one it is important to analyse some relevant European rules as well.

[35] Ktv. Art. 103.

8. Directive 2004/35/EC of the European Parliament and the Council

In the history of the integration, environmental protection has played a significant role from the very beginning, although it has been an individual policy of the EU since the Single European Act, which came into force in 1987. Nowadays, 15% of the secondary legislation[36] addresses the issues of the environment and environmental protection; it contains rules referring to liability, but the member states have the discretion to pass their own laws on this type of liability.[37] The EU's legislation in the field of environmental protection is a very extensive legal area, in terms of both national and international legislations. A very important area of this kind of legislation is sustainable development, tackling climate change, air and water protection, protection of nature and biodiversity. Since the European Union has an international legal personality, it is a party to international environmental conventions too. One of them is the Kyoto Protocol to the United Nations Framework Convention on Climate Change, by which the state parties engaged themselves to reduce their emissions of certain greenhouse gases by at least 5% in the period of 2008-2012, compared with the level of emission in 1990. The Report of the Commission notes that by 2007 the member states' greenhouse gas emissions have reduced by 12.5% compared with 1990 (reference year), while their economic growth has continued.[38] Other international conventions include, for example, the Convention on Long-Range Transboundary Air Pollution,[39] Helsinki Convention on Trans-Boundary Watercourses and International Lakes,[40] Bonn Convention on

[36] On secondary legislation see A. Kecskés, *Felelős társaságirányítás* [Corporate Governance] (Budapest, HVG Orac 2011) p. 162.

[37] Gy. Bándi et al., *Az Európai Unió környezetvédelmi szabályozása* [The regulation of environmental protection in the European Union] (Budapest, KJK-Kerszöv 2004) p. 13.

[38] http://europa.eu/legislation_summaries/environment/cooperation_with_third_countries/l28060_en.htm.

[39] 1979. Convention on Long-Range Transboundary Air Pollution, http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1979.CLRTAP.e.pdf.

[40] 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, http://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf.

Conservation of Migratory species[41] or the Convention of the United Nations on combating desertification in countries[42] seriously affected by drought and the Convention on the Transboundary Effects of Industrial Accidents.

With respect to our topic, the most important piece of *acquis* is Directive 2004/35/EC. The European Parliament accepted this Directive on the 21th of April 2004. This Directive put emphasis on the liability of administrative kind instead of damage liability.[43] The 'polluter pays' principle is a very important prescription of the Directive, which has a significant effect on legal rules in the field of environmental protection. The Directive particularly emphasizes the obligation of the operator[44] in the field of prevention, and authorizes the competent authority to take the measures needed. According to this, where environmental damage has not yet occurred, but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. Member States shall provide that, where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible. The competent authority may at any time require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat; require the operator to take the necessary preventive measures; give instructions to the operator to be followed on the necessary preventive measures to be taken; take the necessary preventive measures itself. The authority also has a wide competence if the pollution has already occurred. The polluter has to fulfil strict prescriptions: it has to take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or

[41] 1979 Convention on the Conservation of Migratory Species of Wild Animals, http://www.cms.int/documents/convtxt/cms_convtxt_english.pdf.

[42] 1994. United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=1404.

[43] Gy. Bándi, *Az Európai Bíróság környezetjogi ítélkezési gyakorlata* [The jurisdiction of the European Court in the field of environmental protection] (Budapest, Osiris Kiadó 2006) p. 242.

[44] The Directive refers to such damage occurring in the environment caused by economic operators.

any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services. Another important duty of the operator is to take the necessary remedial measures. Operators shall identify, in accordance with the Annex to the Directive, potential remedial measures and submit them to the competent authority for its approval. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first. In making that decision, the competent authority shall have regard, inter alia, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery. Risks to human health shall also be taken into account. An important rule is that the operator shall bear the costs for the preventive and remedial actions taken.

We must be aware of the fact that eliminating environmental damages requires a serious financial source. The base for this source can be financial securities. There was a severe debate during the drafting of the Directive about making them compulsory. In the end, the final draft contains only the obligation for the member states to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their liabilities. The Commission had to make a report if there was any political possibility to prescribe these securities compulsory. [45]

One objection against the Directive is that its applicability is quite narrow: it refers only to damage caused by certain operators, it refers to a specific group of environmental elements and it refers to such actions which are dangerous to human health or the environment defined by European rules. These provisions result in other problems, because they merge strict liability based on the polluter pays principle with fault liability, and this could lead to unwanted reliefs.[46] The Directive, in case

[45] 2004/35 EC Directive, Art 14.

[46] O. Csapó, *A környezeti károkért való felelősség kérdése az Európai Unióban* [Liability for environmental damages in the European Union] http://www.jak.ppke.hu/hir/ias/20073sz/10.pdf.

of actions which are not in the Annex III, does not prescribe strict liability; hence in such cases culpability can be relevant.

Relevant cases can point to the practical effect and usage of the Directive. In the case C-378/08 the European Court declared that the Directive does not preclude national legislation which allows the competent authority acting within the framework of the Directive to operate on the presumption. Also, in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area. However, in accordance with the 'polluter pays' principle, in order for such a causal link thus to be presumed, the authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities. The Directive must be interpreted as meaning that, when deciding to impose measures for remedying environmental damage on operators whose activities fall within Annex III to the Directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must first carry out a prior investigation into the origin of the pollution found, and it has discretion as to the procedures, means to be employed and the length of such an investigation. Secondly, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures with regard to damage and pollution are directed.[47]

In the joined cases C-379/08 and C-380/08[48] the Court stated further important principles according to the Directive. According to this, the Directive must be interpreted as permitting the competent authority to substantially alter the measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect.[49] In circumstances

[47] *OJ* C 301, 22.11.2008.

[48] *OJ* C 301, 22.11.2008.

[49] However, in order to adopt such a decision, that authority: i) is required to give the operators on whom such measures are imposed the opportunity to be heard,

such as those in the main proceedings, the Directive does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.

8. Conclusion

Faced with an increase in technical and industrial risks, many European legal systems have since the end of the 19th century introduced liability rules that provide for some form of strict liability. Contemporary requirements in terms of technical and technological advancement, globalization of industry, modern traffic, and free movement of goods, services and capital generate complicated legal relations concerning damage compensation which cannot always be resolved by applying the liability criteria based on fault. Nowadays, almost all European countries deal with strict liability within the sphere of their legislature. There are more and more legal regulations and/or new provisions that foresee liability for damage based on the principle of causation. Beside this open development, strict liability is evolving as part of judicial practice, as well. In Croatian and Hungarian legal systems this is especially true concerning strict liability for dangerous thing and dangerous activities; in these fields neither the Croatian nor the

except where the urgency of the environmental situation requires immediate action on the part of the competent authority; ii) is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and iii) must take account of the criteria set out in Section 1.3.1. of Annex II to the Directive and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

Hungarian legal system has regulations in written legal source. It is up to the judicial practice to determine in each concrete case under which conditions a thing or an activity can be considered dangerous. Since the strict liability is generally opposed to liability based on fault only in theoretical level, neither the legislator or the judge are in the simple position deciding scope or way of determining strict liability rules. That strict liability and fault liability are not totally separate categories is easy to see in the area of liability for damage caused by a motor vehicle in motion. When it comes to damage done to one of the motor vehicle owners (car accident participants) by the other vehicle owner, the rules of liability based on fault are applied despite the fact that motor vehicles are considered dangerous things. But, it is possible to unify at least some parts of strict liability, instead the fact that there is 'grey area' in between strict liability and fault liability and the fact that there are many differences in national strict liability rules, which can be seen in solution concerning liability for defective product. Encouraged by the success of the product liability directive, the European Commission also proposed to harmonise liability for services. But liability under this proposal rest on a rebuttable presumption of fault. Another area where harmonisation is likely is environmental liability. Although approximately 15% of the secondary legislation of the European Union addresses the question of environmental protection, a uniform proposal for the regulation in the field of civil liability has not been accepted yet. The reason for this might be the fact that the Member States usually react[50] very sensitively to every harmonizing recommendation which would interfere too deeply with their domestic law. Such an area is civil law itself, where the intent of unification strengthens from time to time, but we are still waiting for the results. According to several opinions, the harmonization of this area would be impossible because of the differences between the member states' regulation systems. A uniform system of solutions to the issues of liability for environmental damage was the Convention of the Council of Europe on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, accepted in 1993 in Lugano.[51] It has been signed by only seven states, but none of them ratified it and thus it never came into effect. This document would have defined the category of dangerous activity or dangerous substance and would have also dealt

[50] V. Halász and A. Kecskés, *Társaságok a tőzsdén* [Companies on the exchange] (Budapest, HVG Orac 2011) p. 212.
[51] http://conventions.coe.int/Treaty/en/Treaties/Html/150.htm.

with the possibilities of acquittals of the tortfeasor. The one who caused damage would be relieved from his liability if he could prove that the damage was caused by an act of war, or a natural phenomenon of an exceptional, inevitable and irresistible character. The situation would be the same if damage was caused by a third party, or if it occurred because the tortfeasor followed a specific order or compulsory measure of a public authority. The limitation period was set to three years, and the Convention also prescribed the cooperation of certain organizations and authorities. We can see that the Convention would undoubtedly encompass the regulation of the civil liability of the tortfeasor. Although it never came into effect, it obviously had influence to regulations that were accepted from there on. This document put special emphasis not only on the compensation and the mitigation of damages, but also on prevention. The disaster which occurred in Hungary in 2010 is a good precedent set to encourage legislators to develop such environmental legislation that would be identical in every Member State.

Mónika Csöndes*
Dubravka Klasiček**

The legal nature of the forced share of inheritance under Croatian and Hungarian law

I. Introduction

It is undisputed that inheritance law is contended to be the most constant part of civil law and often retains traditional elements from the 19th or the 20th century in its present-day status. At the same time, law of succession is closely connected with property law and family law. The type of properties and assets which can be subject to inheritance has gone through some significant alteration in the last century. Briefly, it is enough to refer to the continuous increase of the variety of non-tangible assets such as company shares, securities, intellectual property rights etc. Also, in the last decades, due to the result of certain changes in family relations as well as in demographic circumstances, the suitability and accuracy of traditional legal institutions and rules of inheritance law have been often called into question.[1] This paper is not aimed at presenting this development and its main aspects. On the contrary, the authors believe that these general theorems will be revealed in this article in connection with the forced share of inheritance and its legal nature.

According to well-known definitions in both countries' legal literature, the forced share of inheritance is an imperative minimum share of the closest relatives and the spouse (or the partner whose legal status is the same or similar to that of the spouse) of the testator chargeable to his/her

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[1] L. Vékás, *Magyar polgári jog. Öröklési jog* [Hungarian Civil Law. Inheritance law] (Budapest, Eötvös József Kiadó 2002) pp. 9-12.; L. Vékás, 'Öröklési jog' [Inheritance law], in L. Vékás, ed., *Szakértői Javaslat az új Polgári Törvénykönyv Tervezetéhez* [Expert Proposal to the Draft of the new Civil Code] (Budapest, Complex Kiadó 2008) pp. 1151-1152.; E. Weiss, *Das Erbrecht als Teil der regionalen Rechtskultur und Identität* http://www.notar.at/blueline/upload/weiss.pdf, qouated by Z. Nemessányi, 'Die Entwicklung des ungarischen Erb- und Pflichtteilsrechts', in R. Welser, ed., *Erbrechtsentwicklung in Zentral- und Osteuropa* (Vienna, Manzsche Verlags- und Universitätabuchhandlung 2009) p. 87.

estate. Legal systems do regulate the forced share of inheritance either as a proprietary right or as a money claim. As far as the former is concerned, a forced heir shall have the legal status like all other heirs and shall receive the same hereditary share as they do or some part of it. This hinders the testator to dispose of those parts of his/her estate which is divided und upheld imperatively by the law for the forced heir. In case of the latter, even if the forced heir's right is infringed by a testamentary disposition or donations given inter vivos, the last will of the testator cannot be avoided and contested, and the forced heir shall be entitled to sue the legal heirs and ask for his/her forced share of inheritance in the form of a money claim. The Croatian legal system is an example of the former while Hungarian law is an example of the latter.

It is worth mentioning that contemporary legal literature of a number of countries often challenges today's function of the forced share[2] of inheritance and its conformity with modern constitutional law.[3] Namely, in terms of constitutional law, there is a debate about whether the freedom of testamentary disposition is restricted unnecessarily by the institution of the forced share of inheritance.[4]

This paper[5] offers a comparison between the Croatian and the Hungarian imperative inheritance law with the emphasis on the legal nature of the forced share of inheritance in these countries. Before getting into the issue of the legal nature of the forced share of inheritance, the main characteristics of the Croatian and Hungarian imperative inheritance law have to be disclosed. Therefore, this paper firstly provides for a basic

[2] Concerning the function of the forced share of inheritance see Z. Csehi, 'Észrevételek és javaslatok az új Polgári Törvénykönvy tervezetének kötelesrészi szabályaihoz' [Remarks and proposals to the rules of the forced share in the new Civil Code draft], in 7-8 *Közjegyzők Közlönye* (2007) pp. 16-18.

[3] In connection to the 1949 Hungarian Constitution, the Hungarian Constitutional Court declared that the forced share is not particularly protected by Article 14 of the Constitution (1383/B/1990 Decision of the Constitutional Court). See also 936/D/1997 Decision of the Constitutional Court Decision of the Constitutional Court, and Nemessányi, op. cit. n. 1, at p. 87.

[4] L. Vékás, 'Die Grundzüge der Reform des ungarischen Erbrechts', in R. Welser, ed., *Erbrechtsentwicklung in Zentral- und Osteuropa* (Vienna, Manzsche Verlags- und Universitätabuchhandlung 2009) p. 70.

[5] This paper is based on the PhD dissertation of Dubravka Klasiček (Imperative Inheritance – Limitation of Freedom of Testation) which was defended at the Faculty of Law in Zagreb in 2011

overview of the main features of imperative inheritance law in Croatia and Hungary and then deals with main differences between the two systems, which include the legal nature of the forced share of inheritance, its consequences and pro's and contras of each system.

II. The historical background of the forced share of inheritance in Croatia and in Hungary

To start with, the brief historical background of the forced share of inheritance should be laid down. According to some authors, the strongest type of the forced share appears in legal systems influenced by Roman law where the forced share is a part of law of inheritance. It can be said that in those systems, the testator's wishes expressed in his/her testament and donations are not respected at all since his/her forced heirs can ask for reduction of the testamentary dispositions and for return of gifts. Furthermore, forced heirs are coerced to be the testator's heirs if they decide to claim their forced share – and that is what the testator tried to avoid at all costs by making his/her will.[6]

Under Croatian law, the forced share has always been a proprietary right. For example, in the middle ages, the freedom of father to dispose of family property was, in one way or another, limited, but he always had to leave certain members of his family (usually his sons) some parts of the inheritance. Those limitations were as follows: in some parts of Croatia, the father's testament was valid only if he at least mentioned one of his heirs (sons) and bequeathed him even the smallest part of the inheritance (father had a rather large testamentary freedom); in some parts of Croatia, father was free to dispose of only a part of the family assets that corresponded to the part that any of his children had while the rest of the assets had to be inherited by his children; in some parts of Croatia, children had the so-called 'right to expect' certain parts of family assets and in those parts, the father's freedom of testation was limited the most. Since those days, some things have changed, but the

[6] R. Welser, Die Reform des österreiches Erbrechts, in *Verhandlungen des Siebzehnten Österreichischen Juristentages*, (Manzsche Verlags- und Universitaetsbuchhandlung, Wien 2009) p. 102.; C. Castelein, 'Introduction and Objectives', in C. Castelein, R. Foqué and A. Verbeke, eds., *Imperative Inheritance law in a Late-Modern Society* (Antwerp – Oxford – Portland, Intersentia 2009) p. 31.; R. Foqué and A. Verbeke, 'Conclusions – Towards an Open and Flexible Imperative Inheritance Law', in C. Castelein, R. Foqué and A. Verbeke, eds., *Imperative Inheritance law in a Late-Modern Society* (Antwerp – Oxford – Portland, Intersentia 2009) p. 220. etc.

basic characteristics of imperative inheritance law have remained the same – there are still certain family members who have the right to claim the forced share in case it is infringed; in this case, forced heirs oppose the wishes of the testator that were expressed in the testament and in donations; the forced share is still a part of the inheritance.[7]
Under Hungarian law, the legal nature of the forced share was disputed before the promulgation of the 1959 Civil Code. According to the so-called Provisional Judicial Rules of 1861, its nature fundamentally referred to inheritance law. In the late 19th century, a famous scholar named Grosschmid Béni applied historical analysis to argue that in Hungarian law, the forced share of inheritance is not necessarily a proprietary right, but it can also be considered as a money claim. The draft specimen of the 1900 Civil Code adopted the latter solution. The 1959 Civil Code clearly regulated the forced share as a money claim.[8]

III. Imperative inheritance

1. Forced heirs

Forced heirs shall be entitled to the forced share of inheritance if they are intestate heirs of the testator or would be so in absence of a testamentary disposition at the time of the descent and distribution. The two legal systems show differences in who can be considered a forced heir.
The Croatian inheritance law divides forced heirs into two main categories – absolute and relative forced heirs.[9] The Croatian inheritance law is one of the few such laws in Europe that makes this distinction. This division depends on whether forced heirs have to meet certain special requirements in order to claim their forced share of inheritance. Absolute forced heirs do not have to meet any special requirement; they just have to be in a certain relationship with the testator (blood relation, marriage, cohabitation, adoption) in order to have the right to claim their forced share of inheritance. This category includes testators' descendants, his/her spouse or cohabitant and his/her adoptees and their descendants. It has to be noted that in Croatia, only cohabitant couples

[7] See more in L. Medvidović, *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo* [Croatian Medieval Family Law and Inheritance Law] (Zagreb, Narodne novine 1996).
[8] Vékás, op. cit. n. 1, at p. 108.
[9] N. Gavella and V. Belaj, *Nasljedno pravo* [Inheritance Law] (Zagreb, Narodne novine 2008) p. 220.

consisting of a man and a women are legally recognized, i.e., different-sex couples, and their legal status is almost the same as that of married couples. The legal form of registered partnership is not accepted by the law. The forced share of inheritance of these forced heirs amounts to one half of their intestate share.[10] On the other hand, relative forced heirs are parents, adopters and other ascendants. They will be granted the right to claim their forced share of inheritance only if they are intestate heirs in that specific case and only if they permanently lack earning capacity and they do not have necessary means for subsistence. Their forced share of inheritance is smaller than the forced share of inheritance of absolute forced heirs and amounts to one third of their intestate share.[11]

Hungarian law does not distinguish between absolute and relative forced heirs. According to Article 661 of the 1959 Civil Code, forced heirs are the descendants, the spouse[12] or the registered partner[13] and the parents of the decedent. However, in this context, some special rules should be mentioned because of two characteristic legal institutions of the Hungarian inheritance law. One of them is the so-called lineal inheritance.[14] Parents and other ancestors will became legal heirs and therefore entitled to the forced share not only if there are neither descendants nor the spouse (nor the registered partner) nor if they are disqualified from the inheritance, but also if there is a property in the estate which is subject to lineal inheritance and there are no descendants.[15] As far as the spouse (or the registered partner) is

[10] Art 70(3) Inheritance Act (IA), *National Gazette* 48/03, 163/03, 35/05.

[11] Art 69/2 IA.

[12] The new Civil Code will bring about some changes concerning the inheritance status of the cohabitants.

[13] Registered partner are a couple who belong to the same gender. The rule and legal effect of the marriage shall be suitably applicable to their relationship, if the XXIX Act of 2009 about registered partnership does not exclude it.

[14] Article 611(1)-(2) of the Civil Code of 1959 says: (1) If the legal heir is not a descendant of the decedent, any property that has come down to the decedent from an ancestor by inheritance or gratuitous bequest shall be subject to lineal inheritance. (2) Property inherited or gratuitously acquired from a brother or sister or his descendant shall also be subject to lineal inheritance if the property had been inherited or gratuitously received by the brother or sister or their descendant from their and the decedent's common ancestor.

[15] Article 661 of the Civil Code of 1959. See L. Sőth, 'The forced share of inheritance', in Gy. Gellért, ed., *A Polgári Törvénykönyv Magyarázata* [The Commentary on the Civil Code] (Budapest, Complex Kiadó 2007) p. 2525.

concerned, the spouse (or the registered partner) as a legal heir shall either became the owner of the property or the estate or shall be granted the right to the so called widow's enjoyment. Regarding the latter, the spouse (or the registered partner) shall inherit the beneficial interest of the whole property, which would not be otherwise inherited by him/her [Article 615(1) of the 1959 Civil Code of 1]. Thus, the right to request the forced share can be awarded on a different legal basis. If there are descendants, the spouse (or the registered partner) shall inherit the beneficial interest of the entire property, which shall be inherited by the descendants. In this case, the forced share is adjudged from the widow's enjoyment. If there are no descendants, the estate shall consist of two parts. The first one is subject to lineal inheritance and the other one is not. In the case of the former, the lineal heirs (ancestors) shall be the owners of this property whereas the spouse (or the registered partner) shall inherit the widow's enjoyment thereon. Concerning the latter, the spouse (or the registered partner) shall be the legal heir as owner of the properties which are not subject to lineal inheritance. Therefore, the forced share of the spouse (or registered partner) shall be based either on his/her property rights as the owner of the property which is not subject to lineal inheritance, or on his/her widow's enjoyment concerning the property which is subject to lineal inheritance.[16]

To highlight and sum up the important difference, the following has to be mentioned concerning the inheritance status of the spouse. In Croatia, the spouse has the same status as the children in the line of intestate inheritance. So, the spouse is entitled to the same proportion from the estate as the children are. Under Hungarian law, the spouse or registered partner as a legal heir shall be the proprietor of the estate only if there are no descendants. Otherwise, according to Article 615(1), of the Civil Code the spouse (the registered partner) of a decedent shall inherit the beneficial interest in the entire property, which would not be otherwise inherited by him/her (the right to the widow's enjoyment).[17]

2. The basis of the forced share of inheritance and its calculation

Here, the rules of the Croatian law and Hungarian law are, by and large, the same. If the forced share of inheritance is infringed completely or

[16] Article 615 of the Civil Code of 1959. See Sőth, op. cit. n. 15, at p. 2526.

[17] Article 615(2) of the 1959 Civil Code of 1959 stipulates as follows: If a spouse or registered partner remarries or enters into another registered partnership, his/her beneficial interest shall cease to exist.

partially by the testator's will or his/her *inter vivos* or *mortis causa* donations, forced heirs have the right to claim his/her forced share of inheritance.[18] If there is infringement of the forced share of inheritance, the estate value has to be established. The estate value represents a basis for calculation of the value of the forced share of inheritance. At first, the value of the entire estate left by the deceased at the moment of his/her death is calculated, together with the deceased's testamentary disposition and claims (even those against his/her heirs).[19] After that value is calculated, it is diminished by estate liabilities (for example: devisor's debts, expenses of the inventory and evaluation of estate, usual funeral expenses).[20] A reminder obtained in such a way is called the 'estate net-value'. After calculating the estate net-value, the estate value of account has also to be calculated. It is to be done after the value of some gifts given by the testator to certain parties is added to the estate net-value.

Under Croatian law, gifts taken into account in this context are all the testator's gifts given to his/her intestate heirs, regardless of when they were made, and gifts given by the testator to third parties other than his/her intestate heirs during the last year of the testator's life.[21] According to Article 89 of the Inheritance Act when calculating the value of a share of inheritance that a certain intestate heir will inherit, everything he/she has received from the testator as a gift or as a legacy[22] has to be incorporated in that share. The reason for this is fair distribution of assets between heirs – if a certain heir was given a gift by the testator while he/she was alive, it is fair that the share of the inheritance he/she will inherit shall be reduced by the value of that gift. This is applied to forced heirs and their forced shares of inheritance as well.[23]

The 1959 Hungarian Civil Code, Article 666(1) only prescribes that 'the basis of the forced share of inheritance is the net value of an estate and the net value, at the time of donation, of the donations granted by the

[18] Gavella and Belaj, op. cit. n. 9, at p. 229, See Arts 661, 665 of the 1959 Civil Code, and Sőth, op. cit. n. 14, at p. 2517.
[19] Art 71(1) IA, Article 666 of the 1959 Civil Code.
[20] Art 71(2) IA, Art. 677 of the 1959 Civil Code.
[21] Art 71(3)-(4) IA.
[22] Croatian law accepts a type of legacy that has a law of obligation nature. See P. Klarić and M. Vedriš, *Građansko pravo* [Civil Law] (Zagreb, Narodne novine 2006) p. 714.
[23] Art 89(4) IA. This principle prevails in Hungarian law as well.

testator inter vivos'. It contains an additional rule, (2) according to which if calculation of a donation pursuant to its net value at the time of obtaining is seriously unjust to any person concerned, the court shall determine the value of the donation in the light of all circumstances. It is worth mentioning that Hungarian law does not distinguish between donations given to intestate heirs and third parties. The expression 'any person' means forced heirs too.[24]

Under Croatian law, everything that a forced heir has received from the testator as a gift or legacy has to be incorporated in that share. Hungarian law adopts the same solution. Article 666(3) of the 1959 Civil Code regulates only that when calculating the net value of an estate, legacies and enjoinders shall not be considered as encumbrances. Still, when calculating the value of the forced share for a forced heir, everything, according to Article 668(1), received by a beneficiary from an estate under any title – including legacies[25] – as well as any gratuitous donations he/her has received from the testator shall be applied to satisfy the forced share of inheritance under the condition that it shall be added to the basis of the forced share of inheritance. This is the so-called inclusion rule.

In both legal systems, there are some donations given *inter vivos* which will not be taken into account when calculating the basis of the forced share of inheritance (to the net value of an estate).[26]

As far as the basis of the forced share of inheritance is concerned, the question of some types of contracts should be paid some attention. In both legal systems, it is unlawful for the testator to leave his estate

[24] See Sőth, op. cit. n. 15, at p. 2551. Supreme Court BH2000.354.

[25] Under Hungarian law, there is not only the type of legacy with a law of obligation nature but also those with a proprietary nature.

[26] Article 667(1) of the 1959 Civil Code governs that the following shall not pertain to the basis of the forced share of inheritance: a) the values of donations granted by the testator to anybody more than fifteen years prior to his death; b) the values of donations granted by the testator before the creation of a relationship conveying entitlement to the forced share of inheritance; c) the values of gifts not exceeding the common value; d) the value of support given to a spouse or registered partner and descendants who are in need of support; e) the value of support provided without consideration to other peoples in need up to a extent necessary for subsistence. Under Croatian law, the following will not be considered as a donation when calculating the basis: a) donations made for some public purposes, b) small ordinary gifts, c) products or interests that a person had from the gift, d) maintenance and school expenses (only for compulsory education, anything above or beyond that will be considered a gift). See Klarić and Vedriš, op. cit. n. 22, at p. 756.

freely to a certain person by contract. In Croatia, this type of contract is called inheritance contract.[27] But, there are valid legal forms in both legal systems for the testator to declare his/her last will in a form of a contract, though it is regulated strictly by law.

Under Croatian law, there are contracts concluded *inter vivos* which fall under law of inheritance the law of obligation as well. One of them is a contract that is concluded between an ascendant and his descendant(s) by which the ascendant gives all or part of his/her existing assets to his descendants. In order for this contract to be valid, all of the ascendant's intestate heirs have to approve of that contract. In the opposite case, it converts into a donation.[28] This type of contract is not known in the Hungarian legal system.

Under Croatian law, there are also two additional contracts that fall under law of obligation and can influence the value of the forced share. The first of the two is the so-called *'ugovor o doživotnom uzdržavanju'* (contract of lifelong maintenance). Considering this contract, a person can commit to give maintenance to another person until he/she dies while after the death of that person, he/she shall obtain the assets of the deceased specified in the contract as a 'counter-performance' for the maintenance.[29] The other one is the *'ugovor o dosmrtnom uzdržavanju'* (contract of maintenance until death) which is concluded between a person that provides maintenance and the person who receives that maintenance until his/her death, although the person providing maintenance does not have to wait for the counter-performance until the death of the other party, he/she receives the assets determined in the contract right away, and is obliged to provide the maintenance until the death of the other contractual party.[30] One of the most important rules relating to these contracts is that they have to contain an element of uncertainty – the person providing the maintenance must not know for sure how long the other party will live.[31]

Under Hungarian law, the former is known as *'öröklési szerződés'* (inheritance contract). Article 655(1)-(2) of the 1959 Civil Code regulates that under a contract of inheritance the testator shall be obliged to assume the obligation to name the contracting party as his heir in

[27] Arts 102-104 IA.
[28] Arts 105-115 IA.
[29] Arts 579-585 Civil Obligations Act, *National Gazette* 35/05, 41/08.
[30] Arts 586-589 Civil Obligations Act.
[31] N. Gavella, *Nasljedno pravo* [Inheritance Law] (Zagreb, Informator 1990) p. 369.

exchange for support or a life-annuity. The testator shall be entitled to make any testamentary disposition in a contract of inheritance. Such contractual disposition in the contract of inheritance by the other party contracting with the testator shall be invalid. Under Hungarian law, the latter contract is regulated in the form of the so-called *'tartási és életjáradéki szerződés'* (support contract and life-annuity contract). Article 586 of the 1959 Civil Code sets out that 'under a support contract one of the parties shall be obliged to provide proper support for another.[32] The obligation to provide support shall include general care, medical treatment, nursing and burial. Such contracts shall remain in force until the death of the dependent. Article 591(1) of the Civil Code of 1959 stipulates that 'under a life-annuity contract one of the parties shall be obliged to provide a specific sum of money or a specific quantity of agricultural produce periodically'.[33]

In both legal systems, if a property is already an object of a contract of maintenance for life or until death, support or life-annuity contract, it shall not be taken into account while calculating the value of the forced share of inheritance. So, the forced share of inheritance cannot be claimed by those whose right is based on these contracts.[34]

In both legal systems, these contracts have to meet certain specific form and requirements.

As far as the extent of the forced share is concerned, under Croatian law, the forced share of inheritance of absolute forced heirs (descendants, adoptees and their descendants, the spouse/cohabitant) amounts to one half of their intestate share.[35] Relative forced heirs shall have the right to claim their forced share only if they are intestate heirs in that specific case and only if they permanently lack earning capacity and do not have necessary means for subsistence. Their forced share is smaller than the forced share of absolute forced heirs and it amounts to one third of their intestate share.[36] Under Hungarian law, Article 665(1) of the 1959 Civil Code determines that 'descendants and parents shall be entitled to half

[32] Even legal persons shall be entitled, as obligors, to conclude support contracts.

[33] Para (2) reads as follows: 'the regulations governing support contracts shall be duly applied to life-annuity contracts'.

[34] For the Hungarian law see the 89th Opinion of the Civil Division of the Supreme Court, point c); BH1990.60. For the Croatian law see Gavella, op. cit. n. 31, at p. 370.

[35] Art 70(3) IA.

[36] Art 69(2) IA.

of what is due to a legal heir as calculated on the basis of the forced share of inheritance'. Here, a special rule should be mentioned due to one of the well-known characteristic legal institutions of the Hungarian inheritance law. As far as the spouse (or registered partner) is concerned, as it was thoroughly elaborated above, the spouse (or registered partner) will inherit the *beneficial interest* in the form of the widow's enjoyment of the whole property which will be inherited by the descendants or by the lineal heirs with respect to the estate which is subject to lineal inheritance. In this case, the forced share is adjudged from the widow's enjoyment. Article 665(2) lays down that "if a spouse or registered partner is entitled to the beneficial interest as a legal heir, his/her forced share of inheritance shall be *the limited degree of beneficial interest* that provides for his/her needs in consideration of the property he/she has inherited, his/her own property and the earnings from his/her labour. Otherwise, a spouse or registered partner shall be entitled to half of his/her legal share of inheritance as a forced share of inheritance."

3. The protection of the forced share of inheritance in case of infringement

Under Croatian law, in case a forced share of inheritance is infringed, forced heirs have the right to request reduction of testamentary dispositions and/or return of donations made by the testator during his/her life.[37] In other words, they have the right to dispute the testator's gratuitous dispositions. This is certainly one of the most important consequences of the so-called inheritance law nature of the forced share of inheritance. Testamentary dispositions will be reduced, regardless of their nature and scope, in the same proportion in order to settle the forced share of inheritance that has been infringed by them.[38] To emphasize again, it come only come to reduction of testamentary dispositions if a forced heir has initiated it; the court will never award a forced heir his/her forced share of inheritance without asking him/her about it first.[39] After the claim, a forced heir shall not be able to influence the order of the reduction of testamentary dispositions. This order is set out by Article 78 of Inheritance Act and it cannot be amended by forced heir's dispositions. The statute of limitation for

[37] Gavella and Belaj, op. cit. n. 9, at p. 229-230.
[38] Art 79(1) IA.
[39] Klarić and Vedriš, op. cit. n. 9, at p. 752.

reduction of testamentary dispositions is three years after the proclamation of the testator's will.[40] If reduction of testamentary dispositions is not enough to settle the forced share of inheritance that has been infringed, a forced heir has the right to demand return of the gifts given to intestate heirs and to third parties by the testator.[41] Not all the gifts given by the testator shall be considered for return. Nevertheless, all the gifts given to his/her intestate heirs will be considered for return, regardless of the time when they were provided. Gifts given to third parties can also be considered for return, but only those given during the last year of the testator's life.[42] In case a gift does not have to be returned in its entirety, but only its ideal part, in order to settle the forced share of inheritance that has been infringed, the forced heir and the donee will become co-owners of that gift.[43] All the gifts that have to be returned in order to settle the forced share of inheritance shall be returned in the order opposite to the one in which they were provided. A testator can never influence the order or the scope of the return of gifts by his/her dispositions.[44] Even though it is a proprietary right; the statute of limitation for the return of gifts is three years after the death of the testator.[45]

Under Hungarian law, a testamentary disposition or donation *inter vivos* made by the decedent cannot be invalid even if the forced heirs' right is infringed. However, pursuant to the aforementioned, a forced heir is entitled to sue the testamentary heirs and claim his/her forced share of inheritance in the form of a pecuniary request. Namely, the obligation based on the forced share of inheritance refers to an estate debt.[46] Forced heirs are entitled to enforce their rights within 5 years, which corresponds with the general limitation period. The limitation starts from the death of the decedent. With regard to the responsibility for satisfaction of the forced share of inheritance, Article 669 stipulates that dispensation, or completion, of forced shares of inheritance can be demanded in the following order: a) responsibility for satisfaction of the

[40] Gavella and Belaj, op.cit. n. 9, at p. 233.
[41] Cf. ibid., p. 234.
[42] Only donations that are taken into account while calculating value of account can be considered for return (Art 71(3) IA).
[43] Gavella and Belaj, op.cit. n. 9, at p. 236, according to Art 78 IA.
[44] O. B. Antić, *Sloboda zaveštanja i nužni deo* – doktorska disertacija [Freedom of testation and forced share – Ph.D. dissertation] (Beograd 1983) p. 335.
[45] Art 84 IA.
[46] See Art 677(1) of the Civil Code of 1959.

forced share of inheritance primarily encompasses persons having a share in the estate; b) donees receiving donations from the testator within fifteen years prior to his death shall be responsible for the part of the forced share of inheritance that cannot be satisfied from the estate, irrespective of the temporal order in which the donations were received. Article 672(1) foresees that a forced heir shall be entitled to demand dispensation of his/her in money. It should be noted that this order does not prevail exclusively. The forced share of inheritance is due in kind if it was the decedent's intention declared *inter vivos* or by a testamentary disposition. Furthermore, if dispensation of the forced share of inheritance in money is injurious either to the beneficiary or to the obligor, the court shall, in the light of all the circumstances, be entitled to order the forced share of inheritance to be dispensed wholly or partly in kind.[47] This occurs often in case of real estate when dispensation of the forced share in money is inequitable to the person who lives in that real estate.[48] The court also opt for this solution when dispensation of the forced share in money is more onerous for the defendant than for the plaintiffs if they get the sum of money equivalent to their forced share only after the dissolution of the co-ownership.[49] Still, the Supreme Court in the given case has highlighted that the maintenance of co-ownership is not a practical solution if personal property is concerned in dispensation of the forced share. Therefore, this practice is more adequate if a forced heir is a sole owner of personal property and is obliged to compensate for the difference in money to the others.[50]

According to Article 671(1) of the 1959 Civil Code, the forced share of inheritance shall be dispensed without any encumbrance or limitation. If, however, the forced share of inheritance is dispensed and the remaining property is insufficient to ensure the spouse's or registered partner's limited right to the widow's enjoyment, the part of the forced share of inheritance ensuring limited enjoyment can only be dispensed after the enjoyment is terminated. The case law admits the right to request redemption[51] of the widow's enjoyment based on the forced

[47] See Arts 671(2)-(3) of the Civil Code of 1959.
[48] Supreme Court Pfv.II.21498/1999. See Sőth, op. cit. n. 15, at p. 2586.
[49] Supreme Court BH2001./5.sz.226. See Sőth, ibid.
[50] Supreme Court Pfv.V.21162/1998. See: Sőth, idib.
[51] According to Article 616(3) of the 1959 Civil Code, both spouses and registered partners, and descendants shall be entitled to request redemption of the right to survivorship of spouses or registered partners. Redemption of the right to tenancy or

share of inheritance as well.[52] Here, it is clear that the interest of forced heirs and the widow's rights can be in conflict. In fact, it is common that though heirs get the title of property, they are not entitled to use it because of the right to the widow's enjoyment.

4. The disinheritance of forced heirs

According to the Croatian Inheritance Act, there are certain conditions under which a forced heir can lose the right to claim his/her forced share of inheritance. There are two main ways to disinherit a forced heir – the so-called *'isključenje'* (exclusion) and *'lišenje nužnog dijela'* (deprivation).

The grounds for *'isključenje'* (Article 85 of the Inheritance Act) involve as follows: a) if an heir has gravely aggrieved the devisor by violating some legal or moral obligation, b) if a forced heir has committed a major criminal offence with intent against the devisor or his/her spouse, child or parent, c) if a forced heir has committed a criminal offence against the Republic of Croatia or values protected by international law, d) if he/she has taken to idling and dishonest life. As a matter of fact, exclusion is a punishment for unaccepted behaviour of a forced heir and if a forced heir is excluded, the testator can freely dispose of his/her forced share of inheritance.[53]

The grounds for the *'lišenje nužnog dijela'* (Article 88 of the Inheritance Act) comprise as follows: a devisor can deprive of the right to the forced share of inheritance only his/her descendant who is a forced heir if he/she is heavily encumbered with debts or is a prodigal. Such deprivation will be valid only if that forced heir has descendants – a minor child or a grandchild from the previously deceased child, or a full age child and/or a full age grandchild from the previously deceased child who is not capable of earning. Those descendants of the deprived forced heir will inherit his/her forced share of inheritance. Deprivation is a way of preserving the forced share of inheritance from a forced heir who is to lose it immediately because of his/her lifestyle and giving it to his/her descendants who need it for their maintenance, education etc. A

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the furnishings and household accessories of the dwelling in which the spouse or registered partner lives cannot be requested.

[52] Supreme Court BH1992/1.sz.27. See Vékás, op. cit. n. 1, at p. 119.

[53] D. Jakelić, 'Neka pitanja o isključenju iz nasljedstva nasljednika s pravima na nužni dio' [Some Questions Concerning Exclusion of Heirs Entitled to Compulsory Part From Legacy], in 2 *Hrvatska pravna revija* (2006) p. 22.

testator cannot freely dispose of the deprived forced share of inheritance, he/she can only 'skip a generation' (his son or daughter) and transfer that forced share of inheritance to his/her grandchildren or grand-grandchildren.[54]
Under Hungarian law, disinheritance is valid only if it is based on one of the grounds regulated in Article 663(1)[55] of the 1959 Civil Code and if it executed in the testament of the decedent. The *'lišenje nužnog dijela'* is not known in the Hungarian legal system.

IV. The legal nature of the forced share of inheritance

The Croatian Inheritance Act has accepted the system of the so-called inheritance law nature of the forced share of inheritance (sometimes called property law nature).[56] Forced heirs, like testamentary or intestate heirs, become heirs at the time of the testator's death, *ipso iure*, if all the other requirements have been fulfilled at that moment. A forced heir has the right to his/her forced share of inheritance which is a part of the total inheritance.[57] He/she inherits in the same way other types of heirs inherit. A potential forced heir is deemed an heir regardless of whether he/she has already claimed his/her forced share of inheritance. This claim is merely a consequence of the fact that a forced heir became an heir at the time of the testator's death.[58] There are a lot of consequences of this type of the forced share of inheritance. One of the main consequences is the fact that the rules of inheritance law are exclusively applicable to this type of imperative inheritance. This means, for example, that potential forced heirs are divided into lines like intestate

[54] Gavella and Belaj, op. cit. n. 9, at pp. 227-228.
[55] Art 663(1) Disinheritance can take place if a person is entitled to the forced share of inheritance a) is undeserving of inheritance from the testator; b) has committed a serious crime to the injury of the testator; c) has attempted to take the life of the testator's spouse, registered partner or his next of kin or has committed another serious crime to their injury; d) has seriously violated his legal obligation to support the testator; e) lives by immoral standards; f) has been sentenced to five years of imprisonment or longer by final verdict. (2) A testator can also disinherit his spouse or registered partner because of a conduct seriously violating matrimonial duties or the duties of unmarried couples.
[56] Gavella and Belaj, op. cit. n. 9, at p. 217.
[57] Cf .Gavella and Belaj, op. cit. n. 9, at 218.
[58] N. Gavella, *Nesklad između pravnog i faktičnog položaja* nasljednika – doktorska disertacija [Dissention between the Legal and Factual Position of Heirs – Ph.D. dissertation] (Zagreb 1981) p. 43.

heirs. All the same principles of inheritance law that are applicable to intestate heirs are applicable to forced heirs, too (particularly the principle of representation and exclusivity).[59] A forced heir cannot claim his/her forced share of inheritance if he/she is not an intestate heir in a specific case. For example, if a testator had children and grandchildren, his/her forced heirs will be his/her children, because they would have been intestate heirs in case that testator had not made a will. Only in case the testator's children died before him/her, or are unworthy to inherit, the testator's grandchildren shall become forced heirs because only then will they be intestate heirs as well.[60]

Potential forced heirs do not only have to be alive at the time of the testator's death and be his/her intestate heirs, but they have to be worthy to inherit, like all the other heirs. Also, since all the same rules that are applicable to intestacy also apply to imperative inheritance, even *nasciturus* can be a forced heir under certain conditions. The same rules are applicable under Hungarian law. A forced heir can renounce his/her right to claim his/her forced share of inheritance and can give all the other statements that other types of heirs can give. A forced heir is responsible for the testator's debts (although there are certain particularities concerning their responsibility for those debts).[61] Certainly, one of the most important consequence of this type of forced share of inheritance (at least for this paper) is the fact that a forced heir can challenge the testator's will and donations and can become a co-owner of inheritance together with testamentary heirs and sometimes even with donees if his/her forced share of inheritance has been infringed by the testator's donations.[62]

Under Hungarian law, forced heirs are not heirs. As it has been analysed above, forced heirs are only entitled to request their forced share of inheritance in the form of a money claim. Because of the law of obligation nature of the forced share of inheritance, the rules of inheritance law and law of obligation are both applicable to imperative inheritance. A forced heir cannot claim his/her forced share of

[59] Gavella and Belaj, op. cit. n. 9, at p. 218.
[60] Art 10 IA.
[61] For more see Gavella and Belaj, op. cit. n. 9, at p. 376.
[62] B.T. Blagojević, *Nasledno pravo u Jugoslaviji, Prava republika i pokrajina* [Inheritance Law in the Former Yugoslavia, Laws of Republics and Regions] (Savremena administracija, Beograd 1988) p. 206-207.

inheritance if he/she is not an intestate heir in a specific case.[63] As a general rule, dispensation of the forced share is ordered in money. But, it can occur that it will be due wholly or partly in kind, and in this case, if it is reasonable and justified, co-ownership can also come into existence. But, this is an exception and not a general rule.

V. Problems with the so-called inheritance law type of the forced share of inheritance

There are some major problems with this type of forced share of inheritance and most of them have to do with the fact that this type of forced share is one of the most severe ways of limiting freedom of testamentary disposition.

1. The fact that the testator's forced heirs have the right to dispute the testator's gratuitous dispositions is probably the most severe consequence of inheritance nature of forced share of inheritance. In legal systems that have this type of forced share of inheritance, forced heirs' claims are directly aimed at the testator's wishes expressed in his/her testament and/or donations. If forced heirs claim their forced share of inheritance, the testator's wishes are, partly or completely, ignored. Legal systems that have forced share of inheritance in 'kind' or in 'nature' (inheritance law nature of forced share) are classified as 'strong reserve type' – systems with the strongest limitation of freedom of testamentary disposition. On the other hand, legal systems that have forced share of law of the contract nature fall into the category of the so-called 'hollowed out reserve' which is represented by a much more open and flexible system of limitation of freedom of testamentary disposition.[64] In those legal systems, forced heirs are creditors that have the right to claim a certain sum of money as their forced share of inheritance.[65] They do not inherit any part of the testator's inheritance, they do not dispute his/her gratuitous dispositions and, therefore, the testator's wishes expressed in his/her will and/or donations shall remain intact.

[63] Sőth, op. cit. n. 15, at p. 2587.

[64] See also C. Castelein, 'Introduction and Objectives', in C. Castelein, R. Foqué and A. Verbeke, eds., *Imperative Inheritance law in a Late-Modern Society* (Antwerp – Oxford – Portland, Intersentia 2009) p. 31.

[65] For example in Austria, Germany, Hungary, the Netherlands etc. For more see L. Garb and J. Wood, *International Succession* (New York, Oxford University Press 2010).

2. If the forced share is of the nature of law of inheritance, testamentary heirs, and sometimes donees, become co-owners of the inheritance and/or gifts with forced heirs after they inherit their forced share. This situation will almost certainly be a nuisance to all parties involved, at least until the division of co-ownership, because each party objects each other's rights and claims; each of their rights diminishes the rights of the others. It can be said that they are adversaries and the more these two sides (forced heirs, on one side, and testamentary heirs and/or donees, on the other side) have to deal with each other, the more problems, stress and conflicts might occur.[66]

3. The forced share of the inheritance law nature might often contradict particular forced heir's wishes. Sometimes it might not be in the best interest of a forced heir to inherit a part of the inheritance. This can particularly happen if he/she is a minor, unemployed, sick, in debt etc. In those situations, a forced heir is more likely to need a certain sum of money to meet his/her needs. If a forced heir inherits a certain part of inheritance as his/her forced share, he/she shall first have to divide co-ownership with a testamentary heir (or heirs), then that forced heir shall have to sell his/her part of the inheritance in order to receive the money needed for life expenses.[67] This can sometimes take a lot of time. It would be much simpler if a forced heir was a creditor (instead of an heir) and if he/she received his/her forced share as a certain sum of money, like it happens in legal systems that have the forced share of the nature of law of contract.

4. The forced share of the nature of inheritance law can lead to fragmentation of things that were left to testamentary heirs in testator's will and/or to donees. This could be prevented if a forced share was a claim for a certain sum of money (also known as the law of contract nature of forced share). The law of contract nature of forced share was first introduced in the Prussian inheritance law in the Middle Ages specifically for this reason: in order to prevent fragmentation of agricultural land and to preserve economic power of the land and its owners, the term of forced share was shaped as a money *(tu možemo*

[66] See also M.J.A. Van Mourik, 'Persective 5, Comparative Law – The Netherlands', in C. Castelein, R. Foqué and A. Verbeke, eds., *Imperative Inheritance Law in a Late-Modern Society* (Antwerp – Oxford – Portland, Intersentia 2009) p. 109

[67] See also R. Welser, 'Die Reform des österreiches Erbrechts', in *Verhandlungen des Siebzehnten Österreichischen Juristentages* (Manzsche Verlags- und Universitaetsbuchhandlung, Wien 2009) p. 102

staviti i pecuniary) claim because these goals could not have been achieved with the forced share of inheritance law nature that was shaped in Roman law and had been until then the only form of forced share.[68]

VI. Conclusion

Analysis of comparative law shows that most European countries are oriented towards more open and flexible imperative inheritance law.[69] This can be achieved by making certain changes, such as narrowing the circle of potential forced heirs, taking into account some circumstances that can influence the forced heirs' rights to claim their forced share and its value, but also by converting the legal nature of forced share from inheritance law to law of the contract nature.

Concerning Croatian law, in her PhD dissertation, Dubravka Klasiček agreed with those who believe that the time for more flexible and open imperative inheritance law has come.[70] Pursuant to the aforementioned, one of the ways to achieve this, at least partially, is by making a switch from the concept of forced share as a part of the inheritance into forced share as a pecuniary claim.

Some of the advantages of forced share as a pecuniary claim are as follows: the testators' wishes expressed in his/her testament or donations are much more respected while forced heirs still receive their forced share of the inheritance; the whole process of obtaining the forced share is simplified and accelerated; there is less stress and altercations between all parties involved due to the fact that testamentary heirs and/or donees do not have to share with forced heirs what they have inherited from the testator or have been given by the testator, if a forced heir decides to claim his/her forced share; a forced heir claims a certain sum of money as his/her forced share which can be an advantage for those forced heirs that need that money in order to support him/herself; division of some valuable parts of the inheritance or donations can be avoided (which is especially important when it comes to, for example, agricultural land). It has to be noted that in some legal systems (for

[68] See also Antić, op. cit. n. 44, at p. 273-274.

[69] See C. Castelein,, R. Foqué and A. Verbeke, eds., *Introduction and Objectives, Imperative Inheritance law in a Late-Modern Society* (Antwerp – Oxford – Portland, Intersentia 2009)

[70] D. Klasiček, *Nužno nasljedno pravo kao ograničenje slobode oporučnog raspolaganja* [Imperative Inheritance – Limitation of Freedom of Testation] (Zagreb, Faculty of Law 2011).

example in Hungary) where forced share is a money claim, the general rule is that forced share will be dispensed in money, but sometimes under certain conditions it is given in kind. In the latter situation, the result can be that testamentary heirs and/or donees have to share with forced heirs what they have inherited from the testator or were given by the testator, but this is an exception.

Therefore, it seems that there is no doubt that Croatian inheritance law should depart from the concept of forced share as a part of inheritance and opt for forced share as a money claim. That way, Croatia would join other European countries that have already made this turn and are now extremely pleased with this change. Also, relevant literature shows that most authors coming from countries that have forced share of the inheritance law nature advocate its transfer to law of the contract nature due to the same problems as those stated above, which is a fact that should not be ignored.

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Differences and similarities in regulations of the Croatian and Hungarian system of matrimonial property

I. Introduction

The relationship between spouses created by marriage has significant financial issues.[1] In a narrower sense the system of matrimonial property includes on one hand the legal relationship between spouses and on other hand relationship between spouses and third parties, all during the marriage as well as in the case of its absolution. In a wider sense it also deals with joint property and its division, the use of joint estates, and with matrimonial support.[2]

The regulation of the system of matrimonial property in a narrower sense – both in legal systems taking turns over legal history, and in legal systems co-existing today – can be traced back to two basic principles: the principles of unifying and separating finances. The mixed system based on joint acquisition act is a bridge between these two opposite principles.[3]

When we turn into contemporary matrimonial property systems, we can recognize there are three commonly accepted basic models of default matrimonial property systems in Europe today. There are the separation of property with judicial adjudication; the deferred community of property[4] and the limited community of property.[5]

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[1] O. Csiky and E. Filó, *Magyar Családjog* [Hungarian Family Law] (Budapest, HVG Orac 2001) p. 120.

[2] E. Csűri, *A házassági vagyonjog* [The Matrimonial Property, Draft for Hungarian Judicial Training of Court Clerks] (Budapest, Banicz, Országos Igazságszolgáltatási Tanács Hivatal, Magyar Bíróképző Akadémia Kiadványa [The Hungarian Judiciary Office Publisher] Komáromi Nyomda és Kiadó Kft. 2007) p.11.

[3] Csűri, 2007 op. cit. n. 2, at pp. 11-12.

[4] When the conjugal community is dissolved, each partner is entitled to one half of the value of the accrued property and not one half of the property itself. See in Feldstein Family Law Group http://www.separation.ca/family-law/division-of-family-assets.

Hungarian as well as Croatian matrimonial property system share the same model: system of the limited community of property (further: community of property). Besides the same matrimonial property system today, both countries also shared the same history which has had significant impact on regulation of matrimonial property. Namely, both countries were under the social system for a long period of time. During this time legislators of both countries did not have too much attention to the issues of matrimonial property. The basic principle of the socialistic era concerning family law was priority of personal relations over the property relations.[6]

Despite the same legal history and the same type of matrimonial systems today it will be interesting to explore and compare these two systems more detailed.

Therefore in this article the following issues will be compared: legal sources, categories of assets (common and separate property), administration of assets, debts and liability of spouses, dissolution and distribution of assets as well as legal protection of family home. Finally convergences and divergences between Hungarian and Croatian default matrimonial property systems will be highlighted as well as recent perspectives in the field of matrimonial property dispute resolution. The paper is organized in a way that each of above mentioned topic is presented first under the Croatian legal system and then under the Hungarian legal system.

II. Croatian and Hungarian systems of matrimonial property

1. The default matrimonial property system

1.1. Croatia

The system of community of property was adopted in Croatia in 1946. This system was stipulated by the Basic Marriage Act which was also a

[5] About comparative matrimonial property systems in Europe see more in M. Antoloskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (Antwerp – Oxford, Intersentia 2006) p. 455 and K. Boele-Woelki, B. Braat and I. Curry-Sumner, eds., *European Family Law in Action, Vol. IV: Property relations between spouses* (Antwerp – Oxford – Portland, Intersentia 2009)

[6] M. Alinčić, 'Obiteljsko pravo u doba uključenosti u socijalistički pravni krug', in N. Gavella, ed., *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [Family law in the era of the involvement in the socialist legal circle, Croatian civil law and continental European legal circle], (Zagreb, Pravni fakultet u Zagrebu 1994) p. 68-70.

federal law in the former Yugoslavia. The 1950 Act on Property Relations between Spouses amended the above Act, but the former referred only to Croatia. The first autochthonous Croatian law in this area was passed in 1978. It was the Act on Marriage and Family Relations. This law was amended in 1989.[7]

All the way to 2003, matrimonial property relations in Croatia had been subject to the system of community of property, according to which matrimonial property was divided between spouses by means of shares. The shares were specified in judicial proceedings initiated in order to divide the martial property.

In Croatia, the most significant change in this context took place in 2003 when Croatian Family Law Act (hereinafter CFLA) entered into force.[8] The indisputable presumption that matrimonial property shall belong to spouses in equal shares was introduced to the Croatian legal system by CFLA 2003. and the presumption was set out has been in force until today. Otherwise, it shall be regulated by a matrimonial agreement (prenuptial agreement) which was for the first time regulated in Croatia the same year.[9]

Regulation of property relations between natural persons belongs to the scope of civil law, though relations between spouses concerning property law can be considered as an exception to the general rules of civil law and hence the 2003 CFLA shall be applied *lex specialis*. Legal regulation of property relations between spouses is based on several principles. One of them is the principle of equality, pursuant to which spouses are equal when it comes to the right to the matrimonial property and its administration, except if it was differently arranged by an

[7] Ibid., at. pp. 70-73.

[8] *Official Gazette* [Narodne novine116/03, 17/04, 136/04, 107/07, 61/2011.

[9] The concept of matrimonial contract was included in the 2003 Family Act and is stipulated by only three articles. A matrimonial contract (prenuptial agreement) is defined as a legal affair concluded between spouses on regulation of current and future property relations (Art 255 of the 2003 Family Act). A matrimonial contract has legal effect on third parties only if it is registered in a land register or other public registers. A matrimonial contract shall be made in writing and the spouses' signatures thereof shall be certified (Art 255 of the 2003 Family Act). If a spouse is incapable of working, then their custodian is entitled to make the agreement on behalf of the former, if having an approval of a welfare centre (Art 256 of the 2003 Family Act). Finally, the law prescribes that spouses are not allowed to apply a foreign law to their property relations (Art 257 of the 2003 Family Act). Prenuptial agreements are very rare in Croatia.

agreement. The next relevant principle is the principle of family solidarity, according to which spouses shall jointly administer their matrimonial property regardless of their income. In compliance with the principle of party autonomy, spouses are entitled to regulate their current and future property relations by means of a matrimonial contract whereas pursuant to the principle of protection of just third parties, a third party does not necessarily have to know that someone administer community of property which is co-owned, so this requires special legal protection.[10]

1.2. Hungary

When the Act IV of 1952 on Family, Marriage and Guardianship (later: Hungarian Family Law Act, further HFLA) came into effect, the Hungarian system of matrimonial property was based on the principle of surplus value in a mixed system.[11]
However, since 1 July1987, i.e., since Act IV of 1986 – amending the HFLA of 1952 – became effective, the system has been based on real value. Its basic legal nature is to, under substantive law, separate the spouses' property acquired before marriage conclusion from that acquired after it. The total property of spouses should be divided into the separated property belonged to each of spouses and their common property.[12]
However, spouses can deviate from default matrimonial system by matrimonial property contracts choosing the unification or complete separation of their property.[13]

2. Community of property

2.1. Croatia

Under the 2003 CFLA, both the limited community of property and separate property are at the disposal of spouses. Community of property

[10] A. Korać Graovac, in M. Alinčić et al., *Obiteljskopravo* [Family Law] (Zagreb, Official Gazette d.d. 2007) p. 499-500.
[11] E. K. Csűri, E. Filó and B. Somfai *A családjogi törvény magyarázata*. Kommentár III. [Commentary III. on Family Law Act] (Budapest, KJK-KERSZÖV 2002) p. 158-162.
[12] The separate properties are at the disposal of the spouses independently; in case of common property every right is common.
[13] G. Jobbágyi, *Személyi és családi jog* [Personal and Family Rights] 7th.edition (Budapest, Szent István Társulat 2008) p. 235.

involves the property acquired by the spouses with respect to labour during the existence of their matrimonial union[14] and of the income derived from that property.[15]

There are two cumulative conditions for community of property under Croatian law: the property must have been *acquired by the labour* of both spouses, and it must have been acquired *during the matrimonial union*. The labour of the spouses may be of any type: individual or joint, direct or indirect.[16] Thus, indirect contribution – labour that does not directly create a new value but enables the other spouse to increase the value of the property (e.g., taking care of the children, doing housework, providing moral support) – is considered to be a contribution to the community of property.[17] Legally, the spouses are co-owners of the community of property in equal parts, unless they have agreed otherwise.[18]

The CFLA specifically determines that community of property shall include winnings from lottery (games of chance) and income from intellectual and related rights realized during the marriage.[19]

The references involve the following matters in community of property: salary (in the form of regular earnings or wages), ownership over movables and real estate acquired based on labour, ownership over a company or craft if founded by assets of matrimonial property, also

[14] Under the Croatian law, a matrimonial union includes an actual relationship and not the existing matrimonial status.

[15] Material benefit gained with respect to copyrights and copyright-related rights and winning prizes are also included in matrimonial property (Arts 252 and 254 of the Croatian Family Law Act, 2003).

[16] Korać Graovac, op. cit. n. 10, at p. 501-502.

[17] The recognition of indirect contribution in terms of the acquisition and division of matrimonial property has been present in Croatian legislation for over 60 years. The first evidence of the term can be found in the Yugoslav Marriage Basic Act of 1946. The legal theory sees it as 'a support that spouses provide to each other regarding households, which is primarily related to housewives taking care of food, cleanliness, upbringing and child's care. Women's in-house labour enable men to make money working outside their place of living since it relieves them from taking care of their basic needs, satisfaction of which would be otherwise impossible without outsourcing. It is clear that the position of employed women also taking care of household is unique since they give double contribution to their families.' A. Prokop, *Komentar Osnovnom zakonu o braku I* [Comment to The Marriage Basic Act I] (Zagreb, Školska knjiga 1959) p. 36.

[18] Art 149 of CFLA, 2003.

[19] Arts 252, 254 of CFLA, 2003.

items used for practice of crafts (tools, instruments), savings in cash, income from community of property in the form of interests or flat rent as well as items for personal usage.[20]
The further issues that have remained unresolved at a normative level comprise life-insurance or voluntary pension insurance related rights, purpose savings related rights and rights based on stocks and specific shares in companies.[21]

2.2. Hungary

As Paragraph 1 of Article 27 of the HFLA provides that common property can be established under two conditions: the first is marriage itself, the second is the existence of matrimony. The absence or termination of either of these conditions inhibits or terminates common property. However, temporary termination of matrimonial community doesn't terminate community of property at the same time.[22]
Marriage establishes community of property between spouses during the marriage. According to this the joint property of spouses, is everything they acquired together or separately during the marriage, except anything that belongs to one of the spouses separate property.[23] The term of joint property acquisition of spouses is a much wider notion than the term of common property provided by the Civil Code, because it includes everything spouses acquire together or separately during matrimony. So the term of joint acquisition of property includes everything that goes under the term of property defined by civil law.[24]
Community property includes the following:

- Profit from separate estates that accumulated during marriage, after deducting administration and maintenance fees. Funds on bank accounts, savings accounts or other interest-bearing

[20] D. Hrabar, 'Status imovine bračnih drugova – neka pitanja i dvojbe' [Status of matrimonial property – some questions and doubts], in *Godišnjak: aktualnosti hrvatskog zakonodavstva i pravne prakse-građansko, trgovačko, radno i procesno pravo u praksi* 9 (Zagreb, Hrvatsko društvo za građanskopravne znanosti i praksu 2002) p. 52.
[21] Korać Graovac, op. cit. n. 10, at p. 506.
[22] Csűri, op. cit. n. 2, at p.19.
[23] Para 1 of Art 27 HFLA, 1952.
[24] Csűri, op. cit. n. 2, at p.16.

investments nowadays only helps maintaining the value of the capital and they cannot be counted as profit.[25]

- The fees of inventors, reformers, author rights acquired during marriage, income from the occupation or job of spouses, all income coming from labour relations and employment and every extra income (tip).[26]
- Properties or financial rewards given with merits and titles, every property and financial asset spouses acquired by legal transactions during marriage, except separate properties (thus, properties acquired by either spouse by way of will, life annuity or matrimonial support will be counted as community property).
- Damages and compensation for the damage destruction or theft of every property either spouse acquired.

3. Separate Property

3.1. Croatia

Pursuant to the CFLA, separate property refers to the property which was owned by a spouse at the moment of marriage conclusion and the property acquired by a spouse during the marriage other than labour-based or labour-originating property.[27]
Separate property also represents intellectual property of the spouse who generated it.[28] In short, separate property is the property that is not included in community of property and that is independently administer by a spouse.

3.2. Hungary

Separate property is every property that is listed exhaustive by the legislator in Article 28 of the HFLA.

[25] *Új Polgári Törvénykönyv Koncepciója. Harmadik Könyv. Családjog* [Concept of the New Hungarian Civil Code, Book III. Family Law Book], http://www.ujptk.hu/dok/hirek/Tajekoztato%20a%20Ptk%20kodifikacio%20elorehaladtarol.pdf.
[26] Jobbágyi, op. cit. n. 13, at p. 238-239.
[27] Art 253 of the CFLA, 2003.
[28] Art 254 of the CFLA, 2003.

Considering separate estates, spouses oppose each other as completely independent parties, but not strangers.[29]
Judicial practice partly widened the concept of separate property (for instance the insurance money for compensating for damaged identities) and partly narrowed it (for instance the liability for property acquired from wills).[30]
As defined by the HFLA and judicial practice, the separate property of spouses includes the following:

- Properties and assets acquired before marriage, brought into the marriage by both spouse, and every property – inherited or given as present – during marriage.
- Convenient gifts, depending on an occasion, become common property (like marriage presents and the money given to the bride during the traditional 'wedding dance'[31]), or separate property (gifts given by spouses to each other become the recipients' separate property, even if they were bought from funds based on the common income).
- not particularly valuable property for everyday use (valuable jewels, tools and equipment needed for work are not separate property[32]) and assets acquired using the value of separate property.[33]

4. Administration of assets

4.1. Croatia

The only provision of the CFLA stipulating community of property administration refers to affairs of regular administration which are supposed to have been approved of by the other party (spouse), if not proved otherwise.[34]

[29] G. Jancsó,' A házassági vagyonjogról 2.' [About the Matrimonial property 2.], in R. Bédy-Schwimmer, ed., *A nő és a társadalom* [the Women and Society Journal] 12/1908 (Budapest) p. 191.
[30] Csűri, op. cit. n. 2, at p. 94.
[31] Jobbágyi, op. cit. n. 13, at p. 244.
[32] Ibid., at p. 245.
[33] Para 2 of Art 28 HFLA, 1952.
[34] N. Gavella, 'Stjecanje prava vlasništva' [Acquisition of property rights], in N. Gavella et al., *Stvarno pravo* [Property Law] (Zagreb, Official Gazette 2007) p. 693. See also Art 251 of the CFLA, 2003.

At the same time, the Family Act implies application of the Ownership and Other Proprietary Rights Act concerning administration of co ownership, more precisely by Articles 37 to 46.[35]
Thus, a co-owner (spouse) is entitled to freely administer with their own ideal share of a community of property item, without being given consent of other co-owner (meaning the other spouse), but only if not interfering with other rights.[36]
It is necessary to differentiate between affairs of 'ordinary administration' and affairs of 'extra ordinary administration', with both requiring consent of the other spouse. The only difference between these two types of administration refers to the legal nature of the consent which needs to be explicit in case of extra ordinary administration and is implied in case of ordinary administration. To sum up, in terms of affairs of ordinary administration, it is presumed that the other spouse has given the consent, if not proved otherwise. [37]
Ordinary administration affairs could include regular real estate maintenance such as wall painting, roof repairs or replacement of a broken window and similar. Regular administration regarding movables could encompass car repairs or its regular check-ups.
On the other hand affairs of *extra ordinary administration* include change of the purpose of an item, major repairs, additional building, building extension, flat rearrangement, alienation of an entire item, leasing an item or renting it for over a year, mortgaging an entire item, pawning a movable, establishment of real or personal easement, real encumbrance or a building right over an entire item. These affairs require consent of all the proprietors i.e. both spouses.[38]
If a spouse concludes a transaction of extra ordinary administration without consent of the other spouse, which transaction might be cancelled[39] except if the spouse was approved of that transaction subsequently, in case of which court assumes that the consent had also existed before.[40]

[35] *Official Gazette* 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09.
[36] Gavella, op. cit. n. 34, at p. 689.
[37] Art 251 of the CFLA, 2003.
[38] Phara 1 of Art 41 of the Ownership and Other Proprietary Rights Act, 1996.
[39] Art 322 of the Civil Obligations Act 2005, *Official Gazette* 35/05, 41/08.
[40] Korać Graovac, op. cit. n. 10, at p. 507-508.

The law also protect third parties concerning ordinary administration affairs as well since it is considered that the other spouse has given consent thereto, if not proved otherwise.[41] The same principle of protection of third parties is applied in relation to administration of real rights which shall be registered in land registers, i.e. public registers.[42] In fact, a just third party considers registrations in land and other public registers true and faithful, which means that examination of a land register should reveal the true status of a land and that corresponds to the principle of trustworthiness of land registers.[43]

4.2. Hungary

The regulation of common usage, management and maintaining the community of property are different.

During the *community of the spouses* the special provisions of Article 29 of HFLA must be applied, which is different from the shared ownership rules of the Hungarian Civil Code.[44]

The provision of Article 29 of HFLA states:

- the right of proper use of both spouses are ensured, its exercise is not limited by the Article 140 of the Hungarian Civil Code,[45] only by the Paragraph (3) of Article 1 of the HFLA which prescribe the requirement of proper exercise.
- the spouses have management right jointly and each spouse may request the other to contribute to those measures which help to avoid depreciation or to maintenance of the common property is necessary
- the maintenance and management costs associated primarily with a common property to be covered. If this is not enough, the spouses are required to contribute proportionately to the cost from their separate property

After the *termination of community of the spouses until the distribution of assets*, the shared ownership rules – Articles 139 to 146 – of the

[41] Art 251 of the CFLA, 2003.

[42] Para 2 of Art 255 of the CFLA, 2003.

[43] Paras 2 and 3. Art 8 of the Land Register Act, 1996, *Official Gazette* 91/96, 68/98, 137/99, 114/01, 100/04, 107/07, 152/08.

[44] Arts 139 to 146 of the Hungarian Civil Code, 1959.

[45] Each co-owner has the right to possess and use the thing; however, none of them shall exercise this right if it adversely affects the rights and rightful interests of the others in connection with the thing. Para (1) of Art 140 of the Hungarian Civil Code, 1959.

Hungarian Civil Code[46] must be applied with Articles 31/A-31/E of the HFLA which stipulate that as long as the spouses disagree about common housing or until the court resolve a respective dispute from the field of property law, the rules of the HFLA also must be applied for regulating their mutual relations (e.g., the residential use of the common house should be provided for a minor, one spouse cannot do anything which restrict the other spouse's rights to use the common home until the dispute is solved by the provisions of the HFLA).[47]

[46] (1) Ownership of the same thing, by specific shares, can be claimed by two or more persons. (2) In the event of doubt, the property shares of the joint owners shall be equal (Art 139). (1) Each co-owner has the right to possess and use the thing; however, none of them shall exercise this right if it adversely effects the rights and rightful interests of the others in connection with the thing. (2) Unless otherwise provided by law, co-owners shall decide by majority vote on issues of possession, use, utilization and expenses not exceeding standard measures; each co-owner has the right to vote in proportion to his ownership share (Art 140). Proceeds from a thing shall be claimed by the co-owners in proportion of their ownership shares; costs of maintenance and other expenses related to the thing, as well as obligations originating from co-ownership, and any damage to the thing shall be borne by the co-owners in the same proportion (Art 141). Any of the co-owners is entitled to carry out works that are essential for the preservation and maintenance of the thing, and each co-owner shall be obliged to bear his share of such costs. However, if possible, the co-owners shall be notified before such expenses are incurred (Art 142). (1) If a majority decision is required by law and if such decision infringes reasonable management or substantially violates the rightful interests of the minority, the minority shall be entitled to contest the decision in court. The contest shall not prevent execution of the decision; however, the court shall be entitled to suspend execution on reasonable grounds. (2) This provision shall also be applied if there is disagreement among the co-owners as to whether the proposed work is absolutely necessary for the preservation and maintenance of the condition of the thing. (3) If a majority decision is required by law and there is no such decision, the court shall pass a decision on matters related to possession, use, or utilization at the request of either of the co-owners (Art 143). A unanimous decision by the co-owners shall be required for a) expenses in excess of standard measures, b) transferring ownership of the entire thing, surrendering it for usufruct or use, pledging it as security or collateral, or encumbering it in any other way (Art 144). (1) Each of the co-owners may freely dispose of his share of the property. (2) The other co-owners shall have the right of preemption before third persons to buy, rent, or lease the property share of a co-owner. (3) Unless otherwise prescribed by law, the right of preemption provided for other persons in specific other legislation shall precede the preemption rights of co-owners (Art 145). Any of the co-owners may act independently in protection of his proprietary rights (Art 146).

[47] Csűri, op. cit. n. 2, at p. 112.

There are no special provisions for the usage, management and maintaining of the separate property in the HFLA. These provisions are in the Hungarian Civil Code which states that one spouse is entitled to freely administer with his own separate property item, without the consent of the other spouse. Except the benefits of the separate property received during the community, less maintenance costs and asset management, as it is common property by Paragraph 1 of Article 27 of the HFLA.

5. Debts and liabilities of the spouses

5.1. Croatia

Debts of spouses, i.e., their liabilities are not part of matrimonial property but these represent its burden. In the process of dissolution of community of property, spouses often have to deal with pecuniary liabilities towards both each other (internal relationships) and third parties. The spouses' liabilities towards third parties can be *individual*, *shared* or *joint* and this depends on a legal basis which a pecuniary liability have arisen from.

If a spouse autonomously concludes a contract with third parties, without any kind of participation of the other spouse (as a fellow debtor or guarantor), then the first one is *solely liable* to the creditor for the debts, regardless of the type of a civil obligation.

Some *shared liabilities*, particularly pecuniary ones, can be binding for both spouses in a way that each of them is liable *for their share* of the debt. This refers to all the liabilities jointly taken by the spouses as fellow debtors whereat no joint liability was contracted, for instance pecuniary liabilities arising from the law such as maintenance of the spouses' child who does not live with its parents.

As far as *joint liability* is concerned, the emphasis is here put on passive solidarity. It means that each spouse is liable for the entire debt to any of the creditors, irrespective of the divisibility of the debt. When it comes to the issue of joint liability of spouses, one can ascertain that this issue is not explicitly prescribed by any law.[48]

[48] Joint liability of spouses was prescribed by the former Act on Marriage and Family Relations (*Official Gazette* 11/78, 27/78, 45/89, 51/89, 59/90), according to which spouses are jointly liable for the liabilities taken by a spouse for conjugal or family needs. However, neither the current Family Act nor the Ownership and Other Proprietary Rights Act nor the Civil Obligations Act prescribes joint liability of spouses of any kind. It also refers to liabilities arising from matrimonial property, as

However, spouses (although it does not happen so often in real life) can be jointly liable pursuant to the general principles of the Civil Obligations Act. The respective situations are as follows: if they have jointly done damage to a third party [49] or if damage has been done by their child aged 7 or more with the civil tort capacity (child aged 7 to 18), in case of which both parents and the child are jointly liable.[50]

5.2. Hungary

The HFLA does not regulate the common and separate liability; however the notion of property clearly covers the passive (negative) elements of the common and separate assets. That means all debts and other financial obligation toward a third party either by one of the spouses or by the spouses jointly. Whether a certain debt can be classified as a common or a separate liability is determined by the following factors:[51]

- the beginning date of the liability;[52]
- the liability arisen as a result of activities concerning common or separate property;
- the liability burdens the common or separate property;
- arrangements regarding the spouse's separate property (by which the liability occurred) increased or decreased the value of the separate or the common property.

Concerning the internal legal relationship between the spouses, distinction of the common and separate property is significant. Namely, if the compensation is not paid from the property that was burdened, then at the distribution of the common property recompensation must take place.[53]

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thought by Kačer. H. Kačer, 'Dugovi i darovi pri diobi bračne stečevine' [Debts and gifts in distribution and division of matrimonial property], in B. Rešetar and M. Župan, ed., *Imovinskopravni aspekti razvoda braka* [Property aspects of divorce] (Osijek, Pravni fakultet u Osijeku 2011) at p. 114.

[49] Art 1107 of the Croatian Civil Obligations Act, 2005.

[50] Art 1057 of the Civil Obligations Act, 2005. P. Klarić and M. Vedriš, *Građansko pravo* [Civil law] (Zagreb, Narodne novine 2006) p. 626. and A. Perkušić, in V. Gorenc, ed., *Komentar Zakona o obveznim odnosima* [Commentary of the Civil Obligation Act] (Zagreb, RRIF 2005) p. 1635-1636.

[51] Csűri, op. cit. n. 2, at p. 103.

[52] The liability may come into effect before matrimony (life-partner relationship), during the matrimony or after the dissolution of matrimony.

