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OVERCROWDING IN PRISONS IN HUNGARY AND SLOVAK REPUBLIC [*]

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1. Introducing

The aim of this study is to point out on current problems is prison system related to prison overcrowding in Hungary and Slovak republic. Prison overcrowding is an essential problem that deserves attention. The study contains information and statistics about overcrowding of prison facilities. The authors also offer de lege ferenda ideas to resolve this alarming situation.

2. Imprisonment

Imprisonment in its unconditional form is undoubtedly one of the most significant interference by the status with the rights and protected interests of a natural person. Imprisonment in general can be considered as last mean of coercion as a necessary consequence of the commission of a criminal offense, which should reflect the aspect of both individual and general prevention. The gradual increase of criminality and the imposition of imprisonment is subsequently associated with an increase of the prison population in prison facilities, what causes many problems of a capacity, organizational or technical nature. Due to the fact that the legal regulation of imprisonment in the Slovak Republic is relatively rigorous and inflexible, we manage to fight the problems of imprisonment only partially.

[*] This scientific paper came with support and is the output of a research project of the Agency for the Support of Research and Development in Slovak republic in the framework of the project: Privatization of Criminal Law – substantive, procedural, criminological and organizational – technical aspects; no. APVV-16-0362; Tento príspevok vznikol s podporou a je výstupom riešenia výskumného projektu Agentúry na podporu výskumu a vývoja v rámci projektu: Privatizácia trestného práva – hmotnoprávne, procesnoprávne, kriminologické a organizačno-technické aspekty; č. APVV-16-0362.

3. Basic principles of the Slovak Republic

The prison system of modern democratic state must also reflect social changes and technical progress, and its conditions must be improved.

The national legislation of the Slovak Republic declares that in prison facilities the human dignity of persons is respected and cruel, inhuman or degrading treatment or punishment may not be used. This is a general treatment clause. We find important material – technical, organizational, educational and other conditions. It is clear that the current modern concept of imprisonment not only prefers to isolate and restrict the personal freedom of a natural person, but it is assumed that this person will be worked on and this person should be integrated into the normal of life.

It is important in what conditions a prisoner restricted in his personal liberty finds himself and whether he has all the rights granted by legislation. All this has an impact on the subsequent integration of the person into everyday life and complex resocialization.

The execution of imprisonment is regulated by Act no. 475/2005 Coll. on the Execution of Imprisonment, as amended (hereinafter referred to as the "Act on the Execution of Imprisonment"). The sentence of imprisonment is carried out differently in institutions for the execution of imprisonment of a minimum, medium or maximum degree of guarding, respecting the so-called external differentiation of imprisonment.[1] In addition, imprisonment can be also served in a juvenile institution and as well as in a hospital for accused and sentenced persons.[2]

The execution of imprisonment in prison facilities currently faces several problems. The decisive factors are the current state of the prison population and insufficient capacities related to the constant increase of the prison population.

Undoubtedly, these problems are mainly due to economic causes, as prison facilities are of a public nature, they are state-owned and operated by the Prison and Judicial Guard Corps as a state body and their costs are mostly covered by limited public resources. This is also reflected in the current state of prison facilities.

For the often treated problem of the current prisons, it is possible to name the current capacity of the Slovak prisons associated with the gradual overcrowding of prisons. The increase in the total number of inmates in recent years is not so clear, but a slight increase can be observed. While in 2016 the prison population consisted of 10,116 people, in 2017 it was 10,270 people, in 2018 10,347 people and in 2019 10,558 people. The expected trend for the next periods is also a slight increase.[3]

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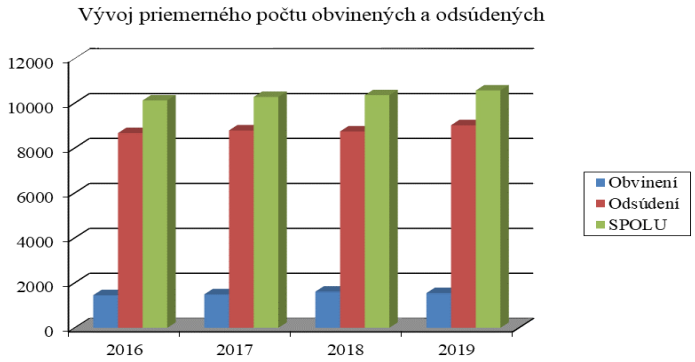
1 Provision of § 48 sec. 1 of Criminal Code.

2 Provision of § 5 of Act on the Execution of Imprisonment.

3 Development of the average number of accused and sentenced (blue – accused, red – sentenced, green – all together).



In order to increase the number of sentenced in the prison environment, it is necessary to reflect another factor, namely the overall capacity of prison facilities. According to statistics published on the website of the General Directorate of the Prison and Judicial Guard Corps, many institutes are showing an alarming situation. For example, facility Sabinov is filled to 103.52%, facility Želiezovce to 108.84%, facility Banská Bystrica – Kráľová to 104.25%, while other institutes are close to 100% as facility Levoča, facility Nitra – Chrenová, facility Prešov, facility Ružomberok, facility Sučany, facility Dubnica nad Váhom, facility Ilava, facility Košice and so on. Official statistics show that the total occupancy rate of these institutions in 2020 is 91.94%.

However, these numbers may not be entirely authoritative and realistic, as it is important what accommodation floor space (area) is included in the overall statistics, which has been criticized in the past by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), which pointed out that there were also included areas into accommodation space that do not primarily serve to accommodate sentenced.

The current legislation declares that the accommodation floor space (area) for a sentenced man is 3.5 m^2 and for women and juveniles 4 m^2. The Act on the Execution of Imprisonment also allows certain exceptions from the area thus determined, related in particular to the excessive increase in the number of prisoners in the prison facility. The total occupancy of the prison facility can therefore be determined by the total capacity of the institution, the specified accommodation area and the number of sentenced persons. It can be stated that the current situation is alarming, as some institutions are capacity undersized and overcrowded. CPT on its last visit to the Slovak Republic, announced that it would like confirmation that a minimum accommodation area of 4 m^2 per prisoner in multi-seat cells (without counting toilet and sanitary) is complied with that and the official prison capacities have been recalculated accordingly.[4]

[4] Report for the Government of the Slovak Republic on the visit of the Slovak Republic by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 28 March 2018.

What CPT asks, in our opinion, is the minimum standard in terms of accommodation, which is officially reflected by the Slovak Republic in the Updated Concept of Prisons of the Slovak Republic No. 392/2013, where there is also accepted the task "to build accommodation capacities with the possibility of accommodation of convicts with an adequate minimum floor area of not less than 4 m²", which is respected in the reconstructed institutions, but not in all.

4. Solutions

It should be noted that the Slovak Republic has been struggling for a long time with the growth of the prison population and the related overcrowding of prisons. In this context, in the Updated Concept of Prisons in the Slovak Republic for the period 2011–2020, adopted by the Government of the Slovak Republic, the increase in the prison population is identified as one of the biggest challenges for the prison system. There are several ways to effectively reduce the prison population.

The first is an effective and efficient system of alternative sentences and electronic monitoring, the expansion of which has recently been noticeable. It should be noted that alternative sentences have recently undergone a number of legislative changes guaranteeing an extension of the conditions for their imposition and competition against unconditional imprisonment, which we undoubtedly welcome. Together with effective electronic monitoring, this is the most effective way to combat prison overcrowding.

Another way of combating overcrowding in prisons is the effective legal regulation of conditional release from imprisonment and the so-called back-end type of home prison penalty, or the conversion of the rest of an imprisonment into a home prison penalty. It can be said that if the institute of conditional release enjoys popularity, the conversion of the rest of the sentence of imprisonment into a sentence of home prison penalty is not a required institute in the conditions of the Slovak Republic. The institute of conditional release has also undergone several legislative changes in the recent period, the most important is the possibility of conditional release of a person sentenced of a crime after half of the imprisonment, while obligatory imposition of control by technical means – electronic monitoring.[5]

The amnesty granted by the President of the Slovak Republic can undoubtedly be included among the ways of combating prison overcrowding. However, this is not a common act and rather a sporadic solution, which is confirmed by the fact that the last one was in Slovakia in 2013.

The problem of increasing prison population and capacity problems can also be solved by expanding existing capacities and building new facilities, but this is economically challenging. Therefore, the partial privatization of the prison system seems reasonable. In this context, it is undoubtedly necessary to mention the con-

[5] Provision of § 66 sec. 1 letter. c) of Criminal Code.

struction of the Rimavská Sobota-Sabová prison facility in the form of a public-private partnership.[6]

5. Basic principles of Hungary

The national legislation of Hungary declares that in prison facilities the human dignity of persons is respected and cruel, inhuman or degrading treatment or punishment may not be used. This is a general treatment clause.[7]

With regard to overcrowding in prisons, the European Court of Human Rights (ECtHR) first addressed the decision of Varga and others of 10 March 2015[8], establishing that Article 3 of the European Convention on Human Rights, namely the prohibition of torture the Hungarian prison conditions violate it. The decision of the ECtHR was given special weight to examine the conditions of the Hungarian prison according to a pilot procedure, which means that this is not an individual case, but the Hungarian regulation suffers from a systemic problem.

The main problem was caused by inadequate movement / air space or hygiene in prisons. The Council of Europe, the Committee for the Prevention of Torture and Inhuman Treatment (CPT), based its position, judgment per room for maneuver in many cases did not even reach 1 nm^2. Inadequate hygienic conditions meant inadequate separation of the living space and toilet, the lack of a sufficient number of washrooms, and the actual obstruction of the open air law for a certain period of time for the convicts.

In the meantime, however, the Constitutional Court is examining freedom and the 6/1996 on the rules for the execution of pre-trial detention. (VII. 12.) of the IM.

In the meantime, however, the legislator should repeal the above-mentioned 6/1996 IM Decree with effect from 1 January 2015 and replace it with Decree 16/2014 (XII. 19.) IM decree entered into force. However, the impugned provisions, with the same content, were included in Section 121 of the IM Decree. According to this: The number of persons that can be accommodated in a cell or in a living quarters should be determined in such a way that each convict has as much as six cubic meters of air space, with three square meters for male convicts and three and a half square meters for women.

For the often treated problem of the current prisons, it is possible to name the current capacity of the Hungarian prisons associated with the gradual overcrowding of prisons. The decrease in the total number of inmates in recent years is not so clear, but a slight decrease can be observed. While in 2017 the prison population consisted of 17,944 people, in 2018 it was 17,251 people, in 2019 16,664 people. The expected trend for the next periods is also a slight decrease.

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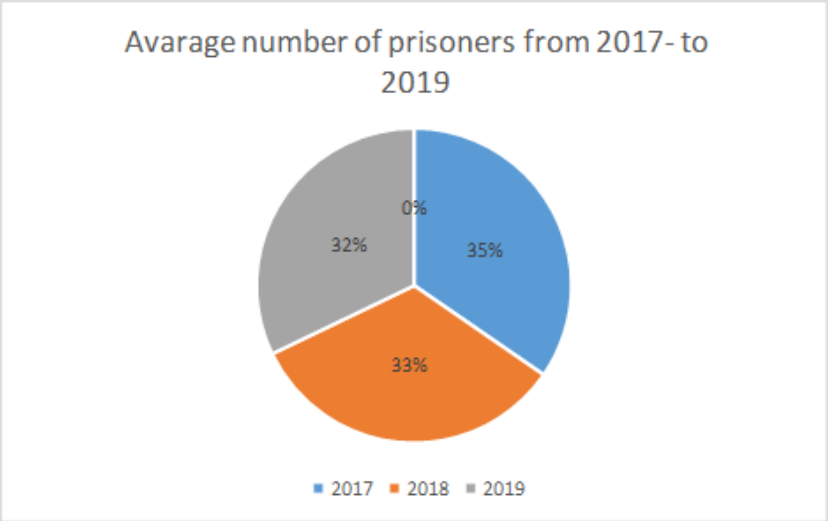
6 Yearbook of the Prison and Judicial Guard Corps for 2019

7 Nagy Anita – Dobos Ádám György: Túlzsúfoltság a büntetés-végrehajtási intézetekben és a konfliktusok. *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 37, 1, pp. 2019, 305–331, 27 p.

8 *Case of Varga v. Hungary* (Application no. 54589/15)ECtHR.



6. Compensation procedure

The European Court of Human Rights – ruled on 10 March 2015 that overcrowding means a mass and structural problem with regard to the Hungarian penitentiary system. Therefore, it obliged Hungary to produce a plan, within six month, to reduce overcrowding significantly and permanently. The deadline for that expired on 10 December 2015.

Building new prisons is not a solution to the above problem. Not only because it is expensive, but also because international experiences show that increasing the system's capacity has been accompanied by the growth in the number of detainees.

CPT on its last visit announced that it would like confirmation that a minimum accommodation area of 4 m^2 per prisoner in multi-seat cells (without counting toilet and sanitary) is complied with that and the official prison capacities have been recalculated accordingly. Therefore, a compensation procedure[9] was introduced for breach of CPT principles. You can initiate compensation proceedings:

– the convicted person,
– his protector.

If the elimination of a placement circumstance that violates the fundamental rights arising from the lack of the provision of living space prescribed by law, the given prison institute cannot be resolved within the prison institute, the commander of the institute transfer to an other prison institute. The legislator has set a 6-month limitation period for initiating compensation proceedings, which is to be calculated

[9] Nagy Anita: A kártalanítási eljárás. *Miskolci Jogi Szemle: a Miskolci Egyetem Állam- és Jogtudományi Karának folyóirata*, 14, 2. különszám, 2. kötet, 2019, pp. 221–232., 12 p.

from the cessation of the circumstances on which the compensation is based.[10] An application for compensation can only be made after a complaint has been lodged with a penitentiary institution by a detainee or his or her counsel for placement circumstances that violate his or her fundamental rights, with the exception of: "if the time spent in circumstances which infringe his fundamental rights does not exceed 30 days".

The complaint must be dealt with by a decision of the commander of the penitentiary institution within 15 days, against which judicial review is warranted. Thereafter, the claim for compensation must be made in writing to the penitentiary institution where he or she is detained, The penitentiary institution shall then forward the application to the penal judge within 15 days, within a very short period of time, with an opinion and an extract containing information on the convicted person's conditions of placement.

Subsequently, the penal judge
1. decide on the basis of the documents within 15 days, or
2. set a hearing within 15 days, or
3. schedule a trial within 30 days.

If the penal judge awards compensation to the convicted person, in his decision: Penal judge decides on the amount of the daily item of compensation (minimum HUF 1,200/day, maximum HUF 1,600/day). The decision commits the State to pay the amount of compensation within 60 days of service of the decision.

7. Solutions

There are several ways to effectively reduce the prison population. The first is an effective and efficient system of alternative sentences and electronic monitoring, and conditional release.

The procedure concerning reintegration surveillance is regulated by Art. 61/A. of the above mentioned Code, according to which: "the correctional institution proposes to the court in order to command reintegrational surveillance." Thus, reintegration surveillance is not authorised by the correctional institution, but the judge of the second instance criminal court. In such cases, the judge decides on the basis of the submitted documents, but he may also hold a hearing on the basis of the request submitted by the sentenced or his defender.

Reintegration surveillance[11] may be initiated once during the term of completing the punishemnt by the sentenced person or his defender. The request is forwarded by

[10] Nagy Anita – Forgács Judit: Jogérvényesítés a büntetés-végrehajtási jogviszony keretei között különös tekintettel kártalanítás jogintézményére. *Studia Iurisprudentiae Doctorandorum Miskolciensium – Miskolci Doktoranduszok Jogtudományi Tanulmányai*, 2017, pp. 17–25.

[11] Menyhért Enikő – Prof dr. Nagy Anita: A reintegrációs őrizet egyes kérdései. *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 36, 2, 2018, pp. 227–240.

the correctional institute to the criminal court within fifteen days. “Once” is impportnat because the sentenced receives a significant change in his conditions in his life-style and therefor it is only accessible to those sentenced who are less dangerous to society and who can reasonably expected to be able to successfully reintegrate into civil society. Although sentenced under reintegration surveillance may leave the correctional institute before the punishment is actually completed, but only to the house or apartment designated by the law enforcement judge, and can only leave the designated property in strictly defined cases. Ensuring the ordinary needs of daily life, carrying out work, education and medical treatment are defined as such cases by the law.

Art. 187/A. (1) of the above mentioned Code regulates the conditions when reintegration surveillance can be ordered. If the purpose of the deprivation of liberty can also be achieved in this way, the sentenced person can be placed under reintegrtion surveillance – before the estimated date of release from punishment –, if he agrees with it and:

- he has been sentenced to custodial sentence for a crime committed with negligency, or
- he has been sentenced to custodial sentence for an intentional crime, then
- not convicted of an offence concerning violence against a person as defined in Art. 459(1) 26 of the Criminal Code
- he has been convicted for the first time for a non-custodial sentence or a non-recidivous criminal, and
- shall complete a maximum term of detention of five years.

The duration of the reintegartional surveillance is

a) up to one year if the sentenced person is sentenced to imprisonment for negligent crime,
b) for a maximum period of ten months, other than that specified in (a).

Reintegration surveillance is also available to minors according to the Code, by laying down further specificities in the application of the above-mentioned reintegration surveillance, so that the conditions for the application of juvenile reintegration surveillance, in addition to the general rules:

(a) to attend family therapy or family counseling at least once during the period of deprivation of liberty,
(b) the consent of the legal representative to the installation of the electronic monitoring equipment and the lodging of a declaration of accommodation with a statement to escort the detainee.

The Code also implements a multi-directional extension of the institution of reintegration surveillance in order to reduce the saturation of institutions. On the one hand, it would allow a wider range of offenders to benefit from this institution, as the amendment would extend not only to those who are sentenced for the first time, but also to those who are convicted of negligent offenses and to re-offenders. On

the other hand, it determines the length of time spent in reintegration surveillance, depending on the degree of guilt and over a longer period (10 months in the case of intentionality and one year in the case of negligence). Another way of combating overcrowding in prisons is the effective legal regulation of conditional release from imprisonment and the so-called back-end type of home prison penalty. In Hungary it means, that after serving 2/3 of the imprisonment, can be released a prisoner according to the general rule of the Criminal Code of Hungary.

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[4] Act no. 300/2005 Coll. Slovak Criminal Code.

[5] Act no. 475/2005 Coll. on the Execution of Imprisonment.

[6] Report for the Government of the Slovak Republic on the visit of the Slovak Republic by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 28 March 2018.

[7] Yearbook of the Prison and Judicial Guard Corps for 2019.

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[9] Nagy Anita – Dobos Ádám György:Túlzsúfoltság a büntetés-végre-hajtási intézetekben és a konfliktusok, *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 37, 1, 2019, pp. 305–331, 27 p.

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[12] Act C of 2012 on the Criminal Code.

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JUDGEMENT ABOUT THE PRINCIPLE OF THE INVIOLABILITY OF THE ARCHIVES OF THE EUROPEAN CENTRAL BANK

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1. Introduction

In a judgment of December 2020 the Court of Justice of the European Union decided that by unilaterally seizing documents that are part of the archives of the European Central Bank (ECB), Slovenia failed to fulfil its obligation to respect the principle of the inviolability of the archives of the Union. Furthermore, by failing to cooperate properly with the ECB to eliminate the unlawful consequences of that infringement, Slovenia also failed to fulfil its obligation of sincere cooperation with regard to the European Union.[1] It was the first case in which the Court had to interpret this issue. In its judgment, the Court, sitting as the Grand Chamber, upholds the Commission's action and declares that the infringements alleged took place in their entirety. This case has given the Court the opportunity to state the conditions applicable to the protection of the archives of the Union with regard to a unilateral seizure of documents forming part of those archives made by the authorities of a Member State in places other than the buildings and premises of the European Union and, in particular, the conditions under which a finding of infringement of the principle of the inviolability of the archives of the ECB may be made. The purpose of this article is to provide an overview of the background to the proceedings, the main legal arguments of the parties and the reasons for the Court's decision.

2. Legal background

According to the Protocol[2] on the European System of Central Banks (ESCB)[3] and the ECB:

- In accordance with Article 282(1) [TFEU], the [ECB] and the national central banks shall constitute the [ESCB]. The ECB and the national central

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1 Judgment in Case C-316/19 Commission v Slovenia.

2 Consolidated version of the Treaty on the Functioning of the European Union Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, *OJ*, C 202, 7. 6. 2016, pp. 230–250.

3 The ESCB comprises the ECB and the national central banks (NCBs) of all EU Member States whether they have adopted the euro or not.

banks of those Member States whose currency is the euro shall constitute the Eurosystem.[4]
- The ECB shall ensure that the tasks conferred upon the ESCB under Article 127(2), (3) and (5) [TFEU] are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.[5]
- The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.[6]
- The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the [Protocol on privileges and immunities].[7]

According to the The Protocol on Privileges and Immunities:
- The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.[8]
- The archives of the Union shall be inviolable.[9]
- The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.[10]
- This Protocol shall also apply to the [ECB], to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on [the ESCB and the ECB].[11]

3. Background of the dispute

As of February 2015, the Central Bank of Slovenia and the Slovenian law enforcement authorities (‘the Slovenian authorities’) had exchanges regarding an investigation carried out by the latter against certain members of staff of that central bank, including the governor at the time (‘the Governor’), on suspicion of abuse of power and of official functions in connection with the restructuring, in

4 Article 1 of the Protocol. The Eurosystem comprises the ECB and the NCBs of those countries that have adopted the euro. The Eurosystem and the ESCB will co-exist as long as there are EU Member States outside the euro area.
5 Article 9.2 of the Protocol.
6 Article 14.3 of the Protocol.
7 Article 39 of the Protocol.
8 Article 1 of the Protocol.
9 Article 2 of the Protocol.
10 Article 18 of the Protocol.
11 The first paragraph of Article 22 of the Protocol.

2013, of a Slovenian bank. In the course of those exchanges, the Central Bank of Slovenia sent to the Slovenian authorities, at the request of the latter, certain information and certain documents which were not linked to the performance of the tasks of the ESCB and of the Eurosystem. The Slovenian authorities however took the view that the Central Bank of Slovenia had not provided all the information and documents requested. On 6 July 2016, on the basis of two orders of the Ljubljana Regional Court, Slovenia of 30 June and 6 July 2016, the Slovenian authorities, in connection with the abovementioned investigation, searched the premises of the Central Bank of Slovenia and seized documents. Although the Central Bank of Slovenia argued that those measures concerned 'archives of the ECB', protected by the Protocol on privileges and immunities, to which the Slovenian authorities were not to have access without the express agreement of the ECB, those authorities continued with that search and seizure of documents without involving the ECB.

On the same day, in a letter sent to the Slovenian authorities, the President of the ECB formally protested against the authorities' seizure of the documents, referring to the principle of the inviolability of the ECB's archives. In particular, he objected that those authorities had not taken any action to find a solution enabling the investigation carried out by them to be reconciled with the principle of the inviolability of the ECB's archives. On 26 July 2016, the ECB suggested to the Slovenian authorities that they could agree on a method to identify the documents seized which were part of its archives, which would enable those documents to be excluded from an immediate assessment in the investigation and would give the ECB the opportunity to determine whether the protection of those documents should be waived. On 27 July 2016, the Prosecutor-General in charge of the case ('the Prosecutor-General') informed the ECB that he regarded that proposal as interference in the ongoing investigation. On 5 August 2016, the ECB brought an action against the two orders of the Ljubljana Regional Court referred to in paragraph 15 above before the Administrative Court, which the latter dismissed by decision of 9 August 2016. On 11 October 2016, the appeal brought by the ECB against that decision was dismissed by the Supreme Court.

On 28 April 2017, the Commission sent the Republic of Slovenia a letter of formal notice in which it stated that, by conducting a search and seizing documents at the premises of the Central Bank of Slovenia, the Republic of Slovenia had failed to fulfil its obligation to observe the principle of the inviolability of the archives of the ECB, in breach of Article 343 TFEU, Article 39 of the Protocol on the ESCB and the ECB and Articles 2 and 22 of the Protocol on privileges and immunities. It also informed the Republic of Slovenia that it considered the Slovenian authorities not to have engaged in constructive discussion on that issue with the ECB, contrary to the requirements of the principle of sincere cooperation laid down in Article 4(3) TEU and Article 18 of the Protocol on privileges and immunities. The Republic of Slovenia replied to that letter of formal notice by letter of 21 June 2017 in which it stated that the documents seized could not be subsumed under the term 'archives of the ECB' for the purposes of the Protocol on privileges and immunities. Taking the view that the Republic of Slovenia's response was not

satisfactory, on 20 July 2018 the Commission issued a reasoned opinion in which it requested the Republic of Slovenia to take the necessary measures to comply with that opinion within two months of its receipt. On 11 September 2018, the Republic of Slovenia, in its reply to that reasoned opinion, disputed the infringement alleged by the Commission. In those circumstances, the Commission decided to bring the action.

4. Alleging interference with the principle of the inviolability of the archives of the ECB

4.1. Arguments of the Commission

According to the Commission by unilaterally seizing at the premises of the Central Bank of Slovenia documents connected to the performance of the ESCB's and the Eurosystem's tasks, the Republic of Slovenia has infringed the principle of the inviolability of the archives of the ECB and, consequently, has failed to fulfil its obligations under Article 343 TFEU, Article 39 of the Protocol on the ESCB and of the ECB, Articles 2, 18 and 22 of the Protocol on privileges and immunities and Article 4(3) TEU.

- The concept 'archives of the Union' in Article 2 of the Protocol on privileges and immunities, although not defined in that protocol, covers all the documents belonging to an EU institution or held by it, regardless of their medium.
- The privileges and immunities recognised by that protocol have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the European Union. In the light of the special institutional regime of the ESCB and of the Eurosystem, Article 2 of the Protocol on privileges and immunities should apply not only to the documents held by the ECB but also to those held by the national central banks which are part of the ESCB and the Eurosystem, such as the Central Bank of Slovenia, in so far as those documents relate to the execution of the tasks of the ESCB or of the Eurosystem, irrespective of whether they originate from the ECB or the national central banks.
- The TFEU confers tasks on the ECB, the ESCB and the Eurosystem. In that regard, it is apparent from Article 9.2 of the Protocol on the ESCB and the ECB that the tasks conferred on the ESCB are implemented either by the ECB itself or through the national central banks.
- The national central banks and their governors participate directly in decision-taking at the ECB and in the implementation and execution of those decisions. The functioning of the system thus established requires an exchange of documents within the ESCB and the Eurosystem and between the ECB and the national central banks for the purpose of adopting the decisions necessary for the performance of the tasks of the ESCB and of the Eurosystem and for the implementation and execution of those decisions by the national central banks. To avoid any interference with the proper functioning and the

independence of the ECB, and of the ESCB and the Eurosystem as a whole, there should be the same level of protection for all documents drawn up for the purposes of carrying out the tasks of the ESCB and of the Eurosystem. Consequently, all those documents should be regarded as part of the 'archives of the Union', even if they are held by a national central bank or located at its premises.

– The principle of the inviolability of those archives means that the national authorities can have access to them only with the ECB's prior agreement or, in the event of disagreement between the ECB and those authorities, with the authorisation of the Court of Justice. In the present case, the search and seizure of the documents concerned were carried out unilaterally.

4.2. Arguments of the Member State

The Republic of Slovenia contends in reply that it did not infringe the principle of the inviolability of the archives of the Union. The main arguments were the following:

– It results from both international law and the case-law of the Court of Justice, as well as from the fundamental values of the European Union such as the principles of transparency, openness and the rule of law, that the concept of 'privileges and immunities', must be strictly interpreted and that, far from being of an absolute nature, the exercise of those privileges and immunities is restricted in functional terms to the extent necessary to guarantee the functioning of the European Union and its institutions and to achieve their objectives.[12]

– The concept of 'archives of the Union' must also be interpreted strictly and that the documents seized by the Slovenian authorities at the premises of the Central Bank of Slovenia were not part of the archives of the ECB. In this connection, first, it submits that the rules concerning the immunity of archives under international law, in particular those applicable to consular and diplomatic relations, are relevant in the present case. According to the case-law of the international and national courts, solely the documents which belong to or are held by the person benefiting from the principle of inviolability of archives may be regarded as forming part of the archives, and not those which are sent by such a person to a third party or which are held by a third party.

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[12] The aim of the system of privileges and immunities in international law is to guarantee the effective functioning of international organisations, which are 'in a position of weakness' in relation to their founding Member States. Having regard to the evolution of EU law and the particular nature of the EU's legal order, the EU institutions are not in such a position in relation to the Member States. Accordingly, the archives of the Union, including those of the ECB, enjoy less extensive protection than under the system of privileges and immunities in international law. That fact supports a strict interpretation of the concept of 'privileges and immunities of the European Union'.

- The objective of the Protocol on privileges and immunities is to ensure the independence of the EU institutions. Thus, solely the ECB, as an EU institution, may enjoy the privileges and immunities provided for by that protocol, and not the ESCB and, as an integral part of the ESCB, the national central banks.
- The interpretation of the provisions at issue defended by the Commission would mean that archives of the Union might be located on the computers of all the national staff and civil servants who are members of the EU institutions or who work under their management, including the ministers of the Member States who participate in decisions of the Council of the European Union, the heads of State or of government of the Member States who participate in decisions of the European Council and all the national staff who work in the EU committees and agencies. That would amount in practice to 'absurd situations' in which all documents in the possession of the national government and its ministers, the head of State and entire administrations of the State would be regarded as archives of the Union.
- The interpretation of the concept of 'archives of the ECB' proposed by the Commission is impossible to implement, in both law and fact, which would prevent or significantly hinder any criminal investigation in the public sector in the Member States.
- Under Article 1 of the Protocol on privileges and immunities, the Court of Justice's authorisation is required only in the event that the national authorities wish to adopt administrative or legal measures of constraint concerning the property or assets of the Union. By contrast, neither Article 2 of that protocol nor the Court's case-law require such authorisation, inasmuch as the Slovenian authorities were not seeking to obtain documents belonging to the EU institutions or in their possession.

4.3. Findings of the Court

The Commission stated that although in its action it refers both to the search and to the seizure of documents carried out by the Slovenian authorities at the premises of the Central Bank of Slovenia on 6 July 2016, in fact that action is directed solely at the seizure of the documents. In that regard, the Commission claimed that by unilaterally seizing documents at the premises of the Central Bank of Slovenia on 6 July 2016, the Slovenian authorities infringed the principle of the inviolability of the archives of the Union. It was therefore necessary to examine, in the first place, whether the documents seized by the Slovenian authorities on that occasion included documents which were part of the archives of the ECB and, if that was the case, in the second place, whether the seizure of those documents constituted an infringement of the principle of the inviolability of those archives.

4.3.1. The concept of 'archives of the Union'

It was first of all necessary to establish the scope of the concept of 'archives of the Union'. First of all, in respect of the Republic of Slovenia's argument that the con-

cept of 'archives' should be interpreted by reference to international law, it should be recalled that, by contrast with ordinary international treaties, the Treaties on the European Union have created their own legal system which, on the entry into force of those treaties, became an integral part of the legal systems of the Member States.[13] It follows that the concept of 'archives of the Union' is an autonomous concept of EU law, distinct from that which might be accepted by international organisations and courts or by the law of the Member States. According to the Court:

- The term 'archives' commonly designates a set of documents, irrespective of when they are dated, their type and their medium, held by a person in the exercise of his or her activity.
- In EU law the term 'archives' has been defined in a different context to that of the Protocol on privileges and immunities, namely Article 1(2)(a) of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community[14] (OJ 1983 L 43, p. 1), as all those documents and records of whatever type and in whatever medium which have originated in or been received by one of the institutions, bodies, offices or agencies or by one of their representatives or servants in the performance of their duties, and which relate to the activities of those Communities.
- In respect of the objective pursued by Article 2 of the Protocol on privileges and immunities, according to case-law the privileges and immunities accorded to the European Union by the Protocol on privileges and immunities have a functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the European Union.[15]
- The concept of 'archives of the Union' within the meaning of Article 2 of the Protocol on privileges and immunities must be understood as meaning all those documents of whatever date, of whatever type and in whatever medium which have originated in or been received by the institutions, bodies, offices or agencies of the European Union or by their representatives or servants in the performance of their duties, and which relate to the activities of or the performance of the tasks of those entities.

4.3.2. The extent of the archives of the ECB

Since the ECB is an EU institution, it is apparent from Article 2 of the Protocol on privileges and immunities, as interpreted in the preceding paragraph and read in con-

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[13] Order of 13 July 1990, *Zwartveld and Others*, C-2/88-IMM, EU:C:1990:315, paragraph 15.

[14] Council Regulation (EEC, Euratom) No. 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, *OJ*, L 43, 15. 2. 1983, pp. 1–3.

[15] Order of 13 July 1990, *Zwartveld and Others*, C-2/88-IMM, EU:C:1990:315, paragraph 19; judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 47.

junction with Article 343 TFEU, Article 39 of the Protocol on the ESCB and the ECB and Article 22 of the Protocol on privileges and immunities, that the principle of the inviolability of the archives of the Union applies to the archives of the ECB. The question was that documents in the possession, not of the ECB, but of a national central bank may also be considered to form part of the 'archives of the ECB'.

- The archives of the Union need not necessarily be kept at the premises of the institution, body, office or agency concerned, otherwise the scope of Article 2 of the Protocol on privileges and immunities would be indissociable from that of Article 1 of that protocol, which provides for the inviolability of the premises and buildings of the Union, to the point of rendering Article 2 of the Protocol redundant. It follows that Article 2 of the Protocol covers the archives of an EU institution, such as the ECB, located at premises other than those of the European Union.[16]
- The ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails.[17] In this highly integrated system intended by the authors of the Treaties for the purposes of the ESCB, the national central banks and their governors have a hybrid status, inasmuch as, although they constitute national authorities, they are authorities acting under the ESCB which, as was observed in paragraph 79 above, is constituted by those national central banks and the ECB.
- Such documents are covered by the concept of 'archives of the ECB' even if they are held by national central banks and not by the ECB itself. Given the functional nature which the principle of the inviolability of the archives of the Union should be acknowledged to have, as recalled in paragraph 73 above, that principle would be rendered redundant if it did not protect the documents issued by the ECB or the national central banks and exchanged between those entities for the purposes of the performance of the tasks of the ESCB and of the Eurosystem.

4.3.3. The infringement of the principle of inviolability of the archives of the ECB

According to the judgement such infringement may only be found if, first, a seizure decided upon unilaterally by the national authorities of documents belonging to the archives of the Union may constitute such an infringement and, secondly, the documents seized in the present case in fact included documents which must be considered to form part of the archives of the ECB.

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[16] See the Opinion of the Advocate General, point 50.

[17] Judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia*, C-202/18 and C-238/18, EU:C: 2019:139, paragraph 69.