[53] Csűri, op. cit. n. 2, at p. 104.

Common or separate liabilities of the spouses toward a third party shall be governed by the rules of the obligatory relation established by the spouses and the third party.[54]
As the HFLA presumes the common property, and this principle is also valid for passive debts. To overcome this presumption, the concerned party has to prove otherwise.[55]

6. Dissolution and distribution of assets

6.1. Croatia

The CFLA does not include particular provisions on dissolution and division of community of property, so, as said above, provisions of property law are applied, i.e., provisions of Articles 47-56 of the Ownership and Other Proprietary Rights Act.
Co-ownership over community of property can be dissolved in its entirety or only with regard to an individual item or right.[56] The dissolved property later becomes separate property of ex-spouses.
Pursuant to the Ownership and Other Proprietary Rights Act, spouses can dissolve community of property by *agreement (voluntarily)* or in *court proceedings.*[57]
If the dissolution is required by only one spouse or both of them but they cannot agree on property division, then their request will be dealt by court in judicial proceedings.[58] Court is also needed if there is a dispute on what should be included in community of property.

6.2. Hungary

Distribution of assets may happen during the matrimony or after the termination of the matrimony. The termination of the community of property is followed by distribution of assets by an agreement out of court, or by the judicial decision of either a matrimonial or in a separate matrimonial property dispute.[59] In case of distribution of community of property a spouse becomes the exclusive owner of a property that had previously been a common asset or if it is not possible or if it entails a significant decrease in value, then the other spouse '*buys out'* the asset

[54] Csűri and Somfai op. cit. n. 11, at p. 338.
[55] Jobbágyi, op. cit. n. 13, at p. 241.
[56] Para 1 of Art 48 of the Ownership and Other Proprietary Rights Act, 1996.
[57] Art 48 of the Ownership and Other Proprietary Rights Act, 1996.
[58] Para 3of Arts 48 and 49 of the Ownership and Other Proprietary Rights Act, 1996.
[59] Csűri, op. cit. n. 2, at p. 235.

according to the decision of the court, or one of the spouses' sell the common asset and divides the purchase money with the other. Thus, distribution of common property is essentially the termination of the common proprietary rights of certain assets.[60]
Distribution of common assets entails not only the distribution of assets between the parties but also compensation claims. The distribution may take place according to agreement between the parties or a court decision. The agreement between the parties can be made in or out of court. In case of distribution of common properties, the principle of comprehensive arrangement of assets prevails, that is, the decision of the court in a procedure to distribute common assets must comprise all common properties.[61]

7. Protection of the family home – advantage of the Hungarian law and disadvantage of the Croatian law

The significant difference between Hungarian and Croatian law regarding matrimonial property refers to protection of family home. Croatian law does not recognize such legal protection today; even one type of protection of family home existed during the era of socialism. Namely, according to the that time legislation a parent who continued to live with minor children after divorce, was granted the right to use common flat or house in which they lived together before divorce.
In contrast, Hungarian legislator regulates the issue of using family home. In accordance with international norms, the HFLA provides the right to use house to both spouses both during the marriage and after its termination. HFLA also separately deals with minor children's right to use house.[62] The FLA describes the arrangement of the right to use the former family home and separately deals with the rules of tenancy relations. The HFLA, as opposed to the general procedural rules of counterclaim, specifies that the court takes family law interests into consideration when making decisions regarding the use of the former family home.[63] If the real estate, which is part of the joint property, is registered in both of the spouses' names, without their consent it cannot

[60] T. Nochta, *Társasági jog* [Company Law] (Budapest – Pécs, Dialóg Campus 2007) p. 240.
[61] E. Csűri, *A társasági részesedések a házassági vagyonjogban* [Company shares in the regulation of matrimonial properties] (Budapest, HVG Orac 2006) p. 425.
[62] Para 2 of Art 31/B, Para 1 of Art 77 of the HFLA, 1952.
[63] *Bírósági Határozatok* [Court Reports] 1997, issue. 9, PK298.

be sold or mortgaged and a third party is not entitled to force it from a spouse on grounds of presumptions that the other spouse, party to transaction, promised to gain his/her spouse's consent. If the real estate, which is part of the joint property, is – for any reason – registered in only one of the spouses' name, the principle of public credibility of register of title deeds certainly has priority over the requirements of the joint administration of joint property. The only exception is the protection of the 'common family home' which breaks the principle of public credibility in order to assert the spouses' and their minor children's right to use the house. In the case of any other single-sided disposition of a joint property which is registered in only one of the spouses' name, the legal consequences in the internal legal relationship between the spouses shall be compensated for according to the rules of compensation.[64]

III. Comparative conclusion: differences and similarities of Hungarian and Croatian system of matrimonial property

Both the Croatian and Hungarian legislators regulate their matrimonial property systems primarily by family acts and only secondarily by other regulations such as the Hungarian Code Civil or Croatian acts on property rights and civil obligations.

In circumstances of new social relations and fast market growth, judicial practice of both countries has taken over the role of legislation in regulating new property relations between spouses. Therefore, legal practice in both countries represents an important indirect source of family law in the context of property relations between spouses.

The Hungarian and Croatian definitions of community of property do not disclose any differences between each other – both definitions refer to the property acquired by spouses through their labour and thus belong to them in equal shares. The Croatian legislation explicitly involves copyrights and winnings from lottery (games of chance) into community of property.

Both legislations include property acquired before marriage, inherited property and free gift into the separate property of spouses. The only difference here is the fact in this context that Hungarian legislation encompasses personal assets of spouses while the Croatian legislation copyrights.

[64] *Új Polgári Törvénykönyv* [The New Civil Code] (Complex Kiadó, Budapest 2009) p. 56.

There is another difference in this area, though. The HFLA specifically regulates the issue of co-ownership over the community of property. Unlike its Hungarian equivalent, the CFLA does not include any specific stipulation regarding this issue but applies the referring rules of the civil law, e.g. Property Act.

While the CFLA contains only one provision on ordinary administration of community of property, the Hungarian legislation deals with this issue in detail. Accordingly, the HFLA includes detailed provisions on management with household items and on covering costs of joint property maintenance.

Dissolution and distribution of community of property can, in both systems, result either from an agreement or from a court order. When it comes to dissolution of community of property, both systems do not apply only the provisions of family law but also the provisions of civil and commercial law.

A major difference between the Croatian and Hungarian legal system with respect to this issue relates to protection of the family home and household. The Hungarian legal system regulates the issue of protection and the right to use the family home in detail whereas its Croatian equivalent is not familiar today with this term at all.

Although the systems in question are featured by the same type of regulation of property relation between spouses in the principle – this is community of property – a more detailed comparative analysis can easily reveal the fact that the Hungarian legislation pays more attention to this concern. The Croatian legislation is now expected to further regulate property relations between spouses whereat the Hungarian practice in this area should be well-appreciated and taken into consideration. According to expectations the new Hungarian Civil Code, which will take effect in 2013, will integrate[65] the regulations of HFLA, creating a wider perspective for regulating the system of matrimonial properties, which will make it easier to pass judgment[66] in cases of matrimonial property debates connected to securities, enterprising and company based fortune.

[65] The Volume on Family Law from the new Civil Code. According to the codification committee, the new Civil Code will consist of 8 parts (volumes). 'Report on the preparation of the Civil Code', http://www.ujptk.hu/dok/hirek/Tajekoztato%20a%20Ptk%20kodifikacio%20elorehaladtarol.pdf.

[66] Csűri, op. cit. n. 2, at p. 26.

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Computerization of land registers in Croatia and in Hungary

I. Introduction

Taking account of the viewpoint of legal theory claiming that simultaneous existence of legal relations and subjective rights is not possible without an object which may also be constituted of legally defined and protected abstract (intangible) assets and intellectual property or spiritual goods, the author indicates the traditional perception of the object of law which was first elaborated by Bierling who differentiated between objects of law of the first and second order.[1] Such an approach implies that the subject of a legal relation is composed of a fixed pattern of conduct with respect to things, goods and action. However, the topic of this paper refers to objects of law of the second order or in Bierling's words,[2] objects of the object of law consisting of things as tangible assets, then abstract (intangible) goods and finally, some action or rights themselves. In terms of social reality, social life and legal transactions, the leading role is played by things such as tangible goods or property, the so-called 'tangible assets' (land, facilities, various industrial and technical products, animals and similar). Such things should be kept written records of. Nowadays these records should be electronic or digitalized, i.e., departments in charge of keeping these records need to be computerized.

The real estate is one of the most specific natural resource; essential condition for everyone whether collectives or individuals. Easy to understand that this important goods is simultaneously a restricted

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[1] V.F. Taranovski, *Enciklopedija prava* [Legal Encyclopaedia] (Beograd, 1923) pp. 152-155, who was more than less Bierling's follower [*Juristische Prinzipienlehre* I. (Mohr 1898)]. Also see B. Perić, *Struktura prava* [Structure of Law] (Zagreb, Informator 1994) pp. 70-73; N. Visković, *Država i pravo* [The State and Law] (Zagreb, Birotehnika CDO 1995) pp. 196-199 and G. Kušej, et al., Uvod v *pravoznanstvo* [Introduction into Legal Science] (Ljubljana, 1992) pp. 172-173., quoted according to D. Vrban, *Država i pravo* [State and Law] (Zagreb, Golden marketing 2003) p. 291.

[2] Vrban, op. cit. n. 1, at p. 291.

resource of which quantity is determined and is not a subject to be produced. Consequently the ownership competence over the real estate has got outstanding importance in the national economies. Documents and other evidenced may testify since the early times of the written history that the proper regulation of this problem posed a mayor and often decisive challenge for the societies. Rich and great fields of science like mathematics, geometrics, geodesy or the contemporary geographic information systems are the offspring of the demand on surveying, allocation, utilization and control of lands.
Collection, storing, archiving and processing of data on real estate is a precondition of the regulation of land question. The modern IT-based system of land-registry is a phenomenon in our times but the need for land-regulation is as old as the first settlements.

II. Electronic land registry in Croatia

1. General on land registers

The issue of ownership over real property has become burning lately. Regardless of the fact whether it comes to property which is still registered as state-owned property, to property which has, pursuant to the Ownership and Other Proprietary Rights Act, to the transition regulations and to other related regulations, become ownership of the previous holders of utilization rights, to property owned by natural persons or to property exempted from ownership relation regimes, all these types of property have a common factor and this is a land register.
The Land Register Act (*Official Gazette* 91/96, 68/98, 137/99, 114/01 and 100/04, hereinafter LRA) in its Article 1 stipulates that if not specified otherwise for particular plots of land, a land register shall be kept for every plot of land for the purpose of defining the legal status of property on the territory of the Republic of Croatia applied when making legal transactions. Land registers are, accordingly, public records[3], i.e. public registers of property situated on the territory of the Republic of Croatia. These registers are applied when making legal transactions. The legal status of property, which is also applicable in case of legal transactions, is stipulated by Article 163 of the Land Register Act. This Article sets out the notion of electronic data processing type land registers too.

[3] Art 7 of the Land Register Act.

Entries in land registers have a constitutive character since they lead to acquisition, deprivation and amendment of land registration rights, i.e. land-related rights. A special law governs situations when an entry in a land register is considered a prerequisite for acquisition or amendment of land registration rights.[4]

The contemporary Croatian legislation has taken over this practice from the Kingdom of Yugoslavia,[5] although the practice itself originates from monarchic regulations,[6] more precisely from the second half of the 19th century when respective laws were gradually introduced to Croatian territories. Land registers are under jurisdiction of municipal courts which include land registration departments managed by land registration judges and land registration department heads.[7] Municipal courts are regular first instance courts dealing with cases emerged on the territory of one or more municipalities, one or more towns or towns wards.[8]

Land registration cases are in the principle resolved by authorized land registration administrators, if not prescribed otherwise.

2. Electronic data processing type land registers (EDP-Land Registers)

An EDP land register refers to electronically processed records on the legal status of property applicable in case of legal transactions and consists of cadastral data on the type, area and coverage of land as well as of land registration court data on the legal status of land stored in land registration databases (LRD) (Article 163 of the Land Register Act).

Even in this case, there is a main book which is kept in the form of two entries. One entry list relates to data on the current legal status of a land registration subject while the second list refers to deleted entries. Amendments to the former list involve new entries and deletion of old ones. Deleted items are moved to the list of deleted entries. The latter list also includes entries of items which are no longer necessary for

[4] Art 4 of the Land Register Act.

[5] The Land Register Act of 1 July 1930 stipulates by its Article 4 paragraph 1 that land registration rights can be acquired, transferred, restrained and revoked only by registration in the main book.

[6] Austrian Land Register Act of 25 July 1871.

[7] Article 5 of the 1930 Land Register Act also empowers courts for land registration affairs.

[8] Law on Courts, Art 13 and 14, *Official Gazette* 15/05.

description of the current legal status of a land registration subject and data on implementation of all the entries in the former list.
Unlike extracts from land registers which are integral parts of EDP-land registers, archives are still kept manually, by embedment and binding of documents. This procedure is used for practical reasons, i.e. the documents based on which land registration has been performed should be stored somewhere anyway and scanning of such documents is not practical since large databases require large disc space. Moreover, such documents need to be scanned in image and not in text formats. This topic is separately elaborated in the second part of this paper.

3. Entries (registration) in land registers

Land registers are public registers containing data on the legal status of property. Hence, they include information on both property itself and on appertaining legal relations. The Ownership and Other Proprietary Rights Act (hereinafter: OOPRA) mentions five types of proprietary rights. One of them is unrestrained and this is the ownership right which allows the owner to manage an item in the broadest sense while the other four rights are restrained and these are easement, (servitus), emphytheusis (emfiteusis), building right (superficies) and incumbrance (lien, mortgage). Property is, according to Article 2 of the OOPRA, constituted of a plot of land and of everything else which is permanently attached to it on the ground and under the ground, if not stipulated otherwise by the law.
Entries into land registers can be either affirmative or negative. Affirmative entries or intabulations refer to input of new data into a land register while negative entries or extabulations are related to deletion of data from a land register (e.g. entry of property encumbrance deletion). It should be pointed out that an extabulation often implies deletion of a plot of land from one extract and its registration into another extract.
The law differentiates between three types of entries into land registers. These are incorporation, priority notice and annotation, including mortgage-free and mortgage-accompanied deletion and subsequent registration of the same property. Entries in land registers are allowed only if changing the registration predecessor or the person having been registered as the holder of the land registration rights.[9] The 1930 Land Register Act in its Article 21 denotes a registration predecessor as the

[9] Art 40 of the Land Register Act.

person who was register as the landowner or the holder of the right based on which registration is conducted.

4. General on EDP-land registers

Advancement of technology results in new possibilities and needs. The contemporary society is quite dynamic and structured. The dynamics of a society leads to the dynamics of the way of living. Demands for swift and accurate information have always had large proportions whereas today they have become a prerequisite for successful business.
In the last few decades, the possibility of generation of databases capable of fast and easy processing of huge amounts of data has emerged. This possibility is a result of the advancement of information technology. The development of the internet has enabled remote utilization of such databases.
Therefore, it is no wonder that the legislator has foreseen keeping of land registers in the electronic form. However, it is software support that causes problems in this context and it will be dealt with in a separate part of this paper.
EDP-related issues were first regulated in Croatia by the 1996 Land Register Act. The legal definition of an EDP-land register is provided in Article 163 of the Land Register Act. This Article defines an EDP-land register as records on the legal status of property applicable on the occasion of legal transactions, which are kept by means of electronic data processing. The emphasis is here put on the legal status applicable when making legal transactions of property. The capitalist system is based on concepts such as ownership and property. Property is a variable multi-conceptual category,[10] integrity of which was first protected by the 1789 Declaration of the Rights of Man and of the Citizen.[11] Every society needs to regulate ownership of assets, particularly with respect to real property *(res immobilles)* since its value is, in the principle, greater than the value of movables. All the way to the Industrial Revolution, the foundations of wealth had referred to land or more precisely to arable land. Mankind in pre-industrial societies secured its existence by cultivation of agricultural land, so the

[10] The concept of property can be observed from several viewpoints, so property appears in the juridical, economic and accounting sense.
[11] Apart from first-generation constitutional rights, the integrity of ownership rights also came into existence as one of the products of the French Revolution.

significance of real property was immense and the notion of wealth was linked to the total surface area of arable land.

EDP-land registers should contain two groups of data, cadastral data on the type, area and coverage of land and land registration court data on the legal status of land stored in land registration databases. The land registration database should be unique for the entire territory of the Republic of Croatia and should comprise both the EDP-land register and cadastral data[12]. However, despite the transformation of data into their electronic form, the land registration database has not been completed yet. Cadastral and land registration data are not identical and they have not been merged in one database. It is needless to say that there are still some land registration data that have not been entered in the electronic database.

The EDP-land register is subject to provisions of the Land Register Act, except in case of provisions particularly regulating keeping and operations with EDP-land registers. The EDP-land register is composed of the entry and deleted entry list. The entry list encompasses currently applicable entries, i.e. the current status of the land register, while the deleted entry list includes deleted entries, entries which are no longer necessary for description of the current legal status of a land registration subject[13] and data on implementation of all the entries in the entry list.

A collection of documents (archives) accompanies the EDP-land register as well, though not in the electronic but in the hard copy form, which is not strange if the purpose of this collection, is taken into consideration. The archives is used for storage of documents that make the legal basis for acquisition and amendment of land registration rights and of relevant facts based on which registration is carried out.

Beside the collection of documents, the collection of land registration decrees is kept manually too and its keeping is regulated by the same provisions as those regulating the keeping of the collection of documents. On the other hand, auxiliary lists are kept electronically like the LRD. The EDP-land register is subject to the principle of public

[12] Article 2 of the Ordinance on the Structure and Functions of the Property Database prescribes that the property database of the Republic of Croatia shall be a national data set unified organizationally and technologically which consists of an EDP-land register and an EDP-real property cadastre.

[13] For example, there are mortgages originating from the period prior to 1945, which were terminated due to regulations of the former Yugoslavia.

access, so every person is entitled to examine it[14]. The examination can be achieved by viewing the contents of a land registration extract on the computer screen.
Electronic storage of data does not guarantee total data security. In order to achieve a higher level of data security, safety data copies are generated on a daily, weekly, monthly and yearly basis.
The legislator foresees the possibility of examination of the LRD by notaries public, attorneys-at-law and other natural and legal persons, though not in public but in their offices and residences[15]. Still, only notaries public are allowed to provide third parties with an insight into the LRD. In fact, the Croatian Government promotes the possibility of every citizen to have an insight into the land register by visiting the webpage of the Ministry of Justice.

5. Transformation of the classical land register into an EDP-land register

A comprehensive task such as transformation of land registers requires creation of a basis for future action. For the start, it is vital to prepare an appropriate project which could anticipate necessary funds and their potential sources.
The Croatian Government prepared a project of transformation of land registers and cadastres (Project) which is being implemented by the Ministry of Justice and State Geodetic Administration (SGA).
The Project was financed by a World Bank loan, the state budget and grants within the EU CARDS programme and is based on the IBRD Loan Agreement no. 4674-HR made between the Republic of Croatia and the International Bank for Reconstruction and Development (IBRD) on 18 September 2002, CARDS 2002 Grant Agreement of 24 June 2003, CARDS 2003 Grant Agreement of 6 July 2004 and CARDS 2004 Grant Agreement of 20 December 2005, the Act on Ratification of the IBRD Loan Agreement no. IBRD-4674-HR of 14 February 2003 and on the Inter-Ministerial Agreement on Implementation of the Project of 28 June 2002. The Project implementation commenced on 15 January 2003 and was expected to be completed until 30 September 2008. For the purpose of successful Project implementation, it came to establishment

[14] Our legislation includes regulations which enable people with a proved legal interest to have an insight into particular registers (e.g., Court ordinance, Court Registry Act etc.).
[15] Arts 171 to 173 of the Land Register Act.

of special bodies. The bodies in charge of Project implementation and Project-related concerns were the Coordination Committee, Bureau for Project Implementation and Support Units.
In order to successfully prepare and subsequently implement a project, one needs appropriate IT knowledge and knowledge of a particular legal area as well as close links with the Ministry of Justice and the Government. It is foreseen that the programme is gradually implemented (phase by phase) while the Project of Transformation of Land Registers and the Cadastre was to be completed within five years and includes four components:

1. Component A: development of a land registration system,
2. Component B: development of a cadastral systems,
3. Component C: cooperation between institution and information technology,
4. Component D: project management, training and monitoring.

5.1. Development of the land register and cadastral system

The need for establishment of an EDP-land register inevitably entails a new technical, organizational and monitoring system. The Ordinance on the Structure and Functions of the LRD foresees establishment of a separate organizational unit of the LRD within the Ministry of Justice, competences of which will involve development, maintenance and enhancement of the technical-technological and IT system of the LRD.
Development of the land registration system implies two current issues. On one hand, some departments are facing backlogs whereas, on the other hand, data from the classical land register should be entered in the electronic database, which increases the need for additional staff. Based on data of the Ministry of Justice, an assessment of the number of necessary land register administrators in charge of transcript, verification and dealing with the backlog at land registration courts was made. The assessment also involved prediction of the completion of the transcript and verification and resolution of the backlog. The respective deadline was 31 December 2006. It was estimated that the timely completion of the transcript requires 293 administrators, performance of the verification 195 licensed administrators and backlog resolution 646 administrators, all referring to the territory of the Republic of Croatia. The issue of an increased volume of work has been dealt with in one of the two mentioned ways. Some courts have approved of overtime work while other courts have opted for employment of temporary workers.

Moreover, some administrators have been reallocated to the Croatian Government.

5.2. Cooperation between institutions and Information Technology

In order to ensure successful implementation of computerization of land registers, cooperation between various state bodies is necessary, particularly cooperation between bodies in charge of the real property cadastre and those in charge of land registers. Until completion of the digitalization of the land register and its public opening, data in the land register and data in the real property cadastre should be harmonized. Since cadastral data do not correspond to the factual status, land surveying should be conducted, the obtained data should be processed and entered in databases and the information stated in the land register should be harmonized with that stated in the real property cadastre.
As to successfully perform this task, one needs to cater for appropriate technical and IT equipment. This part of the Project requires funds amounting to 12.6 million USD which have been provided by the International Bank for Reconstruction and Development and the Republic of Croatia.

5.3. Particular facts on input of data into the IT system and on verification

Data contained in the land register should be somehow entered in the electronic database. Computers communicate with their environment in more than one way. This communication can be both one-way and two-way. A PC monitor represents a one-way data output communication medium or in other words, by means of a monitor, a computer emits information into its environment, but it cannot receive information from the environment[16] while a keyboard is a one-way data input medium which cannot serve as an emitter of data from the computer into the environment. Nevertheless, there are two-way communication media such as modems and remote media which efficiently transmit data from one PC to another.
In terms of land registers, at the moment there is no solution that is as favourable, cheap and fast as manual input of data. Scanning of land register pages would not be practical since some data are not copied, since scanners of a non-standard size and scanning options would be

[16] An exception to the rule refers to the so-called screen-touch monitors which receive commands by touch.

needed and since data would have to be scanned in an image format. However, there is software that can scan a medium in an editable text format,[17] but it does not completely resolve the issue of scanned data formatting and their input in the database. Due to big differences in handwritings, it is almost impossible to find software which would be capable of detecting all the letters, so this solution is inefficient and thus out of question.

Accordingly, data are manually copied or entered into the computer, on the occasion of which the copying should be carried out carefully since it can easily come to an error and the consequences thereof may be fatal. Incorrect entries should be avoided, so entered data are additionally checked by a different person. Incorrect data can be corrected until the verification of a land register extract is completed. After that, correction can be done only following a special decree.

Verification is a procedure aimed at finding out if a particular land register extract is entered into the electronic database, after which the manually kept extract is sealed by drawing a straight red line below the last entry and by affixing a seal which denotes that the data stated in that extract are kept in the EDP-land register. After the verification, all the amendments of the respective extract are kept in the electronic database. The verification procedure can be conducted by judges of land registration courts and licensed administrators.

6. Software (support)

6.1. General

The importance of land registers for proper functioning of the legal system and the system of government is enormous. Realization of a unique base for keeping such relevant data presupposes development of powerful and safe system software. Such software may only be developed by joint efforts of various legal experts. Particularly, such a team should incorporate experts in the field of land registration law, experts in the field of land cadastre and IT experts. Jurists would be engaged in determination of all the data relevant for the programme, i.e. which data are, beside those prescribed by the law and byelaws,

[17] These are the so-called OCR programmes. For example, Canon's OmniPage, ABBYY FineReader, etc. Application of an OCR programme entails the issue of recognizing characters of the Croatian alphabet *(č,ć, dž, đ, š* and *ž)*. The above programmes can recognize them.

necessary for the programme and which data are good to have in the programme.
In 1994, the Ministry of Justice concluded an Agreement on Preparation of a Preliminary Solution for EDP-Land Registers and of a Land Register Database in the Republic of Croatia with *IGEA-Informacijski sustavi d.o.o.* (Ltd) of Varaždin. *IGEA d.o.o.* (Ltd) is a private company founded in 1990. The basic activity of the company is design and implementation of complex information. The preliminary solution has exceeded its original scope and gained importance while the software which is used today at land registration departments was made in an IGEA workshop. The programme has been updated several times up to now.

6.2. Education of staff

Availability of powerful and high quality software means nothing if there are no people who are competent for managing software-based operations. This is why the Ministry of Justice has organized various workshops and seminars intended for land registration court judges and administrators. The seminars first deal with general IT training which is provided by *Algebra d.o.o.* (Ltd.) of Zagreb[18].
The city of Varaždin hosted a three-day seminar intended for land registration departments in June 2005. The seminar was organized by *IGEA d.o.o.* (Ltd.) of Varaždin and offered information concerning EDP-land registers and the related system[19]. In 2005 and 2006, the *KING ICT d.o.o.* (Ltd.) held several educational meetings[20].
In order to make distinction between land register department staff with respect to a different level of IT knowledge, the staff was rendered questionnaires which were to be filled out and returned to the sender. Based on questionnaire answers, the employees were classified into groups. This stratification was aimed at providing people with a higher level of IT knowledge with a possibility of making progress, i.e. acquisition of knowledge which is beyond the beginners' skills.

[18] Letter of the Ministry of Justice, IT Affair Sector, IT Training Department, class: 650-01/05-01/406, file no. 514-12-02-05-01 of 24 November 2005.
[19] Ibid., class: 650-01/05-01/186, file no. 514-12-02-05-08 of 25 May 2005.
[20] Ministry of Justice, Civil Law Administration, Land Registration Law Sector, class: 932-01/05-01/825, file no. 514-03-05-01 of 2 November 2005.

7. Transformation of land registers – law in action

7.1. Procedure of transformation of land registers

The rearrangement of municipal land registers will be explained by the example of the Municipal Court of Virovitica. The rearrangement started with the Decree of the Ministry of Justice, Civil Law Administration, class: 932-01/03-01/165, file no. 514-03-01-02/3-05-2 of 7 March 2005 signed by the then minister of justice, Mrs Vesna Škare-Ožbolt (enclosure 7).

The decree chose the Municipal Court of Virovitica as the court having territorial and in rem jurisdiction to manage the procedure of transformation of the classical land register into an EDP-land register. The transformation was to be performed in a way that hard copy records stated in the classical land register were copied and systematically and gradually transferred. The expression *'systematically'* denotes the liability to transfer the data completely and accurately as they were recorded in the classical land register, taking account of discrepancies stipulated by the Land Register Act and Land Register Ordinance, while the word '*gradually*' means that the data will not be entered at once but throughout a certain period of time. The Municipal Court of Virovitica was also empowered to carry out the closing of the manually kept land register in compliance with provisions of Article 161 of the Land Register Ordinance.

The manner of input of data and the appertaining issues have already been discussed about. In short, data are entered in an electronic database by means of a keyboard, i.e. copying them from land register extracts. The expected average daily rate of copying amounts to 30 land register extracts, which is sometimes accomplished and sometimes not. The copying rate depends on several factors such as busyness of administrators or complexity of land register extracts. When entering data in an electronic database, only current data shall be inputted as prescribed by Article 203 of the Land Register Act. The deadline for the transfer and verification of EDP-land register extracts was 31 December 2006.[21]

[21] Notice of the Ministry of Justice, Civil Law Administration class: 932-01/05-01/855, file no: 514-03-01-01/1-05-1 of 8 November 2005 (example 8)

7.2. Verification procedure

After data from the manually kept land register are transferred in the electronic from, one should verify their regularity. Although the Land Register Ordinance lays down the term of verification, this term is not set out precisely. Article 161 of the Land Register Ordinance mentions both verification and acknowledgment of data transformation and its meaning suggests that these two are synonyms.
Verification of data transformation can be performed only by a licensed land register administrator or judge. The verification procedure needs to be conducted by two licensed land register administrators and includes two parts. Upon completion of input of data into a particular EDP-land register insert, one administrator draws up an extract from that insert and compares the data entered in the EDP-land register extract with the data stated in the manually kept land register. If the data match, the respective land register extract should contain the following remark:

> *'This is to certify the accuracy of data transfer in electronic data processing.*
> *In _____, on_____, land register officer_____, signature'*

The extract is then stored in the collection of copied land register extracts which is kept according to respective regulations by every cadastral municipality. If an error comes up on the occasion of data transcript accuracy check, the correction is made ex officio following a decree.
Upon completion of the above action, the other administration draws a red line below the last entry in every land register extract and affixes a seal containing a note that this extract is to be kept in the electronic form further on as well as the date and signature of the administrator. All the subsequent entries should also be inputted electronically.

8. Concluding judgements

The paper comprises a short overview of the development of Croatian land registers as well as the concept and contents of land registers, land register entries and the land registration procedure. It also discusses the issues related to the EDP-land register. The general goal of the paper is to facilitate an insight into current property dealings and their records.
The procedure of land register transformation has achieved certain results, but some issues have remained unsolved. Converted land register data can be accessed on the webpage of the Ministry of Justice.

These data are still incomplete since some plots of land have turned out to be omitted in land registers. Besides, data in respective databases are not entirely accurate because they were copied without checking the factual status thereof. Pursuant to the aforementioned, the author thinks that an appropriate procedure should be conducted prior to public opening of the reshaped land register. A proper procedure should accompany the restoration of land registers in particular cadastral municipalities.

Parallel with the transformation procedure, procedures of connecting land registers and volumes of lodged agreements are being carried out at some courts while at other courts these procedures are still to be initiated. One of the issues here is the concept of social property artificially formulated in the former legal system. In fact, registered social property does not necessarily have to exist as such in reality whereas building land needn't to belong to the building owner in all cases, so the connection or linking should not be performed automatically.

The issue of the concept of the EDP-land register has appeared as a special concern. Land register data are available to all interested parties on the webpage of the Ministry of Justice. However, these data can be examined only if a party knows parcel (plot) numbers and the name of a respective cadastral municipality. As far as judicature and business are concerned, it would not hurt that the entire territory of the Republic of Croatia was covered by a unique directory or an alphabetic list of holders of land registration rights. The idea originates from the need and possibility that such a directory is supplemented with data on a particular legal entity, which would enable reproduction of all the data referring to property owned by that legal subject on the territory of the Republic of Croatia. This could facilitate implementation of inheritance proceedings and an insight into the economic power of business partners and thus prevent the possibility of manipulations with mortgaged property. Also, this might enable smooth foreclosure of the debtor's property, which has not been the case so far despite the asset disclosure form.

II. Electronic land registry in Hungary

1. Historical background

1.1. Inceptions of the modern Hungarian land-registry

The greatest part of the Hungarian history passed away without organized land-registry. The land and agrarian question was simultaneously a matter of political power and beyond the technical difficulty political interests and historical misfortunes also prevented or hindered the formation of transparent land regulation. The need for a calculable taxation based on the real property was brought forth by the development of the modern administrative system in the 18th century. However the fiscal immunity prerogative of nobility successfully prevented this ambition until the middle of 19th century.
The most important initiative of the modern land registry system of Hungary has been done by the reorganized Austrian imperial public administration after the revolution and war of independence in 1848-49. The imperial warrant of 4th March 1850 ordered that an avails based land tax cadastre[22] should be introduced in Hungary. The files registered data on size and quality of lands and determined the amount of tax imposed. Nevertheless this cadastre didn't take into consideration any other circumstances and laws related to the land but the economic value and avails. It was the Act VII of 1870 on land taxation which stabilized the framework of this land registry system. At the same time the real estate and mortgage registry was set up for recording the property rights affecting the lands and other immovable goods.[23] District courts and the adjunct land registry offices had been worked as land authorities before development of self-contained land-registry offices.

1.2. Land reform and land registry after 1945

Soon after the World War II the most extensive land-reform of Hungarian history, a large scale land resolution has been fulfilled concerning just all of the communities all over the country. The Provisional National Government opened a new age by the promulgation of the decree 600/1945 ME on abolition of landlordism and on the distribution of land to agricultural laborers. The decree has

[22] Magyary Zoltán, *Magyar közigazgatás* [Hungarian public administration] (Budapest, Királyi Magyar Egyetemi Nyomda 1942) p. 182.
[23] Ibid.

also been affirmed by the act VI of 1945 of Provisional National Assembly.

The National Land Resolution Board, the county land resolution boards and the municipal land claiming boards were most important authorities of land administration in this time. Due to the hasty fulfilment of land resolution and the fact that the municipal boards hadn't had got geodetic expertise the technical survey and documentation of the distributed lands were not done properly. These operations were accomplished afterwards by the National Office of Land Registry and by the county offices of land registry.[24] The development of these new offices simultaneously with the dismissal of the people's municipal boards was settled by the act V of 1947 on the accomplishment of land reform.

A further significant transformation of land administration began in 1967. The law decree 8 on 1987 on the reorganization of ministries dissolved the '*Ministry of Agriculture*', the '*Ministry of Food*', the '*Chief Administration of Forestry*' and the '*National Office of Land Surveying and Cartography*'. A new board the '*Ministry of Agriculture and Food*' took over the tasks of these institutions. The '*Institute of Cartography*' was also established in this time.

The transformation also went on during the 1970's with several important measurements. The Government issued the Resolution 1042/1971 on the fusion of national cadastral system and the real estate and mortgage registry maintained by district courts. The new uniform land administration was settled by the law decree 31 of 1972 and the implementing ministry decree 27/1972 MÉM. In spite of the modern organization principles the content of the registry was not reliable as the two separated databases was not adapted for integration. Cartographic data was to be verified by survey on the spot while the verification of legal circumstances required the personal hearing of holders and other concerned persons. The basic structure and content of the present land registry system has been formed and stabilized during this 9 yearlong job. The system comprises of *property sheet*, *land book*, collection of *cadastral map* and *archive* of relevant legal documents like contract and other legal declarations. This legal regime survived until 1st January 2000 the day when the latest regulation that is the act CXLI of 1997 entered into force. This new act expressly focused on the automated processing of land registry data.

[24] Varga József, 'Föld- és területrendezés' http://www.agt.bme.hu/staff_h/varga/foldrend/foldrend.htm.

2. Content and IT services of land registry

2.1. Institutions

Institution network of land administration comprises of 19+1 land offices in the counties and in the capital as well as 121 municipal land offices. These authorities are charged to manage the land registry, to maintain the collection of cadastral maps, to provide legal and technical information to the clients and to fulfill others tasks related to qualification, re-allocation and protection of lands.[25] The one-time '*Institute of Cartography*' now called '*Institute of Geodesy, Cartography and Remote Sensing'* (Hungarian acronym: *FÖMI*[26]) provides indispensable IT services.

2.2. Milestones of IT development in land administration

Modernization and the shift to IT supported workflow of land administration have begun in the early 1990's. Before end of 1997 the content of property sheets has been recorded in digital files. Installation of the so-called *'Municipal Decentralized Cadastral System'* and the *'Registry System'* (Combined Hungarian acronym: *KDIR*) simultaneously went through in the municipal land offices.
The '*National Computerization of Map-based Cadastral System*' (Hungarian acronym: *TAKAROS*[27]) as the first comprehensive IT development strategy of land administration was drawn up in 1994-95. KDIR has been shifted by the TAKAROS soon after.
Next step of national development project was done in 1997 by the integration of the isolated local systems. The network called *TakarNet* made possible the electronic communication between the clients and the decentralized records of municipal and central land offices. From this moment each one of the municipal land offices might have had access to the records stored at any other node of the network. Level of services has been shifted by this development. Since 10th June 2002 via the TakarNet network every municipal land office can provide a *copy of property sheet* referring any real property in Hungary beyond its own venue.

[25] http://www.foldhivatal.hu/index.php?option=com_content&task=view&id=3&Itemid=4.
[26] Proper Hungarian name: Fölmérési és Távérzékelési Intézet. See http://fomi.hu/portal_en/index.php/home.
[27] Térképi Alapú Kataszteri Rendszer Országos Számítógépesítése.

Proprietary operation of TakarNet has been soon followed by the opening towards the external users. Electronic land registry services are accessible for the clients since 14th April 2003.

2.3. Services provided via TakarNet

The TakarNet system interconnects the computer networks of offices in land administration and provides a remote access to the land registry databases for registered external clients who should pay a fee for the digital services. This restricted access network provides limited and controlled services for the external clients. User can log in the TakarNet via strictly controlled gateways and can reach the subscribed services.
The communication is supported on the regular http protocol of Internet and the user-friendly access is provided via the regular web-browser applications. Standard web-pages facilitate the clients in the process of database retrieval and provide other information on the fee of services or the accessibility of customer supporting department.
Commercial banks, local government offices, other branches of public administration, law firms, public notary offices have been the most active users of the TakarNet since the first times as the system became accessible. Ones can log in the system via the http://www.takarnet.hu site.
Basic services accessible in TakarNet:
E-certified copy of property sheet. An e-certified property sheet is an electronic document containing the certificate of service provider, attested by the advanced digital signature of the land office and by digital timestamp. *The e-certified document is conclusive but shall not be recognized as an authentic instrument.* The printed copy of any e-certified document has no conclusive force. The retrieval can be carried out by several aspects as: topographical ID number, postal address of the real estate, ID data of proprietor or other authorized person.
Non-certified copy of property sheet. The document provided as a result of this retrieval is a non-printable image (.jpg) One can initiate the retrieval by the same aspects as in the case of e-certified documents.
Copy of cadastral map. Client can access the cadastral map of the required real estate and neighborhood via the network in .pdf format.
E-certified copy of leasehold sheet. Carrying out retrieval according to the same aspects as the case of property sheet one can access to the e-certified leasehold sheet in .pdf. format.

Information on the invoice. Registered user shall have an account in the TakarNet. By the help of this service one can control the balance of this account, the previous transactions and charges.
Monitoring of alteration. If demanded user shall be informed in email about any changes and alteration took place in the legal status of real properties registered for this monitoring service.

3. Project TakarNet24

3.1. The concept

The development of IT services in land administration also went on after the launch of the TakarNet. Though the IT facilities are accessible for the clients since 2003 the availability of these services was restricted. Access was guaranteed only in official times that is:

- from 8:30 to 16:00 on Monday to Thursdays and
- from 8:30 to 13:30 on Fridays.

The long range development program called *'Digital Land Office'* was worked out in accordance with the e-government visions and concepts.[28]
The first step of the 'Digital Land Office' was the launch of advanced *TakatNet24* project that is the 'Non-top information system of land registry via the client's gateway'.
The TakarNet24 provides a permanent (7/24) access to land registry database. Clients can reach the database via the so-called client's gateway a digital identification protocol of e-government portal of Hungarian public administration.

3.2. Registration and payment

The new system has been opened – after several postponements – in June 2011. Specific and exclusive land office registration (TakarNet registration) is not required any longer. Every client of the generic e-government services having an access code to the so-called '*client's gateway*' shall have a permanent access also to the TakarNet database.
Client may reach again within a month free of charge the results of his/her own previous retrievals. Beyond this personal archive client may perform 20 retrievals per month also free of charge. These retrievals may exceed the first part of property sheet as postal address, function, cadastral ID number, area of the real property. Anyone who already was

[28] Szabó Máté Csaba, *Elektronikus kormányzati szolgáltatások a földügy területén* (manuscript Budapesti Corvinus Egyetem) p. 21.

registered in Client's gateway may also reach the online services of land offices without further specific registration.

3.3. Services

User may log in via the central client's gateway and can reach the well known services of TakarNet that is retrieval of e-certified and non-certified copy of property sheet, copy of cadastral map, access to the statistical data of the land administration and to the data of previous personal transactions.[29]
A significant and user-friendly innovation of the system is the search facilitated by the interactive map. User unknown the cadastral ID number of the real property may initiate a retrieval simply browsing the map of required land. The necessary ID and other data will be assigned to the chosen land.

[29] Doroszlai Tamás, 'A TakarNet24 projekt megvalósításának összegzése' 2 *Geodézia és kartográfia* (2011) p. 14.

Civil procedure and corporate law

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Public policy in national and European private international procedural law

I. Introduction

The discipline of private international law enables extraterritorial application of law and thus symbolizes the willingness of states to engage in international cooperation. However, states tend to embrace this kind of openness to foreign legal systems only under the condition that there are certain corrective mechanisms aimed at protection of their respective legal systems.[1] The institute of public policy,[2] which is common to all legal orders, is traditionally the most prominent institute when it comes to protection of national legal orders.[3] It provides the competent national body with the possibility to refrain from application of conflict-of-law rules or an applicable foreign law while taking account of the compatibility of the applicable foreign law (*lex causae)* with the public policy of the law of the competent forum (*lex fori)*.[4] This way, the public policy clause corrects conflict-of-laws equity, which is,

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[1] J. Kramberger Škerl, 'European Public Policy (with an Emphasis on Exequatur Proceedings)', 7/3 *Journal of Private International Law* (2011) p. 461.

[2] It appears with the following terms: *ordre public, ordine pubblico, public policy, exception d'ordre public, öffentliche Ordnung, orden público*. K. Siehr, 'General Problems of PIL in Modern Codifications', VII. *Yearbook of private international law* (2005) p. 53. For comparative overview of public policy clauses see C. Esplugues, 'General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe', in C. Esplugues, et al., eds., *Application of Foreign Law* (Münich, Sellier 2011) pp. 73-74.

[3] T. Varadi, et.al., *Međunarodno privatno pravo* [Private International Law] (Beograd, Službeni glasnik 2007) p. 151.

[4] K. F. Kreuzer, 'Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechtes', in B. Jud, ed., *Kollisionrecht in der Europäischen Union* (Wien, Jan Sramek 2008) p. 45.

according to its definition, blind to the material outcome (or in other words, it is blind toward legal result from the viewpoint of substantive law)[5] in cases when the fundamental principles of a society or a public interest are in jeopardy.[6]

II. Comparative analysis of the public policy clause

1. Croatian legal order

The Croatian legal order has integrated the public policy clause in several regulations, having it differently formulated but retaining its original sense. For the purpose of differentiating between substantive and procedural public policy, in the followings conflict with substantive public policy, then conflict with procedural public policy is dealt with.

1.1. Substantive public policy

Having regard to the Croatian Private International Law Act (hereinafter: PIL Act),[7] public policy is included in the conflict of laws system as well as in the system of recognition and enforcement of foreign judgements. This PIL Act has played the role of the fundamental regulation in dealing with situations with international elements for 30 years. The Croatian legal system, like most civil law systems, stands on the principle of the cogency of conflict of laws rules, implying that courts are obliged to mandatory application of a foreign law – *ex offo*. The exception to this rule is the possibility of not applying the foreign law which conflict of laws rules refer to, if 'the effect of the former would be contrary to the foundations of the system of government stipulated by the Constitution of the Republic of Croatia' (Article 4). The text of the above Act was included in the Croatian legal system in 1991. Inappropriate reference, from the viewpoint of the respective doctrine, to provisions of the Constitution was acceptable to some extent at the time when the constitution of the former Yugoslavia seemed to be comprehensive in terms of the number and scope of its provisions. However, once the new Croatian constitution had been adopted, the

[5] F. Vischer, 'General Course on Private International Law at the Hague Academy of International Law', 232 *Recueil des Cours* (1992) p. 100.
[6] T. de Boer, 'Unwelcome foreign law: Public policy and other means to protect the fundamental values and public interests of the European Community', in A. Malatesta, et al., eds., *The External Dimension of EC Private International Law in Family and Succession Matters* (Milano, Cedam 2007) p. 298.
[7] Private International Law Act, Sl. SFRJ 43/82, 72/82, NN RH 53/91.

nomotechnical formulation of the Croatian public policy clause appeared to be too narrow.[8] At that previous time, the legislators did not want to constrict the contents of the public policy. On the contrary, they tried to outline the public policy substance using the descriptive method.[9] What arose therefrom was the interpretation that beside the fundamental values of the (now Croatian) legal system protected by the Croatian Constitution, the scope of Art. 4 would also include the fundamental legal principles of conventional law such as the European Convention on Human Rights (hereinafter: ECHR).[10] This way, the narrowly formulated Art 4 acquired satisfying proportions regarding the scope and content of the protected subject. What is curious is that when trying to define the content of public policy in 1982, the legislator failed to involve *terminus tehnicus* 'public policy' in the text of the appertaining provision! One should state that *pro futuro* the autochthonous Croatian act on private international law will retain this mechanism of protection of the national public policy, but the formulation of the referring provision is surely going to be more contemporary.[11]

The public policy clause is particularly evident in Article 184 paragraph 1 of the regulation which is *lex specialis* concerning air navigation

[8] See M. Živković, 'Opšte ustanove međunarodnog privatnog prava i Zakon o rješavanju sukoba zakona sa propisima drugih zemalja – pogled dvadeset godina kasnije i de lege ferenda' [General institutes of private international law and Private International Law Act – viewed twenty years later and *de lege ferenda*], in M. Živković, ed., *Dvadeset godina Zakona o međunarodnom privatnom pravu* [Twenty years of Private International Law Act] (Niš, Pravni fakultet Niš 2004) p. 26.

[9] M. Dika, et al., *Komentar Zakona o međunarodnom privatnom i procesnom pravu* [Comentary on Private International Law Act] (Beograd, Nomos 1991) p. 15.

[10] European Convention on Protection of Human Rights and Fundamental Freedoms, NN – MU br. 6/99. K. Sajko, *Međunarodno privatno pravo* [Private International Law] (Zagreb, Narodne novne 2007) p. 26.

[11] Thesis for Private International Law Act of 2001: 'Foreign law is not applied if it's effect would be contrary to the public policy of Croatia. Foreign court and arbitral rulings would not be recognized if in the course of its issuing the fundamental procedural rules, that form part of Croatian public policy, were not respected.' Sajko, et al., 'Teze za Zakon o međunarodnom privatnom pravu' [Thesys for Private International law Act], in K. Sajko, et al., eds., *Izvori hrvatskog i europskog međunarodnog privatnog prava* [Sources of Croatian and European private international law] (Zagreb, Informator 2001) p. 265.

relations with an international element.[12] Here one can clearly notice a certain lack of consistency of Croatian regulations since the respective ordinance regulating maritime navigation is not familiar with this provision.[13]

The Croatian legal system has embraced the public policy clause via international treaties as well. Bilateral treaties do not contain it, but the Hague Conference on private international law does include the formulation 'manifestly contrary to the public policy of the forum' in its Conventions, and many of them being ratified are part of positive Croatian legal order.

Despite the fact that they give importance to the public policy clause, all these provisions still remain incomplete since the term of public policy is not defined by these regulations. This can be seen as a blanket legal clause, content of which is complemented by the judges in the courts.[14] Numerous dimensions of public policy happen to be the topic of vivid academic discussions: proximity, relativity, discretion, functions, content/scope of protection and restrictions on its application.[15]

The first dimension foresees potential termination of foreign law application if it comes to a situation which is somehow linked with a domestic legal system and application of a foreign law might have permanent effects on the country (*Inlandbeziehung*). Application of the public policy clause could depend on the extent to which it affects a national legal system or to which a national legal system is interested in the case.[16] The intensity of the link and necessary joint features of a case and the forum has to be assessed on every concrete occasion.[17] If the intensity is low, then it comes to mitigated or softened application of

[12] Zakon o obveznim i stvarnopravnim odnosima u zračnoj plovidbi [Act on obligatory and proprietary relations in air navigation] *NN* 132/98, 63/08. (hereinafter: ZOSOZP).

[13] Pomorski zakonik [Maritime Act] *NN* 181/04, 76/07; 146/08. It is notable that both acts recognize the institute of *fraus legis*, as they both contain a separate provision on its prohibition. Compare Art 987 of the Maritime Act with Art 184 of ZOSOZP.

[14] Sajko, et al., eds., loc. cit. n. 11, at p. 265.

[15] S. Mills, 'The Dimensions of Public Policy in Private International Law', *Journal of Private International Law* (2008) pp. 201-236.

[16] Sajko, et al., eds., loc. cit. n. 11, at p. 261; Varadi, op. cit. n. 3, at p. 157.

[17] K. Siehr, 'Kollisionen des Kollisionsrechts', in *Festschrift für Hans Jürgen Sonnenberger* (Munich, C.H. Beck 2004) p. 223; de Boer, loc. cit. n. 6, at p. 299; Mills, op. cit. n. 15, at p. 210.

public policy. Furthermore, due attention is paid to the effects of the application of foreign law abroad, although these effects could not have come into existence in the forum country by applying the respective foreign law. Reduced intensity often appears in cases when a legal relation emerges abroad and, in a concrete case before a forum judge, the issue appears in the course of preliminary question.[18]

The second dimension refers to the function of public policy. Undoubtedly, public policy has two functions, the negative and the positive one. The institute of public policy is frequently linked with the negative function of public policy, while the positive function thereof refers to norms of immediate application (*lois d'application immediate*).[19] Croatian regulations use public policy for correction of an inacceptable foreign law which is overruled in its application. The legislator did not define all the provisions precisely, so concrete implications of the application of the public policy clause are not completely clear: Which law shall be applied instead of an inacceptable foreign norm? Court does not have the *denaio justice* option and must deal with the case. Even though comparative doctrine could detect clear arguments that some other rule *lex causae* is to be applied instead of an inacceptable foreign law, our doctrine denotes application of the adjustment method as contrary to provisions of Article 9 of the PIL Act stipulating that a foreign law shall be applied in the sense and concepts contained therein. Therefore, instead of an incompatible foreign norm, one shall apply the corresponding norms of domestic law.[20]

The third dimension refers to the content of public policy. In this context, public policy is said to be relative – which should be interpreted as the syntagma that the content of public policy is subject to changes in time and space, i.e. it differentiates between states.[21] Therefore,

[18] Dika, op. cit. n. 9, at p. 19.; Sajko, loc. cit. n. 11, at pp. 262-263.

[19] Dika, op. cit. n. 9, at p. 17.; Sajko, loc. cit. n. 11, at p. 263 and ff; Vischer, op. cit. n. 5, at p. 102.; J. Meeusen, 'Public policy in European PIL', in A. Malatesta, et al., eds., *The External Dimension of EC Private International Law in Family and Succession Matters* (Milano, Cedam 2007) at. p. 332.; de Boer, loc. cit. n. 5, at p. 296.

[20] Dika, op. cit. n. 9, at pp. 18-19; Sajko, loc. cit. n. 11, at p. 264; Varadi, op. cit. n. 3, at p. 161; Mills, loc. cit. n. 15, at p. 208.

[21] J. Bloom, 'Public Policy in Private International Law and Its Evolution in Time', 50 *Netherlands International Law Review* (2003) pp. 373-399.

assessment of conflict is made at the moment of issuing a decision on the merits which disqualifies a foreign law.[22]

1.2. Procedural public policy

The institute of public policy affects the sphere of procedural law where it prevents foreign judicial decisions and arbitral awards, contrary to the foundations of domestic procedural law, from having effect in the respective country. The content of procedural public policy can be derived from provisions of the Croatian Constitution, e.g. the right to appeal (Art 18), equality before courts (Art 26). Everyone has the right, within a reasonable timeframe, to a just decision on their rights and liabilities by an independent and impartial court established in compliance with the law (Art 29); everyone is guaranteed security and confidentiality of personal information (Art 37).[23]

This sphere of protection of the Croatian legal order is also dispersed into several legal regulations. The basic regulation, the PIL Act, comprises a provision on protection of the domestic public policy which has found its place in the segment of recognition and enforcement of foreign decisions. In such case, court *ex officio* monitors possible violation of substantive and procedural public policy (Art 90 of the PIL Act).[24] Beside this general provision, the PIL Act additionally regulates concrete procedural irregularities which would be inacceptable from the viewpoint of the domestic public policy (Art 88 of the PIL Act).[25] If these two provisions are compared, the difference arises from the fact that court *ex officio* caters for violation prescribed by Art 91, while

[22] Dika, op. cit. n 9, at p. 19; Sajko, loc. cit. n. 11, at p. 269.

[23] Ustav Republike Hrvatske [Constitution of Republic of Croatia] *NN* 85/10 – clarified text.

[24] Dika, op. cit. n. 9, at pp. 300-305; Sajko, loc. cit. n. 11, at p. 270.

[25] Art 88. 1. The Croatian court will refuse to recognize and enforce a foreign judgment in on a complaint the person against whom the decision is made it determines that the person could not participate in the proceedings because of irregularities in the proceedings. 2. In particular, it will be deemed that the person against whom the foreign court judgment is issues was not able to participate in the proceedings because the claim, decision or conclusion by which the procedure was initiated đ was not personally delivered or which had not even attempted delivery, unless that person engaged into discussion about the merits of legal matter at first degree trial.

considering Art 88 paragraph 1, court inspects a situation if a party files an appertaining appeal in this regard.[26]

Violation of procedural public policy with respect to the field of international legal aid is also regulated by the Civil Procedure Act.[27] As far as arbitration is concerned, the Arbitration Act (hereinafter: AA) foresees that court, in the appeal procedure, shall *ex officio* cancel the arbitral award if it is contrary to the public policy of the Republic of Croatia.[28] Then, court, in the procedure of recognition and enforcement of the arbitral award, shall *ex officio* examine if the recognition or enforcement is in compliance with the public policy of the Republic of Croatia.[29] These provisions of the AA have the same purpose as Art. 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration as well as Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[30] There is a relatively clear consensus on the content of the public policy which needs to be protected.[31]

What is worth mentioning is that bilateral treaties are familiar with the procedural public policy clause. For instance, Art 57 item c of the 1968 Treaty on Mutual Legal Transactions made between Hungary and Croatia stipulates that recognition or enforcement is denied if an award is contrary to the public policy of a respective country.[32]

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[26] Sajko, loc. cit. n. 11, at p. 271.

[27] It determines that the court would decline legal aid to a foreign court if the subject of a request is an act/procedure that violates Croatian public policy; it also determines that the act that is a subject of a foreign court's request can be performed in a way required by the foreign court, if that procedure would not be incompatible with Croatian public policy. Zakon o parničnom postupku [Civil Procedure Act] *NN* 53/91, 91/92, 112/99, 88/01, 117/03, 02/07, 84/08, 123/08, 57/11. Art 181 s. 2, Art 182 s. 2.

[28] Zakon o arbitraži [Arbitration Act] *NN* 88/01, Art 36. s. 2 b.

[29] Art 40.

[30] New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. Sl SFRJ, MU no. 11/1981, *NN MU* 4/1994.

[31] Cf. P. Lalive, 'L'ordre public transnational et l'arbitre international', in G. Venturini and S. Bariatti, eds., *Liber Fausto Pocar* (Milano, Giuffre Editore 2009) p. 608; and H. Sikirić, 'Javni poredak kao razlog za poništaj arbitražnog pravorijeka' [Public policy as a reason for arbitral award annulment], 59/2-3 *Zbornik PFZ* (2009) p. 229.

[32] Contract between SFRJ and People's Republic Hungary on reciprocal legal transactions, Sl. SFRJ 3/1968; *NN MU* 13/97.

1.3. Public policy in the Croatian judicial practice

It has already been stated that this blank norm is filled by the judges. The doctrine clearly propagates that the public policy clause shall be interpreted in a restrictive fashion and applied carefully.[33] This represents an obvious conflict with public policy, an exceptional remedy when it comes to extremely severe violation thereof.[34] In spite of only few articles on the relating judicial practice, the existing decisions may indicate particular regularities and tendencies when applying the public policy clause.[35] With respect to an appeal for cancellation of an arbitral award pursuant to Article 36(2) of the AA, the difference between national and international public policy becomes easily noticeable.[36] The reasoning (revised) of the Supreme Court in the same case and in the same context is straightforward too and it explicitly states that the concept of public policy cannot be identified with mandatory rules.[37] Explanation of the High Commercial Court follows this direction as well:

> '[...] public policy does not represent the totality of mandatory legal provisions, but it comprises only those regulations which are aimed at safeguarding fundamental legal values (social, moral and

[33] Dika, op. cit. n. 9, p. 19.

[34] I. Grbin, *Priznanje i izvršenje odluka stranih sudova* [Recognition and enfocement of foreing judgements] (Zagreb, Informator 1980) pp. 116-117; Varadi, op. cit. n. 3, p. 156.

[35] High Commercial Court (hereinafter: HCC); Supreme Court of Croatia (hereinafter: SCC), all of the decisions are available through IUS-INFO database <www.ius-info.hr> date 09.1.2012.

[36] „...and that public policy is not violated because there is no violation of fundamental principles embodied in international public policy.... all of the violations that plaintiff is claiming regard to the violation of mandatory rules as a internal public policy are not reasons that the courts is entitled to review in the procedure of arbitral award annulment." HCC, XXV Pž-1574/04-6 of 12. December 2006.

[37] „.... for a appraisal of this prerequisite (namely on contrarity to public policy) it is relevant only if the award violates the fundamental principles of internal public policy, and not if the legal provisions of mandatory nature are properly implied – which is a question in domain of proper application of material law – and for which reason the arbitral award cannot be annulled; SCC no. Revt 74/07-2 of 7 October 2009. The same is stated in the decision CSS – Gž 2/08 of 20 March 2008.

> economic) of the public policy of a country (in this case, it is Croatia) or at challenge of its legal order'.[38]

In the practice of Croatian high courts we can track some common practice: all pose a requirement that reference to violation of public policy is supported with reference to the violated principle.[39] Moreover, courts demand an explanation of the relevance of the violated principle for the public policy of the Republic of Croatia and of the significance of the violation for the same policy.[40]

2. Hungarian legal order

Legal literature discloses a wide range known view that public policy contains both substantive and procedural aspects, which mutually influencing each other. This phenomenon could be well described in the Hungarian law with the development of public policy's notion of Hungarian private international procedural and substantive law. Before the entry into force of Law-Decree No. 13 of 1979 on International Private Law positive law basis of public policy's notion could be firstly noticed in procedural rules allowing the refusal of recognition and enforcement of foreign decisions which are being contrary to public policy.[41]

2.1. Procedural public policy

The notion of public policy in Hungarian legal system appeared relatively late and with firmly narrowed meaning-content. Act I of 1911

[38] HCC LI Pž-2264/06-3 of 4 April 2007.

[39] '[...] the court had determined that this does not violates some principle of Croatian public policy; [...] and a plaintiff repeatedly (both in the claim and a review) identifies mandatory rules with the notion of public policy, yet not stating concretely which principle of Croatian public policy would be violated'. No. Gž 19/10-2 of 19 August 2010.

[40] 'Description of a decision [...] contains merely declarations without adequate explanation [...] decision does not contain an interpretation of the public policy notion in the context of factual situation of a case. Rationale of a decision in that part is reduced only on a statement that arbitral council, while applying Art 342 Civil Procedure Act, made a manifest breach of basics principle of CPA, but without clearly pointing to a concrete principle of PA that would be violated, what is the importance of that principle for Croatian public policy and what is the significance of such breach for Croatian public policy.' HCC LI Pž-2264/06-3 of 4 April 2007.

[41] L. Kecskés and Z. Nemessányi, 'Magyar közrend – nemzetközi közrend – közösségi közrend' [Hungarian public policy – international public policy – community public policy], 7 *Európai Jog* (3/2007) p. 26.

on civil procedure (1911 Pp) did not actually contain the notion of public policy, but it's meaning derived from Article 414 point 5 'the decision of a foreign court shall not be recognized as a valid, if the recognition of the decision is contrary to a domestic judgment-at-law, public moral or the purpose of an inland act'.[42]

More than fifty years later, as a result of modification of the Act III of 1953 on Civil Procedure (hereinafter: Pp) in 1967,[43] the expression 'public policy' firstly appeared in Hungarian procedural law – although only as a part of the detailed reasoning of the modification.[44] In the case of international related disputes Pp opened the door to nullification only, if the judgment was contrary to the Constitution or a Hungarian mandatory rule. In the case of disputes relating to domestic corporations – it was enough for nullification if the decision is contrary to a mandatory provision of a norm (*ius cogens*). In this sense, public policy was equal with the Constitution, imperative norms and, in a certain extent, a whole bulk of *ius cogens*. This three-parts regulation was put down in 1972[45] when the fundamental rules of arbitral procedure – already together with notion of public policy – was built into the Pp as a single chapter. From that time, till the Hungarian Act LXXI of 1994 on Arbitration entries into force of 13 December in 1994, one could annul with reference to Pp Article 362(1) point c) just those arbitral awards which were 'contrary to the Constitution or an overriding mandatory rule of Hungarian law (public policy)'. By this definition it can be stated that the Hungarian notion of public policy were getting narrowed to imperative rules in the judicature of courts.[46]

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[42] I. Balla, *Tételes magyar nemzetközi magánjog* [Itemized Hungarian international private law] (Budapest, 1928) p. 25; L. Burián, 'Gondolatok a közrend szerepéről' [Thoughts on the function of public policy], in D. Kiss and I. Varga, eds., *Magister Artis Boni et Aequi. Studia in Honorem Németh János* (Budapest, ELTE Eötvös Kiadó 2003) p. 108; Kecskés and Nemessányi, loc. cit. n. 41, at p. 27.

[43] Law-Decree No. 40 of 1967. See A. Badó and J. Bóka, *Európa kapujában. Reform, igazság, szolgáltatás* [In the gate of Europe. Reform, justice, service] (Miskolc, Bíbor Kiadó 2002) p. 91.

[44] Miklós Világhy constructed the substantive law content of public policy clause by this procedural rule. See M. Világhy, *Bevezetés a nemzetközi magánjogba* [Introduction into the international private law] (Budapest, Tankönyvkiadó Vállalat 1971) pp. 59-62; Burián, loc. cit. n. 42, at p. 109.

[45] See Law-Decree No. 26 of 1972 on the modification of Civil Procedure Act. See also Badó and Bóka, op. cit. n. 43, at p. 91.

[46] Ibid., at p. 91; Kecskés and Nemessányi, loc. cit. n. 41, at p. 27.

Since 1 July 1979, the entry into force of Law-Decree No. 13 of 1979 on International Private Law, the possibility has been opened for recognition and enforcement of any foreign decision without the requirement of an existing international bi or multilateral convention between Hungary and the state of that foreign court which has rendered the decision. Among other reasons the § 72 (2) of Law-Decree declares that '(a)n official foreign decision shall not be recognized, if: a) doing so would violate public order in Hungary'.

The rules of recognition and enforcement covered by the Law-Decree have become subsidiary toward European Union (hereinafter: EU) law after the accession of Hungary to the EU. From there on, because of the supremacy of EU law, the Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) has had primary applicability in relations existing between Member States concerning recognition and enforcement. Article 34 of Brussels I imply the public policy clause: '(a) judgment shall not be recognized: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought'. The main difference between the Hungarian and Brussels I regulation is the requirement of 'manifestly contrary'.

This criterion narrows the discretionary movement of a Member State court when rendering a decision on refusing recognition of a foreign judgment, because the Member State court is bound to concretize the notion of 'manifestly contrary'. ECJ judgments could serve as a good strong point for a Member State court in the concretization of this requirement. We argue that via this method ECJ can harmonize the legal thinking and judicial practice concerning public policy at least to the extent which can provide a common theoretical background for refusing the recognition of a foreign judgment rendered by a Member State court on the ground that it is 'manifestly contrary to the public policy in the Member State in which recognition is sought'.[47]

The Hungarian Act LXXI of 1994 on Arbitration – similar to New York Convention (1958) and UNCITRAL Model Law (1985) – does not define the public policy. Relating to Article 55 (2) of the Act '(a)n action for overturning the arbitration award may also be filed alleging

[47] S. Franc, 'Art. 34', in U. Magnus, and P. Mankowski, eds., *Brussels I Regulation. European Commentaries on Private International Law* (München, Sellier – European Law Publishers 2007) pp. 568-579.

that: b) the award is in conflict with the rules of Hungarian public policy'.

Thus Hungarian courts got free hand to characterize the new notion of Hungarian public policy. However, only recently some changes occurred that indicate a departure from the practice used before Hungarian Arbitration Act.[48] State courts took the necessary dogmatic backgrounds from the Hungarian legal literature, which is – near uniformly – in favour of the tight interpretation of public policy.[49] In addition, other factors occurred that state courts seemed to be reluctant from rendering a judgment on directly any general principle in default of a norm including a concrete and special regulation. One must state that the confliction of public policy always presuppose a regulation infringing public interest. It covers anyway guarantee-like rules defined by the Constitution and the infringement of constitutional fundamental rights and obligations. Beside this, other legal regulations could be part of this subject matter if they directly defend the foundations of economic and social order. The fact in itself, that a foreign decision or an arbitral award is contrary to a domestic legal regulation or applies it improperly, does not give a sufficient ground for annulling the decision. As a summary, we can state that the infringement of a legal regulation is a necessary but not sufficient requirement to refer upon public policy.[50]

Nevertheless, regarding the latest Hungarian legislation, we emphasize that our latest statement seems to be refuted. Namely the Act XVI of 2003 on Agricultural Market Organization was amended by Article 8/B with effect on 1st of January in 2012: '(b)y the § 55 (2) b) of Act LXXI of 1994 on Arbitration an arbitral award shall be regarded as a contrary of public policy if it obliges the producer, who is unable to serve the self-produced agricultural product in whole or in part because of force

[48] L. Kecskés, '"Jó lovassal a nyeregben a zabolátlan ló is megfegyelmezhető." A közrend fogalmáról két bírósági határozat alapján' ['With a good man in the saddle, the unruly horse can be kept in control.' On the concept of public policy, on the basis of two court orders'], in I.L. Gál and Sz. Hornyák, eds., *Tanulmányok Dr. Földvári József professzor 80. születésnapja tiszteletére* [Papers in honor of Professor József Földvári's 80th Birthday] (Pécs, PTE ÁJK 2006) p. 137.

[49] The most cited decision of the Supreme Court (BH1997/489) in this subject matter is the one of those few ones which contains citations on law literatures. See F. Mádl and L. Vékás, *Nemzetköz magánjog és nemzetközi gazdasági kapcsolatok joga* [International private law and economic relations] (Budapest, Közgazdasági és Jogi Könyvkiadó 1992) pp. 131-132; Badó and Bóka, op. cit. n. 43, at p. 91.

[50] Kecskés and Nemessányi, loc. cit. n. 41, at pp. 27-28.

majeure (*vis maior*), to replace, purchase the missing agricultural product or instead of it to provide other service or guarantee for the purpose of performance'.
The regulation clearly defines situations where an arbitral award shall be regarded as a contrary to public policy. Therefore the reference of cited legal regulation made by party who is seeking for annulment can be a sufficient ground to declare judgment as a contrary to public policy.

2.2. Substantive public policy

Public policy rules from a substantive law perspective, in the field of private international law, will come into play when the forum of trial although has reached the applicable law, but before making any further procedural movements, it is bound to discover whether application of foreign law is contrary to own public policy. The Law-Decree on Hungarian International Private Law is ruling this situation as follows: Article 7 (1) The application of foreign law shall be disregarded if it conflicts with the Hungarian public order. (2) The application of foreign law cannot be disregarded merely because the social and economic system of the foreign state is different from that of the Hungarian. (3) The Hungarian law shall apply in place of the disregarded foreign law.
Two comments seems to be important concerning this provision. Firstly, paragraph (1) defends the Hungarian public policy in the widest possible range, but paragraph (2) provides an interpretational crutch for the forum when declares that only the existing unequivocal differences between public policies of the forum and the state of applicable law are in themselves not a sufficient ground for disregarding the foreign law. This interpretation well reflects to our previous statements, namely a foreign decision or a foreign applicable law ought to be regarded as a contrary to public policy if it infringes guarantee-like rules defined by the Constitution or other legal regulations if they directly defend the foundations of economic and social order. Secondly, paragraph (3) is the appearance of a classic private international law phenomenon, the so called '*nach Hause treiben*' ('endeavouring to home'). This phenomenon covers those situations when interference has emerged between the application of foreign law and *lex fori* and the legislator chooses the simplest way to solve the problem by choosing *lex fori* instead of interfered foreign law. In this respect substantive public policy rule goes further than the procedural one because it not merely declares that the application of foreign law shall be disregarded if it

conflicts with the Hungarian public policy (similar to the refusal on recognition and enforcement) but also gives solution by pointing out the applicable law, namely the *lex fori*.[51]

Since the entry into force of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)[52] and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)[53] Hungarian substantive public policy rules have become subsidiary towards Regulations on those fields which are covered by their scope. So called Rome Regulations have modified the function and structure of substantive public policy. Article 7 of the Law-Decree has become subsidiary towards the so called 'general clause of public order' of Regulations. Rome I contain it in Article 21, Rome II contains it in Article 26 but the two texts are the same in wording: '[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum'.

This wording indicated the intention of EU legislator to create a common theoretical and legal background for procedural and substantive public policy within the EU. The wording i.e., 'manifestly incompatible' is not only a reminiscence of the wording of Brussels I Regulation Article 34 i.e., 'manifestly contrary', but a real legislative intention to create consistency between the three legal manner. Therefore we emphasize that forums of Member States must take into account the ECJ interpretation on public policy (procedural public policy) in private international law cases in order to ensure the recognition and enforcement of a judgment rendered upon a case in which the foreign applicable law of a Member State was disregarded by the forum on the ground that it was manifestly incompatible with the public policy of the forum.[54]

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[51] L. Burián, et.al., *Európai és nemzetközi kollíziós magánjog* [European and Hungarian conflicts-of-laws] (Budapest, Krim Bt. 2010) pp. 128.131.

[52] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations. Effective from: 17 December 2009 except for Article 26; this shall be applied from 17 June 2009.

[53] Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations. Effective from: 11 January 2009, except for Article 29; this shall be applied from 11 July 2008.

[54] J. Harris, 'Mandatory Rules and Public Policy under Rome I Regulation' in F. Ferrari, and S. Leible, eds., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Münich, Sellier-European Law Publishers 2009) pp. 269-

2.3. Public policy in Hungarian judicial practice

It is well outlined from previous analyses that unlawfulness in Hungarian law is the *condition sine qua none* of the notion of infringement of public policy. It has become a dogma that the infringement of public policy could be declared just within the notion of unlawfulness and just those cases which are concerning with momentous unlawfulness. Therefore we consider the Hungarian Supreme Court judgment under No. Gfv.VI.30.450/2002 as a particularly important one as the Court spectacularly breached the mentioned dogma. This judgment of the Supreme Court caused a considerable confusion in the Hungarian legal reasoning regarding public policy. The Supreme Court judgment significantly upended Hungarian legal thinking regarding public policy.[55] It stated namely not less than that (part of) an arbitral award may be contrary to public policy and so null and void, which is otherwise lawful, i.e. not contrary to the law.[56] In the lawsuit initiated against the defendant seeking the annulment of an arbitral award, pursuant to a request for revision submitted by the plaintiff against final judgment No. 22.G.75.451/2001/20 of the Metropolitan Court, dated December 11,

342; F. Pocar, 'Some Remarks on the Relationship between the Rome I and Brussels I Regulations' in Ferrari, and Leible, eds., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Münich, Sellier-European Law Publishers 2009) pp. 343-348. See also K. Raffai, 'A szerződéses kötelmekre alkalmazandó jog meghatározásáról szóló Római Egyezemény és Róma I. rendelet közrendi szabályai' [Public policy rules of Rome Convention and Rome I Regulation on the law applicable to contractual obligations], in G. Palásti and I. Vörös, szerk., *Európai kollíziós kötelmi jog: A szerződésekre és a szerződésen kívüli kötelmi viszonyokra alkalmazandó európai jog* [European conflict of laws rules relating with law of obligations: Applicable law on contractual and out-of-contractual relations] (Budapest, Krim Bt. 2009) pp. 92-118.

[55] However, this is not the first judgment rendered by the Supreme Court in the matter of the setting aside of an arbitral award which has been criticized by the legal literature. László Burián made critical comments on the decision No. Gf. VI. 30848/1997/8 of the Supreme Court, published under number BH 1997.489. See Burián, loc. cit. n. 42, at p. 122.

[56] According to an old famous saying public policy '[…] a very unruly horse, and when you once get astride it you never know where it will carry you'. *Richardson v Mellish* (1884) 2 Bing. 228. 1824-1834 All Er Rep. 258. Almost 150 years later Lord Denning said however so that '[w]ith a good man in the saddle, the unruly horse can be kept in control'. *Enderby Town Football Club Ltd. v The Football Association Ltd.* [1971] See Kecskés, loc. cit. n. 48, at p. 130.

2001, the Supreme Court, as court of revision, based upon a hearing held on September 30, 2002, delivered its judgment under file No. Gfv.VI.30.450/2002/6 on October 7, 2002. Under this judgment, the Supreme Court partly modified final judgment No. 22.G.75.451/2001/20 of the Metropolitan Court, annulled arbitral award No. VB. 99164, dated April 2, 2001, of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry and ordered the plaintiff to pay the defendant the amount of HUF 290,000,000 (two hundred and ninety million Forints) as litigation costs, deeming such to be contrary to public policy. The Supreme Court, as court of revision, in its judgment presented the following train of thought and reasoning. As material grounds for the violation of public policy, amongst other things, the plaintiff referred to the fact that the total amount of the attorney fees awarded by the Arbitration Court to the benefit of the defendant was so excessive that it not only imposed a disproportionate obligation on the losing party, but it was also contrary to the value judgment of society and, therefore, violated public policy. According to the final first instance judgment of the Metropolitan Court, the court is not entitled to revise the litigation costs specified by the arbitral tribunal, as such specification constituted a substantive aspect of the arbitral award. The amount of the litigation costs is not contrary to any law, and cannot be considered as injurious to the fundamental economic and social order. Therefore, the Metropolitan Court considered that it could not be established that the arbitral award was contrary to public policy.

The plaintiff based its request for revision on the inconsistent consideration of evidence. In considering such request, the Supreme Court, as court of revision, started from the fact that jurisprudence strives to define the social interest to be protected by public policy on the basis of various considerations. Constitutional provisions do not cover all those social purposes which are to be protected in such manner. Fundamental human rights and moral requirements also qualify as such social purposes.[57] The essence of public policy is that the law intends to protect and enforce, by all means, the institutions and principles falling within the concept of public policy.[58] Public policy – similarly to the general value judgment of the law – is a category of

[57] See Jogi Enciklopédia [Legal Encyclopedia] (Budapest, KJK-Kerszöv Jogi- és Üzleti Kiadó Kft 1999) p. 371.

[58] Mádl and Vékás, op. cit. n. 49, at p. 119.

varying content, both in respect of time and space, and is always subject to specific social-economic system and political and moral thinking.[59]
Starting from the above referenced theoretical basis, according to the position of the court of revision, the actual occurrence of infringement is not a requisite element in respect of the establishment of the fact that the arbitral award is contrary to public policy. The general value judgment of society is one of the elements of public policy. Therefore, if an arbitral award is contrary to the value judgment of society, it may be established that such award is contrary to public policy, as society is to be protected from the enforcement of such award.
The Supreme Court pointed out that the award of HUF 290 million for litigation costs by the arbitral tribunal to the plaintiff was the highest award for litigation costs recorded in Hungary in lawsuits between Hungarian parties, according both to the appellate court and the plaintiff's statement, which statement was uncontested by the defendant. This amount was specified by the arbitral tribunal as consideration, 'attorney fees', for the legal services provided during the approximately 16 month long lawsuit, which had a value of HUF 32 billion.
Decree of the Hungarian minister of Justice No. 12/1991./IX.29./IM., effective at the time of the rendering of the arbitral award, stipulated the value of the case as the initial basis for the determination of the amount of the attorney fees. In addition to the value of the case serving as the basis for the determination, established court practice also considers time and labour requirements, as well as the quality of the actually performed legal services.[60] However, as the Supreme Court pointed out, in the case of a substantial amount being in dispute, the legal fees determined as a percentage of such amounts may be so excessive, that it is disproportionate to the legal services that may be performed.
According to the position of the Supreme Court, as court of appeal, the specific decision, supported by judicial practice and referenced above, also emphasizes that despite the fact that the law does not stipulate an amount as an upper limit for attorney fees, even in the case of lawsuits where the amount claimed is extraordinarily high, the court should avoid the determination of legal fees which are unacceptably excessive, in the view of accepted public opinion. In cases with an extraordinarily high value, even keeping within the limit of 5% of the amount claimed, the

[59] Ibid., p. 122.
[60] See Decision published as BH1996/321 regarding the determination of attorney fees in cases of an extraordinarily high value.

court may not specify attorney fees in an amount large enough to prevent the parties from exercising their right to go (i) before a court, seek a remedy or put the losing party in a financially awkward position and (ii) contravene the value judgment of society.

The revision court established in its judgment that the court of first instance failed to consider the above described aspects. Therefore, it came to the inconsistent conclusion that the award of the arbitral tribunal regarding the stipulation of attorney fees in the amount of HUF 290 million was not contrary to Hungarian public policy.

According to the position of the revision court, even with a view to the HUF 32 billion value of the case at hand, the HUF 290 million attorney fees was disproportionately excessive consideration, as compared to the highest quality work that may have been performed by the legal representative of the successful defendant during the 16 preceding months. Upholding the attorney fees award will have an undesirable negative effect on the established Hungarian judicial practice constituting a part of the legal system. Consequently, it is also contrary to Hungarian public policy.

With regard to the aforementioned, the Supreme Court, as court of revision, pursuant to Section 275/A(2) of the Pp. reversed the unlawful part of the final first instance judgment, and annulled the provision of the arbitral tribunal award deemed contrary to Hungarian public policy and ordered the plaintiff to pay to the defendant litigation costs in the amount of HUF 290 million. Pursuant to Section 56(2) of the Vbt., in the event of the establishment of a ground for annulment, the judgment of the ordinary court is to be restricted solely to the annulment of the arbitral award. Therefore, the ordinary court may not make any statements regarding the actual amount of the litigation costs. Pursuant to Section 275/A(1) of the Pp., the court of appeal upheld all the other aspects of the final judgment which complied with the applicable law.

The plaintiff requested the annulment of the entire arbitral award in the given case valued at HUF 32 billion. However, the Supreme Court, as court of revision, considered the plaintiff's claims to be well-founded only in respect of the annulment of the provision establishing the litigation costs in the amount of HUF 290 million. This meant that the extent to which the case pending before the Metropolitan Court, as court of first instance, was judged to be favourable to the plaintiff was so insignificant that it did not justify the reduction of the amount of the litigation costs determined by the court of first instance – having regard

also to the fact that the plaintiff was required to pay a procedural duty based upon the value of the case established on the basis of the principal subject matter of the proceeding, and as regards such principal subject matter the plaintiff did not win the lawsuit.[61]

In theoretical point of view we do not agree with the reasoning of the judgment rendered by the Supreme Court as a revisionary Court, namely the infringement of a legal regulation is not a mandatory required part of the declaration that an arbitral award is contrary public policy. This standpoint is namely based upon such a legal point of view in which the notion of public policy (intern public policy) is not located within the frames of a certain legal system. However, in our conception, the notion of public policy existing within the theoretical frames of a certain legal system, therefore the infringement of legal system – i.e., the infringement of a certain legal regulation of the legal system – is an inevitable condition for the infringement of intern public policy. Public policy is namely the core of such values which characterize a legal system.

III. Public policy in judgments of European Court of Justice

Public policy in EU law does not function as a significant motive for national restrictive measures opposing, otherwise superior, EU law rules, but occasionally it can result in refusing the recognition and enforcement of (civil court) decisions rendered in other Member States. Public policy in the EU law and in national legal systems also, is an institution that involves both substantive law and procedural law elements. Nevertheless, in EU law the institution of public policy has multiple functions. As a rule it prefers prevailing mostly the values of national domestic laws of the Member States, however sporadically, it does the same with EU law. Public policy can be conceived as an ever-moving slider connected to the institutional axle of primacy of EU law. The various legal techniques and rules based on public policy perform an 'elevator-like' vertical operation, lifting and sinking between the level of EU law and the level of national domestic laws of the member states. During this vertical operation, sometimes elements of member

[61] The arbitral panel of three arbitrators complied with the provisions of the judgment of the Supreme Court. However, in a letter, the contents of which corresponded to the conceptual elements described in the next section, it notified the Supreme Court as to its principal points of contention with respect to the arbitral award.

state domestic laws are lifted up to the level of EU law, sometimes the application of EU law by national courts and tribunals, especially the important EU law principles of this application, such as direct effect, direct applicability and primacy of EU law are emphasized and strengthened.

1. Eco Swiss judgment

Questions of public policy appeared in the judicature of the European Court of Justice in the 1999 ECO Swiss case.[62] In Eco Swiss, the High Court of Netherlands, the *Hoge Raad der Nederlanden* made a reference to the ECJ under Article 234 of the post-Amsterdam EC Treaty, asking whether a domestic court is obliged to grant a claim for annulment of an arbitral award if the award infringes Article 81 of the post-Amsterdam EC Treaty. The ECJ ruled that the award must be annulled if the domestic court's procedural rules require it to annul on the grounds of breach of national rules of public policy. The ECJ's ruling confirmed that Article 81 is a rule of public policy under EC law. An arbitral award that infringes Article 81 should suffer the same consequences as an award that infringes any other rule of public policy of the domestic court, such as a refusal to recognize and enforce the award.
In the Eco Swiss judgment the ECJ helped primary EU law to prevail by stating that:

> 'Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85 of the EEC Treaty (Article 81 of post-Amsterdam EC Treaty). That provision constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of the internal market. Also, EU law requires that questions concerning the interpretation of the prohibition laid down in Article 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.'[63]

[62] Case C-126/97 *Eco Swiss China Time Ltd. v Benetton International NV* [1999] *ECR* 3055.
[63] Ibid., para 37.

The provisions of Article 85 of the EEC Treaty (Article 81 of post-Amsterdam EC Treaty) may be regarded as a matter of public policy within the meaning of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.[64]

A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.[65]

Eco Swiss gave rise to a *de facto* duty on arbitrators to consider competition law issues in order to avoid the award infringing public policy and being refused recognition and enforcement. This is reinforced by the general duty of arbitrators to issue valid and enforceable awards. However, strictly speaking, the ECJ's ruling in Eco Swiss referred only to Article 81 and only equated an infringement of that article with a breach of public policy. This means that it is unclear whether infringement of another competition law aspect of the EC Treaty or of relevant secondary legislation would constitute a breach of public policy. Whether an arbitrator has a prima facie duty to apply competition law issues, even where they have not been raised by the parties and are not included in the substantive law of the contract, is the subject of academic debate. The general consensus is that there is a prima facie duty to do so, at least for an arbitrator who is sitting in an EU member state. However, even critics of the theory that arbitrators have such an unequivocal duty agree that arbitrators have a duty in practice (a de facto duty) to apply competition law issues. This is the inevitable conclusion to be drawn from the European Court of Justice's ruling in Eco Swiss China Time Ltd v Benetton International NV., at least in respect of arbitrations having a seat within the EU.

The ECJ in Eco Swiss expressly preserved member states' procedural autonomy over the review of awards on grounds of public policy. As a result, the courts of a member state are only required to review an award's compatibility with competition law if its national procedural rules provide for review of an award on grounds of public policy. The extent of that review is also to be determined by the state's procedural laws. The only caveat imposed by the ECJ is that those laws do not

[64] Ibid., para 39.
[65] Ibid., para 41.

render excessively difficult or virtually impossible the exercise of rights conferred by EC law.

2. Krombach judgment

Krombach judgment of the European Court of Justice rendered in 2000[66] seems to have a central and significantly important role in the chain of ideals of its judicature in connection with public policy. ECJ declared its theoretical interest towards public policy issue in this judgment. In its later decisions the ECJ used to refer to the Krombach case regularly. The starting point of the arguments of the ECJ in these later cases used to be parallel with the bottom-line of views expressed in Krombach. In this judgment the ECJ emphasized that its task is to review the limits of the notion of public policy in the domestic laws of the EU Member States. While the Contracting States in principle remain free to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention (Article 27(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels Convention of 1968). Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State. The public policy of the member state in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.[67]

3. Maxicar judgment

In the Maxicar judgment[68] the European Court of Justice in 2000 analyzed the concept of public policy in economic matters. ECJ underscored that while the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1 of the Convention, to determine according to their own conception what public policy

[66] Case C-7/98 *Dieter Krombach v André Bamberski* [2000] *ECR* 1935.
[67] Ibid., paras 22, 23, 32.
[68] Case C-38/98 *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] *ECR* 2973.

requires, the limits of that concept are a matter of interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State. Recourse to the clause on public policy in Article 27, point 1 of the Brussels Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognized as being fundamental within that legal order.[69]
Maxicar and Mr Formento wished the Court to define the concept of public policy in economic matters. In particular, they wished it to confirm that EU law, and in particular the principle of free movement of goods and freedom of competition, supports the approach taken by Italian law, which, unlike French law, does not recognize the existence of industrial property rights in spare parts for cars, and to declare that that approach is a principle of public policy in economic matters. The French and Netherlands Governments, and the Commission, after noting that the preliminary issue is whether and to what extent the Court of Justice has jurisdiction to rule on the concept of public policy in the State in which recognition is sought used in Article 27, point 1 of the Convention, argue in favour of a narrow interpretation of the concept, which should only be applied in exceptional instances. An alleged error in interpreting the rules of EU law is not sufficient, they maintain, to justify recourse to the clause on public policy.[70]
The court of the state in which enforcement is sought cannot, without undermining the aim of the Brussels Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or EU law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the

[69] Ibid., paras 27, 28, 30.
[70] Ibid., paras 24, 25.

preliminary ruling procedure provided for in Article 177 of the EEC Treaty (Article 234 of post-Amsterdam EC Treaty), affords a sufficient guarantee to individuals.[71]

European Court of Justice in the Maxicar judgment decided that Article 27, point 1 of the Brussels Convention must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognizing the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.[72]

In this case, what has led the court of the State in which enforcement was sought to question the compatibility of the foreign judgment with public policy in its own State is the possibility that the court of the State of origin erred in applying certain rules of EU law. The court of the State in which enforcement was sought is in doubt as to the compatibility with the principles of free movement of goods and freedom of competition of recognition by the court of the State of origin of the existence of an intellectual property right in body parts for cars enabling the holder to prohibit traders in another Contracting State from manufacturing, selling, transporting, importing or exporting such body parts in that Contracting State.[73]

The fact that the alleged error concerns rules of EU law does not alter the conditions for being able to rely on the clause on public policy. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law. Since an error of law such as that alleged in the main proceedings does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought, the reply to the third question must be that Article 27, point 1 of the Convention must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognizing the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing

[71] Ibid., para 33.
[72] Ibid., paras 27, 28.
[73] Ibid., para 31.

or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.[74]

4. Gambazzi judgment

In Gambazzi judgment[75] in 2009 the European Court of Justice tested certain procedural instruments of common law (such as freezing order, disclosure order, unless order, default judgment) with regard to the requirements of the public policy concept. It is also significantly interesting in connection with this case that problems of public policy occurred on the basis of the parallel application of Brussels Convention and Lugano Convention. It happened so because the defendant of the original case (Mr Gambazzi) was a Swiss citizen and resident and the judgment of the High Court of Justice (England and Wales) rendered against him was requested to be recognized and enforced almost in the meantime at a Swiss and a Italian court.

At the request of Daimler Chrysler Canada Inc. ('Daimler Chrysler') and CIBC Mellon Trust Company ('CIBC') in July 1996 the High Court of Justice (England and Wales) Chancery Divison issued a freezing order against Mr Gambazzi (Swiss citizen). By that freezing order he was prohibited from dealing with his assets in order to safeguard the enforcement of a future judgment. In February 1997, at the request of Daimler Chrysler and CIBC, the English court issued an amended version of the freezing order, with additional instructions under which Mr Gambazzi was required to disclose information regarding his assets and to submit certain documents also relating to the main proceedings (disclosure orders). Mr Gambazzi did not comply with the obligations under the disclosure orders, or at least not in full. Thereupon, at the request of Daimler Chrysler and CIBC, the English court issued a further order (unless order). In this order Mr Gambazzi was notified that unless he complied with the terms of the orders and disclosed the requested information by a certain date his defence submissions in the main proceedings would not be taken into consideration and he would be prohibited from taking further part in the proceedings. Mr Gambazzi brought various appeals against the freezing order, the disclosure order and the unless order without any success. Even after a repeated unless order he failed to comply with his obligations in full within the

[74] Ibid., paras 32, 34.

[75] Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc.,CIBC Mellon Trust Company* [2009] *ECR* 2563.

prescribed period of time. The English court considered it as a contempt of court and excluded him from the proceedings (debarment), as notified in the unless orders. In the original main process Mr Gambazzi was then treated as a defendant in default. By a default judgment of 10 December 1998, the High Court of Justice ordered him to pay Daimler Chrysler and CIBC damages of CAD 170 million and CAD 71,6 million and a further USD 130 million.[76]

Daimler Chrysler and CIBC, plaintiffs of the original process, wished to have that judgment enforced in Italy. By order of December 2004, the Corte d'Appello di Milano (Court of Appeal, Milan) declared enforceable the English judgment and the order by which Mr Gambazzi was ordered to pay damages. Mr Gambazzi appealed against this order. He claimed that the High Court judgment cannot be recognized in Italy, on the ground that this is contrary to public policy within the meaning of Article 27, point 1 of the Brussels Convention, because it was made in breach of the rights of the defence and of the adversarial principle. By order of 27 June 2007, the *Corte d'Appello di Milano*, which was hearing the appeal, decided to stay the proceedings and referred questions to the European Court of Justice asking for a preliminary ruling. In this application the Italian court asked essentially, whether the court of the state in which recognition and enforcement is sought may reject the recognition and the enforcement of the High Court of Justice on the ground of breach of public policy as the defendant was prevented from exercising his rights of defence.

In that context, the parties to the main proceedings refer to a judgment of 9 November 2004 of the *Tribunal fédéral* (Federal Supreme Court) (Switzerland). By that judgment, that court dismissed an appeal brought by CIBC and DaimlerChrysler against a decision of the *Tribunale d'appello del cantone Ticino* (Court of Appeal of the Canton of Ticino, Switzerland) which refused to recognize and enforce in Switzerland the High Court judgment against Mr Gambazzi on the basis of Article 27, point 1 of the Lugano Convention. The *Tribunal fédéral* held that Mr Gambazzi's exclusion from the High Court proceedings was not contrary to Swiss public policy, but considered that other circumstances, to which the national court did not refer in the present proceedings, nevertheless justified the application of the public policy clause.[77]

[76] Ibid., see paras 1-19.
[77] Ibid., see para 35.

In accordance with the declaration by the representatives of the governments of the states signatories to the Lugano Convention which are members of the European Communities, it is appropriate that the ECJ pay due account to the principles contained in that *Tribunal fédéral* judgment and, in application of Article 1 of Protocol 2 on the uniform interpretation of the Convention, the national court is to pay due account to those principles. In that regard, it must be pointed out that the Swiss *Tribunal fédéral* referred, to give substance to the public policy clause, to the right to a fair trial and the right to be heard, principles to which the ECJ itself referred earlier in its Krombach judgment. With regard to the specific assessment of the conflict with Swiss public policy carried out in the present case by the *Tribunal fédéral* in its abovementioned judgment, it should be noted that that assessment cannot formally bind the Italian national court. That is especially true in this case because the latter court must carry out its assessment with regard to Italian public policy. In order to fulfil its task of interpretation, it is for the ECJ to explain the principles which it has defined by indicating the general criteria with regard to which the national court must carry out its assessment. To that end, it must be stated that the question of the compatibility of the exclusion measure adopted by the court of the state of origin with public policy in the State in which enforcement is sought must be assessed having regard to the proceedings as a whole in the light of all the circumstances.[78]

By the interpretation of Article 27, point 1 of the Brussels Convention, the ECJ answered the referred questions in Gambazzi judgment as follows:

> '[…] that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.'[79]

[78] Ibid., paras 36, 37, 38, 39, 40.

[79] See also L. Kecskés and K. Kovács, 'Test of certain common law procedural law instruments int he practice of European Court of Justice', in T. Drinóczi and T.

IV. Contemporary challenges in application of the institution of public policy: Hungarian reality and Croatian near future perspectives

In the last decade, the greatest controversies in the field of private international law have been connected with public policy – more precisely with 'the European public policy'.[80] Several issues have brought to the controversies, but they are all trying to find an answer to the following question: what is actually the content of the European public policy, what makes it different from national public policies, what values are we talking about here? The concept of 'European public policy' includes values originating from the ECHR and EU law, '[It involves] the gradual merging of the values of the "two Europes," the seat of human rights and the union of economic interests'.[81]

The public policy clause is part of legal heritage and has been integrated in conflict-of-laws rules and in procedural law.[82] This aspect reflects the core of the issue of the relation between the fundamental principles of private international law and EU law.[83] In fact, the development of human rights protection on a global and regional level has generated significant changes in a broader legal domain. The integration of the EU Charter of Fundamental Rights with the binding part of the Treaty of Lisbon[84] sets special challenge to all EU policies in terms of a serious approach to systematic and efficient protection of human rights. Simultaneously, economic integration based on the so-called Four

Takács, eds., *Cross-border and EU legal issues: Hungary-Croatia* (Pécs – Eszék, PTE ÁJK, J.J. Strossmayer University, Faculty of Law 2011) pp. 291-297.

[80] L. Fumagali, 'EC Private International Law and the Public Policy Exception – Modern Features of a Traditional Concept', VI *Yearbook of Private international law* (2004) p. 171; M. Fallon, 'L'exception d'ordre public face a l'exception de reconnaissance mutuelle', in G. Venturini, et al., eds., *Liber Fausto Pocar* (Milano, Giuffre Editore 2009) pp. 331-341.

[81] H.M. Watt, 'Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions', *36 Texas International Law Journal* (2001) p. 539.

[82] For all of the sources see S. Bariatti, *Cases and Materials on EU Private International Law – Studies in Private International law* (Oxford, Hart Publishing 2011) pp. 214-227.

[83] Fallon, loc. cit. n. 80, at p. 331.

[84] Treaty amending the Treaty on European Union and the Treaty establishing the European EU, signed in Lisbon, 13 December 2007, *OJ* C306/07; in force since 01 December 2009.

Freedoms keeps on promoting these freedoms while also supplementing them with the fifth freedom – the so-called freedom of movement of decisions! Promotion of these two freedoms is basically compatible, but there is a danger of their conflict. How to harmonize fundamental principles included in public policies of all civilized nations with the basic values of the European Union is a burning issue.[85] This issue can be simply shown in a concrete case of European international family law. Positioning of protection of public policy is disputable within the framework of growing private international family law.[86] In fact, the divergence of national substantive regulations is highly relevant in this segment and texts written within the scope of corresponding conflict-of-laws rules[87] have universal application – which means that if conflict-of-laws rules refer to the law of a non-member state, the latter shall be applied. Since substantive law is not harmonized within the framework of EU law, there is no system of European family law which serves as a basic point for control of acceptability of a foreign law. Further in the text, solutions with respect to the scope of application and acceptability of the public policy clause in family law cases are proposed.[88] Within the sphere of national public policy protection, the need for application of the public policy clause is emphasized by substantive family law regimes which are inacceptable due to the following aspects: a) in

[85] Kramberger Škerl, loc. cit. n. 1, at p. 497.

[86] M. Župan, 'European judicial cooperation in cross border family matters' in Drinóczi and Takács, eds., *Cross-border and EU legal issues: Hungary-Croatia* (Pécs – Eszék, PTE ÁJK, J.J. Strossmayer University, Faculty of Law 2011) p. 621, at. p. 630, 647; de Boer, op. cit. n. 6; S.P. Peruzzetto, 'The Exception of Public Policy in Family Law within the European Legal System', in J. Meeusen, et.al., eds., *International Family Law for the European Union* (Antwerpen, Intersentia 2007) pp. 279-301.

[87] At the moment it is the Protocol on the law applicable to maintenance which is applied according to the art. 15 of the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, and Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* L 343/10.

[88] M. Harding, 'The Harmonisation of Private International Law in Europe: taking the character out of family law?' 1 *Journal of Private International Law* (2011) p. 206, 215; H.J. Sonnenberger, 'Wandlungen und Perspektiven des familienrechtlichen ordre public', in R. Freitag, et al., Hrsg., *Internationales Familienrecht für das 21. Jahrhundert* (München, Sellier 2006) pp. 29-53.

relation with Islamic family law which interferes with the contemporary perception of the equality of man and woman[89] - polygamy, getting rid (dismissal) of wives, child marriages;[90] b) the rights and liabilities arising from same-sex marriages.[91] There is still a gap between national and EU values: whereas on one hand, one can tolerate that national courts are not willing to acknowledge a same-sex marriage, on the other hand, the same courts violate a fundamental European value – freedom of movement of people![92] It is indicative that protection in the field of international family law is provided by frequently used rules of immediate application and conflict-of-laws rules that take account of, by functional reference, the result of the reference belonging to the area of substantive law.[93] Their application substitutes application of the public policy clause.[94] All in all, contemporary circumstances require a compromise between honouring cultural diversity on one side and the standards of human rights protection on the other side.[95]

The next issue is focused on abolition of exequatur, which brings to a new perception of the public policy clause. Regarding application of the public policy clause aimed at facilitated recognition and enforcement of foreign decisions, one can differentiate between the 'first generation' of regulations such as the Brussels I Regulation which restrains application of public policy (by introduction of the term 'obviously (clearly)' contrary which does not appear in the 1968 Brussels Convention) and

[89] Protected with Art 5. of the Protocol No. 7 on ECHR.

[90] C.G. Beilfuss, 'Islamic family law in the European Union', in Meeusen, et al., eds., *International Family Law for the European Union* (Antwerpen, Intersentia 2007) pp. 431-434.

[91] M. Župan, 'Registered partnership in the EU', in N. Bodiroga, ed., *Invisible minorities in law* (under publication, 2012).

[92] Peruzzetto, loc. cit. n. 86, at p. 286.

[93] For difference between factual and functional allocation see: M. Župan, *Pravo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu* [Closest connection principle in Croatian and European private international contract law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2006) p. 18.

[94] De Boer, op. cit. n. 6, at pp. 300-302.

[95] See Resolution of the Institut de droit international 'Différences culturelles et ordre public en droit international privé de la famille', http://www.idi-iil.org/idiE/resolutionsE/2005_kra_02_en.pdf. Malta declaration: proceeding the Third Malta Judicial Conference on Cross-Frontier Family Law Issues Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law 26 March 2009, http://www.hcch.net/upload/maltadecl09_e.pdf.

the 'second generation'[96] which terminates both exequatur and public policy control. The most numerous controversies are related to the proposal of amendment of the Brussels I Regulation. As a result of the previous models of termination of exequatur, the regulation makers and scientists are not unanimous on the following issue: how to achieve free movement of decisions (by terminating exequatur) and, at the same time, retain a certain mechanism for control of decisions of other member states?[97] Termination of exequatur is to a great extent challenged by the academics,[98] particularly since the accompanying regulations put a heavy burden on national enforcement law which actually 'floats' beyond the scope of the unification of the EU![99] The possibility of rejection of recognition of a decision of another member state due to conflict with the fundamental principles of the right to a fair trial represents an important innovation of the Brussels I Regulation.[100]

[96] The term is invented by S. Pabst, in T. Rauscher, Hrsg., *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Münich, Sellier 2010) note 46.

[97] P. Beaumont and E. Johnston, 'Can exequatur be abolished in Brussels I whilst retaining a publiy policy defence?', 2 *Journal of Private Intenational Law* (2010) pp. 249-279; P.F. Schlossser, 'The Abolition of Exequatour Proceedings – Including Public Policy Review' *Heft 2. IPRax* (2010) pp. 101-104.

[98] M. Dieter, 'Recognition and Enforcement of Foreign Judgement', in J. Basedow, et.al., eds., *Japanese and European Private International Law in Comparative Perspective* (Hamburg, Mohr Siebeck 2007.) p. 388.

[99] M. Župan, 'Ukidanje egzekvature u europskom pravu: nekoliko odabranih pitanja' [Abolishing the exequatur in European law: several selected issues], 17 *Pravo i porezi* (2008) pp. 65-74. A further difficulty is related to the model of the abolition of exequatur in the Regulation on maintenance, where the expression of the provisions of Article 19 considerably differs from the provisions of the other EU instruments that have abolished exequatur, as it gives into the hands of the defendant the right to autonomously appeal against national court decisions. This regulation impinges into national procedural law, as the mere fact that the subject matter and it's enforcement are potentially of cross-border nature, qualifies the matter for invoking the protection of public order! Undoubtedly, the internal jurisdiction derived from Art. 81 TFEU should have had no such connotations. For details see: E. Jayme, 'Neue Wege im Internationalen Unterhaltsrecht: Parteiautonomie und Privatisierung des ordre ublic' *Heft 4 IPRax* (2010) p. 378; B. Gisell and F. Netzer, 'Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt – Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht' *Heft 5 IPRax* (2010) pp. 403-409.

[100] Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec 14th, 2010, COM (2010) 748 final, Art 46.

The recital of the proposal to amend the Brussels I Regulation reaffirms the thesis that all the values arising from Article 47 of the EU Charter of Fundamental Rights are protected, which implies that this also refers to Article 6 of the European Convention on Human Rights and Fundamental Freedoms.[101] It is notable that this kind of amendment completely neglects the protection of substantive public policy, while the justifiability of this attitude is also questionable.[102] According to the UNALEX database and a 2007 study,[103] the public policy clause referring to Article 34 paragraph 1 of the Brussels I Regulation has been involved in 178 judicial decisions.[104] Research has shown that despite relatively often reference to violation of public policy, the judicial practice of member states has been rather moderate – only 25 judgments have specified violation of public policy and most of them (23) relate to violation of procedural public policy. Only two of those decisions have determined violation of substantive public policy.[105] The EU Court has made several relevant decisions which provide national courts with a clear instruction on interpretation and application of the public policy clause in the *acquis* discourse.[106] The restrictive interpretation contained in decisions of the EU Court, which has been accepted by national courts too, has become an incentive for the radical proposal to amend Brussels I Regulation that is aimed at ultimate elimination of this mechanism, supporting this standpoint with the fact that it is not needed by member states anymore![107] There are different opinions on this issue, some advocate preservation of the clause in recognition and enforcement mechanisms and some propose transfer of this objection

[101] Ibid., recital 24.

[102] G. Cuniberti and I. Rueda, 'Abolition of Exequatur – Addressing the Commission's Concerns' *Bd. 75 Rabels Z* (2011) p. 313.

[103] B. Hess et al., 'Report on the Application of the Regulation Brussels I in the Member States', *Study JLS/C4/2005/03* available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

[104] See UNALEX.

[105] S. Corneloup, 'The public policy exception in Brussels I practice' 1 *The European legal forum* (2011) p. 23.

[106] A. F. Lowenfeld, 'Jurisdiction, Enforcement, Public Policy and res judicata: the Krombach Case' in T. Einhorn, et al., eds., *Intercontinental cooperation through private international law : essays in memory of Peter E. Nygh* (The Hague, T.M.C. Asser Press 2004) p. 242.

[107] A.R. Vazques, 'Review of the Brussels I Regulation: Complete abolition of exequatur?' in B.C. Díaz, et al., eds., *Latest developments in EU private international law* (Intersentia, 2011) p. 161.

from the exequatur phase (recognition and enforcement) to the enforcement phase.[108]

V. Conclusion

The public policy clause has been broadly applied in the Croatian and Hungarian normative system of private international law. The referring norm implies no legal definition, but its content, function and restrictions are shaped by practice, on a certain territory and within a certain period of time. Despite the above facts, the public policy clause is a general conflict-of-laws rule that should be applied exceptionally and carefully and only in cases when violation of domestic law is obvious and inevitable.

The elaborated judicial practice suggests that courts do pay due attention to fundamental values of the system, but they considerately detach domestic from foreign public policy and, accordingly, pretty restrictively apply the public policy clause.

The key role of public policy exception was traditionally tied up to protection of national legal order. Recently the focus has changed – public policy more often refers at protection of European and international sources, what indicates towards amendment of the public policy character.

[108] Cuniberti and Rueda, loc.cit. n. 102; Beaumont and Johnson, loc. cit. n. 97.

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Mediation in family and labour law conflicts

I. Introduction

Peaceful settlement of disputes serves not only the interest of the parties concerned but also that of the entire society. Mediation has a great but partly unexploited potential for preventing and handling conflicts. We use the example of conflict resolution in Croatian family law and Hungarian labour law, examine various levels of regulation and explore to what extent is mediation effective in the two selected fields. We list the obstacles and make recommendations on how to make the most of mediation in the future.

1. Mediation in labour law conflicts – Labour mediation in international documents and a snapshot from the practice of other states

To understand the national system of mediation it is important to examine the international context. For this reason first we present the most important documents regarding labour mediation. Afterwards noteworthy elements from the practice of other states are displayed. Lastly we turn our attention to the Hungarian regulations and practice.

a) International documents

The International Labour Organisation treats the resolution and the prevention of labour disputes almost as equal categories. Recommendation No. 92 on Voluntary Conciliation and Arbitration as early as 1951 advocated the use of ADR in labour conflicts. Mediation also has a distinguished role when it comes to workers with limited right to strike or no right to strike at all. The Committee on Freedom of Association underlines that appropriate, independent, fast, conciliation, mediation or arbitration procedures which have the trust of the parties have to compensate for the restrictions on the right to strike.[1]

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[1] 328th Report, Case No. 2114, para 406.

The Council of Europe also devotes substantial attention to the use of mediation in labour issues. Article 6 (3) of the European Charter states that '[w]ith a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake […] to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes'.
At European Union level one can distinguish three main channels to resolve labour disputes: (1) industrial relations (2) administrative way (3) judiciary. Undoubtedly, the first channel gains most of the attention. The policy of the Union concentrates more on encouragement of collective bargaining and avoidance of conflict through dialogue, negotiation and workers' participation than the resolution of an already escalated conflict.[2] It is noteworthy that in labour law cases no directive similar to Mediation Directive 2008/52/EC exists. Although an elaborated and uniform regulation is lacking one can observe clear intentions to formulate common ground (see Article 13 of the Community Charter of the Fundamental Social Rights of Workers). The Community Charter lists three categories of alternative methods: conciliation, arbitration and mediation. Establishment and use of these processes has to be promoted. From the wording of Article 27 on implementation it is apparent that it is mainly the task of the member states to ensure the application of the rights protected under the Community Charter. This article refers to the specific features of national law and underlines the importance of contractual and act based law sources.

b) The practice of other states

In the US mediation, – which as a technique first appeared in the employment arena– is a natural corollary to conflicts arising from collective bargaining. The Uniform Mediation Act of 2001 with more than 2500 legal sources connected to it is the cornerstone of the regulation. To ensure the effectiveness of the negotiations before a collective agreement expires the parties have to use mediation. The

[2] F. Hendrickx, 'Labour Dispute Resolution and Settlement in EU Perspective', in A. F. M. Brenninkmeijer, et al., eds., *Effective Resolution of Collective Labour Disputes* (Groningen, Europe Law Publishing 2006) pp. 36-37.

tendency is that the parties often make mediation a prerequisite to arbitration.[3]

Recognising the threat open labour conflicts pose on both the society and the labour market from the beginning of the 19th century until the end of the 20th century most of the European states institutionalised the system of collective dispute resolution. To protect the public interest and to restore industrial peace the state and in some cases the social partners themselves supported the use of a third party (conciliator, mediator or arbitrator).[4] Mediation was (is) useful in individual disputes (related to for instance wage, holidays, unlawful termination of employment relationship, etc.) as well.[5]

In the United Kingdom alternative dispute resolution (ADR) forms natural part of the industrial relations. The Advisory, Conciliation and Arbitration Service claims that amongst other factors its accessibility, fast reactions, and informality are to be thanked for its success.[6] In contrast in France mediation is seldom applied to resolve labour disputes. The reasons include lack of information and inflexibility of the partners. Lately however, there is a growing interest in mediation on the behalf of social partners especially in relation to acute conflicts requiring rapid solution.[7] A specific feature of the French system to be

[3] R.D. Raisfeld, 'How Mediation Works: A Guide to Effective Use of ADR', in 33 *Employee Relations Law Journal* (2007) p. 30.

[4] S. Jefferys et al., *A five country study of third party dispute resolution social dialogue and the changing role of conciliation, arbitration and mediation services in Europe (CAMS)* 2010. http://www.workinglives.org/londonmet/fms/MRSite/Research/wlri/Comparative%20Report.pdf5.

[5] J. Purcell, 'Individual Disputes at the Workplace: Alternative Disputes Resolution', *EIRO 11-12* (2010), http://www.eurofound.europa.eu/eiro/studies/tn0910039s/tn0910039s_10.htm.

[6] F. Noonan, 'The ACAS Approach to Employment Dispute Resolution', in M. Liebmann, ed., *Mediation in Context* (London J. Kingsley Publishers, 2000) p. 161.

[7] J. Rojot, et al., 'Mediation within the French Industrial Relations Context: The SFR Cegetel Case', 21 *Negotiation Journal* (2005) pp. 443-467.

considered is that labour inspectors also mediate.[8] In Germany works councils have similar role.[9] In Sweden state organised mediation is regulated by law since 1908.[10] The use of mediation is not wide-spread, except one field: labour issues, where it is applied successfully.[11] The mediator has strong rights, should the parties refuse to comply with his request, he may ask the National Mediation Office to intervene and freeze the collective dispute and order a postponement for maximum 14 days.[12] Finland declares mediation compulsory, but with no obligation to reach an agreement.[13]

2. Mediation in Hungary

a) The legal background

The rotes of ADR go way back in Hungarian history. Sayings such as 'It is better to be harmed then to litigate', 'Gifts make the judge blind' or 'The law's nose is waxy' illustrate well the unpopularity of litigation. Alternative methods had a very important role. The so-called trapped or chosen judge (*fogott bíró*) was asked to arbitrate, the head of the extended family (*nagycsalád feje*) served as a permanent judge of his family members. If several hunters shot a beast together, the hunter-judge decided whose shot was fatal, to name just a few examples.

[8] According to the statistics of the Labour Ministry in 2003-2004 labour inspectors mediated in 94-98 % of the mediated labour disputes. F. Grima and G. Trépo, 'Knowledge, Action and Public Concern: the Logic Underlying Mediators Actions in French Labour Conflicts', 20 *The International Journal of Human Resource Management* (2009) p. 1173.

[9] N. M. Alexander, *International and Comparative Mediation, Legal Perspectives* (Alphen aan den Rijn, Kluwer Law International 2009) p. 232.

[10] K. Eriksson, *The Swedish Rules on Negotiation and Mediation. A Brief Summary* (Medlingsinstitutet, 2010), http://www.medlingsinstitutet.se/pdfs/pdfs_2005/sw_rules.pdf p. 6.

[11] B. Lindell, 'Mediation in Sweden', 7 *ADR Bulletin* (2004) p. 85.

[12] Industrial actions already under way are excluded. http://www.mi.se/inenglish/lev3_eng_presentation.html.

[13] C. Welz, and M. Eisner, 'Collective Dispute Resolution in an Enlarged European Union', *EIRO* (2006), http://www.eurofound.europa.eu/pubdocs/ 2006/42/en/3/ef0642en.pdf p. 7.

Currently mediation is used in various areas, such as labour law, family law,[14] healthcare,[15] criminal law[16] etc. Hereinafter we will use labour mediation as an example to display the Hungarian system.

Act LV of 2002 on Mediation sets out the general rules of mediation, defines the services, the conditions and the modalities of mediation which precede or replace the trial in the case of litigation in civil and commercial matters. Parties may be natural persons, legal persons, business entities without legal personality and other organisations. Vital principles of mediation include confidentiality, impartiality, interest-based negotiation, open communication, trust, etc. Mediation is voluntary. The mediator's fee is subject to agreement. Mediation might be used before, during or after court procedure. Though there is no legal obstacle to having recourse to extrajudicial mediation as an instrument of management of litigation but there has been no significant breakthrough in this field as of this date.[17]

Mediation in labour conflict is regulated by Act 22 of 1992 on the Labour Code (hereinafter LC). The LC came shortly after the change of regime. It introduced arbitration, mediation and conciliation. These methods were seen as tools for resolving collective disputes over interests. The weak point of the act: blurred categories. The current LC distinguishes four forms of ADR: negotiation (*egyeztetés*), conciliation (*békéltetés*), mediation (*közvetítés*) and arbitration (*döntőbíráskodás*). Negotiation leaves the decision to the parties, who exclusively participate in the process. In conciliation a third, neutral person is involved. The conciliator helps the parties to find a solution but has no authority to give any recommendations to the parties nor decide any of the issues. His/her aim is to improve the parties' communication, define and clarify the issues, help the parties understand their and the others needs and interests and in general get the viewpoints closer. The third method, mediation is very similar to conciliation; however there is a very important difference. The mediator is more active, he/she has the competence to make suggestions for resolution of the conflict. The suggestions however are not binding to the parties. Finally, the strongest method regulated by the LC is arbitration. Here the dispute is taken from

[14] 2003 amendment to Government Decree No. 149/1997 (IX. 10.) on Child Welfare Agencies, Child Protection and Child Welfare Administration.
[15] Act CXVI of 2000 on Mediation in Healthcare.
[16] Act CXXXIII of 2006 about the Mediation in Criminal Cases.
[17] First International Conference on Judicial Mediation, Paris, 16-17 October 2009.

the hands of the parties and turned over to a third, neutral decision maker, the arbitrator. This is the strongest method, because the case is decided by the arbitrator.
To resolve disputes of interest the Hungarian law makes the use of these alternative methods available. The Strike Act (Act VII of 1989) too mentions one method itself: it prescribes an obligatory 7 day cooling off period in which the parties have to negotiate but it does not contain reference to other methods.
Collective interest-based disputes are typically the subject of collective bargaining between the parties. The balance of power between trade unions and employers (employers' associations) is closer to equal (at least compared to the balance of power between employee and employer). About half of all collective agreements contain regulations on internal conflict settlement and 28 per cent establish some sort of conflict-management committee. Also, the majority of multi-employer collective agreements include some mechanism to solve collective disputes at the workplace level.[18]

b) Labour mediation – is it any different?

Though mediation as a technique is universal, the fields in which it is applied are unique. Divorce Mediation may serve as a therapeutic adjunct to divorce and may help the parties in resolving grief issues. In case of labour relations the characteristic which makes mediation unique is the special working environment and the imbalance of power between the parties. While the employer possesses more resources and information, the employee as the subordinated party has much less power and influence. The mediator has to create equilibrium.
To understand the mechanism to resolve employment conflicts one has to be familiar with a specific typology of employment disputes. These disputes are divided into subcategories such as individual and collective, rights and interest disputes. The first concerns a single worker, the second groups of workers, mainly represented by a trade union. A rights dispute concerns disagreement over the implementation or interpretation of statutory rights, or the rights set out in an existing collective agreement. An interest dispute involves settling the terms of a new agreement, mostly a collective agreement.

[18] A. Tóth and L. Neumann, 'Thematic Feature on Collective dispute resolutions in an enlarged European Union – case of Hungary', *EIRO*, (Dublin 2005), http://www.eurofound.europa.eu/eiro/2005/08/word/hu0508102t.doc.

It is essential to point out that mediation is capable of solving both individual and collective disputes of law, but it is up to the legislator to decide in which cases it allows mediation to operate.

Anyone may be a mediator who has a diploma and registers on the roll of mediators, but there is no requirement to complete mediation training. Mediators come from all sorts of backgrounds (e.g., law, sociology, psychology and economics) and usually have another 'main occupation'. There are additional requirements of qualification and practice regarding certain legal areas, such as child protection. A labour mediator has to hold a university degree and have five years work experience in the field.

The parties may decide to make the content of their agreement resulting from mediation enforceable. They can request the court or a public notary to incorporate the agreement into a judgment or an authentic instrument which can be enforced afterwards.

The agreement relating to the mediation procedure does not affect the right of the parties to turn to the court to deal with their conflict. In such a case, the court forces the plaintiff to reimburse the costs of the procedure. If, thanks to mediation, the parties agree on a solution the judge can confirm the agreement and verify its conformity with the applicable rules. If the mediation is unsuccessful the parties can refer to the court to decide the case (provided it concerns conflict of rights). The code of conduct for employment law disputes issued by the Labour Mediation and Arbitration Service (hereinafter MKDSZ) contains rules on confidentiality.

The main actor in conflict resolution is the Labour Mediation and Arbitration Service. MKDSZ carries out three activities: conciliation, mediation and arbitration. Although it has been operating since 1996 parties seldom turn to the Service. In practice, unfortunately parties mostly take advantage of MKDSZ when chances are already high that the situation gets bitter, by the time even the relationship that could initially be considered as good goes awry when 'direct connections almost completely vanish, communication ceases, and trust reaches the lowest possible level'.[19] The mediation offered by the Service however is successful in 93% of the cases that is the parties reach an agreement. The presence of the mediator eases the tension, gets the dialogue

[19] G. Kálmán, 'Közvetítés a munka világában' [Mediation in the World of Labour], in M. Eörsi and Z. Ábrahám, eds., *Pereskedni rossz!* [It is Not Good to Litigate!] (Budapest, Minerva 2005) p. 109.

between the parties started, keeps the negotiation within borders, encourages the parties to suspend the use of coercive tools and give up threatening one another. Mediation usually lasts for 3-4 weeks average.[20]

Mediation is often used in disputes concerning pay. Mediation is applied in transport sector (Volán bus company, Malév Hungarian Airlines), energy supply (Nuclear Plants of Paks) as well as certain areas of the public sector (school, hospital).[21] For instance it was used successfully in resolving the dispute between the workers of Dekoten Ltd (a firm which is a contracting partner of the Nuclear Plants of Paks) and the workers of PADOSZ (Trade Union of Paks Nuclear Power Plant Employees). The MKDSZ intervened after an initial strike action and the dispute was settled in a short period of time.[22] Mediation is also used in relation to strikes (prevention, moderation of escalated strikes) it makes the negotiation process more effective, speed up the agreement. It is important to point out that mediation is not a substitute for the right to strike. There is one exception: when certain groups of workers (e.g. policemen) are denied the right to use industrial weapons. In such case the use of an impartial third party, a mediator, or another ADR expert becomes essential, therefore the use of the ADR method so to speak replaces the more traditional methods of collective interest representation.[23]

3. Labour mediation: a tried & tested but seldom used method

a) Tried and tested

We are all aware of the benefits of mediation. This method is fast, cheap, flexible and adaptable to the parties' needs; the parties retain the

[20] G. Kovács, 'Sztrájk a mediátor szemével' [Strike through the Eyes of the Mediator], 54 *Munkaügyi Szemle* (2010) p. 53-55.

[21] I. Mihály, 'Vitarendezés, kulturált munkaügyi kapcsolatok, preventív mediáció, beszélgetés Kovács Gézával a Munkaügyi Közvetítő és Döntőbírói Szolgálat igazgatójával' [Conflict Resolution, Civilised Labour Relations, Preventive Mediation, Interview with Kovács Géza, director at Labour Mediation and Arbitration Service], 52 *Munkaügyi Szemle* (2008) pp. 89-92.

[22] http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Hirek_rolunk_irtak&switch-content=tpk_mkdsz_rolunk_egy_konfliktus_tanulsagai&switch-zone=Zone1&switch-render-mode=full.

[23] E. Kajtár, *Magyar sztrájkjog a nemzetközi és az európai szabályozás fényében. PhD értekezés* [Hungarian Strike Law in the Light of International and European Regulations. Doctoral Thesis] (Pécs, PTE ÁJK Doktori Iskolája 2011) p. 27.

ability to make their own decision. Mediation could (and in fact it does) prevent damages; let us think about the working hours lost due to strike. Indeed, mediation has numerous advantages. It is economic, disputants save time and money. It handles the conflict confidentially, in a safe environment. It is less complicated and more flexibly than the judicial way. It is the parties process as they have the power to 'craft' the process, choose the mediator, select the issues they wish to discuss, self determination is a key element, in other words the parties remain 'masters of the case'. It is voluntary; the parties may leave the room any time they feel to. As the parties play an active role in shaping the solution the agreement usually lasts. There is also a possibility to future check-ups. Mediation very often serves as an 'alarm clock' – as the third party neutral sheds light on the objective facts as well as the things the parties may lose (in terms of time, money, prestige, etc.) if they continue the fight.[24] The existence of effective dispute resolution method is a decisive factor in the success of collective bargaining process and it also have an effect on how individual workers feel (and on the long term perform) at the workplace. For these reasons we can fully agree with Rúzs Molnár Krisztina who claims that unlike in other fields of law, in labour law mediation should not be seen as an 'alternative', but as the 'traditional' way of dispute resolution.

b) Seldom used: The obstacles to mediation in labour law

Seeing the advantages of mediation one could easily arrive to the conclusion that in Hungary the majority of conflicts is resolved this way. The reality however is different, strikes (in case of conflict of interest) and labour court cases (in case of conflict of law) are a lot more prevalent. Despite all its benefits mediation is seldom used. Here we attempt to display the reasons for this phenomenon. We will move from broad to specific, first we will expose those features that are connected to Hungarian culture, later focus on those elements that make mediation in general difficult; finally we highlight those specific elements that impede labour mediation.

[24] J. Hajdú and K. Rúzs Molnár, 'Az alternatív vitamegoldás rendszerének általános jellemzői, különös tekintettel a munkaügyi vitákra' [General Features of the System of ADR with Specific Regard to Labour Disputes], in M. Ploetz and H. Tóth, szerk., *A munkajog és a polgári jog kodifikációs és funkcionális összefüggései* [Labour Law and Civil Law in Functional and in Codification Context] (Miskolc, Novotni Kiadó 2001) pp. 355-364.

Starting with the features that are connected to Hungarian culture, historical traumas of the 20th century are partly to be blamed for the ineffectiveness of mediation. These dark periods deeply traumatized the Hungarian society, created fear, suspicion and the sense of injustice. The latest trauma the 45 years of communist-socialist era created mistrust in society. This works against mediation, a process which is very much based on communication patterns and trust (later in the sense that the participants trust in the process and in the legal system).[25]

There are obstacles stemming from the legal regulation too. The Hungarian Mediation Act is becoming outdated. To take one example: the act is not suited to online mediation. The obligation to meet personally (at least twice: once at the first meeting and once when the parties sign the settlement agreement) rules out solely online procedure.[26] The other side of the same coin: The parties can send their representative to act on their behalf (except on the first meeting when they sign a mediation form). Though at the first glance this seems as a beneficial option very often it backfires. The main advantage of the mediation is that it creates a safe environment in which parties can act. If there is no need to participate personally, this opportunity is lost. Another flaw is that the plaintiff, having opted for a trial after successful mediation is forced to pay all the expenses of the court procedure regardless of the outcome of the lawsuit.

Some obstacles are related to the system of labour relations. In the Hungarian context of a pluralistic union system, disagreements between members of different unions can also make dispute resolution difficult. There are also 'hard to deal with' cases. For instance conflicts in multinational companies are difficult to access. While they seemingly accept the unions' presence, complaints filed to headquarters are often sanctioned by local managers. Legal regulations concerning mediation do not suit multinational companies. Local executives may not have the competence to make decisions and, in such a situation, the MKDSZ has no mediation instruments at its disposal either. Also, the MKDSZ only

[25] J. Révész, *Mediation without Trust: Critique of the Hungarian Mediation Law* (May 2005), http://www.mediate.com/articles/reveszJ1.cfm.

[26] G. Szőke, 'The Possibility of Online Mediation under the Hungarian Mediation Act – in Comparison with a Number of International, including European Documents on Mediation', 15 (2) *Information and Communications Technology Law (U.K.)* (2006) p. 138., http://mujlt.law.muni.cz/storage/1205530110_sb_12-szoke.pdf.

has access to large organisations where trade unions are present, even though a substantial proportion of individual disputes are emerging in SMEs. A solution would be to improve employees' awareness, which might be raised if mediation cases received more publicity.[27]

The parties' presuppositions and (hidden) agendas may also serve as disincentives. Parties often have prejudices about mediators and they generally wish to resolve their disputes alone. Oddly enough in practice it also happens that the parties ask for mediation without a genuine will to settle the dispute (e.g., the case between the Free Trade Union of Railway Workers and Hungarian Railway Company). Obviously mediation does not work if the true will to settle is missing, or if one of the parties enters mediation under false pretences (for instance to gain time or money).[28] The use of mediation is also not advisable if one of the parties wishes to make a precedent out of the case (i.e. the real motive is to send a message to the other).[29]

4. Conclusions regarding labour mediation. The way forward

Mediation indeed has many outstanding advantages yet, it would be mistaken to view it as a "one fixes it all" magic tool. As examples from Hungary and from other states show, mediation is capable of solving the majority of collective labour disputes, but not all of them.

What is the way forward? The first step is to provide information in various levels and to various groups. Education should start as early as possible (elementary school). It is essential that ADR forms part of higher education such as legal education (this can be done by including mediation in the academic curricula). We should provide law students with information about ADR, negotiation techniques and peaceful dispute resolution. We should teach them to think outside the box,

[27] G. Lovász and L. Neumann, 'Social Partners Evaluate Role of Mediation and Arbitration Service', *EIROnline* (2006), http://www.eurofound.europa.eu/eiro /2006/10/articles /HU0610019I.htm. See also E. Balogh, et al., *Kutatási Beszámoló. A Munkaügyi Közvetítői és Döntőbírói Szolgálat tevékenységének társadalmi hasznossága. (Rézler Gyula Mediációs Intézet Zárótanulmánya)* [Research Report. The Social Effectiveness of the Labour Mediation and Arbitration Service. (Final Report of the Rézler Gyula Mediation Institute)] (Budapest, Foglalkoztatási és Szociális Hivatal 2008).

[28] Lovász and Neumann, loc. cit. n. 27, at pp. 365-366.

[29] R. Csécsei, 'Szerződéses jogviták és a mediáció' [Contract Conflicts of Law and Mediation], in M. Eörsi and Z. Ábrahám, szerk., Pereskedni rossz! [It is Not Good to Litigate!] (Budapest, Minerva 2005) pp. 72-73.

consider alternative options to solve disputes, not just trial. It is to be welcomed that specific trainings are being made available for the parties concerned (employers, employees, trade unions). In Hungary since 1 April 2004 persons eligible for legal assistance can receive information from the legal assistance provider on the possibilities of settling a legal dispute out of court. Their three-day training is based on the US model, teaching negotiation techniques, the stages of mediation, the mediator's role, ethical issues as well as a number of skill building exercises. Judges are in the position to spread mediation as well therefore their training is of utmost importance.

Only when information is provided can we start to build trust towards the use of mediation. Once people know about mediation, they might try it, and former good experience with mediation certainly serves as an incentive to choose the method again. The willingness to negotiate is strengthened by previous positive experience. In Hungary the parties' choice is usually based on personal connections or on how experienced the mediator is (the more an expert mediates the more likely he or she will be asked again).[30] If one of the parties requests mediation for the other one this serves as an incentive to go along too, as he too would like to demonstrate his willingness to make compromises to the outer world (to the media, business partners, consumers).

Furthermore, there is a need for more effective legal regulation. Of course, it would be naive to assume that there is a direct and exact correlation between the changes in for instance strike numbers (one indicator of open collective conflicts) and the modification of the mediation act. However, it is also true that strikes as social phenomenon have a special relationship with the legal regulations. One example: in Spain, when strike rates went down, analysts pointed out more factors behind the decline. Obviously, economic prosperity kept the fighting spirit low, but there was another reason too. They claimed that the creation of a system of conciliation and mediation too contributed to industrial peace.[31] For this reason in Hungary the legal regulation concerning the operation of the MKDSZ needs to be clarified; this

[30] G. Lovász, 'Mediátorok: szerintünk. Avagy milyen tényezők állnak az MKDSZ közvetítői tevékenysége fogadtatásának hátterében?' [Mediators: How We See Them. What Factors Influence the Reception of the Mediation Activity of MKDS?], 54 *Munkaügyi Szemle* (2010) p. 59.

[31] S. Mongourdin-Denoix, 'Spain: a country profile', *EIRO* (2010), http://www.eurofound.europa.eu/pubdocs/2010/08/en/1/EF1008EN.pdf p. 8.

should include specifying the individual cases in which the MKDSZ is authorised to act, together with supplementing public sector laws to regulate proceedings of mediation.
It would be one option to make mediation obligatory in certain types of disputes. This idea is supported by the trade unions but fiercely opposed by the employers. This solution is dubious because of the very nature of mediation (i.e., it is a voluntary process). The availability of mediation is a better option. By available we mean: a system that is cheap, accessible and fast in reacting to the conflict. In labour disputes we suggest the parties involved to inform the MKDSZ about their collective bargaining developments.
Last but not least mediators as well as their organisations (especially the MKDSZ) have to adapt to the new challenges. As we pointed out there is only a small number of requests for mediation. In addition to provision of information this requires a shift in activity towards pre-emptive mediation and counselling and a more close cooperation with the social partners is a must.

II. Mediation in family law conflicts

Termination of a family union and the need to resolve the issues concerning disputable personal and ownership relationships between former marital and cohabitation partners, as well as regulation of the way for accomplishing content of parental responsibility concerning joint children, are the most frequent sources of conflict of interests in family law matters.
For example, conflicts may break out between the parents regarding exercising parental responsibility for their common child, whereby the same may be further encouraged, or even caused by a disturbed relationship of the spouses, but long-term parental conflict also inevitably leads to crisis of marriage and can cause dissolution of a family union.
Therefore, in this part of paper it will be presented some general reflections on mediation in family law conflicts, international regulations in this area, especially legal instruments of the Council of Europe as well as the present state of family mediation in Croatian domestic legislative with concluding reflections on peaceful resolution of conflict of interest in family law matters including review of possibilities for its further development and extension of its

implementation in Croatian family law system in light of European solutions and global tendencies.

1. Family mediation in general

Family law conflicts are specific due to the fact that family law matters above all involve an emotional component and continuity, especially in the case of relationships between parents and children. In judicial proceedings, as a regular way of giving legal protection, family members are opposing parties and this leads to deepening of conflicts in the relationship and growing apart of the parties involved in family law matters. Such development of the situation usually affects children the most. In such circumstances children are often in the centre of their parents' conflicts and therefore become a 'weapon' in legal disputes of the people who are primarily supposed to take care of their benefit. Seeking for another way, trying to obtain something that is a rare case in lawsuit, and this is a winning position for both parties in a legal matter (the so called win-win) obtained by their cooperation and agreement and better implementation of principals for protection of the best child's interest lead to broader acceptance and legal regulation of various models of peaceful resolution of conflicts of interest in family legal matters in the contemporary legal systems.

The sense of different approach when it comes to resolving conflicts in family law matters lies firstly in the endeavour to give the family in crisis, which is confronted with strong emotions, weakening of the feeling of belonging and being connected to each other provoked by divorce or termination of cohabitation partnership, the needed support and help to reshape their relationships. Reaching acceptable solutions by agreement should contribute to shortening of conflict duration, increasing of sustainability of agreements achieved in such a way, and better future communication for the sake of the child with the aim to obtain better and more quality parenthood after the termination of family union.

The most widespread and important form of peaceful resolution of family law disputes is family mediation. It is a process that was initially tied exclusively to the controversies that arose over the divorce, while in recent times its application seems to expand.

In addition to family mediation, as a main institute in the field of peaceful settlement of disputes of family law disputes, there are also other forms of assistance to families in crisis with the aim of faster and

easier finding ways of resolving the conflict, which mainly take into account the interests of the parties themselves, encouraging them to participate actively in the search for acceptable solutions, respecting their autonomy, but taking into account the protection of the welfare of children who are often at the centre of family conflict.[32]
Taking into account the experience of other jurisdictions which suggests that the numerous advantages of this way of resolving the family law conflicts, and because of the importance of preserving family relationships after termination of the family union, especially for children, it is necessary to consider the potential for their wider acceptance in the Croatian family law system.

2. Family mediation in international documents

The first international instrument, which includes provisions about the use of family mediation was the European Convention on the Exercise of Children's Rights[33] 1996 that emphasizes the importance of the principle of family autonomy and obligates the member states of Council of Europe to promote mediation, i.e. peaceful models of

[32] Those models are: parenting education, expert evaluation, parenting coordination, collaborative law. See A. Schepard, *Children, Courts and Custody* (Cambridge, Cambridge University Press 2004) pp. 68-78, 108-111; G. Firestone and J. Winestein, 'In the Best Interest of Children, A Proposal to Transform the Adversarial System', 42 *Family Court Review* (2004) pp. 203-215; N. Ver Steegh, and S. Erickson, 'Mandatory Divorce Education Classes: What Do the Parents Say', 28 *WM. Mitchell L. Rev* (2001) pp. 890-909; T. Schaefer, 'Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes', 19 *Columbia Journal of Gender and Law* (2010) pp. 491-537; S. L. Pollet, 'A nationwide survey of programs for children of divorcing and separating parents', 47 *Family Court Review* (2009) pp. 523-543; J. Johnston, 'Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-conflict Divorcing Families and their Children: Who Needs what Kind of Help', in J. Singer and J. Murphy, eds., *Resolving Family Conflicts* (Ashgate Publishing Limited 2008) pp. 297-316; N. Ver Steegh, 'Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process', *42 Family Law Quarterly* (2008) pp. 659-671; E. Greenberg, 'Fine Tuning the Branding of Parenting Coordination: „...You May Get What You Need"', 48 *Family Court Review* (2010) pp. 206-211; P. Tesler, *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation* (Chicago, American Bar Association 2008); J. Hilbert, 'Collaborative Lawyering: A Process for Interest-Based Negotiation', 38 *Hofstra Law Review* (2010) pp. 1083-1101.

[33] European Convention on the Exercise of Children's Rights, *Official Gazette* (Narodne novine – MU) 1/10.

resolving conflicts of interest in family law matters related to the exercise of children's rights. According to the Convention, they should be the primary format for resolving such disputes. Family mediation - should be allowed before the court proceedings were initiated, and during it, as well as in the stage of enforcement, while the agreements resulting from mediation or other forms of ADR should not be against the best interests of children.[34]

Another instrument of the Council of Europe also stipulating obligation of States Parties to promote and facilitate the peaceful ways of resolving conflict of interest in family law matters is the Convention on Contact Concerning Children 2003.[35] Specifically, the Convention provides that the judicial authority shall take all appropriate measures to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, in particular through the use of family mediation when resolving disputes concerning contact.[36]

Since both conventions are in force in Croatia, it follows that the state is obliged to comply with the conventions' requirements and to act appropriately in order to promote family mediation and peaceful ways of resolving family law disputes generally, especially those affecting children.

The most important document of the Council of Europe concerning the peaceful settlement of conflict of interest in family law matters is definitely Recommendation No. R (98) 1 of the Committee of Ministers to member states on family mediation.[37] Despite being non-binding legal document, the Recommendation is extremely important because it contains fundamental principles and regulates the basic characteristics of mediation proceedings in family matters in details. It provides the member states with the basis and legal framework for regulation of family mediation. Recommendations to the Member States of the Council of Europe include introduction, promotion and strengthening of

[34] Art 13. Convention on the Exercise of Children's Rights. See European Convention on the Exercise of Children's Rights (ETS no. 160), Explanatory Report p. 65., http://conventions.coe.int/Treaty/en/Reports/Html/160.htm.

[35] Convention on Contact Concerning Children, *Narodne novine – MU*, 7/2008, 1/2009.

[36] Art 7. Convention on Contact Concerning Children.

[37] Recommendation No. R (98) 1 of the committee of Ministers to member states on family mediation, https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2.

implementation of family mediation as an appropriate model for resolving family law disputes together with outlining advantages of that model of dispute resolution in terms of preserving quality and continuity of family relationships and promoting the best interests of the child. The following document of Parliamentary Assembly of Council of Europe is the Recommendation 1639 (2003) on family mediation and gender equality[38] that aimed to regulate one aspect of family mediation more detailed, namely to ensure gender equality at all stages of the proceedings. In addition, when the subject matter is related to a question concerning a child, it encourages the participation of the child in mediation in order to be given the opportunity to express his/her opinion because, according to the recommendation, just hearing the child can come up with solutions that will indeed be in its best interest.[39] The Recommendation also specifies the basic content and characteristics of family mediation and proceeding from the principles set out in earlier Recommendation (1998), proposes a series of measures such as the ruling out mandatory referral to mediation, development 'screening' tools for domestic violence, the inclusion of mediation in the legal aid system, review of the lawfulness and fairness of mediation agreements through their approval by the competent courts, the confirmation of mediation agreements by the competent courts, etc. The Guidelines for better implementation of existing recommendations concerning family mediation and mediation in civil matters of the European Commission for the Efficiency of Justice from 2007[40] highlighted the importance of providing information and raising awareness of general public on family mediation and its benefits, the indispensable role of judges and lawyers to develop culture of peaceful resolution of disputes, the existence of supervision system and evaluation of its implementation, the appropriate qualifications of mediators, common standards concerning their training, then confidentiality principle of the proceedings, and providing state's financial support for the mediation programmes. The above mentioned document provides the possibility that states make the obligation to bear

[38] Recommendation 1639 (2003) on family mediation and gender equality, http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1639.htm, hereinafter: Recommendation 2003.

[39] Art 6. Recommendation 2003.

[40] Guidelines for better implementation of existing recommendations concerning family mediation and mediation in civil matters, http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf (hereinafter: Guidelines 2007).

the costs of court proceedings dependable on the party's attitude and willingness to discuss and attempt to resolve the dispute concerned using family mediation.[41] Such an approach could indirectly encourage the parties to think about the possibilities offered through alternative ways, which they should be informed about, and then decide to accept it. In addition to the documents of the Council of Europe, the relevant provisions on the peaceful resolution of disputes contain documents and initiatives adopted by the institutions of the European Union, although none of them applies especially to disputes in family law matters.[42]

Taking previously exposed into account, it should be pointed out that adequate support and assistance provided to families by concerted action of all authorities and persons whose support and assistance is expected, as well as their proper education and awareness about the benefits that the conflicted family members can have from expert and efficient acting, are of crucial importance for achieving the aim which should be strived for in our society – the preservation of the content and quality of family life in terms of transformation of family relationships due to the termination of the family union in order to reduce or avoid the negative effects of family law conflict.

Achieving this goal would follow the requirements set to Croatia by international documents that are in force in Croatia, being a state party, but would also mean taking into account modern trends in this area with a clear commitment to responsible parenthood with respect to the guaranteed child's rights.

3. Family mediation in Croatian legislation

In accordance with the provisions of the Croatian Family Law Act 2003[43] there is only one model of peaceful settlement of family law disputes carried out only in conjunction with the process of divorce and the content of that procedure is limited to an attempt to identify the causes of marital relations disorder, preferably to remove them and

[41] Art 49, Guidelines 2007.

[42] Those documents are: Green Paper on alternative dispute resolution in civil and commercial law COM(2002)196, European Parliament resolution on the Commission's Green Paper on alternative dispute resolution in civil and commercial law P5_TA (2003)0084, European Code of Conduct for Mediators, Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters

[43] Family Law Act, *Narodne Novine* 116/2003, 17/2004, 136/2004, 107/2007, 61/2011.

reconcile spouses, as well as to inform spouses about legal and psychosocial consequences of their divorce.[44] This is the institute of family intermediation, which has a long tradition in the Croatian family law. The social welfare centres, council for marriage and approved expert persons are authorized to help, and the process is substantially limited in content to attempt of spousal reconciliation, i.e. it has function of preserving the marriage, and the mere introducing regarding the legal and psychosocial consequences of divorce.[45]

The meaning and purpose of family intermediation, according to the rules of comparative family law systems and international documents, is to assist the parties in arranging consequences of divorce amicably, i.e., resolving other family law disputes by participation of a third neutral person.[46]

Since Croatian legislation does not specify that as content of the proceeding, i.e. obligation of the mediator, the mediation process according to the Family Law Act 2003 in strict sense, is difficult to deem as a real alternative model for resolving the disputes in family law matters. Likewise, the procedure of intermediation as a kind of peaceful resolution of conflict is in our family law limited to cases of divorce, while there is apparent trend towards expanding the application of mediation on other types of family law disputes.

This primarily applies to disputes about parental responsibility, which can occur regardless of the divorce. In that sense we think that it would be good to expand the applicability and to encourage alternative ways of resolving other types of disputes in family law matters, especially those affecting children, and work on dissemination of information and appropriate training of professionals working with families.

With intermediation regulated by the norms of Family Law Act 2003, the other possibility for peaceful resolution of disputes in family law matters in Croatian positive law is the application of norms of the Conciliation Law Act 2011[47] to the disputes in the area of family law.

[44] Art 48 paras 1 and 2, Family Law Act.

[45] See I. Majstorović, 'Posredovanje prije razvoda braka: hrvatsko pravo i europska rješenja' [Divorce Mediation: Croatian Law and EuropeanSolutions], in 57 *Zbornik Pravnog Fakulteta u Zagrebu* (2007) p. 415.

[46] Cf. Schepard, op. cit. n. 32, at p. 52; L. Parkinson, *Family Mediation* (London, Sweet & Maxwell 1997) p. 5; M. Roberts, *Mediation in Family Disputes, Principles of Practice,* (Aldershot, Ashgate 2008) pp. 8 and 9.

[47] Conciliation Law Act, *Narodne novine* 18/2011.

Interpretation of the provisions of this Act could be inferred about their applicability and to disputes concerning family law relations and not just property ones (as it was the case under the previous Conciliation Law Act 2003[48]).

Nevertheless, as acceptable solution we consider the specific provisions within the basic family law legislation which would regulate the scope of peaceful resolution of conflict of interest in family law matters because one should not forget the uniqueness and complexity of family relations, especially in case of crises caused by conflict and the consequences it may have on third parties, especially when we think of the children.

For a quality system of peaceful resolution of family law disputes it is necessary to identify the specific characteristics of those types of disputes in relation to others which can also be dealt with alternative methods of resolution.

Ignoring special characteristics of family law disputes or making them equal to any other disputes in the area of civil law, represents a serious danger and underestimates the needs and best interests of children.[49]

4. Closing remarks on family mediation

Conflicts that arise between family members, especially between parents due to divorce or termination of the family union and the need for reshaping their relationships as well as those concerning children, except its legal nature, essentially involve strong emotions, and represent not only a legal conflict, but also psychological crisis and the crisis of relations. We can say that much more complex and layered conflict between family members is rooted deeply in the background of legal dispute. According to the nature of judicial proceeding, the judge who resolves a legal dispute does not involve himself in considering and discussing about that conflict background, so decision that he makes on filed claim cannot resolve all the complexities of family relationships from which the concerned dispute has arisen. Parties' dissatisfaction due to the mentioned reflects the fact that traditional judicial proceedings are not always the most appropriate way to resolve conflict of interest in

[48] Conciliation Law Act, *Narodne novine* 163/2003, 79/2009.

[49] J. Walker, 'Introduction to Family Mediation in Europe and its Special Characteristics and Advantages', in *Family Mediation in Europe: Proceedings, 4th European Conference on Family Law, Strasbourg, 1-2 October 1998* (Strasbourg, Council of Europe 2000) p. 25.

family law matters.[50] In such circumstances greater success, both on the level of the family within which the conflict exists and the general social level, can be achieved by family mediation and other forms of peaceful resolution of family disputes. Judicial proceedings are likely to reinforce entrenched positions and rarely provide a solution that is acceptable to both parties.[51] They may also lead to further deterioration of the parties' relationship, and family conflicts are likely, despite or precisely because of court decision, to last even longer. Before the adversarial judicial proceeding, which still remains the last option, the parties should be provided opportunities and be helped in reaching solutions of their dispute that will best suit their needs and interests. Specifically, the solutions obtained in this way are more sustainable and largely carried out without the need for some form of intervention or coercion. The interest of the child in such alternative models of family dispute resolution shall be a primary consideration.

III. Final conclusions

Mediation is a remarkable method with a partly unexploited potential. The obstacles which hinder the optimal efficiency of mediation are from various sources: the broader environment ("culture of mistrust"), the specialties of the given fields of law (power imbalance), the flaws in the letters of the law. How could we overcome these obstacles and make mediation more effective? The first step is to provide information and build trust. We suggest raising awareness at both general and specific levels. Education should start at elementary school. Later on, legal education is in a distinguished position as it trains future judges, advocates, etc. It is very important that specific trainings are provided for the parties to the disputes concerned (employers, employees, trade unions, couples, families). While ADR education in elementary school is in its infancy, we can find encouraging examples in some Hungarian and Croatian law schools' academic curricula. Regarding specific information the training of legal assistance providers in Hungary is a good practice.

There is a need for more appealing and more effective legal regulation (in terms of confidentiality, costs, enforceability, etc.). Of course, it

[50] L. Err, *Family Mediation and Equality of the Sexes, Report for Debate in the Standing Committee, Doc. 9983,* Committee on Equal Opportunities for Women and Men, 2003, http://assembly.coe.int/Documents/WorkingDocs/doc03/ EDOC9983. htm p. 21.

[51] Ibid., p. 23.

would be naive to assume that there is a direct and exclusive correlation between the changes in for instance strike or divorce numbers and the modification of labour or family law mediation. However, it is also true that conflicts are solved more effectively in a stable and coherent legal environment. On the other hand it is also true that mediation must not be over-regulated.

An important contribution to the quality of the implementation of mediation, especially in family law conflicts, would be the creation of codes of ethics and standards of good practice as well as establishing an adequate system of monitoring adherence to set rules and standards that would perform a central authority for the mediation, the existence of which would be desirable from the point of affirming a new approach to resolving family law disputes.

Knowing the numerous advantages of mediation it is tempting to suggest introduction of obligatory mediation in certain types of disputes. This solution however is doubtful because of the very nature of mediation (voluntary process). The enhance availability of mediation is a better option. By available we mean: a system that is cheap, accessible and fast in reacting to the conflict. Former good experience with mediation serves as an incentive to choose it again. The willingness to negotiate is strengthened by previous positive experience.

Finally, let us point out, that mediation is constantly evolving. New forms, such as online mediation present us with new challenges but also prove that the method is alive and capable of renewing itself.

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Lawyers' fees and length of civil litigation: examples from Croatian and Hungarian law and practice

I. General remarks concerning the problem of unpredictability of lawyers' costs and its relation to the length of civil litigation

It is no mystery that civil litigation can be costly. Even if parties are allowed to appear in a procedure *pro se* (without being represented by a lawyer), resorting to a professional lawyer is, in most cases, eventually unavoidable.[1] Under normal conditions, if a party is being represented by a lawyer outside of the system of free or subsidized legal aid – as suggested by a recent comparative research (the Oxford Study) – lawyers' fees are in almost all cases (i.e. in most countries) higher than court fees and comprise a major element in total costs of civil litigation.[2] According to the same Study, in those jurisdictions in which lawyers' fees are not tariff system based, it is difficult to predict the amount of work done, and consequently the lawyers' fees, so the potential range of lawyers' costs varies hugely. Furthermore, findings from the Study suggest that while the court costs are always predictable due to tariffs established by the statutes, lawyers' costs are only relatively predictable

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[1] F. Fernhout, 'Outcome-Related Fee Agreements in Europe and Hong Kong', in A. Uzelac and C.H. van Rhee eds., *Access to Justice and the Judiciary. Toward New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Antwerp – Oxford – Portland, Intersentia 2009) p. 13 and related text. It is worth to note that in Croatia parties may undertake procedural actions either personally or through agents, but in case a party decides to hire an agent, the party's possible actions are severely narrowed. According to Art. 89 of the Croatian Civil Procedure Act, only a licensed lawyer may represent a party as an agent before courts, if the law does not prescribe otherwise. Within the meaning of the Civil Procedure Act, 'otherwise' means that a party may be represented by a blood relative in a legal line, a brother, sister or marriage partner – if he/she has full disposing capacity and if he/she is not illegally practicing law.

[2] See C. Hodges and S. Vogenauer, et al., eds., *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Oxford, Hart Publishing 2010) p. 69 and related text and graphs.

in those countries where tariffs exist, but otherwise are largely unpredictable.

This lack of predictability is manifestly related to the method of charging lawyers' fees upon hours worked, especially if there is no tariff or any other type of the ceiling applied.[3] The basic idea behind 'billable hours' – ways of charging lawyers' fees according to the amount of time they spend delivering them is that a lawyer records time spent on a matter, usually in increments of one or two tenths of an hour. At the end of the month, bills are prepared that multiply the number of hours logged by the lawyer's hourly rate.[4]

A kind of remuneration per hour began to dominate the legal profession, especially in the world of corporate legal services in the last few decades of the twentieth century, starting in the United States but shortly after spreading to Europe and elsewhere. According to the information from reports available on the Internet,[5] billable hours dominate the way lawyers' fees are being charged in a number of European countries, not just in the world of corporate lawyers. In the Netherlands, for example, lawyers charge their fees mostly according to the hours spent and the same has started to be the case in other countries; in Sweden, Denmark, the Republic of Ireland, the UK, Belgium, Portugal, Italy and Germany (for out-of-court work).

Although it has been advertised for a very long time that the system of billable hour is nothing but a clean system in which clients pay for what they get in a transparent and linear manner, numerous findings indicate that there might be something wrong with that way of charging lawyers' fees. For instance, it has been alleged that the overreliance on billable hours by the legal profession provides no predictability of costs for clients, penalizes efficient and productive lawyers, fails to discourage excessive layering and duplication of efforts, discourages taking on *pro bono* work and, generally speaking, puts client's interest in conflict with lawyer's interests.[6] Still, despite the ever louder complaints from various

[3] Cf. ibid., pp. 16-17, 70, 88.

[4] See J. Derrick, *Boo to Billable Hours* (Santa Barbara Podia Press, 2007) p. 7-8.

[5] See reports available on http://www.csls.ox.ac.uk /COSTOFLITIGATIONDOCUMENTSANDREPORTS.php.