- The concept of 'inviolability', within the meaning of Article 2 of the Protocol on privileges and immunities, means protection against any unilateral interference on the part of the Member States. As the Advocate General observed in points 67 and 68 of her Opinion,[18] by the fact that that concept, which also appears in Article 1 of the Protocol, is described as protection against any search, requisition, confiscation or expropriation measures. Therefore, the unilateral seizure by the national authorities of documents belonging to the archives of the Union must be considered to constitute an infringement of the principle of the inviolability of those archives of the Union.
- The documents seized by the Slovenian authorities included all communications sent through the Governor's email account, all electronic documents on his workspace computer and on his laptop concerning the period between 2012 and 2014, irrespective of their content, and documents relating to that period that were in the Governor's office. The Slovenian authorities also seized all electronic documents from the period 2012 to 2014 stored on the IT server of the Central Bank of Slovenia and relating to the Governor. Having regard, first, to the considerable number of documents seized and, secondly, to the duties that the governor of a national central bank, such as the Central Bank of Slovenia, is called upon to carry out within the framework of the Governing Council of the ECB, and therefore also in connection with the ESCB and the Eurosystem, the documents seized by the Slovenian authorities must have included documents which were part of the archives of the ECB. So the material and documents seized by the Slovenian authorities at the premises of the Central Bank of Slovenia on 6 July 2016 included documents which were part of the archives of the ECB.
- Since Article 2 of the Protocol on privileges and immunities expressly provides that the archives of the Union are inviolable, by seizing such documents unilaterally the Slovenian authorities infringed the principle of the inviolability of the archives of the ECB.

5. Alleging failure to comply with the obligation of sincere cooperation

5.1. Arguments of the parties

In its second head of claim the Commission has submitted that the Republic of Slovenia has failed to fulfil its obligation of sincere cooperation under Article 18 of the Protocol on privileges and immunities and Article 4(3) TEU. In essence, the Commission has alleged that the Slovenian authorities did not cooperate adequately with the ECB, be it before the search by those authorities and their seizure of documents or afterwards, for the purposes of reconciling the principle of the inviolability of the archives of the ECB with the national investigation. According to the Commission, the principle of sincere cooperation required the Slovenian authorities

[18] Opinion of Advocate General Kokott delivered on 3 September 2020 in Case C-316/19 European Commission v Republic of Slovenia.

to cooperate with the ECB in order to (i) determine which documents were protected by the Protocol on privileges and immunities and which documents were not, (ii) identify, among the documents protected, those which could be relevant for the national criminal investigation, and (iii) allow the ECB to decide, in the case of the potentially relevant documents, whether the protection should be waived or whether, on the contrary, it could not be waived for reasons relating to the functioning and independence of the ECB.

The Republic of Slovenia has contended that it did not fail to fulfil its obligation of sincere cooperation.

- First, it submits, the Slovenian authorities interfered neither with the archives of the ECB nor with the functioning and independence of the latter.
- Secondly, throughout the investigation, the Prosecutor-General requested that the documents seized be handled 'with extreme caution', in order that they be accessible to the fewest investigators possible and the risk of disclosure be reduced to the minimum. Although it was not provided for under national law, the Prosecutor-General also allowed representatives of the ECB to be present during the procedure for securing those documents.
- Thirdly, even if the Republic of Slovenia did not engage in constructive discussion with the ECB, the Commission has not shown that that fact threatened the establishment of an economic and monetary union and the maintenance of price stability in the European Union.

5.2. Findings of the Court

According to settled case-law, it follows from the principle of sincere cooperation laid down in Article 4(3) TEU that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law.[19] Under Article 18 of the Protocol on privileges and immunities, which sets out in this connection the principle laid down in Article 4(3) TEU, the institutions of the Union and the authorities of the Member States are required to cooperate in order to avoid any conflict in the interpretation and application of the provisions of that protocol.[20]

- By the first head of claim, the Commission has alleged specifically that the Slovenian authorities unilaterally, and therefore without consulting the ECB beforehand, seized documents at the premises of the Central Bank of Slovenia. That seizure constitutes an infringement of EU law inasmuch as the documents seized necessarily included documents linked to the performance of the tasks of the ESCB and of the Eurosystem.

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[19] Judgment of 31 October 2019, *Commission* v *Netherlands*, C-395/17, EU:C:2019:918, paragraph 95 and the case-law cited.

[20] See, to that effect, judgment of 21 October 2008, *Marra*, C-200/07 and C-201/07, EU:C:2008:579, paragraphs 41 and 42.

- Admittedly, the obligation of sincere cooperation is, by its very nature, reciprocal. It was consequently for the ECB to assist the Slovenian authorities so that the latter could remedy, as far as possible, the unlawful consequences of its seizure of documents at the premises of the Central Bank of Slovenia on 6 July 2016.
- To enable the ECB to cooperate effectively with the Slovenian authorities in this respect, it was essential for the Slovenian authorities to allow the ECB to identify, among the documents seized on 6 July 2016, those connected with the performance of the tasks of the ESCB and of the Eurosystem. It is common ground that, at the end of the deadline set in the reasoned opinion, the Slovenian authorities had not allowed the ECB to carry out such identification. It is also common ground that, at that date, the Slovenian authorities had not returned those documents to the Central Bank of Slovenia although, at the hearing, the Republic of Slovenia stated that such documents were not relevant for the purposes of the pending criminal case in that Member State.
- The fact that the Slovenian authorities took measures to ensure that the confidentiality of the documents seized on 6 July 2016 at the premises of the Central Bank of Slovenia was maintained does not cast doubt on the finding that, in the present case, those authorities failed to fulfil their obligation of sincere cooperation with the ECB. The same is true of the fact, highlighted by the Republic of Slovenia, that the investigation conducted by the Slovenian authorities was not capable of threatening the establishment of an economic and monetary union and the maintenance of price stability in the European Union, since that fact has no bearing on the duty which the Slovenian authorities were under, in accordance with what was stated in paragraph 124 above, to eliminate the unlawful consequences of the infringement of the archives of the ECB which they had committed in seizing the documents on 6 July 2016.
- The Slovenian authorities failed to fulfil their obligation of sincere cooperation with the ECB and that the Commission's second head of claim must be upheld.

6. Final remarks

An analysis of the judgment shows that the Court places particular emphasis on the principle of inviolability of the archives of the Union and the obligation of sincere cooperation with regard to the European Union. The Court noted that the Protocol on privileges and immunities and the principle of the inviolability of the archives of the Union preclude, in principle, the seizure of documents by the authority of a Member State where those documents are part of those archives and the institutions have not agreed to such a seizure. Nevertheless, that authority has the option of requesting the EU institution concerned to waive the protection enjoyed by the documents concerned, subject to conditions if necessary and, in the event that access is refused, of applying to the EU judicature for a decision of authorisation

forcing that institution to give access to its archives. Furthermore, the protection of the archives of the Union does not preclude in any way the seizure by the national authorities at the premises of a Member State's central bank of documents which do not belong to the archives of the Union.

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THOUGHTS ABOUT THE CONNECTION BETWEEN DEMOGRAPHY AND THE FINANCES OF THE PENSION SYSTEM*

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1. Introduction

The aging process has many economic consequences, both for society as a whole and for the lives of individuals. However, the largest macroeconomically important institution affected by this process is the pension system. In debates about its reform, it is often said that this system should stimulate economic growth, help the expansion of capital markets. In contrast, its real purpose and task is to create a livelihood security for old age based on the income of the working life stage. This article will look at the impact of demographic change, in other words, aging, on the pension system and its finances. The demographic "aging" of the population, i.e. the increase in the proportion of older age groups, stems from two factors: the increase in life expectancy and the change in the number of births. The former is a welcome, continuous and, to our current knowledge, irreversible trend. However, the latter is a cyclical process determined not only by current, relatively low fertility. On the contrary, the extremely populous vintages born in the early 1950s (their members are called the Ratkó child in our country, the baby boomer in the rest of the world) and their large number of children, also born in the late 1970s, will cause significant fluctuations in the age composition of the population for decades to come. The fluctuation will put strong pressure on pension systems first this year, in 2020, and then for the second time around 2050, when these populations reach the threshold of retirement age.[1]

At the same time, it should also be borne in mind that the "burden" on working-age people is greatly exaggerated by the demographic dependency rate in old age,

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1 AUGUSZTINOVICS, MÁRIA: A nyugdíjrendszerekről (About the pension systems). *Magyar Tudomány*, 2002/4, p. 447. http://www.matud.iif.hu/02apr/auguszt.html (2020. 11. 20.)

precisely because the proportion of dependent children and minors will decrease. The total demographic dependency ratio (the combined ratio of younger and older people of working age to able-bodied people) "...will not be higher when the 'baby-boom' generation retires than it did when they went to school".[2]

For pension systems, the system dependency rate (the ratio of pensioners to contributors) is more important than the demographic rate anyway. However, there may be a significant discrepancy between the two due to labor market developments. The demand for labor in the "new economy" is expected to decline further. Within this, new so-called "atypical" forms of employment are spreading. Part-time, business, fixed-term contracts will replace full-time employment, the traditional relationship between employer and employee. The full-time employment rate "...is in Europe at about the same level as it was in 1985… it is possible that another wave of growth will not significantly reduce unemployment: Europe may enter a phase of growth without jobs."[3]

These trends are undermining the scope and contribution base of defined benefit pension schemes in the European Union as well as in the transition countries of Central and Eastern Europe.[4] The economic environment is therefore far from favorable for traditional pension schemes. However, the challenge must be met and can be offset, at least in part, by forward planning systems.[5]

In recent decades, due to low fertility and longer life expectancy, the proportion of older people in the population has increased in many countries around the world, including Hungary. Demographic aging is a well-documented phenomenon at both European and national levels. In Hungary, the proportion of the population aged 65 and over was 13% in 1990, then reached 15% by 2001 and 17% by 2011. By the beginning of 2014, the proportion of this age group had risen to 17.5%.[6]

According to the latest data for the beginning of 2017, the proportion of this age group has risen to 19%. According to Eurostat forecasts, the value of the indicator will grow even more strongly in the future, by 2070 it will reach 29 percent in Hungary. One of the most important social significance of the development of the age structure lies in the effects of these processes on the sustainability of various social institutions. That is, how dependency rates evolve and how many people of active age need to "support" those of inactive age. The decline in the number of working-

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2 CONCIALDI, P.: Demography, the Labour Market and Competitiveness. In: Hughes, G. – Stewart, J. (eds.). *Pensions in the European Union: Adapting to Economic and Social Change*. Kluwer Academic Publishers, Boston/Dordrecht/London, 1999.

3 DUCATEL, K. D. – BURGELMAN, J. C.: *Employment Map: Jobs, Skill and Working Life on the Road to 2010.* Futures Report Series 13, European Commission Directorate-General, Joint Research Centr, Institute for Prospective Technological Studies, Sevilla, Spain. 1999.

4 AUGUSZTINOVICS MÁRIA: Nyugdíjrendszerek és reformok az átmeneti gazdaságokban. *Közgazdasági Szemle*, 1999, július–augusztus, pp. 657–672.

5 AUGUSZTINOVICS MÁRIA (2002): op. cit. 447.

6 MONOSTORI Judit: Öregedés és Nyugdíjba vonulás. In: Monostori Judit – Őri Péter-Spéder Zsolt (szerk): *Demográfiai portré 2015.* KSH NKI, Budapest, 2015, p. 118.

age people also means a shrinking labor force potential, which is accompanied by difficulties in the sustainability of large public benefit systems.

The old-age dependency ratio expresses the number of elderly people (65 years and older) per 100 active ages (15–64 years). The value of the indicator in Hungary increased from 20 to 28 between 1990 and 2017. According to Eurostat calculations, it will rise to 52 by 2070, ie approx. A resident over the age of 64 will reach 2 active ages.[7]

The relative proportions of children and the elderly are expressed in the aging index. The value of this indicator in Hungary is growing more dynamically than the old-age dependency ratio, which is a consequence of the extremely low fertility rates, and predicts that in the future the proportion of the active age and the elderly will show an even more unfavorable picture than today. Between 1990 and 2017, the value of the aging index, i.e. the number of elderly population per 100 children, increased from 65 to 129.[8]

Demographic aging is a phenomenon observed in all European countries, usually due to low fertility and longer life expectancy. However, there are already differences in the extent of aging at the societal level, resp. how the strength of the factors influencing it develops. There are also more favorable and unfavorable countries within the generally low fertility rate, but there are also large differences in life expectancy in Europe. Taking into account the old-age dependency ratio, Hungary is one of the countries with a lower value, which can be explained primarily by the still low life expectancy. Among the countries most exposed to demographic aging, we find mainly southern and northern countries, but the value of the indicator is also very high in Germany. In Italy, the extremely low fertility rate is coupled with a high life expectancy, while in Germany and Greece; the extremely low fertility rates are associated with a relatively high but lower life expectancy than in Italy. In the case of the Scandinavian countries, on the other hand, it is not the unfavorable fertility rates but the high life expectancy that is behind it.[9]

2. The pension system from demographic point of view

The most important demographic changes of the last hundred and one hundred and fifty years can be summarized as follows:

1. Since the First World War, fertility has been declining everywhere in the developed world, with only a tiny detour from this more than a century-long process being the two decades of the baby boom.
2. Marriage rates have been steadily declining over the last few decades.
3. Divorce rates are increasing significantly.

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7 MONOSTORI Judit – GRESITS Gabriella: Idősödés. In: MONOSTORI Judit – ŐRI Péter – SPÉDER Zsolt (szerk.) (2018): *Demográfiai portré 2018.* KSH NKI, Budapest, 129. European Union (2017). *The 2018 Ageing Report. Underlying Assumptions & Projection Methodologies*. European Economy Institutional Paper 065.

8 MONOSTORI Judit: op. cit. 117.

9 MONOSTORI Judit: op. cit. 118.

4. Single-parent households are common.
5. The number of cohabiting relationships has increased and is growing dynamically.
6. The number of children born out of wedlock is increasing.
7. The number of consciously childless couples is increasing.
8. Mortality rates in old age are constantly improving.[10]

Pension schemes are usually organized according to different typologies. A three-dimensional typology is most common in the literature:

1. Covered or unsecured.
2. Insurance is mathematically correct or not.
3. Contribution or benefit specified.

The elements of the systems classified in each cell of this typology obviously have different fertility effects, but for now, let's disregard the different elements. Each pension scheme defines a period of accumulation in the active life of individuals. At the end of the accumulation period, when a certain age is reached, it is usually converted into an annuity by the individual (in the event of the insured's death, those who are left behind usually receive the annuity). The accumulation period in covered schemes is the accumulation of these contributions during the active life stage. In pay-as-you-go systems, coverage is not physical but human capital: the ability and willingness of rising generations to pay contributions. In this system, accumulation means educating and training the next generations.[11]

According to the contemporary principle of the pay-as-you-go pension system (developed in the immediate aftermath of World War II), contributions paid for the long-term earnings of many active workers cover the relatively few elderly people who typically live only a few years after retirement. This system is based on the trust of three successive generations:

- the parent pays the contribution so that the grandparent has a pension,
- while supporting his child in the hope that he will grow old,
- and your child will pay the contribution from which he will have a pension.

The unsustainability of the system is based on the fact that the number of domestic contributors is shrinking unstoppably because, on the one hand, not enough children have been born in the last four decades to replace the large number of retirees in the labor market; on the other hand, an increasing number of young people and middle-aged people do not pay contributions at home, thus missing out on financing domestic pensions. Even in the event of a possible improvement in population conditions, an increase in employment and the reduction of undeclared work, we cannot trust that the trend would be fundamentally different, and that Hungarian

[10] MÉSZÁROS József: *Nyugdíjrendszerek és demográfia: egymásra kölcsönösen ható folyamatok.* http://www.mstnet.hu/cikkek/_doku/Meszaros_Jozsef.pdf (2020. 11. 27.) p. 1.

[11] MÉSZÁROS József: op. cit. 2.

(retired) society could expect more pensions and more financing resources in the future.[12]

Pension schemes have been set up to provide care for the elderly in historically homogeneous groups of workers. These groups came from either large-scale industrial workers or civil servants. In the late 1800s and in the 20th century. at the beginning, those employed in this circle were predominantly male, and the income and family positions of the employees were stable and homogeneous. Collecting contributions from homogeneous groups of workers was relatively simple and it was impossible to avoid contributions. Society was in a state of demographic equilibrium or growth, and the economy was in a period of slow but steady growth, i.e.

- the employment structure is stable,
- the demographic situation is favorable,
- society was in a state of economic growth.

We can state that social security pension schemes were organized along these three basic assumptions and still rest on these three conditions. The 20th century was essentially a period of the development and success story of state social systems. By the beginning of the 20th century, essentially every developed state had developed its social security system, which, after World War II, transformed into pay-as-you-go systems depending on the extent of the devastation of the war. We can also follow this process in the transformation of the budget structure. It is particularly interesting to compare the United States and continental Europe in this regard. It is clear from the data that in continental Europe, the development of a social safety net was considered more important by individual societies, while in the United States the role of individual responsibility and responsibility was emphasized.[13]

Society operated within a nation-state framework, it was clear who the subjects of taxes and contributions were and similarly the range of beneficiaries could be easily determined. There was essentially no international mobility, people lived their lives in more or less the same place where they were born. Recent decades have intensified previous processes, i.e., due to declining birth rates and increased age, the age tree of developed societies has changed. While in the past the elderly were in the minority, today the ratio of the elderly to the young has changed radically. This poses new challenges, as the funding of old-age care systems has been based on a different premise, that the current active age groups represent a much higher proportion than the current ones. Thus, policymakers are forced to face raising the retirement age so that the pension system can continue to be funded. In parallel with this challenge, the whole of the world has essentially been covered by the pension systems of society as a whole in the 1970s, and the impact of this is still being felt today.[14]

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[12] VÉRTESY László: *A nyugdíjrendszer helyzete és finanszírozhatósága*. Pénzügyi műhelytanulmányok 4, Budapest, 2018, p. 14.

[13] MÉSZÁROS József: op. cit. 3.

[14] MÉSZÁROS József: op. cit. 4.

The most commonly used method of calculating long-term mortality in the demographic literature is the Lee–Carter model[15], which can be used to predict the future evolution of an age- and time-dependent mortality rate. Calculations suggest that the overall mortality trend for women has improved at a slightly faster rate than for men.

There was no constant trend of mortality in Hungary, and there was even a period - especially around the 1990s - when mortality increased in general. In the case of the change in both female and male mortality, it can be said that the years of regime change did not only affect the political and economic dimension, its imprint can also be seen in mortality, as a large-scale deterioration took place at that time. Another indicator used in demography is life expectancy at birth, which is an important indicator of the socio-economic development of a community. For women, life expectancy at birth for 2035 is 82.1 years, while for men this figure is nearly six years lower at 75.9 years. This also supports the well-known phenomenon that in Hungary, on average, women typically live much longer than men.[16]

3. The impact of the aging society to the state pay-as-you-go pension system

The social security pension system is usually discussed in several conceptual frameworks, so the problem can be formulated in several ways. The essence of the state pay-as-you-go pension system can be more directly characterized (somewhat simplifying the reality) in that the state, as an authority, continuously imposes a wage contribution obligation on its current active citizens, which pays the pension contributions of its current retired citizens. Active citizens themselves are entitled to a pension annuity by paying their wage contributions. However, this system can also be understood in such a way that the payment of contributions by the current active citizens is essentially a loan to the state, the debt of which will be repaid by the state in the form of a pension annuity. In this conceptual framework, this system therefore operates in such a way that the State finances the pension benefits of the current pensioners from a loan in the form of a wage contribution from the current active citizens. In this way, the state constantly rolls its debt before it, since the repayment of the debt due at any time is financed by the state from its new borrowing due at any time, so it constantly pushes its (implicit) debt to be repaid to the creditors due at all times. Finally, this system can be understood in such a way that the state, as an authority, obliges its current active citizens to compulsorily save in old age. In this conceptual framework, this system thus works in such a way that the state finances the pension benefits of the current pensioners from the forced savings of the current active citizens. It can be seen that the point is the same regardless of the conceptual framework. The state pay-as-you-go pension system operates in such a way that the state finances the current pension annuity of

[15] LEE, R. D. – CARTER, L. R.: Modeling and Forecasting U.S. Mortality. *Journal of the American Statistical Association*, Vol. 87, No. 419, 1992, pp. 659–671.

[16] VÉRTESY László: op. cit. 10.

the current pensioners from the current contributions of the active citizens. That is, the state forcibly deducts the current income generated by the current active citizens to the current retirees. The aging of society means that the number of active citizens is declining due to low fertility, resulting in an increase in the proportion of older people in the population as a whole. The problem that arises can also be articulated within different conceptual frameworks, although the same. The state pay-as-you-go pension system is unsustainable in the long run because there is a depletion of active citizens who use their contributions to fund the pensioners' due (already earned, entitled) annuities. This can also be seen as the depletion of the state's active contributing creditors, so that it is unable to fully finance its current debt repayments from its borrowing at any given time. The period of "living up" with non-existent property is coming. Also, the aging of society can also be understood as the forced savings of active citizens are no longer sufficient to fully fund pensions. The point is that the active citizens of the state are no longer able to fully finance the current (legitimate) pension annuity of pensioners from their current contribution payments. The system is not self-financing, the imbalance is constant. The state needs additional income deductions to create a river, i.e., cross-sectional balance. It can typically be subtracted from the active ones. We can also say that the state obliges active citizens to lend even more and to make even more forced savings.[17]

Based on both domestic and international projections, the old-age dependency ratio will almost double over the next 35 years. The fertility rate, along with mortality, largely determines the country's future population. Comparing the active to the number of retirees, we also get the old-age dependency ratio. Both fertility rates and dependency rates largely determine the future sustainability of the current pension system. In addition to the population data, the old-age dependency ratio shows the internal age structure of the studied society, the rate will increase monotonically until 2035, and is expected to approach 39% from below. The expected significant decline in the population and, at the same time, the also intensive increase in the old-age dependency ratio raise serious concerns about the sustainability of the Hungarian pension system.[18]

4. The relationship between retirement age and demography

One of the most important changes associated with old age is the cessation of labor market activity and retirement. In this respect, extremely important changes have taken place in Hungary and in several European countries in the last decade, mainly generated by the pension system and some active employment policy instruments. With the raising of the retirement age in old age, the tightening of early retirement, and the transformation of the conditions for disability, the date of leav-

[17] TÓTH ISTVÁN: *Demográfia és nyugdíjrendszer – adalék a nyugdíjrendszerek makroökonómiájához* http://www.portfolio.hu/cikkek.tdp?k=3&i=76502 (2020. 11. 27.) 1.

[18] VÉRTESY László: op.cit. 11.

ing the labor market has been postponed, especially for women. In addition to the increase in the age limit, another legislative change in Hungary has recently affected the average retirement age: the provision that entered into force in 2012, according to which women can retire before reaching the age limit of 40 years.

As a result, in 2012, the average retirement age for women fell. According to preliminary data, in 2013, the average retirement age for men was 62.2 years and for women 59.4 years. One of the retirement characteristics of the Hungarian population is that older people usually retire for many years before reaching the retirement age for them. This is partly a consequence of wide-ranging labor market and pension policies aimed at alleviating labor market problems. This is partly due to the fact that the increase in the retirement age since 1997 could only have been introduced in a shorter period of time under very high social tensions. That is, in parallel with the raising of the age limit, many of the age groups concerned were given the opportunity provided by law to retire before the age limit. In 2012, this also changed fundamentally, as from this year onwards, an old-age pension – with the exception of women with 40 years of service – cannot be determined before reaching the age limit. As a result, many types of early retirement and several occupational pensions have disappeared. As a result, according to preliminary data for 2013, 90% of men who retire in old age in a given year were just the same age as the general retirement age for their year of birth. The situation was somewhat different for women, but the similarities between men and women are not negligible either. The most important of the latter was the fact that early retirement was also characteristic of women during the period under review. However, the differences between calendar years are stronger in terms of women's retirement. More precisely, the differences between the ages of retirees and the retirement age are also very significant between successive years. This is due to the fact that the retirement age for women has been raised from 55 to 65, and different age limits have been set for each birth year during the transitional years. On the other hand, the timing of women's retirement also differs from that of men in that only one group of them is subject to the tightening introduced in 2012 (i.e. a ban on early retirement), as 40 years of service entitles women to an old-age pension regardless of age. This can be explained by the fact that in 2013, a significant proportion of women, 65%, entered the old-age pension system before reaching their age limit.[19]
By population aging we mean the growing proportion of the elderly within the population as a whole. However, the definition of old age is no longer so uniform: 60 (e.g. Eurostat interpretations) or 65 and older (eg UN interpretations) may be included. However, the essence of the process is not only the proportion of the elderly, young people or the employed; the problem is much more general: the whole age composition of the population is changing.

[19] MONOSTORI Judit: op. cit. 123.

Demographic aging is basically due to four factors:

– Fertility

In the late 1950s, fertility levels in Europe (thanks to the baby boom) were high, with the average number of children above 2.5. A declining trend begins in the 1960s, by 1980 this value was already below 2. According to UN forecasts (based on the medium hypothesis), countries will converge to a level of 1.85, which is significantly below the level required for supply.

– Mortality

Life expectancy also has an impact on aging with their ever-increasing values. The main reason for this is the rapid development of health systems. Life expectancy at birth in Europe is projected to increase from 73.8 to 81.0 between 2000 and 2050, rising from 78.0 to 84.2 for women and from 69.6 to 77.8 for men. means a change in.

– Immigration

Immigration is able to partially offset population decline and even aging due to its age composition, which is concentrated on the younger generations. However, the relevant statistics should be treated with caution, as the calculation of immigration and emigration can only be imagined indirectly, which carries the potential for error. Immigration and emigration are mainly continental in Europe and have not had a significant impact on aging so far, but are projected to be even more important in the future.

– Age composition

Increasingly longer lifespans have also fundamentally changed in terms of their structure. Not only the expected age has shifted, but also the length of each section. The number of years spent studying has increased significantly, which has delayed, among other things, the start of employment. In addition to all this, the upper limit of working capacity has also moved significantly upwards, which of course also means a change in the optimal retirement age.[20]

In recent decades, not only has the proportion of the population aged 65 and over increased, but there has also been a restructuring in the age composition of older people. The so-called also the oldest elderly, i.e. the number and proportion of those over 80 years of age. In 1990, 260,000 and in 2011, 400,000 belonged to this age group. Due to the different mortality of men and women, women are overrepresented in older age groups. The older the age group, the higher the proportion of women.[21]

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[20] STRÉHLI Kitti: *Öregedés és a nyugdíjrendszerek Európában*. Budapest, 2008, http://209.85.129.132/search?q=cache:H9Ewee2PcMoJ:www.corvinusembassy.com/ep/download/2/82/strehli_kitti_-_oregedesnyugdij.doc+%C3%B6reged%C3%A9s+hat%C3%A1sa+a+nyugd%C3%ADjrendszerre&hl=hu&ct=clnk&cd=8&gl=hu (2019. 12. 27.), p. 5.

[21] MONOSTORI Judit: op. cit. 118.

5. The effects of social aging

– For individuals and families

With aging, the proportion of time spent in paid work relative to lifetime decreases. The number of school years and years spent in retirement will increase, while the number of traditional years of work will decrease. Women spend more and more time working, but they are also characterized by high unemployment and frequent part-time employment, which are often forced solutions. The number of people reaching retirement age is sharply rising. By the age of 80, most older people are already struggling with serious health problems and social exclusion. Despite all this, it is becoming more and more difficult to generalize to each age group, the differences within age groups are already larger than between age groups.

Demographic aging affects women and men differently. Women have lower incomes, longer life expectancies, so they live longer alone and, on average, spend more time morally weak at a lower standard of living in the last stages of their lives. The increase in life expectancy - both for women and men - also means the appreciation of being outside the family and a kind of increased burden for the family, as the morally weak elderly often need family support and help.

– For income

As a result of recent decades, the income situation of the elderly in Europe has improved significantly, mainly due to the development of pension systems. On the other hand, poverty remains common among the elderly, especially among divorced, widowed single women. The financial situation of the elderly is mostly higher than that of the other groups, but the reason for this is extremely simple, they have been working on accumulating their wealth for a long time.These data raise the issue of intergenerational equity. This is exacerbated by the awareness that the cost of the necessary transformations of welfare systems should be borne by current young generations. According to some analyzes, and supported by several practical examples, this creates a kind of tension between the generations.[22]

– To the economy and especially to the labor market

As a result of demographic change, the average age in the labor market will rise, which makes lifelong learning particularly important, and unemployment may fall. The processes of lowering the previous retirement age have slowed down or they seem to turn back. There have also been fundamental changes in the age composition of the workforce. In the labor market, young people and those close to retirement age are at a significant disadvantage compared to middle-aged people. Changes in consumer demand have led to changes in the structure of the economy, job opportunities and employee demands. Aging has also brought about fundamental changes in the system of savings, investment and capital accumulation, especially with regard to national savings.

[22] STRÉHLI Kitti: op.cit. 6.

– To social policy

Health, education, and social policies are highly dependent on the age composition of the population; it is enough to think only of lifelong learning or caring for the elderly. Finding and applying the right procedures for the purpose is more important than ever. In the area of public finances, the pension system is under the greatest pressure. The unfundability of pension systems poses serious decisions for most European countries. There are also increasing burdens on health due to demographic aging. The complexity and intertwining of the issue requires coherent responses from governments, in particular the coordination of short- and long-term goals and a high level of coordination. Demographic change and the processes closely linked to it pose an unexpected challenge to public policy, fundamentally shaking up a system that has worked so far. The difficulties encountered can be divided into four major groups:

- The first and perhaps most urgent challenge is fiscal policy. Demographic aging is placing increasing burdens on government spending, making current systems unsustainable. This effect is further exacerbated by a slowdown in GDP growth without a significant increase in productivity. This is due to the steady decline in the proportion of people of working age in the population. Together, these processes bring with them a significant slowdown in the rise in living standards (measured in GDP/capita).
- The second task can be related to market sensitivity. Demographic change makes it necessary to set up a stable system that allows for rapid and flexible responses in both labor and financial markets. Reforming the structure is a kind of springboard for making and implementing further reforms, as most of the necessary changes are either not feasible without it or it loses its reality and function. The population needs to be adapted to adapt flexibly in both the labor market and the money and capital markets. Not only the creation of opportunities becomes emphasized, but also the continuous market feedback.
- The third set of challenges concerns individuals. The population must be supported in finding a place in the labor market, as it is important to have active, flexible workers. Particular attention needs to be paid to those in front of retirement, for whom potential long-term health problems make this significantly more difficult. In addition, it is important for individuals to learn to structure their longer lives differently. It is not enough to focus on shaping the attitude among the elderly, we can achieve much greater efficiency if we start all this in childhood, in schools.
- The fourth task is related to the shift of the balance of individual and collective responsibility. Governments are unable to maintain the affordability of welfare systems, so the role of the private sector will increase significantly compared to the past, and its presence will become

> key. While more flexible arrangements provide opportunities and greater influence for many in their own affairs, for others it embodies a lack of security. Individuals must believe that they will receive adequate and equitable health care, the right to lifelong learning, pensions and all such services that are necessary for their safety. Currently, this kind of trust is lacking in many states.[23]

When implementing reforms, it is essential that they form a coherent whole, that they can be realized as elements of a common strategy. Otherwise, it is feared that reforms will take a different direction, making it impossible for a well-functioning welfare system to emerge.

6. The pension in the budget

Changes in the age composition of the population can have both direct and indirect effects on the budget balance. On the expenditure side, as a direct effect, pension expenditures and health care expenditures together may exceed their 2010 value by 2.8 percent of GDP in Hungary in 2060, according to the AWG forecast (EC 2012).

On the revenue side, a decline in the working-age population, with an unchanged regulatory environment and activity rate, could lead to a decline in wage-related revenues. Social security benefit systems may be under double pressure, as declining contribution revenues due to demographic trends will have to finance social security benefits with a growing number of users.

Pension expenditures are one of the largest expenditures of the central budget in Hungary. In the pay-as-you-go Hungarian pension system, the current contributions of employees primarily cover the pension of the elderly. The level of public pension expenditure depends on several factors at the same time, such as the parameters of the pension system (retirement age, length of service, replacement rate of new pensions, indexation of defined benefits) and demographic trends. European countries with higher old-age dependency rates generally have higher public pension expenditure as a share of GDP.

This also statically shows that unfavorable demographic trends (decrease in the working age population and increase in the share of people over 65) result in an increase in the pension fund deficit in the absence of measures. The aging of society points in the long run towards expenditure growth based on the decomposition of pension expenditure. According to the forecast in the AWG report, pension expenditure as a share of GDP could increase from 11.9 per cent in 2010 to 13.6 per cent in Hungary by 2060 (EC 2012), and this increase in expenditure may be slightly higher than the EU average (1.2 percentage points). The change in the old-age dependency ratio is the most significant contributor to the increase in expenditure.

The biggest demographic impact may occur in 2040, which may be caused by the retirement of the Ratkó generations. The impact of aging is partly offset by measures affecting the pension system. The retirement age will gradually increase

[23] STRÉHLI Kitti: op. cit. p. 7.

from 62 to 2014 to 65 years between 2014 and 2022. In addition to raising the age limit, tightening the use of pre-age benefits and disability benefits will also result in an increase in the effective retirement age. As a result, the ratio of pensioners and pension-like benefits to the population over the age of 65 may fall from 176 per cent in 2010 to 122 per cent by 2060 (EC 2012). The decline in the benefit ratio in 2010 could have the largest reduction in pension expenditure. The amendment to the indexation rule also supports the sustainability of the pension system: since 2012, a purely inflation-adjusted pension increase rule has been in force, according to which the usual indexation of already established benefits at the beginning of the year follows the planned inflation rate in the budget. The rule ensures that the real value of pensions is preserved, but in the case of economic growth, indexation below the rate of nominal GDP results in expenditure savings in the budget in proportion to GDP from one year to the next. Overall, from 2013 to 2014, pension expenditures may have declined by 0.6 percent of GDP due to the combined effect of measures affecting the number of employees (such as the raising of the age limit starting in 2014) and the indexation rule. According to AWG's forecast of pension expenditures, pension expenditures as a share of GDP may gradually decrease further by 2030 (to 10.4 percent of GDP by 2030), so no imbalances in the Hungarian pension system are expected in the next 20–25 years. At the same time, the impact of the aging of society on the pension system may intensify in the 2040s with the retirement of Ratkó grandchildren[24].