[6] See American Bar Association Commission on Billable Hours Report 2001-2002. See also Derrick, op. cit. n. 4, where he is honestly stating how when he first became a lawyer and joined a firm that he was presented with a simple directive: 'Record all your time'. However, later on he realized that the more time he spent lawyering, a lot

sides that the practice of billing per hours spent encourages lawyers to delay the problem rather than to work it out, little has changed so far. In a given sense, financial interests of lawyers are certainly not the fact that should not be taken into account, since at the heart of the lawyerly function lies the fee.

Lawyers' fees are, in most countries, almost always negotiable rather than strictly regulated, even in systems which are considered to be extreme – tariff systems where fees are set by statute. At the same time, although a number of other methods of charging lawyers' fees can be discussed,[7] the fact is that the negotiable hourly fee arrangement persists as the dominant method of charging lawyers' fees in many countries of common and civil law systems, not only for the out-of-court work but also in the case of charging representation before courts.

Still, some civil jurisdictions, like Italy and Germany, have tariffs set out by statute, but they are rarely binding, so lawyers can freely agree fees with their clients within the statutory limits. Croatia also has a tariff system – a lawyers' fee schedule, officially called the Lawyers' Fee Schedule and Cost Compensation. Contrary to the conclusion of the Oxford Study which says that lawyers' costs are only truly predictable where a straightforward tariff applies irrespective of the amount of work done, as we will see in Croatia's case the previous conclusion might not be correct.

At the same time, what was not in the focus of respectable Oxford Study is the relation of the regulation of lawyers' fees with the length of civil proceedings in respective countries. An answer to the latter – could various ways of charging lawyers' fees influence the length of civil litigation - may not only confirm the Oxford study finding on the unpredictability of lawyers' costs but could also serve as an indicator that the problem of the unpredictability of costs lies primarily within lawyers themselves for a simple reason; if we take into account that it is in client's best interest to resolve a legal matter efficiently and quickly, an efficient and quick lawyer will earn a lower fee than an inefficient and slow lawyer. That is why lawyers will show an incentive to work

of time should not even be recorded – time spent looking for lost files, time spent managing his time, time spent distracted and so forth.

[7] A list of national approaches to lawyers' fees can be found in the Evaluation report of European judicial systems – Edition 2010 (2008 data): Efficiency and quality of justice published and presented by the European Commission for the Efficiency of Justice (CEPEJ).

even harder and longer on the case, to use tactics before courts that are inherently unethical, tactics that may cause delays in litigation, such as bringing frivolous contentions before court, filing unnecessary motions to restore a prior status, motions to adjourn the hearing just to provoke delay and similar.

1. Fee contracts and tariff system regulation in Croatia

Croatian lawyers charge their fees according to the Tariff for Lawyers' Fees and Cost Compensation Act (hereinafter Tariff[8]), fee schedule according to which fees must be calculated on the basis of the amount in dispute. Before 2008, the Croatian Bar Association was empowered to autonomously adopt the Tariff for Lawyers' Fees and Cost Compensation.[9] Pursuant to the amendments to the Act on Legal Profession.[10] a new rule was introduced, so the Tariff drafted by the Bar had to be given consent of the Minister of Justice who was obliged to seek the opinion of the Economic and Social Council – a special governmental body that consist of representatives of the Government, trade unions and employers. At first, the Tariff was denied by the Minister on the ground that the proposal of the Tariff adopted by the Bar needed to be changed in order to better reflect the problem of social sensitivity (in terms of prices for legal services) as well to integrate a mechanism that would encourage a concentration of court procedure and decrease the number of hearings and, additionally, to encourage different models of alternative dispute resolution. After corrections by the Bar were adopted, the Tariff changed only slightly. For certain types of procedures (such as trespassing, housing relations and tenancy disputes, divorce or annulment of the matrimony, labor relations as well some other), regardless of the number of undertaken actions, a lump sum was introduced. Also, a limit on the number of possible submissions in first instance proceedings was set so that now no more than a total amount of 4 submissions in first instance proceedings may be drafted, filed and calculated by lawyers. As to all the other services

[8] Tariff for Lawyers' Fees and Cost Compensation Act. The fee schedule was published in the *Official Gazette* (OG) 148/09 of 11 December 2009.

[9] According to former Art 18 of the Act on the Legal Profession, *OG* 9/94, lawyers were entitled to a fee for his or her legal services and to compensation of the costs incurred in connection with the work done according to the tariff established by the Bar Association itself.

[10] See Article 3 of the Amendments of the Act on the Legal Profession, *OG* 117/2008.

(especially those related to property litigation and services), the price and method of calculation per single lawyer's action maintained.[11] These cosmetic changes satisfied the Minister, who gave his consent in December 2009 and commented that the adopted changes would contribute to the further shortening of proceedings since lawyers would not be able to charge their fees for every single action (drafting civil action claims, counterclaims, motions, pleas, representation at court hearings, drafting an applications for the issuance of a writ of enforcement, etc.).

In order to better explain the nature of the present Tariff it is necessary to point out that the Croatian Tariff is rather flexible since it widely accepts the freedom of contract principle.

The Tariff permits lawyers to make special arrangements for the provision of legal services with a legal person or a self-employed person to be paid in a lump sum, they can also agree with a client on the amount of remuneration, in criminal as well property law cases lawyers may agree with their clients in writing on remuneration based on an hourly rate which may be higher but not lower than the remuneration fixed in the Tariff. Contingency fees are also allowed.[12]

However, even if special agreement on fee is reached, court will still be obliged to calculate the costs according to the fixed indexes provided in the Tariff. The latter arises from the rule of the Civil Procedure Act on costs of procedure stating that if there is a prescribed tariff for lawyer's fees and other costs, these costs shall be calculated according to this tariff.[13]

The Lawyers' Code of Ethics also contains different rules on lawyer's relationship to client. For example, one rule that calls for attention says that a lawyer shall not cause unnecessary procedural costs to the client.[14]

[11] See Arts 7-8 of the Tariff.

[12] See Arts 38, 39 and 40 of the Tariff.

[13] See Art 155 of the Civil Procedure Act, *OG* 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011. Unlike in other countries where fees for cost-shifting purposes are established by the statute, in Croatia we are witnessing one rather strange situation – while applying the Lawyers' Tariff is not compulsory for lawyers themselves (since they enjoy a wide possibility of entering into different kinds of arrangements with their clients on the basis of the freedom of contract principle), a court is obliged to calculate the costs according to the Tariff. Yet, in deciding which costs are to be paid to the party, the court has to take in consideration only the costs which were necessary for the conduct of the case, taking careful consideration of all the circumstances.

[14] See Art 52 of the Lawyers' Code of Ethics, *OG* 72/2008.

On the other hand, it is in question how does this rule relate to the fact that Croatian lawyers are entitled, in most court cases, to calculate their fees for every single rendered action. Although the primary intention of a tariff system should be to prevent excessive charging for legal services, as well to ensure the availability of legal services to citizens and legal persons, it seems that the Croatian Tariff does the opposite. Moreover, although the issue of judicial delay is an issue which has been researched mainly in the context of the right to a fair trial within reasonable time and the judicial reform for the EU accession, from the perspective of the court case management there are some serious indications that a part of the problem lies in the model of calculation of legal services prescribed in the present Tariff. In order to reach a more precise answer, it is necessary to shortly address some solutions from comparative law as well.

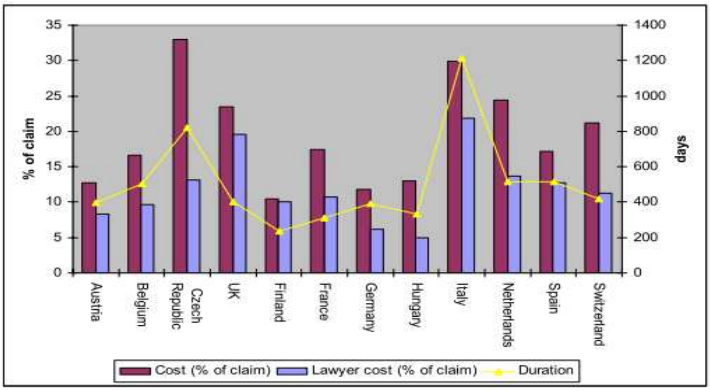
2. Croatian lawyers' fee system, its relation to the length of civil litigation and Western European perspective

A closer look into systems where fees are prescribed by a schedule of fees that lawyers are bound to reveals some interesting information. It is a well known fact, for example, that the German civil litigation cost system has always placed emphasis on the equal availability of civil justice for all, regardless of their social status. That is why the German system is burdened with a high level of regulation for all types of costs incurred in civil litigation, which is supposed to deliver a greater predictability of costs of any proceeding. In the German context, it seems that this kind of approach results in a high operational efficiency of the system of civil justice, as the following data analysis suggests.[15] According to the given graph,[16] which provides information on access to law for small and medium-sized enterprises, the duration of enforcing a contract is relatively short in Germany, while the lawyers' fees as percentages of claims remain low in relation to the total cost of enforcing the contract. Supposedly, part of the explanation may lie in the fact that lawyers' fees in Germany for in-

[15] B. Hess and R. Hübner, 'General Overview and Trends in the German Civil Litigation Cost System', in C. Hodges, S. Vogenauer, et al., eds., *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Oxford, Hart Publishing 2010) p. 349-351.

[16] 'SEO Economic Research paper, Regulation of the Legal Profession and Access to Law' (2008) p. 72.

court work are calculated on the basis of a statute (since 1st July 2004, the *Rechtsanwaltsvergütungsgesetz* (*RVG*) – Act on Lawyers' Fees) which recognizes only three types of fees for judicial work: fee for proceedings (*Verfahrensgebühr*), fee for court hearing (*Terminsgebühr*)



and fee for settlement (*Einigungsgebühr*). The fees depend on the value in dispute.[17] One of the main features of the RVG is tied to the principle of once-only-levy of lawyers' fees. The once-only levy of fees means that in each instance a lawyer may calculate and receive fees only once at a given stage of proceeding irrespective of whether he or she appears in court once or several times and irrespective of whether he or she writes one or more submissions.[18] A lawyer can also agree with his or her client on remuneration based on negotiated fees rather than statutory fees provided for in the RVG, however, when deciding on the fees for cost-shifting purposes courts will always follow the RVG principles. The statutory fees are specified in the provisions and schedules of the RVG and are thus transparent and predictable in advance.

The situation is, however, very different in countries without statutory schemes where charging according to hourly rates is frequent and popular (Switzerland, Spain, Netherlands, UK etc.) or with statutory schemes but with calculation per action permitted (Italy[19]). One other thing which can be

[17] See Questionnaire on funding, costs and proportionality in civil justice systems – Germany, report available on http://www.csls.ox.ac.uk /COSTOFLITIGATIONDOCUMENTSANDREPORTS.php.

[18] Ibid.

[19] In Italy lawyers' fees are regulated by statute which establishes minimum and maximum amounts that lawyers can charge per service rendered.

distinguished from the above graph shows how lawyers' fees and costs grow as the duration of enforcing a contract lengthens.

Does this mean that the way lawyers charge their fees deeply influences the speed of civil litigation? Certainly, a positive answer to this question cannot emphasise the entire complexity of the way in which judicial systems in Europe function and the complexity of the relationship between the lawyer and the justice system in a given state. No doubt a lot more should be taken into account in order to confirm the answer; the way courts are organized and managed, public expenditure on the operation of judicial system, professionalism and salary of judges, number of lawyers and judges in different states, rules of civil procedure on party control over the scope and nature of proceedings, the judge's duty to structure the proceedings and intervene, judicial reforms taken on to ensure more efficiency and quality in the European judicial proceedings and etc.

Even so, a closer look to the map on disposition time and clearance rate of litigious civil (and commercial) cases at 1st instance courts in 2008 which may be found in the newest CEPEJ's evaluation of European judicial systems[20] indicates that Croatia is one of the nine states which have the highest disposition rates (the number of days that are necessary to resolve cases pending in first instance) – an average of 498 days. If the latter fact is adjoined with a serious criticism of the tariff method of calculation of fees, which allegedly stimulates lawyers to produce more actions than actually needed, a serious dose of suspicion exists that the Croatian tariff method of calculation, although seemingly transparent, may be linked with the length of civil litigation and high costs of judicial proceedings in Croatia.

II. Interests of parties and their lawyers and the length of civil procedure

As pointed out in the previous sections, there are several ways of calculating lawyers' fees which can influence lawyers' attitudes in civil procedures, altering their style and length. As a consequence, various legal systems induce lawyers to a variety of behaviors, but there is something common to all of them: lawyers try to maximize their benefits within the limits of the system. Nevertheless, this natural economic interest can be opposed with other interests, in particular with the interests

[20] See *European Judicial Systems, Efficiency and Quality of Justice* (data 2008) (Council of Europe, 2010) p. 149 and related text.

of the society, the court or the opposite party, or even with the interests of their own clients. In this section we would like to describe the kinds of interests lawyers have in civil litigation, with particular attention to those which lead to the application of dilatory tactics.

With respect to the length of a civil lawsuit, traditionally the opposite interests of the parties are emphasized. 'It is believed, and that is often true, that the plaintiff is interested in a quick, the defendant in a slow completion of the lawsuit. Perhaps it is better to put it a bit more complicated: the party who believes he has a greater chance of winning hastens, while the party who believes he has a lesser chance of winning delays the completion of the lawsuit.'[21] The basic idea of the liberal civil procedure that the fight emerging from the opposing interests of the parties can resolve the dispute most efficiently is based on this traditional, but, in our opinion, overly simplistic viewpoint. Kengyel points out that while this idea was mostly present in the English adversary system and, as a result, in the English jurisprudence, 'these arguments were not unknown in the continental jurisprudence. According to Habscheid, the 19th century codifications, which granted unlimited autonomy to the parties, were built on two axioms: 1. civil action is an institution for the enforcement of private claims, so it is the parties' private affair. 2. The "free play of powers" must prevail, so the interests of the parties, who fight for their own rights, are the most efficient catalysts to resolve the legal situation as soon as possible.'[22] History has proven the false nature of this assumption. From the aspect of making correct decisions its results are undeniable, but from the aspect of efficiency it has failed utterly. The weakness of the system was due to the overstretching of the limits and the misuse of the rights. Zuckerman notes – in line with the findings of Lord Woolf – that 'the cause of complexity, delay and cost is due not to the nature of our procedural devices but, rather, to the excessive and disproportionate use and abuse of the procedural tools'.[23] The social civil procedure had evolved at the end of the 19th century in Austria as a response to the

[21] D. Kiss, *Az ügyvédek nagy kézikönyve* [The Lawyers' Great Handbook] (Budapest, Complex Kiadó 2010) p. 347.

[22] M. Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben* [Court's Power and Party Autonomy in Civil Procedure] (Budapest, Osiris Kiadó 2003) p. 79.

[23] A.A.S. Zuckerman, 'Reform in the Shadow of Lawyers' Interests', in A.A.S. Zuckerman and Ross Cranston, eds., *Reform of Civil Procedure, Essays on 'Access to Justice'* (Oxford, Clarendon Press 1995) p. 62.

anomalies of the liberal civil procedure. It transferred the procedural tools of case-management from the parties to the judge. 'For the realization of the social function of civil procedure, the role of the court has become crucial. As an opposite of party autonomy, Klein emphasized the court's vigorous activity'.[24] The social function of civil procedure was intensified across Europe in the previous century and, as one of the most spectacular results of it, we can mention the English civil procedure reform, which can be associated with Lord Woolf.

The demand for efficient procedures has become particularly relevant after the intensification of civil procedures' social function. In our opinion, to achieve this, it is crucial to recognize the underlying problems and find their causes first. From all the causes we examine only one in our paper: the dilatory tactics.

The above mentioned thesis leads to an erroneous conclusion because of its overly simplistic nature. It suggests that in a civil procedure only opposite interests, intended to extinguish each other, exist, and are only expressed by lawyers, as if they would be devices, without their own wills and interests[25]. But this theory does not take lawyers' own interests into account. Nick Armstrong notes that 'the adversarial system rests on the assumption that the parties are best placed to act in their own interests. This, it may be said, ignores the fact that the parties are represented by lawyers, who may not always be acting in their client's interests due to incompetence, a desire to inflate fees, or due to factors inherent to the lawyer-client relationship'.[26] Verkijk systematized the interests of the clients and their representatives and concluded that in the civil procedure, beyond their client's interests, also lawyers have various interests.[27] The first group is the lawyer's own interests as a good professional, in particular to represent his client in a good, professional manner. Another group is his illegal interests, and the last group is other legitimate interests of his own that are not strictly related to good

[24] Kengyel, op. cit. n. 22, at p. 105.

[25] 'According to Savigny's theory of representation, the act of the representative is actually the act of the represented, so the representative is no more than a device to enforce the will of the represented.' M. Kengyel, *Magyar polgári eljárásjog* [Hungarian Civil Procedure] (Budapest, Osiris Kiadó 2010) p. 159.

[26] N. Armstrong, 'Making Tracks', in A.A.S. Zuckerman and Ross Cranston, eds., *Reform of Civil Procedure, Essays on 'Access to Justice'* (Oxford, Clarendon Press 1995) p. 107.

[27] R. Verkijk, 'Beyond Winning: Judicial case management and the role of lawyers in the principles of transnational civil procedure', in C. H. van Rhee, ed., *Judicial Case Management and Efficiency in Civil Litigation* (Antwerpen, Intersentia 2008) p. 72

professionalism. Among these, from the aspect of our topic, we should deal with the latter more closely. Verkijk mentioned the lawyers' fees as an example which is legitimate but not strictly related to good professionalism.[28] As we stated above, lawyers are interested in the maximization of their fees. This in itself cannot be regarded as morally reprehensible; it is value-neutral, because it follows from the fundamental contexts of the market economy. However, if it conflicts with other interests, then it loses its value neutrality, because lawyers have such duties to their clients, to the court and to their professional community, which would be infringed if they would act only to maximize their benefit instead of fulfilling their duties. Zuckerman also noted that representatives have interests separated from the interests of their clients, such as their fees. He remarks in this context, that 'yet, given the scope for procedural maneuvering and low client resistance, it would be a miracle if there were no substantial connection between lawyers' financial interests and litigation practices'.[29]

From the aspect of dilatory tactics we can examine two groups of interests, the clients' and their representatives'. A legal representative can recognize his client's interests in a late decision and use procedural tools which can delay the lawsuit. Such tools could be, for example, 'torpedo claims',[30] the withholding and 'dripping' of relevant information,[31] playing to adjournments, repeated groundless requests for withdrawal of the judge assigned to hear the case,[32] or suing correlated lawsuits at different courts for the purpose that they will wait with the trial until the other decisions are rendered. The number and efficiency of different methods depends on a given legal system and on the judge hearing the case, but their final purpose is the same – delaying the procedure. Furthermore, as we have stated above, regardless of the client's interest in delay, it may be the intention of the lawyer to delay

[28] Ibid., at p. 72.

[29] Zuckerman, loc. cit. n. 23, at p. 65.

[30] F. Sander and S. Brebler, 'Das Dilemma mitgliedstaatlicher Rechtsgleichheit und unterschiedlicher Rechtsschutzstandards in der Europäischen Union – Zum Umgang mit sogenannten "Torpedoklagen"', 122 *Zeitschrift für Zivilprozess* (2009) p. 157.

[31] See F. J. Rinsche, *Prozeßtaktik* (Köln, Carl Heymans Verlag 1993) p. 62; G. Lüke and A. Walchshöfer, eds., *Münchener Kommentar* (München, C.H. Beck'sche Verlagsbuchhandlung 1992) p. 1668.

[32] Grgič, 'The Length of Civil Proceedings in Croatia: Main Causes of Delay', in A. Uzelac and C.H. van Rhee, eds., *Public and Private Justice – Dispute Resolution in Modern Societies* (Antwerpen, Intersentia 2007) p. 155.

the process. Delay can be the result of an active or passive conduct, so a lawyer can use dilatory tactics or refrain from preventing or even cooperate in the dilatory tactics of the opponent's lawyer. Lord Woolf also drew attention to this matter in his reports. According to his research, 'delay is of more benefit to legal advisers than to parties'.[33] He pointed out that 'it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours. Judicial experience is that it is for the advisers' convenience that many adjournments are agreed. This is borne out by the fact that when the courts have required the client to be present to support a late application to adjourn the trial, the number of such applications has reduced dramatically'.[34] In our opinion, this can be explained by two reasons: first the above mentioned interests of lawyers and second the 'professional solidarity' of lawyers with each other. Beside all of the above mentioned reasons, Zuckerman highlighted another correlation. In his opinion, 'self-interest finds expression not only in seeking maximal remuneration, but also in acquiring immunity from claims in negligence. In order to minimize liability for negligence lawyers would naturally tend to follow all procedural avenues open to their client.'[35]

In most legal systems it is a high priority aim to reduce the length of procedure. A wide range of solutions have been found to solve this problem. In this paper we do not undertake to examine all of these solutions, but make an attempt to systematize them and find out how various systems try to fight off dilatory tactics.

III. Techniques of fighting against dilatory tactics

As we have mentioned previously, we think dilatory tactics are only applied if they serve someone's interests. Thus it seems logical that if we extinguish or offset this interest, then we can take up the fight against dilatory tactics. Different systems have tried various techniques against these tactics, partly by neutralizing this interest, partly by reducing their maneuvering grounds, and finally by applying sanctions to deter those interested from using these tactics. In our opinion, these techniques can be classified into three groups according to their objective and means.

In the first group we have classified those measures which neutralize the interests of lawyers which induce them to use dilatory tactics. As an

[33] Lord Woolf, *Access to Justice: Interim Report*, 1994, Chapter 3 Nr. 31.
[34] Ibid.
[35] Zuckerman, loc. cit. n. 23, at p. 65.

example, we can mention the German cost rules, where reimbursable lawyer fees are independent from the working hours spent on the case, and are determined by the achieved stage of the trial instead. Leipold writes that 'the evidence fee can also only be earned once in the same instance. Thus, a lawyer does not get more money when ten witnesses and three expert witnesses are heard than he gains if there is only one witness. The lawyer has an economic interest that the procedure reaches the stage of taking evidence by the court, but he has no economic interest in expanding the evidence.'[36] The purpose of this rule is to cause lawyers to lose interest in prolonging the lawsuit. In Leipold's opinion 'the influence of cost regulations must not be underestimated and if you want to influence the reality of the procedure, you have to think about the degree to which the behaviour of the parties and especially of their representatives is influenced by economic factors'.[37] This cost regulation can hinder the use of dilatory tactics by reducing lawyers' interest in cases where only the lawyer is interested in delay, but it does not have the same effect in cases where the delay serves the client's interests.

Another technique is the reduction of the maneuvering opportunities for the parties. This does not affect interests of those involved, but focuses on procedural tools instead. In this group, legal limitations and judicial case-management can be distinguished, both of which have the objective to concentrate the procedure. In the first sub-group we can mention in particular the time limits for change of action or for presentation of evidence. As an example, we can mention the reform of the Hungarian civil procedure from 2008. According to the new rules for small claims procedure, the plaintiff cannot change his claim after the first hearing, and the parties can present their motions for the performance of taking of evidence on or before the first day of the hearing. The purpose of these provisions was to reduce the opportunities of changing the subject of the case thereby concentrating the lawsuit. Active judicial case-management has the same objective. Indeed, by giving procedural tools into the judge's hand to manage the lawsuit, the parties lose maneuvering ground. Andrews states, that 'under the new system of judicial case-management, it might be expected that there will be fewer

[36] D. Leipold, 'Limiting Costs for Better Access to Justice: The German Approach', in A.A.S. Zuckerman and Ross Cranston, eds., *Reform of Civil Procedure, Essays on 'Access to Justice'* (Oxford, Clarendon Press 1995) p. 272.
[37] Ibid., at p. 266.

opportunities for the parties to engage in adversarial manoeuvres',[38] and by it a speedy and efficient civil procedure can be achieved. An extensive selection of judicial case-management tools exists. Unable to examine all of them in our paper, we will highlight only one – the procedural sanctions.

To the third group, in our opinion, belong those procedural sanctions, which try to achieve their goals by deterrence. They form a part of judicial case-management, but because of their special objectives we handle them as a separate group. We can examine the differences between sanctions from various aspects. Taruffo writes that 'such differences stem from the interaction of several factors, as for instance: variety in the legal regulation of abuse of procedural rights (APR) (e.g., general clause v specific provisions); differences concerning the allocation of responsibility (e.g., client v lawyer); differences in considering the state of mind of the author of APR (e.g., subjectivism v objectivism); use of private law remedies (damages) rather than procedural devices, and so forth'.[39]

Based on these, Taruffo outlined the following system of sanctions of APR. In his opinion, there are three groups of sanctions:

- To the first group monetary sanctions belong: (1) damages, (2) share of costs between the parties, by derogating totally or partially the general rules concerning the ordinary allocation of costs and (3) penalties and fines.[40]
- To the second group belong sanctions such as nullity, voidness, preclusion, illegality, rejection, denial etc. This includes, for example, the procedural institution of preclusion, which is one of the main sanctions of the German and Austrian civil procedures. It attempts to ensure the concentration of procedure by excluding those 'attack and defense devices' of the parties which are not submitted in due time[41]. So, the violation of the obligation to support the process (*Prozessförderungspflicht*) can

[38] N. Andrews, 'Abuse of Process in English Civil Litigation', in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 96.

[39] M. Taruffo, 'Abuse of procedural rights: comparative standards of procedural fairness', in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 22.

[40] Ibid.

[41] U. Foerste in H. J. Musielak, *Kommentar zur Zivilprozessordnung* (München, Verlag Franz Vahlen 2002) p. 712.

lead to the loss of a lawsuit. Leipold also highlights that the risk of losing the lawsuit because of the exclusion of the motions forces the parties to take their obligation to support the process seriously.[42]

- The third class of sanctions is characterized by the fact that their subject is the lawyer. For example, the sanction for the violation of the rules of professional ethics belongs to this group.

In the following, we will examine those monetary sanctions which not only the party, but his lawyer can also become subject to.

IV. Procedural sanctions for lawyers

As we have seen, most of the sanctions affect the party directly and the most serious ones among these – for example the preclusion or striking out – can only affect the party, due to their effect to the outcome of the case. Naturally, the party can take revenge on his lawyer afterwards by claiming damages based on professional negligence. However, in this situation the judge has no possibility to directly sanction the lawyer, so he can not deter him, who is directly responsible for the delay, from using dilatory tactics. Only some legal systems know the sanctioning of lawyers aside from their clients. Jasques Normand notes that 'on the whole lawyers are the main initiator of procedural abuses and stalling tactics. Nonetheless there are few legal systems which have potential sanctions against them.'[43]

The judge's sanctioning powers differ from country to country. At the one end of a hypothetical scale are the common law countries, in particular the USA, at the other end of it is Germany. While in the USA the Federal Rules of Civil Procedure allow, in excessively many cases, the use of sanctions against lawyers, the German civil procedure code (ZPO) does not allow the sanctioning of lawyers by judges.

In the USA, courts – federal district courts in particular – have long been able to exercise panoply of powers to regulate attorneys.[44] These

[42] D. Leipold in *Stein-Jonas Kommentar zur Zivilprozeßordnung*, 11. Lieferung (Tübingen, J.C.B. Mohr, Paul Siebeck 1985) p. 268.

[43] J. Normand, 'Final Report: The Two Approaches to the Abuse of Procedural Rights', in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 246.

[44] 'Developments in the Law: Lawyer's Responsibilities and Lawyer's Responses', 107 *Harvard Law Review* 1993-1994, p. 1629

powers derive from multiple sources and courts can punish by fine or imprisonment, award fees and costs. The range of penalized conducts varies enormously. From these, we would like to emphasize only one: 'By far the most visible and controversial sanctioning mechanism, however, is Rule 11 of the Federal Rules of Civil Procedure, which empowers federal district courts to sanction attorneys who fail frivolous pleadings, motions, or other papers'.[45] The purpose of this sanction is deterrence, so attorneys do not waste the court's time with ill-planned, half-baked legal claims.[46] This rule can entail potential risks from various aspects; on the one hand, it can hinder legal development in a precedent-based jurisprudence, and on the other hand, it can impede access to justice. There is a possibility that those who have modest financial background will be deterred from bringing legally right, but hardly provable claims. In addition to the risks, it also carries possibilities; therefore it was not removed from the rules, but frequently amended in recent decades. After 1993, the sanctions may be imposed on law firms as well, which is more consistent with the American realities.

At the other extreme is Germany, where the rules do not allow for any disciplinary powers, or procedural sanctions on lawyers, because of the independence of lawyers. Breyer compared the common law systems with the German one and stated that while a judge in a common law system can order lawyers to pay the cost caused by their actions, in the German system it is unimaginable.[47] By now the situation is similar in Austria. Previously, the Austrian civil procedure code *(ÖZPO)* allowed the judge to impose fines upon the attorney who delays the proceedings by gross negligence.[48] This was changed by the reform of 1983, which abolished judicial disciplinary power with regard to attorneys.[49] Application of dilatory tactics in Austria is considered a violation of professional regulations and the bar has disciplinary powers in these cases.[50]

[45] Ibid., at p. 1630.

[46] 'Deterring dilatory tactics in litigation: Proposed amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure', 26 *Saint Louis University Law Journal*, 1981-1982, p. 904.

[47] M. Breyer, *Kostenorientierte Steuerung des Zivilprozesses* (Tübingen, Mohr Siebeck 2006) p. 12.

[48] Normand, loc. cit. 43, at p. 246.

[49] W. H. Rechberger, *Kommentar zur ZPO* (Wien, Springer Verlag 1994) p. 558.

[50] B. König and A. König, 'Landesbericht Österreich', in G. Walter, ed., *Professional Ethics and Procedural Fairness* (Bern, Verlag Paul Haupt 1991) p. 196.

The sanctioning of lawyers is also known in the English civil procedure. According to the English rules, the court has the power to disallow a legal representative from recovering costs from his own client, or order that the legal representative personally pay costs to another party.[51] Examples of conduct that may justify a wasted cost order include failing to attend a hearing, causing an unnecessary step to be taken in proceedings, or prolonging a hearing by gross repetition or extreme slowness in the presentation of evidence or argument.[52] The court applies the wasted cost order on its own initiative, or on request. In connection with the purpose of sanctions Lord Woolf noted that 'as part of a case-management system, sanctions should be designed to prevent, rather than punish'[53].

Regarding the suing of hopeless cases, the English courts have an interesting case law. Andrews mentions a decision where the Court of Appeal restated its determination to make a wasted costs order against lawyers 'who acted for misplaced reasons of altruism in pursuing a hopeless and vexatious action'[54] (Count Tolstoy-Milaslovsky v Lord Aldington [1996] 1 WLR 736, CA). However, the House of Lords decided to the contrary in a subsequent case, so 'it will not be enough to justify an order that the court considers that an advocate has been arguing a hopeless case'[55] (Medcalf v Weatherill [2002] UKHL 7, per Lord Hobhouse).

V. Procedural sanctions and tools of fighting against dilatory tactics: Croatian and Hungarian rules

The Croatian Civil Procedure Act (CPA) contains a general rule which says that the court is obliged to conduct without any delays, within a reasonable time and with minimum of costs and to prevent any form of abuse of rights in the proceedings. The court shall fine with a monetary fine anyone who attempts to abuse the rights they have in the proceedings, unless prescribed otherwise. Fine may be imposed on a

[51] P. Loughlin and S. Gerlis, *Civil procedure* (London, Cavendish Publishing Limited, 2004) p. 537.
[52] Ibid, at p. 538..
[53] Lord Woolf, *Access to Justice, Final Report*, 1996, Chapter 6.
[54] Andrews, loc. cit. n. 38, at 85 p.
[55] Loughlin and Gerlis, loc. cit. n. 51, at p. 538.

party or intervener or their legal representative if he/she is responsible for the abuse of rights.[56]

It is, however, hard to say how often courts recourse to the mentioned rule. It seems that this will mostly depend on the way an individual judge operates. For instance, CCP makes clear that in deciding which costs are to be paid to the party (on the basis of a loser pays rule) the court shall take into consideration only costs which were necessary for the conduct of the case. It continues: the court shall decide which costs were necessary and on the level of these costs taking careful consideration of all the circumstances.[57] It seems that some judges will indeed approach the problem of deciding on costs with reasonable care and that they will be ready to reject any costs which were unnecessary for the conduct of the case. On the other hand, it is no secret that quite often it happens that the costs of submissions are duplicated by the costs of representation at court hearings which are actually serving the very same aim and have identical content. A devoted judge will certainly watch out for such an occurrence and in his/her decisions on costs reject those costs which were duplicated. Making this kind of conduct generally accepted and frequent would lead to a better alignment of client interests and a lawyer's duty to expedite litigation. This is, of course, not only a matter of lawyers' ethics which calls for fair relationship between the lawyer and client, but also the matter of lawyer's relation and his obligations to the justice system.

Otherwise, there will always be the risk that the lawyer might use his professional engagement and different kinds of tactics in the adversary system of civil justice to pursue his own personal interest rather than that of the client and at the expense of the client. Consequently, if the fee arrangement meets lawyers' financial interest during litigation, lawyers may neglect an important ethical rule which says that in order to offer a client expeditious legal protection at the lowest expense, a lawyer shall avoid dragging out or misusing of any right in a lawsuit before the court.[58]

The Hungarian Civil Procedure Code[59] (HCPC) summarizes those expectations which are required from the parties and their

[56] See Art 10 of the CPA.

[57] See Art 155 of the CPA. Also, court may decide that the legal representative of the party must pay the opposing party costs he or she has caused by his or her own fault.

[58] See Art 97 of the Lawyers' Code of Ethics.

[59] Act III of 1952 on the Code of Civil Procedure.

representatives in the principle of exercising rights in good faith. So the court shall take measures to prevent any and all procedures, acts and actions which contradict the principle of exercise of rights in good faith, such as efforts taken to delay the proceedings or that may lead to delays. The court shall apprise the parties to exercise their legal rights in good faith, including the consequences applicable for litigating in bad faith [HCPC Article 8(2)]. The court shall impose a financial penalty (Section 120) upon any party (counsel), and other litigants for making a statement in delay without justification, or for their failure to make the statement in spite of being so notified, hence delaying the conclusion of the proceedings [HCPC Article 8(4)]. Besides these, the court shall impose a financial penalty upon any party (counsel) for delaying legal actions without justification, for any failure to meet a deadline, or for causing unnecessary expenses in any other way, in addition to ordering the party in question to pay for such expenses on the strength of law – regardless of whether the courts decision is for or against the party in question, and shall have powers to impose other legal sanctions as well [HCPC Article 8(5)]. However, where a party fails in carrying out certain acts during the proceedings, or falls in delay with certain acts without justification, or fails to meet a deadline or time limit, or causes unnecessary expenses in any other way, such party may not claim any reimbursement for the expenses resulting therefrom even if he succeeds in the litigation, or may be ordered to cover the costs of the opposing party resulting therefrom irrespective of the outcome of the litigation [HCPC Article 80(2)].

As we can see, the Hungarian civil procedure utilizes sanctions not only against the parties, but the lawyers as well; however, the HCPC, contrary to the English CPR, only refers to the parties when regulating costs and does not permit the court to disallow a legal representative from recovering costs from his own client. In addition, we can state that the HCPC does not generally prohibit malicious actions; rather it lays down a list of actions which may be sanctioned.[60] One example of such conducts is where a report made by a party for recusation is clearly unfounded or if the party makes another clearly unfounded report against the same judge in the same litigation. The HCPC sanctions this apart from the others, in Section 18. But in this case only the party is subject to the sanction, his lawyer is not. In comparison it can be said

[60] M. Kengyel and V. Harsági, *Civil Justice in Hungary*, Nagoya University Comparative Study of Civil Justice Vol. 4. (Tokyo, Jugakusha 2010) p. 30.

that the Hungarian judicial practice clearly rejects the sanctionability of suing hopeless cases.[61]

VI. Conclusion

We believe that a significant relationship exists between how lawyers charge their fees and the length of civil procedure. In our study we tried to demonstrate this relationship and its components through comparative examples. After identifying the problem, we examined the most common procedural instruments which are used in various jurisdictions to eliminate delay. In our view, the most effective devices are those cost rules which try to neutralize lawyers' interests in delay. As an example for this, we presented the German model where – due to cost rules - lawyers do not become interested in using dilatory tactics. In addition, we attach great importance to active judicial case management which can handle dilatory tactics in an early stage. Particular attention was paid to sanctions which are directly applicable against lawyers. Although we consider these to be two-edged weapons, their usefulness as instruments of active judicial case management cannot be questioned. However, we do not find it satisfactory if the judge lets the procedure to be delayed then sanctions *post factum*. *Ex post* punishment should not be in the hands of the judge. The judge should seek to prevent the use of dilatory tactics, before they express their effects, and not penalize them subsequently.

In our opinion, lawyers' interests should neither be underestimated nor forgotten, although their role in undue delay is not exclusive, but rather significant. Adoption of appropriate measures alone does not solve the problem, because the will of the participants of a procedure, especially of the judge, is also necessary for that. However, without an adequate legal background, judges cannot act effectively against dilatory tactics.

[61] Legfelsőbb Bíróság P.IV.20551/1961. sz. döntése [High Court Decision].

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One tier and two tier board systems in Hungary and Croatia with special emphasis on the problem of corporate governance in Croatia's National Oil Company INA

I. Introduction and general overview of the one-tier and two-tier board models

A comparative analysis[1] of corporate conduct leads us to the conclusion that two different board models[2] can be distinguished in corporate governance practice, namely a unitary and dualist regime, better known as one-tier and two-tier board models.

Within the one-tier model, the functions of decision making and supervising are not delegated to separate corporate bodies, but exercised by a unitary board. The one-tier board consists of executive directors and non-executive independent directors;[3] hence latters have the function to oversee the operation of the board. This corporate governance practice is applied by Anglo-Saxon corporations particularly in the United States and in the United Kingdom, although as a result of convergence of company laws many other states allow investors to apply a one-tier model, even those which strictly denied the solution in the past.

The two-tier board model has mainly German origins,[4] thus wide spread in continental Europe. While German company law can be considered as an influential one, many central European countries – including

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[1] See K.J. Hopt and P. C. Leyens, 'Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', 1 *European Company and Financial Law Review* (2004) pp. 143-148.

[2] See T. Papp, 'Corporate Governance – Társaságirányítási rendszerek', in S. Papp, ed., *ActaConventus de IureCiviliTomus X*. (Szeged, Lectum Kiadó 2009) p. 194.

[3] See D.C. Clarke, 'Three Concepts of the Independent Director', 32 *Delaware Journal of Corporate Law* (2007) pp. 73-111.

[4] See K.J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms', in K.J. Hopt, et al., eds., *Comparative Corporate Governance: The State of the Artand Emerging Research* (Oxford, 1998) pp. 227-228.

Hungary – originally transplanted its provisions and followed the models of corporate governance set up by German laws, especially the provisions of the German stock corporations act, the *Aktiengesetz*. The two-tier model defines a governance system in which two main company organs play key role in corporate conduct. The board of directors is responsible for the strategic management of the company as an executive body. Besides, a supervisory board oversees the actions of the board of directors in interest of the corporate ownership (shareholders). The theory of corporate law defines the supervisory board as an internal oversight body distinguishing its role from the aspects of external supervisory duties exercised by the auditors.

In consideration of the original purpose of our article, namely to demonstrate and solve an extraordinary interesting situation occurred in the governance practice of Croatia's National Oil Corporation (INA) we would first like to introduce the theoretical background of the above mentioned conduct practices with special regards to the legal background and some other interesting theoretical approaches. Following these guidelines the legal background of different board systems will be introduced. Second we would like to refer two interesting issues, already been raised many times by academic and business society. First one relates to the question which structure of the corporate governance can be considered better? Business effectiveness and ethics could be highly improved with the application of a model which is unquestionably better than the other one. However, such analysis can only results in merely theoretical conclusions, as business practices always depend on the real content of governance. Second, it is in question whether two structures are converging and getting closer to each other, or on the contrary showing signs of divergence.

1. Ownership structures and board models

a) One-tier board structure and plural shareholder structure in the Anglo-Saxon states

While in Central Europe majority shareholders dominate markets and corporations, in the United Kingdom and moreover in the United States a plural shareholder structure can be considered as typical. The large block holdings are not as usual as in Europe within the ownership structure of corporations, which partially derives from the attitude of citizens, showing much more intention to invest their savings in securities and they are more involved in taking risks of capital market

investments. Therefore, the market capitalization of corporations is higher, but ownership control is not as influential. In this plural structure the board enjoys a particularly important role in corporate governance. Comparing with Europe, a higher level of board authority is experienced in the United States but on the other hand shareholders have a higher level of financial rather than strategic interests. All of these attributes result in a compromise between shareholders and managers setting up a collective purpose accepted by both parties: the maximization of share price. In case shareholders are satisfied by gaining profit through their corporate stockholdings they place their confidence in company executives and are disposed to vote on lucrative remuneration packages. Anglo-Saxon traditions of business law provisions do not separate the functions of decision-making and supervising by setting up two different company organs for these purposes. Instead a unitary board exercises both functions where as above mentioned executive and none-executive directors take place.

As an aspect of legal regulation in the United States we would like to emphasize the importance of the provisions on boards and directors set up by the Delaware Code, while Delaware corporate law has a powerful influence in the United States.[5] Also the provisions of the Model Business Corporation Act had been adopted in many member states and are also addressing the concerning issues on board models. Section 141 (a) of the Delaware Code provides: 'The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors […]'.[6] Section 8.01(a) of the Model Business Corporation Act also sets up the requirement of a board, stating: 'each corporation must have a board of directors', while Section 8.01(b) sets up the standard of a unitary system providing: 'All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors [...]'.[7]

Both the Delaware Code and Model Business Corporation Act are setting up rules on the number of directors and standards of qualification

[5] See V. Halász, 'Comparative analysis of stock purchase from the viewpoint of trade law', in T. Drinóczi, szerk., *Studia Iuvenum Iurisperitorum* (Pécs, PTE ÁJK 2008) p. 41.

[6] See Delaware Code Section 141(a).

[7] See Model Busyness Corporation Act Section 8.01(a)-(b).

and both describe a system of oversight and responsibilities including the establishment of board committees and the removal of directors.

In coherence with the above mentioned regulations there are two primary fiduciary duties of directors principally set up by courts, namely the duty of loyalty and the duty of care.[8]

Crisis oriented reforms had also shown influential on board operation and the role of directors. During the economic crisis of the 1930s, the Securities and Exchange Act of 1934 created an authority, the Securities and Exchange Commission to oversee the markets, the regulators and the issuers. Besides, the markets themselves including the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASDAQ) also exercise an influential self-regulative competence. The Enron and Worldcom Scandals of 2002 shocked both the markets and the investors, thus the consequences resulted in the passage of the Sarbanes-Oxley Act of 2002. The act provided significant governance amendments in the United States with special regards to the role of audit committees and independent board members.[9] Proceeding to the 2007-2008 financial crises, the Dodd-Frank Wall Street Reform and Consumer Protection Act came in to effect in July 21, 2010. The act restructured the financial regulatory environment of the United States and exercised a massive influence on governance issues in the banking sector. As an aspect of executive remuneration, there had been numerous questions and ideas raised regarding overcompensation scandals during the events of the financial crisis. The passage of the Emergency Economic Stabilization Act and especially the Troubled Asset Relief Program (TARP) in 2008 brought special criteria on director's bonuses for those corporations that had been helped out by the State.

In the United Kingdom there are numerous laws setting adequate provisions on corporate actions. The Companies Act of 2006 is a comprehensive regulation that applies UK companies;[10] however particular regulations on board operations are not included in the act. The laconic provisions on boards within the Companies Act only set up minimal requirements. As Section 154(2) provides: '[a] public company

[8] See A. D. Garrett, 'A Comparison of United Kingdom and United States Approaches to Board Structure', 3 *The Corporate Governance Law Review* (2007) p. 101.

[9] Ibid.,at pp. 100-108.

[10] Ibid., at p. 97.

must have at least two directors'. As a result, detailed provisions on board structures take place in self-regulatory codes (like the UK Corporate Governance Code, the former Combined Code on Corporate Governance). Jonathan Charkham[11] has remarked, before the advent of the self-regulatory codes, even the largest British company 'could legally be run by two directors, like the Consulate of the Roman Republic'.

The self-regulatory Combined Code on Corporate Governance, – latterly the UK Corporate Governance Code – was based on former reports on corporate governance. As Allison Dabbs Garett[12] refers, Cadbury Report in 1992 was the first comprehensive review of corporate governance practices ever conducted. Later it was followed by other major reports: the Greenbury Report, the Hampel Report, the Turnbull Report, the Higgs Report and the Smith Report.[13]

The UK Corporate Governance Code (former Combined Code) includes many aspects of the above mentioned reports. The Code applies to UK listed companies and it is based on the concept of a self-regulatory „comply or explain" model. When listing on the stock exchange the issuer shall accept the recommendations as best practice and shall explain its differing practice in case of non-compliance. The Combined Code on Corporate Governance had given a role model for many European countries during the process of issuing corporate governance codes on best practices. Accordingly, the UK Corporate Governance Code provides: 'The Code is not a rigid set of rules. It consists of principles (main and supporting) and provisions. The Listing Rules require companies to apply the Main Principles and report to shareholders on how they have done so. The principles are the core of the Code and the way in which they are applied should be the central question for a board as it determines how it is to operate according to the Code.'[14]

[11] See J. Charkham, *Keeping Good Company* (Oxford, Oxford University Press 1995) p. 262. With regards to our original context Charkham was quoted by Paul L. Davies, see P.L. Davies, *Board Structure in the UK and Germany: Convergence or Continuing Divergence?*, http://ssrn.com/abstract=262959 or DOI: 10.2139/ssrn.2629592012. p. 8. Originally released in 2 *International and Comparative Corporate Law Journal* (2001) pp. 435-456.

[12] Professor, Jones School of Law, Faulkner University.

[13] Garrett loc. cit. n. 8, at pp. 96-97.

[14] See UK Corporate Governance Code – Comply or Explain (Chapter).

Concerning the role of directors and the one-tier boars model the UK Corporate Governance Code as a 'soft-law' fills out the gaps left by the legal regulation especially the Companies Act of 2006. The Code provides, that '[e]very company should be headed by an effective board which is collectively responsible for the long-term success of the company'.[15] Besides the Code obviously sets the requirement of the operation of a unitary board with the active participation of non-executive[16] directors: 'Every company should be headed by an effective board which is collectively responsible for the long-term success of the company. […] As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy.'[17]

Providing recommendations on the operation of the unitary boards, the Code emphasizes the importance of regular board meetings, board committees and appropriate insurance in respect of legal actions against the directors. The Code's provisions strictly emphasize the importance of separation of functions regarding the CEO's and the chairman's position describing just the opposite practice followed by US corporations, where the CEO usually also holds the position of the chairman. The Code's provisions recommend the board to be sufficient sized, but it should not be so large as to be unwieldy. Additionally, at least half of the board should consist of non-executive directors.

As a conclusion, Anglo-Saxon states support a unitary board model which had improved much in the past ten years through the experiences arising from the great corporate scandals. The aspects of anti-fraud measures brought independent directors and board committees in the spotlight, however in the United States an increased level of responsibility and internal control were set by the post-Enron legislation. The one-tier model has the advantage, that non-executive directors are active members of the boards contrary to the members of the two-tier model's supervisory board members. Thus they are able to gain sufficient information regarding corporate affairs and can directly raise questions on the board's meetings. As an improved level of best practice it is optimal for the non-executive directors to hold their own

[15] See UK Corporate Governance Code – The Main Principals of the Code – Section A: Leadership.

[16] H.A. Sale, 'Independent Directors as Securities Monitors', 61 *Business Lawyer* (2005-2006) p. 1379.

[17] See n. 15.

apart sessions with the absence of executive directors where the independents can discuss confidential agendas. Board committees should also operate with an increased involvement of non-executive directors. The issues of accounting affairs and remuneration policy became crucial in light of crisis oriented experiences, so the role of audit- and remuneration board committees also improved much in the last few years.

b) Two-tier board structure and concentrated shareholder structure in continental Europe and Hungary

Contrary to the Anglo-Saxon states the corporations of continental Europe are characterized by a concentrated ownership structure[18] regarding a major block holder frequently exercising controlling influence or a group of individuals or institutional investors holding strategic blocks of shares.[19] A concentrated ownership structure enables majority owners to effectively oversee management actions,[20] moreover they have decisive role in the appointment of the company executives. This type of corporate structure is generally governed by a board of directors responsible for strategic decision making and supervised by a board of supervisors[21] with participation of shareholder and employee delegates.[22]

Nevertheless, this regime of corporate governance usually delegates less power to the board of directors comparing to the above described Anglo-Saxon structure. The original German approach often contemplates corporations as articulations of various interests, instead of directly categorizing them as concentration of capital. We should take the fact into consideration, that the spheres of corporate interests became

[18] V. Halász, loc. cit. n. 5, at p. 53.

[19] T. Baums and K. E. Scott, 'Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany', 53 *American Journal of Comparative Law* (2005) p. 40.

[20] S. Cools, 'The Real Difference in Corporate Law Between The United States and Continental Europe: Distribution of Powers', 30 *Delaware Journal of Corporate Law*. (2005) p. 765.

[21] See P.O. Mülbert, 'Die Stellung der Aufsichtsratmitglieder', in D. Feddersen, P. Hommelhoff and P. Schneider eds., *Corporate Governance* (Köln, Uwe H., Otto Schmidt Verlag 1996) pp. 99, 122-123.

[22] See C. Jungmann, 'The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems', 3 *European Company and Financial Law Review* (2006) pp. 426-474. Also see K.J. Hopt, loc. cit. n. 1, at p. 135-168.

more complex by this time, so we can view the traditional German approach as a kind of early stakeholder theory.[23] The German *Aktiengesetz* provides mandatory obligation for corporations to operate in frame of a two-tier board structure, therefore the structure of corporate governance should incorporate in the above mentioned two corporate bodies.

After the political changes of late 1980's, Hungarian legal regulation followed the framework of German company law, so in the early 1990s the transplantation of a mandatory applicable two-tier governance system was obvious. Meanwhile Anglo-Saxon investors became more and more involved in the Central European countries including Hungary, the original concept has been modified. The 2006 review of Hungarian company law suggested that shareholders should have the option between one-tier and two-tier models.

The Hungarian Act IV of 2006 on Business Associations provides: 'Where the articles of association of a public limited company so provides, it shall be controlled by the board of directors under the one-tier system instead of the management board and the supervisory board. In this case, the board of directors shall discharge the duties of the management board and the supervisory board conferred upon them by law.'[24]

However, this specific provision is only enabling departure from general provisions in Article 33(1) point a): 'Establishment of a supervisory board shall be mandatory: a) for public limited companies, except for any public or private limited company that is controlled by the one-tier system; [...]'. By Article 243(1), the administrative duties of corporations are handled by the management body, consisting of minimum three and maximum eleven members, all natural persons.[25]

Regarding the supervisory board, Article 34 (1) provides that it shall consist of minimum three and maximum fifteen members. Article 34(2) states that the supervisory board shall act as an independent body. Unless otherwise prescribed by law or the memorandum of association, the supervisory board shall elect a chairman and, if necessary, a deputy chairman from among its members. The supervisory board shall have a quorum if two-thirds of its members, but at least three members, are

[23] R. E. Freeman, *Strategic Management – A Stakeholder Approach* (Boston – London – Melbourne – Toronto, PITMAN 1984) p. 31.

[24] See Hungarian Act IV of 2006 on Business Associations, Art 308.

[25] See Hungarian Act IV of 2006 on Business Associations, Arts 33-34.

present. The supervisory board shall pass resolutions with a simple majority.

Hungarian company law is not unique in sense of enabling option between the two models; moreover EU regulation of on the Statute for a European company (SE) also suggests both one-tier and two-tier model for investors. Article 39 and 40, provides that '[t]he management organ shall be responsible for managing the SE' and '[t]he supervisory organ shall supervise the work of the management organ. It may not itself exercise the power to manage the SE.' Meanwhile Article 43 states that an '[…] administrative organ shall manage the SE […]', as a one-tier board.[26]

The comparison of the two structures points out, that two-tier structures suffer potential risks deriving from their reactive roles while supervising strategic decisions. Supervisory boards – at least theoretically – only have the chance to oversee board actions but it cannot effect the decision making process itself. Many states – including Germany – prefer the two-tier board model, but at the same time recognized the occurrence of the described problem. German company laws were amended by the *Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG)* of 1998 and the *Transparenz- und Publizitätsgesetz (TransPuG)* of 2002. Since then – as Carsten Jungmann[27] emphasizes – it has become an additional task of the management board to inform the supervisory board on intended business policy and corporate planning.[28]

However, the two boards are characterized by a demonstrable difference in connection with the flow of information. While non-executive board members of one-tier-models have the opportunity to directly gain information during the board meetings, the members of the supervisory boards are only are only permitted to receive their information from the management board. Hence, that information can be filtered, while non-executive directors can form base their judgement on original information.

On the other hand, there is an additional issue significantly effecting the operation of two-tier boards in practice – namely the problems arising from co-determination. One-tier board systems deny the concept of

[26] See Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company, SE, *OJ* L 294, 10.11.2001.

[27] Dr. iur., LLM (Yale), MSc in Finance (Leicester) Wissenschaftlicher Assistent, Buccerius Law School in Hamburg.

[28] Jungmann, op. cit. n. 22, at p. 452.

employee representation in the board; however two-tier structures prefer employee participation in the supervisory bodies. In German companies with 2.000 or more employees, 50% of the supervisory board shall consist of employee delegates. In Hungary co-determination rules are not as stict a sin Germany, but in accordance with the original concept of the dualist corporate governance system. Article 38(1) of the Hungarian Act IV of 2006 on Business Associations provides: 'If the annual average of the number of full-time employees employed by the business association exceeds two hundred, the employees shall have the right to partake in the supervision of the company, unless there is an agreement between the works council and the management of the business association to the contrary. In this case the representatives of the employees shall comprise one-third of the members of the supervisory board.' However, these are *lex minus-quam-perfecta* provisions and are often not followed in practice.[29]

Material issues of best practice are always decisive, while they are filling out formal frames. As a result, they are always more important than procedural methods of governance. Therefore, we can conclude that none of the two board models can automatically be considered better than the other. However, in corporate practice a higher level of business integrity and higher standards of improved governance practices can indeed earn winner's title to certain boards, no matter if they are functioning as unitary or dualist structures.

2. Is there convergence or divergence between the two systems?

Finally, the question can be raised whether the dualist and unitary systems of corporate governance are converging or diverging with each other. This analysis was originally the idea of Professor Paul Davies,[30] who in his article 'Board Structure in the UK and Germany: Convergence or Continuing Divergence?' laid down the conclusion that tendencies are still – or continuously – working out divergence. The idea of convergence was based on the experience that a certain 'rise of the monitoring board'[31] was experienced in the Anglo-Saxon system of corporate governance in the 1970s.

[29] See Hungarian Act IV of 2006 on Business Associations, Art 38(1).

[30] Cassel Professor of Commercial Law at the London School of Economics and Political Science.

[31] Davies, op. cit. n. 11, at pp. 435-456.

Notwithstanding these concepts, Professor Davies concluded that the divergence of the two systems can still be pointed, stating that on the formal level convergence may have emerged, but on the level of functions further divergence can be experienced. According to this concept, we may share the idea that a feasible trend of convergence can only occur if the structure of shareholdings changed in Germany. Additionally, in the UK, stakeholders have historically been protected outside company law rather than through it, so the debate of the 1970s had silenced.[32]

II. Corporate Governance in Croatian Legal and Economic Environment

Different models of corporate governance have developed within specific historical, economic, cultural and legal circumstances. Given the fact that the Croatian company law was largely modelled on German legislation and company law tradition,[33] at the time when the Companies Act was introduced (hereinafter: CA)[34] there was no possibility to select between different board management structures and opt for one-tier system of corporate governance, while both a management board and a supervisory board had to be established before filing an application for registering a company in the Register of Companies.

CA was amended several times, primarily because of Croatia's legal obligation to approximate its existing legislation to that of the European Union. Among other things, the Act on the Amendments to the Companies Act in 2007 introduced a new Subsection 2a in the part which regulates management board structures. According to Article 272a of the Amendments Act, in the basic deed of a public limited company – the Articles of Association – it may be determined that the

[32] Ibid.

[33] It was the intention of the legislator to make the Croatian law easily identifiable to foreign investors by adopting the German company law model. Taking into account the fact that German law was already amended by the European Union regulations and directives on companies, it is apparent that solutions that have been adopted in Croatian CA fully met the European and international standards, many years before Croatia has started accession talks with EU.

[34] Companies Act 1993 (Zakon o trgovačkim društvima), *OG* 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 137/09. The Act regulates different types of business forms (sole traders, general and limited partnerships, economic interest grouping, public and private limited liability companies). The Companies Act was last amended in 2009 to reflect recent developments in the German and European company laws.

company has a single management board in place of management and supervisory boards. Following the fact that the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) granted opportunity to choose between a supervisory body plus a management body (two-tier system) or a management body (one-tier system),[35] depending on the form adopted in the Articles of Association, as well the fact that some European countries offer such option for domestic companies, the Croatian legislator had accepted an argument that granting an opportunity to choose between one-tier and dual tier system structure may be an interesting option for owners of Croatian companies, depending on their temporal interest and analysis.

Several studies suggest that so far only a small number of public limited liability companies in Croatia have chosen to amend their statutes and turn to the one-tier system of corporate governance.[36] It seems that no matter what the theoretical advantages of each system, the reasons for sticking with the dual tier system in Croatia mainly lie in legal heritage and tradition, while change to one-tier system will continue to take place rarely and sporadically, mostly because of owners' preference and their linkage with one-tier systems abroad. [37]

Usually, the management board structure is characterized by the existence of both executives and non-executive directors, while the two-tier system consists of a supervisory board and an executive board of management where there is a clear separation between the functions of supervision and management. In general, the management board in the one-tier system and the supervisory board in the two-tier system are elected by shareholders and, typically, both the management board and the supervisory board in the two-tier system appoint company directors – members of the managerial body. According to the CA, the management board appoints one or more executive directors for a term of office, the duration of which is determined in line with the Articles of Association, but for a period no longer than six years. If more than one executive director is appointed, one must be appointed as chief executive director.[38]

[35] See Art 38 of Council Regulation (EC) No. 2157/2001.

[36] About case of Arenaturist d.d. see, for instance, Lj. Maurović, et. al., eds., *The One-Tier System on Corporate Governance – Croatian Practice* [Monistički ustroj tijela dioničkog društva], http://hrcak.srce.hr/38201.

[37] Ibid.

[38] See Art 272l of the CA.

If a company has a single management board in place of management and supervisory boards, executive directors may be appointed from among the management board members, but only in such a way that the majority of members of the management board are not executive directors.[39] Also, if more than one executive director is appointed, they are authorized to manage the company's business exclusively jointly, although the Articles of Association or the Rules of Procedure for executive directors as passed by the management board may determine a different manner of managing the company's business. It is important to call attention to the rule that powers granted by law to the management board may not be transferred to executive directors. For example, when the management board represents the company toward executive directors, then none of the executive directors may participate in that representation.[40] Names of executive directors have to be accessible in the Court Register, therefore directors are obliged to submit an application for entry into the court register and the appropriate supporting documents must be submitted to the registry court in the same manner as prescribed for members of the company management board.

Although Article 272a of the CA Amendments 2007 suggests in express terms that no combination of one-tier and dual-tier corporate governance is possible; we are witnessing a rather strange case currently in Croatia. Namely, an unusual board system is currently in place at the oil company INA d.d., a system which exhibits the properties of both corporate governance structures – one-tier and dual tier systems. This phenomenon has been covered by the media to some extent, but on the other hand no legal analysis of the current situation has been made available to the public thus far. Even though it is hard to bring out a complete study of the case without inside information, some conclusions may be derived from the available collection of facts and statements.

1. A brief account of the privatization of INA d.d. and its present model of corporate governance

At the time of writing this paper, INA – Industrija nafte d.d. (INA d.d.) is a joint-stock company with the Hungarian oil company MOL Rt holding 47.26% of its shares, the Republic of Croatia holding 44.84% of

[39] Ibid.

[40] See Art. 272l para 2 in conjuction with Art 272d para 1 of the Amendments. Ordinary, the company is represented by the executive directors.

the shares, while the institutional and private shareholders hold 7.9%. INA d.d. shares have been listed on the London and Zagreb stock exchanges since 1 December 2006.[41]

Since this is a company of strategic significance for the Republic of Croatia, a special legal framework for INA and other strategic companies was formed in the 1990s. Consequently, in 1996 the Act on Privatization was passed, which determined that strategic companies would be privatized according to a special law. Consistently, the Act on the Privatization of INA was passed in 2002.[42] Based on this Act, the sale of 25% plus one share to a strategic investor, transfer of 7% of shares to Croatian Homeland War veterans, sale of 7% of shares to employees at preferential terms, and the sale of at least 15% of shares to other Croatian citizens, domestic legal entities and foreign investors was determined.[43] It is worth to note that the same Act on Privatization of INA also regulated the keeping of 25 % plus one share in state ownership, which would be privatized on the basis of a special law after Croatia joined the EU.

In 2003, Hungary's MOL offered 505 mill. $ for 25% plus one share of the INA and was selected as a strategic partner via an international tender. After MOL entered the ownership structure, a Shareholders' Agreement between the Croatian Government and MOL – Hungarian Oil and Gas Plc. was signed on 17 July 2003.[44] The Shareholders'

[41] Info from INA's website: http://www.ina.hr/default.aspx?id=246. INA d.d. was established on 1 January 1964, when Naftaplin (oil and gas exploration and production company) merged with the oil refineries in Rijeka and Sisak. Today, INA is a medium-sized European oil company with a leading role in oil business in Croatia and a significant role in the region in the areas of oil and gas exploration and production, oil processing, and oil and oil products distribution. Its head office is located in Zagreb. As at 31 December 2010 there were 14,703 persons employed at the Group and 9,061 persons employed at the INA, d.d respectively.

[42] See Act on Privatization (*OG* 21/96) and Act on Privatization of INA (*OG* 32/2002).

[43] Same in 'Gentleman's Agreement', 1(2) *Political and economic monthly review* p. 9.

[44] It has been alleged that with this contract MOL gained greater controlling rights which were disproportional to its ownership share. The issue of the company's management was regulated in the part 7 of the Agreement (Ugovor o međusobnim odnosima dioničara koji se odnose na INA-Industrija nafte d.d.) which regulated number of members of aforementioned boards as well rights to directly appoint members of management and supervisory boards.

Agreement was concluded for an indefinite period of time, as long as both parties continue to hold at least 25%+1 share ownership of INA.[45] Later, in 2005, 7% of shares were transferred to the Croatian Veterans' Fund and a political decision has been made to continue with the privatization of INA through an initial public offering (the so called IPO).[46] By using the IPO model, a total of 17% of shares was sold to Croatian citizens and institutional investors. In order to avoid situations of unlicensed buying and selling of shares by certain groups of wealthier citizens on the basis of others citizens' rights to participate in the IPO, a maximum amount for the subscription of block shares was limited to 38,000 HRK per citizen (approx. 5,200 €). Citizens' interest for the shares was fairly large and ultimately the price was set at 1,690 HRK per share plus one bonus share for each 10 shares subscribed, provided that the shares are not sold within one year.[47] In 2008, MOL announced a voluntary offer to take over all the remaining shares which were not owned by the Croatian Government. Since the Act on the Takeover of Joint Stock Companies sets the legal minimum – a price in the takeover bid that cannot be lower than the highest price at which the bidder and the persons acting in concert with him have acquired the voting shares within the period of one year before the obligation was created,[48] MOL offered 2,800 HRK to the Croatian public. Although MOL's offer had a strong political connotation at the time it was announced, followed by the initial public resistance to sell shares to MOL and the involvement of institutional investors in trading INA's shares, after completing the bidding for the takeover MOL increased its position to the earlier mentioned level of 47.26% of shares, thus becoming the largest single shareholder.[49]

As a logical consequence of the change in the ownership structure, the Croatian Government and MOL have agreed to amend the 2003 Shareholders' Agreement to better reflect the new ownership structure in the corporate governance of the company. Therefore, the major

[45] See Art 13 paras 1 and 2 of the Shareholders Agreement (Duration and Termination of Agreement).
[46] Gentlemen's Agreement.
[47] Ibid.
[48] See Art 16 para 2 of the Act on the Takeover of Joint Stock Companies, *OG* 109/2007, 36/2009.
[49] Gentelman's Agreement, pp. 10-11.

changes according to the 2009 Amendment to the Shareholders' Agreement[50] were related to the question of company management.
Under the new provisions on company management, MOL took over the dominance in the Management and the Supervisory Boards, although it was not a majority shareholder. At present, the Supervisory Board of INA consists of nine members (instead of seven members according to the 2003 Agreement), with five appointed by MOL, three by the Croatian Government, whilst employees are entitled to nominate one board member in accordance with applicable laws.[51] The management board structure has also been modified so that the Management Board of INA now consists of 6 members, three members appointed by the Croatian Government and three by the strategic partner.[52] While the right to appoint the President of the Supervisory Board has remained within the power of the Croatian Government, the strategic investor – MOL is entitled to nominate the President of the Management Board. It was also agreed that in the case of equal number of votes, the vote of the President of the Management Board is decisive.[53] Strangely enough, the amendments to the Agreement contain a new set of rules concerning executive directors and the company's Board of Executive Directors.[54] Under such rules, executive directors, including the Chief Executive Director, are appointed by the Management Board and they are responsible for the daily operation of each business unit and function

[50] Amendment to the Shareholders' Agreement was signed on 30 January 2009 between MOL Plc. and the Government of the Republic of Croatia together with the Gas Master Agreement, a frame contract for the separation and sale of gas storage and trading activities of INA together with agreements on long-term gas supply to the Croatian market. This contract, which had been confidential, was made public after the strong public and media pressure on November 10, 2009. It is also worth noticing that the pressure aroused after the former Prime Minister of Croatia dr. Ivo Sanader was suspected of selling the controlling rights to the MOL for 10 million $ after meeting a MOL CEO in a restaurant in Zagreb. It is expected that this affair will be brought to a trial, which is expected to start in early 2012. It will be interesting to see further development of the situation in this case and possible indictment as well to envisage consequences of possible conviction, especially in terms of termination of the Amendments of the Shareholders' Agreement if it stands in relation to the bribe that is being allegedly paid to the former prime minister.

[51] See amended Art 7 of the Amendment to the Shareholders' Agreement (hereinafter Amendment).

[52] See Art 7.2. of the Amendment.

[53] See Art 7.2.2. of the Amendment.

[54] See Art 7.5. of the Amendment.

(Corporate Services, Refining and Marketing, Finance, Retail etc.). It is also specified that executive directors will not be members of INA's Management Board.[55]

At the very end of the part of the Agreement that deals with the new management structure, it is stated that the contractual parties have agreed to review and consider the existing structure of corporate governance in order to increase the efficiency of the decision-making process, including, but not limited to the purpose of analysing the possibility for introducing the one-tier system of corporate governance after or even before the expiry of two years following the entry into force of the Amendments to the Agreement.[56]

Although a decision to turn to the one-tier system of corporate governance has never been brought, nor was it expressly fixed in the Amendments that the General Assembly meeting would be held with the purpose to change the corporate governance model, at first glance it seems obvious that a combination of the Anglo-Saxon one-tier system of corporate governance and the continental legal dualistic system was created, since in addition to the Management and Supervisory Boards, a new structure – a Board of Executive Directors – was also formed. Questions arise whether such a system is in accordance with law – i.e. the wording of CA, what are the crucial elements we need to examine in order to reach an answer and - if such combination really exists – what should be done to resolve such a strange situation.

2. A combination of one-tier and dual tier system – confusion or reality?

Having two different types of managing boards in a single company – a board of executive directors together with a managing board in a single company – signifies, to put it mildly, an unusual situation, especially taking into account the insofar known traditions of corporate governance practices. Company law theory (together with the examined legal provisions) clearly suggests that in the one-tier model only one management board exists and that it manages the company and sets the foundations for carrying out the business activities.[57] Contrarily, when it

[55] These facts can be easily checked on the INA web page, in the subpage of corporate governance where the list and names of all the members of the boards are listed, http://www.ina.hr/default.aspx?id=1857.

[56] See Art 7.6. of the Amendment.

[57] Jungmann, op. cit. n. 22.

comes to INA, it is self-evident that besides the supervisory board there are two boards responsible for carrying out business activities – the Management Board and the Board of Executive Directors. Still, a deeper analysis indicates that the problem in question may be analysed from two essentially opposite perspectives.

The first perspective relates to the fact that CA allows the issuing of the so-called commercial power of attorney, which is essentially an instrument in writing by which a company's management may appoint one or more of its employees to operate certain parts of the company's day-to-day businesses. When appointed, agents may enter into contracts and do other things as necessary and usual when running a part of company business. However, CA limits the powers that may be granted with a commercial power of attorney in such manner that an agent will require special authorizations to sell property, borrow money, to promise or enter into a contract, to answer for debt, to sue and represent the company before courts, etc.[58] The available information suggests that the appointed executive directors in INA run certain types of company business – finance, retail, exploration and production, marketing and similar. At the same time, it is evident from an excerpt from the Court Register that executive directors are not registered in the court registry, although a clear requirement of CA exists, setting an obligation for the executive directors to file for registration at the Court Register in the same manner as it prescribes such obligation for members of company management board in the two-tier system.

Does this mean that INA in reality does not have a board of executive directors but a board composed of company employees with commercial powers of attorney, people authorized to manage day-to-day business of the company on the basis of previously issued authorizations? The fact is that the Shareholders' Agreement does not regulate the competences of the Executive Committee in detail, but articulates only that executive directors would be responsible for daily operation of each business unit; neither executive directors nor their competences are mentioned in the Articles of Association, as amended in June 2009.[59] Everything that has been said so far deepens the doubts of what is the legal position of the INA's Executive Board at the moment. Sure enough, the fact that INA has a Board of Executive Directors in addition to the regular Management and Supervisory Boards leads to confusion all those who

[58] Arts 55 and 56 of CA.

[59] See Articles of Association of INA d.d., consolidated version, Zagreb, 2009.

potentially want to cooperate and enter into business with this respectable and powerful oil company.

The problem of the compliance of INA's corporate governance structure with the Croatian legislation had its mention in some media as well. As reported this year, two diverging legal opinions were issued. According to the announcement from INA's website,[60] INA's Management Board had sought an independent legal opinion from a law firm based in Zagreb which confirmed that the structure of corporate governance and the appointment of executive directors were in line with the wording of the Croatian legislation. On the contrary, conclusions given in the analyses of another law firm, which was commissioned by the Croatian part of the Supervisory Board of INA, state that the Board of Executive Directors may not manage the company business instead of the Management Board, particularly if an internal document called 'the list of the responsibilities and decision making' is taken into account. According to the statement of the President of the INA Supervisory Board, the first law firm, which ruled in favour of the management controlled by the Hungarian owner, did not have at its disposal the aforementioned document when drafting its legal study. He continued: 'The list of the responsibilities and decision making presents a document that is below the level of the Shareholders' Agreement, but at the same time that is the document which actually regulates the management of the company. Without this material, the first law firm was not able to make a complete analysis of the compliance of the management model to the Croatian law.'[61]

The truth is that a full assessment of INA's model of corporate governance is not an easy task to do, especially if we take into account that the vast majority of INA's internal documentation as well as the diverging legal opinions have never been made public. In such circumstances, the only analysis that can be made is the one based on a systematic examination of the available documents: CA, the Amendments to the Shareholders' Agreement and the Articles of Association of INA.

The provisions of the Articles of Association clearly answer the question of who is authorized to conduct the company business - the

[60] http://www.ina.hr/default.aspx?id=3835.

[61] See daily newspaper *Vjesnik* dated May 15, 2011, Štern, *Inom treba upravljati Uprava, a ne izvršni direktori* [Ina has to be handled by the Management, not by the Board of Executive Directors].

Management Board manages the business. It is authorized and responsible to take all actions and to issue resolutions necessary for the successful management of the Company within the limitations of the law and the Articles of Association.[62] Granting the power of attorney is also regulated in the Articles of Association; the Management Board may, with the consent of the Supervisory Board, grant a power of attorney to one or more persons.[63] However, Art 19 of the Articles of Association deals with *prokura* (procuration), a type of power of attorney different than the commercial power of attorney since it implies a wider range of powers than the latter.[64] If proper analogy is applied, it would be hard to find the reason against the possibility to appoint a certain group of people to perform certain types of daily operations on the basis of commercial power of attorney, even without a special consent of the Supervisory Board since essentially these are two different instruments. In any case, if members of INA's Executive Board operate on the basis of a commercial power of attorney, their powers should clearly distinguish from the powers of the Management Board and remain within the limits that CA sets for the instrument called commercial power of attorney. If, by chance, the managerial functions of the Management Board and Executive Board and its directors overlap, for example if executive directors are entrusted not only with the management of daily affairs within their sector of business, but also with the responsibility to decide on the company strategy and with setting the foundations for carrying out business activities, then it is apparent that the structure in question shows elements of both systems of corporate governance. In that case, executive directors are responsible for the business usually done by the Management Board in the two-tier model, while the Management Board performs the function of supervision, which is entrusted to the regular supervisory board. To the contrary, if managerial power is vested in the Management Board, e.g., by the Articles of Association, it has to be possible to clearly distinguish between the functions of management and supervision, even if a special

[62] See Art 11 of the Articles of Association of INA (consolidated version, 2009). It is continued in the same article that the Management Board is authorized to adopt a set of Rules of Procedure on the manner in which the Management Board is to manage the company. These rules may be passed only with prior approval of the Supervisory Board.
[63] Art 19 of the Articles of Association.
[64] Arts 44-55 of CA.

committee of agents appointed for daily operations is formed, no matter what the name of the committee in question. Yet, it is obvious that formulations such as 'Executive Board', 'Executive Board of Executive Directors', 'Executive Director(s)' lead to confusion, particularly if the blurry provision of Art 7.6 of the Amendments about the need to increase the efficiency of the decision-making process *via* one-tier system of corporate governance is taken into account. Now, when CA clearly distinguishes between the two systems of corporate management, the term 'executive director(s)' may be used only in the sense provided by the law. Keeping this term in use along with the two-tier model of corporate governance may lead to confusion and result in the possibility of false representation. But an answer to the question what would be the sanction for keeping these terms functional cannot be found in the text of CA. It seems rather that the solution of this question lies not within the extent to which the CA is enforced, but within the specific case of possible misrepresentation.

III. Concluding remarks

The primary aim of this paper was to explain the theoretical background and structural differences between the two main types of corporate governance models – one-tier and two-tier board systems. While the one-tier system presents a form of board structure characterized by one single board comprising both executive and non-executive directors, the two-tier system consists of a supervisory board and management board where there is a clear separation between the functions of supervision and management. So, which is the right model? As yet, there is no right answer. In spite of the globalization and the EU model of approximation of the laws, corporate governance patterns continue to differ because business practices, patterns of ownership, business customs, labour laws, etc. in the countries concerned are not uniform. The fact remains that good corporate governance practices require more than just effective board structures.