7. Final remarks

Demographic aging, i.e. the increase in the proportion of older people, is one of the defining socio-demographic phenomena in the more developed regions of the world. Whatever indicator we measure, we are witnessing an increasingly dynamic change that, according to population projections, will continue over the next few decades. In Hungary, the proportion of the population aged 65 and over increased from 13% to 19% between 1990 and 2017, and is projected to reach 29% by 2070.[25]

The gender gap has started to narrow in the last few years. One of the most important milestones of aging is the exit from the labor market, retirement. The average age of retirees has risen significantly over the last decade and a half as a result of tightening eligibility conditions and raising the age limit, especially for women. In 2013, the average age of women retiring was 59.4 years, while that of men was 62.2. In the year before the 1997 reform of the pension system, in 1996, the value of the indicator was still 54.3 for women and 58.7 for men. The internal age composition of the elderly has also changed in recent decades. There has been an increase in the proportion and number of people aged 80 and over, that is, the very

[24] KREISZNÉ HUDÁK Emese – VARGA Péter – VÁRPALOTAI Viktor: A demográfiai változások makrogazdasági hatásai Magyarországon európai uniós összehasonlításban. pp. 111–114. *Hitelintézeti Szemle*, 14. évf., 2. szám, 2015. június, pp. 88–127.

[25] MONOSTORI Judit – GRESITS Gabriella: op. cit. p. 127.

elderly. While in 1990 there were 260 thousand, in 2016 there were already 412 thousand inhabitants of this age. Due to the different mortality rates of men and women, the proportion of women is higher among the elderly. Furthermore, the older the age group, the greater the ratio shift. While 57% of people aged 65–69 and 73% of the population aged 85 and over are women. In recent decades, life expectancy has been steadily rising not only at birth, but also at age 65, which means that the life expectancy in old age is also increasing. In 2000, life expectancy at age 65 was 12.5 years for men and 16.2 years for women. In 2016, men could expect an average of 14.4 years of age and women 18.2 years of age. Increased life expectancy is accompanied by a shift in the lower age limit to a later age in several respects.

This is indicated not only by various scientific approaches, but also by the population. While in 2001 the adult population marked the lower limit of old age at an average of 65.3 years, in 2016 it was already 68.3 years. In 2016, the healthy life expectancy of men at age 65 was 6.7 years and that of women 6.4 years. Because women live longer on average than men and there is no significant difference in their life expectancy in health, women can expect to spend longer in illness than men. In 2016, 31% of the population aged 65 and over living in private households lived alone. The proportion of people living alone is higher among women, and their proportion increases with age.[26]

[26] MONOSTORI Judit: op. cit. p. 115.

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INTELLIGENT CONTRACTS – A NEW GENERATION OF CONTRACTUAL AGREEMENTS?

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1. Introductory thoughts

The fourth industrial revolution that we are witnessing, fundamentally changes the world and almost all areas of our life. The process called digital transformation impacts our work activity and our private life also does not remain intact. In parallel with the 'smarten-up' process, almost all profession undergoes changes to some extent, thereby artificial intelligence (hereinafter referred as to AI) appears and is integrated into the work of lawyers.

The appearance and the impacts of the AI and the digitalisation in the different types of legal work and in the different legal areas and in relation to certain legal institutions, are nowadays examined and analysed by many researches in many ways. The scope of the problems posed and the questions to be answered is extremely colourful and virtually infinite.

Smart contract constitutes the core element of this study. In the first part of the work, we attempt to designate the conceptual framework of smart contract and to collect the main characteristics of this new legal phenomenon. After reviewing the definition problems, we try to find the right place of intelligent contract within the system of the traditional contract law. In the course of this, we outline the different scientific approaches of smart contract. At the same time, we intend to draft all those questions relating to the smart contracts, which shall be answered over time by the legislation and by the contract law regulation.

2. Conceptual framework. Main characteristics and definition problems

During the examination of the different digital technologies' impact on the law of obligations, the appearance and interpretation of the so-called 'intelligent contract' or 'smart contract' and its incorporation into the framework of the classical contract law is one of the most frequently examined areas.

A couple of years ago, the appearance of the conclusion of contract by electronic means brought radical changes in the method of the formation of contract. However, these changes were merely technical, although they raised regulatory questions at the same time. Conversely, *the appearance of smart contracts means not only a new kind of contract conclusion, but a whole new phenomenon in the world*

of contract law, since the application of these contracts based mostly, but not exclusively, on blockchain technology.[1] This latter feature is very important, since it impacts the performance of the contract as well. Indeed, in case of application of this new technology, *the fulfilment of conditions and terms determined in the contract leads automatically to the performance of the contract*. This characteristic of smart contract called *'self-enforcement'* is derived from the technical term *'self-execution'* and the two expressions are used often, and improperly, interchangeably in the literature.[2]

In relation to smart contract, there are basic expressions which shall be explained. First of all, the term 'blockchain' deserves clarification. *Blockchain* is a kind of 'distributed ledger technology' (DLT), which, in order to distribute values and information, allows to establish a peer-to-peer (P2P) relationship between parties who are geographically absent or who less trust each other. Despite the fact that blockchain is typically public, it is able to proof satisfactory transactions, without the need for involving of an intermediary due to the different cryptographic processes.[3]

By the application of blockchain technology, not only different asset movements, but the conclusion and fulfilment of contract, as well as the tracking of its phases and the processing of different data takes place entirely by computer encryption.[4]

Determining the *conceptual framework of smart contract* is not an easy task, since *it does not have a generally accepted, universal definition*.[5, 6] At first sight, it

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1 The operation of smart contracts mostly, but not always, based on the blockchain technology. However, there are other platforms, e.g. the Hungarian developed TrustChain, which ensures the online conclusion of contract, but it is not based on blockchain technology. About the TrustChain see: www.trustchain.com

2 About this problematic see MIK, Eliza: Smart Contracts: A Requiem. *Journal of Contract Law*, Vol. 36, 2019, Part 1 (hereinafter referred as MIK [2019]), p. 70.

3 DE FILIPPI, Primavera – WRIGHT, Aaron: *Blockchain and the Law: The Rule of Code*. Harvard University Press, 2019, pp. 13–14.

4 The functioning of blockchain technology is not reviewed in detail within this study. About the detailed elaboration of the topic see GLAVANITS, Judit – KIRÁLY, Péter Bálint: A blockchain-technológia alkalmazásának jogi előkérdései: a fogalmi keretek pontosításának szükségessége. *Jog – Állam – Politika*, 2018/3, pp. 173–183; SZUCHY, Róbert: A blockchain technológia alkalmazása a kötelmi jogban. In: CERTICKY, Mário (ed.): *Innovatív magánjogi megoldások a társadalmi-gazdasági haladás szolgálatában*. Miskolc, 2020, pp. 75–83; CSITEI, Béla: *Okos szerződések*. Opuscula Civilia, 2019, https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Opuscu la_Civilia_2019_Csitei_ Bela.pdf (Date of download: 18 March 2020).

5 Cf.: DE CARIA, Riccardo: The Legal Meaning of Smart Contracts. *European Review of Private Law*, 2019/6, pp. 731–752, p. 735.

6 Although the fact that smart contract does not have a general, worldwide accepted definition, there are countries, where a regulation was adopted which recognise the application of blockchain technology and smart contract, and, at the same time, to a certain extent, it designates the conceptual framework of these contracts. For instance, several

can be surprising, since the topic of smart contract is one of the most frequented and most researched area within the researches in the borderlines of computer science, digitalisation trends, AI and jurisprudence. Nevertheless, the lack of definition can be traced back to various causes.

a) Although the expression 'smart contract' has already been present for more than two decades in the public consciousness[7], it appears as a relatively new phenomenon in the present contractual practice, inasmuch as it came to the forefront of the attention of legal professionals interested in computer science and programming, only in the last few years, due to the spread of bitcoin and blockchain technology. Additionally, it should be mentioned that the original meaning of the expression at the time of its first use by *Nick Szabó*, is not identifiable with all those elements, which the not strictly limited concept of smart contract covers.
b) When defining the notion of intelligent contract, the complexity of the technology upon which the functioning of this contract is based also causes difficulties, since *the proper conceptual delineation of smart contract is not possible without the thorough knowledge of blockchain technology*. Creating the concept of intelligent contract requires at least a minimum knowledge and understanding of the information technology operating behind the contract. However, such a knowledge and perception means a major challenge for average legal professionals having only user-level computer skills. It is an additional difficulty that the denomination 'smart contract' is basically created and used by IT specialists. According to their conception, smart contract is merely a computer protocol, which has no real legal relevance. This is the reason, why the expression 'smart contract' appears in clarified form in the foreign-, mostly English-language literature. *'Smart contract code'* means the contract in the IT sense mentioned above, while the expression *'smart legal contract'* is used for analysing the topic from a legal perspective.[8] Nevertheless, the term 'smart legal contract' also can be used in two ways: it can be interpreted as contract or as a

states of the USA, e.g. Arizona, Deleware, Nevada, Ohio, Tennessee, Wyoming have rules on smart contract. Cf. CATCHLOVE, Paul: *Smart Contracts: A New Era of Contracts Use*, https://papers.ssrn.com/sol3/papers.cfm?abstract _id=3090226 (Date of download: 17 March 2020).

7 The expression was used at first by Nick Szabó. He defined smart contract as *'[a] set of promises, including protocols within which the parties perform on the other promises. The protocols are usually implemented with programs on a computer network, or in other forms of digital electronics, thus these contracts are "smarter" than their paper-based ancestors. No use of artificial intelligence is implied.'* L. SZABO, Nick: *Smart Contracts: Building Blocks for Digital Markets*, http://www.fon.hum.uva.nl/rob/ Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html (Date of download: 6 January 2020).

8 Cf. STARK, Josh: *Making Sense of Blockchain Smart Contracts*, https://www.coindesk.com/mak ing-sense-smart-contracts (Date of download: 2 March 2020).

method to perform an already existing contract.[9] In this latter sense, smart contract is not a contract, but a tool, through which a contract is performed. An alternative view is that 'smart legal contract' is a combination of the 'smart contract code' and traditional legal language.[10] According to smart legal contract *Durovic* and *Janssen* apply a further typing regarding the fact, if the given contract is concluded *off-chain* or *on-chain.*[11] In the former case, data are stored in the chain in itself. In case of off-chain smart contracts, information is stored in various forms off the blockchain.[12]

Briefly, due to all factors mentioned above, it is not possible to speak about a general and universal concept of smart contract. Nevertheless, several *definition attempts* appear in the quite rich and expanding literature relating to the topic. A typical feature of these definitions that, instead of the conceptual delimitation of smart contract, *they identify and highlight the main characteristics* of the construction, seeking to draw the borders of this construction, while designating the conceptual framework of intelligent contract is not an aim in itself. This kind of work is absolutely necessary to make remarks and to draw conclusions regarding the relationship existing between smart contracts and traditional contract law. Moreover, based on all these, it becomes possible to make recommendations and, in a given case, to designate the directions of the transformation of contract law, triggered by technological development. However, beyond the relative precise designation of conceptual framework and the creation of the logical closure, *the definition method shall* also *be flexible*. It means that *the scope of the concept shall be 'moveable' in order to be able to adapt itself later to the relatively fast-changing technological environment*, upon which the operation of intelligent contracts is based.

Thanks to the particularly high level of attention for the different issues of intelligent contracts and to the quantity of studies published recently, the number of definition attempts is practically endless. Therefore, giving a complete picture of these various, sometimes more, sometimes less complex definitions seems hardly

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9 FINOCCHARIO, Giusella – BOMPREZZI, Chantal: A legal analysis of the use of blockchain technology for formation of smart legal contract. *Rivista di diritto dei media*, 2020/2, pp. 111–135, p. 116

10 Cf. DJAZAYERI, Alexander: Rechtliche Herausforderungen durch Smart Contracts. *jurisPR-BKR*, 2016/12; KAULARTZ, Marcus: Herausforderungen bei der Gestaltung von Smart Contracts. *Zeitschrift für Innovations- und Technikrechts*, 2016/1, pp. 201–206, p. 205; DUROVIC, Mateja – JANSSEN, André: The Formation of Blockchain-based Smart Contracts in the Light of Contract Law. *European Review of Private Law*, 2019/6, pp. 753–772, p. 756.

11 DUROVIC – JANSSEN: op. cit. p. 760.

12 About the technological background, advantages and disadvantages of on-chain and off-chain data storage see HEPP, Thomas –SHARINGHOUSEN, Matthew – EHLET, Philip – SCHOENHALS, Alexander – GIPP, Bela: On-chain vs. off-chain storage for supply- and blockchain integration. *Information Technology*, 2018/5–6, pp. 283–291, p. 284.

possible. Regarding this, some potential definition of smart contract will be presented, without being exhaustive.[13]

If we designate the conceptual borders of the intelligent contract, we are given more options. *From the technical point of view, intelligent contract is a kind of computer protocol*, which, by the application of blockchain technology, executes itself automatically, without the contribution of any other actor or intermediary.[14] In addition, the transaction is automatically registered in a distributed database. With regard to this latter feature, these blockchain-based contracts are often called in the practice *'decentralised intelligent contract'*.[15] According to another approach, *smart contract is an agreement incorporated into digital form, which executes and enforces itself*[16]; it is an objective and infallible computer program, which establishes, performs and enforces the agreements.[17]

A further definition considers that *smart contract are computer programs* of a new type, which are independent from a central operator and which are able to make the contract, in whole or in part, self-executing by transforming the contract terms to computer code.[18]

According to the simplest and briefest phrasing, *smart contract is a self-executing agreement*.[19]

After reviewing the sometimes simpler, sometimes complicated wordings of intelligent contract, it is clear that there is a common characteristic which is included in every definition: all of them contain the *self-executing nature of the contract* which can be deem as the *key feature of smart contract*. *Self-enforceability* and *tamper-proof nature* can be identified as *further essential features* of the intelligent contract. Tamper-proof enforcement means that smart contract cannot be stopped or modified, which raises several problems opening numerous further examination directives and possibilities which are not to be discussed within the framework of this study.[20]

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[13] In his previously referred work *De Caria* collects several definition attempts of smart contract. See DE CARIA: op. cit. p. 735.

[14] DE FILIPPI – WRIGHT: op. cit. p. 33; WOEBBEKING, Maren K.: The Impact of Smart Contracts on Traditional Concepts of Contracts Law. *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2019/1, pp. 106–113, p. 107.

[15] DE CARIA: op. cit. p. 733.

[16] WERBACH, Kevin – CORNELL, Nicolas: Contracts Ex Machina. *Duke Law Journal*, 2017/2, pp. 313–382, p. 320.

[17] MIK, Eliza: Smart contracts: terminology, technical limitations and real world complexity. *Law, Innovation and Technology*, 2017/2, pp. 269–300 (hereinafter referred as MIK [2017]) p. 270.

[18] ROHR, Jonathan – WRIGHT, Aaron: Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Market. *Hastings Law Journal*, 2019/2, pp. 463–524, p. 473. Cited by GLAVANITS – KIRÁLY: op. cit. p. 180.

[19] RASKIN, Max: The Law and Legality of Smart Contracts. *Georgetown Law Technology Review*, 2017/2, pp. 306–341, p. 306.

[20] About the elaboration of this topic see MIK [2017] pp. 283–284 and CLACK, Christopher – BAKSHI, Vikram A. – BRAINE, Lee: *Smart Contract Templates: foundations, design*

If smart contract is approached from the point of view of the traditional contract law, it shall be noted that *it cannot be deemed as a specific type of contract*, just like the different groups and contract types existing and regulated by national laws. Instead, *smart contract* can be perceived as *an improved, 'upgraded', AI-supported version of the formation of contract by electronic means.* Smart contract is *independent from the type of contract*, therefore it ensures for contracting parties to conclude and perform their contract online, fully virtually, without personal meeting, using the guarantees ensured by the blockchain technology.

Smart contract is practically 'type-independent', as it, in theory, can appear in any form of contract types. Nevertheless, it should be added that there are and always be contracts, which would not be or less appropriate or which do not arise the demand for smart contracting.

Regarding the appearance, *smart contract always shows the contract terms in translated form, i.e. as a computer code*. In some cases, smart contract appears exclusively in encoded and encrypted form. In other cases, smart contract is the encoded version of a traditional contractual document. However, there are other cases, where intelligent contract combines the two form and appears as a hybrid which contains together the elements of the traditional contract and the computer code.[21] Regardless the form of smart contracts, the most important characteristic are their irrevocability (finality) and automation.[22]

In the case, if contractual partners conclude an intelligent contract, both *the performance and the enforcement of the contract is ensured by an unchangeable computer code by using blockchain technology*.[23] Such a contractual construction allows contractual parties to rely exclusively on the blockchain technology, instead of establishing and strengthening the mutual trust. In such a case, parties let the performance of contractual obligations fulfil via blockchain technology, irrespective of whether changes occurred after the conclusion of the contract either in the external circumstances or in the parties' attitude to the contract or each other, their intention, motivation or goals to be reached by the conclusion of the contract.

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landscape and research directions. http://www.resnovae.org.uk/fccsuclacuk/images/article/sct2016.pdf, (Date of download: 19 March 2020), p. 4.

[21] CIEPLAK, Jenny – LEEFATT, Simon: Smart Contracts: A Smart Way to Automate Performance. *Georgetown Law Technology Review*, 2017/2, pp. 417–427, p. 418.

[22] SZCZERBOWSKI, Jakub J.: Place of smart contracts in civil law. A few comments on form and interpretation. *Proceedings of the 12th Annual International Scientific Conference: New Trends 2017 – New Trends in Economics*, Management, Marketing and Public Administration, Znojmo, pp. 333–338, p. 333; RASKIN: op. cit. p. 306.

[23] SAVELYEV, Alexander: *Contract law 2.0:* 'Smart' contracts as the beginning of the end of classic contract law. *Information & Communications Technology Law*, 2017/2, pp. 116–134.

3. The place of intelligent contracts in traditional contract law

Before finding the right place of intelligent contract within the system of the traditional contract law, two basic question shall be answered. First, it shall be discussed, if these contracts are really intelligent, really smart. It is evident that these attributes are not to be taken literally.[24, 25] Moreover, it is also important to see that a smart contract goes much further than a kind of digitalized contract conclusion. The denomination of the legal institution is also misleading: it suggests that the use of artificial intelligence is essential in the operation of the contract, while it is not true.[26] In general, a given contract shall be deemed as intelligent, if it is able to communicate with another computer protocol.[27] Smart contracts based on blockchain technology fulfil this criterion.

Secondly, it is also a question, if clauses existing in encoded form as computer protocols can be deemed in classical contract law approach as a contract which includes the consent of the contracting parties or not.
The answers to questions asked above are quite diverse. There is a sense, for instance, in which the expression 'intelligent contract' is a mere habit, since these constructions are neither smart, nor contract.[28]

In their co-written study, *Werbach* and *Cornell* do not dispute that intelligent contract can be deemed as contract[29], but, at the same time, they draw attention to the fact that the legal enforceability of the agreement is an important question which must be examined in order to assess the legal nature of smart contract. According to Werbach and Cornell, with the application of smart contracts, contracting partners probably intend to avoid the legal enforcement of the contract, since the automation of performance precludes or, at least, minimises the possibility of breach of contract by either of the parties.[30] For this reason, they conclude that

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[24] MÜLLER, Lukas – SEILER, Reto: Smart Contracts aus Sicht des Vertragsrechts. Funktionsweise, Anwendungsfälle und Leistungsstörungen. *Aktuelle Juristische Praxis*, 2019/3, pp. 317–328, p. 318.

[25] DE CARIA: op. cit. p. 736.

[26] Cf. DE CARIA: op. cit. p. 737. It is important to note that opposing views also exist in the relating legal literature. Most them emphasise that the use of AI is one of the essential elements of the concept of intelligent contract. See O'SHIELDS, Reggie: Smart Contracts: Legal Agreements for the Blockchain. *North Carolina Banking Institute*, 2017/3, pp. 177–194; SCHOLZ, Lauren Henry: Algorithmic Contracts. *Stanford Technology Law Review*, 2017/2, pp. 128–169.

[27] CARRON, Blaise – BOTTERON, Valentin: How smart can a contract be? In: KRAUS, Daniel – OBRIST, Thierry – HARIP, Olivier (eds.): *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law*. Edward Elgar Publishing, Cheltenham – Northampton, 2019, pp. 101–143, p. 109.

[28] Cf. GRIMMELMANN, James: All Smart Contracts are Ambiguous. *Journal of Law & Innovation*, 2019/1, pp. 1–22.

[29] WERBACH – CORNELL: op. cit. p. 339.

[30] WERBACH – CORNELL: op. cit. p. 339.

intelligent contracts still not can be deemed as contract in the traditional sense, but they are more like a 'gentlemen's agreement', which is informal and typically has no legal binding force, therefore it cannot be enforced in a judicial proceeding.[31]

The arguments put forward by Werbach and Cornell, definitely reflects the approach of the Anglo-Saxon contract law. Nevertheless, we presumably come to a different conclusion, if we intend to examine the legal nature of smart contract on the basis of continental contract law. In this approach, legal enforcement is an essential element of contract[32]; in the lack of enforceability, the given legal relationship is 'natural obligation' which the debtor may perform, but the performance of which cannot be required by the creditor. If smart contract is considered as contract in legal sense, it shall also be assumed that legal enforceability relates to it. However, it is important to note that in case of smart contract, the non-applicability of a judicial proceeding, i.e. the lack of legal enforceability, is due to the fact that the automated performance of contract theoretically does not arise any problem or does not raise a dispute.

At present, the question of legal enforceability of smart contract remains unanswered yet, since it needs for further discussion. Nonetheless, in the course of answering, it will be crucial, how the smart contract appears, is there a traditional contract prior to it or the contractual parties' intention is recorded only in encoded form.

4. In case of comparing smart contract with traditional contract, the difference between the two legal institutions is apparent.[33] From legal viewpoint, the appearance of the contract is an existing, but less relevant difference. Thus, in case of a smart contract contractual terms do not appear in tangible form, e.g. as a written document, but in computer code. According to contract law, contractual parties are free to choose the manner of expressing their contractual intention; they can choose written or oral form or they can express their intention by conduct which can be regarded as the equivalent of a statement. Though smart contracts are, by definition, written in code, it is a question, if this way of expressing the contractual intention can be deemed as written form. As *Eliza Mik* noticed, the source of the parties' rights and duties is the agreement itself, not words or documents.[34] *Finocchario* and *Bomprezzi* emphasize that regarding the national civil laws and the European and international model rules, in the silence of law, parties are free to choose any form to conclude their contract. According to this, they can conclude their contract by electronic means which covers the expression of intention in the form of a computer code as well.[35]

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[31] About the question of enforceability see DUROVIC, Mateja – LECH, Franciszek: The Enforceability of Smart Contracts. *The Italian Law Journal*, 2019/2, pp. 493–511.

[32] VÉKÁS, Lajos: *Szerződési jog. Általános rész.* ELTE Eötvös Kiadó, Budapest, 2016, p. 21.

[33] In their co-written work, *Stefan Grundmann* and *Philipp Hacker* review and analyse the differences between smart contracts and traditional contracts. See GRUNDMANN, Stefan – HACKER, Philipp: Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture. *European Review of Contract Law*, 2017/3, pp. 255–297.

[34] MIK [2019] p. 70.

[35] FINOCCHARIO – BOMPREZZI: op. cit. p. 117.

Agreeing with the assessment of Mik, Finocchario and Bomprezzi, it also should be emphasized that it is a further question, how smart contracts meet other formal requirements (e.g. notarisation of the agreement) provided by national laws for a legally binding agreement.

Actually, the seemingly almost irrelevant feature of contract, i.e. its real appearance, is of paramount importance, since this element ensures the self-executive, automatic performance of the contract. Regarding the performance of the contract, this characteristic is relevant from a legal point of view, which reflects a completely different approach compared to the logic of traditional contract law. Classical contract law mainly aims at treating the losses and injuries suffered by the contractual parties in relation to their contracts. Conversely, in case of application of smart contract, contractual parties, by the automation of performance, preclude the possibility of the breach of contract by either of them, overshadowing the above mention function of traditional contract law.[36]

According to this characteristic of smart contracts, *Raskin* brings an illustrative example in his relating work, when he compares the contractual parties to Ulysses who had himself tied to the mast of the ship to be able to resist the deadly seduction of Sirens.[37, 38] Although the different factors impacting the existence and performance of contract do not mean mortal danger neither the contractual parties, nor the contract, the parallelism drawn by Raskin can be right. Contractual parties, indeed, commit themselves *ex ante* to comply with the terms stipulated in their contract and, at the same time, avoiding the occurrence and the legal consequences of the breach of contract by either of them. Considering the aspect of contractual law, the course of contractual phases[39] is incomplete in case of intelligent contract, since the phase of breach of contract lefts out due to the exclusion of future occurrence of both parties' breach of contract. In other words, the 'life cycle' of a smart contract is shorter, since it comes to an end by the performance of the contract, which is automatic due to the computer encoding.[40]

5. Relating to the application of smart contracts, fully automation means the main problem. Nevertheless, the amendment of contract is no less problematic, since it is, in theory, also precluded.[41] Smart contracts are less flexible than agreements fixed on paper. After the conclusion and the encoding of the contract, parties have no opportunity to make any amendment in their contract. The contract runs to completion, to the programmed 'expiration date' without external intervention and regardless any external circumstance, and, without reacting to any of them.[42]

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36 WERBACH – CORNELL: op. cit. p. 318.

37 HOMER: *Odyssei*, Book XII, 39–52.

38 RASKIN: op. cit. p. 309.

39 VÉKÁS, Lajos: op. cit. p. 77–79.

40 About this topic see SILLABER, Christian – WALTL, Bernhard: Life Cycle of Smart Contracts in Blockchain Ecosystems. *Datenschutz und Datensicherheit*, 2017/41, pp. 497–500.

41 CLACK – BAKSHI – BRAINE: op. cit. p. 4.

42 MIK [2017] p. 281.

The amendment of contract is only possible, if parties, at the time of the conclusion of the contract, include the potential future amendments (e.g. indexation clause, payment deferment, moratorium, etc.) into their agreement. Therefore, these clauses are to be also encoded and automatically executed if the prescribed conditions fulfilled. Nevertheless, since parties are not able to anticipate and cover every situation, there will always be such external circumstances arising after the conclusion of the contract, which would impact the existing contract, but cannot be treated at all because of the intelligent nature of the contract.

From programming aspect, it is practically impossible to insert into the contract such a 'sensitive' command, which is able to handle unforeseeable changes in circumstances occurring after the conclusion of the contract, since the potential consequences of these changes are very diverse and therefore these potential outputs cannot be fully programmed.[43]

6. As it was mentioned before, there are also cases, where smart contract is linked to the contract in the traditional sense. Broadly speaking, two different methods are imaginable. In the first case, contract is concluded in traditional way, but this legally binding agreement will be later transformed into computer codes by the use of the technology built-in the smart contract. This action allows the application of blockchain technology and the performance of the contract will be automatized. In this case, the smart contract can appear in two roles. It is possible that it only provides support for the performance of the contract by the blockchain technology, i.e. it makes the payment transparent and safer. However, it is also possible that the contract transformed to computer code is wholly performed by the intelligent contract.[44]

In the above mentioned cases, the existence and operation of a smart contract is necessarily preceded by the conclusion of a traditional contract. Therefore, in these cases, *smart contract is nothing but the dematerialisation of the latter*. Nevertheless, there are cases, where smart contract does not appear as the computerised manifestation of the traditional contract, but the contractual parties conclude their contract from the beginning in coded form, without defining their contractual intention, rights and duties in understandable terms, in legal language. In these cases, the relationship between the contractual parties is exclusively regulated by the smart contract, i.e. both offer and its corresponding acceptance are made in encoded form by the blockchain, which records and stores the agreement of the parties.[45] From that moment, smart contract is not a mere computer code, but a real and binding contract ('smart legal contract'), which establishes rights and duties for the contracting parties. In this regard, intelligent contract is the platform facilitating the conclusion of the contract. However, the mere fact that the contract is concluded

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[43] The in-depth elaboration of the question see CARRON – BOTTERON: op. cit. p. 120–121.

[44] CARRON – BOTTERON: op. cit. pp. 111–112.

[45] CARRON – BOTTERON: op. cit. p. 113.; JACCARD, Gabriel: *Smart Contracts and the Role of Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099885 (Date of download: 3 February 2020) p. 22.

exclusively in this form, via internet, arises the appropriate protection of the offeree who typically does not have IT expertise, but user-level computer skills.

7. Closely linked to this latter topic, it also shall be examined, how a 'non-expert', i.e. a person having only average computer knowledge can participate in the negotiations prior to the conclusion of the contract and in the preparation of the draft agreement and its assessment. Actually, in the lack of technological knowledge, contractual parties have to rely on a third party, a computer specialist, a programmer who transforms the traditional contract into an intelligent contract. This moment requires for a special confidence from the parties. This case is similar to the situation, where, because of the use of legal terms, a client has problems with the understanding of the language of the contract and therefore he needs for the explanation of these terms by a lawyer. As it was said, the situation is similar but not the same as in case of a smart contract, where the client having no programming knowledge practically is in complete darkness concerning the content of the contract, even if the given smart contract was made in the simplest programming language. Precisely for this reason, it is common in the practice that contractual parties ask the programmer to declare that the smart contract appearing in encoded form and made by him complies with the expressed intention of the contracting parties, and, it contains the terms and conditions envisaged by them.

The involvement of the third person, the IT expert, into the process of contract conclusion, which is needed because of the technological incompetence of the parties, is not only a question of confidence, but arises further questions relating to liability. There may be situations in which the non-performance of the contract is dues to programming error. A situation can also arise, where the intelligent contract does not fully cover, does not express faithfully the parties' intention, because the contractual parties did not tell it with sufficient precision to the IT expert preparing the smart contract.[46] It is also problematic, how a situation should be assessed, where a smart contract made by a programmer is to be used by the parties for unlawful purpose.[47] All three situations arise liability questions which cannot be answered yet, since the regulation of smart contract is controversial and it generates quite a lot of problems at this time.

8. Closing remarks

According to the American futurist, Martin Ford, we are not at the beginning of the development of information technology, but, in a short time, we get to the steep section of the exponential curve. The events accelerate and the future can arrive long before we could prepare for it. Digitalisation and the fourth industrial revolu-

[46] The explanation of this topic see HOFFMANN, Thomas: Smart Contracts and Void Declarations of Intent. In: PROPER, Henderik A. – STIRNA, Janis. (eds.): *Advanced Information Systems Engineering Workshops. CAiSE 2019. Lecture Notes in Business Information Processing*, Springer, Cham, pp. 168–175.

[47] SAVELYEV: op. cit. p. 20–21.

tion open new perspectives which we could not imagine before. New constructions appear, which make us uncertain and arise a number of questions.

Ford's thought above can be especially true, if we compare the particularly rapid tempo of the technological development to the circumstantial and quite slow process of the legislation which would react to the technological development and which would designate the regulatory framework. However, legal regulation does not exist in itself, but always has its own purpose. Therefore, legislators are under the duty to react to the regulation demands arisen due to the technological development, and, to modernise the existing legal regulation to the extent necessary.

The achievements of the modern age affect all areas of the law. Due to the spreading of the Internet, almost all segments of life changed. These changed situations requires for the amendment of the existing rules, or for the adoption of new provisions if a relating regulation did not exist before.

At the beginning of the 2000s, a process started in the field of private law, particularly in contract law, which resulted in the gradually development of rules on the electronic commerce. Accordingly, provisions on contracts concluded by electronic means also appeared including special consumer protection rules. Nevertheless, the development process did not stop at this point. The spreading of digital tools forced the legislators to face up with new challenges. It soon became clear that contracts on these tools need more detailed rules. In 2019, two directives were adopted under the auspices of the European Union[48], which can be understood as an answer to the above mentioned regulatory demands, since these legal acts contain express rules on the digital content and digital services and the supply of digital services.

The expanding of contracts for the supply of digital content or digital service is a major challenge for national legislators, particularly in case of cross-border online contracts. Similarly, it is also a difficult situation for legislators, when the demand for amending an already existing regulation or for creating new rules are not arisen by the specific subject-matter of contract, but the new method of contract conclusion.

Concluding a contract by electronic mean is an ordinary phenomenon today. Nevertheless, the conclusion of contract via Internet enters another dimension when electronic mean joins to cryptography, another achievement of technological development. In these cases, it is possible that a given contract exists only in the form of computer code. In some way, intelligent contracts mark a new phase, practically the end of the development of contract conclusion by electronic means. Nonetheless, due to the involvement of a new element, i.e. cryptography, these

[48] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22. 5. 2019, pp. 1–27.; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22. 5. 2019, pp. 28–50.

contracts are completely different from any other previously known and used solutions of contract conclusion.

The use of intelligent contracts starts from the idea that the transformation of traditional agreements to computer codes and their storing in blockchain make the contracts tamper-proof, self-executive and self-enforcing. Application of smart contracts bring numerous benefits. By the exclusion of human routine tasks and intermediaries, process of contract conclusion becomes less risky and more cost-effective at the same time. On the other hand, due to the use of artificial language, these contracts are always univocal, while traditional contracts carrying several uncertainties because of the use of human language.[49] Though the widespread use of intelligent contracts offers several opportunities, their real application, due to its nature, is limited in several ways. Moreover, the application of this contracting method is also restricted by the regulatory environment in force.[50]

There can be no question that the appearance of blockchain technology and intelligent contract based on this technology revolutionize the contractual practice. Nevertheless, the expansion of their application requires for the soon revision of the existing regulatory framework and the contract law rules. In some countries, for instance in certain states of the USA, the elaboration of a legal regulation on intelligent contracts has already started or the relating provisions have already been adopted. On the contrary, the legal status of smart contracts is still uncertain in the jurisprudence, which makes more difficult for the national legislators to create their own rules on smart contracts. Though the appropriate application of the legal provisions in force can be a solution, it is unsatisfactory, since smart contracts arise constantly new questions in the practice.

During the examination of intelligent contracts, often raises the question whether the law, particularly contract law, shall react to such a construction, which is so far from the thinking of lawyers and other professionals having legal knowledge.

There is no doubt that law shall reckon with the massive expansion of intelligent contracts and, shall answer in the future to the difficult questions raised by them. One of these questions, if smart contracts can replace traditional contracts, i.e. can smart contract appear as a real alternative of traditional contract over time. Answering these questions may be too soon, even if we know that the future is happening now. However, one thing is certain: the appearance of intelligent contracts and their online conclusion in encoded form opens a new era of contract law, where all of us have to learn how to manage our life.

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[49] That conclusion is contradicted by *James Grimmelmann*. See GRIMMELMANN: op. cit. pp. 20–21.

[50] SZUCHY: op cit. 82.

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DISCIPLINARY PROCEEDINGS IN THE UNITED NATIONS

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With regard to the liability of public servants in Europe we can distinguish between the English, French and German models, based on the traditions of these legal systems. In addition, the influence of the European Union is gaining ground, although it cannot directly regulate the public service law of the Member States on the basis of Articles 152 and 153 para. 5 of the Treaty on the Functioning of the European Union, it can formulate recommendations and sectoral regulations independently.