In the follow-up to the political changes of the early 1990s, both Hungarian and Croatian legislators decided to follow the framework of the German company law where two-tier governance system is mandatory for joint stock companies. Later on, in 2006 and 2007, a more modern approach was introduced in Hungary and Croatia in order to allow shareholders to choose between the two systems, depending on their preferences.

The fact that practice does not always go hand in hand with theory has its actualization in the case study of INA, Croatia's oil and gas exploration and production company owned mostly by the Hungarian oil company MOL Rt and the Republic of Croatia. Although a brief look at the system of corporate governance in INA shows elements of both one-tier and dual-tier systems, a deeper research suggests that the existence of a supervisory board and a management board together with the board of executive directors may be in accordance with law if strict separation of supervision and management exists and if the management is ultimately responsible for managing the company's business. If the latter is the case, the problem that nevertheless remains concerns the use of adequate terminology in the sense of board naming, in order to eliminate the possibility of confusion and misrepresentation, especially against third parties.

Citizens and human rights

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Effects of Directive 24/2011/EU on the application of patients' rights in cross-border healthcare and its implementation in Croatian law

1. Introduction

Freedom to provide services represents one of the four fundamental freedoms granted by the Treaty on the Functioning of the European Union[1] (hereinafter: TFEU), provisions of secondary legislation, Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market[2] (hereinafter: the Services Directive) and by the European Court of Justice case law.[3]

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[1] Treaty of Lisbon amending the Treaty on the European Union and the Treaty Establishing the European Community, *OJ* C 306 of 17 December 2007, for the consolidated version thereof see Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ* C 115 of 9 May 2008. Article 56 of the TEU (ex Article 49 of the TFEU) stipulates that freedom to provide services refers to the right of Member State citizens and of legal entities having the seat in a Member State to, within the EU, provide persons from other Member States with services under the same conditions as their fellow citizens do. Article 57 (ex Article 50 of the TFEU) sets out that services shall be considered to be 'services' if they are, in the principle, provided for remuneration and if they are not subject to regulations referring to freedom of movement of goods, capital and persons. This particularly relates to activities of an industrial and a commercial character, activities of craftsmen and self-employment.

[2] Directive 2006/123/EC of the European Parliament and of the Council of 12 December2006 on services in the internal market, *OJ* L 376/36 of 27 December 2006. Such services are subject to numerous other regulations such as Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, *OJ* L 255/22 of 30 September 2005, and many others.

[3] Various judgements of the European Court have included the issue of differentiating between freedom to provide services and other economic freedoms (e.g., judgement in case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 regards company establishment,

In order to deem a particular situation involving freedom to provide services as a situation comprised by the scope of EU law, the following three criteria shall be met: there must be a service defined by the TFEU, there must be substantial restriction of free movement of services and at least two Member States have to be included in the situation, i.e. there must be 'cross-borderness'.[4] Also, the respective service must be chargeable and it has to be provided occasionally and on a temporary basis.

Freedom to provide medical services is an integral part of freedom to provide services granted by Article 56 and 57 of the TFEU, which has been acknowledged in a number of judgments of the European Court of Justice.[5] Due to their special status and character, healthcare services differ from other services, particularly with regard to the significance of healthcare within national policies of Member States and to competences of Member States in the field of their regulation.

This paper offers analysis of freedom to provide healthcare services granted by the TFEU, new Directive 2011/24/EU on the application of patients' rights in cross-border healthcare[6] (hereinafter: The Patients' Rights Directive) and the practice of the European Court of Justice[7] which serves as a basis for the Patients' Rights Directive. Freedom to provide services in the field of healthcare has effect on other freedoms

judgement in case C-155/73 *Giuseppe Sacchi* [1974] ECR 409 regards free movement of goods etc.) and the issue of the economic character of a service.

[4] T. Ćapeta and S. Rodin, *Osnove prava Europske unije* [Basics of EU Law] (Zagreb, Narodne novine 2011) p. 70

[5] Judgement in case C-158/96 *Kohll* [1998] ECR I-1931; C-70/95 *Sodemare* [1997] ECR I-3395 and others.

[6] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, *OJ* L88/45 of 4 April 2011.

[7] Judgments in cases C-120/95 *Nicolas Decker v Caisse de maladie desemployés privés (Decker)* [1998]; case C-158/96 *Raymond Kohll v Union des caisses de maladie* ECR I-1931; case C-368/98 *Abdon Vanbraekel et al. v Alliance nationale des mutualités chrétiennes (Vanbraekel)* [2001] ECR I-5363; case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen (Smits and Peerbooms)* [2001] ECR I-5473; case C-372/04 *The Queen, ex parte Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325; case C-286/06 *Commission v Spain* [2008] ECR I-8025; case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* of 5 October 2010, ECR I-0000, *OJ* C 328 of 4 December 2011.

as well and on some special areas such as freedom of movement for workers and members of their families. Moreover, this freedom has a direct influence on social rights considering the importance of the patients' rights to be provided with healthcare services in another Member State under the same conditions as in their own state and of the right to be refunded treatment costs by the national health insurance system. The key issue with respect to freedom to provide healthcare services refers to the transparency of procedures for getting authorization for medical treatment in another Member State as a prerequisite for reimbursement for treatment-related costs and to harmonization of administrative procedures concerning the accession of the Republic of Croatia to the European Union in 2013.

2. Freedom to provide healthcare services within EU law

Member States are liable for setting out their healthcare policies and for organization and providing health services and medical care.[8] Healthcare is extremely important and has effect on all citizens either directly in the form of medical treatment or indirectly through taxation and cost reimbursement.[9] The principle of the individual possibility of cross-border choice, which is based on fundamental economic freedoms, is actually in contradiction with the principle of solidarity defining national healthcare systems in the European Union. Based on its numerous judgements, the European Court has developed a concept of freedom to provide healthcare services. This concept has been shaped pursuant to interpretation and application of Regulation 1408/71 on the application of social security schemes to employed persons and members of their families[10] (hereinafter: Regulation 1408/71) amended by Regulation 883/2004[11] and Regulation 987/2009.[12] The latter lays

[8] Provisions of Art 168 para 7 of the TFEU.

[9] T. Sokol, 'Rindal and Elchinov: A(n) (impending) revolution in EU Law on patient mobility?', 6 *CYELP* (2010) p. 167.

[10] Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] *OJ* L149/2.

[11] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] *OJ* L 166/1.

[12] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) *OJ* L 284, 30.10.2009, p. 1-42.

down the procedures for implementation of Regulation 883/2004. These Regulations are aimed at coordination of social security systems pursuant to conflict-of-laws rules. Since in practice, the EU principle catering for individual choice of cross-border healthcare basically opposes the principle of solidarity being a prerequisite for establishment of Member State healthcare systems, one needs a regulation to resolve this conflict. This task is performed by Regulation 1408/71 and Regulation 883/2004, interpretation of which leads to numerous conflicts between the European Court practice broadening cross-border rights and the rights of Member States to protect national competences in the area of social security.[13] This is the reason why the rules regulating the right to compensation for the costs of cross-border medical treatment have emerged pursuant to the European Court practice.

In this context, the references suggest that the European Court interpretation of the rules for protection of the fundamental freedoms granted by the TFEU is contrary to the efforts of Member States to organize their healthcare systems in compliance with their national policies.[14]

These are the most current issues in this field, resolution of which is expected within the framework of application of the provisions on freedom to provide medical services.[15] In accordance with the aforementioned lines, one can ascertain that the rules defining freedom to provide and use medical services and regulating reimbursement for the costs of such are still blur. In the light thereof, the European Court has in every case assumed a posture concerning the relation between various healthcare systems and fundamental economic freedoms, particularly with respect to the rules regulating prior authorization for

[13] For more details see J-P. Lhernould, 'New rules on conflicts: Regulations 883/2004 and 987/2009', *ERA forum* (2011) 12, 25-38, 4 February 2011.

[14] T. Sokol, op. cit. n. 9, at p.168; A. Morton, 'A Single European Market in Healthcare: The impact of European Union policy on national healthcare provision', 3 *European Public Service Briefings* (2011) available at www.european-services-strategy.org.uk, V. Hatzopoulos, 'Killing national health and insurance systems but healing patients? The European Market for Health Care Services after the Judgements of the ECJ in Vanbraekel and Peerboom', 39 *CMLRev* (2002) p. 684, I. Goldner Lang, 'Patient Mobility in the European Union', 28 *Medicine and Law* (2009) 4; p. 665.

[15] http://www.imtj.com/news/?EntryId82=270809.

cross-border medical treatment.[16] Many Member States have though criticized such an attitude of the European Court for unjustified 'europeisation' of healthcare systems. This actually means that the possibility of healthcare choice is governed in Europe by economic and not social goals despite the fact that healthcare and social security systems are guided by social goals.[17] Perhaps that is why some authors[18] share the opinion that in this area, the European Court practice has most probably contributed to legal insecurity and the principle of solidarity and financial sustainability of national healthcare systems and that it is the practice of the European Court that sets the boundaries of the internal market, i.e. how far this court can go in terms of interpretation of the rules for regulating the internal market, particularly regarding areas not covered by any law and beyond EU competences.[19]

After the judgment in the case of *Kohll,*[20] the European Court practice expanded the scope of the fundamental right to freely provide and receive services in the up-to-then traditional area of healthcare, precisely in situations when people cross borders for getting healthcare services or medical treatment.[21] In authors' words,[22] the judgement generated concern for social and health insurance funds since the European Court broadened, accepting the opinion of advocate general Tesauro, application of Article 49 of the TEU (now Article 56 of the TFEU) to healthcare services even if they are provided within the scope of social security. That way, the judgement has indirectly 'weakened' the right of Member States to independently organize their healthcare systems and allowed the rules for free movement[23] to use 'the back door' to enter the field of healthcare as specified in the judgement in the case of *Decker*.[24]

In this area, the European Court practice frequently overlaps with the right of Member States to independently organize their social security systems on one side and with the right to freely provide services as a fundamental economic freedom granted by Article 56 of the TFEU on

[16] Morton, op. cit. n. 14, at p. 7.
[17] Ibid.
[18] Goldner Lang, op. cit. n. 14, at p. 5.
[19] Hatzopoulos, op. cit. n. 4, at p. 684.
[20] Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931.
[21] Sokol, op. cit. n. 9, at p. 168.
[22] Hatzopoulos, op. cit. n. 4, at p. 688.
[23] Goldner Lang, op. cit. 14, at p. 5.
[24] Judgement in case C-120/95 *Decker* [1998] ECR I-1831.

the other side, taking account of the fact that social systems of Member States are organized in different ways.[25] Nevertheless, being based on Article 56 of the TFEU, this kind of approach, which is characterized by non-harmonized restrictions of free movement between Member States, might bring to restrictions for both service providers and service users and to double restrictions which are contrary to freedom to provide services. The Patients' Right Directive was adopted as a solution for this problem and it partially regulates possible action in this sphere and gives space to various ways of its implementation into national legislation[26]. It also singles out numerous procedural issues appearing when respective rules are applied and coordinated by administrative bodies and stresses the need for transparency and a precise definition of the rules for reimbursement for medical treatment costs, i.e. authorization procedures for medical treatment in another Member State.

In terms of freedom to provide healthcare services, the emphasis is here put on studying patients' social rights at a national level. This reflects in the right of patients to be provided with a medical service abroad under the same conditions as in their own state. The consequences of freedom to provide services in the field of healthcare interfere with other specific areas such as freedom of movement for workers and members of their

[25] The references differentiate between two basic types into which public healthcare systems can be classified. These are national health services and social insurance systems. National health services are funded by public taxation and based on privileges (Such systems exist in the UK, Ireland, Portugal, Spain, Italy, Denmark, Sweden and Finland). National health service systems are also called Beveridge systems. Social insurance systems lean on mandatory insurance of various categories of insured persons and comprise the entire population. Contributions in these systems are in most cases related to salaries (Such systems characterize Belgium, Luxembourg, the Netherlands, Germany, France and central and eastern European countries. Social insurance systems are also called Bismarck systems. See in Morton, op. cit. n. 14; T.K. Hervey, and J. V. McHale, *Health Law and the European Union* (Cambridge University Press 2004) p. 21; H.J. Meyer, 'Current legislation on cross-border healthcare in the European Union', presentation at a conference entitled 'The globalization of health care: legal and ethical challenges', 21 May 2011, Harvard Law school p. 2.

[26] On the modes of implementation of the Services Directive see H. Horak and K. Dumančić, 'Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou' [Issues of Implementation of the Directive on Services into Croatian Law – giving up on the social model at the national level], vol. 32, no. 2 *Digest of the Faculty of Law of Rijeka* (2011),

families.[27] Accordingly, it comes to the issue of social rights with respect to workers' needs for healthcare in another Member State.

Internationalization and globalization, and free movement of workers, capital, services and goods lead to new controversies in the field of freedom to provide medical services, e.g. the issue of upper limits of reimbursement for the costs of cross-border medical treatment by national healthcare systems and the issue of free market competition regards foreign service providers.

The European Court has already dealt with cases referring to the patients' needs for using healthcare services abroad, thereat facilitating cross-border patient mobility. The issue of cost refund within social and health insurance systems of Member States has not been part of the decision-making process and neither has been the right of patients to be medically treated abroad. Appertaining payments have also been excluded from the judgements. What has been included in the court decisions is freedom to provide services stipulated by Article 56 of the TFEU and the terms and conditions of Regulation 1408/71 prescribing the conditions for refund of costs of healthcare services abroad if patients are obliged to use respective medical services in their own country.[28] The refund may refer either to the cost of a particular medical service in the patient's Member State of affiliation[29] (if Article 56 of the TFEU is applied) or to the cost of the same healthcare service in the member state of treatment[30] (if refund is based on Regulation 1408/71). If reimbursement settled pursuant to Regulation 1408/71 is lower than that specified in accordance with Article 56 of the TFEU, one is allowed

[27] Regarding possible solutions, one needs to consider the importance of the system of harmonization of laws through various procedures such as the procedure for utilization of open coordination methods. More about open methods of coordination see N. Bodiroga-Vukobrat, G. G. Sander and S. Barić, eds., *Open method of coordination in the European Union, Schriften zum Sozial-, Umwelt- und Gesundheits recht*, (Verlag Dr. Kovač 2010) Band 1, pp. 11-346.

[28] L. Hancher and W. Sauter, 'One foot in the grave or one step beyond? From Sodemare to DocMorris: the EU´s freedom of establishment case law concerning healthcare', *TILEC Discussion Paper*, DP 2009-028 (2009) p. 16.

[29] Paras 8, 33 and 34 of the Patients' Rights Directive Preamble. For definiton of the member state of affiliation see Article 3(c) of the Patients' Rights Directive.

[30] Paras 19, 20 and 23 of the Patients' Rights Directive Preamble. For definition of the member state of treatment see Article 3(d) of the Patients' Rights Directive.

to request compensation for the difference in compliance with the same Article.[31]

As far as the refund settlement period is concerned, the refund is, in the principle, received after the right to use a healthcare service abroad has been confirmed in the patients' Member State of affiliation since Regulation 1408/71 prescribes mandatory issue of prior authorization regardless if it comes to inpatient or outpatient care.

One can draw a conclusion that the European Court practice in the sector of healthcare is connected with existence of the right to reimbursement for the costs of provided healthcare services in a Member State other than the patient's member state of affiliation. Urged by public interest-related reasons, the Court has sustained restrictions[32] of settlement of reimbursement for the costs of provided healthcare treatment abroad under the condition that these reasons have been objective and proportional with the rules for award of prior authorization, particularly taking account of the duration of a time period necessary for prior authorization with respect to the condition of every single patient.[33]

3. Specificities of freedom to provide healthcare services

Freedom to provide healthcare services involves the patients' right to use healthcare services in another Member State. This right also encompasses restrictions which may be imposed by a Member State in case of cross-border healthcare services and financial compensation for such services. The grounds for the compensation refer to the right of patients to be refunded costs which would have been covered if the service had been provided in the patients' member state of affiliation. This principle favours the internal market.

In its practice, the European Court has recognized the right of Member States to determine the scope and justification of social security rights at a national level. The right to compensation for medical treatment costs incurred in a Member State other than the insured person's country by the social security system of the latter has been acknowledged in a

[31] Hancher and Sauter, op. cit. n. 28, at p. 16.

[32] Member States can justify the restrictions by setting forth important public interest-related reasons such as maintaining the financial balance of their social security systems and planning of hospital affairs.

[33] Hancher and Sauter, op. cit. n. 28, at p.16.

number of judgements of the European Court.[34] These judgements encouraged the Court to develop a concept of freedom to provide healthcare services by applying the parallel regime of freedom to provide healthcare services granted by the provisions of the TFEU and by Regulations 1408/71 and 883/2004. In most cases, patients have received sooner and better medical treatment in another Member State, on the occasion of which they requested refund of the treatment costs in accordance with the regulations governing social security systems in the patients' member state of affiliation.[35]

As stated in the above lines, the European Court practice has confirmed that healthcare services are covered by the scope of Article 56 of the TFEU and that the right to provide cross-border services encompasses the patients' right to go to a foreign country to get the needed service[36] and the right to provide services abroad. For instance, the judgement in the case of *Kohll* included the free movement rules (this basically refers to freedom to provide and receive medical services) and their application irrespective of harmonization of national measures with the European legislation, precisely with Article 22 of Regulation 1408/71, since these provisions are aimed at enabling insured persons to use, following a given authorization, a healthcare service in another Member State, accompanied with the right to claim reimbursement for the costs of received healthcare service in the amount corresponding to the service cost in the country where the service was provided. It is forbidden to restrain freedom to provide medical services among

[34] Judgements in case C-120/95 *Nicolas Decker v Caisse de maladie desemployés privés (Decker)* [1998]; case C-158/96 *Raymond Kohll v Union des caisses de maladie* ECR I-1931; case C-368/98 *Abdon Vanbraekel et al. v Alliance nationale des mutualités chrétiennes (Vanbraekel)* [2001] ECR I-5363; case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen (Smits and Peerbooms)* [2001] ECR I-5473; case C-372/04 *The Queen, ex parte Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325; case C-286/06 *Commission v Spain* [2008] ECR I-8025; case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* of 5 October 2010, ECR I-0000, *OJ* C 328 of 4 December 2010.

[35] Notably, judgements in the cases of *Kohll, Vanbraekel, Geraets-Smits and Peerbooms*, judgement in case C-145/03 *Keller* [2005] ECR i-2529; *Watts; Elchinov* et al.

[36] See paragraph 20 of the judgment in the case of Kohll stating that 'the specific nature of particular services does not make them immune to the fundamental principle of free movement'.

Member States since it can make a healthcare service harder to get than within the healthcare system of a Member State. The thesis that freedom to provide healthcare services belongs to the scope of Article 56 of the TFEU has been acknowledged in a number of judgements of the European Court (*Decker, Vanbraekel, Geraets-Smits and Peerbooms* and others). In terms of differentiating between hospital and non-hospital care in the case of *Vanbreakel,* it was established that freedom to provide medical services refers to both hospital and non-hospital treatment.[37]

The particular issue of coverage of the difference in costs of a healthcare service between the country where the patient is insured and the country where the healthcare service was provided, which is to be faced when specifying the amount of reimbursement for medical treatment costs, also appeared in the case of *Vanbraekel*. If the price of a healthcare service in the patient's Member State is lower than in the Member State where the treatment was provided, then one needs to ensure additional compensation to cover the difference in the price. In the case of *Vanbraekel,* the European Court asserted that Article 22 of Regulation 1408/71 is founded on the principle that the costs of medical treatment born by the patient shall be refunded in compliance with the rates applicable in the country where the treatment was performed. The reimbursement in the case of *Vanbraekel,* which was prescribed by the French legislation, was lower than that foreseen by Belgian law, i.e. the country where the service was provided. The Court laid down that the intention of Article 22 of Regulation 1408/71 is not specification of the reimbursement amount and does not prevent compensation for costs by the patients´ member state of affiliation. However, if patients are not compensated for the incurred costs of medical treatment to the same extent as they would be compensated if the same treatment had taken place in the country where they are insured, then such a situation shall be considered as restriction of freedom to provide services stipulated by Article 56 of the TFEU.[38] If the amount of reimbursement calculated according to the respective rules of the country where the treatment was conducted is higher than the amount of reimbursement calculated pursuant to the respective rules of the country where the patient is

[37] Para 41 of the judgement in the case of Vanbraekel.
[38] Para 45 of the judgement in the case of Vanbraekel.

insured, the health insurance fund is obliged to cover the difference in the reimbursement.[39]

The judgement of the European Court in the aggregated cases of *Geraets-Smits* and *Peerbooms* was derived from the decision on the patient's right to reimbursement for the costs of healthcare treatment which was provided outside the Netherlands. In both cases, the national court refused to give consent for hospital care abroad, referring to the fact that the care was neither common nor necessary. The prerequisite for prior authorization for the care was to deem it in both cases common and necessary by competent national doctors, i.e. that it can be provided within the national healthcare system within a reasonable period of time.[40] In the Netherlands, foreign healthcare is part of the insurance system, pursuant to which insured persons are obliged to make nominal payments to providers of public services (funded by contributions of workers and state funds) as to be provided with free healthcare by contractors of these providers (the contractors are exclusively situated in the Netherlands). The authorization system for medical treatment abroad foresaw meeting two requirements. The first one was to consider treatment as 'common (ordinary)' by Dutch professional circles and as

[39] Para 67 of the judgement in the case of Vanbraekel.

[40] In the case of Geraets Smits and Peerbooms, the European Court was to make a decision on patients who were Dutch citizens and claimed reimbursement for the expenses of medical treatment provided in Germany and Austria from the Dutch health insurance fund. Mrs Geraets Smits was administered a multidisciplinary therapy for Parkinson's disease in a German hospital. Regulations of the Dutch health insurance fund would have approved of reimbursement for the costs only if the treatment had been completed in compliance with 'the common procedure for medical treatment', which actually entailed mandatory treatment in the Netherlands. The therapy applied to Mrs Geraets Smits was not deemed as common and thus the request was rejected. The decline of the request also resulted from the fact that an appropriate therapy for Parkinson's disease was available in Holland as well and that there was no 'medical necessity' for treatment in Germany. Mr Peerbooms, aged 35 at that time, fell into a coma after a car accident and was transferred from a Dutch hospital where he was initially treated to a clinic in Austria. In the latter centre, he was administered a special intensive therapy based on neurostimulation. This kind of therapy was used only on an experimental basis and was not available to patients over 25 years of age. Mr Peerbooms went for expense refund but the claim was declined due to the fact that he could have been provided with adequate medical treatment by a Dutch provider appointed by the Dutch health insurance fund based on an agreement. Moreover, the medical treatment provided in Austria was not considered 'common' by Dutch medical circles.

necessary in the sense that appropriate treatment could not be realized in the Netherlands without a major delay. The judgement confirmed the earlier viewpoints of the Court that freedom to provide services should be applied in case of inpatient (hospital) care too.

The recent practice of the European Court concerning the conditions for granting the right to reimbursement for the costs of foreign healthcare services makes a distinction between hospital and non-hospital care.[41] This distinction commenced with the judgement in the case of *Geraets-Smits* and *Peerbooms*.[42] The European Court practice has ascertained that the requirements for prior authorization for reimbursement for non-hospital care costs by the social security scheme of the patient's member state of affiliation is not justified. Unlike in terms of non-hospital care, the European Court does not exclude the possibility of prior authorization for reimbursement for the costs of foreign non-hospital care. In fact, when it comes to hospital care, just reasons for restriction of freedom to provide services may refer to the inability of prevention of the possible risk of serious disturbance of social security systems or to the inability to maintain balanced medical and hospital care available to all citizens, which can be seen as a public interest[43], and to the procedure of prior authorization for reimbursement for the costs of healthcare services provided abroad, which is not incompatible *per se* with freedom to provide healthcare services. Still, these conditions need to be justified and to correspond to what is objectively necessary for that purpose, suggesting that the same goal cannot be accomplished by less repressive measures (the principle of proportionality).[44]

[41] See in I. Goldner Lang and I. Vukorepa, *Izvješće o hrvatskom zakonodavstvu koje uređuje radno pravni status radnika migranata (iz Eu i trećih država), te pravima koja proizlaze iz njihovog radno pravnog statusa (njihovim socijalnim pravima) u odnosu na pravnu stečevinu EU* [Report on the Croatian Legislation Regulating the Legal Status of Migrant Workers (from the EU and Third Countries) and on the Rights Arising from Their Legal Status on the Labour Market (Their Social Rights) with Respect to the acquis of the EU] (Council of Europe, Coordination of Social Security Systems and the Reform of the Social Security System, October 2010) p. 11.

[42] Paras 79 and 80 of the judgement in the case of *Geraets Smits and Peerbooms*.

[43] Patients' Rights Directive makes no distinction between inpatient (hospital) and outpatient care.

[44] See judgements in the cases of Smits and Peerbooms, Műller Fauré and van Riet, Commission v France, Elchinov. For more details see in Goldner Lang and Vukorepa, op. cit. n. 41, at p. 11.

Justifications for restriction of freedom to provide healthcare services have been differently accepted in different periods by national legislation. In the beginning, there was a 'conservative' perception of freedom to provide healthcare services which allowed restriction of free movement aimed at using foreign healthcare services. The restriction was interpreted as a denial of the rights of entrepreneurs to use public funds from social security systems of Member States other than their own. By the time, this approach has been amended and now existence of measures intended for prevention of the fundamental freedoms granted by the Treaty or making their exercise less attractive is considered such a restriction. The grounds of the Court for the decision-making process in this context span the relation between the claims and rights of individual patients to use a service on one side and public claims and interests focused on financially sustainable healthcare on the other side.[45]

This and other sectors are more and more characterized by an economic approach,[46] preventing Member States from restriction of freedom to provide services by broad interpretation of the Treaty. Member States are supposed to enact their laws and resolutions in accordance with reasonable economic claims in the field of healthcare too. If the goal of creation of an internal market is to be achieved by shaping economic freedoms, then Member States shall meet economic criteria in the sphere of free movement.

Attempts of coordination of Member State healthcare policies encompass the adoption of the Patients' Rights Directive. The Directive has been tailored to cater for a unique and transparent framework for cross-border healthcare.[47] Considering the fact that the Directive mostly codificates the former judicial practice, it in fact facilitates harmonization of healthcare at the European level. The draft Directive has, in the principle, induced positive comments,[48] although some

[45] Goldner Lang and Vukorepa, op. cit. n. 41, at p. 32.

[46] N. Bodiroga Vukobrat and H. Horak, 'Cross border provisions of health services (freedom to provide services or health tourism?', *Economic integrations, competition and cooperation, Economic Faculty of the University of Rijeka* (Opatija 2009)

[47] Press releases (1 February 2012), text available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1080&format=HTML&aged=1&language=EN&guiLanguage=hr.

[48] See European Federation of Public Services Unions (EPSU), Press Communication-for immediate release, 18 January 2011, International Medical

Member States claimed that it basically legalizes ‘‘medical tourism’’, hence confronting their interests.[49]

4. Patients' Rights Directive

The Charter of Fundamental Rights of the European Union[50] lays down the following fundamental rights: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.[51]
Pursuant to Article 168 (1) of the TFEU, a high level of protection of human health shall be guaranteed when defining and implementing all the EU policies. The Patients' Rights Directive was adopted in order to improve the functioning of the internal market and the free movement of

Travel Journal: News (1 September 2011), available at epsu@epsu.org. Likewise, in the Republic of Croatia, in the interview published in Slobodna Dalmacija on 5 December 2011, Mirando Mrsić asserted that 'the Croatian Institute for Health Insurance rarely gives consent for reimbursement for the costs of medical treatment abroad. The consent is given only in cases when appropriate treatment is not available in Croatia. Croatian citizens who opt for healthcare services abroad due to a higher quality of medical treatment in foreign hospitals or reliance on skills of foreign doctors despite the possibility of undergoing adequate interventions in Croatia have to find the funds for their treatment themselves since the Croatian Institute for Health Insurance is not willing to bear the respective expenses. However, this situation should change in the year 2013 when the EU Directive on Cross-Border Healthcare becomes effective. The Directive prescribes that EU citizens are entitled to, if desired, use healthcare services in other Member States and that national social security systems, even if the treatment could be provided in the patient's country, shall cover the accompanying expenses up to the amount of the inland cost of the appertaining medical intervention. The greatest benefit from "healthcare without borders" will relate to Croatian patients suffering from rare diseases since they will have a chance to be treated in specialized centres throughout Europe. Healthcare without borders is a good idea, but its implementation might face some obstacles because health insurance schemes need to be harmonized as they differentiate between each other'. http://www.suprazdravlje.hr/clanak/616/165/ pogodnosti-za- hrvatske-pacijente-nakon-pristupanja-eu.

[49] National Health Service, Ludwig von Von Mises Institute, available at http://vonmisesinstitute-europe.org/newsite/index.php?option=com_frontpage&Itemid=1.

[50] *Charter of Fundamental Rights of the European Union* (2000/C 364/01) *OJ* C 364, 18 December 2000, pages 1-22.

[51] Charter of Fundamental Rights of the European Union, Art 35.

goods, persons and services. The provisions on free movement make an appropriate legal basis even when it comes to protection of public health as the decisive decision-making factor. Healthcare systems of Member States also constitute a wide framework for services of general interest.[52]

The area of healthcare services has been exempted from the scope of the Services Directive.[53] In accordance with its Article 3, the Services Directive shall not be applied in situations regulated by the provisions of Regulation 1408/71,[54] which excludes healthcare services from the scope of the former. The Draft of the Services Directive contained provisions on healthcare service or more precisely their character and modes of their funding and providing. The European Commission proposed the Patients' Rights Directive in 2008.[55] It happened before the adoption of the Services Directive. The Patients´ Right Directive[56] was adopted on 9 March 2011, having the implementation deadline of 25 October 2013. It regulates patients' rights in situations in which they have an opportunity to be provided healthcare in a Member State other than the state of their affiliation. Since its adoption, the Patients' Rights Directive has become the most important source of the right to cross-border healthcare for citizens of the European Union.

The legal regime of the Patients' Rights Directive is applied parallel with Regulation 1408/71[57] and Regulation 883/2004. As far as patients

[52] Paras 2 and 3 of the Patients' Rights Directive Preamble.

[53] Art 2 para 2(f) of the Directive on Services.

[54] Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, *OJ* L 149, 5 July 1971, page 2.

[55] Proposal for a Directive of the European Parliament and of the Council on the application of patients´ rights in cross-border healthcare COM(2008)414 final, 2 July 2008; available at http://ec.europa.eu/health/ph_overview/co_operation/ healthcare/ docs/COM_en.pdf.

[56] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L88/45 of 4 April 2011.

[57] For example, in compliance with Regulation 1408/71 and Regulation 883/2004, prior authorization of medical treatment abroad as a prerequisite for reimbursement for the expenses of both inpatient and outpatient care is always required. Pursuant to Article 56 of the TFEU, prior authorization, which in fact represents an obstacle to freedom to provide services, cannot be required in terms of outpatient care but only when it comes to hospital care. This restriction is deemed as valid following the necessity of maintenance of the financial balance of national healthcare systems and

are concerned, these two systems must be coherent, so that patients are subject to either the provisions of the Patients' Rights Directive or the Regulation of the European legislation referring to coordination of social security systems.[58]

Paragraph 28 of the Preamble of the Patients' Rights Directive does not comprise situations protecting the right of insured persons to reimbursement for the costs of healthcare which was medically necessary during the temporary stay in another Member State. Such situations are covered by Regulation 883/2004. Also, the provisions of the Patients' Rights Directive have no effect on the right of insured persons to be awarded authorization for healthcare in another Member State if the requirements foreseen by regulations on coordination of social security systems have been met, particularly Regulation 883/2004 or Regulation 1408/71 being applied based on Regulation 1231/2010 and Regulation 987/2009.

The aim of the Patients' Rights Directive is establishment of rules which should facilitate an access to safe and high quality cross-border healthcare in order to ensure patient mobility based on the principles established by the European Court and to promote cooperation between Member States in providing healthcare while respecting their responsibility for defining social security benefits relating to health and for organization and delivery of medical care and healthcare, and social security benefits, particularly in case of sickness.[59]

The Directive on Patients' Rights should also offer a clear portrait of their right to reimbursement for the expenses of medical care provided in a Member State other than the state of their affiliation and ensure necessary conditions for high quality, safe and efficient healthcare founded on common principles of all EU healthcare systems as well as provide for a specific framework for cross-border healthcare and for European cooperation in this field.

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planning in the hospital care sector. What is imposing is the conclusion that concerning authorization of medical treatment in a foreign country, Regulation 1408/71 always presupposes prior authorization while Article 56 of the TFEU governs that Member States are allowed, but are not bound to, to prescribe prior authorization for hospital care but never for outpatient care. Hence in Saulter, W.: 'The proposed patient mobility Directive and the reform of cross-border healthcare in the EU', TILEC discussion paper (2008) http://ssrn.com/abstract=1277110 p. 29.

[58] Para 30 of the Patients' Rights Directive Preamble.

[59] Para 10 of the Patients' Rights Directive Preamble.

The Patients' Rights Directive is applicable to individual patients who receive for healthcare treatment in a Member State other than the state of their affiliation.[60] The member state of affiliation means, from the perspective of insured persons, the Member State which is in competent to grant a prior authorization for healthcare treatment to be provided outside the state where the patient resides pursuant to Regulation 883/2004 and Regulation 987/2009, i.e. the Member State which is expected to grant prior authorization to patients for healthcare in another Member State according to Regulation 59/2003 or Regulation 1231/2010. If none of the Member States finds itself competent for such a procedure according to these Regulations, the Member State of affiliation shall be the Member State where the patient is insured or has the right to sickness benefits according to the legislation of that member state.[61]

In terms of telemedicine[62] and therewith related medical services in a foreign country, the Member State where a healthcare service is provided shall be the Member State where the provider has its seat.[63]

The modes of expense refund by a Member State governed by the Patients' Right Directive are founded on the European Court of Justice case law. However, as the European Court has made judgements in individual cases, the Directive intends to establish general principles and their effective application.[64] The manner of expense reimbursement regarding cross-border healthcare set out by the Patients' Rights Directive is applicable not only in cases when patients are treated in a Member State other than the Member State of their affiliation but also in situations comprising prescriptions, allocation and supply of medical products and devices that are utilized in the context of healthcare

[60] Para 11 of the Patients' Rights Directive Preamble.

[61] Art 3(c) of the Patients' Rights Directive.

[62] Ordinance on the Conditions, Organization and Modes of Conducting Telemedicine (*Official Gazette* no. 138/11) lays down the conditions, organization and modes of conducting telemedicine and the conditions for getting authorization for opening a tele-medical centre. Article 2 of this Ordinance defines telemedicine as providing remote healthcare services by application of information and communication technologies. Telemedicine encompasses medical consulting, preventive medicine and diagnostic and therapeutic procedures based on data provided by an IT and communication system and exchange of information aimed at continuous vocational training of staff.

[63] Art 3 (d) of the Patients' Rights Directive.

[64] Para 8 of the Patients' Rights Directive Preamble.

services. The definition of cross-border healthcare should refer to situations in which patients purchase medical products and devices in a Member State other than the Member State of their affiliation as well as to situations in which patients purchase medical products and devices in a Member State other than the Member State where the prescription was issued.[65] Nevertheless, the Directive on Patients' Rights does not concern the rules of Member States for online sale of medical products and devices.[66]

As far as possible restrictions of freedom to provide cross-border healthcare are concerned, the Patients' Rights Directive takes, following the case law of the European Court, relevant public interest-related reasons into consideration in case the provisions of Article 49 and 56 of TFEU are to be applied.[67]

[65] Para 16 of the Patients' Rights Directive Preamble.

[66] Para 17 of the Patients' Rights Directive Preamble. This provision of the Patients' Rights Directive is based on the European Court practice acknowledged in the judgement in case C-108/09 Ker Optica of 2 December 2010, *OJ* C 30, 29 January 2011 since online sale of such products is subject to the provisions of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, *OJ* L 109/29 of 6 May2000 (the so-called 'E-commerce Directive'). The case of Ker Optika required the European Court to decide on the Hungarian laws allowing sale of contact lenses exclusively in specialized stores and thus prohibiting their online sale. The European Court points out, that decisions on online sale of medical products encompass two starting points. The Court explains the scope of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, *OJ* L 109/29 of 6 May 2000. (the so-called 'E-commerce Directive') relating to Hungarian law: the provisions of this Directive does not exclude online sale of medical products. However, the national regulations governing manners of supplying end users with medical devices (for instance, only after a trial period) are not comprised by the E-commerce Directive, so they are not subject to the rules stipulated thereby. These regulations shall be taken account of within the framework of European law relating to free movement of goods. Considering the fact that online sale of medical products is included in the E-commerce Directive, the European Court judged that such a sale cannot be banned even if appertaining prior authorization given by a qualified expert is required since the test cannot be detached from the future online sale. Hence, the Court has ascertained that sale of medical products and devices are covered by the E-commerce Directive.

[67] Para 12 of the Directive Preamble lays down that judgements of the European Court have confirmed several times that important public interest-related reasons represent proper justification for restriction of freedom to provide services. These

The Patients' Rights Directive is not applicable to services, the purpose of which is long-term care of people which means support people in need of assistance in carrying out routine, everyday tasks, providing them with assistance in satisfying their everyday's needs. This particularly refers to assistance in making those people capable of independent living such as long-lasting assistance in doing housework or helping people situated in nursing homes and similar institutions.[68] The Directive is not intended for services related to allocation of and access to organs for the purpose of transplantation.[69] Except when it comes to cooperation between Member States foreseen in its Chapter IV, the Directive shall not apply to public vaccination programmes against infectious diseases which are exclusively aimed at protecting the health of the population on the territory on one Member State and which are subject to specific planning and implementation measures.[70]
The provisions of the Directive do not affect laws and other regulations in Member States referring to organization and financing of cross-border healthcare. In particular, Member States are not obliged to refund the expenses of medical treatment provided on their territory if the providers are neither part of their social security systems or public health system of another Member State.[71]
The Directive is applied alongside the regime stipulated by Article 56 of the TFEU and in accordance with a number of regulations and directives stated in its Article 2.[72] These systems need to be coherent, so that

reasons involve planning aimed at achievement of a sufficient and permanent access to a balanced spectre of high quality healthcare in a Member State or the wish to control costs and avoiding, to the greatest possible extent, waste of financial, technical and human resources. Since the European Court mentions the goal of maintaining balanced medical and hospital care available to all people, this can be deemed as an exception to the rule pursuant to public health-related reasons stated in Article 52 of the TFEU as long as this goal contributes to accomplishment of a high level of healthcare.

[68] Art 1 (3)(a) of Patients' Rights Directive and Art 14 of the Patients' Rights Directive.

[69] Para 14 of the Patients' Rights Directive Preamble.

[70] Arts 1(3) (b) and (c) of Patients' Rights Directive.

[71] Art 1 (4) of Patients' Rights Directive.

[72] Article 2 of Patients' Rights Directive reads as follows: Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems, *OJ* L 40, 11.2.1989, p. 8.; Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the

Member States relating to active implantable medical devices, OJ L 189, 20.7.1990, p. 17.; Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ L 169, 12.7.1993, p. 1.; Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L 331, 7.12.1998, p. 1. ; Directive 95/46/EC and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p. 37.; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1; Directive 2000/31/EC; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.; Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, OJ L 121, 1.5.2001, p. 34.; Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67.; Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components, OJ L 33, 8.2.2003, p. 30.; Regulation (EC) No 859/2003; Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, OJ L 102, 7.4.2004, p. 48.; Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, p. 1.; Regulation (EC) No 883/2004; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1.; Directive 2005/36/EC; Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, p. 19.; Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work, OJ L 354, 31.12.2008, p. 70.; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non- contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.; Directive 2010/53/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, OJ L 207, 6.8.2010, p. 14.

patients are subject either to the Patients' Rights Directive or to the regulation relating to coordination of social security systems.[73]
The greatest value of this Directive refers to its Article 5 governing the responsibility of the Member State of affiliation for reimbursement of costs for cross-border healthcare and to its Article 7 prescribing general principles for reimbursement of costs. In terms of implementation of the rights granted by this Directive, certain relevance carries its Article 6 regulating the liability for establishment of national contact points regarding cross-border healthcare in order to facilitate exchange of information and exercise of patients' rights. Also, Article 8 of the Directive is significant in the sense of specification of medical services which can be comprised by the prior authorization procedure. Once again, these provisions are worth emphasizing since they are supposed to be implemented into national laws and thus expected to entice transparency and preciseness in the determination of medical treatment lists and corresponding pricelists.

5. Concluding considerations

The legal framework of the Republic of Croatia for providing cross-border healthcare has been, to some extent, harmonized with the *acquis* of the European Union. More precisely, the conditions for getting prior authorization for foreign healthcare have been prescribed and defined. They are available to all patients as stipulated by the Regulation on the Rights, Conditions and Manner of Usage of Healthcare Services Abroad.[74] However, the prior authorization procedure needs to be amended and harmonized with the provisions of the recently adopted Patients' Rights Directive by introducing mechanisms which will provide patients with the right to be informed about their rights and powers in the Member State of their affiliation with respect to cross-border healthcare, particularly regarding the conditions and modes of refund of the costs of healthcare services abroad granted by Article 5 of the Patients' Rights Directive.
The procedure for getting authorization for healthcare services abroad and the appertaining right of appeal are prescribed by the above Regulation. Still, in order to avoid arbitrary decisions on cross-border healthcare treatment, one shall draw up and adopt lists of acceptable

[73] Art 30 of the Patients' Rights Directive.
[74] Regulation on the Rights, Conditions and Manner of Usage of Healthcare Services Abroad, *Official Gazette* 50/09, 118/09, 4/10, 13/10, 14/10, 1/11, 31/11 and 93/11.

healthcare treatments and corresponding pricelists. The authorization system is in fact restriction of freedom to provide healthcare services[75] and hence it must have objective and non-discriminatory grounds which should be known from the beginning as to prevent discretionary assessments of competent national boards, i.e. arbitrary decisions on sending someone to a foreign country for healthcare treatment.[76]

The need for preparation of a list of acceptable healthcare treatments accompanied with possible pricelists is derived from the existence of numerous differences between Member States, which depend on various factors such as geographic position, language barriers, hospitals in bordering areas (a social scheme is applicable on the entire territory of a Member State), size and density of population or part of the budget referring to healthcare.[77] Every Member State is expected to define and justify criteria for possible rejection of prior authorization needed in this specific context. Furthermore, all Member State should specify which healthcare services are subject to the prior authorization system since certain therapeutic procedures (diagnostic and therapeutic procedures, surgeries and similar) are highly specialized and can be encompassed by these procedures despite a certain outflow of patients with respect to other procedures. In that sense, Member States may determine different criteria among regions or other ways of administrative action all in order to organize healthcare as long as the system is transparent, easily accessible and the criteria stable and timely published.[78]

The above Regulation offers broad criteria for using cross-border healthcare in its Article 22, without specifying exact and transparent requirements. One can assert that there is a legal framework for using cross-border healthcare, but it is not transparent. The foundations of the Croatian Regulation and the EU Directive on Patients' Rights refer to the right to reimbursement for the costs of provided healthcare abroad. Article 7 of the Patients' Rights Directive sets out the patients' right to reimbursement of the costs incurred when an insured person was provided with a healthcare service abroad if the service is covered by the health insurance scheme of the insured person's Member State of affiliation. This provision and appertaining benefits of the health insurance scheme are comparable with Article 16 of the Croatian

[75] Art 37 of the Preamble of the Directive on Patients' Rights.
[76] Goldner Lang, op. cit. n. 14, at p. 11
[77] Para 44 of the Preamble of the Directive on Patients' Rights.
[78] Para 44 of the Preamble of the Directive on Patients' Rights.

Compulsory Health Insurance Act. The expenses of cross-border healthcare shall be compensated for or directly refunded by the Member State of affiliation in the amount of the costs which would have been covered in the Member State of affiliation, not exceeding the actually born costs of the received healthcare service.[79] For the sake of calculation of these costs, Member States shall develop a transparent mechanism which will enable insured persons to be reimbursed for the costs of provided cross-border healthcare, which should be based on objective, non-discriminatory and timely published criteria and which should be applicable at a particular administrative (local, regional or national) level.[80] Member States may prescribe conditions that shall be fulfilled if a patient wants to be medically treated abroad and these conditions can include assessment of medical experts. Still, the conditions will represent restriction of free movement of patients, services and goods if they are not supported by objective reasons such as achievement of a sufficient and permanent access to balanced possibilities of high quality healthcare in Member States or the wish to control costs and prevent waste of financial, technical and human resources.[81] If such reimbursement is to be restrained, the restriction must be necessary and proportional but never discriminatory. Furthermore, this restriction must not disproportionally prevent free movement of goods, persons and services. Member States shall inform the European Commission about all decisions aimed at restriction of the right to costs reimbursement.[82]

[79] Art 7(4) of the Directive on Patients' Rights.
[80] Art 7(6) of the Directive on Patients' Rights.
[81] Art 7(7) of the Directive on Patients' Rights.
[82] Art 7(11) of the Directive on Patients' Rights.

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The Human Rights Council and the Universal Periodic Review: A novel method of promoting compliance with human rights

> '[...] peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, [...] development, peace and security and human rights are interlinked and mutually reinforcing [...]'.
> *Resolution 60/251 of the GA of 3 April 2006*

I. Introduction

In 2006, the new Human Rights Council came into being, replacing the Commission on Human Rights. While the Commission undoubtedly achieved a lot in standard-setting, in its last years it had to face allegations of politicization, selectivity and the use of double-standards. The HRC was intended to offer a fresh start to international human rights protection.

The objective of this paper is twofold. Firstly, it aims at giving a brief description of the key flaws of the Commission and the efforts to overcome these deficiencies by the newly established Human Rights Council. The article also endeavours to undertake the analysis required to understand the so-called Universal Periodic Review (UPR) better, a mechanism set up to complement the work done by treaty bodies. In doing so, the achievements as well as the shortcomings will be addressed. Following the analysis of the UPR coverage of Croatia and Hungary, the paper concludes with the summary of the new modalities to be applied in the second cycle of the UPR (2012-2016).

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II. The Human Rights Council and its predecessor, the Commission on Human Rights

1. The UN Commission on Human Rights

The UN Commission on Human Rights was founded in 1946 and for several decades served as a one of the key actors in standard-setting as well ensuring compliance with human rights. Whereas the Commission was soon engaged in the drafting of conventions and declarations,[1] it had originally no power to take any action over petitions.[2] Subsequently, however, the Commission's mandate was broadened: it was given wide-ranging ability to investigate human rights abuses. Its mandate included the power to appoint special rapporteurs (or working groups) with either thematic or country mandates,[3] as well as the use of the so-called 1503 procedure (complaint procedure).[4]

Be that as it may, the Commission gradually lost credibility and legitimacy. Politicization, declining credibility and professionalism, selectivity and double standards tarnished the reputation of the Commission. The major criticism levelled at the Commission was that,

[1] L. Rahmani-Ocora, 'Giving the Emperor Real Clothes: The UN Human Rights Council', 12 *Global Governance* (2006) 15; J. Vengoechea-Barrios, 'The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past?', 12 *Revista Colombiana de Derecho Internacional* (2008) 103; M. Viégas-Silva, 'El nuevo Consejo de Derechos Humanos de la Organización de las Naciones Unidas: Algunas consideraciones sobre su creación y su primer año de funcionamiento', 12 *Revista Colombiana de Derecho Internacional* (2008) 41; J. Matiya, 'Repositioning the international human rights protection system: the UN Human Rights Council', 36 *Commonwealth Law Bulletin* (2010) 314. This standard setting started with the adoption of the Universal Declaration of Human Rights (1948) under the chairmanship of Eleanor Roosevelt, chairing the Commission on Human Rights between 1946 and 1951.

[2] ECOSOC Resolution 75(V)1947.

[3] Thematic special procedures are mandated to investigate the situation of human rights in all parts of the world, irrespective of whether a particular government is a party to any of the relevant human rights treaties. In the case of country mandates, mandate-holders are called upon to take full account of all human rights (civil, cultural, economic, political and social).

[4] M. Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations', 35 *Alternatives: Global, Local, Political* (2010) p. 451; M.S. Edwards, et.al., 'Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission', 61 *Political Research Quarterly* (2008) 391; Vengoechea-Barrios loc. cit. n. 1 p. 104, Viégas-Silva, loc. cit. n. 1, at p. 42.

due to the relatively loose criteria for gaining *membership*, it was at times made up of undemocratic and repressive States.[5] As Kofi Annan, the then Secretary-General of the UN put it, States sought membership 'not to strengthen human rights but to protect themselves against criticism or to criticize others'.[6] In addition, the permanent members of the Security Council were virtually guaranteed a permanent seat in the Commission notwithstanding flagrant human rights violations.[7]

Loss of credibility of the Commission derived also from the *selective use of country-specific resolutions* and country specific scrutiny in general.[8] The public discussions of alleged human right violations in many instances led to the adoption of resolutions condemning the human right practices of certain countries in a highly confrontational manner.[9] In addition, there was the issue of the 'no action' motion, whereby any delegation wishing to prevent discussion on an issue could block the Commission from taking action.[10] Another problem related to the lack of meeting time: the Commission held only one annual session for a six-week period which meant that the Commission was not able to deal effectively with crisis situations.[11]

To elevate attention to human rights and to address shortcomings of the Commission, the General Assembly decided to replace the discredited Commission with the Human Rights Council in April 2006.

[5] Davies, loc. cit. n. 4 p. 452. See also Rahmani-Ocora, loc. cit. n. 1, at p. 16, Edwards et al., loc. cit. n. 4, at p. 391, Matiya, loc. cit. n. 1, at p. 316.

[6] UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All 2005. A/59/2005.

[7] Consider Tibet, the Tiananmen Square massacre, Chechnya or Guantanamo Bay.

[8] E. Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 7 *Chinese Journal of International Law* (2008) 722-723; Rahmani-Ocora, loc. cit. n. 1, at p. 16; Vengoechea-Barrios loc. cit. n. 1, at p. 104, Viégas-Silva loc. cit. n. 1, at p. 44, Matiya, loc. cit. n. 1, at p. 316.

[9] Davies loc. cit. n. 4, at p. 453. See also H. Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights', 7 *Human Rights Law Review* (2007) 85; J.H. Lebovic and E. Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR', 50 *International Studies Quarterly* (2006) pp. 861-888.

[10] Domínguez Redondo loc. cit. n. 8, at p. 723, Matiya loc. cit. n. 1, at p. 316.

[11] Rahmani-Ocora loc. cit. n. 1, at p. 16.

2. The Human Rights Council

Following a long process of negotiations, the Human Rights Council was agreed upon by the General Assembly.[12] The original purpose of the reform plan was to upgrade the status of the Commission, to make it a principal organ of the UN. Thus, human rights, in institutional terms, would have got their proper place next to the other two pillars (peace and security, and development) as one of the three pillars of the UN.[13] Notwithstanding the fact that this ambitious plan failed, a new, more authoritative human rights body was created.[14] The linking of the Council to the General Assembly guarantees the topic of human rights enhanced impact, visibility and legitimacy in the UN system.

The principal features of the *appointment* of the Council members are the following. First of all, its membership was reduced from 53 to 47 seats. The members of the Council serve for a period of three years. In order to prevent quasi-permanent membership, Council members shall not be eligible for immediate re-election after two consecutive terms. The membership is based on equitable geographical distribution. A certain filtering system has been introduced: States that join the Council must commit themselves to human rights and submit to review themselves. Thus, the status of ratification of the international human rights treaties and the observance of democracy is taken into account.[15] For this reason, the candidacies of Belarus (2007), Sri Lanka (2008) and Azerbaijan (2009) were each defeated, while Iran withdrew its bid in 2010.[16] Members of the Council are elected by the majority of the

[12] UN General Assembly, resolution A/RES/60/251, March 15, 2006. Four States voted against (US, Israel, the Marshall Islands and Palau); three abstained (Iran, Venezuela, Belarus). See Y. Terlingen, 'The Human Rights Council: A New Era in UN Human Rights Work?', 21 *Ethics & International Affairs* (2007) p. 168.

[13] Rahmani-Ocora loc. cit. n. 1, at p. 16; Terlingen loc. cit. n. 12, at pp. 169 and 170, Viégas-Silva loc. cit. n. 1, at p. 40.

[14] The Council is a subsidiary body of the General Assembly. Furthermore, a new Advisory Committee, replacing the former Sub-Commission on the Promotion and Protection of Human Rights, was set up as well to assist the Council and act as a 'think tank' providing it with expertise and advice on thematic human rights issues and the revised Complaints Procedure mechanism.

[15] Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council. See http://www2.ohchr.org/english/bodies/hrcouncil/docs/pledges.pdf.

[16] See http://www.demcoalition.org/pdf/pdf/DCP%202009-2010%20HRC% 20 Report.pdf.

members of the General Assembly. Finally, the General Assembly, with a two-thirds majority, has the right to suspend the rights of membership in the Council of any member that commits gross and systematic violations of human rights. The example was set by the suspension of membership of Libya.[17]

The Council was given *a broad mandate*. A large degree of continuity was retained by the preservation of the 1235 and 1503 procedures, which were regarded as one of the major contributions of the Commission to the protection of human rights.[18] However, the so-called Universal Periodic Review, an innovative system for assessing the human rights records of all States was introduced.[19] A further innovation is that the Council has a *more regular meeting schedule* than its predecessor: the Council meets in at least three sessions a year, each of which lasts at least ten weeks. To address emergency situations, the Council may hold special sessions.[20]

One year after holding its first meeting, on 18 June 2007, the Council adopted Resolution 5/1 setting forth the framework of its functioning, such as the modalities of the UPR, the special procedures and the complaint procedure, agenda and framework for the programme of work, methods of work, rules of procedure, and establishing a new Advisory Committee, which replaced the former Sub-Commission on the Promotion and Protection of Human Rights.

III. Universal Periodic Review: general aspects

As noted above, the UPR was introduced in 2006 as part of major reforms of the United Nations human rights system. The salient features of the review are the following.

[17] The Libyan Arab Jamahiriya was suspended by General Assembly Resolution A/65/265 adopted on 1 March 2011. See http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm or http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/265&Lang=E.

[18] Viégas-Silva, loc. cit. n. 1, at pp. 43 and 52-55. See also Annex to HRC Res. 5/1, II. (Special Procedures) and IV. (Complaint Procedure).

[19] HRC Resolution 5/1, Annex, Section IB.1.

[20] As of December 2011 there have been eighteen extraordinary sessions: four in 2006; one in 2007; three in 2008; four in 2009; two in 2010; and four in 2011. See http://www2.ohchr.org/english/bodies/hrcouncil/.

1. Basis of the review

The UPR assesses the extent to which governments respect human rights including their obligations as set out in the Charter of the United Nations; the Universal Declaration of Human Rights; the human rights treaties that have been ratified by the country; voluntary pledges and commitments made by the State; and international humanitarian law that applies to the country.[21]

2. Preparation for the review

Since the Council had to establish a clear difference between the reporting mechanisms of human rights treaty bodies and the UPR,[22] the UPR is not exclusively based on national reports, but complemented by reliable information submitted by other relevant stakeholders.

The State report of maximum 20 pages describes the normative and institutional framework, the major achievements and challenges in the promotion of human rights, the key national priorities and initiatives to improve the human rights situation and, beginning in the second cycle of review in 2012, information on the follow up of previous reviews. The national report is submitted to the UPR mechanisms six weeks prior to the review in the UPR Working Group.[23]

The Office of the High Commissioner is responsible for the preparation of the other two reports not exceeding 10 pages, containing a recapitulation of actual UN information on the State under review, as well as a summary of third-party stakeholder interests. *The UN information* is generally compiled from the documents prepared by the treaty bodies, the UN High Commissioner for Refugees, the ILO Committee of Experts, as well as that of the special rapporteurs created under the special procedures. *Stakeholders*, such as regional intergovernmental organizations (e.g. Council of Europe, OSCE), NGOs, women's groups, national human rights institutions, labour unions, church groups are invited to send their submission to the Office of the High Commissioner in one of the six official UN languages. The

[21] HRC Res. 5/1, Annex I.A 1-2.

[22] In para 5(e) UNGA Resolution 60/251 states that 'such a mechanism shall complement and not duplicate the work of treaty bodies'.

[23] On the content of these reports, see HRC Decision 6/102 of 2007, A/HRC/DEC/6/102, setting forth a series of guidelines for the States. See http://ap.ohchr.org/documents/E/HRC/decisions/A_HRC_DEC_6_102.pdf.

deadline for NGO submissions is usually around 5-6 months in advance of the relevant UPR session.[24]

3. Review in the Working Group of the HRC

The next phase, including the interactive dialogue and the adoption of the outcome report, takes place in Geneva. Review is prepared by groups of three States (troika), drawn by lot, who act as rapporteurs. The State under review may request that one of the Rapporteurs be from its own Regional Group and may also object to a selected Rapporteur; however, it may do so only once. The States selected as part of the troika may request to be excused from a particular country review, in which case another State will be selected.[25] There is no set limit to the number of times a Rapporteur may request to be excused.[26] The troika is mandated to facilitate the interactive dialogue: they relay questions submitted in advance to the state under review, they are responsible for drafting the outcome report, and they are one of the main targets for NGOs to ensure that their recommendations are integrated.

The review of all UN Member States takes place in the *UPR Working Group*, composed of the 47 Members of the Council, and chaired by the President of the Council. Each Member of the Council will decide on the composition of its delegation to the UPR Working Group, which may include human rights experts. A key part of the review is the *three-hour interactive dialogue* in the Working Group between the State under review and other UN Member States. During the dialogue, Member States are able to raise questions and make recommendations to the State under review. NGOs may only attend the dialogue, but may not take the floor.[27]

[24] See also Technical guidelines for the submission of stakeholders' information to OHCHR (as of 1 July 2008). http://www.ohchr.org/EN/HRBodies/UPR/Pages/TechnicalGuide.aspx.

[25] E.g., Pakistan declined to serve on the troika reviewing India (2008). See Domínguez Redondo loc. cit. n. 8, at p. 727.

[26] On the list of troikas, see http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx.

[27] The three hours dedicated to the review start with the statement of the State under review (SuR), presenting its report. In the next phase (two hours), Members of the HRC (three minutes to each speaker) and Observer States (two minutes to each speaker) can ask more questions and make recommendations. Accordingly, the average number of speakers can be 40-45. The dialogue is closed by the concluding

Following the dialogue, a report is compiled by the Troika Rapporteurs, the UPR Secretariat, and the State under review. The report includes a record of issues raised during the dialogue and lists the recommendations made by other States with an indication of which of these enjoy the support of the State under review.
The outcome report is adopted in two stages. The first stage takes place in the UPR Working Group, while the second is in the Council plenary. The report is adopted by consensus in the UPR Working Group at least 48 hours after the interactive dialogue. The report summarises the presentation of the State under review, the issues and questions raised together with the responses, as well as a list of recommendations. The reviewed State may indicate which recommendations it supports and these will be identified as such in the report. Other recommendations will be noted in the report. In practice, however, this is not always the case: in some instances the State under review does not provide a clear answer or consider many recommendations as 'already implemented or in the process of implementation'.

4. Plenary session of the HRC

At a subsequent regular session, the Council plenary adopts the final outcome of the review, including further responses from the State under review. Up to one hour is set aside for the adoption of each *outcome report*. Unlike in the Working Group session, during the plenary session relevant stakeholders may participate and can make general comments.[28]

5. Follow-up mechanism

The outcome of the review should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders. The implementation of these recommendations serves as a basis on which the subsequent review is carried out. In cases of persistent non-

remarks of the SuR. The SuR's overall speaking time throughout the session of the WG is of 60 minutes.

[28] The one hour available for the consideration of the UPR is organized as follows: the SuR will have up to 20 minutes, Member States and observer States of the Council will have up to 20 minutes, and finally stakeholders will have up to 20 minutes to make general comments. See Eighth Session of the Human Rights Council. Universal Periodic Review Segment (9-13 June 2008), http://www.upr-info.org/IMG/pdf/NV-UPR.pdf. See also Amnesty International, http://www.amnesty.org/en/library/asset/IOR41/033/2008/en/1478d09a-7dcc-4225-a317-15cdb770b946/ior410332008en.html.

cooperation with the UPR mechanism, the Council will 'address' such situations. Fortunately, this has not yet been the case since the level of cooperation by States in the review process has been good: all the UN Member States have actually participated in the UPR.

IV. State under review: Croatia

Croatia was reviewed on 8 November 2010 within the framework of the 9th session of the first UPR cycle.[29] The UPR troika was constituted of representatives of Pakistan, the USA and Burkina Faso.[30]

1. The three reports

National report. The National Report of the Republic of Croatia was drawn up by the Working Group established by the Croatian Government in accordance with the UPR procedure while the preparation was coordinated by the Ministry of Foreign Affairs and European Integration, the Ministry of Justice and the Government Office for Human Rights.[31] The introductory lines of the Report include a positive evaluation of the normative and institutional framework for the protection and promotion of human rights in Croatia. This framework was denoted as 'highly developed', providing an explanation that it was adjusted to all required international standards, particularly to those which needed to be incorporated in the Croatian legislation within the process of the accession of Croatia to the European Union. As the greatest challenge in this field, better and more efficient implementation of the existing normative framework and strengthening administrative and financial capacities of the institutional framework are emphasised.[32] The human rights protection in Croatia represents the highest value in the constitutional order. The legal framework of this protection includes the Constitution, the national legislation, and the international instruments for the protection of human rights to which Croatia is a

[29] The Tentative Timetable for the 9th Session of the UPR Working Group (1-12 November 2010). http://www.upr-info.org/-Sessions-.html.
[30] UPR-troikas – Ninth Session of the Working Group (1-12 November 2010). http://www.upr-info.org/IMG/pdf/List_troikas_9th_session.pdf.
[31] Paragraph 3 of the National Report submitted in accordance with paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1 – Croatia (A/HRC/WG.6/9/HRV/1), 12 August 2010. http://lib.ohchr.org/HRBodies /UPR/Documents/session9/HR/A_HRC_WG.6_9_HRV_1_Croatia_eng.pdf.
[32] Para 5.

party.[33] The latter were explicitly mentioned in the Report, particularly the fact that Croatia is a party to 88 instruments of the Council of Europe (CoE) to whose monitoring mechanisms regularly submits reports.[34]

The recent programme of human rights protection in Croatia is defined in the National Program for the Protection and Promotion of Human Rights 2008-2011 whereas the Operational Plan for its Implementation was adopted in 2010, the purpose of which refers to development and monitoring of the implementation of the goals, measures and activities from the National Program. The Report stated the *priorities* of the human rights protection in Croatia. These were: the Croats living abroad, detained and missing persons in Croatia, rights of active participants and victims from the Homeland War, right to a fair trial, victim/witness protection, freedom of the media, right to access to information, religious rights and freedoms, right to work, special protection of the family, children, youth, care for particularly vulnerable groups of citizens, right to healthy life and environment, combating corruption, trafficking in human beings, security and human rights, and mine clearing in the areas covered with land mines remained from the Homeland War.[35] The areas of human rights protection relating to combating racial and other discrimination, gender equality, domestic violence and violence against women, rights of the child, and rights of persons with disabilities, trafficking in human beings, migrants and asylum seekers were characterized by significant progress.[36] A special role in increasing the level of human rights protection was also performed by the 2008 Anti-Discrimination Act[37] and the National Anti-discrimination Plan 2008-2013.[38] On the other hand, some fields

[33] Paras 6 and 7. Pursuant to Article 141 of the Constitution stipulating as follows: 'International agreements concluded and ratified in accordance with the Constitution and made public and which are in force, are part of the internal legal order, ranking above laws in their legal effect'.

[34] Para 9.

[35] Para 21.

[36] Para 22.

[37] Anti-Discrimination Act, *Official Gazette* of the Republic of Croatia 85/08.

[38] Paras 28, 30, 36, 38, 48, 56, 61, 83. In the context of raising the level of the human rights protection in Croatia, the following documents and initiatives deserve due attention: the National Policy for the Promotion of Gender Equality 2006-2010, the Strategy for the Development of Women Entrepreneurship 2010-2013, the National Strategy for Protection from Domestic Violence 2008-2010, the National

required appropriate interventions in order to raise the level of human rights protection, notably when it comes to the protection of the rights of persons deprived of liberty, some aspects of the right to education that concern the education for human rights and the right to free legal aid.[39]
Among the most important *challenges* for Croatian authorities and the society as a whole, one had to single out the issue of refugee and displaced persons return and their housing[40], the issue of war crimes (particularly the fate of the missing persons[41] and cooperation with the International Criminal Tribunal for the Former Yugoslavia[42]) and the issue of protection of the rights of national minorities.[43]
UN Summary Report.[44] Regarding the scope of international obligations assumed through ratification, accession or succession of the most relevant universal human rights treaties, Croatia can be awarded a positive mark. However, Croatia is still not a party to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and the International Convention for the Protection of All

Plan of the Activities for the Rights and Interests of Children from Year 2006 until the Year 2012, the National Strategy for Equalising the Opportunities of Persons with Disabilities 2007–2015, The third National Plan Against Trafficking in Persons (2009-2011), and the National Strategy of Health Care Development 2006-2011.

[39] Para 23.

[40] Paras 93, 94, 95, 96, 97, 98, 99. Croatia provided 700,000 displaced persons and refugees with accommodation and put great efforts in their return and restoration of their homes. So far, Croatia has repaired or rebuilt 146,000 housing units, which has ensured the return of 500,000 members of households of reconstruction beneficiaries. About 80% of these beneficiaries are Croatian citizens of Serb national origin.

[41] Para 100. In terms of consequences of the war, even today as many as 1899 persons are still considered missing.

[42] Para 101.

[43] Para 104. Despite an adequate legislative framework for protection of national minorities and efforts of the government to implement it efficiently in practice, violation of the rights of the Serbs and the Roma has still been registered.

[44] Compilation prepared by the office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1 – Croatia, A/HRC/WG.6/9/HRV/2, 13 August 2010, p. 2. http://lib.ohchr.org/HRBodies/UPR/Documents/session9/HR/A_HRC_WG.6_9_HRV_2_Croatia_eng.pdf.

Persons from Enforced Disappearance (CED; which was signed in 2007, but not ratified).[45]

When it comes to the *implementation of international human rights obligations*, the UN specified several problematic areas as follows:

- *Equality and non-discrimination*. The first place in the list of vulnerable groups is held by women due to obvious inequalities between women and men in many areas, particularly in the labour market (e.g. sexual harassment and discriminatory practices that exclude pregnant women or women with small children from employment). Problems may also arise from societal prejudice against certain minority groups, such as the Roma and Serb minorities. Finally, the reluctance of some local authorities to implement laws and policies on non-discrimination, particularly with regard to returnees turned out to be controversial too.[46]
- *Right to life, liberty and security of the person*. The UN expressed its concern due to the fact that no prosecution or conviction for alleged crimes of torture had taken place; about reports of physical and verbal attacks against members of ethnic minority groups; about continuing poor conditions in detention facilities, including overcrowding and inadequate access to medical care; about the use of enclosed restraint beds in psychiatric and related institutions; about the alleged failure of the state to address the issue of violence and bullying between children and young adults placed in social care institutions; about incidents of domestic violence and impunity due to a low conviction rate; about relatively high number of deaths and injuries among children due to traffic and domestic accidents; about trafficking in women and children for sexual and other exploitative purposes; and about the flaws which have been noticed with respect to the Juvenile Courts Act which do not include the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs.[47]
- *Administration of justice, including impunity and the rule of law*. The crucial issues seem to have been continuing substantial

[45] List of international treaties from the domain of human rights protection ratified by Croatia see in: Compilation prepared by the office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 – Croatia (A/HRC/WG.6/9/HRV/2), 13 August 2010 p. 2.
[46] Paras 15-18.
[47] Paras 19-27.

backlog of court cases, and delays in court proceedings; the full implementation of juvenile justice standards; the reported failure of Croatia to carry out prompt and impartial investigations and prosecute perpetrators in connection with torture and ill-treatment which reportedly occurred during the 1991-1995 armed conflict; reports that many potential cases of war crimes remained unresolved and that the selection of cases had been disproportionally directed at ethnic Serbs; and the fact that Croatia still had not located and turned over to the ICTY the necessary records concerning military shelling by the Croatian forces during the 1995 Operation Storm so as to allow the Tribunal's investigation to proceed.[48]

- *Right to privacy, marriage and family life*. The main concerns include the fact that Roma girls tend to be married at an early age and that many children are placed in institutions where they grow up deprived of the nurturing and support that a family setting could provide.[49]
- *Freedom of expression, association and peaceful assembly, and right to participate in public and political life*. The following issues were qualified as highly critical by the UN: acts of intimidation and attacks on journalists that have not been properly investigated and the underrepresentation of women in legislative and executive bodies.[50]
- *Right to work and to just and favourable conditions of work.* In this field, the issues referred to the scale of unemployment in Croatia, particularly in areas with large numbers of returnees and the high unemployment rate among women.[51]
- *Right to social security and to an adequate standard of living*. Here the focus was on poverty and social exclusion of single-parent households; poor living conditions in the Areas of Special State Concern and other isolated communities; child poverty; the increasing number of cases of drug abuse, as well as alcohol and tobacco consumption by adolescents; and the lack of a

[48] Paras 28-32.
[49] Paras 33-34.
[50] Paras 36-37.
[51] Paras 38 and 40.

comprehensive and just solution for former occupancy tenancy rights (OTR) holders.[52]

- *Right to education and to participate in the cultural life of the community*. The UN was concerned about the different access to education for children belonging to minorities and vulnerable groups; about the very centralized education system and the poor quality of equipment and school facilities in many parts of the country.[53]
- *Minorities and indigenous peoples*. Croatia was rebuked for low representation of members of ethnic minorities in local and regional government, all public bodies, including the judiciary and human rights coordination bodies at county level, and that some ethnic groups, in particular persons of Roma and Serb origin, continue to face difficulties obtaining the documentation necessary to acquire citizenship.[54]
- *Migrants, asylum-seekers, refugees and internally displaced persons*. The key issues in this field appeared to be the obstacles faced by returnees, in particular members of the Serb minority, with regard to repossession of their property, access to reconstruction assistance, as well as reintegration into Croatian society; and some shortcomings in the asylum system both in legislation and its implementation.[55]

Stakeholders' Report.[56] The content of the Stakeholders' report corresponds to a great extent to allegations in the UN Summary Report and also refers to the scope of international obligations, constitutional and legislative framework, institutional and human rights infrastructure, policy measures, and to situations related to promotion and protection of human rights on the ground.[57] What is also worth mentioning is a datum

[52] Paras 42-46.
[53] Paras 49-50.
[54] Paras 52-53.
[55] Paras 54 and 57.
[56] Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1 – Croatia, (A/HRC/WG.6/9/HRV/3), 10 August 2010. http://lib.ohchr.org/HRBodies/UPR/Documents/session9/HR/A_HRC_WG.6_9_HRV_3_Croatia_eng.pdf.
[57] Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the Annex to Human Rights Council resolution 5/1 – Croatia (A/HRC/WG.6/9/HRV/3), 10 August 2010.

of the Ombudsperson of the Republic of Croatia stating that in terms of discrimination complaints the body received in 2009, the most frequent form was discrimination based on nationality (31 per cent) followed by gender, social status, social origin and disability.[58] The Commissioner for Human Rights of the Council of Europe gave his comments to the complexity of procedure for obtaining the Croatian citizenship, which, in his opinion, should have been simple and prompt and complemented by an efficient system of free legal aid. In this context, he also suggested Croatia should ratify the European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession.[59] It is important to mention that part of his observations referred to employment and education of Roma, advising Croatia to act in full compliance with the European Court of Human Rights' judgment in the case of *Oršuš and others* (2010).[60]

2. Interactive dialogue[61]

During the interactive dialog in November 2010, 46 delegations made oral statements.[62] The dialog was preceded by presentation of the key features of the legal framework for human rights protection in Croatia, during which the State Secretary for European Integration laid down some of the protection priorities. For instance, it was said that Croatia paid special attention to promoting tolerance and combating all forms of discrimination, to promoting reconciliation in a post-war society in the region, to full cooperation with the International Criminal Tribunal for the Former Yugoslavia and to domestic war crimes trials, to refugee issues, to minority rights (esp. the Roma), to gender equality and children rights, etc.[63]

The content of the objections made by some states during the dialog mostly referred to the areas of human rights protection which had been depicted as problematic in the aforementioned three reports. *Algeria* encouraged Croatia to implement measures regarding the high rate of

[58] Para 17.
[59] Para 20.
[60] Para 59.
[61] Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review – Croatia*, Geneva, 1-12 November 2010. http://lib.ohchr.org/HRBodies/UPR/Documents/session9/HR/A_HRC_WG.6_9_L.11_Croatia.pdf.
[62] Para 5.
[63] Paras 8-21.

child mortality as a result of traffic accidents[64] while *Cuba*, *Brazil*, *South Korea*, *the USA*, *Slovenia* and *the UK* required explanation with respect to supplementary measures or programmes to create better conditions for minorities.[65] In terms of national minorities, *Poland* and *Norway* expressed their concern about their low representation in local and regional governments, *Finland* objected to the poor status of the Roma whereas *the Republic of Korea* warned about their limited ability to acquire citizenship.[66] *Poland* and *the Russian Federation* focused their enquiries on steps to be taken to facilitate returnees' repossession of their property, access to reconstruction assistance and reintegration into Croatian society.[67] *Indonesia* objected to the high incidence of domestic violence[68] while *Canada* singled out the flaws of the cooperation with the ICTY.[69] *Belgium* and *Egypt* regretted the lack of visibility of and follow-up to the work of the Ombudsperson.[70] *Austria* noted concerns regarding poor conditions of detention as well as an inefficient judiciary.[71]

3. Report adopted by the HRC plenary

Out of the total of 116 proposed *recommendations*, Croatia accepted 111 of them while 2 of them were rejected and 3 of them are still pending.[72] The two recommendations which could not be accepted relate to the access to citizenship (as it was incompatible with domestic legislation since it had set requirements going beyond the international standards); and on free legal aid (which remained open to interpretation owing to its drafting). Furthermore, Croatia only partially accepted recommendations referring to ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

[64] Para 22.
[65] Paras 24, 32, 39, 40 and 43.
[66] Paras 25, 37, 41 and 42.
[67] Paras 25 and 27.
[68] Para 26.
[69] Para 29. Notably, Canada noted concerns over the fact that key documents had not yet been located and made available to the Tribunal and concerns over discrepancies between accused of Serb and Croat origin in war crimes cases.
[70] Paras 31 and 33.
[71] Para 38.
[72] According to the available update dating from July 2011. Responses to Recommendations, Croatia, Adoption in the Plenary, 17 March 2011. http://www.upr-info.org/IMG/pdf/recommendations_to_croatia_2011.pdf.

and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. In terms of the former Convention, Croatia was of the view that an effective system for migrants' rights should be seen as an integral part of the wider European human rights framework. Although Croatia still has not made a final decision on whether to sign or ratify the respective convention or not, the broad legislative framework for migrant protection has already been enacted. With respect to the latter international treaty, the inter-agency working group was in the process of formulating recommendations with regard to its signature and possible ratification. All the other postponed recommendations were accepted without any objection.[73]

V. State under review: Hungary

Hungary was reviewed on 11 May 2011. France, Gabon and Ukraine was selected as the group of rapporteurs (troika) to facilitate the review of Hungary.[74]

1. The three reports

National report.[75] It has to be pointed out at the outset that, due to the timescale of the UPR, the first national report could not deal with the provisions of the new constitution. Hungary was in the process of redrafting its constitution at the submission of the report (16 February 2011). The situation is partly similar with regard to the extremely debated media law, attracting intense criticism from national and international sources.[76] Since these important acts were passed in April

[73] Report of the Human Rights Council on its sixteenth session, Paras. 614-617. http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.2.doc.

[74] All the documents are available on http://www.ohchr.org/EN/HRBodies /UPR%5CPAGES%5CHUSession11.aspx. – Please note that Hungary served as a member of the Human Rights Council in 2009-2012.

[75] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Hungary. A/HRC/WG.6/11/HUN/1, 16 February 2011.

[76] See e.g., the Opinion on the New Constitution of Hungary, adopted by the European Commission for Democracy Through Law (Venice Commission) at its 87th Plenary Session (Venice, 17-18 June 2011), http://www.venice.coe.int /docs/2011/CDL-AD%282011%29016-e.pdf, and the Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, Strasbourg, 25 February 2011. CommDH(2011)10, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1751289.

2011 and the last two months of 2010, respectively, stakeholders did not have the possibility to reflect on it.[77]

In its report, Hungary referred to various *challenges*, including segregation, violence against women, the legal gap in the regulation of homebirth and the issue of forced sterilization. Clearly, one of the principal issues was the Roma community: the gradual removal of disadvantages concerning them in the fields of economy, employment, culture, health care, living conditions and social services. Another major difficulty relates to the conditions of detention where Hungary has a relatively poor record, including overcrowding in detention facilities, the situation of the mentally ill, the use of excessive force and abusive language during arrests and interrogations.[78]

The reader of the national report cannot be but astonished at *the lack of reference* to other important issues. By way of example, the national report ostentatiously fails to address the anomalies of the health care system, including the disproportionate territorial distribution of health care facilities; access to the health services; long waiting lists or the so-called gratitude money.[79] Similarly, the controversies surrounding the withdrawal of the private tier of pensions are omitted.[80] On a positive note, Hungary indicated its willingness to uphold a standing invitation for mandate holders of human rights special procedures, and stated that it was keeping the deadlines with respect to the submission of periodic reports to the UN human rights treaty bodies.[81] In addition, Hungary made the commitment to ratify the Optional Protocol to CAT.[82]

[77] Civil organizations submitted their contributions in November 2010, i.e. six months before the review actually took place. The Hungarian media legislation, consisting of Act CIV of 2010 on the freedom of the press and the fundamental rules regarding media content (9 November 2010), and Act CLXXXV of 2010 on media services and mass media (21 December 2010), were passed later. Similarly, the new Constitution was adopted by the Hungarian Parliament on 18 April 2011. The new Constitution shall take effect on 1 January 2012.

[78] See paras 15-16, 24, 27, 28, 38-54 and 58-70, respectively.

[79] In Hungarian 'hálapénz' which is a symbol of the everyday corruption in a non-market based health care. The name itself is misleading as the money would not always be given after the medical service; in many cases it is used to bribe providers to offer better care and services.

[80] Para 97.

[81] Unfortunately, on factual grounds we cannot agree with the Hungarian government's contention on timely submission of national reports. Hungary is and has been late with the submission of several periodic reports. See

UN Summary Report.[83] As far as *the scope of international obligations*[84] is concerned, Hungary has a good performance. Albeit Hungary is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance (CED), it intends to ratify OP-CAT. Treaty bodies have encouraged Hungary to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and the Optional Protocol to ICESCR. The major *substantive issues* of concern highlighted by the UN report are the following.

- *The situation of women*. The report noted the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society; the occupational segregation of women and men in the labour market; the wage gap between women and men, the discrimination in hiring women of childbearing age or mothers with small children; domestic violence and spousal rape; and the fact that women continue to be underrepresented in public and private spheres of life.[85]
- *The Roma population*. The problems include discrimination with respect to education, employment, health and housing, disproportionately high levels of extreme poverty; segregation of Roma children in schools; overrepresentation of Roma among the inmates; and the widespread anti-Roma statements by public figures and the media.[86]
- *Migrants, asylum-seekers, refugees*. The report noted the poor living conditions of asylum-seekers and refugees, the strict administrative detention regime, the problems of integration of refugees and the fact that Hungary does not ensure with full respect the principle of *non-refoulment*.[87]

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http://www.ohchr.org/EN/countries/ENACARegion/Pages/HUIndex.aspx Menu item: Reporting Status.

[82] Paras 102-104.

[83] Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1. A/HRC/WG.6/11/HUN/2, 21 February 2011.

[84] The core international human rights instruments can be accessed on http://www2.ohchr.org/english/law/index.htm#core.

[85] Paras 10-13, 21-32 and 46.

[86] Paras 30, 41, 43, 48, 55, 58-61.

[87] Paras 25-28, 68-71.

- *Torture and administration of justice*. Here the report mentioned the alleged ill-treatment by custodial/prison staff and the limited number of investigations carried out in such cases; prison overcrowding; the fact that pre-trial detainees under and over 18 years are accommodated in the same cell; and that a high number of persons with an *ex officio* defence counsel remains without actual assistance from their attorney in the investigation phase.[88]
- *Social security and adequate standard of living*. The report noted the inadequate level of the net minimum wage and social benefits; the poor mental and physical health status of the population; the inequalities experienced with respect to the health care system, the high suicide and abortion rate.[89]

Stakeholders' Report.[90] Not surprisingly, the stakeholders' report,[91] to a large extent, reiterates the issues collected in the UN Summary Report. Thus, the Hungarian Helsinki Committee contended that the new Government started to prepare a new Constitution without giving proper reasons on why it was necessary. The report noted the inadequate handling of racially motivated crimes. The independent medical examination of persons who claimed to have been ill-treated by officials was not guaranteed, the free defence attorneys usually did not make efforts in the underpaid cases. NGOs pointed out that the Public Service Broadcasting Television and Radio and the National Media and Telecommunication Authority were not independent from the government with respect to the nomination process and financing. CoE CPT stated that Hungary did not amend the legislation to ensure access to a lawyer as from the very outset of deprivation of liberty, as recommended by CoE CPT in 2005.[92]

[88] Paras 19-30, 37-38.
[89] Paras 50, 52, 54-57.
[90] Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1. A/HRC/WG.6/11/HUN/3, 28 January 2011.
[91] See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRHUStakeholdersInfoS11.aspx.
[92] Paras 2, 9, 16, 33-34 and 42.

2. Interactive dialogue[93]

During the interactive dialogue, which took place in May 2011, forty-eight delegations made oral statements.[94] The questions posed were answered solely by the Minister of State for Social Inclusion at the Ministry of Public Administration and Justice. The concerns raised by the States focused on the issues identified earlier.[95] Several countries raised the issue of *the new Constitution*.[96] Pakistan inquired how Hungary intended to build national consensus on it, Slovakia referred to provisions of the new Constitution that Hungarian citizens not residing in Hungary may participate in Parliamentary elections, whereas Germany asked about the Government's plans to seek international expertise regarding the new Constitution.[97] Various countries expressed their hope that the implementation of the newly adopted Constitution would be in accordance with Hungary's international obligations.[98] France observed that the new constitution did not explicitly prohibit death penalty, and discrimination on grounds of sexual orientation.[99] Germany, as well as Italy, raised the issue of the *competence of the Constitutional Court*. Hungary argued that the recently introduced restrictions are due to the serious economic situation, and are of a minor and temporary nature.[100]

[93] This chapter is based on the following two sources: (1) Human Rights Council: Draft report of the Working Group on the Universal Periodic Review. Hungary. Eleventh session, Geneva, 2-13 May 2011 (Unedited version). Accessible at http://www.upr-info.org/IMG/pdf/a_hrc_wg.6_11_l.15_hungary.pdf; and (2) http://www.un.org/webcast/unhrc/archive.asp?go=110511#am1.

[94] Nine countries (Sweden, Belgium, the Czech Republic, Denmark, Slovenia, Switzerland, the UK, Netherlands and Norway) submitted advance questions to Hungary.

[95] E.g., the situation of the Roma, the lack of a NHRI, domestic violence, migration, prison overcrowding, racially motivated violence, the situation of migrants and asylum-seekers. In his answer, Mr. Balog, Head of the delegation, announced the evidently very optimistic 'breaking news' (his very own words!) that the Government would create 100 thousand jobs for the Roma within 4 years. In addition, the delegation informed about the target set by the Government to reduce the occupancy of prisons by 39 per cent.

[96] Ecuador, Pakistan, Slovakia, Brazil, Norway, Germany, Sweden, the UK and the Holy See.

[97] Paras 38, 45 and 59, respectively.

[98] Ecuador and Norway, paras 35 and 57, respectively.

[99] Para 31.

[100] Paras 58, 59 and 84.

Brazil, Austria, Australia, Germany, the Netherlands, the US, Belgium and Mexico expressed concerns regarding *the new media legislation*: they argued that the new media law still contained elements incompatible with international human rights standards and asked if the Government was considering revising the media legislation in the light of those concerns. Norway was concerned about possible restrictions in the freedom of the press by mandatory content requirements and 'public morality' standards, whereas Italy and the UK were interested in the provisions aimed at guaranteeing the independence and impartiality of the Media Authority and Media Council.[101]

3. Report adopted by the HRC plenary[102]

A total 148 *recommendations* were made, out of which 122 was accepted, and 20 rejected by Hungary.[103] Hungary *rejected* to accede to the ICRMW,[104] and to revoke the condition which requires from a minority group to have lived in the county at least one hundred years in order to be considered a national minority.[105]

Many of the *recommendations accepted* are relatively weak, requiring a low level of commitment. More robust obligations include accession to OP-CAT and CED, creating a NHRI in accordance with the Paris Principles, the adoption of measures to combat discrimination, a plan of action to prevent racist attacks, the continuity of the standing invitation for mandate holders of human rights special procedures, the undertaking to ensure the implementation in practice the prohibition of corporal punishment in schools and to ensure that detention of children under 18 should be separated from adults.[106]

[101] Paras 47, 49, 54, 57-59, 61, 63-65, and 74.

[102] At the time of going to press, only the draft report of the HRC plenary is available. See Report of the Human Rights Council on its eighteenth session. Advance Unedited Version, A/HRC/18/2 (10 October 2011). http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-2.pdf. The relevant paragraphs are 594 to 621.

[103] Thus, approximately 82.4 per cent of the recommendations is accepted, and 17.6 per cent rejected.

[104] Recommended by Egypt, Argentina, Iran, Guatemala, Algeria.

[105] Recommended by the Russian Federation.

[106] Para 94.

VI. The way forward

1. General Overview

It is beyond any doubt that the Human Rights Council's previous and current activities have so far determined a starting point for evaluation of the successfulness and efficiency of the Universal Periodic Review. It has been six years now since the Council was established, but it has neither achieved results to remember nor met the expectations of its supporters. However, it has not failed in its mission to such a great extent. Like its predecessor, the Council has focused on setting international standards of human rights protection and their codification. When it comes to activities of the latter, it has, for instance, completed the 20-year long negotiations on the United Nations Declaration on the Rights of Indigenous Peoples (2007)[107] and requested preparation of a draft declaration on the right to education on human rights. Moreover, its agenda has included a number of complex and recent issues related to the area of international human rights protection such islamophobia, religious hatred and violation of human rights in the context of climate change, poverty, external debt and solidarity. Finally, the Council has proceeded with, in a more efficient way with respect to its predecessor, the investigation of violation of human rights in particular countries. In this context, the leading role has been played by the Universal Periodic Review itself.[108] Today, the UPR seems to be 'the most important procedural innovation introduced by the Council'.[109] Although the mission of the Council was initially supposed to be based on the principles of transparency, inclusiveness, de-politicization, and non-selectivity,[110] its previous activities indicate that the Council has not succeeded in meeting these great expectations[111].

[107] United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295).

[108] T. Buergenthal, et al., *Međunarodna ljudska prava u sažetom obliku* [International Human Rights in a Nutshell] (Rijeka, Faculty of Law of the University of Rijeka 2011) p. 115.

[109] H. J. Steiner, 'International Protection of Human Rights', in M. D. Evans, ed., *International Law* (New York, Oxford University Press 2010) p. 791.

[110] I. Brownlie, *Principles of Public International Law* (New York, Oxford University Press 2008) p. 558; H. J. Steiner, et al., *International Human Rights in Context – Law, Politics, Morals* (New York, Oxford University Press 2007) p. 807.

[111] M. Schmidt, 'United Nations', in D. Moeckli, et al., eds., *International Human Rights Law* (New York, Oxford University Press 2010) p. 395.

Being based on objective and reliable information, and on constructive dialogue, the UPR represents a fairly realistic assessment of 'the fulfilment by each state of its human rights obligations and commitments in a way that it ensures universality of coverage and equal treatment'.[112] Still, the first reviews dating from 2008 and 2009 were mostly focused on selected issues such as the issue of protection of women's and children's rights in Indonesia's review[113] whereas later reviews reveal efforts to provide for a full overview of the prevailing human rights situation.

Although it is hard to cater for a unique and objective evaluation of the successfulness of this innovative mechanism after its first cycle, one can still single out several preliminary observations. Firstly, the UPR has disclosed that during its course, most UN member states have been willing to get involved into a constructive and open dialogue with the Council. Only few states have tried to manipulate the dialogue diverting the attention from substantial to minor issues of human rights protection. Secondly, outcome reports of the Council have involved numerous recommendations to states referring to a number of issues of human rights protection. Although being numerous, thorough and explicit, many recommendations have hardly been applicable in practice due to their extremely vague content. Besides, the Council has, with regard to the number of recommendations, been selective and by the time the number of recommendations has grown, so in the end some states (e.g. Algeria, China, Pakistan, the UK, Ukraine and the UAE) have explicitly rejected some of the recommendations. The experience with the UPR has shown that this mechanism does not contradict other monitoring procedures of the UN treaty bodies. On the contrary, it is compatible with them.

In Schmidt's opinion, present perceptions of the successfulness of the UPR allow one to be 'cautiously optimistic'. Although the monitoring mechanism of the UPR is complex and as such it is subject to scepticism, it may develop into a platform for the improvement of human rights protection at a national level. In order to achieve that, states need to show strong political will.[114]

[112] Ibid.

[113] R.K.M. Smith, *Textbook on International Human Rights* (New York, Oxford University Press 2010) p. 62.

[114] E.g., activities of the Committee on the Elimination of Racial Discrimination, Human Rights Committee, Committee on Economic, Social and Cultural Rights,

2. New UPR modalities for the second cycle

The Resolution of the General Assembly 60/251 of 3 April 2006 resulting in the establishment of the Human Rights Council called upon the Council to review its work and functioning five years after its establishment and report to the General Assembly.[115] In compliance with this request, the Council adopted, at its 12th session held in September 2009, a resolution aimed at establishment of an open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council.[116] The Working Group has so far held two sessions, one in October 2010 and the other in 2011, which first resulted in adoption of the Report of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council on 7 March 2011[117] and then in adoption of a resolution of the Human Rights Council entitled 'Outcome of the Review on the Work and Functioning of the Human Rights Council' on 25 March 2011.[118] The latter defined various new modalities for the Second Cycle of the UPR. Written proposals for the UPR are contained in states papers, NGO papers, requests of National Human Rights Institutions and others.[119] In the end, following all the preliminary action, the 17th session of the Human Rights Council held

Committee against Torture, Committee on the Elimination of Discrimination Against Women, Committee on the Rights of the Child, Committee on the Rights of Migrant Workers, Committee on the Rights of Persons with Disabilities, etc. M. Schmidt, loc. cit. n. 111, at pp. 396-397 and 405.

[115] Point 16. Resolution adopted by the General Assembly, Human Rights Council (A/RES/60/251), 3 April 2006.

[116] Resolution adopted by the Human Rights Council, Open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council (A/HRC/RES/12/1), 12 October 2009.

[117] Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council (A/HRC/WG.8/2/1), 7 March 2011.

[118] Resolution adopted by the Human Rights Council, Review of the work and functioning of the Human Rights Council (A/HRC/RES/16/21), 12 April 2011.

[119] E.g. Office of the High Commissioner for Human Rights non-paper on the HRC review – 15 October 2010 and Commonwealth Secretariat submission to HRC Review. See Compilation of written proposals for the UPR review. http://www.upr-info.org/IMG/pdf/Compilation_of_proposals_by_issues.pdf. For more details on concrete proposals of particular states see: Compilation of statements on the UPR made under item 4.1. http://www.upr-info.org/IMG/pdf/Compilation_statements_UPR-26-27-10-2010.pdf.

on 17 June 2011 included adoption of a decision referring to the follow up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review.[120] This document sets out the purpose of the UPR with an emphasis on quality and efficiency increase. Hence, Article I of this Decision stipulates that the order of the review established for the first cycle shall be maintained for the second and subsequent cycles, whereby 14 states shall be reviewed during each session of the Working Group.

Article II provides for General Guidelines for the Preparation of Information under the UPR, which reaffirms the provisions of three previous documents related to the UPR: General Assembly Resolution 60/251 of 15 March 2006, and of Human Rights Council Resolution 5/1 of 18 June 2007 (containing the institution-building package) and Resolution 16/21 of 25 March 2011 (containing the outcome of the review of the work and functioning of the HRC). On that occasion, the Human Rights Council pointed out that the second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the development of human rights situations in the State under Review. The General Guidelines for the drafting of the three reports that form the basis of the review identify seven areas relevant for human rights protection.[121] These areas have been slightly modified with respect to the previous Guidelines in order to give a greater emphasis on the need for states to report on the implementation of recommendations.[122]

Article III regulates the issues of the duration of the review in the Working Group on the UPR in a way that 'the duration extended to three hours and thirty minutes for each country in the Working Group, so as to be within existing resources and with no additional workload, during which the State under Review shall be given up to 70 minutes to

[120] Decision adopted by the Human Rights Council, Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review (A/HRC/DEC/17/119), 19 July 2011.

[121] For the list of seven areas see: Draft decision presented by the President of the Human Rights Council, Follow up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review (A/HRC/17/L.29), 17 June 2011.

[122] New UPR Modalities for the Second Cycle. http://www.upr-info.org /IMG/pdf/new_upr_modalities_second_cycle.pdf.

be used for initial presentation, replies and concluding comments [...]'.[123]

The decision also regulates the issue of the list of Speakers in the Working Group on the UPR while Article IV. stipulates that 'the established procedures, which allow 3 minutes speaking time for Member States and 2 minutes for Observer States, will continue to apply when all speakers can be accommodated within three hours and thirty minutes available to Member and Observer States'. If all the speakers cannot fit in the foreseen time of three hours and thirty minutes, the speaking time shall be reduced to 2 minutes for all. Moreover, 'if all speakers still cannot be accommodated, the speaking time will be divided among all delegations inscribed so as to enable each and every speaker to take the floor'. In other words, every state shall be given a chance to speak, so the ultimate possibility can be reduction of the time available to speakers to two minutes per speaker or 140 minutes will be divided by the number of speakers.[124] The speakers are obliged to strictly adhere to the specified time limits and if they exceed the speaking time, their microphones will be cut off. Due to that fact, most speakers try to bring out their most important theses at the beginning of their speeches. The list of speakers is defined on the Monday of the week preceding the beginning of the UPR Working Group session while for each review states take the floor in alphabetic order, bearing in mind the fact that the beginning of the list is drawn by lot. Although the rules for defining the order of speeches are precisely laid down, states can, by mutual agreement, change their positions.

Furthermore, Article V of the decision sets out the rules on voluntary funds, according to which 'the Secretariat is requested to revise the terms of reference of the Voluntary Fund for participation in the UPR and to provide an annual written update to the Human Rights Council, starting from the 18th session, on the operations of the funds and the resources available to it'.[125] It has been foreseen that the General Assembly of the UN establishes, for that purpose, a board of trustees

[123] Decision adopted by the Human Rights Council, Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review. Unlike the State under Review (SuR) which was allotted 70 minutes, other States were given 140 minutes.

[124] New UPR Modalities for the Second Cycle.

[125] Decision adopted by the Human Rights Council.

pursuant to the UN rules, taking account of equitable geographic representation.

Other relevant provisions of the Resolution A/HRC/RES/16/21 determine that the second and subsequent cycles will last 4.5 years, that there will be 14 sessions per cycle and that 14 states will be reviewed per session (nine states in the first week and five states in the second week). The first session of the second cycle will be held in June 2012 and the second one in October 2012. Unlike in the year 2012, for which only two sessions are scheduled, from 2013 on the sessions will be held in January, May and October. States are obliged to present their standpoints, clearly and in writing, on all received recommendations to the Council. On such occasions, states are encouraged to supply the Council with a midterm update on follow-up to accepted recommendations. Special attention is paid to National Human Rights Institutions (NHRIs) with A status, which have the right to set forth their standpoints immediately after state representatives and the observations of the former will be included into the summary of other stakeholders' information. In the end, NGO's are also enticed to provide their information on the follow-up to the preceding review.

Annex I of the Decision reveals that Croatia will be in the 138th and Hungary in the 174th place during the Second Cycle of the UPR.[126]

VII. Conclusion

The establishment of the Human Rights Council in 2006 is symbolically called 'the dawn of a new era' in the area of human rights protection. In fact, since its very beginnings, high expectations were put on the Council's implementing and enforcement mechanisms. This particularly refers to the UPR which has, although being more recent, met all the expectations since most states involved in the review process depict it as constructive.

The UPR of the Human Rights Council have contributed to affirmation of human rights within the framework of the UN, the mission of which, pursuant to its founding treaty – Charter, includes reaffirmation of faith in fundamental rights (the preamble), respect for human rights (Article 1) and obligation of member states to take both joint and separate action to ensure respect for and observance of human rights and fundamental

[126] From the chronological point of view, Croatia will be reviewed at the 22nd session of the Second Cycle in 2015 while Hungary will be reviewed at the 25th session of the Human Rights Council in 2016.

freedoms for all (Articles 55 and 56). This mechanism should represent a 'peer review' of activities of UN member stats related to human rights protection and an instrument for detection of areas in states under review, which require external advice or assistance, so that these states could correct these irregularities in their approach to human rights. The future of the UPR was highlighted in a majestic and visionary manner in a speech of UN Secretary-General Ban Ki-moon dating from 2007, in which he considered this mechanism to 'have a great potential to promote and protect human rights in the darkest corners of the world'.[127]

[127] Universal Periodic Review,http://www.ohchr.org/en/hrbodies/upr/ pages /uprmain.aspx.

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Are older workers second-class? – The case of Croatia and Hungary

I. The law of the European Union on old age discrimination

1. Introduction

'Age' represents the most common ground of experienced discrimination under all grounds in the European Union. This was the major finding of a survey carried out by the European Commission.[1] As the survey shows the majority of Europeans – 58% of the answerers – had the feeling in 2009 that discrimination on the ground of age is widespread.[2] Interestingly, Hungary is at the top of the list with 79% of Hungarians saying that age discrimination is widespread in Hungary. Croatia is below the European average, as only 47% of the Croatians perceive that age discrimination is very or fairly widespread.[3] When turning to the experience of age discrimination, 6% of EU-citizens report that they have been discriminated against based on age.

Reasons for the high level of perceived and experienced age discrimination are twofold. First, discrimination based on age can hit everybody, i.e. everybody can suffer from this kind of discrimination either in young or in old age. The other significant reason is that European societies are ageing and the proportion of older people is constantly increasing in society. This fact brings about serious economic difficulties, namely the increase of costs of social and pension insurances and slowing down the economic growth.

Therefore one of the main aims of the EU employment policy is to increase the employment rate of workers above 50 years and keep older workers in the labour market.[4] The Council together with the

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[1] Special Eurobarometer 317, Report of the European Commission, Discrimination in the EU in 2009. p. 75.

[2] Ibid., p. 71.

[3] Ibid., p. 72.

[4] In European surveys and statistics persons between 55 and 64 years are considered as old workers.

governments of the Member States adopted a resolution on the employment of older workers setting measures how to keep them in the labour market.[5] The 1999 guidelines of the European Employment Strategy set the main aims to promote active ageing and support older workers remaining in labour market.[6] The Europe 2020 strategy set the target that in the EU 75% of the 20-64 year olds should be employed by 2020.[7]

2. Regulation of the European Union in a nutshell

The first legally binding prohibition of discrimination based on age in the EU was included in the Directive 2000/78/EC.[8] In 2000 two framework directives were adopted fighting against discrimination, directives 2000/43/EC[9] and 2000/78/EC. The adoption of these directives clearly proves that the European Union has moved from a scattered view of equal treatment – when only some special fields were regulated - to a more comprehensive regulation.[10]

The special feature of the Directive 2000/78/EC is that its Article 6 allows the justification of different treatment on grounds of age. The directive makes a difference between discrimination and justifiable difference in treatment. Article 6 provides the opportunity for Member

[5] Resolution of the Council and of the Representatives of the governments of the Member States meeting within the Council on the employment of older workers, *OJ* [1995] C228/1.

[6] Council Resolution of 22 February 1999, *OJ* [1999] C69/2, para 4.

[7] See: http://ec.europa.eu/europe2020/pdf/targets_en.pdf 2012 has been designated by the European Commission the European Year for Active Ageing and Solidarity between Generations.

[8] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal* L 303, 02/12/2000 P. 0016 – 0022. Earlier documents did not expressly mention age, as a prohibited ground of different treatment. Non-discrimination legislation of the EU concentrated long-time mainly on equal treatment of men and women following the principle of equal pay for equal work for men and women declared in Article 119 of the Treaty of Rome. See also later Article 16 of Community Charter of the Fundamental Social Rights of Workers.

[9] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal* L 180 , 19/07/2000 P. 0022 – 0026.

[10] Gy. Kiss, 'A Domnica Petersen ügy tanulságai a kor szerinti diszkrimináció versus igazolt nem egyenlő bánásmód körében – hazai összefüggésekkel', 1 *Pécsi Munkajogi Közlemények* (2010) p. 107.

States to adopt a regulation that differences of treatment on ground of age shall not constitute discrimination. The regulation is bound on some conditions. Different treatment on ground of age can only be justified, if it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Possible legitimate aims can justify difference in treatment, but only employment policy aims are expressly listed.

The Court of Justice of the European Union (in the following: CJEU) stated that the prohibition of discrimination on ground of age must be regarded as a general principle of the law of the European Union and it was given specific expression by Directive 2000/78/EC in the field of employment and occupation.[11]

The Charter of Fundamental Rights of the European Union[12] provides the major fundamental rights, inter alia social rights. The first paragraph of Article 21 of the Charter prohibits any discrimination on the ground of age.

3. Judgments of the CJEU on old age discrimination

a) Fixed-term employment contracts for elder workers

The CJEU delivered several judgments on age discrimination in the last couple of years. In the following we will focus on the judgments dealing with discrimination of older workers. The decisions can be classified into three groups.

The first judgment on old age discrimination at all was the *Mangold case* in 2005,[13] which generated heated debate due to its statement on the direct effect of the principle of equal treatment[14]. In this case Mr. Mangold, then 56 years old, concluded an employment contract for six months without any objective reason for the short period of the contract.

[11] C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, para 21; Case C-297/10, *Sabine Hennigs v Eisenbahn-Bundesamt* and Case C-298/10, *Land Berlin v Alexander Mai*, both September 2011. para 47.

[12] Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/C 364/01. Since 1st December 2009 the Charter is legally binding in the EU apart from the UK and Poland.

[13] C-144/04. *Werner Mangold v Rüdiger Helm*, 22 November 2005.

[14] Special feature of the case was that at the time of the conclusion of Mr. Mangold's employment contract the deadline for the implementation of Directive 2000/78/EC has not yet expired.

The contested German law declared that a fixed-term employment contract – unlike the standard rule – shall not require objective justification if, when starting the fixed-term employment relationship the employee has reached the age of 58 (later the age of 52).[15] The objective of the German regulation was to promote the employment of older workers by evading the difficult termination procedure of an indefinite employment relationship. The CJEU declared that the rule had a legitimate, public-interest objective, namely to promote the vocational integration of unemployed older workers. However, such legislation does not consider the structure of the labour market in question or the personal situation of the person concerned, therefore it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.[16] Fixed-term employment contracts can be only exceptional, since the stability of workplace is important element of the protection of workers. Therefore the German legislation contravened the directive. A similar problem arose in the *Lufthansa versus Kumpan case*.[17]

b) Compulsory retirement

The key issue of age discrimination is the so-called 'compulsory retirement'. 'Compulsory retirement' or 'forced retirement' means that the employment relationship ends automatically or can be terminated by the employer's notice at the time when the worker reaches the retirement age and gets entitled to pension. The expression 'compulsory retirement' indicates that the termination is forced by the employer. Workers in many cases wish to continue to work, either because their pension is not enough to live on it or simply because they like their job. From the worker's point of view the automatic termination of the employment relationship is a constraint. The main question is therefore, whether a clause in law, collective agreement or employment contract is justified, which provides that with the achievement of the retirement age and entitlement to pension the employment contract will end automatically.

[15] The judgment had to be examined in the light of the Council Directive 1999/70/EC on fixed-term work. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ* 1999 L 175, p. 43.
[16] Mangold judgment, paras 64-65.
[17] C-109/09, *Deutsche Lufthansa AG v Gertraud Kumpan*, 10 March 2011.

The declared objective of such a regulation is usually to decrease unemployment and support young workers to get a job. The background idea is that the termination of the employment relationship of elder workers will lead to the employment of young ones. In our opinion this idea is in general not true; it should be applied only in some branches, where the number of workers is limited by the state (see below: the Georgiev case and Fuchs & Köhler cases).

In the *Palacios case*[18] the contested Spanish law allowed for the collective agreements to contain a clause, which authorises employers to terminate the employment relationship of workers who have got entitled for pension. The regulation aimed to lower unemployment through the termination of employment relationship of elder workers and making jobs for younger. The CJEU ruled that this regulation was compatible with the requirements of the Directive 2000/78/EC for two main reasons; first, the relevant legislation took account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension. This argument reiterates in every later judgment of the CJEU. Second, the Court considered that collective agreements guarantee considerable flexibility and they can take into account the specific features of the professions, jobs, sectors in the labour market.

In the *Age Concern case*[19] the contested English regulation said that the dismissal of a person at or over the age of 65 is not unlawful, where the reason for dismissal is retirement. CJEU ruled that the regulation does not establish a mandatory scheme of automatic retirement and it is for the national court to determine whether and to what extent this provision is justified by legitimate aims and whether it is appropriate and necessary.

In the *Domnica Petersen case*[20] the German national legislation provided that admission to practise as a panel doctor expires at the end of the calendar quarter, in which the panel doctor completes his 68th year. Two aims of this regulation were specified, namely first the protection of health of patients, since the performance of dentists declines after a certain age. The CJEU ruled that in the light of this

[18] C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007.

[19] C-388/07, *The Queen, on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009.

[20] C-341/08, *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, 12. January 2010.

objective the measure lacks consistency because doctors outside the panel system can practise at any age. The rule consequently impairs the Directive. The second mentioned aim was to balance among the generations' employment opportunities in the profession of panel dentists. A measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as a legitimate employment policy measure. The regulation complies with the Directive, when its aim was to support young doctors to become panel dentists. It is for the national court to identify the real aim of the national legislation.

The *Rosenbladt judgment*[21] is the most controversial of all such cases. Mrs. Rosenbladt cleaned barracks part-time 39 years long.[22] She earned about 307 Euros per month. Her employment ended, when she reached her retirement age. The legal basis for the termination was a clause in a universally applicable collective agreement for the cleaning sector. Mrs. Rosenbladt contradicted the termination and wanted to continue to work as her pension was monthly 253 Euros. The Court ruled that the clause in the collective agreement and the law, which allowed this regulation are not discriminative as Mrs Rosenbladt had the same right as other workers to look for another job. In the Court's view the termination of an employment contract does not have the automatic effect of forcing the person concerned to withdraw definitively from the labour market and that provision does not establish a mandatory scheme of automatic retirement.[23] Therefore the means used to achieve the employment policy aims – clauses in collective agreements on automatic termination of employment contracts – are necessary and appropriate. In our opinion, this is an extremely cynical reasoning. Mrs. Rosenbladt's pension was obviously not enough to make ends meet and so not even the financial compensation reason can be effective. It is anyway debatable whether the general employment policy aim, namely the

[21] C-45/09, *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH*, 12 October 2010.

[22] Her daily working time was two hours, weekly working time ten hours. It does not belong narrowly to the case, but for better understanding it is worth mentioning that the reason for Mrs. Rosenbladt's part-time was that she cared for her disabled child.

[23] 'It does not deprive employees who have reached retirement age of protection from discrimination on grounds of age where they wish to continue to work and seek a new job.' Rosenbladt judgment, para 75.

support of the employment of young workers would stand in the cleaning sector.

The CJEU recently examined two regulations on compulsory retirement applied for certain branches. The Court argued that in professions where the places are very limited, compulsory retirement age can help young workers to receive a job. In the *Georgiev case*[24] the Bulgarian Labour Code provided that the employer can terminate the employment contract of professors and lecturers by giving prior written notice to the employee, when the right to receive a retirement pension has been acquired and they reach the age of 65. The Court decided that this rules does not create discrimination. The posts for university professors are, in general, of a limited number. According to the Court, if the legislation pursues a legitimate aim, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, then setting an age limit for professors can be an appropriate and necessary mean.[25]

In the *Fuchs and Köhler case*[26] the applicants worked as state prosecutors until they reached the age of 65 in 2009, the age at which they had to retire. The declared aim of setting a retirement age was to establish an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, while at the same time seeking to provide a high-quality justice service.[27] All of these can constitute a legitimate aim of employment and labour market policy. In the face of budgetary constraints, the opportunity of creating new posts is limited. The Court drew the conclusion that age limit can be an appropriate and necessary mean, if those workers are entitled to a pension the level of which cannot be regarded as unreasonable.[28]

[24] Joined cases C-250/09 and C-268/09, Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv, 18 November 2010.

[25] Georgiev case loc. cit. n. 24. para. 68. paras. 45-46.

[26] Joined cases C 159/10 and C 160/10, Gerhard Fuchs (C 159/10), Peter Köhler (C 160/10) v Land Hessen, 21 July 2011.

[27] Ibid. para. 50.

[28] Ibid. para. 66. The prosecutors got a full pension equivalent to approximately 72% of their final salary.

c) Severance pay

The third problem on age discrimination getting before the CJEU was related to severance pay. In Denmark in the event of dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months salary as severance pay. This provision shall not apply, if the employee is entitled to an old age pension on termination of the employment relationship. In the Andersen judgment[29] the government explained that the severance pay aimed to facilitate the move to new employment for older employees who have many years of service with the same employer. The measure supports workers who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment.[30] This aim is considered as legitimate. However, the measure may thus force workers to accept an old-age pension, which is lower than the pension that they would be entitled to, if they were to remain in employment for more years, leading to a significant reduction in their income in the long term. This provision causes great financial losses for this group of people anyway.[31] Another major problem is that these people can exercise their right to work with more difficulties.[32] Therefore the CJEU decided that this measure goes beyond what is necessary to attain the social policy aims and cannot be justified.

II. The Hungarian regulation on old age discrimination

1. The regulation of equal treatment

The new Hungarian Constitution – which entered into force on 1 January, 2012 – has a statement on equal treatment which applies only on the application of fundamental rights. Article XV. subsection (2) declares the following: Hungary guarantees the fundamental rights for everybody without any distinction, namely on the basis of race, colour, sex, disability, language, religion, political or other opinion, nationality or social background, asset, birth or other situation. Clear shortage of

[29] C-499/08, *Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen, v Region Syddanmark*, 12. October 2010.
[30] Ibid., para 39.
[31] Ibid., paras 44-46.
[32] Ibid., para 45.

this rule is that the list of specified grounds of discrimination does not include age; however, it can be implied by the expression 'other situation'.[33] The new Constitution is a setback compared to the old one,[34] as it not only guaranteed the fundamental rights for everybody without any distinction, but also provided the legal consequences for violating this rule.[35]

The Labour Code[36] only includes a short statement, namely in connection with employment relations the principle of equal treatment must be strictly observed. Similarly, the new Labour Code contains a short declaration emphasising particularly the principle of equal pay for equal work.[37]

Detailed regulations contain the Act on Equal Treatment and Promotion of Equal Opportunities.[38] The act has to be applied inter alia for the employment relationship, which is interpreted in a very broad way[39]. Article 8 point o) expressly states age as a prohibited ground of discrimination. Every direct and indirect discrimination, harassment and reprisal on ground of age is prohibited in the employment relationship. Article 22(1) contains two exemptions on the general principle specified for the employment relationship. The difference in treatment does not constitute discrimination, if a) it is a proportional different treatment based on important and lawful conditions, justified by the feature or nature of the work, or b) the different treatment is based on religious or other belief, national or ethnic affiliation and it directly arises from the special nature of the employer's organisation and it is a proportional and

[33] The interest of older people is expressly mentioned in subsection (5) Article XV. It states that Hungary protects children, women, elder and disabled people with special actions. Nevertheless, this is a statement for the general protection of old people and not the declaration of equal treatment.

[34] Act XX of 1949, Constitution of the Republic of Hungary. It was completely rewritten after the collapse of the socialist system and was in force till the end of 2011.

[35] Art. 70/A (2) The law seriously punishes people's adverse treatment according to subsection 1.

[36] Act XXII of 1992. It will be abrogated at the end of June 2012.

[37] Art 5 of the old Labour Code and Art 12 of the new Labour Code (The new Labour Code – Act I of 2012 will enter into force on 1 July 2012.).

[38] Act CXXV of 2003 (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról).

[39] The act has to be applied for all forms of employment in both public and private sectors. Furthermore, it applies for other relationships which are directed to provide labour, e.g., contract for work.

real different treatment, justified by the content or nature of the activity concerned.

In 2012 there is a serious cutback concerning the procedural rules in case of the violence of the principle of equal treatment. The so-called Equal Treatment Authority is an independent organization set up by the government in 2004 for guaranteeing equal treatment.[40] Until February 2012 the authority had the right on request or ex officio to make inquiries in order to state whether the principle of equal treatment was violated. Every natural and legal person had the right to bring a complaint to the authority alleging that she/he was discriminated against. On the basis of its inquiry the authority adopted a resolution, in which it could impose a fine for violating the principle of equal treatment.[41] The vast majority of complaints received were related to labour.[42] This right of the authority was cancelled from 2012 and recently it has only certain public rights.[43]

Until 2012 the labour inspectorates had the right to control employers, whether they comply with the principle of equal treatment.[44] The control was extended on the preparation of the employment relationship, as well. Since 2012 the authorities do not have this right any more. With the abolishment of the main right of the Equal Treatment Authority and the labour inspectorates, workers discriminated against have the only possibility to sue their employers, which obviously is an expensive and long-lasting procedure.

2. The definition of pensioner in the Labour Code

The Labour Code gives a special definition of pensioner and makes a difference between two categories.[45] Under Article 87/A (1) a) an

[40] Egyenlő Bánásmód Hatóság. See its homepage also in English: www.egyenlobanasmod.hu.

[41] To get compensation for the discrimination the victim has to sue the violator at court. The Authority only imposes fine.

[42] See Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, http://www.egyenlobanasmod.hu/data/2010report.pdf p. 4.

[43] It can bring an action to the court to protect the rights of violated group of people. Furthermore, it has some information and consultation rights and the right to make a proposal for an act.

[44] Act LXXV of 1996 on Labour Control, Art 3(1) point d).

[45] Art 87/A of the Labour Code. The same rule is contained in the new Labour Code, Art. 294(1) point g).

employee shall be recognised as a pensioner upon reaching the retirement age for old-age pension benefits prescribed by the Social Security Pension Benefits Act and if having the service time required to receive old-age pension. Interestingly, these workers have only entitlement for a pension, but they are still not pensioners. The workers have reached retirement age and have the necessary period of service, thus they can freely decide, whether they want to retire. It is a legal presumption to qualify them as pensioners, as they maybe do not want to retire, even if they are entitled to. The second category of pensioners includes several forms of pension or benefit, e.g., early retirement pension, church-related pension, unemployment benefit, and invalidity benefit. Common conditions of the qualification as pensioner in this category are that – beside of the early retirement – workers have to reach retirement age and apply for pension.

3. Special regulation for dismissal of pensioners

The Hungarian Labour Code includes three special rules for dismissal of pensioners. These provisions make it much easier to dismiss a pensioner and deprive this group of all kinds of protection against dismissal.

a) Ordinary dismissal without reason

In Hungary, if an employer wants to dismiss a worker, he has to specify the reason for it. There are three groups of reasons, which can justify a dismissal. The law does not define directly the specific reasons or circumstances, which can justify the termination, but specifies three groups of reasons. The reason can be related to a) the skills of the workers; b) the behaviour of the worker in connection with the employment relationship; c) the operation of the employer.[46] The regulation contains an exemption for pensioners. The employer is not obliged to give reasons for the ordinary dismissal of an employee if he/she is a pensioner.[47] It is enough, if the employer just gives a notice on the termination of the employment relationship. This is an extremely easy way to dismiss a worker. The employer has discretionary power to decide, whether he wants to dismiss the worker who gets pension and thus the worker has very limited possibilities to bring an action to the court against this notice.

[46] Art 89(3) of the Labour Code.

[47] Art 89(6) Labour Code. The new Labour Code maintains the same regulation in Art 66(9).

b) No prohibition of dismissal

In certain cases the employer is not allowed to dismiss the employees. Article 90(1) Labour Code declares that employers shall not terminate an employment relationship by ordinary dismissal during certain periods, e.g.: incapacity to work due to illness, the period of sick leave for the purpose of caring for a sick child; leave of absence without pay for nursing or for providing home care for a close relative, etc. During these periods the employer is prohibited to dismiss a worker. If the employee is qualified as a pensioner, he/she does not enjoy this right, i.e., the employer can dismiss him/her at any time, even during sick leave.[48] The new Labour Code does not have the same regulation. The new Labour Code limits the kinds of protected periods, during which it is prohibited to terminate the employment relationship. A major change is that during sick leave it will be allowed to give notice of termination and the period of notice can start after the recovery and return of the worker. However, there will be no special regulation for pensioners any more.

c) No severance pay

The third special regulation shows similarities to the Danish case. According to Article 95 of the Labour Code, the employee is entitled to severance pay after three years of service, if his employment relationship is terminated by ordinary dismissal or in consequence of the dissolution of the employer without succession. The sum of severance pay increases with the length of service. However, the employee is not entitled to severance pay, if he/she is recognized as a pensioner on or before the date, on which his/her employment is terminated.[49]

In order to answer the question, whether severance pay is in line with the principle of non-discrimination, we have to clarify the function of this institution. To my opinion severance pay has two aims, namely to reward the worker's long-time loyalty to his employer and to create a reserve for the time of unemployment. In Denmark the aim of severance pay – according to the government's assumption – was to make workers the period between two jobs easier. However, the fact that in Denmark

[48] Art 90(3) of the Labour Code provides that the restriction of dismissal laid down in Subsection (1) above shall not apply to the termination of an employee who is recognized as a pensioner [Art. 87/A (1)].

[49] Art 95(2) of the Labour Code.

workers get entitled to severance pay only after 12 years of service is against this function of severance pay. This indicates that also loyalty was rewarded by the severance pay. In Hungary the regulation is different from the Danish one as workers get entitled to severance pay already after having three years of employment relationship.
The official reasoning of the Hungarian regulation is not clear, but indicates that real motivation was to support workers in the unemployment and thus severance pay serves mainly a social function. This social reason is not necessary in case of pensioners. The loyalty of workers is not mentioned in the reasoning. This strengthens the impression that the Hungarian regulation on severance pay has the same objective like the Danish one. This impression is definitely intensified by the fact that the right to severance pay is guaranteed after a shorter length of service than in Denmark. The common feature of the two systems is that workers cannot decide on the fact whether they want to receive severance pay and stay in the labour market or rather retire.[50] Consequently, in my opinion the Hungarian rule violates Art. 6 of the Directive 2000/78/EC and would not stand the examination of the CJEU. Art 77(5) new Labour Code maintains this regulation.[51]

4. The decision of the Hungarian Constitutional Court

The Hungarian Constitutional Court examined the constitutionality of the mentioned regulations – particularly the lack of reasoning in case of pensioners – in some decisions.[52] The judgment from 2001 is particularly interesting.[53] The question was, whether the lack of reasoning in case of ordinary dismissal of pensioners contravenes the prohibition of unequal treatment set in Article 70/A(2). The

[50] Workers belonging to the second group of pensioners defined in Art 87/A of the Labour Code and described under II. 2. can decide, whether they apply for early retirement, other kinds of special pension, unemployment benefit, invalidity benefit or rather keep working.
[51] For getting a more complete picture on the regulation we have to mention that workers being five years prior to getting entitled to pension enjoy a special dismissal protection and receive more severance pay. The reason for this is that they have more serious difficulties to find a new job.
[52] 44/B/1993 Decision of the Constitutional Court and 11/2001. (IV.12.) Decision of the Constitutional Court.
[53] In that time Article 70/A(2) of the earlier Constitution declared the principle of equal treatment.

Constitutional Court ruled that the mentioned regulations comply with the principle of equal treatment.
The Constitutional Court's starting point was that the employer's right to dismiss workers is free and has no borders. It assumed that the main principle is free dismissal and there are only some exceptions of it. The rule that the employer has to give a reason for ordinary dismissal constitutes an additional protection and thus a positive discrimination. Therefore the exception for pensioners does not constitute negative discrimination, but only abolished the additional protection. Since the regulation does not create an adverse treatment, the Court does not need to examine, whether the different treatment complies with the principle of equal treatment. The explanation of the Constitutional Court does not refer to employment policy aims or the proportionality test of the CJEU. In my opinion the Court's reasoning is false and illogical, as according to the general rule the dismissal has to be explained, i.e. the reasons for the termination of the employment relationship have to be given for all workers apart from pensioners. In my opinion this is the general rule and there are only a few exceptions. This is not a positive discrimination, but the normal case.

5. Assessment of the Hungarian regulation

The CJEU judgments on old age discrimination clearly indicate that it is justified to treat older workers adversely concerning their termination of employment, if they get entitled to pension. As far as the Hungarian regulations are concerned this is a general excuse Hungary could refer to employment policy aims, as objectives of the different treatment of older workers. Besides, the dismissed workers get a financial compensation, even if this is not enough in every case to live on it. Therefore in the light of the recent CJEU judgments, the regulation on ordinary dismissal without any reasoning and without complying with the general prohibition on dismissal is probably in line with the Directive 2000/78/EC and would stand the examination of the CJEU.
The special Hungarian legislation considers those people pensioners, who receive invalidity benefit, unemployment benefit or early retirement pension. The involvement of these groups generates at least two major problems. Firstly, the adverse treatment of these groups is not bound to any labour market objectives. Secondly, their pension is too low to make ends meet. However, following the reasoning of the Rosenbladt judgment, having financial compensation in form of some

kind of pension can be an appropriate ground for the justification of the different treatment.
More controversial is the rule on severance pay. In my opinion, this rule contravenes the Directive. The official reasoning of the Labour Code argues that in case of the termination of the employment relationship no social reason can explain to give severance pay for the worker, when she/he receives appropriate money by pension. However, in my opinion there is no real employment policy aim behind this regulation, therefore it cannot be justified. Furthermore, the contested Hungarian regulation is extremely similar to the Danish case found incompatible with the Directive 2000/78/EC in the Andersen judgment.

III. The Croatian regulation on old age discrimination

1. Introduction

Age discrimination is a topic that causes many debates in Croatia and witnesses noticeable contradictions. According to the research of 2010 conducted by the Institute of Social Sciences Ivo Pilar, in the opinion of the unemployed and employers, age discrimination is the most common form of discrimination and it is followed by discrimination based on disability and discrimination based on sex.[54] In accordance with such perception, empirical data on the incidence of discrimination identified by the aforementioned research prove that age discrimination, regardless of whether these are problems of discrimination in general, discrimination in the labour market, employment or workplace discrimination, affects the largest number of persons.[55] Nearly 20% of the unemployed believe that they did not get a job in the past year because of their age, 15% of the unemployed experienced direct discrimination in job interviews, since they were told that they were not suitable for the job because of their age, about 17% of unemployed persons experienced essentially the same unfair treatment in their workplaces, and almost 10% of respondents claimed that they were deprived of or denied promotion, better working conditions, training,

[54] R. Franc, I. Ferić, J. Maričić et al., *Raširenost i obilježja diskriminacije na hrvatskom tržištu rada, Izvješće na temelju ankete među nezaposlenim osobama i ankete među poslodavcima* [Prevalence and Characteristics of Discrimination in the Croatian Labour Market, The Report Based on a Survey among the Unemployed and Survey among Employers] (Zagreb, Institut Društvenih znanosti Ivo Pilar, April 2010).
[55] Ibid.

equal pay and other benefits in their workplace because of their age.[56] Moreover, in all these cases, age discrimination was more commonly experienced in the group of unemployed persons aged 40 years or above, than in the group of persons younger than 40.[57] Taking these data into account, additional concern arises from the fact that nearly 40% of employers and unemployed persons have never heard of the Anti-Discrimination Act, they are not familiar with other acts relating to discrimination in the labour market (70% of employers, 90% of unemployed persons), and they do not even know which central national authority is responsible for combating all forms of discrimination (70% of employers, 80% of unemployed persons).[58] Although the above study included a relatively small number of respondents, it is a valid indicator of the relative incidence of discrimination that provides sufficient basis for further research. One should *pro futuro* also examine possible forms of multiple discrimination, i.e. forms of simultaneous discrimination based on age and/or sex, disability, sexual orientation, and national origin, since the obtained results could reflect a more complex picture and the complexity of a discrimination problem.[59]

Age discrimination in Croatia has imposed a debate about a possible different treatment of older workers employed in the government and public sector, that are mostly protected by general and special acts and collective agreements and older workers employed in the private sector and working for small employers to whom collective agreements do not apply. The situation is also interesting, because of the specific features and structure of retirees, since there is discrimination against elderly people and on the other hand, according to the age structure, the smallest number of retirees has reached full retirement age. This is a consequence of an extremely high percentage of disability support pensions and Croatian Homeland War veterans' pensions from the nineties of the last

[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Cf. M. Vinković, 'Spolna segregacija i tržište rada – hrvatski diskurs europskih trendova' [Sex Segregation and the Labour Market – Croatian Discourse of European Trends], in I. Radačić and J. Vince Pallua, eds., *Ljudska prava žena, Razvoj na međunarodnoj i nacionalnoj razini 30 godina nakon usvajanja Konvencije UN-a o uklanjanju svih oblika diskriminacije žene* (Zagreb, Institut društvenih znanosti Ivo Pilar and Ured za ravnopravnost spolova Vlade Republike Hrvatske 2010) p. 203.

century, the specific culture and aspirations of workers who are predominantly directed towards an early retirement.[60]
The Croatian legislation related to the fight against discrimination has been created and altered in good part through the influence of the process of harmonising national legislation with the *acquis communautaire*, satisfying the Copenhagen criteria and establishing the rule of law.

2. National legislation on equal treatment

In Article 3, the Constitution of the Republic of Croatia[61] promotes freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system as the highest values of the constitutional order and the foundation for interpreting the Constitution. The highest values *expressis verbis* do not mention age, but it is undoubtedly subsumed under the constitutional value of '*equal rights*'. Moreover, similarly to the Hungarian Constitution, age is not mentioned in Article 14, Chapter III Protection of human rights and fundamental freedoms of

[60] The average past service of old age pension, disability support pension, and dependents pension beneficiaries is 32, 24, and 27 years, respectively, whereas the average past service of all beneficiaries is 29 years. The share of retirees with 40 or more years of past service in the total number of retirees is only 11.54%. In 2009, the average old age pension was 17 years and 11 months, disability support pension 19 years and 2 months, and dependents pension 16 years and 8 months. Also in 2009, the average age of old age pension beneficiaries was 68 years and 11 months (women) and 71 years and 10 months (men), disability support pension beneficiaries 61 years and 5 months (women) and 61 years and 10 months (men). The largest number of retirees is between 65 and 69 years old (19.12%). We are also concerned about the ratio of the number of insured persons and the number of pension beneficiaries that was only 1.30:1 at the end of 2009 and it was the lowest ratio recorded in the Republic of Croatia. This ratio is even less favourable today. It has to be added that in Croatia there are nearly 70,000 pension beneficiaries, whose right was determined in accordance with the Act on the Rights of Croatian Homeland War Veterans and their Family Members, and nearly 11,500 pension beneficiaries according to Pension Insurance Rights of Active Military Personnel and Authorised Official Persons. See Mirovinski vodič, VII(7) July 2010 at: http://www.mirovinsko.hr/UserDocsImages//publikacije/mirovinski_vodic/hzmo_Mirovinskivodic_br7_srpanj_2010.pdf (last accessed on 20 January 2012).

[61] The Constitution of the Republic of Croatia, Official Gazette, Nos. 56/90, 135/97, 113/00, 28/01 and 76/10.

the Constitution which contains a general clause prohibiting discrimination, i.e., it guarantees that all persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status *or other characteristics*. The latter category, i.e., 'other characteristics', extends its application to make a distinction based on age. However, the Croatian Anti-Discrimination Act,[62] which together with the Gender Equality Act[63] and the Same Sex Cohabitation Act[64] makes the backbone of the Croatian anti-discrimination legislation and has the status of a constitutional act since it governs human rights and freedoms, explicitly states age as one of the seventeen legal grounds for the prohibition of discrimination.[65] Although it contains a 'closed list' of legal grounds, a general clause from the Anti-Discrimination Act prohibiting discrimination encompasses a much wider area than the one regulated by secondary EU law, i.e., framework and individual directives. The reasons for such approach can be found in an attempt of instructional activities of the Croatian legislator that wants to refer to the possible extent of discrimination in everyday life, provide as effective protection as possible and prevent possible consequences of insufficient and often limited judicial interpretation. By numerous precisely and extensively defined legal grounds for the prohibition, the legislator avoided the possibility that some cases depend solely on the legal and creative practice of national courts that would, in the case of a reduced number of legal grounds and different nomotechnical methodology, develop undoubtedly at a much slower pace.[66] In contrast to that, Article

[62] Anti-Discrimination Act, *Official Gazette* 85/08.
[63] Gender Equality Act, *Official Gazette* 82/08.
[64] Same Sex Cohabitation Act, *Official Gazette* 116/03.
[65] The others are: race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, health condition, disability, genetic heritage, gender identity, expression or sexual orientation. See Article 1 of the Anti-Discrimination Act.
[66] See M. Vinković, 'Horizontalna harmonizacija hrvatskog (radnog) zakonodavstva – Kamo je nestala zabrana diskriminacije i zaštita majčinstva/roditeljstva?' [Horizontal Harmonisation of the Croatian (Labour) Legislation – Where has the prohibition of discrimination and protection of motherhood/parenthood gone?], in I. Cvitanović, et al., *Novi Zakon o radu – Detaljni komentar novih odredaba* (Zagreb, Rosip 2010) p. 334; M. Vinković 'New Croatian Anti-discrimination Legislation –

19 TFEU (ex Article 13 TEC) extends the competence of the Union only to the fight against discrimination based on sex, racial or ethnic origin, religion or belief, physical or mental impairment, and lately age and sexual orientation. A large number of legal grounds referring to the prohibition of discrimination makes the Croatian solution closest to the provision of Article 21 of the Charter of Fundamental Rights of the European Union that exemplifies a far longer list of legal grounds for the prohibition[67], and it got an entirely new legal treatment in the judicial system of the EU by the fact that the Lisbon Treaty entered into force. Its transition from a *soft law* source ends by a legal status equal to founding treaties, so that the Croatian legislator confirmed its insight into the implications that will be brought by the Lisbon changes.[68] In accordance with European standards, the Anti-Discrimination Act, defines both direct and indirect discrimination, harassment and sexual harassment and goes a step further by defining segregation, albeit by means of an impotent definition and qualified forms of discrimination: multiple – discrimination against a person on more than one ground; repeated – discrimination committed several times and continued – discrimination that lasted over a longer period of time or whose consequences are particularly harmful for the victim.[69] By its application, it is extended to the areas of work and employment, education, science and sports, social security (social welfare, pension and health insurance and unemployment insurance), health protection, judiciary and administration, access to goods, information and services, housing, membership and activities in trade unions, civil society organisations, political parties, or other organisations as well as access to participation in cultural and artistic creation.[70] The Act applies to the conduct of all state bodies, bodies of local and regional self-government

Harmonisation with the Acquis or even more?', in K. Klima and G. G. Sander, Hrsg., *Grund- und Menschenrechte in Europa*, Schriften zu Mittel- und Osteuropa in der Europäischen Integration, Band 10 (Hamburg, Verlag Dr. Kovač 2010) pp. 96-123.

[67] Article 21(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Charter of Fundamental Rights of the European Union, *OJ* C 303, 27.12. 2007.

[68] Vinković, Horizontalna harmonizacija hrvatskog …, loc. cit. n. 66, at p. 335.

[69] See Articles 2-6 of the Anti-Discrimination Act.

[70] See Article 8 of the Anti-Discrimination Act.

units, legal persons vested with public authority and to the conduct of all legal and natural persons.[71] Although it *expressis verbis* does not mention private employers, in the context of work and working conditions it especially refers to the following: the ability to perform independent and dependent activities, i.e., self-employment and occupation, including selection criteria, recruiting and promotion conditions, access to all types of vocational guidance, vocational training, personal improvement and retraining, access to goods and services and their provision, membership and activities in trade unions, civil society organisations, political parties, or other organisations as well as access to participation in cultural and artistic creation. [72] Exclusion of unlawfulness in the world of work *inter alia* identifies in the case of positive measures, i.e. positive actions, when such a conduct is based upon provisions of laws, subordinate regulations, programmes, measures or decisions with the aim to improve the status of ethnic, religious, language or other minorities or other groups of citizens or discriminated persons; in the case of granting of privileges to pregnant women, children, young people, older persons, persons with caring responsibilities who regularly fulfil their caring duties, and disabled persons with a view to their protection, when such a conduct is based on provisions of laws, subordinate regulations, programmes and measures; in relation to a particular job 'when the nature of the job is such or the job is performed under such conditions that its characteristics related to any of the grounds for the prohibition of discrimination present an actual and decisive condition for performing that job, provided that the purpose to be achieved is justified and the condition appropriate"; in the case of "fixing minimum conditions of age and/or professional experience and/or level of education limit for access to a certain employment or for acquiring other advantages linked to employment when it is provided for in separate regulations", and in the case of "fixing a suitable and appropriate maximum age as a reason for the termination of an employment and prescribing a certain age as a condition for acquiring the right to retirement'.[73] We should also bear in mind the provision contained in Article 9 paragraph 2, point 5 on the exclusion of unlawfulness in relation to employment, entering into membership and acting in conformity with the canon and mission of a church and

[71] Ibid.
[72] Ibid.
[73] See Article 9 of the Anti-Discrimination Act.

religious congregation entered into the Register of Religious Congregations of the Republic of Croatia, and any other public or private organisation which acts in conformity with the Constitution and laws. Namely, in the given cases, the law allows the exclusion of unlawfulness, if this is required by '*the religious doctrine, beliefs or objectives*'.

The Anti-Discrimination Act is extremely important in terms of the process as well, since it defines the types of discrimination claims[74], including collective claims, specifies the burden of proof, and inaugurates the national central body responsible for the suppression of discrimination, i.e. the Ombudsman, who is also assisted by special Ombudsmen for Gender Equality, for People with Disabilities and for Children.

3. The Labour Act

As a consequence of the horizontal harmonisation of national regulation and the adoption of the Anti-Discrimination Act, the new Croatian Labour Act of 2009[75] no longer contains definitions of discrimination, harassment and sexual harassment. The Act contains only the basic obligation of the employer who employs twenty or more workers to adopt rules of procedure including provisions referring to the protection of dignity and the prohibition of discrimination, if these issues are not regulated by the collective agreement.[76] In the context of equal treatment, provisions on equal salaries to women and men for equal work and for work of equal value are important[77], as well as on the

[74] According to Professor Alan Uzelac, Article 17 introduces a new action for protection of the right to equal treatment. The individual anti-discrimination lawsuit comprises several anti-discrimination claims, i.e., Action for determination of discrimination (declaratory anti-discrimination claim); Action for prohibition of discrimination (prohibitive anti-discrimination claim); Action for the elimination of discrimination or its effects (restitutional anti-discrimination claim); Action for damages caused by discrimination (reparational anti-discrimination claim) and Action for the publication of determination of discrimination (publicational anti-discrimination claim). A. Uzelac 'Proceedings before the Court', in: A. Grgić, et al., *A Guide to the Anti-Discrimination Act* (Zagreb, Government of the Republic of Croatia Office for Human Rights 2009), p. 99.

[75] Labour Act, *Official Gazette* 149/09, 61/11.

[76] Art 125(1) of the Labour Act.

[77] Ibid., Art 89.

procedure for the protection of workers' dignity including the protection by employers and specific employment rules.[78]

The protection of older workers against discrimination as well as a series of legal protective provisions pertaining to the so-called protected groups of workers is nomotechnically divided into many chapters of the Labour Act. Moreover, a great number of protected categories of workers, whose employment contract either cannot be terminated or it is extremely difficult to terminate it (pregnant women, workers over 60, trade union representatives, employee council members, employee council member candidates, etc.) is considered to be a major stumbling block in the relations between employers' associations and the Government, an explicit form of inflexible Croatian labour legislation and a serious obstacle to foreign investments.[79] However, the criticism of the rigidity of the Croatian labour legislation and a large number of protected groups should be viewed in the context of social circumstances in relation to adoption of regulations in the areas of labour and employment since Croatian independence in the nineties of the last century. Rigid legislation was actually a response to the "wild" transformation and privatisation of state-owned companies, in which workers needed protection from the newly introduced capitalism that did not show a human face in Croatia.

a) Compulsory retirement and old age workers

Unlike the Hungarian legislation, the Croatian Labour Act contains no definition of retirees, but it lists *inter alia* the following legal grounds for termination of employment contracts: when the worker has turned 65 years of age and has 15 years of employment service, unless otherwise agreed by the employer and the worker; an agreement between the worker and the employer; expiration of the period, for which a fixed-duration employment contract has been concluded and submission of a legally effective decision on retirement due to general inability to

[78] Ibid., Art130.

[79] '*Otpuštanje 27 tisuća ljudi viška stajalo bi nas 3.5 milijardi kuna, Nemoguća misija, Kako dati otkaz zaposleniku u državnoj upravi, 16 kategorija posebno zaštićenih koji ne mogu dobiti otkaz*' ['The lay-off of 27,000 redundant people would cost us 3.5 billion HRK, Mission Impossible, How to fire a civil service employee, 16 categories of specially protected who cannot be fired'], Jutarnji list, daily newspaper, 11 February 2012, pp. 6-7.

work.[80] The possibility that the worker who has turned 65 years of age and has 15 years of employment service remains working, if he/she reaches an agreement with his/her employer is of recent date and a consequence of filling legal gaps and providing opportunities for employers to retain older workers with special skills, experience and competence. The only exceptions are judicial officials (judges and state attorneys) and tenured full professors who may work up to the age of seventy on the basis of special regulations, and categories of workers protected by special acts (military personnel, police officers, employers with reduced years of service for retirement) who can meet conditions for an old age pension before the age of 65. Former parliamentary representatives and members of the Government had this possibility until recently, but the given Act was changed under public pressure and we believe, a conscious, yet publicly unarticulated criticism of the unconstitutionality of such an act. The specificity of the Croatian legal system lies in the fact that retirees can put their retirement and retiree status obtained under the tax laws and regulations in the field of pension insurance on hold and can join the labour market, if the employer needs such persons. This work is mainly governed by fixed-term contracts and in practice we have no knowledge of legal disputes related to the termination of the employment contract concluded after retirement.

The specificity of labour legislation is also a protective clause obliging the employer to consult with the workers' council about termination of the employment contract of a worker older than 60. In case the workers' council opposes such termination, this may be replaced only by a judicial decision.[81] However, in practice, private or privatised companies have addressed such issues by offering greater amounts of severance pays and signing an agreement terminating the employment contract, which only deepened the existing vicious circle. Although employers tried to bypass the law in relation to workers of the age of 60, and even younger, these persons have regularly burdened pension funds (early retirement) or unemployment insurance.

b) Severance pay

Severance pay provisions were also subject to modifications and criticism referring to the need for their reduction. Currently, the legal solution provides for severance pay in cases, where an employer

[80] Art 104 of the Labour Act.
[81] Art 150 of the Labour Act.

dismisses a worker after two years of continuous uninterrupted service and provided dismissal does not take place due to worker's misconduct. Severance pay is determined on the basis of the length of prior continuous employment with that employer and must not be agreed upon or determined in an amount lower than one-third of the average monthly salary earned by the worker in a period of three months prior to the termination of the employment contract. Unless otherwise specified by the law, collective agreement, book of rules or employment contract, the aggregate amount of severance pay determined by the Act may not exceed six average monthly salaries earned by the worker in a period of three months preceding the termination of the employment contract. Diction of the norm would suggest that severance pay is paid only in the case of termination not conditioned by worker's misconduct, but not in other cases of the termination of employment contracts. However, in practice, under collective agreements, books of rules or employment contracts, severance payments are common when conditions for retirement are met, but the amount of severance payments is generally limited by the aforementioned statutory maximum.

It should be noted that workers employed by insolvent employers exercise their given legal rights with great difficulty, since payments of their material rights are often limited by regulations governing bankruptcy and difficult material conditions of such companies. Restructuring in transition has greatly influenced the loss of jobs occupied mostly by older workers, who find it extremely difficult now, unlike the favourable conditions to retire some ten years ago, to return to employment.[82] After the age of 65 less than one tenth of the Croatian population is economically active and these are mostly people with a low level of education who are self-employed in agriculture.[83] In conditions of a high unemployment rate, the biggest problem yet seems to be how middle-aged workers return to employment, since women over 40 and men over 45 are groups, for which it is most difficult to get a job and that, if left without jobs, remain registered with the employment agency for the longest period of time.[84]

[82] T. Matković, 'Tko što radi? Dob i rod kao odrednice položaja na tržištu rada u Hrvatskoj' [Who does what? Age and Gender as Determinants of the Position on the Labour Market in Croatia], 15(3) *Revija za socijalnu politiku* (2008) p. 493.
[83] Ibid., p. 490.
[84] N. Kerovec, 'Poteškoće u zapošljavanju osoba starije dobi' [Difficulties in Employing Elderly Persons], 8(3) *Revija za socijalnu politiku* (2001) p. 267.

IV. Concluding remarks

The paper tries to show the differences in the treatment of Hungarian and Croatian elderly workers in the light of secondary sources and relevant case law of the CJEU. The complexity of the phenomenon of age discrimination clearly indicates that by setting a maximum age for retirement, although in line with European and national regulations, the desired effects of higher employment of younger persons will not be achieved, but it will surely partly result in the loss of a competent, educated and skilled older workforce. Moreover, in circumstances in which the population of Europe is evidently getting old, early retirement, relatively small pensions, and especially big problems with re-employment of middle-aged persons in some Member States, have strengthened pressures on pension insurance systems, assistance for the unemployed and other forms of social benefits, creating thereby a national and European *circulum viciosus*. Due to specific professions, the question of old age must be considered and regulated heteronomously and not homogenously, bearing in mind the harmonised definitions of discrimination in national legal systems of Member States and the present interpretations as to setting a maximum age for retirement in national systems as a possible form of direct discrimination.[85]

[85] M. Sargeant, 'Age Discrimination in the EU and the Framework Directive', in M. Sargeant, ed., *The Law on Age Discrimination in the EU* (The Netherlands, Kluwer Law International 2008) p. 25.

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Danube Strategy and Cross-Border Region Hungary – Croatia: protecting the environment and building prosperity in the Danube Region

'By 2020 the Danube region should offer its inhabitants an improved quality of life, more economic opportunities, more innovative companies creating jobs, a better environment an increased cultural exchanges. Success in the Danube region will contribute to the prosperity of Europe as a whole.'[1]

I. Introduction

1. Development of the European Union Strategy for Danube Region (EUSDR)

The EU Danube Strategy has been elaborated within the regional development and territorial cohesion policy of the European Union. This strategy is in line with Article 3 of the Treaty on European Union which sets the aim to 'promote economic, social and territorial cohesion, and solidarity among member States', and with Title XVIII of the Treaty on the Functioning of the European Union on such cohesion policy. The aims of the EU cohesion policy, *inter alia*, are to reduce disparities between the levels of development of the various regions, to strengthen economic, social and territorial cohesion. To achieve this, Art. 175 TFEU requires Member States to coordinate their policies in line with these objectives, and the EU to take into consideration these aims in its other policies and to support their achievements through its Structural Funds.

The focus on the enhanced and wider cooperation between the EU Member States along the Danube became stronger with the accession of

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[1] Welcome words by Johannes Hahn, Commissioner for Regional Policy on 13 April, 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/472&format=HTML&aged=0&language=EN&guiLanguage=en.

Central Eastern European Countries to the EU, since it strengthened the strategic importance of the Danube Region. After joining of 12 new Member States and the preparation of further enlargement in this area, the Danube Region encompasses 8 EU Member States: Germany, Austria, Slovakia, Hungary, Romania, Bulgaria (Danube riparian states), Czech Republic and Slovenia (belonging to the Danube catchment area) and 6 non-Member States: Croatia and Serbia (Danube riparian states),[2] Bosnia and Herzegovina, Montenegro, Ukraine and Moldova (belonging to the Danube catchment area). Thus, the Danube became the central axis of Europe, and the Black Sea became the coastal area of the EU.

The Danube-Black Sea Region, the world's most international river basin, contains the most important non-oceanic body of water in Europe. It flows approx. 3000 kms from its source in the Black Forest (Germany) to the Black Sea, covering a fifth of EU surface, with over 100 million people, thus the area is vital for Europe. This is shown by its economic, environmental, social, political and cultural importance: the Danube is a source of drinking water, it is used by agriculture, industry, fisheries, power generation, navigation – transport, it is also an important area for tourism, and recreation. The Danube Region is extremely rich in ecological assets: its wetland areas are habitats for a diversity of plants and animals, and a home of rare and threatened species. This region shares a multitude of different traditions, cultural heritage, historical experiences. The intensive use of the river and the basin itself often resulted in a heavy pollution and waste-water disposal and created severe environmental problems, *inter alia*, loss of biodiversity.

There are other reasons for enhanced development and closer cooperation in this region. In the last decade new challenges have emerged, and opportunities opened. The EU Danube Strategy has to contribute to the objectives of the EU in reinforcing major EU policy initiatives, especially the Europe 2020 strategy for sustainable growth and the EU Sustainable Development Strategy.

There are many international and EU initiatives, programmes and activities to solve economic, social and environmental problems in the Danube Region, cooperation bodies, such as the Danube Commission and International Commission for the Protection of the Danube River

[2] Croatia has already signed the Treaty of Accession (Brussels, 9 December 2011) their full membership will start on 1 July 2013. Serbia is a potential candidate country.

have made a considerable progress in environmental issues too,[3] however they address specific issues, their efforts should be further strengthened and integrated. The new EU Danube Strategy intends to widen their approach. The EU Territorial Cooperation includes several cross-border, transnational and interregional programmes under the EU cohesion policy, however, the new EU Danube Strategy constitutes a new type of regional cooperation programme: the so-called macro-regional strategy. 'The importance of the Danube Basin for the EU cannot be underestimated […] The Danube needs a specific strategy […] A one-size-fits all approach doesn't work in an EU of 27 Member States and 271 regions. We need a targeted policy for the Danube that meets its ecological, transport and socio-economic needs.'[4]

The preparation of the EUSDR started in 2009, when the European Council asked the Commission to develop the strategy.[5] During the 2009/2010 preparation phase several public consultations and consultations with participating countries were held. In this phase the Commission DG REGIO issued a scoping paper which suggested main topics for consultation.[6] In response, a series of stakeholder conferences have been conveyed from Germany through Hungary to Romania, many position papers have been submitted with common concern, expressing common interests and also different national priorities.[7] In 2010 the European Commission drafted the European Union Strategy for the Danube Region, and an accompanying Action Plan,[8] which was adopted by the Council for General Affairs in April 2011 and endorsed by the

[3] Zsuzsanna Horváth and Branislav Malagurski, 'International and EU Law Aspects of Sustainable Development and Environmental Protection in the Danube Catchment Area' in Timea Drinóczi and Tamara Takács, eds., *Cross-border and EU legal issues: Hungary – Croatia* (Pécs – Osijek, PTE ÁJK, J.J. Strossmayer University, Faculty of Law 2011) pp. 213, 215-218.

[4] Words of Commissioner Hübner on the open day in October 2008, http://www.interact-eu.net/danube_region_strategy/danube_strategy/285/3928.

[5] Brussels European Council, 18/19 June 2009, Presidency Conclusions, 11225/2/09 REV 2, pp. 12-13.

[6] Commission, DG REGIO, EU Strategy for the Danube Region, Scoping Paper for the public consultation, REGIO/E1/EN/NV/OB D (2010), Brussels, 2 February 2010.

[7] About the preparation phase and the consultation process see more in Horváth and Malagurski, loc. cit. n. 3, at pp. 229-233.

[8] Commission Communication, European Union Strategy for Danube Region, COM(2010)715, Brussels, 8.12.2010, Commission Staff Working Document, Action Plan, SEC(2010)1489, Brussels, 8.12.2010.

European Council in June 2011.[9] On 3 February 2011 Commissioner Johannes Hahn designated the Priority Area Coordinators, who will lead the work in 11 priority fields.[10]

2. Concept of the macro-regional strategy

There is not yet a standard definition of the so-called macro-regional strategy. The first experimental strategy of this type is the EU Strategy for the Baltic Sea Region, in which 9 states (8 of them are members of the EU) sharing common resources joined to cooperate in order to solve common economic, environmental and social problems of the Baltic Sea Region.[11] According to the Commission, the macro-region is 'an area including territory from a number of different countries or regions associated with one or more common features or challenges'. [12] Thus the key words are the common geographic, economic, cultural and other features and challenges that are identifiable.[13] It is an area covering a number of administrative regions with sufficient issues in common to justify a single strategic approach.[14] Accordingly, the macro-regional strategy should be an integrated multisectoral regional strategy, where the territorial cohesion approach is applied, and where 'interventions are built around the needs of functional regions rather than according to pre-determined financial and administrative criteria. This form of macro-regional approach also provides the EU with an innovative policy instrument, which could serve as a good example of efforts to achieve common EU objectives and more effective coordination of territorial and sectoral policies based on shared territorial challenges.'[15] Thus, the

[9] Council of the European Union, Conclusions, 3083rd General Affairs Council meeting, Brussels 13 April 2011; European Council Conclusions – EUCO 23/1/11 REV 1, 23/24 June 2011, p. 13. The European Council called for the development of further macro-regional strategies, in particular as regards the Adriatic and Ionian region.

[10] http://www.interacteu.net/danube_strategy_news/priority_area_coordinators_designated/293/7830.