It is a common European practic therefore, for disciplinary liability to serve as a means of counterbalancing the prerogatives associated with the civil service, so that in each case the culpable breach stands in the focus. None of the regulations seeks to define disciplinary offenses in an exhaustive manner, and it is up to the disciplinary authority or council to decide, in the individual case, whether or not a conduct falls within this scope, taking into account the circumstances.[1]

In Austria, disciplinary liability is used to offset the immobility of civil servants. The legal background does not list disciplinary offenses, the disciplinary sanction can range from a warning to a fine to dismissal, and the proceedings take place before a multi-level disciplinary authority. It is a general feature that the procedure is often cumbersome, with little room for maneuver for the disciplinary authority to impose penalties.[2]

In Germany, the system is very similar to what was established by the General Assembly at the United Nations: under a separate law (Bundesdisziplinargesetz, BDG), there is an obligation to report disciplinary offenses against civil servants, and disciplinary liability applies in the event of a breach of duty. The two systems are very similar in terms of the types of penalties, as warnings, fines, reductions in service allowances, reinstatement and separation from service,[3] or measures corresponding to their nature, can all be found in the organisation's disciplinary rules.

The UN disciplinary law is similar to the English system in that both groups of officials can be punished in separate proceedings for minor violations (closed by an informal or formal procedural decision) and more serious violations (usually a formal procedure closed with a disciplinary sanction). In the English system, sus-

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1 VESZPRÉMI, Bernadett: *Felelősség a közszolgálatban*. Debreceni Egyetemi Kiadó, Debrecen, 2012, pp. 17–18.
2 Ibid. p. 21.
3 Ibid. p. 24.

pension[4] during proceedings is known, which is not a disciplinary punishment but seeks to further the purpose of the proceedings – this legal institution is also found in UN regulations.

Besides these, the French and Hungarian systems identical with the disciplinary law known at the UN in that it explicitly considers any conduct that constitutes a breach of any public service obligation to be a disciplinary offense.[5] However, there is a huge discrepancy in the fact that as long as the disciplinary sanction imposed by the French Disciplinary Board is only a proposal to the employer, in the case of the UN, due to high levels of Assistant-Secretary-General and Under-Secretary-General, the result of the decision is not only binding on the employer, but it is practically made by him.

The Hungarian and UN regulations are also similar in two levels: besides the Law on Government Administration (Act no. 125 of 2018) regulating the status of government officials most similar to the status of UN officials in Hungary, Government Decree No. 31/2012 (III. 7.) on disciplinary proceedings against civil servants also contains procedural provisions. Tamás Prugberger and György Kenderes took the position on the issue of two-level regulation that maintaining it is not justified, as the content of the law and the decree cannot be divided into substantive and procedural rules, nor can it be said that the law would regulate in general and the decree would regulate in detail.[6] It is also difficult to see clearly the legal background due to the duality that has characterized the system for eight years now. I fully agree with what the two professors have said: it would be worthwhile for the Hungarian civil service to give a much more uniform picture of the adverse legal consequences of breaches of official obligations, as there is no reason to group penalties imposed in and out of trial into two sources. The UN regulates this issue simply and transparently, the jurisprudence itself is consistent, there is nothing in the issue that would result from the quality of the international organization, so it could even serve as a model for domestic legislation in the framework of a possible reform. The regulation is similar to the Hungarian one, but the Staff Regulations, which can be compared to the level of acts in state practice summarizes general, important information, and an administrative instruction issued on the subject, which is at the level of a government decree in the sources of law, contains detailed rules.

1. Misconduct

Under the UN Charter, the need to ensure the highest standards of performance, competence and integrity should be a guiding factor in the selection of officials and

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4 Ibid. p. 27.

5 Ibid. p. 29.

6 KENDERES, György – PRUGBERGER, Tamás: A közszolgálati fegyelmi felelősség hazai jogi szabályozásának alakulása napjainkig a külföldi jogfejlődés tükrében. *Új Magyar Közigazgatás*, Vol. 5, No. 10 (October 2012), p. 5.

the conditions of employment.[7] In addition, disciplinary legislation is based on Chapter 1 on fundamental rights and obligations of the Staff Regulations and Rules of the United Nations (hereinafter: Staff Rules).[8]

Article 10 of the Staff Rules provides for a specific disciplinary right and stipulates that the Secretary-General may take disciplinary action against any member of staff who engage in misconduct, and also states at this point that sexual harassment and abuse count as a serious misconduct.[9] A breach of duty may, moreover, take the form of non-compliance with any applicable source of law, administrative measure or mandate.[10] Given that the Staff Rules leaves the determination of what constitutes an infringement and that whether it is necessary to initiate proceedings in a case entirely to the Secretary-General and the delegates of powers, primarily administrative instructions[11] and information circulars[12] are used to guide officials regarding the applicable practice.

The administrative instruction on disciplinary proceedings shall distinguish between unsatisfactory conduct and misconduct that can lead to disciplinary measures. Any failure by an official to comply with the provisions of the Charter, the Staff Rules and with lower-level administrative sources shall be considered as unsatisfactory conduct, and includes conduct of sufficient gravity that rises to the level of misconduct. The letter case may lead to the imposition of disciplinary measures, financial recovery, administrative measures and/or managerial action. If the unsatisfactory conduct does not reach the level of a misconduct, the official can only be sanctioned by an administrative and/or managerial action. If a performance deficiency does not reach any of the levels, the manager has the opportunity to indicate the deficiency within the framework of the normal performance evaluation.[13]

Committing and abetting those acts in particular in the administrative instruction No. 2017/1, section 3.5 are considered as a misconduct, such as criminal acts (e.g. smuggling, theft, fraud, forgery, abuse of power), discrimination, harassment, breach of professional secrecy, abuse of UN privileges and immunities, damage to the reputation of the organization.

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7 UN Charter Article 101 para. 3, https://www.un.org/en/sections/un-charter/chapter-xv/index.html.

8 UN Staff Regulations and Staff Rules, Art. I. Duties, obligations and privileges, https://hr.un.org/handbook/staff-rules.

9 Ibid. Regulation 10.1.

10 Ibid. Rule 10.1 (a).

11 ST/AI/2017/1 – *Administrative instruction on unsatisfactory conduct, investigations and the disciplinary process*. https://hr.un.org/sites/hr.un.org/files/handbook//AI%202017-1%20-%20Unsatisfactory%20conduct%2C%20investigations%20and%20the%20disciplinary%20process.docx.

12 A good example of this is the series of information circulars issued each year on the disciplinary practice of the Secretary-General. (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour.) The latest report: proceedings between 1 January and 31 December 2018, https://digitallibrary.un.org/record/3798767.

13 Administrative instruction No. ST/AI/2017/1, Section 3, 3.1–3.3.

2. Disciplinary proceedings

The principles of procedural law relating to fundamental human rights apply to internal proceedings as well as to state and international case law. In the interests of a transparent procedure, it is specified exactly in which phase who is involved, so that officials can be aware of their case.

2.1. Duty to report

All officials within the organization are required to report any breach they notice and to cooperate with the relevant departments in subsequent proceedings. The regulations are in line with Act 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities in Hungary, expressly prohibiting retaliation against an official for reporting. Retaliation is an unlawful act of discrimination causing or aiming injuria, or threatening with unjust treatment towards a person who objects to breaching the applicable legal sources, initiates a procedure or participates in proceedings based on the unlawful practice.[14]

2.2. Preliminary assessment

During the preliminary assessment of the information about unsatisfactory conduct Office of Internal Oversight Services (OIOS) is free to decide whether the reported breach is serious enough to initiate disciplinary proceedings or, at its discretion, to involve the responsible official (RO)[15] in the proceedings in order to conduct the preliminary investigation independently or to conduct disciplinary proceedings. A number of factors must be taken into account during the preliminary assessment, including the gravity of the breach, the good faith and validity of the provided information, the available evidence and the possibility of an informal dispute settlement. Following the preliminary assessment phase, the acting RO or OIOS may decide to initiate an investigation, order an administrative or managerial action, or close the procedure without ordering further measures.

2.3. Investigations

Within the investigation phase, the acting internal oversight service or the responsible official shall gather all the mitigating and aggravating circumstances and evi-

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[14] Administrative instruction No. ST/AI/2017/1, Section 4, 4.1.

[15] Responsible official (RO) is the *Secretary-General*, for reported unsatisfactory conduct on the part of an Assistant Secretary-General or Under-Secretary-General; the *head of mission*, for staff members administered by the Department of Field Support and serving in a peacekeeping mission or special political mission; the *respective Registrar*, for staff members of the International Residual Mechanism for Criminal Tribunals and of the International Tribunal for the Former Yugoslavia; the *Under-Secretary-General* for Internal Oversight Services, for staff members of the OIOS; and the *head of department or office* of the subject staff member, for any other staff members. [Administrative instruction No. ST/AI/2017/1, Section 2, 2.1 (a)].

dence that may be used in the remainder of the proceedings to adjudicate the case. The person conducting the investigation may not give any preliminary judgment on the basis of the data collected. Of course, both witnesses and officials subject to proceedings are required to cooperate with the head of the investigation, since a breach of the duty to cooperate itself may result in disciplinary action.

The investigating body shall nominate at least two persons qualified to conduct on-the-job inspections to the investigative body. If these persons are officials, the RO must, as a general rule, select at least one person who is at or above the level of the person subject to the procedure in respect of the staff classification. If the composition of the panel cannot meet these requirements, the reason must be recorded in accordance with the principle of due process.

The investigation phase may include an interview, of which a transcript or the minutes signed by the interviewed official must be forwarded to the Assistant Secretary-General for Human Resources Management for a decision. It is important, however not compatible with the rights of the defense, that at the interview stage a third party, including a legal representative, may not take part in the proceedings, only a person with observer status may be present to keep the proceedings transparent.[16] In accordance with the principle of due process, the official subject to the procedure must be notified in writing of the initiation of the investigation procedure, the nature of the alleged infringement, the interview, the identity of the person conducting it and a copy of the minutes of the hearing. During the hearing, it is necessary to provide the official with a real opportunity to submit his observations and to identify any additional circumstances which may be relevant to the assessment of the case. Within two weeks of the hearing,[17] the official subject to the proceedings may submit his observations in writing, supported by the necessary documentary evidence.[18] The investigation procedure shall end with a report, which shall include the conclusions and the documented evidence on which it is based. If the breach has caused material damage to the organization, the amount of this must also be included in the report so that it can form the basis of the compensation subsequently imposed.

2.4. Disciplinary proceedings

After evaluating the investigation report, the Assistant Secretary-General for Human Resources Management may decide to request a further investigation from OIOS or the responsible official, or may make a decision based on the evidence

[16] Anexception to this is made by the investigator if the official's special situation justifies it (e.g. a 'support person' may be present in the case of a minor under the age of 18, who may not, however, be substantially involved in representation or advice).

[17] If necessary, the investigator may, at the written request of the official, permit an extension of the time limit. Failing that, after the expiry of the two-week period, the official shall be deemed not to have exercised his right to submit a written statement.

[18] Administrative instruction No. ST/AI/2017/1, Section 6, 6.1–6.10.

provided. At its discretion, he may initiate disciplinary sanctions, take managerial or administrative action, or close the case.

If the Assistant Secretary-General orders the imposition of a disciplinary sanction, he shall inform the official in writing, who shall have one month[19] in which to submit further written observations. At the next stage of the procedure, the official is already entitled to receive a legal representative from the organisation's Office of Staff Legal Assistance (OSLA) or to request a third party lawyer at his own expense. A copy of the investigation report shall be given to the official.

2.5. The outcome of the procedure

In connection with the procedure, we should mention the standard of proof, according to which the organization sets a lower threshold than the exclusion of doubt known from criminal law for the application of either acquittal or other legal consequences. In the case of separation from service, the failure to fulfill obligations must be clearly and convincingly established, and in the case of the application of other sanctions, it is only necessary to substantiate that the failure to fulfill obligations is more likely than not to have occurred.[20] This legal principle was stated in the Molari-case,[21] when UNAT required more than a preponderance of the evidence but less than proof beyond a reasonable doubt. UNAT found that in this case, the facts were so clear as to be irrefutable and no matter what the standard, the Administration met its burden of proof.

Based on the investigation report, the Assistant Secretary-General for Human Resource Management can make three types of decisions: does not take further action on the matter; no longer treats the matter as a disciplinary matter and envisages administrative or managerial action; or make a proposal to the Under-Secretary-General for Management to decide on the adequacy of the evidence, impose disciplinary sanctions, take appropriate administrative and managerial sanctions, and, if necessary, impose appropriate compensation.[22] The decision of the Deputy Secretary-General shall subsequently form part of the personal file of the official subject to the procedure.

3. Possible adverse legal consequences

The Staff Rules shall have the power to provide for the types of penalties by which the organization may penalize misconduct by officials. The source in question pro-

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[19] If necessary, the Assistant Secretary-General may, at the written request of the official, permit an extension of the time limit. Failing that, after the expiry of the one-month period, the official shall be deemed not to have exercised his right to submit a written statement.

[20] Administrative instruction No. ST/AI/2017/1, Section 9, 9.1.

[21] Judgement No. UNDT/2010/058, https://www.un.org/en/internaljustice/files/undt/judgments/undt-2010-058.pdf, and Judgement No. 2011-UNAT-164, https://www.un.org/en/internaljustice/files/unat/judgments/2011-unat-164.pdf.

[22] Administrative instruction No. ST/AI/2017/1, Section 9, 9.2.

vides, by means of an exhaustive list, a sufficiently effective, transparent and predictable system of disciplinary sanctions, in addition to which it mentions in exemplary nature certain administrative or managerial actions.[23] The requirement of the legality of the penalty imposed, in accordance with general principles of law, to be proportionate to the gravity of the misconduct.[24]

3.1. Disciplinary sanctions

Possible penalties are specified in Rule 10.2 of the Staff Rules, the elements of the list are essentially the same as the disciplinary sanctions that European states apply to civil servants. An unavoidable guarantee requirement is that the official be duly informed of the penalties which may be imposed for his disciplinary offense. In private employment law, the law only provides a framework in this regard, within which the employer or himself can set up the system governing it, and must provide information on this in an employment contract or collective agreement.[25] This is mainly due to the fact that private employment law does not recognize the term disciplinary law and orders severe breaches to be sanctioned with "adverse legal consequences". In contrast, the situation in the public sector in Hungary, in the states of rule of law in general and, of course, in the case of the United Nations, is different, as the legislators have established a well-established system for disciplinary proceedings, which is described in detail in the relevant law (in the case of the UN the Staff Regulations), in a non-derogatory manner.

The following disciplinary sanctions are applicable at the UN:

- Written censure;
- Loss of one or more steps in grade;
- Deferment, for a specified period, of eligibility for salary increment;
- Suspension without pay for a specified period;
- Fine;
- Deferment, for a specified period, of eligibility for consideration for promotion;
- Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- Dismissal.

3.2. Other actions

The Staff Regulations also recognize certain administrative or managerial measures in addition to the above (e.g. written or oral reprimand), as well as recovery of

[23] Staff Rules, Rule 10.2.
[24] Ibid. Rule 10.3 (b).
[25] See e.g. Act no. 1 of 2012 on the Hungarian labour code, § 56.

monies owed to the Organization and administrative leave with full or partial pay or without pay which, however, are not classified as disciplinary sanctions. Liability for damages is so strong in UN disciplinary law that, on the instructions of the Deputy Secretary-General, a reasonable sum of money may be withheld from the official's salary until the proceedings are closed, and direct deduction from the salary may be made after the final decision.[26]

The kind of compensatory damages known at the UN can also be found in the legal practice of the states, and it has also played an increasingly important role in the development of Hungarian law over the decades: under section 113 of the 1951 Labour Code, verbal reprimand, written reprimand, downgrading from one month to one year, and immediate dismissal were possible adverse legal consequences. This system of disciplinary sanctions was found to be deficient in both theory and practice, and the introduction of fines was suggested.[27] It is a fact that if, as part of the disciplinary proceedings, there may be a financial consequence of a possible breach of obligations, on the one hand the proceedings themselves have a more serious and deterrent effect, and on the other hand they are able to at least partially mitigate and compensate for the damage caused to the organization. Accordingly, today the Act 125 of 2018 also provides that a government official, if he has not acted in the manner normally expected in a given situation, shall be liable for damages for breach of an obligation arising out of his governmental service.

Under the provisions of the Staff Rules, an official may be sent on administrative leave of not more than three months at any stage of the procedure by an authorized official until a date fixed in advance in writing.[28] As a general rule, such leave shall be paid in full to the official concerned, and partial payment or total non-payment may be decided by the Secretary-General in special circumstances.[29]

4. Case law

The case law of the UN disciplinary system is truly interesting and if we can take a look at it, as earlier mentioned, a picture of a well-established and balanced sanction system is outlined. In this chapter I chose some more significant cases from 2019 when 3 dismissals, and 34 separations from service were imposed as a consequence out of 68 cases. If we look at the available case law material, it is evident, that in any disciplinary proceedings the competent body tends to focus on the lowest possible amount of measures, but even so the practice is really strict: out of 504

[26] Administrative instruction No. ST/AI/2017/1, Section 9, 9.6.

[27] KENDERES, György – PRUGBERGER, Tamás: A közszolgálati fegyelmi felelősség hazai jogi szabályozásának alakulása napjainkig a külföldi jogfejlődés tükrében. *Új Magyar Közigazgatás,* October 2012, Vol. 5, No. 10, pp. 3–4.

[28] Staff Rules, Rule 10.4 (a)–(b).