[11] Commission, Communication on the EU Strategy for the Baltic Sea Region, COM(2009)248, 10.06.2009.

[12] http://www.interacteu.net/macro_regional_strategies/macro_regional_strategies/283/392.

[13] Macro-regional strategies in the European Union, http://www.interact-eu.net/downloads/1682/Macro-regional_strategies_in_the_European_Union.pdf.

[14] EU Baltic Sea Strategy, COM(2009)248, 10.06.2009, p. 5.

[15] EU Baltic Sea Strategy, pp. 5-6.

idea is 'to add value to interventions, whether by the EU, national or regional authorities or the third or private sectors, in a way that significantly strengthens the functioning of the macro-region. Moreover, by resolving issues in a relatively small group of countries and regions the way may be cleared for better cohesion at the level of the Union. Working together can become a habit and a skill. In addition, overall coordination of actions across policy areas will very likely result in better results than individual initiatives.'[16]

3. Main pillars and characteristics of the EU Danube Strategy

As a result of the wide consultation procedure it became clear that the strategy has definitely involved not only the EU Member States but Third Countries, including candidate and potential candidate countries; the Commission has to lead the strategy development and implementation process; existing resources should be better used, and the strategy must deliver concrete, visible improvements for the Region. The expectation towards the strategy are: transport interconnections and informatics access have to be modernised to connect people; energy efficiency and security improved; economic development has to be balanced with the protection of the environment and sustainable development; risks and disasters (natural and industrial) have to be minimised; trade and enterprises have to be further developed; education and employment have to be improved and disparities eliminated; the region should become a safe and secure area. The Commission expressed the desired purpose of the EUSDR: 'By 2020, all citizens of the Region should enjoy better prospects of higher education, employment and prosperity in their own home area. The Strategy should make this a truly 21st century region, secure and confident, and one of the most attractive in Europe.'[17]

The Commission listed several challenges the Danube Region has to face and many opportunities that can be based on to reach the strategy goal: they refer, among others, to mobility, energy, risks, environmental, socio-economic and security issues. It is emphasized that these challenges could be best addressed together, and making the most of opportunities also requires increased cooperation, planning and implementation together.

[16] http://www.interacteu.net/macro_regional_strategies/macro_regional_strategies/283/3921.

[17] Commission, EUSDR, COM(2010)715, p. 3.

Similarly to the EU Baltic Region Strategy, the EU Danube Strategy groups the major issues in four pillars:

A. Connecting the Danube Region (to improve mobility and multimodality through inland waterways, road, rail and air links; to encourage more sustainable energy; to promote culture and tourism).
B. Protecting the environment in the Danube Region (to restore and maintain the quality of waters; to manage environmental risks; to preserve biodiversity, landscapes and the quality of air and soils).
C. Building prosperity in the Danube Region (to develop the knowledge society, research, education, information technologies; to support the competitiveness of enterprises; to invest in people and skills).
D. Strengthening the Danube Region (to set up institutional capacity and cooperation; to work together to promote security and tackle organised and serious crime).

The Action Plan attached to the EUSDR lists several actions within each pillar and priority field. The Action Plan is and indicative framework, which will be evolved and extended further during the implementation phase, as the work progresses. Coordination of each priority area is allocated to a Priority Area Coordinator.[18] They are responsible for making the Strategy operational; they will lead the implementation by agreeing on a work programme and identifying sources of finance. They will work in close contact with the Commission and with all the other stakeholders: Member States, other countries, regional and local authorities, inter-governmental and non-governmental organisations and bodies, etc.

It is emphasized that the EU Danube Strategy is built on the involvement and efforts of all the stakeholders, the Commission will be responsible for the coordination assisted by the High Level Group of all Member States, where Non-Member States will also be invited. The Commission will organise Annual Forums to discuss the work and necessary revisions of actions, furthermore, it will report and evaluate progress regularly, in partnership with Priority Area Coordinators.

[18] Priority Area coordinators were designated and announced by Johannes Hahn, Commissioner for Regional Policy in Budapest in February 2011. For Hungarian and Croatian responsibilities see point II. 3. of this article. For the complete list see at http://www.interact-eu.net/pacs/priority_area_coordinators/470/8953.

It was clear from the beginning – as the characteristics of the macro-regional strategies – that the EUSDR will not provide any new EU funds. It can rely on additional national, international, regional or private funds, although the emphasis is on the better and more efficient use of existing funds. They are available within the framework of e.g. EU Structural Funds, IPA funds or the Western Balkan Investment Framework, and other international financing mechanisms. Similarly, the EUSDR requires any changes to EU legislation, since the EU adopts legislation for the EU 27 and not for the macro region alone, and not for Non-Member States. The last 'no' is that the EUSDR creates no additional structures; the implementation will be done through existing bodies, who will act in a complementary character.[19]

In order to reinforce the integration of the whole region the EUSDR intends to support the implementation of EU policies and legislation. It will contribute to the Europe 2020 which is the EU Strategy for smart, sustainable and inclusive growth.[20] The priorities of the EUSDR are in line with the headline targets of the new EU growth strategy in relation to employment, innovation, research and development, climate change and energy objectives, education, and social inclusion issues. The EUSDR is aimed also at fostering the European Union Sustainable Development Strategy[21] goals with its priorities in environmental protection, nature conservation, biological diversity, climate change, energy and other fields. It also contributes to policy objectives in the area e.g. of single market, transport, energy, environmental protection, external relations – especially cooperation with third countries in the Danube river basin. Although the EUSDR has a primarily internal character – as for the integrity of the EU decision-making – participation of third countries is crucial to achieve its objectives. The necessary links between the EUSDR and other EU policies are emphasized also by the Council: it asked the Commission to take its objectives into account in relevant policy initiatives and programmes.[22]

[19] Commission, EUSDR, COM(2010)715, p. 12.

[20] Commission Communication, EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM(2010)2020, Brussels, 3.3.2010.

[21] Commission Communication, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM(2009)400, Brussels 24.7.2009.

[22] General Affairs Council, Conclusions, 3083rd meeting, Brussels 13 April 2011, p. 2.

II. Protecting the Environment in the Danube Region

1. Environmental issues in the pre-EUSDR phase

The strategic and environmental importance of the Danube and the Black Sea Region was already emphasized by the Commission ten years ago. In its 2001 Communication the Commission gave an overview of the environmental situation and the environmental cooperation activities there. It listed the main environmental problems, which affected the Danube River ecosystems: high nitrogen and phosphorous loads from agriculture, industry and domestic sources; extensive water consumption by the agriculture and industry, lack of integrated planning and water management; an overexploitation of surface and groundwater; contamination with hazardous substances; accidental pollution; degradation and loss of wetlands and biodiversity. The Commission urged for regional cooperation by all the countries concerned and international organisations working in the region in order to prevent further deterioration and enhance the status of the aquatic ecosystems, to promote sustainable water use, to enhance protection and improvement of the aquatic environment, to ensure the progressive reduction of pollution and to contribute to mitigating the effects of floods and droughts.[23] For the preparation of the EUSDR, in its Scoping Paper the Commission listed three specific question for consultation: 1) connectivity and communication; 2) protection of the environment and 3) reinforcement of socio-economic, human and institutional development. Environmental protection issues covered: preservation of water resources; improvement of quality of air and soils (including waste); biodiversity and landscapes; natural risks (floods and droughts); and mitigation and adaptation to climate change.[24]

2. Environmental priorities of the EU Danube Strategy

The second, B pillar of the EU Danube Strategy concerns environmental protection issues. However, this pillar cannot be seen in isolation from the other pillars and priorities, first of all from the first A pillar, which includes questions of transport (inland navigation), energy efficiency, encouragement of the use of renewable energy resources, environmental

[23] Commission Communication on Environmental co-operation in the Danube – Black Sea Region, COM(2001)615, Brussels, 30.0.2001. pp. 1-24.
[24] Commission, DG REGIO, EU Strategy for the Danube Region, Scoping Paper, p. 4.

effects of land transport and tourism.[25] The importance of the environmental pillar is emphasized by the Commission when it calls for a balance between development and protection of the environment 'within a sustainable development approach, in line with the environmental *acquis communautaire* as applicable', and for working together to minimise risks and disasters such as floods, droughts and industrial accidents.[26] Within the challenges and opportunities listed by the Commission many concern environmental issues. Since the Danube Region is a major international hydrological basin and ecological corridor, and since water and air pollution does not respect national borders, common solutions must be found, which requires a regional approach to nature conservation, spatial planning and water management. This is also true for fighting against major flooding, droughts, and industrial pollution. The Commission emphasizes that environmental resources in the Region – which are under growing pressure from human activity – are shared across borders and go beyond national interests, thus, a high degree of cooperation and information sharing is required.

The three main priorities of the EUSDR environmental pillar are the followings.

To restore and maintain the quality of waters. The Danube region has many important tributaries, lakes and groundwater bodies, where a good water quality should be ensured, sustainable water management and reducing pollution from organic, nutrient and hazardous substances is required. These tasks should be done through the implementation of the EU Water Framework Directive and the joint River Basin Management Plan adopted jointly by all Danube States in 2009.[27]

To manage environmental risks. Disastrous events such as floods, droughts and industrial accidents having significant transnational negative impacts became more frequent in the last some years. Preventive and management measures should be taken jointly through

[25] Importance of traffic development, environmental and nature protection, and the sustainability of the EUSDR are emphasized by Pánovics Attila, 'Az EU Duna-régió stratégiájának környezetvédelmi aspektusai' 1 *Európai Tükör* (2011) pp. 75-78

[26] Commission, EUSDR, COM (2010)715, p. 3. It should be noted that the Action Plan to the EUSDR emphasizes that '[a]ll actions should be understood without prejudice to the existing EU competences and requirements of the EU *acquis*'. Commission, Action Plan to the EUSDR, p. 3.

[27] See more in Horváth and Malagurski, loc. cit. n. 3, at pp. 218-224.

regional cooperation, since isolated national actions cannot produce the required results, 'simply displaces the problem and puts neighbouring regions into difficulty'. The implementation of EU directives, e.g. on floods, mining, waste or on environmental liability is of importance in this field.

To preserve biodiversity, landscapes and the quality of air and soils. The Danube Region is not an exception to the general loss of natural habitats and biodiversity. The EUSDR list some causes, e.g. intensive land use, urban development, fragmentation of ecosystems. To halt the loss of biodiversity and ecosystems by 2020 is required by the EU, this target is endorsed by the EUSDR, as well as objectives of the EU Natura 2000 project. Concrete and concerted actions are also needed to protect soils from erosion, which causes water pollution, and to manage waste disposal properly. The EUSDR contains concrete targets, e.g. to achieve targets set out by the Danube River Management Plan, to reduce the nutrient levels in the Danube River, which helps to recover ecosystems of the Black Sea, to implement the flood risks management plans, to draw up management plans for all Nature 2000 sites; to reduce the area affected by soil erosion, to protect certain fish species, etc.[28]

The Action Plan accompanied to the EUSDR lists several concrete actions to each priority field and examples of projects within these actions. In relation to water quality for example, an action is to implement fully the Danube River Basin Management Plan, and another is to greatly strengthen the cooperation at sub-basin level, examples of projects within these actions are: to complete and adopt Danube Tributaries' River Basin Management Plans, and to complete and adopt a Management Plan for the Danube Delta. Other important actions in this priority field are to promote alternative collection and treatment of waste to reduce polluting discharges into rivers; to develop cooperation between authorities responsible for agriculture and environment to prevent agricultural pollution; to adopt legislation to avoid the use of phosphates in detergents; to use the newest technology and BAT in treating hazardous substances and contaminated sludge; to promote measures to limit water abstraction, etc.

To manage environmental risks, the Action Plan refers *inter alia*, to climate change, floods, droughts, forest fires, erosion, water scarcity, and industrial risks issues. It calls for the development of a Danube

[28] Commission, EUSDR, COM(2010)715, pp. 8-9.

Adaptation Strategy in the nearest future. Actions listed in this area concern the development of a single, overarching floods management plan at basin level; to extend the European Floods Alert System to the whole Danube River basin, to continuously update the existing database of accident risks spots; to foster transnational cooperation in order to develop a Climate Change Adaptation Strategy for the Danube Region, etc.

Within the third priority area – the preservation of biodiversity, landscapes and the quality of air and soils – the Action Plan considers the compliance with EU environmental legislation crucial in the improvement of the environment in the countries of the Danube Region. It emphasizes that the natural heritage of the Danube Region is of European importance since it contains a large share of Europe's remaining wilderness areas and rich cultural landscapes, which are under growing pressure due to the rapid industrial, transport and agricultural development. There are several actions already included in the Joint programme of Measures of the Danube River Basin Management Plan prepared by the ICPDR. The Action Plan proposes actions, which will be complementary to the already existing ones. Examples are: to contribute to the 2050 EU vision and 2020 EU target for biodiversity; to manage Natura 2000 sites and other protected areas effectively; to develop green infrastructure in order to connect different bio-geographic regions and habitats; to decrease the input of pesticides into the environment of the Danube Region; to prepare and implement transnational spatial planning and development policies for functional geographical areas (river basins and mountain ranges, etc.); to ensure appropriate treatment of solid waste; to create standardised and compatible information on land cover on transnational basis; to raise awareness about soil protection; to decrease air pollutants; furthermore, other actions to educate people on the value of natural assets, ecosystems and the services they provide, including awareness raising of the general public and capacity building of local authorities in the environment related matters. Examples of proposed projects here are: to establish fully the Mura-Drava-Danube Biosphere reserve; to identify and protect old growth forests of the Danube Basin; to promote the conservation of the genetic pool and gene bank cooperation along the Danube; to develop the Alpine-Carpathian (wildlife) Corridor; to implement transnational spatial development plans; to implement the strategy for soil protection; to use various databases to establish critical

loads of air pollutants for the Danube region ecosystems (causing acidification, eutrophication and ozone formation effects).[29]

3. National priorities and objectives in Hungary and in Croatia

a) Hungarian priorities within the EUSDR

The overwhelming part of the preparation of the Danube Strategy was completed under the Hungarian EU Presidency in the first half of 2011. The adoption of the strategy was within the main goals of Hungary, therefore it undertook a key coordinating role. The idea behind the high priority given the EUSDR is expressed by the Hungarian Presidency. 'The Danube is the artery of Hungary, flowing across its heart. Without its pulsation, life would be unthinkable in this area. It brings and gives what nourishes and takes what is harmful. But it can and does bring damage too, and it sometimes washes away our essential needs. We both love and fear this calm and capricious mighty power, which can be used wisely but cannot be foolishly harnessed without serious consequences, which we must protect and be protected against at times, and which has been with people in this land for thousands of years now.'[30] Indeed, Hungary is the sole country along the Danube with its total territory belonging to the Danube catchment area. In the three Hungarian contribution papers submitted to the preparation of the EUSDR the following horizontal aspects were emphasized: strengthening the territorial cohesion of the Danube region; moderating the social, economic and environmental consequences of climate-change; promoting the unified EU market; promoting development and innovation. The strategic priorities for Hungary are: strengthening the safety of the Danube region, sustainable economic development; strengthening cooperation and identity in the Danube region.[31]

The outstanding priority for Hungary is a coordinated water management: the concept of 'responsible water governance' which means to reconcile several contradictory interests in order to preserve

[29] Commission, Action Plan to the EUSDR, pp. 34-53.

[30] http://www.eu2011.hu/files/bveu/documents/DUNA_EN_web.pdf (28.12.2011). The idea can also be expressed by the words of the famous Hungarian poet, Attila József who wrote that the Danube is 'past, present and future' and whose 'waves are all-embracing in a soft caress' (*At the Danube*).

[31] See Hungarian contributions, strategy papers to the EUSDR, and a chart summarizing priorities at http://www.mfa.gov.hu/kum/en/bal/foreign_policy/duna_strategia/magyar_jovokep_es_celrendszer.htm.

strategic water reserves, to satisfy demand for water (drinking, industrial, transport, regional, etc., including water demand in the ecosystem) and to maintain satisfactory water quality. The Danube Strategy can be a good example of integrated water management, with the achievement of the environmental objectives of the EU Water Framework Directive, including the implementation of common policies on floods, drought and climate risk management, rural development, agricultural and tourism development along the Danube. The concept also covers creation of infrastructures which ensure the availability of water reserves, water storage and distribution systems, and prevention of water damage. Since Hungary has one of the largest stocks of sub-surface fresh water in the Carpathian Basin, the conservation of this supply is of great importance, thus, bilateral cooperation is crucial in water management, which should be supported in the EUSDR.

Besides the development of sustainable transport and ensuring the navigability of the Danube, the other high priority for Hungary is an improvement in the security of energy supply and in energy saving, integration and development of energy systems and mitigation of the negative effects of climate change. Hungary supports the regional network integration, the New European Transmission System (NETS – unified gas network), the Nabucco gas pipeline, and the development of liquefied natural gas (LNG) capacity in the Adriatic. Hungary would like to have access to supplies from the future LNG terminal in Croatia, and supports the modernisation of the Friendship oil pipeline and the construction of the North-South gas link, furthermore, the operation of an electrical network between Hungary and Croatia.

Hungary considers it necessary to increase the use of renewable energy sources, in particular the capacity for bio-energy production (biomass, biogas, bio-fuels) and the use of geothermal energy as widely as possible, furthermore, to increase the energy efficiency of buildings and to reduce the energy use of transport.[32] According to the designation of priority area coordinators, among the 11 priority areas, Hungary will be responsible for three priorities: to encourage more sustainable energy (with Czech Republic); to restore and maintain the quality of waters (with Slovakia); and to manage environmental risks (with Romania).[33] On 20 July 2011 an agreement between Hungary and the European Investment Bank was concluded, according to which a Danube Contact

[32] See Hungary's 3rd contribution to the development of the Danube Strategy, pp. 3-8.
[33] http://www.interact-eu.net/pacs/priority_area_coordinators/470/8953.

Point would be established in Budapest, which would have a coordinating role in the implementation of the EUSDR, especially in the utilization of financial resources.

b) Croatian priorities within the EUSDR

Within the preparatory phase of the EUSDR the Croatian contribution – non-paper – Croatia welcomed and fully supported the idea of creating an integrated European transnational approach, the Danube Strategy. Croatia expressed its fundamental approach to the strategy: the equal partnership, which it considered as a prerequisite to its successful implementation. This means a 'balanced development of all the states of the Danube River Basin, which is an endeavour that requires their full engagement'.[34] Croatia also considers its involvement an excellent opportunity and an added value in its Euro-integration process, in its accession to the European Union.[35]

Due to its geographic position, Croatia can give an additional dimension to the Danube Strategy: it can be considered as a 'bridge' between the Danube and the Adriatic (Mediterranean) areas, which is important for the development of trade, transport and tourism activities of the Danube region. Drava and Sava, the two main rivers of Croatia are tributaries of the Danube with their rich natural assets that have to be protected.

The main priorities of the Croatian Danube area are: the development of intermodal transport and effective connecting of the Danube region with the Adriatic coast; increasing economic competitiveness – development of entrepreneurship, tourism and modernisation of agriculture; environmental protection, risk prevention and development of renewable energy resources; human resources development. Among the proposed projects many concerns the environmental protection priority, such as: revitalisation of Drava-Sava waterway, flood prevention, improvement of ecological network and nature protection measures and conditions, development of satisfactory agricultural structure, development of

[34] Non Paper – Croatia's Priorities and Cooperation in the Danube Region, http://ec.europa.eu/regional_policy/archive/consultation/danube/doc/countries/hr_non_paper_en.doc.

[35] On 9 December 2011 Brussels, the EU and Croatian leaders signed Croatia's EU Accession Treaty. Subject to necessary ratifications Croatia will become the 28th Member State of the European Union on 1 July 2013. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/883.

energy supply.[36] There are well-preserved wetland areas along the Croatian Danube area with rich biological diversity and natural assets, which are at the same time important hydrological resources. Leisure and health tourism activities are to be further developed in this area.
Another priority is waste management where Croatia has already complied with relevant EU legislation.
Within the integrated water management the main goal is to provide sufficient quantity and quality of drinking water, and the necessary quantities of water for economic purposes.
In the area of biodiversity, Croatia's priority is to prevent, first of all habitats and species in its numerous Natura 2000 sites from negative effects of economic activities, e.g., navigation, traffic, tourism, and so on. Cooperation between Croatia and Hungary is of importance in the development of the Mura-Drava Regional Park as a reservation area.
In the area of climate change Croatia's main aim is to improve cooperation and joint actions in the Danube region in order to mitigate the effects of climate change, to prevent the accompanying harmful consequences (floods and droughts), and to implement adjustment measures. Equally important here is the establishment and implementation of a joint strategy for soil protection.
Croatia's efforts to ensure secure and sustainable energy supply are closely connected to environmental priorities. The use of renewable energy resources is one of Croatian priorities, for which it has favourable conditions. Croatia wants to improve regional cooperation in specific projects to interconnect energy, tourism, environmental protection and other sectors. The development of sustainable agriculture, forestry, fisheries as well as sustainable industrial development and tourism need to integrate environmental requirements. Croatia has an outstanding tourism potential which should be exploited through joint strategies and cooperation with other countries within the Danube region.[37]
Croatia is designated as a coordinator country for two priority areas: to preserve biodiversity, landscapes and the quality of air and soils (with Germany – Bavaria), and to support the competitiveness of enterprises (with Germany – Baden-Württemberg).[38]

[36] Non Paper – Croatia's Priorities and Cooperation in the Danube Region, pp. 3-4.
[37] Ibid., pp. 7-11.
[38] http://www.interact-eu.net/pacs/priority_area_coordinators/470/8953.

On 26 May 2011 in Niederalteich, Bavaria, Joint Declaration by the country representatives responsible for the coordination of the Pillar 'Protecting the Environment in the Danube Region' of the EU Strategy for the Danube Region was signed to start the cooperation for the implementation of the environmental pillar of the EUSDR.[39]

III. Building prosperity

The Pillar C, building prosperity in the Danube Region, as a part of the EUSDR, includes various aspects focused towards the development of the knowledge society, research, education, information technologies, the support to the competitiveness of enterprises and the investment in people and skills. Its focus covers three Priority Areas: (1) To develop the knowledge society through research, education and information technologies; (2) To support the competitiveness of enterprises including cluster development; and (3) To invest in people and skills (education and training, labour market and marginalized communities).[40]

The EUSDR and its Action plan do not foresee particular fund for the implementation of the Strategy. However, EU programmes contribute to this pillar.[41] The European Economic and Social Committee in its

[39] See the Joint Declaration by representatives of relevant Bavarian, Croatian, Romanian, Slovak and Hungarian Ministries in the Priority Areas: restoration and maintenance of the quality of waters, management of environmental risks, preservation of biodiversity, landscapes and the quality of air and soils, signed in Niederalteich, May 26, 2011. By signing the Joint Statement the first step was made towards achievement the objectives of the Strategy. Joint Statement represents an important basis for effective cooperation in the field of environmental protection in the Danube region. http://zastita-prirode.hr/eng/Projects-International-Cooperation/International-Cooperation-and-European-Union/Activities/EU-Strategy-for-the-Danube-Region-Priority-Area-6-to-preserve-biodiversity-landscapes-and-the-quality-of-air-and-soils/Joint-Declaration-by-the-country-representatives-responsible-for-the-coordination-of-the-Pillar-Protecting-the-Environment-in-the-Danube-Region-of-the-EU-Strategy-for-the-Danube-Region.

[40] Commission, Action Plan to the EUSDR, p. 55.

[41] This relates in particular to the 7th Research Framework Programme, the Instrument for Pre-Accession Assistance (IPA) National, Cross-border Cooperation and Multi-beneficiary country programmes, several programmes of the European Neighbourhood and Partnership Instrument (ENPI) (such as the Regional programmes or the Cross-border Cooperation Programmes), the European Agriculture Fund for Rural Development (EAFRD), the European Fisheries Fund (EFF) and the Competitiveness and Innovation Programme. More recently, for the

working documents particularly addressed Structural Funds, countries in the region, private sector and international financial institutions.[42] Europe 2020, the EU Strategy for smart, sustainable and inclusive growth supports such approach.[43]

1. To develop the knowledge society through research, education and information technologies

The Priority Area 7, within the Pillar C, building prosperity in the region, relies in the first line on development of knowledge society, where research, education and information technologies play a decisive role. A society's ability to create and exploit knowledge is a key factor for progress and growth. The European Innovation Progress Report classifies some countries in the Region as 'innovation leaders', or 'catching up innovators'.[44] Studies on researchers' mobility (students, graduates and higher education staff) show south-east European countries at a disadvantage compared to other EU countries, especially in international research mobility, as well as in the ability to attract bilateral R&D cooperation.

The application of information and communication technology may particularly advance growth in the Danube region.[45] To stimulate excellence in research and development, cooperation between knowledge providers, companies and the public sector should be enhanced and incentives for stronger cooperation developed. Centres of excellence were presented on the first meeting of Priority area 7 coordinators, while exchange of PhD students and promoting the efficient use of existing research infrastructure should be used for set up

countries of the Western Balkans, additional efforts have been made to better coordinate and blend instruments for grants and loans via the Western Balkans Investment Framework (WBIF).

[42] European Economic and Social Committee, Working Document of the Section for Economic and Monetary Union and Economic and Social Cohesion on The European Union strategy for the Danube region, ECO/277 – R/CESE 587/2010, p.6.

[43] Commission, EUROPE 2020, at p. 20.

[44] Commission, Action Plan to the EUSDR, at p. 58.

[45] The private and public sectors could progress rapidly, to provide services more effectively and efficiently, for example through e-government, e-business, e-education and e-health, or through intelligent co-modal use of transport infrastructure supported by technologies such as river information service systems or e-freight. Commission, Action Plan to the EUSDR, p. 58.

of a network to serve that purpose.[46] A better coordination of national and regional funds is needed to stimulate research and development in the Region and to benefit fully from the European Research Area. This is in accordance with the attitude of the European Commission that resources need to be concentrated. Clearer objectives will lead to more impact and better results. By spending more effectively more can be achieved with the same resources.[47] The use of cross border and international networks should be advantageous for such objectives. These networks can be borrowed from various programs and projects that have been already implemented in order to achieve different goals.[48] The Action plan has proposed a number of actions in line with several pillars of the Digital Agenda for Europe, especially pillars n 4 on 'Fast and ultra-fast Internet access', n 5 on 'Research and Innovation', n°6 'Digital literacy, skills and inclusion' and n 7 on 'Information and Communication Technologies' – enabled benefits for the EU society.[49] These actions are defining various measures to be undertaken in order to achieve specific objectives of this Priority Area, as well as to give examples of projects to be drawn. For example, Action – 'To coordinate better national, regional and EU funds to stimulate excellence in research and development, in research areas specific for the Danube Region' give an example of project 'To create a Danube research area through coordination of funds', or Action – 'To develop and implement strategies to improve the provision and uptake of Information and Communication Technologies in the Danube Region' gives examples of projects 'To build upon the existing projects to promote the Information

[46] More details on this meeting held at the University of Novi Sad on 22 06 2011 on http://www.dunavskastrategija.rs/en/?s=137.

[47] European Commission DG Regional Policy, Information and Communication Plan 2012. See on http://ec.europa.eu/dgs/regional_policy/document /complan_ 2012.pdf.

[48] UNESCO supports various global networks including those in the field of education, research, development (See related to the network UNESCO-UNEVOC on http://www.unevoc.unesco.org/wiki.0.html?&no_cache=1&tx_drwiki, or the network UNITWIN on http://www.unesco.org/en/unitwin/university-twinning-and-networking. On the other hand in Europe there are a number of active networks in the field of education and research, including those that link together EU and non-EU member states, Universities, other education and research institutions (related to SEE-ECN network see on http://www.see-educoop.net/portal/id_nodes.htm or WBC-INCO.NET see on www.wbc-inco.net.

[49] Commission, Action Plan to the EUSDR, pp. 59-62.

Society in lagging or in rural areas', 'To build upon the existing projects to promote the Information Society for SMEs', and 'To provide ICT based training for the general public, especially for prioritized target groups such as low-income, elderly or disabled'.[50]

2. To support the competitiveness of enterprises, including cluster development

The Priority Area 8 within the Pillar C, building prosperity in the region covers the support to competitiveness of enterprises, in particular integration of SMEs through cluster development. This happens, because the integration of SMEs is the precondition to become receptive to transfer of technologies and organizational models developed by Academia and large enterprises.

To draw the full benefits from the Danube region's growth potential and to support the competitiveness of sectors, framework conditions need to be improved and made more coherent. Among the possibilities to achieve this, the development of clusters and centres of excellence should be fostered and cluster cooperation across borders and across sectors should be facilitated. Through centres of excellence and clusters the links to education and research policy should be established. Existing cluster mapping studies conducted in the Danube region through numerous other European initiatives should be exploited and built on.[51] To improve the conditions for enterprises, especially SMEs, the institutional capacities of business support agencies and industry associations should be strengthened throughout the Danube region.[52] An additional way to improve the existing trade links among companies in the Danube region however suggest a large potential for future growth and economic integration, if barriers for doing business across borders could be brought down and existing rules could be simplified.

Priority Area 8 also includes a number of actions, with indicative projects. Action 'To foster cooperation and exchange of knowledge between SMEs, academia and the public sector in areas of competence in the Danube region', with examples of projects 'To develop a Danube region programme for clusters and SME networks', 'To utilise better the performing, heritage and cultural assets of the Region by developing strengths in the creative, cultural, entertainment and tourism industries',

[50] Commission, Action Plan to the EUSDR, pp. 59-62.
[51] Commission, Action Plan to the EUSDR, p. 64.
[52] Commission, Action Plan to the EUSDR, p. 64.

and 'To establish a Danube region network for innovative environmental technologies'. Further action 'To support enterprises through high performing training and qualification schemes', with the project 'To develop joint programmes for professional education and vocational training together with enterprises', and action 'To eliminate cross border barriers and bottlenecks to people and business – Seamless Europe for a liveable Danube region'.[53] The mentioned projects are only indications, and their further development and drawing the new projects by stakeholders will add to them more concrete idea and proposals. Initial coordinators' meetings have shown directions, in which they are going to be developed.[54] Since the primary goals of this Priority Area activities are to support the EU integration and the 'Europe 2020' Strategy for intelligent, sustainable and inclusive growth, the main actions are to foster cooperation and exchange of knowledge between SMEs, Academia and the public sector, to improve business support to strengthen the capacities of SMEs through cooperation and trade and all enterprises through high performing training and qualification schemes, to improve rural areas, in particular agriculture sector, eliminate cross border barriers and bottlenecks to people and business and framework conditions for SMEs in areas where competitive infrastructure is missing.[55] The particular devices for the integration are identified, such as activities on formation of clusters along Danube riverside in food and processing industries (organic food, green industry and metal processing), as well as services (tourism, other services).[56]

[53] Commission, Action Plan to the EUSDR, pp. 64-68.

[54] After initial coordination meetings in Germany and Romania, it was held a conference in Zagreb on 15 12 2011, where the up to date developments in frames of Priority Area 8 have been summarized. DANUBE STRATEGY – An Impetus for Strengthening Regional Cooperation between Croatia, Hungary and Serbia, Zagreb, 15.12.2011, see on http://ec.europa.eu/regional_policy/conferences/od2011/Open-Days-FTP-2011/docs/607-12B14-Dragica_Karaic_European_Union_Strategy_for_Danube_Region_-_Bruxelles.pdf.

[55] Karaic, Dragica, 'European Union Strategy for Danube Region, Priority Area 8: To Support the Competitiveness of Enterprises, including Cluster Development', Zagreb Conference presentation, see on http://ec.europa.eu/regional_policy /conferences/od2011/Open-Days-FTP-2011/docs/607-12B14_ Dragica_Karaic_European_Union_Strategy_for_Danube_Region_-_Bruxelles.pdf, slides 2, 3 and 4.

[56] Ibid., at slide 9.

3. To invest in people and skills

Through Pillar C, Priority Area 9, investment into better use of its human capital, the Danube region can progress and grow in a smart and inclusive way. To make use of the full potential of the labour force and to fight poverty, the Danube region's labour market also needs to be more inclusive. Regarding equal opportunities between men and women, inequalities are more pronounced in upper parts of the Region than in lower parts.[57] This analysis calls for actions across a whole range of fields, education, labour market, integration, research and innovation should be mutually reinforcing.

The particular measures of this Priority Area include action 'To enhance performance of education systems through closer cooperation of education institutions, systems and policies', with example of project 'To support sustainable education reforms in the Danube region', action 'To foster cooperation between key stakeholders of labour market, education and research policies in order to develop learning regions and environments', action 'To support the mobility of workers, researchers and students through implementing the European Qualification Framework', with example project 'To enhance capacities of key stakeholders in education, science and research' and other.[58]

The capacity building is indispensable on all levels, whether individual, organisational, regional, national or macro-regional. It should include developing key competencies and organisational skills, promotion of innovative partnerships, and governance in the regional/ national context.[59] This means that within the pillar C, as well in other pillars, priority areas should be in harmony with efforts to develop the Danube region. All these efforts contribute to the achievement of objectives of Europe 2020, which is the EU Strategy for smart, sustainable and inclusive growth.[60]

4. National Plans and Measures in Hungary and in Croatia

a) Hungarian priorities within the Pillar C

Hungary has not put the focus on Pillar C priority areas related to the EUSDR, but it is rather oriented towards the water management and

[57] Commission, Action Plan to the EUSDR, p. 69.
[58] Commission, Action Plan to the EUSDR, pp. 70-73.
[59] Commission, Action Plan to the EUSDR, p. 69.
[60] Commission, EUROPE 2020, pp. 4, 16.

infrastructural issues.[61] However, in its contribution to the EUSDR as one of its strategic priorities Hungary has mentioned the sustainable economic development of the region, which includes sustainable development of tourism and improving the industrial conditions.[62] Further, the development of knowledge-based society, competitive economy and investment into skills is key instrument for rural development, rendering assistance to the economy through local power sources and by the establishment of a creative economy.[63] It also mentions scientific clusters and research filed cooperation.[64]. However, these actions belong to Priority Areas of Pillar C only through Priority Areas A and B. This does not mean that Hungary does not participate in all other Priority Area activities, including those of Pillar C. For example, it is active participant of the Priority Area 8 – Support the Competitiveness of Enterprises, Including Cluster Development.[65]

b) Croatian priorities within the Pillar C

Croatia is one of the coordinators of Priority Area 8, to support the competitiveness of enterprises including cluster development.[66] This Priority is included in its Non Paper, describing priorities for cooperation in the Danube region.[67] Among the projects proposed by Croatia, to pillar C are contributing clusterisation and export incentives (Priority Area 8), projects for the transfer of know-how and technology and new technological solutions that are to contribute to the specialisation, clusterisation and creation of the climate conducive to foreign investment (Priority Area 8) and strengthening of the network of universities and colleges (Priority Area 7).[68]

[61] See Hungarian priorities, in point II. 3. a) of this Article.

[62] Hungarian contributions, strategy papers to the EUSDR. See on http://www.mfa.gov.hu/kum/en/bal/foreign_policy/duna_strategia/magyar_jovokep_es_celrendszer.htm pp. 9 and 10

[63] Hungarian contributions, strategy papers to the EUSDR, pp. 9 and 10.

[64] Hungarian contributions, strategy papers to the EUSDR, p. 10.

[65] Hungarian Ministry of Foreign Affairs and Ministry of National Development and Economy, European Danube Region Strategy – Hungary II. contribution, 30.4.2010, http://www.mfa.gov.hu/NR/rdonlyres/AD5437132324445B958F6B523E856185/0/0_EDRS_INTRODUCTION_30042010.pdf p.10

[66] On priorities and their coordinators See at http://www.interact-eu.net/pacs/priority_area_coordinators/470/8953.

[67] Non Paper – Croatia's Priorities and Cooperation in the Danube Region, p. 4.

[68] Non Paper – Croatia's Priorities and Cooperation in the Danube Region, p. 4.

Related to the Priority Area 8, as the coordinator, Croatia has participated in two Steering Committee meetings (in Germany, June 2011 and in Romania, December 2011).[69] At the Zagreb Conference in December 2011, the debate stressed the relevance of human capital and exchange of good practices and knowledge in implementation of the EUSDR. Furthermore, the issues of institutional paradox have been discussed in the light of potential trilateral cooperation mechanisms within the DS.[70] As this Conference related to the trilateral cooperation of Hungary, Croatia and Serbia, it has been integrated Croatian and Hungarian attitudes related to cross-border and international cooperation, that refers to Priority Area 8 (to foster cooperation and exchange of knowledge between SMEs, academia and the public sector, to improve business support to strengthen the capacities of SMEs for cooperation and trade, to support enterprises through high performing training and qualification schemes, to prioritise the effective implementation of measures provided for under the Small Business Act for Europe – SME Policy Index 2011, to improve the competitiveness of rural areas and in particular of the agriculture sector, to improve framework conditions for SMEs in areas where competitive infrastructure is missing, entrepreneurship as a key competence in education.[71] These actions and projects proposed in cooperation with cross-border partners give an incentive to participants to contribute to the development of scientific and economic activities in the Danube region creatively.

IV. Conclusions

The implementation of the EUSDR, as a macro-regional strategy, and its Action plan has recently started, and there are only few steering committee meetings in each Priority Area behind us. The networking of various institutions around the EUSDR has occurred, and now the integrated activities in frames of four pillars, i.e. eleven priority areas, are expected to serve EU regional development and territorial cohesion policy objectives in the Danube region. It also contributes to the objectives of Europe 2020 Strategy and of the EU Sustainable

[69] Karaic, op.cit. n. 55, at slide 7.
[70] Panel's Report from Zagreb Conference 'Strengthening the Danube region through cross-border and transnational cooperation between Croatia, Hungary and Serbia', see at http://www.imo.hr/files/report-danube-strategy.pdf.
[71] Karaic, op.cit. n. 55, at slides 3 and 4.

Development Strategy. EUSDR is well prepared, coordinators of priority areas have been nominated and the activities have been started. The present paper gives an insight into the activities of two pillars: Protecting the environment in the Danube region (B) and Building prosperity in the Danube region (C).

As the Pillar B, protecting the environment in the Danube region is concerned, the first conclusion is that all three priority areas, to restore and maintain the quality of waters, to manage environmental risks and to preserve biodiversity, landscapes and quality of air and soil are not only interconnected within the Pillar B, but also with priority areas of other pillars, in particular the Pillar A, where questions of transport, energy efficiency and use of renewable energy resources have a strong impact on the environmental issues. It also necessarily has an interaction with the Pillar C, as it includes economic development matters, where economic development and environmental protection activities have strong mutual impact. Further, the actions mentioned by the Action plan, with examples of projects focus on water quality, strengthening of the cooperation at sub-basin level, promotion of alternative collection and treatment of waste to reduce polluting discharges into rivers, development of cooperation between authorities responsible for agriculture and environment to prevent agricultural pollution; management of environmental risks, to climate change, floods, droughts, forest fires, erosion, water scarcity, and industrial risks issues; the preservation of biodiversity, landscapes and the quality of air and soils are crucial for the improvement of the environment in the countries of the Danube region. Hungarian priorities cover all priorities of this Pillar. Croatian priorities within this Pillar are environmental protection and risk prevention, in particular as related to the revitalisation of Drava-Sava waterway, flood prevention issues and the improvement of ecological network and nature protection measures.

As far as conclusions related to the Pillar C, building prosperity in the Danube region is concerned, it can be stressed that initial actions of coordinators and Steering Committees on Priority Areas are encouraging. This Pillar includes in its activities three groups of participants (education and research, private sector and public sector), in an integrative way to interconnect actions and projects contributing to the development of the Danube region. One set of tools for the integration can serve numerous already existing networks, which helps

to link together various stakeholders, necessary for the more successful achievement and more effective utilization of results within the EUSDR. A certain inertia could be felt in the activities of the of earlier ICPDR and Danube Commission activities, which concentrated mainly on infrastructural, environmental and logistics (navigation-transportation) issues, and on direct actions concerning infrastructural, water management and environmental issues on the Danube. Therefore, it is very important to have a focus on research and economic development issues within the framework of the EUSDR, i.e. Priority Areas 7 and 8. Only new and creative solutions, reached through cooperation of Academia and Business, with the support of public sector can substantially increase competitiveness and support the prosperity of the Danube region. In addition, actions and projects integrating stakeholders from Academia and Business communities and giving them an incentive to develop and spread their clusters throughout the region, can adequately contribute to the dissemination of new solutions to existing problems of economies of the region. That includes dissemination and spread of knowledge and technologies from north-west, a more developed part of the region, towards south-east. South-east part of the region can also contribute to the achievement of common objectives, where the cooperation of Croatia and Hungary in actions of Priority Areas 7 and 8 can be of substantial help. Further, Priority Area 9, investment into people and skills, in a way to renew their knowledge, i.e. retrain them, or to include marginalized groups into common effort to build prosperity, will also add value to the results of research, creative work and better competitiveness of economies of Danube region. Croatian priorities in this Pillar relate to fostering cooperation and exchange of knowledge between SMEs, academia and the public sector, to the improvement of business support to strengthen the capacities of SMEs for cooperation and trade, including high performing training and qualification schemes, improving of framework conditions for SMEs in areas where competitive infrastructure is missing.

The Pillar C itself is innovation oriented, as it represents the efforts to include vast scientific and business community of the Danube region into its development towards better prosperity.

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Environmental rights in the context of three legal systems – stepping into the EU legislature's shoes?

I. Introduction

In recent decades it has become a matter of common sense that protection of the environment and of natural resources represents a fundamental societal need. Environmental protection is a matter of public or common concern, environmental degradation and deterioration and measures to counter it, have an impact not only on human health and well-being, but also on the general quality of life. Consequently, environmental policies and legal rules directly affect every individual, group and organisation.

Public participation is an important theme in contemporary environmental policy and law at all levels. Private persons (individuals, NGOs, etc.) acting in the public interest, such as in relation to the environment, contribute to increasing public awareness and improving participation by stakeholders. Agenda 21 stated that 'one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making'.[1]

Developed under the auspices of the United Nations Economic Commission for Europe (UNECE),[2] the Aarhus Convention is widely

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[1] J. Cameron and R. MacKenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions', in A. E. Boyle and M. R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford, Oxford University Press, 1996) p. 151.

[2] UNECE was one of the first two regional economic commissions to be established by the Economic and Social Council (ECOSOC) of the United Nations in 1947. The main aims of the international organisation are to promote pan-European economic integration, bringing together 56 countries in the EU, non-EU Western and Eastern Europe, South-East Europe (SEE), Commonwealth of Independent States (CIS) and North America (USA and Canada). For more than 40 years, UNECE was the only instrument of economic dialogue and cooperation between East and West. UNECE also sets out norms, standards and conventions to facilitate international cooperation within and outside the region. Its concern with problems of the environment dates

viewed as the foremost legally-binding instrument protecting the public's environmental rights. It was adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process of UNECE governments.

The Convention is not only a multilateral environmental agreement (MEA), it is also a Convention about government accountability, transparency and responsiveness.[3] The provisions of the Convention, although drafted in broad terms, are intended to ensure effective environmental protection. The experiences of the Aarhus Convention process provide guidance for other global, regional and national initiatives around the world. Though it focuses on public participation at the (sub)national level, it has also served as a catalyst for the democratisation of supranational and international decision-making processes.[4]

The Convention came into force on 30 October, 2011; this was a major development for procedural rights relating to the environment. The main advantage of focusing on procedural rights is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy.[5]

The Convention guarantees environmental rights by implementing Principle 10 of the Rio Declaration, establishing a number of closely connected procedural rights of individuals and their associations with regard to the environment. It is therefore that the Convention consists of three main ideas or 'pillars': access to environmental information, participation in environmental decision-making processes, access to justice in environmental matters. The access to justice pillar of the Convention is closely tied to the other two pillars.

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back at least to 1971, when the group of Senior Advisors to the UNECE governments on environmental issues was created which led into establishment the Committee on Environmental Policy (CEP).

[3] http://www.unece.org/env/pp/welcome.html.

[4] M. Palleamerts, 'Introduction', in M. Pallemaerts, ed., *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law, The Avosetta Series (9)* (Groningen, Europa Law Publishing 2011) p. 5.

[5] P. Birnie., A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford, Oxford University Press 2009) p. 298.

Environmental NGOs having the status of 'the public concerned'[6] have both the right to be informed and to participate in the administrative stage and the right of access to the courts to challenge the decisions of the administrative authorities. Article 9(2) of the Aarhus Convention states that 'Each Party shall, within the framework of its national legislation, ensure that members of the public concerned […] have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the *substantive and procedural legality* of any decision, act or omission subject to the provisions of […] this Convention'.

Under Article 9(3) of the Convention, environmental NGOs have the right not only to challenge acts and omissions by public authorities, which contravene environmental law, but also acts or omissions of private persons that do so. This provision appears to be the most complicated element within the EU and other Parties of the Convention. Difficulties arise regarding the interpretation of the provision, and the diversity of systems where this provision is supposed to apply. According to the Implementation Guide to the Convention, Article 9(3) has been introduced to give citizens[7] standing to go to court or another review body to enforce environmental law.[8]

Article 9(3) provides that '[…] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public[9] have access to *administrative or judicial procedures* to challenge *acts and omissions* by *private persons and public authorities* which contravene provisions of its national law relating to the environment'. Such access is to be provided to members of the public 'where they

[6] The 'public concerned' is defined in Article 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'. For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. Such organisations therefore have an *automatic* right of access to justice.

[7] The Convention grants environmental NGOs wider access to the courts than individuals. The distinct role for NGOs is perhaps the most significant innovation of the Convention. See M. Lee and C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention', 66 *The Modern Law Review* (2003) p. 86.

[8] UN ECE, *The Aarhus Convention. An Implementation Guide* (United Nations, New York and Geneva, 2000) p. 130.

[9] Incidentally, Article 9(2) refers to 'members of the public concerned', and Article 9(3) refers to 'members of the public'.

meet the criteria, if any, laid down in […]) national law'. In other words, the issue of standing is primarily determined at national level, as is the question of whether the procedures are judicial or administrative.[10] The CJEU has helped to clarify that the right of access to a review procedure does not depend on whether the authority, which adopted the decision or act at issue is an administrative body or a court of law.[11]

II. The Aarhus Convention and the EU

EU environmental policy is consistently rated by citizens as an area, in which the European Union should be active, and widely considered to be one of the EU's most successful policies. The European Union serves as a model for regional integration, and demonstrates at a global level that it is determined to assume its responsibility in environmental matters.

Basically the European Commission, as 'the guardian of the Treaties',[12] has the responsibility of ensuring that EU legislation is applied.[13] The Commission exercises this responsibility mainly through bringing infringements proceeding against EU Member States under Article 258 of the Treaty on the Functioning of the EU (TFEU).

A very considerable part of environmental legislation in Europe is produced by the EU, and many economical financial and administrative decisions affecting the environment emanate from the EU institutions.

[10] J. Wates, 'The Aarhus Convention: A New Instrument Promoting Environmental Democracy', in M.-C. Cordonier Segger and Judge C. C. Weeramantry, eds., *Sustainable Justice – Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers 2005) pp. 401-402.

[11] Accordingly, the Court has emphasized that public participation in an environmental decision-making procedure is separate and has a different purpose from a legal review. Right of access to the courts does not derive from an earlier participation in the administrative stage. Thus, members of the public concerned must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views. See Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967, paras 38-39.

[12] EU Treaties consist of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as they result from the amendments introduced by the Treaty of Lisbon, signed on 13 December, 2007.

[13] See Art 17(1) TEU.

The EU's growth of significant competence in this policy area since the 1970s should be of help in addressing its legitimacy problem and the enforcement deficit of EU environmental rules at the same time. Often unsatisfactory enforcement can also be found in other fields of EU law but are particularly salient in EU environmental law. Problems of enforcement arise in all sectors in relation to which the EU has adopted environmental rules.[14] Failures of effective implementation are likely to put the credibility of the EU with its citizens at risk. A Union based on the rule of law has to ensure that laws are respected and, if necessary, enforced.

Even where the rule of law exists, it can be inefficient.[15] The need to protect the environment may be limited by several factors. Enforcement of EU environmental law, in contrast to other areas of EU law, mainly rests with public authorities of the Member States, and is dependent of their powers, resources and goodwill. It must also be recognized that infringement procedures are not particularly designed with environmental cases in mind. Lengthy and formal procedures are not always the best way to prevent environmental degradation or damages. For these reasons, EU environmental policy focuses on *participation*, helping present the EU as 'more than a market' and building participatory mechanisms in the NGO sector.[16] Participatory mechanisms establish a reliable basis for making better decisions that benefit all stakeholders, and participatory democracy is a pre-requisite for the realisation of sustainable development.

The European Community, together with the fifteen Member States, signed the Aarhus Convention. EU Member States that are Parties to the Convention are bound to implement both the Convention itself and the

[14] Enforcement can be defined as all approaches of the competent authorities to encourage or compel others to comply with existing legislation (monitoring, sanctions, etc.) in order to improve the performance of environmental policy with the final goal of improving the overall quality of the environment. See Annex I of COM(96)500 final (Implementing Community Environmental Law, Brussels, 22.10.1996)

[15] *Giving Force to Environmental Laws: Court Innovations Around the World, Briefing Paper* (Pace Law School 2011) p. 21. Available at http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/IJIEABriefingPaper.pdf.

[16] A. Warleigh, *Democracy and the European Union – Theory, Practice and Reform* (SAGE Publications 2003) p. 93.

EU acts intended to implement the Convention.[17] The European Commission signed the Convention on behalf of the Community with a view to its ratification. As the Commission notes, the Convention is the first international instrument which applies to the Community institutions and calls it a 'major political and legal development'.[18] The signing of the Convention obliges the EU to align its legislation to the requirements of the Convention with a view to its conclusion by the EC.
The European Union, in accordance with the TFEU, and in particular Article 191 thereof, is competent for entering into international agreements, and for implementing the obligations resulting there from, which contribute to the pursuit of the objectives listed in the TFEU. The Convention was concluded by the European Community and its Member States under shared competence.
In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence.[19] Since the Convention creates rights and obligations in a field covered in large measure by EU legislation, there is an EU interest in compliance by both the Union and its Member States with the commitments entered into under those instruments.
Since 1998 the EU has taken important steps to update existing legal provisions in order to meet the requirements of the Convention by means of legislation directed to the Member States, but also for its own institutions.[20] The Community (EU) has adopted secondary legislation with a view to implementing the Convention with respect to Community institutions and bodies (in the form of a regulation[21]), and with respect to Member States' authorities (in the form of directives). Other EU legislative acts have already been adopted in line with the requirements

[17] All EU Member States are Parties to the Convention, except for Ireland.
[18] European Commission press statement, 23 June, 1998.
[19] See Case 12/86 *Demirel* [1987] ECR 3719, para 9.
[20] For an overview of EC activities taking place to allow ratification of the Convention by the EC, see http://ec.europa.eu/environment/aarhus (05.01.2012).
[21] In 2006 the European Parliament and the Council have adopted Regulation 1367/2006 on the applications of the provisions of the Aarhus Convention to Community institutions and bodies (*OJ* 2006 L 264, 25.09.2006, p. 13); it shall apply from 28 June, 2007.

of the Convention.[22] In 2003, as part of the 'Aarhus package', the Commission has adopted a proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters.[23]

The draft directive is complemented by other recent EC measures providing access to justice rights that are more specific in terms of sectoral coverage and/or context. The proposal is still pending before the EU legislature. The adoption would support the uniform enforcement of environmental law,[24] but the Member States still consider that access to justice at national level is their exclusive competence. The extent to which individuals and/or environmental NGOs can address national courts and claim there a breach of EU law is governed by national law.

The EC approved the Convention by Council Decision 2005/370 of 17 February 2005.[25] Article 19(5) of the Convention requires organisations, such as the European Community, to declare the extent of their competence with respect to the matters governed by the Convention. In its declaration of competence annexed to Decision 2005/370, the Community stated 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its *Member States* are responsible for the performance of these obligations at the time of approval of the Convention by the European Community, *and will remain so* unless and until the Community, in the exercise of its

[22] See Directive 2000/60/EC establishing a framework for Community action in the field of water policy (*OJ* L 327, 22.12.2000, p. 1), or Directive 2001/42/EC on the assessment of the effects certain plans and programmes on the environment (*OJ* L 197, 21.07.2001, p. 30).

[23] COM (2003) 624; the chance for the directive to be adopted is rather limited.

[24] Widespread fears of public interest actions are not well-founded in that such actions will not lead to a collapse of the judicial system and carry little lack of abuse. On the other hand, the proposal had some aspects, which could be seen as the lowest common denominator with regard to public interest actions. See M. Dross. 'Access to Justice in EU Member States', 1 *Journal for European Environmental & Planning Law (JEEPL)* (January 2005) p. 30.

[25] See Council Decision 2005/370/EC, *OJ* 2005 L 124, 17.05.2005, p. 1. The up-to-date ratification is described at http://www.unece.org/env/pp/ratification.htm.

powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

III. Facts of the case

The reference has been made in proceedings between a Slovak environmental NGO *(Lesoochranáske zoskupenie VLK)*, and the Ministry of the Environment of the Slovak Republic *(Ministerstvo životného prostredia Slovenskej republiky)*. The appeal pending before the referring court concerned the Habitats Directive,[26] which listed the brown bear as a protected species.[27] The preliminary ruling procedure concerned the interpretation of Article 9(3) of the Convention, in particular, whether that article had direct effect within a Member State's legal order.

EU Member States belong to different traditions with some of them granting a broad access to justice (including *actio popularis* that gives the possibility to everybody to act in favour of the environment), others have a more limited approach. The majority of Member States continue to require an 'interest' of the applicant for seeking judicial redress.

The Slovak NGO concerned had legal personality and it was established in accordance with national law. The main objective of the association is nature conservation by creating a network of private reserves, in which plants and animals have the possibility to evolve their environment towards maximum stability without any human intervention.[28] Prior to 30 November, 2007, the second sentence of Article 83, paragraph 3, of Law No 543/2002 gave the status of 'parties to the proceedings' to environmental associations that made a written request to be allowed to participate, and also did so by a set deadline. Such associations also had the opportunity to contest before the national courts, in accordance with Article 250, paragraph 2, of the Civil Procedure Code, any decisions taken.

Law No 543/2002 was amended by Law No 554/2007, with effect from 1 December, 2007. As a consequence, environmental associations have become *'interested parties'* instead of 'parties to the proceedings', being precluded from directly initiating proceedings to review the legality of decisions. The amendment changed the status of the applicant before the

[26] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ* 1992 L 206, p. 7.
[27] See Annex IV to the Habitats Directive.
[28] http://www.wolf.sk/en/who-we-are/what-have-we-done.

referring court, which requested the defendant (the Ministry of the Environment of the Slovak Republic) to inform it of any administrative decision-making procedure which might potentially affect the environment, or which concerned granting derogations to the protection of certain species or areas.

In 2008, the Ministry of the Environment informed the association of a number of pending administrative proceedings brought by, inter alia, various hunting associations. By its decision of 21 April, 2008, the Ministry granted an application for permission to derogate from the protective conditions accorded to the brown bear *(ursus arctos)*.

The association sought recognition of its status as a party to the administrative proceedings and asserted that the proceedings in question directly affected its rights and legally-protected interests arising from the Aarhus Convention.[29] The Ministry further stated that NGOs could not appeal against its decision without the status of a party to the proceedings. The association lodged an action against the contested decision, but the national court (Bratislava Regional Court) dismissed the application.

Finally, the association appealed to the Slovak Supreme Court, which decided to suspend the proceedings and refer the following questions to the CJEU for a preliminary ruling:

1. 'Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ('self-executing effect') in circumstances, in which the European Union acceded to that international treaty on 17 February, 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?
2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

[29] The Slovak Republic's National Council agreed to accede to the Convention on 23 September, 2005. The Convention entered into force in the Slovak Republic on 5 March, 2006.

3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, which contravenes provisions of its national law relating to the environment?'

In general, it is hard to exaggerate the importance of the preliminary ruling procedure, though the answers given by the Court of Justice often leave the national court in little doubt about how the case before it could be resolved. These procedures ensured that the Court was asked to resolve a host of fundamental questions to the functioning of the legal order, which might not otherwise have been bought before it.[30]

The preliminary rulings procedure is of particular importance for the enforcement of EU environmental law,[31] as the enforcement of environmental law mostly raises questions of interpretation.[32] In order to provide a satisfactory answer to a national court which has referred a question to it, the Court may also deem it necessary to consider provisions of EU law, to which the national court has not referred in the text of its question.[33]

IV. Judgment of the Court

In its judgement the Court's major argument has been that Article 9(3) is a provision, which lies in a sphere, in which the EU has legislated. In the field covered by Article 9(3) of the Convention, the European Union has

[30] A. Arnull, *The European Union and its Court of Justice, Second Edition* (Oxford, Oxford University Press 2006) pp. 96-97.

[31] For an overview of the impact of the preliminary ruling procedures in an environmental context, see H. Somsen, 'The private enforcement of Member State compliance with EC environmental law: an unfulfilled promise?', 1 *Yearbook of European Environmental Law* (2000) pp. 311-360.

[32] However, questions of a regulation's or directive's validity may also occur. See J. Kokott, *The experience of the Court of Justice of the European Communities in enforcing Environmental Law,* available at http://www.isprambiente.gov.it/site/_contentfiles/00010300/10340_icef2011.pdf p. 291.

[33] See Case 35/85 *Tissier* [1986] ECR 1207, para 9.

exercised its powers and adopted provisions to implement the obligations, which derive from it.

In its case-law on the effects of international agreements the Court has consistently held that, from the moment they enter into force, the provisions of international agreements concluded by the EU form an essential ('integral') part of the legal order of the European Union. By virtue of Article 216(2) TFEU, where international agreements are concluded by the EU, they are binding upon its institutions and, consequently, they prevail over acts of the Union.[34] The effects which the agreement produces may differ, depending on the nature of the agreement and on its provisions.

The most complex questions concerning the Court's jurisdiction to interpret provisions of an international agreement arise as regards '*mixed agreements*'.[35] The Court has stressed on several occasions that the protection of the environment constitutes one of the essential objectives of the EU.[36] The EU, in accordance with the Treaty, and in particular Article 192(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 191 TFEU.

It is clear from the provisions of the Treaty[37] and from the practice, that EU competence in environmental matters is wide and inclusive, yet shared with the Member States. The EU's external powers in environmental matters are not confined to the arrangements referred to in Article 191(4) TFEU, but extend to all other areas of EU environmental law-making.[38] When an agreement is concluded, the EU may select to what extent it is exercising the EU's external competences in matters of environmental protection.[39]

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[34] Case C-308/06 *Intertanko* [2008] ECR I-4057, para 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, para 307.

[35] P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', 7 European Foreign Affairs Review (2002) p. 25.

[36] See Case 240/83 *ADBHU* [1985] ECR 531, para. 13.; Case C-302/86 *Commission* v *Denmark* [1988] ECR 4607, para 8; and Case C-213/96 *Outokumpu* [1998] ECR I-1777, para 32.

[37] Arts 191-193 TFEU.

[38] P. Eeckhout, *EU External Relations Law, Second Edition* (Oxford, Oxford University Press 2011) pp. 141-144.

[39] Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635.

According to settled case-law, the provisions of the Aarhus Convention also form an integral part of the EU legal order,[40] rendering its implementation at the domestic level justiciable by the Court. The Court has confirmed that a specific issue, which has not yet been the subject of EU legislation, is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.[41] Before the referring court, the Slovak NGO has sought to rely only on Article 9(2) and (3) of the Aarhus Convention. The Court pointed out that Article 9(2) has been incorporated fully into EU law. The questions referred to the Court relate essentially only to Article 9(3) of the Convention, which covers all other infringements of EU environmental law.[42]

Since there were no national rules that ensured access to justice under Article 9(3) of the Convention, it was necessary to claim the direct effect of this provision. It has already been acknowledged by the Court that provisions of international treaties concluded by the EU with a non-member country 'must be regarded as being directly effective when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[43] Each Convention provision, on which it is sought to rely, must meet the well-established, clear and unconditional criteria, if there is to be any possibility to direct effect.

Environmental agreements can contain provisions, on which any interested party is entitled to rely before the courts.[44] Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3) of the Aarhus Convention, that provision does not contain any clear and precise obligation capable of directly regulating the legal position of individuals.[45]

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[40] See, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 36.

[41] See, by analogy, Case C-239/03 *Commission* v *France* [2004] ECR I-9325, paras 29-31.

[42] Paras 26-27 of the judgment; the Court briefly declared that there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Convention.

[43] See Case 12/86 *Demirel* [1987] ECR 3719, para 14., Case C-265/03 *Simutenkov* [2005] ECR I-2579, para 21.

[44] Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, particularly para 47.

[45] Para 45 of the judgment.

However, the Court did not end its interpretation here, and went on to state that the aim of Article 9(3) is the effective protection of the environment. One of the most intriguing aspects of the decentralised enforcement of EU law is the extent, to which Member States may impose restrictions on access to the courts without breaching the principle of *effective judicial protection*.[46] Under the principle of sincere cooperation laid down in the second subparagraph of Article 4(3) TEU, it is for the Member States' courts to ensure judicial protection of an individual's rights under European Union law.[47] According to settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[48] and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.[49] Under EU law – as in the majority of domestic legal systems – individuals generally enjoy legal protection in so far as it is necessary to safeguard their guaranteed rights or freedoms.[50] The Court pointed out that Article 9(3) of the Aarhus Convention does not have to be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

The Slovak Republic has a duty to ensure that the Habitats Directive is implemented effectively, but the Habitats Directive does not itself provide *locus standi* for a party to challenge an administrative procedure.[51] While the Habitats Directive contains only substantive

[46] Á. Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart Publishing 2009) p. 263.

[47] See, to that effect, Case 33/76 *Rewe*, [1976] ECR 1989, para 5; Case 45/76 *Comet* [1976] ECR 2043, para 12.; Case 106/77 *Simmenthal* [1978] ECR 629, paras 21-22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, para 19; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 12.

[48] See Case 222/84 *Johnston* [1986] ECR 1651, paras 18-19; Case 222/86 *Heylens and Others* [1987] ECR 4097, para 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, para 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, para 39; and *Unibet* [2007] ECR I-2271, para 37.

[49] *OJ* 2010 C 83, pp. 389-403. The Charter has the same legal value as the EU Treaties since the entry into force of the Treaty of Lisbon; see Article 6(1) TEU.

[50] See the Opinion delivered by AG Kokott in Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-0000, point 73.

[51] Opinion of AG Sharpston in Case C-240/09, point 71.

regulations, the procedural protection of the substantive rights resulting from the Directive is provided through the Aarhus Convention. In general, each component of the environment should, besides the substantive legislation adopted at EU level, also encompass the procedural protections that correspond to the requirements of Article 9(3).[52]

Notwithstanding the opinion of the Advocate General, the Court finally invited national courts to interpret Article 9(3) broadly: 'It is, however, for the referring court 'to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation […] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'.[53]

The judgment means in practice that in each individual case, applicants will have to persuade national courts of the wording, the objective and the spirit of Article 9(3), in order to obtain standing.[54]

V. Conclusion

The growing urgency for remediating environmental problems cuts across all legal systems, and is found in international, EU and national laws. Sustainability fails without effective environmental protection. The involvement of the public in environmental decision-making can enhance respect for environmental rules and reduce the enforcement deficit with regard to environmental law. Environmental legislation typically does not confer rights on private persons, and the legal procedures and remedies for enforcement of EU law in national and EU courts are consequently less accessible to them compared with other areas of EU law.[55]

[52] Justice and Environment, *Legal Analysis of the VLK Case* (2011) p. 5. Available at http://www.justiceandenvironment.org/_files/file/2011%20ECJ%20SK.pdf.
[53] Para 52 of the judgment.
[54] L. Krämer, *EU Environmental Law* (Sweet and Maxwell 2011) p. 147.
[55] P. Wennerås, *The Enforcement of EC Environmental Law* (Oxford, Oxford University Press 2007) p. 3.

As mentioned above, EU environmental legislation confers more discretion on national authorities than in many other areas of EU law.[56] The shortcomings of Commission enforcement on compliance suggest an indispensable complementary role for private persons. In response to the infringements of EU environmental law, cases can be brought before the CJEU by individuals and/or environmental NGOs – either through preliminary reference procedures or in direct action before the EU courts.

The European Union undoubtedly legislated in the field of environmental protection, for instance by adopting the Habitats Directive. This is, however, not the field of application of Article 9(3) of the Aarhus Convention. Environmental law covers a vast range of topics; the Habitats Directive specifies *substantial* issues whereas the Convention imposes *procedural* obligations.[57] The case before the national court concerned the grant of derogations to the system of protection for species such as the brown bear. The fact that the brown bear is included on the list of species protected by the Habitats Directive is *not relevant* for the purposes of determining whether Article 9(3) of the Convention lies within a sphere falling within the scope of EU law.[58] This means that the Court made a mistake: it looked at access to justice in environmental matters as being auxiliary to the substantive standards of the Habitats Directive.[59]

The EU has not adopted a directive implementing the obligations, which derive from Article 9(3) of the Convention with respect to national administrative or judicial proceedings. In the absence of EU legislation in this respect, the issue remains outside the scope of EU law and fully within the legal framework of the Member States.

[56] However, most EU legislation in the field of environment comes in the form of directives which must be transposed into national laws, giving EU Member States the freedom to enact transposing legislation in the form most appropriate to their national conditions.

[57] K. Hamenstädt and T. Ehnert, 'Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011', 3 *Maastricht Journal of European and Comparative Law* Vol. 18 (2011) p. 363.

[58] See in this respect Opinion of AG Sharpston in Case C-240/09, point 68.

[59] J.H. Jans, *Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09 Lesoochranárske Zoskupenie of 8 March 2011*, p. 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1834102.

Directive 2003/35[60] covers Article 9(2) of the Convention, but the provisions of Article 9(3) have not yet become part of EU law. Regulation No 1367/2006, which is also intended to implement the provisions of Article 9(3) of the Convention, only concerns EU institutions and bodies. Advocate General *Sharpston* also emphasises in her opinion that it is of crucial importance that the EU legislature has intentionally chosen not to act. Consequently, Article 9(3) does not lie within a sphere that falls within the scope of Community (EU) law. By ignoring the absence of relevant EU legislation, the *Court stepped into the legislature's shoes*.[61] Moreover, it seems that the Court applies a *dual standard* here. On the one hand, the Court obliges national courts to grant standing to NGOs in national procedures. On the other hand, environmental NGOs generally do not have legal standing in front of the EU courts themselves.[62]

Nevertheless, the ruling of the Court in this case confirmed again that the integration of the Aarhus Convention into EU environmental law is currently one of the most interesting legal developments. Over the last few years, the CJEU has ruled on important questions concerning the interpretation of provisions of EU directives adopted to implement the Aarhus Convention. Several more cases are still pending before the EU courts and an increasing number of requests for preliminary rulings on all three pillars of the Convention are referred to the CJEU by national courts in the Member States.[63]

International and European law on access to justice not only matters, because it may oblige the states concerned to expand existing rights to access to justice. Indeed, it also serves to *prevent* these states from restricting the rights to access to justice in environmental matters. This is highly important in the current EU context, since public participation,

[60] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ* 2003 L 156, p. 17.

[61] Opinion of AG Sharpston in Case C-240/09, points 77-79.

[62] See, for instance, B. Dette, 'Access to Justice in Environmental Matters; A Fundamental Democratic Right', in M. Onida, ed., *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer* (Groningen, Europa Law Publishing 2004) p. 3; A. Pánovics, 'The Paraquat Cases – Why is Article 230 Interpreted against European Environment Protection Organisations?', 2 *JURA* (2007) p. 122.

[63] M. Pallemaerts, loc. cit. n. 4, at p. 10.

access to justice and other procedural elements may be perceived as obstructive hurdles to economic growth and corporate interests.[64]
Indisputably, EU Member States as Parties to the Convention retain certain discretion in designing the requirements of access to justice, but this does not amount to an unlimited leeway. Although the Council of the EU did not act on the proposal by the Commission for a specific directive, EU law can clearly limit the discretion of the Member States in ensuring access to justice in environmental matters.
Courts have a significant role to play to ensure the observance of environmental laws. Hopefully, the preliminary ruling of the Court in Case C-240/09 will have far-reaching implications for the standing criteria of the public concerned in the EU Member States, enabling national courts to become more effective in their own environmental adjudications.[65]

[64] J. Ebbesson, 'Access to Justice at the National Level. Impact of the Aarhus Convention and European Union Law', in M. Pallemaerts, ed., *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law, The Avosetta Series (9)* (Groningen, Europa Law Publishing 2011) pp. 249-250.
[65] Based on the Court's judgment, the Supreme Court of the Slovak Republic cancelled the decision of the Ministry of Environment (see decision No. 3Sžp/30/2009 of the third senate on 2 June 2011, and decision No. 5Sžp/41/2009 of the fifth senate on 12 April 2011).

Quality of higher education and students' mobility

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Managing quality in higher education: comparative study between University of Osijek and University of Pécs

1. The social environment of higher education

According to the changes that have happened in the field of higher education in recent decades in the more developed parts of the world, the ideas about the aims and tasks of education have changed. These changes have affected the entire field of education, but the biggest changes can be found in higher education. The following changes should be emphasized among the significant changes we have all felt in the field of higher education: a) increasing social need for higher education, b) consequently to that, mass training and increasing number of teaching staff, c) it is necessarily related to structural changes, d) the new directions of the higher education policy. All these – and most notably the Bologna process – resulted in the everyday decisive psychological change of the 'top trainers', which is based on the changes of the roles of higher education.[1] The starting point of the changes lies in the expansion of higher education. Before the Second World War, less than 10% of the typical higher education age groups attended higher education institutions; from the 1960s on, an initially extremely fast and then decelerating rate in the increasing number of students was observed in Western Europe, and the rate was over 50% at the turn of the millennium in Europe.[2] According to Ildikó Hrubos, the growth is unstoppable, because failure affects individuals with serious risk. The composition of the student population has become increasingly heterogeneous in pursuance of social background, prior experiences,

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[1] M. Kocsis, 'Társadalom – állam – felsőoktatás, A felsőoktatási autonómia értelmezési tartományai' [Society – State – Higher Education, Framework for Interpreting the Autonomy of Higher Education], 3 *Jogelméleti Szemle* (2010), http://jesz.ajk.elte.hu/kocsis43.html.
[2] M. Trowe, *Problems in the Transition from Elite to Mass Higher Education* (Paris, OECD 1974)

motivation and career plans. It has resulted in the visualization of a wide range of interests and values.
The central question of the theoretical and practical debate about higher education nowadays, unfolding all around the world in different social groups, is how to train intellectual professionals in these institutions of mass higher education able to meet the needs of the new millennium.[3]

2. Transformation of the concept of higher education autonomy

2.1. Cooperation between the subjects of higher education autonomy

The cause of the termination of the previously system-wide agreement between the subjects of higher education autonomy is generated from the misconception of unlimited autonomy and paradoxically results in a minimum change of autonomy's definition, or its erosion from a pessimistic viewpoint, which implies the following hazards: the different segments of fragmented higher education are running independently and do not form a system. As a result of the fragmentation, every institution – within that faculty, college, etc. – only cares about its own work, and does not fit into bigger units, ultimately into higher education as a whole; as the result of the balkanisation, all relevant stakeholders are trying to get support and gain ground at the expense of others. [4]

2.2. The state and social environment which determines the autonomy of higher education

In parallel with the transformation of autonomy's definition, higher education has undergone significant changes and it has to face even greater challenges. During these processes, the role of the state has changed, and the expectations of the society in connection with higher education have changed at the same time. According to these interactions, the traditional 'quality' of higher education is threatened, which is also a disturbing phenomenon. According to the literature, the definition of quality assurance is: 'those activities of an institution, organization, sector or industry aimed to satisfy the needs of users with

[3] K. Redl, A fakultások vitájának előtörténetéhez, [To the History of Debate on Faculties], in T. Tóth, szerk., *Az európai egyetem funkcióváltozásai* [Function-Changing of European University] (Budapest, Professzorok Háza, 2001) p. 57.
[4] Kocsis, loc. cit. n. 1.

their own services and products'.[5] The difficulty of the conceptual problems is that this definition is largely trivial in the case of market players, but we can identify more 'users' in the case of higher education: students, parents, actors of the economic sphere, employers, scientific sphere and the society itself. Due to these interacting processes, higher education staff finds itself in a new situation. Those statements – incurred by the state – have become platitudinous, which means that the consumption of resources by the institutions is inappropriate. The society – in particular the employers' organizations – has criticized the institutions that they do not serve the needs of the society adequately and do not give 'marketable' knowledge to students. It should be also noted that many countries have been forced to fiscal constraints, and this resulted in the rationalization and efficiency-enhancing of higher education. The institutions of higher education have tried to focus on the definition of higher education's autonomy as a response to the – often reverse – expectations of the society and the state. This attempt was not even restrained, due to the expansion of staff in higher education, the number of quality 'top trainers' who could maintain some kind of autonomy, due to their subjective conditions – skills – was significantly reduced. It has been recognized that the Magna Charta Universitatum cannot be a basis for the management of these challenges, because the labour market is fragmented all around the world, the difference between the winners and the losers has broadened and the only defence against hopeless exclusion is learning. Further pressure on the higher education sector is that it has to accept everyone.[6]

Such processes are a permanent breeding ground for references to autonomy as a final resource. It was the same in previous 'crisis periods' of higher education as well: a medieval university operating in a guild form was not able to adapt to the challenges of the civilization, in the next model – from the nineteenth century – the state had funded the institutions; it had not been a problem until sources began to diminish.

[5] I. Polónyi: 'A munkaerőpiacra orientált felsőoktatási minőségbiztosítás', in I. Polónyi, szerk., *A felsőoktatás minősége* (Budapest, FKI 2006) p. 10.

[6] Governments interfere with the life of higher education because of social considerations and allow often uncontrolled appearance of private sector due to difficulties with budgetary financing. I. Hrubos, 'A XXI. század egyeteme' [University of the 21th Century], 4 *Educatio* (2006) p. 11. See more about it S. Lay, *The Interpretation of the Magna Charta Universitatum and its Principles* (Bologna, Bononia University Press 2004).

Then appeared the concept of collective autonomy as opposed to institutional autonomy. The central idea of these references is that scientists should work free from external influences, which is financed by the state to the extent necessary. This 'myth' is not talking about the responsibility of scientists with regard to the social function of science: namely, the responsibility that available resources should be utilized in an optimal way, to serve the benefits of the members of society. The autonomy of higher education cannot mean absolute independence – the same way it did not mean absolute independence in the earlier ages, contrary to the public perception – it has to be consistent with the requirements of the economic, social and political environment. More forms of the responsibility of enforcing are known, but almost in all cases it is consistent with the quality requirements. In the modern higher education and administration systems, separated organizational systems are formed to control the quality of higher education, where both the society and the state are present formulating the expectations from higher education. This is because higher education system is increasingly forced to transparency and, in this context, to provide information about the quality of its work; on the other hand, the increasing competition in the higher education sector also focuses on the qualitative aspects. From the aspect of the autonomy's function it raises the question about the limited extent of the institutions and their members – for the quality not to damage the freedom of science. Higher education institutions cannot exist without autonomy, which is 'the lifeblood of every scientific work'.[7] In addition to insisting on the principle of autonomy, we have to ensure autonomy for institutions and we have to ensure that state bodies can accomplish their control tasks. Several aspects must be considered during this work. First of all, that the accreditation models are difficult to understand without the government policies behind them – the accreditation systems are part of the national governmental policies; and the accreditation executive bodies are

[7] B. Hóman, 'A felsőoktatás reformja' [The Reform of Higher Education] in K. Martonffy, szerk., *Magyar Felsőoktatás. Az 1936. évi december hó 10-től december hó 16-ig tartott országos felsőoktatási kongresszus munkálata.* [Hungarian Higher Education. Working Documents of the National Higher Education Congress 10-16 December 1936] (Budapest, published by Hóman Bálint M. Kir. Vallás és Közoktatásügyi miniszter 1937) p. 10.

between the sector of the higher education and the government.[8] Secondly, that outstanding 'quality' can be established in that kind of areas which are permeated by the 'culture of excellence'. Excellence is never a permanent achievement: it has to face with more and more challenges. In rare cases, it can prevail for entire institutions too, but generally it is a characteristic of individual faculties or units within institutions. The nature and intensity of research (as in other activities as well) differs by countries and institutions.

The European University Association accepted a new conception about the quality of higher education in September 2001. Within this framework, it is stated that accreditation is the published formal recognition of minimum requirements' compliance referring to the quality of programs and institutions. Therefore, accreditation is the adequate mechanism to complete the minimum requirements of education, and therefore it can be considered as the first step for quality assurance. However, accreditation can be used only together with strong internal institutional quality evaluation.

The need for autonomy – as shown above - was justified with the coercive force of scientific freedom, namely that scientific methods are inappropriate without autonomy.[9]

The question is what kind of function should be guaranteed for autonomy in the middle of the situation connected to the changed social tasks to continue serving the realization of the freedom of science?

Higher education is different from other educational levels. The difference is that scientific knowledge is the essential component of training, even if its coverage mode and rate are depending directly on the specialization and concrete training goal. Accordingly, higher education is not primarily an institution, but an activity; we cannot give sensible and regulated framework to higher education by putting it into a rigid institution system, and we cannot 'reform' it with apparent and spectacular organizational and administrative transformations, but we should help higher education to enforce its autonomous motion. It can be concluded, that the absolute and complete autonomy of higher

[8] T. Kozma, 'Bevezetés' [Introduction], in T. Kozma and M. Rébay, szerk., *Felsőoktatási akkreditáció Európában* [Accreditation in Higher Education in Europe] (Budapest, Oktatáskutató Intézet 2003) p. 5.

[9] See e.g., A. Köttgen, 'Die Freiheit der Wissenschaft und die Selbstverwaltung der Universität', in Neumann, Nipperdey, Scheuner, *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte* (Berlin 1954) p. 299.

education or fully centralized state control does not serve the interests of science: resources of rights abuse are inherent in institutions as much as in state power. The extent of institutional autonomy interpreted as the sum of individual and collective autonomy depends on the cooperation between institutions, the state and the society, to finance the knowledge owned or created by them, and to utilize it for its intended purposes by the society.[10]

In accordance with the Bologna Declaration, every educational institution shall develop a system which ensures the quality of their output, in other words, a quality management system. Research conducted in this paper had two objectives; examine student perceptions of the quality of higher education at the Faculty of Law in Pécs and Faculty of Law in Osijek and deeper insight into the structure of the samples, extract those criterion variables that influence the quality of teaching observed at the faculties the most.

3. Methodology

3.1. Method

The survey on the quality of higher education was conducted at the Universities of Osijek and Pécs during October and November 2011. By means of the PAPI (Paper and Pencil) method and as instructed by the surveyor, students independently filled out the survey after the completed courses. For the purpose of survey implementation, a measuring instrument called KVALIMETAR[11]was utilized. The tool consists of 31 statement categorized into five areas: *administrative staff, teaching staff, reputation, rooms and equipment, curriculum and teaching plans*. The grades are based on Likert scaling [12] and range from 1 to 5 with 1 referring to 'complete disagreement with a statement' and 5 to 'complete agreement with a statement'. The below table presents the applied measuring tool.

[10] Kocsis, op. cit. n. 1.

[11] J. Legčević, *The System of Managing Quality in Higher Education*, Doctoral Dissertation [Faculty of Economics, University of Osijek, Doctoral Dissertation, July 2011] p. 134.

[12] J. E. Hanke and A. G. Reitsch, *Understanding Business Statistics* (Boston, Homewood 1991) p. 273.

Table 1 – KVALIMETAR measuring instrument

		STATEMENT	GRADE
ADMINISTRATIVE STAFF	1.	Administrative staff is available and ready to provide students with assistance.	1 2 3 4 5
	2.	Administrative staff treats students with respect and dignity.	1 2 3 4 5
	3.	Administrative staff deals with students' enquiries in a prompt and professional manner.	1 2 3 4 5
	4.	Administrative staff helps students with respect to providing information on the study, curriculum and majors...	1 2 3 4 5
	5.	Students' applications and enquiries are timely and accurately dealt with.	1 2 3 4 5
	6.	Student office keeps records of students properly and precisely.	1 2 3 4 5
	7.	Students are timely informed by the faculty on current changes of course schedule, time of examination and delayed/cancelled lectures...	1 2 3 4 5
TEACHING STAFF	8.	Professors and teaching assistants give an impression of love and enthusiasm for their course.	1 2 3 4 5
	9.	Professors and teaching assistants are highly motivated for doing their job and conscientiously fulfil their obligations.	1 2 3 4 5
	10.	When teaching, professors and teaching assistants seem to have proper knowledge of the matter and demonstrate it in a clear and comprehensible manner.	1 2 3 4 5
	11.	Using teaching tools and modern technology, professors and teaching assistants raise the level of teaching quality.	1 2 3 4 5
	12.	Professors and teaching assistants hold classes, seminars and practices regularly and in time.	1 2 3 4 5
	13.	Professors and teaching assistants encourage students to actively participate in classes and to take responsibility for studying.	1 2 3 4 5
	14.	Professors and teaching assistants assess students' performance appropriately, objectively and fairly.	1 2 3 4 5
	15.	Professors and teaching assistants are available and friendly to students.	1 2 3 4 5
	16.	Professors and teaching assistants possess proper communication skills and create pleasant working atmosphere.	1 2 3 4 5
	17.	Professors and teaching assistants are available and willing to receive students during office hours.	1 2 3 4 5
	18.	Professors and teaching assistants can also be reached after classes.	1 2 3 4 5
REPUTATION	19.	Faculty is characterized by its professional image.	1 2 3 4 5
	20.	Faculty includes adequately qualified teaching staff.	1 2 3 4 5
	21.	After the studying, students are capable of transferring acquired knowledge and skills.	1 2 3 4 5

ROOMS AND EQUIPMENT	22.	Faculty possesses appropriate equipment necessary for organization of classes, seminars and practices...	1 2 3 4 5
	23.	Faculty manages with adequate rooms for teaching and studying (libraries, workshops, laboratories, IT classrooms...)	1 2 3 4 5
	24.	Illumination and cleanliness of classrooms are also adequate (halls, classrooms, laboratories...).	1 2 3 4 5
	25.	Faculty owns teaching tools as well as adequate and available literature.	1 2 3 4 5
	26.	Student access to faculty classrooms/rooms is at a proper level	1 2 3 4 5
	27.	Student access to IT classrooms is at a proper level.	1 2 3 4 5
CURRICULUM AND TEACHING PLANS	28.	Curriculum and teaching plans contain clear goals and guidelines comprehensible to both professors and students.	1 2 3 4 5
	29.	Curriculum standard matches the acquired level of qualifications.	1 2 3 4 5
	30.	Faculty as an entity offers various curriculums (majors) intended for advancement of students.	1 2 3 4 5
	31.	Goals and guidelines of curriculums are harmonized with course contents.	1 2 3 4 5

The area 'a*dministrative staff'* includes statements from 1 to 7 and refers to services of student office, reception office and faculty bookshop and to particular scientific-teaching units. These services include availability, proper treatment of students, timely dealing with students' applications and enquiries, reporting on current schedule changes and precise student record keeping.
The area '*teaching staff*' involves statements from 8 to 18 and relates to motivation, competence and communication of teaching staff, utilization of teaching tools and modern technology, regular schedule of classes, objective and fair assessment of students' performance, friendly attitude to students during office hours.
The area '*reputation*' contains statements from 19 to 21 and implies faculty reputation, qualified teaching staff, capability of transferring acquired knowledge and skills after completion of the study.
The area '*rooms and equipment'* comprises statements from 22 to 27 and refers to rooms and equipment necessary for studying and teaching, these include libraries, laboratories, workshops, IT classrooms, illumination and cleanliness of rooms, adequacy and availability of literature.

The area '*curriculum and teaching plans*' involves statements from 28 to 31. This area entails clear goals and guidelines as well as various curriculums intended for student education.
Based on the KVALIMETAR statements, an entry pattern was drawn up. This was actually a formatted SPSS database[13] which served as an entry frame and was also used for validation and data processing, deleting the papers which had remained mostly unfilled.

3.2. Samples

The survey was based on the random sample method[14] and comprised 228 students of the Faculty of Law of Osijek and 133 students of the Faculty of Law of Pécs. The samples included students from every year of study. The students' age ranged from 18 to 29 years while the average age amounted to 21 year and the most common age to 20 years. Separate analysis of examples is shown in Table 2.

Table 2 Demographic structure of students of the Faculty of Law of Pécs (PTE) and the Faculty of Law of Osijek (PRAVOS)

VARIABLES	FACULTY			
	PTE		PRAVOS	
	Absolute frequencies	Relative frequencies	Absolute frequencies	Relative frequencies
GENDER				
female	87	65.9	170	74.2
male	45	34.1	59	25.8
TOTAL	132	100	229	100
YEARS OF AGE				
18-20	11	8.3	152	**66.4**
21-23	79	**59.8**	60	26.2
24-26	19	14.4	14	6.1
27-29	23	17.5	3	1.3
TOTAL	132	100.0	229	100

[13] Andy P. Field, *Discovering Statistics Using SPSS (Introducing Statistical Method)* (Sage Publications 2009) pp. 113.
[14] T.G. Vavra, *Improving Your Measurement of Customer Satisfaction: A Guide to Creating, Conducting, Analyzing, and Reporting Customer Satisfaction Measurement Programs* (Milwaukee, ASQC 1997) pp. 71-250.

STATUS				
Financed by the Ministry	86	**65.2**	175	**76.4**
Partial financing	46	34.8	54	23.6
TOTAL	132	100.0	229	100.0
YEAR OF STUDY				
First	1	0.75	68	**29.68**
Second	2	1.51	63	**27.51**
Third	49	**37.13**	70	**30.57**
Fourth	30	**22.73**	1	0.44
Fifth	50	**37.88**	27	11.8
TOTAL	132	100.0	229	100.0
ATTENDANCE OF CLASSES				
-25%	5	3.8	-	-
25-50%	24	18.2	13	5.7
50-75%	31	23.5	70	30.6
more than 75%	72	**54.5**	146	**63.7**
TOTAL	132	100	229	100
GRADES STATED IN THE STUDENT RECORD BOOK				
Good	10	7.6	16	7.0
Very good	55	41.7	65	28.4
Excellent	67	**50.8**	87	**38.0**
Not provided an answer	-	-	61	26.6
TOTAL	132	100	229	100

3.2.1. Demographic structure of samples from the Faculty of Law of Pécs (PTE)

In terms of gender, the samples included 65.9% of female students and 34.1% of male students, out of which the greatest share referred to students aged from 21 to 23 (59.8%) whose study is fully financed by the competent Ministry (65.2%). The majority of surveyed students were 3rd-year students (37.13%), followed by 4th-year students (22.73%)

and 5th-year students (37.88%). Over a half of surveyed students (54.5%) actively participate in more than 75% of classes while 50.8% of examinees are excellent students.

3.2.2. Demographic structure of samples from the Faculty of Law of Osijek (PRAVOS)

As far as the sex of surveyed students is concerned, the samples were constituted of 74.2% of female students and 25.8% of male students, out of which 66.4% of students were aged from 18 to 20 whose studying is fully supported by the competent Ministry (76.4%). The surveyed students mostly represented the first year of study (29.68%). The rest of them were on the second (27.51%) and the third year of study (30.57%). Over a half of examinees (63.3%) actively participate in more than 75% of classes and are (66.4% of examinees) either very good (28.4) or excellent students (38%).

Such results, taking samples from both faculties into consideration, were expected since at both faculties students study in compliance with requirements of the highly proclaimed Bologna process which emerged as a European need for development of a knowledge-based society and economy.[15] After introducing the sample characteristics, analysis of the results of the survey of the students' perception of educational service quality was conducted in order to detect improvement possibilities and provide guidelines for achieving excellence by realizing the existing conditions at the respective institutions.

4. Survey results

Most developed European countries regularly perform systematic evaluation of institutions of higher education and their programmes as to assure and improve the service quality. The evaluation procedure consists of internal and external assessment, both including a document preparation phase in which results are elaborated and integrated into a proposal for possible improvements. Internal assessment is carried out by an institution of higher education and is made up of continuous mechanisms of quality monitoring: monitoring and control of all processes of higher education, evaluation by students and periodic preparation of a standardized report with respect to a certain period of

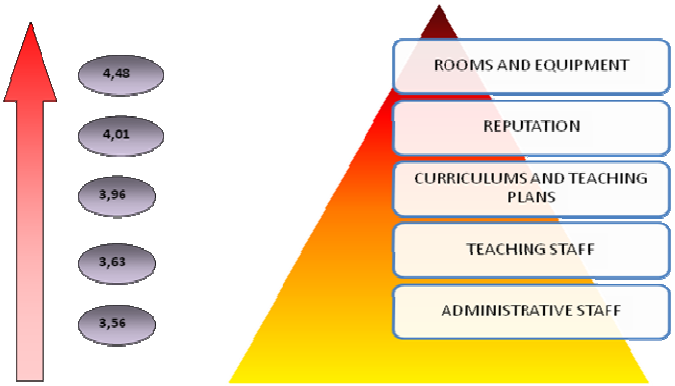
[15] Vavra, op. cit. n. 14, at p. 121.

time.[16] The backbone of this survey is internal assessment of the current conditions at the Faculty of Law of Pécs and at the Faculty of Law of Osijek in order to identify possibilities for raising the level of educational service quality. The following chapter offers separate analysis of the conditions at the referring institutions.

4.1. Analysis of the conditions at the Faculty of Law of Pécs (PTE)

By means of a measuring tool called KVALIMETAR, the students' perception of education quality was surveyed. The survey included five precisely defined areas (*administrative staff, teaching staff, reputation, rooms and equipment, curriculum and teaching plans*). Image 1 shows the students' perception (using a 1 to 5 scale) of each area posted as an average grade. The grades range from 3.56 to 4.48, which clearly entails great satisfaction in all layers of educational service. Detailed analysis of every area will be presented by a network diagram by means of which one can detect areas requiring improvement for the purpose of achieving better results in general.

Image 1 Student satisfaction with particular areas of the KVALIMETAR measuring instrument

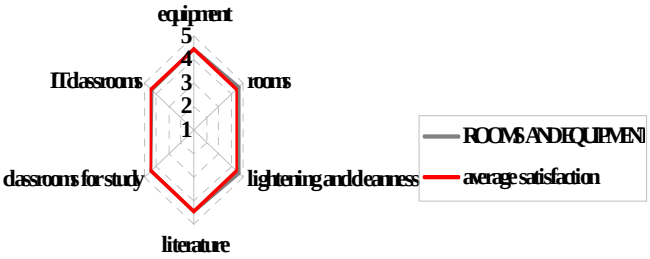


In terms of the University of Pécs, the best grades were given to the area 'equipment and rooms' (4.48). Students were satisfied with the classrooms and teaching equipment to the greatest extent. The detailed analysis has revealed that senior students (4th and 5th-year students) have

[16] S. Schwarz and F. Westerheijden, Accreditation and Evaluation in the European Higher Education Area, *Higher Education Dinamics, Vol 5* (Springer, 2007) pp.143.

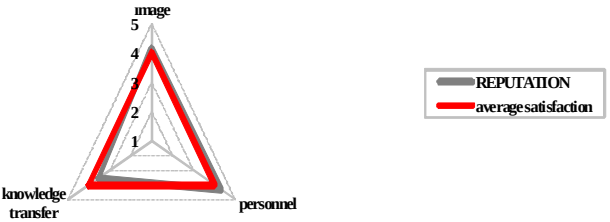
a higher GPA (<4.0) and that they attend classes more regularly (<75%). Somewhat lower grades were given to the area 'administrative staff' (3.56). It has been ascertained that these grades were given by junior students (1st-year students) who do not attend classes regularly (> 25%) and have a lower GPA (>2.5).The below diagrams show grades given to every area with respect to the overall grade.

Image 2 Results of the students' perception of the area rooms and equipment



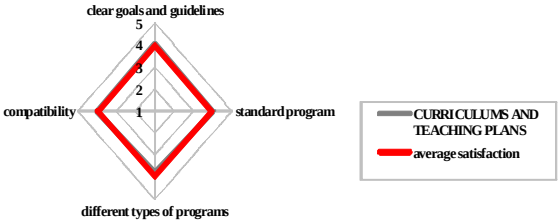
The average grade of the area 'rooms and equipment' amounts to 4.48. Students were pleased with all the factors of this area: available rooms and literature needed for studying, cleanliness of classrooms and appropriate teaching equipment. All the factors of this area are concentrated around the area average, which means that they should all be treated with due importance.

Image 3 Results of the students' perception of the area reputation



The area 'reputation' has an average grade of 4.01. To a great extent, students were satisfied with the faculty as a whole and with the properly qualified and professional teaching staff. Their satisfaction was a littler lesser with respect to transfer of acquired knowledge and skills to the labour market, which represents a field that needs improvement in order to raise the overall level of the quality of the area.

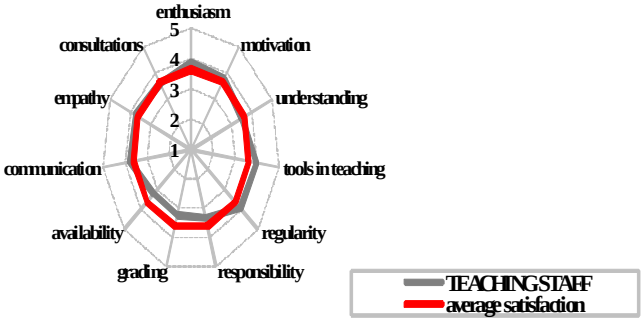
Image 4 Results of the students' perception of the area curriculums and teaching plans



The average grade of the area 'curriculums and teaching plans' totals 3.96. Students supported the goals and guidelines harmonized with the course contents which were comprehensible to both students and teachers. All the elements in question are within the average, which implies that there are no critical points and that all the factors deserve equal attention. One of the fundamental indicators of the successfulness of an institution of higher education refers to curriculums and accompanying teaching staff.

Curriculums have the role of a frame within which students have an opportunity to accomplish a certain level of education, so it is utterly important to be in touch with student small talks and with their needs and wishes since they are the ones who are familiar with the curriculum and teaching staff.[17]

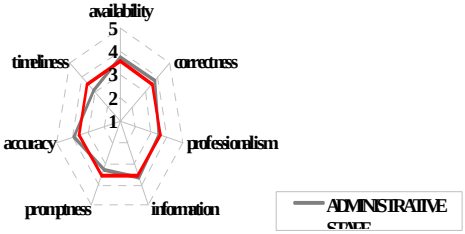
Image 5 Results of the students' perception of the area teaching staff



[17] D. Rees, *Evidence Based Quality Assurance, A New Paradigm for Higher Education* (Saarbrucken, VDM Verlag Dr Muller 2011) p. 43.

The area 'teaching staff' was awarded an average grade of 3.63. Concerning this area, students found the following factors the most satisfying of all: teaching enthusiasm, friendly attitude during office hours of professors, motivation of teaching staff for transferring the course contents, competence and qualifications of teaching staff, proper communication skills enabling transfer of knowledge in a clear and understandable fashion, regular schedule of classes. The grading of students' performance, availability and accountability are below the average grade and should be considered as critical points that require significant improvement in the future whereas the tendencies relating to good comprehension of knowledge transfer, utilization of teaching tools and regular schedule of classes exceed the above average and hence should be maintained.

Image 6 Results of the students' perception of the area administrative staff



The area `administrative staff` was awarded an average grade of 3.56. Students were least satisfied with untimely dealing with their applications and requests and with the slow service-providing process. The availability, decent treatment, preciseness and competence of the administrative staff exceed the above average and represent a competitive advantage which should be maintained because these factors raise the level of the entire area. The administrative staff should work on promptness and timeliness.

4.1.1. Concluding considerations regards the Faculty of Law of Pécs

The students' perceptions of five areas have been quantified by means of a measuring tool called KVALIMETAR and accompanying analysis. It has been concluded that the Faculty of Law of Pécs manages with rooms most appropriately equipped for teaching and available literature necessary for exam preparation. One of the fundamental indicators of the successfulness of an institution of higher education refers to high quality curriculums and accompanying teaching staff. Curriculums have

the role of a frame within which students have an opportunity to accomplish a certain level of education, so it is utterly important to be in touch with student small talks and with their needs and wishes since they are the ones who are familiar with the curriculum and teaching staff.[18] Since teaching staff is expected to motivate students, guide their study and encourage their educational and professional development, it is vital to evaluate the students' performance objectively and define the grading system precisely. As quality management is, among other things, aimed at education of an individual and development of a social community where at various approaches to quality reflect various approaches to education itself, which finally results in desired quality, one can say that, based on the conducted survey, students of the Faculty of Law of Pécs were impressed to the greatest extent by the extrinsic values of their faculty.

Extrinsic quality caters for requirements of the society regarding higher education, on the occasion of which these requirements are modified together with social changes occurring within a certain period of time. This quality relates to the capabilities of an institution of higher education to respond to flexible needs of the society which the institution interacts with.[19]

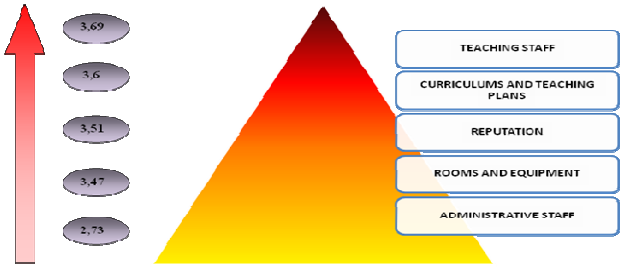
4.2. Analysis of the conditions at the Faculty of Law of Osijek

By means of a measuring tool called KVALIMETAR, the student satisfaction with education quality was surveyed. The survey included five precisely defined areas (*administrative staff, teaching staff, reputation, rooms and equipment, curriculum and teaching plans*). Image 7 shows the students' perception (using a 1 to 5 scale) of each area posted as an average grade. The grades range from 2.73 to 3.69.

[18] C. Chakrapani, *How to measure Service Quality and Customer satisfaction* (Chicago, Illinois American Marketing Association 1998) p. 59.

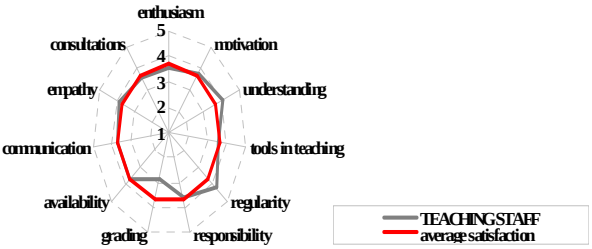
[19] S.J. Arcaro, *Quality in Education, An implementation handbook* (Florida, 2005) p. 15; V. Zidarić, 'The European dimension in education – its origin, development and current state', 21 *Social Research* (1996) p. 168.

Image 7 Student satisfaction with particular areas of the KVALIMETAR measuring instrument



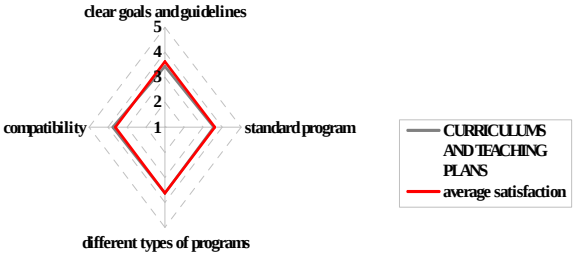
Students of the Faculty of Law of Osijek were most impressed with the quality of teaching staff (average=3.69), they also awarded good grades to the competence and qualifications of the teaching staff, proper communication skills enabling transfer of knowledge in a clear and understandable fashion, regular schedule of classes and availability and friendly attitude during office hours of professors. Unexpectedly, students were very satisfied with the area '*scientific and teaching plans and curriculums*' (average=3.60) since it is this area that represents the frame within which students have an opportunity to accomplish a certain level of education. As far as the area '*reputation*' is concerned (average=3.51), students seem to be pleased with the faculty as a whole and with the properly qualified and professional teaching staff as well as with appropriate rooms and equipment necessary for teaching ('*rooms and equipment*'; average=3.47). Students were least happy with the availability and promptness of the `*administrative staff*` (average=2.73). Detailed analysis of every area specified by a measuring tool called KVALIMETAR will be presented by a network diagram by means of which one can detect areas requiring improvement for the purpose of achieving better results in general.

Image 8 Results of the students' perception of the area teaching staff



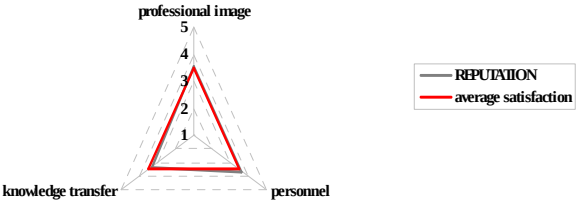
The area 'teaching staff' was awarded an average grade of 3.69. The results indicate both above and below average fields. The former should be maintained and supply with input in order to strengthen the image of the entire area while the latter should be additionally supported. Students were satisfied with the following factors: transfer of knowledge in a clear and understandable fashion, regular schedule of classes and friendly attitude of the teaching staff. Since teaching staff is expected to motivate students, provide guidance through their study and encourage their educational and professional development, it is vital to evaluate the students' performance objectively and define the grading system precisely.[20]

Image 9 Results of the students' perception in the area curriculums and teaching plans



The area 'curriculums and teaching plans' has an average grade of 3.60. Student satisfaction refers to goals and guidelines harmonized with the course contents intended for advancement of students. The results are within the average, which means that the Faculty of Law of Osijek should try to maintain this level and to cater for foreseeable outcome of its programmes. It appears that the teaching staffs are willing and capable of running classes and providing appertaining assistance in studying in order to facilitate accomplishment of these goals by the students.

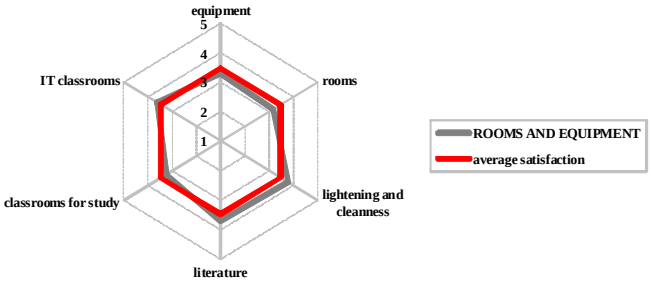
Image 10 Results of the students' perception of the area reputation



[20] Chakrapani, op. cit. n. 18, at p. 156.

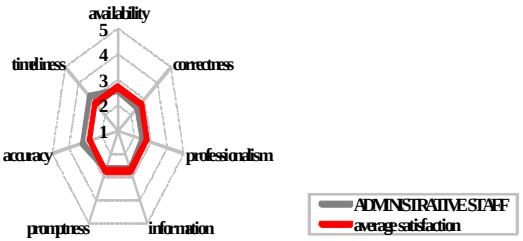
This area is characterized by an average grade of 3.51. Students were happy with all the elements of this area and their satisfaction is an average one.

Image 11 Results of the students' perception of the area rooms and equipment



The area 'rooms and equipment' was awarded an average grade of 3.47.Although the status of this area is satisfying, there is still room for improvements, particularly considering informatization of the entire administrative staff, which is rather obvious in the enrolment period, modernization of equipment necessary for high quality teaching and assurance of resources which are to provide students with assistance when studying. This area and the area 'administrative staff' should be firmly linked with the area 'reputation'. That will stimulate development of culture, which will then encourage professors to be in touch with the public and become, in a way, spokesmen of their institution announcing the latest, impartial and objective information.

Image 12 Results of the students' perception of the area administrative staff



The area 'administrative staff' was graded 2.73. Students were pleased with the timeliness and accuracy of services while they object to student treatment and to the competence of the administrative staff. Features such as availability, promptness and access to relevant information correspond to the average.

4.2.1. Concluding considerations regards the Faculty of Law of Osijek

The Bologna process has emerged as a European need for development of a knowledge-based society and economy. In Croatia, it does not represent only an inevitable consequence of harmonization with EU standards but also an appropriate framework for commencement with necessary reforms, so that the Croatian society could efficiently transform into a knowledge-based society.[21] The quality management system is based on the liability of integral parts (faculties) of the University for the quality of education offered to students who represent its essence, i.e., central interest of the Faculty. As assurance of quality within a higher education system is a continuous process which facilitates meeting the respective standards, every integral part of the University has a chance to achieve impressive results and implement high quality programmes by applying defined standards and guidelines. This survey has shown that students are very pleased with those elements and values that come from the heart of higher education and are referred to as intrinsic values.
Intrinsic quality is oriented towards studying and generation of knowledge and represents the foundation of the academic community whereat this community can be seen as the guard of intrinsic quality.[22]

5. Conclusion

Every quality assurance system reflects a national system of higher education and a local social framework within which institutions of higher education operate. Nevertheless, the emergence of the European system of higher education, European labour market, an increasing level of student and professor mobility, an increasing number of institutions

[21] I. Mencer, 'Quality Management at Croatian universities in efforts involving the European Space of Higher Education', *Proceedings of the 11th International Symposium on Quality `QUALITY, COMPETITIVENESS AND SUSTAINABILITY, March 18-19 2010* (2010) p. 135.
[22] Arcaro, op. cit. n. 19, at p. 123.

and *globalization* of education[23] have all made quality assurance relevant at the European level as well. Therefore, European standards of higher education have been established and these have to be applied in all the Bologna process signatories.

Many countries and interested parties consider quality assurance one of the foundations of the Bologna process. It is not only a matter of assurance but also a way of improving quality. Quality assurance has never been experienced as a process which needs to be identical in all the European countries. On the contrary, one has attempted to increase the level of cooperation within this process. Mutual trust is thus of vital importance for the process.[24]

The liability and initiative for reaching and enhancement of higher education quality primarily belong to the scope of the Universities' tasks which should, based on general methodological patterns of qualitative and quantitative surveys and evaluations, develop own models accommodated to the specific needs of the achieved development. Since successful quality management in higher education implies findings on the current condition which can contribute to detection of problems at a certain moment, it came to a need for survey of the students' perception of higher education quality at the two Universities: the Faculty of Law of Pécs (n=133) and the Faculty of Law of Osijek (n=228). The survey was conducted by means of a measuring tool called KVALIMETAR. Quality management requires monitoring of quality over the time for each faculty. As the quality in paper is measured by perception of the students, main objective is not comparison between them but ensuring quality control for each faculty.

6. Recommendations for improvement

The phase of self-analysis requires inclusion of a student representative into the Quality Assurance Council as to enable students to be provided with first-hand information on the activities and goals that should be accomplished. The implementation of the analysis needs to involve particular parameters which might appear as quality indicators at a faculty and refer to the ways how the faculty intends to accomplish its

[23] S. Lelas, *Rethinking science: Croatian Philosophical Society* (Zagreb, 1990) p. 24; R.J. Dew and M.Mc. Nearing, *Continuous Quality Improvement in Higher Education* (USA, American Council on Education 2004) p. 81.

[24] P. Nightingale and M. Oneil, *Achiving Quality Learning in Higher Education* (London, Philadelphia, Kogan Page 2007) p. 94.

goals and assure the quality of the education process. It is essential to systematically raise the level of awareness of the importance and role of quality assurance, accepting it as a permanent process which entails regular efforts of all the providers of the teaching and research process. One should also shape an approach in which every person would have their own active role in every activity whereas quality assurance would be their collective task. Managements of faculties within the Universities should be focused on quality policies as a management and improvement instrument. When setting out quality policies, the managements should analyse the following issues: desired and anticipated level of student satisfaction and satisfaction of other interested parties, level and type of future improvement necessary for a particular faculty. Then, one needs to prepare well-organized and regular implementation of self-analysis at all faculties within the Universities by means of KVALIMETAR as an evaluation method which will warn about positive and negative sides of the education process.

People are an inevitable segment of quality. Only highly motivated and educated employees who take advantage of the most contemporary technologies can reach the highest level of quality. If the human factor is neglected, then every effort put into improvement of quality will be doomed to fail. Taking care of employees, their knowledge, creativity and expertise are of great importance in this context. Therefore, quality management tasks are gradually becoming a regular and mandatory university activity.

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A cross-cultural comparison of student mobility: Croatian and Hungarian experience

I. Introduction

Globalization has proven to have multiple impacts on various aspects of social, political and economic life. Thus, it is not surprising that its influence can be seen in the various aspects of education, particularly when it comes to higher education. International student mobility has become one of the most evident outcomes of the globalization process in higher education.[1]

Positive changes can be expected within Croatia after the European Union (EU) membership implementation, whereby mobility by itself is going to become more represented, while Hungary can already use this benefit due to being a full member of the EU.

The mobility of students can be defined by the syntagm learning mobility, which is transitional, physical and for broad range of learning purposes, be it in organised programmes or on the learners own initiative.[2] The characteristics of learning mobility imply a learning purpose and can have various durations. Concerning transnationality, crossing geographical and national borders is essential in strengthening intercultural awareness.[3] Many students choose universities abroad for their studies and usually students from developing countries go to more advanced countries with a high quality of higher education.[4] Erasmus is

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[1] See more: B. Denman, '*Globalization, Globalisation and Its Impact on International University Cooperation1*', (2002), http://globalization.icaap.org /content/v2.1/04_denman.html.

[2] Mapping University Mobility of Staff and Students. http://www.maunimo. eu/index.php/mobility-definitions.

[3] Ibid.

[4] U. Teichler, 'Students Mobility in the Framework of Erasmus: findings of an evaluation study', 2 *European Journal of Education* (1996), http://www.jstor. org/pss/1503594.

the European Commission's higher education training programme that enables 200,000 students to study and work abroad each year, but also enables professors who want to teach abroad to do so. Since it started in 1987, more than 2.2 million students have participated and there is no other European Union programme that has had this degree of success. Students' participation in the Erasmus programme enables them to gain valuable experiences: individual development in foreign languages, acquiring skills, self-awareness and self-reliance, bettering their employability in this way. The Erasmus' target is to reach 3 million students in this year (2012), and it is not an inapproachable target, knowing that most of the European universities participate in Erasmus.[5] Erasmus has also had a great contribution in the modernization and better quality of the European Higher Education and Bologna Process.[6] The exceptional importance of higher education programmes and policies is based on the quality of higher education institutions and English language programmes, since this language is an important tool that international students are attracted to.[7] Numerous and various reasons motivate students to participate in the Erasmus programme and study abroad. There is a significant impact of studying abroad on labour market mobility and those values can rise up to 15%[8] (Parey, Waldinger, 2007). Data that point at Erasmus as a recognized programme of student mobility in EU justify this by the fact that 32 countries have taken part in Erasmus, which has been a part of the Lifelong Learning Programme since 2007. The data of students going abroad referring to their number in the academic year 2009/10, show Spain as the highest-ranking country in terms of students abroad (31,158 students), as well as the most popular destination among students (35,386 students). It was

[5] European Commission, Education & Training, http://ec.europa.eu/education /lifelong-learning-programme/doc80_en.htm.

[6] Erasmus-Facts, Figures and Trends, http://ec.europa.eu/education /pub/pdf/higher /erasmus0910_en.pdf.

[7] M. Kahanec and R. Králiková, 'Pulls of International Student Mobility', *IZA Discussion Paper No. 6233* (2011), http://ftp.iza.org/dp6233.pdf.

[8] Studying abroad and international labour market mobility, http://www.voxeu.org /index.php?q=node/6287. See more: M. Parey and F. Waldinger, 'Studying Abroad and the Effect on International Labor Market Mobility – Evidence from the Introduction of ERASMUS', CESifo Venice Summer Institute, 18-19 July 2007, http://www.cesifo-group.de/portal/page/portal/CFP_CONF /CFP_CONF_VSI/VSI%202007/vsi07_Papers_IHE/vsi07_ihe_Parey.pdf.

mostly students of social sciences, business and law that have participated in the exchange.[9]

Taking a closer look at the Erasmus student mobility in Hungary in the period 2000 – 2010, it can be seen that a substantially larger number of Hungarian students went to study abroad through the Erasmus programme (27,576 students) compared to foreign students who showed interest to come to Hungary through the Erasmus programme (15,198 students). However, a positive trend is noted in incoming foreign students willing to study in Hungary on the basis of the Erasmus programme. According to the available data, in 2000 there were only 623 foreign incoming students, while in 2010 there were 2,804 foreign students who came to Hungary as Erasmus students.[10] In a survey conducted at the Faculty of Law in Pècs in 2011, the aim was to describe and compare the perception, attitudes, drivers and barriers toward the Erasmus programme. In 2010, the same survey was conducted at the Faculty of Law in Osijek. As Hungary has been participating in the Erasmus programme much longer, their experience could serve as a development and implementation template for Croatian universities. With respect to the Erasmus student mobility in Croatia, as part of the Lifelong Learning Programme, it was recorded in the academic year of 2009/10 that 235 students went to study abroad.[11] Still, Croatia has been involved in the Erasmus programme only for a short period. The Lifelong Learning Programme started in 2007 and its planned duration is 7 years, until 2013, and the programme budget for the mentioned period is about 7 billion EUR. The European Union's aim is to develop through the Lifelong Learning Programme a European society in which sustainable economic growth and more and better workplaces can be ensured.[12] The Lifelong Learning Programme is one of the ways to ensure Europe's convergence to the objectives of the EU Strategy 2020. The EU Strategy 2020 is a way for Europe to become an intelligent, sustainable and inclusive economy and society. The mobility

[9] Erasmus-Facts, Figures, Trends, http://ec.europa.eu/education/pub/pdf/higher /erasmus0910_en.pdf.

[10] Lifelong Learning Programme, Hungary, http://ec.europa.eu/education/erasmus /doc/stat/0910/countries/hungary_en.pdf.

[11] Lifelong Learning Programme, Croatia, http://ec.europa.eu/education /erasmus/doc/stat/0910/countries/croatia_en.pdf

[12] Lifelong Learning Programme, Guide for 2011, http://www.mobilnost.hr /prilozi/05_1291986088_LLP_vodic_za_korisnike_2011_PART_I_HR_final.pdf.

of students is one of the ways to become more adjustable to all sorts of fluctuations, from institutional ones to those caused by the labour market. In the Erasmus programme, universities are responsible for securing high quality in all necessary segments and all institutions that participate in Erasmus receive certain compensation, depending on the number of students included in Erasmus.

Since Croatia has been in the Erasmus Programme for a relatively short period of time, there are some obstacles that Croatian universities have been facing. A few of them include the following: i) insufficient number of courses and study programmes in foreign languages, particular in English, ii) insufficient accommodation for foreign students on Croatian campuses, iii) possible problems with the recognition of periods of study outside of the home university due to the inexperience of Croatian teachers in this area.[13]

Even though there may be obstacles that prevent Croatian students in getting more involved in the Erasmus Programme, one should focus on identifying the motives which would induce students to become more interested in such a programme. The guiding idea of this research and paper is to contribute in identifying those motives and enable students to engage in mobility to a greater extent.

For the purpose of this paper, a survey among students at the Faculty of Law in Osijek was conducted in 2010, while another survey among students at the Faculty of Law in Pécs was conducted in 2011. Since the findings of international studies[14] suggest that the motivation of students is not affected by geo-political or socio-demographic conditions, the main goal is to analyse the possible similarities and differences between these two student groups driven by different mobility backgrounds, such as difference in the history of exchange programmes or experience with the Erasmus programme, which differs due to the fact that the University of Pécs has been conducting it longer, while the University of Osijek has introduced it in its academic offer fairly recently.

[13] Institution profiles, http://www.stipendije.info/en/scholarships/institution_profiles/ulazak_hrvatske_u_erasmus_-_najveci_i_najvazniji_program_eu_za_razmjenu_studenata_i_nastavnika.

[14] L. Endrizzi, 'Student mobility: between myth and reality', http://ife.ens-lyon.fr/vst/LettreVST/english/51-february-2010_en.php.

II. Research methodology

As stated, two waves were conducted concerning the perception of student mobility and Erasmus programme. The first wave was conducted at the Faculty of Law in Osijek during April and May of 2010. The survey was conducted using the *Paper and pencil method* (PAPI), where students were asked to fill out the questionnaires independently, with moderator's guidance, right before their classes. The survey was conducted as part of the EUNICOP project. The measurement instrument consisted of 34 questions, 20 of which were related to student mobility and 14 were related to socio-demography. While most questions have been formulated in a closed manner with predefined answers, three questions were open-ended with the intention to get a more in-depth understanding of students' attitudes on matters asked. In addition to nominal scales, predefined answers were composed of ordinal scales, using the Likert scale (from 1 to 5 points. There were two pilot studies made. The first pilot study was conducted after setting up a draft of research questions in order to detect all possible responses; the second pilot study was conducted after the finalization of the questionnaire within the sample of 30 students. After these two pilot studies were completed, the survey remained unchanged, taking into consideration that the pilot studies have shown readable and logical questions. According to the survey questions, the database for data entry was made. The initial base consisted of 323 questionnaires. After formatting, the base was used in SPSS form and served as a basis for the cleaning process and database validation. All questionnaires that had incomplete contents or inadequate answers were disregarded. After the cleaning process and database validation, the final database consisted of 310 questionnaires, which were further analyzed.[15]

The second wave was conducted at the Faculty of Law in Pécs in 2011 using the same *Paper and Pencil method* (PAPI method). The survey was conducted using the same methods as in Croatia a year before.

Thus, surveying the Hungarian students was done in the same manner: students were asked to fill out the questionnaires independently, with moderator's guidance. There were 400 students participating in the survey at the Faculty of

[15] N. Mujić, et al., 'International student mobility as a driver of modern University education: Croatian and Hungarian experience with the Erasmus Program', in T. Drinóczi and T. Takács, eds., *Cross border and EU legal issues: Hungary-Croatia*, (Pécs – Osijek, Faculty of Law in Pécs and Faculty of Law in Osijek 2011) pp. 479-480.

Law in Pécs. After the database cleaning and validation process, the final database consisted of 382 questionnaires which are further analyzed.
The survey results related to the Faculty of Law in Pécs obtained in 2011 are shown and discussed in the next section. In order to meet the goal of this paper, the results have been compared with the results obtained from the survey conducted at the Faculty of Law in Osijek in 2010. The comparison of results enable us to discuss the perception, attitudes, motives and barriers of Hungarian and Croatian students when it comes to international exchange, particularly in the context of the Erasmus Programme.

III. Survey results

The survey was designed to capture not only students' mobility and their perception of Erasmus, drivers and barriers, but their demographic profile as well. The study included a total of 382 students. The demographic characteristics of students reveal that the respondents were in the age range of 18 to 30 years, where the average age of the students was 21 years. The majority of the students surveyed in Pécs were full-time students. A detailed sample structure is shown in Table 1.

Table 1 The structure of the sample by socio-demographic variables in %

Age	
18-20	44.6
21-23	49.0
24 and above	6.4
Total	**100.0**
Type of study	
full-time student	99.5
part-time student	.5
Total	**100.0**
Average grade in present study	
1	1.0
2	9.3
3	50.5

4	27.8
5	11.3
Total	**100.0**
Plan to continue studying after graduation	
yes, specialist study	9.0
yes, doctoral study	18.4
no	14.9
I do not know yet	57.7
Total	**100.0**
Settlement size	
to 5,000 inhabitants	30.2
5,000 – 10,000 inhabitants	11.4
10,000 – 50,000 inhabitants	20.8
50,000 – 100,000 inhabitants	18.3
100,000 inhabitants and more	19.3
Total	**100.0**
Studying in the place of residence	
yes	25.7
no	74.3
Total	**100.0**
Current living	
with parents	69.3
alone	6.3
with friends	18.0
with partner	6.3
Total	**100.0**
Standard domestic	
standard is below Hungarian average	3.9

standard is at the level of Hungarian average	81.8
standard is above Hungarian average	14.3
Total	**100.0**

Student mobility is more widely represented among student population if students are member of university organizations, not necessarily Erasmus, although it is the best known student mobility programme. At the Faculty of Law in Pécs, almost 84% of the respondents were members of a student organization at the university level and the same percentage of the students were members of organizations outside of the university. About 10% more, almost 95% of the students were participating in some other forms of organizations.

Also interesting were the percentages of students ambitious regarding their desired place of work after completing their studies and getting a degree. The Croatian students mostly preferred to work in a domestic firm in Croatia (46% of the respondents), about 30% of the respondents in a foreign firm located in Croatia and another 24% of the respondents preferred to work abroad. On the other hand, 48.1% of the Hungarian students preferred to work in a foreign company abroad, almost 41% preferred to work in a foreign company in Hungary, and only 11.1% of the Hungarian students would like to work in a domestic firm, but abroad. The differences are evident and it can be seen that the Hungarian students are more flexible in terms of mobility regarding employability.

Speaking of mobility, we can assume that higher rates of student mobility would lead to higher rates of employment mobility. In the questionnaire, the answers to the question '*What would motivate you to participate in the international program of exchange'* were graded using the scale from 1 to 5, where 1 referred to not motivating at all, and 5 referred to very motivating. The survey results concerning motivation of students for mobility is shown in Table 2.

Table 2 Motives for Involvement in the International Student Exchange Program

	CRO	HU	Std. Deviation	Median	Mod
Benefits of employment	4.55	4.46	0.700794	5	5
Language learning	4.49	4.73	0.841783	5	5
Meeting people	4.38	4.30	0.881296	5	5
Getting to know new cultures	4.26	4.23	0.970183	5	5
Potential business contacts	4.19	4.34	0.964851	4	5
Professional training	4.12	4.09	0.928408	4	5
Entertainment	4.09	3.88	1.089756	4	5
Gaining independence	3.95	3.28	1.165867	4	5
Possible political contacts	3.39	2.97	1.316186	3	5

It is evident from Table 2 that all the motives scored relatively high grades. The average rating for Croatia ranged between 3.39 and 4.55 and for Hungary between 2.97 and 4.73. *Employment benefits* and *language* learning were graded both by the Croatian and Hungarian students above 4.4, meaning they were motivating for them. However, differences exist. For example, the lowest importance of participation in international exchange for the Croatian students concerned *possible political contacts* (grade 3.39) as well as for the Hungarian students (2.97), but the difference in grading is evident. On the other hand, the biggest difference between these two universities is in *independence*, where the difference is 0.67 of the grade. As it can be seen, independence is a motivating factor for the Croatian students (3.95), while the Hungarian students are indifferent concerning this motive (3.28).

When deciding what information was necessary for the students in order to decide whether to participate in an international exchange programme or not, the students had to grade their answers from grades 1 to 5, where 1 meant *does not matter at all* and 5 meant *very important.* The results are given in Table 3.

Table 3 Importance of Information Required to Make a Decision on Participation in International Exchange

	HU	CRO
Am I going alone or with a group?	4.14	3.92
What is the planned length of stay?	4.30	3.99
Do I have health insurance?	4.21	4.00
What conditions do I have to satisfy for application?	3.81	4.07
What are the criteria for an exchange student selection?	3.73	4.08
What is the language of communication?	4.26	4.18
Who covers all expenses abroad (e.g. travelling, accommodation, food)	4.30	4.22
Do I get a certificate about the participation along with my diploma?	3.78	4.26
Are my student rights prolonged for the time spent in the int. exchange program?	4.36	4.38
Will I be able to pass all exams necessary for fulfilling a condition for a higher year?	3.96	4.44
Are passed exams recognized at (home) university?	4.05	4.45

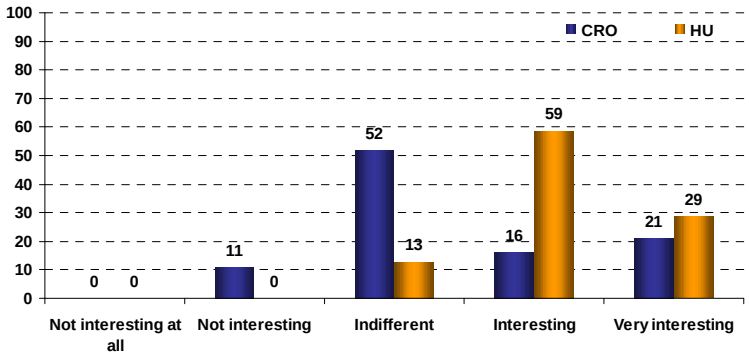
The grades were again relatively high for the Croatian as well as for the Hungarian students. However, the most important information for the Croatian students was the one related to passing exams and exams being recognized at the home university (4.45), while the most important information for the Hungarian students was if their students' rights were going to be prolonged for the time spent abroad (4.36). The biggest difference between Croatian and Hungarian students regarding the importance of information was concerning the certificate about the participation in the mobility programme, which was much more important for the Croatian students (4.26) than for the Hungarian students (3.78).

An important aspect of mobility programmes is the awareness of students about the existence of the programme. The percentages significantly differ. While there were only about 20% of the Croatian respondents who had heard of the Erasmus programme, there were approximately 17% of the Hungarian respondents who had not heard for that programme. The Hungarian students have been mostly informed

about the Erasmus programme through the notice board (51.2%) and fellow students (33.5%). It is surprising that only 13.4% of the students gained information on the Erasmus programme via the Internet, and a very small number of the respondents indicated their professors or assistants as a source of information about the Erasmus programme,

When analyzing how interesting did the students find the Erasmus programme, it is evident that the Hungarian students were much more interested in the programme than the Croatian students. Regarding the question '*How interesting do you personally find the Erasmus programme'*, on the scale from 1 to 5, where 1 meant *not interesting at all* and 5 meant *very interesting*, almost 80% of the Hungarian students were interested or very interested in the program, while the Croatian students were mostly indifferent to the programme (Graph 1). One of the reasons for such a big difference can be the different traditions of these programmes in Croatia and Hungary. While the Erasmus programme has existed in Hungary since 1998, it is relatively a new programme in Croatia that started in 2007.

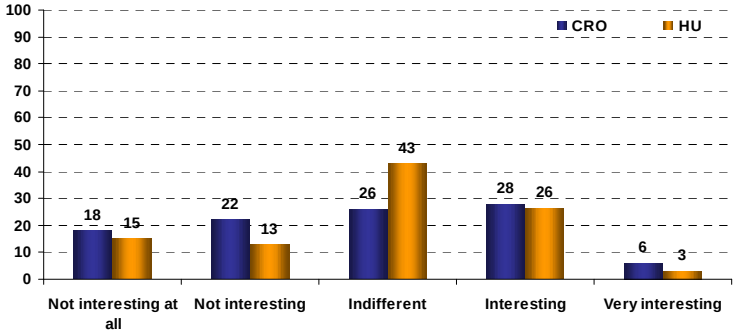
Graph 1 How interesting do you personally find the ERASMUS programme?



As it can be seen in Table 3, the length of mobility programme and planned duration of stay in another country were important for both the Croatian and Hungarian students, although somewhat more important for the Hungarian students. Most of the Hungarian students were ready to stay abroad from few days up to 3 months (44.1%), somewhat less respondents were ready to stay up to 6 months (36.5%) and the least number of respondents were willing to stay abroad more than 6 months (19.4%).

The possible Croatian/Hungarian student exchange and student mobility between these two universities is supported by the above mentioned percentage of respondents that were willing to take part in an international exchange mobility programme and to study abroad. Graph 2 displays interests of the Croatian and Hungarian students in a student exchange between the two Faculties of Law in Pécs and Osijek. Regarding the question *'How much are you interested in the student exchange (visiting)with the Faculty of Law in Pécs/Osijek'*, the respondents gave their ratings from 1 to 5, where 1 meant *not at all*, and 5 meant *very interested*, 43% of the Hungarian students and 26% of the Croatian students were indifferent to the possible student exchange between these two universities, but there were over 30% of the Croatian students interested in a mobility programme of exchange, particularly concerning the Faculty of Law in Pécs, and somewhat less than 30% of the Hungarian students were willing to participate in the exchange program concerning the Faculty of Law in Osijek.

Graph 2 How much are you interested in the student exchange (visiting) with the Faculty of Law in Pécs /Osijek?



IV. Conclusion and suggestions

Student mobility is a good way for improving students' competences and disseminating different ways of learning. Also, the cooperation between the Faculty of Law in Osijek and the Faculty of Law in Pècs can be a good basis for students that have a desire to participate in the exchange programme, but still do not want to travel too far from their homes, relatives and families.

Student mobility can be a good way of enhancing skills necessary for the labour market and better employability, due to the improvement of language and social skills. Furthermore, a mobility programme offers an opportunity of meeting new cultures and potential business contacts. In a certain way, participation in a mobility programme contributes to students' independence.

Comparing the Croatian and Hungarian students' perception, attitudes, motives and barriers, it is evident that the background of mobility experience is an important part of student participation in the Erasmus programme or any other student exchange programme.

Information about concrete mobility programmes should be better presented to students and more available. Academic staff should be also included in mobility programmes as an important part of the whole programme, in such way to become an important source of information about international exchange programmes.

Students have similar motives and are looking for similar information regardless of residence. This means that the geo-political impact is not significant at the global level and there are also many similar factors that may contribute in keeping students away from involving themselves into mobility programmes. There are a significant number of Hungarian students studying abroad. The number of outgoing students is rising and the strategy should aim at a continuous increase of incoming students. Experience obtained through the Erasmus programme has resulted in better programme awareness in Hungary, which is not surprising since Hungary has a longer tradition in the Erasmus Programme. Croatia does not have such a long Erasmus tradition, but by informing its students in the right way and by defining mobility programmes on the part of the academic community, it can certainly be improved in a short period.

The importance of these two surveys is in the fact that an almost equal number of students that participated in the survey from Osijek/Pécs showed interest for staying in Pécs/Osijek. In that regard, the exchange experience of the Faculty of Law in Pècs can contribute to the better promotion of mobility in Croatia, and could be even improved through the cooperation of these two Faculties.

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International student mobility measurement – methodological challenges

I. Introduction

The international student market is changing and managing student mobility is becoming more challenging daily. One statement remains the same through last decades: student international mobility has significantly gained in currency as a major policy in Europe and worldwide as well. The promotion of international mobility has come to be regarded as important element of higher education policy. This approach can be found within individual higher education institutions but within national governments in Europe as well. Although first mobility initiatives originate in 1950s, mobility initiatives development happened in 1980s, when Erasmus Programme was launched with the idea of enabling a minimum of 10 percent of all higher education students in Europe to study for a period of time in another European country. Later on, Erasmus Programme was followed by the Sorbonne Declaration and the Bologna Declaration continuing mobility necessity path. All mentioned argues that mobility became one of the 'concrete objectives' for European education. Every objective achievement implies objective management and objective management implies objective measurement, which means that there is obvious need for comprehensive, up to-date and reliable information related to student mobility. Most of the data nowadays is dealing with effects of mobility or statistical data on mobility, needed to measure progress and goals achievement of individual higher education institutions or national governments goals. These quantitative measures are meeting some methodological challenges meaning that 'mobility statistics' do not, in most cases, report on proper mobility at all. Instead, they report on foreign students per university/country/region, using the foreign

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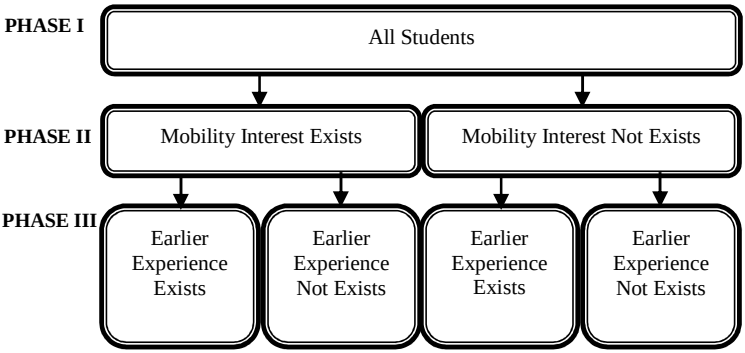
nationality of students as a measure of mobility. The use of 'nationality' data as a measure of true mobility would not be a major problem if every foreign student (or at least the overwhelming majority) had also been mobile prior to taking up studies in the 'host' country. But, this is far from being the case. This issue was recognised by Academic Cooperation Association, and publication EURODATA[1] has been produced which investigates which data on international mobility are being compiled and made available and which are not, at the international, the national and the programme level and presents the student mobility data identified. Furthermore, based on an analysis of these data, it tries to depict a picture of the main trends in international student mobility into and out of 32 European countries. It also emphasis that these statistics on student mobility should help to show the extent to which student mobility takes place and how it is distributed by countries, higher education and socio-biographic characteristics, and modes of mobility. Although those quantitative measures as 'mobility statistics' are must-have information, needed for performance tracking purposes, it is insufficient to fit student mobility management purpose. There is a need for measurement of intangible elements of student mobility in the decision-making process for student application to an international destination, such as of motivational factors, fears, barriers…of different targets groups among students (representative sample segmenting students according to interest and potential of involvement). Since those intangible elements were measured among students of the Faculty of Law in Osijek (Croatia) and students of the Faculty of Law in Pécs (Hungary), using the same methodology in both cases, with a goal of discussing motives towards international student mobility with emphasise of Erasmus Programme since this program is conducted at both faculties, that survey will be used as basis for methodological discussion and further methodological improvements. Survey among students at the Faculty of Law in Osijek was conducted in 2010, while the survey among students at the Faculty of Law in Pécs was conducted in 2011. This article is focused on research methodology and measurement instrument, and discusses the advantages and disadvantages of survey methodology used in measuring international student mobility.

[1] M. Kelo, U. Teichler and B. Wächter, eds., *EURODATA – Student mobility in European higher education* (Bonn, Lemmens Verlags & Mediengesellschaft 2006) p. 3-5.

II. Measurement role in international student mobility management

Measurement as a basis for managing international student mobility is a complex process – no single measure can capture. As mentioned, this article is focused on measurement of intangible elements of international student mobility process. Measurement should be used in different mobility stages within different students segments since measurement role through different stages varies. First phase is related to general understanding of representative sample of students of individual higher institutions, which enables segmenting students according to interest and potential of involvement. Since level of information, primarily personal experience is crucial for detecting elements for further communication; experience should be used for segmentation in third research phase (figure 1).

Figure 1 Target groups through research phases



When it comes to measuring opinions, feelings, interactions or communication through all three phases, within all given target groups, measurement instruments needs to be developed. Typical qualitative instruments used in research are in depth interview, focus group or different kind of observations. On the other hand, typical quantitative instruments are different psychometric tests, questionnaires, standardised rating sheets... The development of mentioned measures is a time-consuming and costly job if it is to be done properly with all the issues of reliability, validity and piloting needed for measurement development. Instruments should be reliable and valid. Instruments are reliable to the extent to which using them on the same individual at different times or in different circumstances still produces a relatively

similar result. This test–retest correlation should be at least 0.5 for groups and above 0.8 for individuals. Instruments are valid when they measure what they set out to measure. Construct validity refers to the degree to which the items on an instrument relate to the relevant theoretical construct. Construct validity is a quantitative value rather than a qualitative distinction between 'valid' and 'invalid'. It refers to the degree to which the intended independent variable relates to the independent variable (Hunter & Schmidt 1990). Since this article emphasise need of usage both measurement types: quantitative and qualitative measurement, described measures of reliability and validity are primarily related to quantitative research which relies primarily on numbers as the main unit of analysis. Quantitative research is more commonly used as a primary method in scientific and clinical research. Although quantitative research is based on questionnaires using a series of closed questions (usually with nominal scales or questions to which responses are given against a Likert or other type of scale), open questions can also be included to gather richer data. Qualitative research relies primarily on words as its unit of analysis and its means of understanding. However, it can also use voice tone, loudness, cries, sighs, laughs, and many other ways of human communication. Qualitative research tends to be small scale, simply because it is hugely labour intensive. Interviews or focus groups will usually need to be transcribed before they can be analysed. In addition, the researcher is often more involved with the person producing the words, and so it is sometimes helpful for others to conduct the analysis; again this can be costly. Still, nothing else can provide the same level of richness as qualitative data, adding space for respondents to provide some words to describe what might be otherwise gathered by numbers is immensely useful to the researcher and could even, in some situations, be a help to the subject. Qualitative methods are usually including projective techniques in order to help respondents in classifying, relating or commenting research theme. Today, it is generally recommended to combine some form of qualitative and quantitative data, as suggested above.

Although, until now, international student mobility measurement mostly relay on quantitative data, which enables giving answers to question 'how many', qualitative data should be incorporate as well, in order to answer question such as 'why' and 'how', needed for managing

international student mobility, enabling different management and communication strategy for different mobility segments.

III. Croatia and Hungary research

In order to develop an analytical framework to better understand and compare student mobility, survey was conducted in two phases: in a first phase among students at Faculty of Law in Osijek (in 2010), and in the second phase among students at Faculty of Law in Pécs (in 2011). Major goals were profiling students of the Law Faculty in Osijek as well as students of the Law Faculty in Pécs, and measuring their past experiences (student mobility status) as well as important criteria for making decisions about participation in such projects in future. Survey was conducted among the student population, with Paper and pencil method (PAPI). Students were asked to fill out the questionnaires independently, with the moderator's guidance.

1. Methodology overview

Tested measurement instrument was consisted of 29 questions, out of which 17 questions were related to the student mobility and 12 questions were related to socio-demography. Questions were mostly closed ones with predefined answers, except several open-ended, qualitative questions used for in-depth understanding of student responses and several questions where option 'other' was offered. The predefined answers were composed of nominal and ordinal scales, where for ordinal scale Likert scale (from 1 to 5 points) was chosen. Detailed questionnaire is presented in table 1.

Table 1. Measurement instrument used and tested

MOBILITY QUESTIONS	ANSWERS
1. Are you a member of any student organization at the Faculty?	1. Yes - which (more answers possible): _____ 2. No
2. Are you a member of any organization/association outside your Faculty?	1. Yes → which (more answers possible): 2. No
3. Are you a member of any other organized form of activity which is not encompassed by previous questions (e.g. political party,	1. Yes → which (more answers possible): 2. No

professional association, hobby, religious group, etc.?)	
4. Have you ever been abroad?	1. Yes 2. No
If you have answered YES please answer question 5 and 6, if not – go to the question 7:	
5. You have told that you have been traveling abroad. Could you tell following:	How many times: _____
6. Which countries have you visited, in which period of your life (preschool and primary school period secondary school period, faculty period, how long, with whom and what was the purpose of your travel (academic, tourist, religious, etc.). Please, fill out the table *Note: if you have been on your high school graduation trip abroad, and travelled throughout several countries, please state only your final destination (treat it as one travel)*	1ST VISIT: Country visited Age How long With whom Purpose of travel 2ND VISIT: Country visited Age How long With whom Purpose of travel …
7. Have you ever heard of ERASMUS program?	1. Yes 2. No
If you have answered YES, please answer questions 8,9,10; if not – go to the question 11	
8. What do you know about ERASMUS program? (describe briefly)	Description:
9. How did you find out about ERASMUS program?	1. Announcement board at the Faculty 2. From fellow student(s) 3. From professors/assistants 4. On web site 5. Other sources: _____

10. How interesting you personally find the ERASMUS program?	1. Not interesting at all 2. Not interesting 3. Indifferent 4. Interesting 5. Very interesting Briefly explain your answer:
11. What would motivate you to participate in the international program of exchange? Grade using the scale 1 to 5; 1 - not motivating at all; 5 – very motivating	Gaining independence Academic reasons (learning) Fun Meeting new people Possible professional contacts Possible political contacts Learning about new cultures Foreign language improvement Advantages for employment Other _____
12. If you could choose, where would you go on an exchange?	1st choice:_____ 2nd choice:_____ 3rd choice:_____
13. What do you consider the greatest obstacle for your participation in an international exchange program (choose only one answer):	a. Finances b. Repudiation of credits c. Not speaking a foreign language d. Fear of unknown e. Other:_____
14. Grade the importance of information which are necessary to you in order to decide whether to participate in an international exchange program or not: (1 does not matter at all, 5 very important)	What criteria do I need to meet in order to apply? What are the criteria for an exchange student selection? Who covers all expenses abroad (e.g. traveling, accommodation…) How long to stay abroad? Are the passed exams recognized at (home) university? What is the language of communication? Do I have a health insurance? Am I going alone or in a group? Do I get a certificate about the participation

	in the international exchange program along my diploma? Will I be able to pass all exams necessary for fulfilling a condition for a higher year due to the travel/exchange program? Are my student rights prolonged for a time spent in the international exchange program?
15. If you would participate in the international exchange program, how long would you be willing to stay abroad?	a. up to a few days b. up to one week c. up to one month d. up to 3 months e. up to half a year f. longer than half of year
16. How interested are you for potential study stay at the Faculty of Law in Pécs (Hungary)?	1. Not interesting at all 2. Not interesting 3. Indifferent 4. Interesting 5. Very interesting Why:
17. What is your usual way of getting informed about happenings at your Faculty?	1. Announcement board at the Faculty 2. From fellow student(s) 3. From professors/assistants 4. On web site 5. Other sources: _____
DEMOGRAPHIC QUESTIONS	
1. Year of birth 2. Gender 3. Year of study 4. Type of study 5. Your grade point average of study so far	
6. Do you plan to continue your university education?	1. Yes, at one-year specialized master program 2. Yes, at PhD program/doctoral studies 3. No 4. I do not know yet
7. Who in your family has a higher education degree?	1. Father 2. Mother 3. Someone from brothers/sisters 4. None
8. Type of settlement you are coming from?	1. up to 5.000 inhabitants 2. from 5.000 to 10.000 inhabitants

	3. from 10.000 to 50.000 inhabitants 4. from 50.000 to 100.000 inhabitants 5. 100.000 inhabitants and more
9. Do you study in the place of your residence?	1. Yes 2. No
10. You currently live with:	1. Parents 2. Alone 3. Friend 4. Partner
11. How would you describe your standard of living:	1. Below my country average 2. Average 3. Above my country average
12. What foreign languages do you speak and how well? Use the grade scale: 1 being insufficient and 5 being excellent)?	Language Grade from 1 to 5 _____ 1 2 3 4 5 _____ 1 2 3 4 5 _____ 1 2 3 4 5 _____ 1 2 3 4 5 _____ 1 2 3 4 5
Thanking note!	

Two pilot studies have been made: first, after setting up a draft of research questions, in order to detect all possible responses. The second pilot study was conducted after the finalization of the questionnaire, within the sample of 30 students, after which the survey remained unchanged, considering that the pilot has shown readable and logic questions. Based on survey questions the mask for the data entry was made, formatted databases in SPSS tool, used for data entry, data validation and data cleaning[2].

2. Methodological challenges

First part of methodology testing was related to reliability and validity check through factor analysis of quantitative measurement instrument. As being presented in table 1, many variables used in quantitative survey are nominal ones. Since reliability refers to the consistency of a measure and can be tested primarily for interval measures, an instrument is considered reliable if the same result occurs repeatedly. For that

[2] N. Mujić, et al., 'International student mobility as a driver of a modern University education: Croatian and Hungarian experience with the Erasmus Program', in T. Drinóczi and T. Takács, eds., *Cross-border and EU legal issues: Hungary-Croatia* (Pécs – Osijek, Faculty of Law in Pécs and Faculty of Law in Osijek 2011) pp. 497-518.

purpose, these two sets of data were used to check reliability for given measurement instrument – interval scales.

First tested scale was motivational scale. Reliability Statistics, Cronbach's Alpha for motivational scale (9 items) is 0,635. This number confirms that used scale is reliable for motivational measurement. In order to discuss possible improvements, Cronbach's Alpha if item deleted was measured for all motivational items and is presented in table 2.

Table 2 Item – Total Statistics

	Scale Mean if Item Deleted	Scale Variance if Item Deleted	Corrected Item-Total Correlation	Cronbach's Alpha if Item Deleted
Gaining independence	32,90	15,675	,219	,640
Academic reasons (learning)	32,07	15,031	,441	,576
Fun	32,40	15,997	,262	,621
Meeting new people	31,88	15,656	,434	,583
Possible professional contacts	31,81	15,137	,522	,563
Possible political contacts	33,21	15,792	,185	,653
Learning about new cultures	31,96	16,882	,205	,632
Foreign language improvement	31,43	17,059	,389	,603
Advantages for employment	31,70	16,271	,401	,593

In future, there are possible improvements since motives such as 'possible political contacts', and 'learning about new cultures'; even 'gaining independence' is influencing Cronbach's Alpha to be somewhat lower.

After testing reliability, factor analysis, statistical method used to describe variability among observed, correlated variables in terms of a potentially lower number of unobserved variables called factors, was used. Factor Analysis is a statistical method commonly used during instrument development to cluster items into common factors, interpret each factor according to the items having a high loading on it, and

summarise the items into a small number of factors. Loading refers to the measure of association between an item and a factor. A factor is a list of items that belong together. Related items define the part of the construct that can be grouped together. Unrelated items, those that do not belong together, do not define the construct and should be deleted (Munro 2005). Results of factor analysis are presented in table 3.

Table 3 Total Variance Explained

Compo-nent	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings
	Total	% of Varian-ce	Cumulati-ve %	Total	% of Variance	Cumulati-ve %	Total
1	2,677	29,745	29,745	2,677	29,745	29,745	2,337
2	1,452	16,130	45,875	1,452	16,130	45,875	1,688
3	1,119	12,430	58,305	1,119	12,430	58,305	1,601
4	,923	10,256	68,561				
5	,753	8,371	76,932				
6	,616	6,841	83,773				
7	,563	6,259	90,032				
8	,502	5,574	95,606				
9	,395	4,394	100,000				

Extraction Method: Principal Component Analysis.

Cumulative percentage of 58,305 is a great result which confirms usability of given measurement instrument. Still, when analysing content of detected dimension measured by motivational scale, it can be detected that there are 3 dimensions, which in a long run could be improved, and reorganised in two dimensions, argued by motivational theory: intrinsic motives and extrinsic motives.

Regarding second scale used in questionnaire, related to important factors when deciding about mobility involvement, Cronbach's Alpha

for is even higher, 0,798 for 11 items of importance scale. In order to discuss possible improvements, Cronbach's Alpha if item deleted was measured for all importance scale items and is presented in table 4.

Table 4 Item – Total Statistics

	Scale Mean if Item Deleted	Scale Variance if Item Deleted	Corrected Item-Total Correlation	Cronbach's Alpha if Item Deleted
What criteria do I need to meet in order to apply?	40,97	31,938	,469	,780
What are the criteria for an exchange student selection?	41,08	31,928	,508	,776
Who covers all expenses abroad (e.g. traveling, accommodation…)	40,69	32,935	,461	,782
How long to stay abroad?	41,26	32,670	,388	,789
Are the passed exams recognized at (home) university?	40,76	31,739	,513	,776
What is the language of communication?	40,77	31,350	,549	,772
Do I have a health insurance?	41,33	31,548	,462	,781
Am I going alone or in a group?	41,25	32,563	,327	,798
Do I get a certificate about the participation in the international exchange program along my diploma?	40,86	33,467	,365	,791
Will I be able to pass all exams necessary for fulfilling a condition for a higher year due to the travel/exchange program?	40,78	32,029	,530	,775
Are my student rights prolonged for a time spent in the international exchange program?	40,91	32,185	,477	,780

Scale is rather reliable when measuring importance of items in decision making process of student. Still, are those items sufficient to measure different dimension of importance elements, or are perceived as rather similar from students perspective can be verified with factor analysis. Factor analysis showed that there are 3 dimensions – factors which can

be extracted, still with very high correlation between them, which is presented in table 5.

Table 5 Component Correlation Matrix

Component	1	2	3
1	1,000	-,239	,329
2	-,239	1,000	-,233
3	,329	-,233	1,000

Extraction Method: Principal Component Analysis. Rotation Method: Oblimin with Kaiser Normalization.

In order to improve given dimension, there are two possibilities for further research waves – 1st option is to exclude some items which are measuring same dimension, or 2nd one is related to adding new items to get stronger dimensions, and stronger subscales.

Second part of methodology testing was related to discussing qualitative view of study as well as possible improvements based of qualitative input toward nominal variables. Authors of measurement instrument tried to get in depth inside by using open questions, but most of them were not answered. Students were more likely to give an answer to closed than to open question. Although qualitative insight is not sufficient and should be improved for further researches study, some observation has been made and possible improvements are presented as follows.

IV. Future improvements

When discussing measuring intangible elements of international student mobility, such as motives, reasons, and attitudes, measurement instrument used in Croatia and Hungary can be seen as a good foundation and starting point for further development. As argued, this instrument is successful in measuring motives and important factors, and survey results presented[3] are reliable basis for international student mobility management in Croatia and in Hungary. Nevertheless there are possible vertical methodological improvements within tested quantitative measurement instrument used in both surveys: nominal

[3] Mujić et al., loc. cit. n. 2, at pp. 497-518.

variables should be tracked and upgraded if needed with every new wave since they are related to context and situation when study is conducted. Some observation of nominal scales has been made and possible improvements are presented as follows. Related to ERASMUS program awareness, instead of open question, closed question could be used in order to achieve higher response rate, and still control genuine ERASMUS awareness. Question structure could be as follows: 'Choose one the following statements to describe ERASMUS program', using answer options such as 'employment program', 'student mobility program', 'assessing the quality of university program', etc. Some concrete questions would help in targeting interested students, so questionnaire could be supplemented with questions regarding interest for newsletters with possibility of e-mail collection. Regarding scales, when discussing motivational scale there are possible improvements since motives such as 'possible political contacts', and 'learning about new cultures', even 'gaining independence' are influencing Cronbach's Alpha to be somewhat lower. Those should be explained better in new version of questionnaire. Second scale related to important factors in decision making process is also reliable and all results can be base for management decisions, still there is possibility to improve validity through given dimension, or by excluding some items which are measuring same dimensions, or adding new items to get stronger dimensions, and stronger subscales. In order to do that properly horizontal improvement toward qualitative survey completion is expected. This means that qualitative study should be conducted prior to new quantitative data collection, gaining in depth insight in student's motives, emotions, fears, through in depth interviewers or focus groups of homogeneous segments of students. Those results should be used as ideas for new items in above tested scales. Some of them should be in negative form, so respondents would be kept involved and all positive answers could be tested and used for database cleaning. Above discussion of methodological principles relevant to student mobility measurement tends to support and empower international student mobility in future by ensuring reliable and valid analytical framework for measuring intangible aspects of international student mobility as a base for successful management of international student mobility in future.