[29] Ibid. Rule 10.4 (c).

cases in 303 cases the penalty was dismissal (93) or separation from service (220), which is a 60% rate on the side of more serious consequences.[30]

A staff member created a hostile work environment for several staff members by shouting at, and verbally abusing them and repeatedly making accusations of incompetence while other staff members were present and threatening their contractual status. As a disciplinary measure the staff member received a written censure, a fine in the amount of one-month's net base salary, and loss of two steps in grade.

A similar penalty, demotion by one grade with deferment, for one year, of eligibility for consideration for promotion was imposed when a staff member created a hostile work environment for three staff members by marginalizing them in work-related conversations and social gatherings, and by supporting relocation of one particular staff member among the three to a remote duty station. The staff member also failed to report irregularities in the recruitment exercise to which the staff member was a candidate, which resulted in the staff member's selection.

Demotion, with deferment for different periods for eligibility for consideration for promotion was the imposed penalty in a case when five staff members failed to disclose in job applications and/or submissions about their familial status that relatives were employed by the Organization. The staff members' conduct was significantly mitigated by their early admission and very long service as General Service level staff members in a difficult mission environment.

Without prior approval, a staff member used a personal UN e-mail account and engaged in outside activities by assisting the business of an external individual. The staff member also made a false statement in favour of the individual and for the individual's acquaintance his penalty was a loss of two steps in grade, plus a written censure. Similarly, written censure, loss of two steps in grade and fine equivalent to two months' net base pay was imposed when a staff member engaged in unauthorized outside activities related to one or more wine businesses. in this case the staff member was required to reimburse the Organization for financial loss relating to a payment for security services. Also written censure and loss of two steps in the grade were the adverse consequences for a staff member signed vouchers for the disposal of waste jet fuel, without authorization and in violation of the Organization's policies and procedures. This conduct included signing the name of another staff member as the recipient of the waste fuel without authorization. Mitigating factors included an early admission and long service.

When we look at the cases, we can draw the conclusion that in general all the harassment, discrimination and abuse of authority issues fall into the category in which the disciplinary proceedings end with a decision on separation from service.

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[30] OHR: Compendium of disciplinarymeasures Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2019, https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-December%202019_0.pdf and disciplinary measures in a searcable format: https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-%20December%202019.Final_.10.08.2020_0.xlsx.

In one case a staff member engaged in prohibited conduct, including sexual harassment of a subordinate, and created a hostile work environment. The staff member also facilitated the promotion of another staff member with whom the staff member had a personal relationship and failed to disclose the resulting conflict of interest. The same happened when a staff member with security responsibilities engaged in sexual harassment when he attempted to kiss another staff member while on duty. In another case a staff member touched a colleague inappropriately, including by kissing the other staff member's lips, and used inappropriate language, including by commenting on the other staff member's appearance. The fact that the staff member's misconduct occurred on multiple instances and over a protracted period of time constituted aggravating factors. In these situations post-separation the former staff member was informed that had the former staff member remained in service, a sanction of, at least, separation from service with compensation in lieu of notice and without termination indemnity, would have been imposed. The names of the incriminated staff members were entered in Clear Check.

There are similar cases when the disciplinary body explicitly decided for separation of service: while acting in an official capacity, a staff member sexually harassed a staff member of a UN-related organization. In another situation a staff member participated in a fuel fraud scheme. The staff member's initial admission to the conduct and the very limited number of false transactions over a period of several months were considered as mitigating factors. That the staff member served as a driver was considered an aggravating factor. Another case was when a staff member took, without authorization, a mobile phone that belonged to another staff member, removed the information on the phone and used it for personal purposes. A case connected with fraudulent action was when a staff member submitted to the Organization a claim for payment of an education grant and documentation of such claim that contained false information. It was a kind of unfortunate case when a staff member drove a private vehicle after having consumed alcohol, and caused the vehicle to collide with an UN-Contingent armoured vehicle, causing significant damage to the armoured vehicle. The staff member's position as a Security Officer served as an aggravating factor and long service with the Organization served as a mitigating factor. The penalty in all of these cases was separation from service with compensation in lieu of notice and without termination indemnity

The three cases when dismissal was the decision were highly serious misconduct and involved significant moral aspects as well. In the first case a staff member sexually abused a minor, in the second one the same happened with one person from the local population. In the third case a supervisor sexually harassed a subordinate staff member by making a sexual advance to the staff member and offering help in an ongoing recruitment process in exchange.

5. Summary

The practice of disciplinary proceedings observed at the UN is very similar to that observed in the case of state public services. This is not surprising, as the organiza-

tion has developed its own internal rules based on existing models. The stages and participants of the disciplinary proceedings are organized in a transparent structure, the officials can easily get acquainted with the provisions governing them, so that the internal law of the organization complies with the principle of the rule of law. As we can see from the case law, the disciplinary body tries to decide according to the criterion of proportionality, but it is a general phenomenon that when a case reaches disciplinary stage, in the more cases the legal relationship between the staff member and the organization is terminated at the end of the procedure.

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SMART CITY INTERNATIONAL CONCEPTS AND CHALLENGES*

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1. Introduction

From the middle of the 20th century in the developed countries it is now a typical feature to see urbanization and cities growing: increasing population and areas of the cities, expending city life, improving infrastructure and public services, and the changing of the structure of economy. Urbanization and globalization both affect the development of cities by proposing new challenges. Dealing with the problems (such as health care, public transport, pollution etc.) require new innovative solutions, social innovation is needed on an urban level. Such innovative solutions could be the developing of smart cities which could also contribute to the development of the local information society. Today international competitiveness is directed by a city's innovative nature. In order to achieve this cities go thorough significant changes; implementing ICT infrastructures places them on a global level by providing new locations for businesses and clusters.

2. Smart City definitions and international concepts

The concept of smart cities gained a respectable attention in the second half of the 1990s thanks to the spreading of the information communication technologies (from now on ICT). In literature they refer to the smart city concept as the future's safe, environment friendly and effective city center which innervates high existence and sustainable economic growth with its developed infrastructures (such as sensors, electronic devices and networks). In the meantime, the smart city has yet to have a uniformly accepted definition, there are actually several definitions.[1] In the following, I m going to introduce the concepts published in international literatures after the turn of the century.

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1 NAGY, Zoltán –SZENDI, Dóra – TÓTH, Géza: Opportunities for Adaptation of the Smart City Concept – A Regional Approach. *Theory, Methodology, Practice*, 2016/3, p. 87, DOI: 10.18096/ TMP.2016.02.08.

Robert Hall created the definition of smart city in 2000, according to which a smart city is a city that inspects and integrates the critical infrastructures (roads, bridges, ports, water supplies, tunnels, railways, airports, big buildings, communication systems, power supplies) optimizes power sources, plans and supervises preventive maintenance activities while maximizes public services.[2]

The most referred study on the concept of smart city in the international publications is Rudolf Giffinger's work[3] in 2007 in which he came up with the definition of smart city and defined the indicator system of European middle sized cities. According to Griffinger the smart city is a city which provides outstanding performs in the areas of people, public transport, quality of life, governing, environment and the economy,[4] furthermore, it provides a certain approach which considers awareness, flexibility, the ability to transform, consistency, cooperation and strategic behavior as abilities.[5]

According to Griffinger the term smart economy implies competitiveness, based on innovative business point of view, entrepreneur potentials, trademarks, costs spent on research-development, productivity and flexibility of the labour market, the city's national and international economic integration.[6]

Smart governing includes partaking in decision making, community and social services, transparent governing and political strategies as well as perspectives.[7]

Smart people are not characterized only by its citizens' level of qualification and their affinity towards lifelong learning, but their flexibility, creativity, open mindedness and their social activity.[8]

The elements of smart mobility are local and international accessibility, sustainable, safe and innovative transport system, furthermore, availability of ICT infrastructures. Smart mobility programs also support more effective transport systems (such as pedestrian, bicycle).[9]

Smart environment can be characterized by its auspicious environmental conditions (such as climate, green areas), efforts made to the betterment of pollution, energy source management as well as environmental protection.[10] Smart environment promotes the necessity of sustainable environmental energy source-management and

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2 HALL, Robert E.: The Vision of a Smart City. *2nd International Life Extension Technology Workshop*, 2000, Paris, p. 1.

3 GIFFINGER, Rudolf: *Smart Cities – Ranking of European Medium-sized Cities.* Centre of Regional Science, Vienna UT, 2007, pp. 1–28, http://www.smart-cities.eu/download/smart_cities_final _report.pdf.

4 NAGY, ZOLTÁN – SZENDI, DÓRA – TÓTH, Géza: op. cit. p. 88.

5 SZENDREI Zsolt: *Smart city, a jövő városa.* p. 4. http://www.urb.bme.hu/segedlet/varos1/eloadasok_2014/07B_SMART%20CITY_SZENDREI%20ZSOLT_kivonat.pdf

6 GIFFINGER, Rudolf: op. cit. p. 11.

7 Ibid. p. 11.

8 Ibid. p. 11.

9 Ibid. p. 12.

10 Ibid. p. 12.

city planning, supports the decreasing of energy consumption and the integrating of new technological innovations, which result in increasing efficiency. Decreasing pollution and emission as well as the efforts made in environmental protection both contribute to the preservation of the city's environmental beauty.

Smart lifestyle includes the different elements of the quality of life such as: culture, health care, safety, housing, tourism etc. and those that improve the quality of life.[11]

Griffinger groups the six areas of a smart city further into factors and indicators.[12]

Andrea Caragliu, Chiara Del Bo and Peter Nijkamp created a definition for smart city in 2009: a city is smart if the human and financial investments, the traditional transport and modern infrastructures – due to responsible utilization of natural resources and governing based on participation – support the sustainable economical growth and the higher quality of life.[13] We can recognize a smart city by the following determining qualities:

- The utilization of the network infrastructure increases efficiency in economy and politics as well as contributes to the social, cultural and city development. By infrastructure we mean the business, housing, spare time and life leading services, furthermore the ICT services (such as phone, TV, internet).
- The primary emphasis is on the business based developments.
- In the public services the most important priority is the social integrating of the different city inhabitants.
- High tech and creative sectors have an important role in the city's long term development.
- Social and relation capital get highlighted attention in city development. A city can become in a smart city if its community learns to learn, adapt and renew. The people must be able to use technology in order to benefit from it. However, ignoring social and relation problems could lead to social polarization.
- One of the most important factors of strategy is the social and environmental sustainability. In a world where sources are scarce, and where the cities rely on tourism and natural sources in their development and well being, they need to make sure that while taking advantage on these sources they also maintain the safety and renewability of the natural heritage.[14]

Donato Toppeta explains in his study written in 2010 that since a smart city is part of a complex, multiple dimensional network system, and some of the cities have individual cultural, economical, social and geographical boundaries, the definition

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[11] Ibid. p. 12.

[12] See in details in: GIFFINGER, Rudolf: op. cit.

[13] CARAGLIU, Andrea –BO, Chiara Del – NIJKAMP, Peter: Smart Cities in Europe. *3rd Central European Conference in Regional Science – CERS*, 2009, p. 50. https://inta-aivn.org/images/cc/Urbanism/background%20documents/01_03_Nijkamp.pdf

[14] Ibid. pp. 47–48.

of smart city need an analytical and holistic approach.[15] Smart cities connect ICT and Web 2.0 technology with other functional and projecting solutions in order to accelerate bureaucratic process, as well as in order to increase sustainability and livability they contribute to the complexity of the city governing with new, innovative solutions.[16] Toppeta classifies the role of ICT for smart cities according to the following:

- "Infomobility" and intelligent transport systems: include the integrated, variable fare systems, more advanced travel information services (such as locating stops, nearest taxi/bus, restaurant etc. on smart phones), analysing traffic intensity, automatic acknowledging of traffic violations, automatic noticing of hazards in traffic (such as out of order traffic lights, flood, fog, etc.) [17]
- Smart people (the developing of human energy sources and social capital): includes for example life long learning, education involving computers, e-book rentals, telemedicine-services, providing local services for adds and touristic information, etc., virtual museums, digital art, ecotourism services, etc. [18]
- Economy 2.0.: the author includes for example individualized services for the citizens, virtual offices for universities, commercial chambers and incubators related to analytic and consulting companies, etc. [19]
- Life quality and sustainability: listed here by the author for example the geothermic heating systems, third generation central heating, micro horticulture, the CAD software and the WebGis applications, etc. [20]
- Ecosystem: Sustainable environmental protection, renewable energy and other sources: here, he mentions the list of smart traffic control solutions, continues inspection of severs and gutters for the protection of water, efficient lightings, the operation of systems controlling noise and electromagnetic pollution, the operation of the sustainable city drainage system and smart watering systems to prevent ground water contamination and floods. [21]
- E-Democracy, government 2.0, smart government: here the author lists for example the cloud based information sharing platforms, the direct and safely accessible internet systems operated for the good access to local information and public services, and the centralized smart appointment making systems for health care services, furthermore, the public safety and the decreasing of the time in responding to crime or emergency calls, etc. [22]

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15 TOPPETA, Donato: *The Smart City vision: How Innovation and ICT can build smart, "liveable", sustainable cities.* The Innovation Knowledge Foundation, 2010, p. 1.
16 Ibid. p. 4.
17 Ibid. p. 5.
18 Ibid. p. 6.
19 Ibid. p. 6.
20 Ibid. p. 6.
21 Ibid. p. 7.
22 Ibid. p. 7.

In his 2010 written study, Harrison explains that a smart city is lead by electronic devices, connected and intelligent city, which has an impact on the city's collective intelligence by the combination of its physical, IT, social and business infrastructure.[23] Lead by electronic devices means that applying sensors, kiosks, devices, cameras, smart phones, inbuilt medical equipment, web and similar data gathering systems makes it possible to record and integrate actual concrete data. The author means by connecting that these data are integrated in a company computer platform and then made accessible to the different city services. Intelligence refers to the complex analysis, modelling, optimizing and visualizing in the operative business process- and decision management.[24]

In their study, published in 2010, Dough Washburn and Usman Sindhu explains that smart a city uses "smart computing" technologies in order to make the city's critical infrastructure (such as local government, education, healthcare, public safety, traffic and public services) more intelligent, connected and efficient. "Smart computing" is the new generations of integrated hardware, software and web technologies, which help people make more intelligent decisions in the possession of the real world and real time observing IT system and improved analysing and also optimises business processes and business balance outcomes.[25]

Thomas Chen published his standpoint in 2010, according to which smart cities take advantage of the communication and sensor possibilities built in the city's infrastructure in order to optimize the necessary electronic, transport/traffic and other logistic operations and by doing so can they improve everybody's quality of life.[26]

Taewoo Nam and Theresa A. Pardo in 2011 created a relatively new concept for smart city. They simplified and regrouped a city's most important defining elements into three categories: technological (hardware, software infrastructures), human (creativity, diversity, education) and institutional (governmental, political) factors.[27]

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[23] HARRISON, C. – ECKMAN, B. – HAMILTON R. – HARTSWICK, P. – KALAGNANAM, J. – PARASZCZAK, J. – WILLIAMS, P.: Foundations for Smarter Cities. *IBM Journal of Research and Development*, 2010/4, p. 7, DOI: 10.1147/JRD.2010.2048257.

[24] CHOURABI, Hafedh – NAM, Taewoo –WALKER, Shawn –GIL-GARCIA J. Ramon – MELLOULI, Sehl – NAHON, Karine – PARDO, Theresa A –SCHOLL, Hans Jochen: Understanding Smart Cities: An Integrative Framework. 2012, *45th Hawaii International Conference on System Sciences*. 1st ed. Washington, DC: IEEE Computer Society, p. 2290, DOI: 10.1109/HICSS.2012.615.

[25] WASHBURN, Doug – SINDHU, Usman: *Helping CIOs Understand "Smart City" Initiatives. Defining The Smart City, Its Drivers, And The Role Of The CIO.* Forrester Research, Inc., 2010, p. 3.

[26] CHEN, Thomas: Smart Grids, Smart Cities Need Better Networks. *IEEE Network*, 2010/2, p. 3, DOI: 10.1109/MNET.2010.5430136.

[27] NAM Taewoo –PARDO, Theresa A.: Conceptualizing Smart City with Dimensions of Technology, People, and Institutions. *Proceedings of the 12th Annual International Conference on Digital Government Research*, DG.O 2011, College Park, MD, USA, June 12–15, 2011, p. 286, DOI: 10.1145/2037556.2037602.

A smart city's essential technological elements are the wireless infrastructure as well as the everywhere present computer infrastructure. Also essential to a smart city's technological requirements the network devices (optical and wireless networks) public hotspots (wireless hotspots, kiosks) and the service oriented information systems. Technology is indispensable for a city to become smart because the use of ICT basically changes life and labour conditions in the city. Well working infrastructure is necessary; however, this alone is not enough: information infrastructure and applications are both preconditions for a smart city, but unless the cooperation of the public institutes, private sphere, civil organizations, schools and the public are not present, we cannot possibly talk about a smart city.[28]

In addition to the accessible and qualitative IT infrastructure, in urban development the role of human infrastructure, creativity and education are determining. By human factors we mean the citizens social integration to public services, city diversity, social, human and relation capital as well as education based educational institutes.[29]

Governmental and political support has a key role in establishing a smart city.[30] Providing an administrative environment, transparent, integrated management, strategic and promotional activities, building relationships as well as taking care of partnerships are necessary. Governing include cooperation, partnership, partaking and role of the citizens. The specifics of a successful city rely in the cooperation of the government, business, scientific, non-profit, civil sectors and the political parties. The local government must share its smart city plans, visions, priorities, and strategies with the citizens and other parties concerned. Management has a cardinal role in a smart city's success.[31]

John V. Winters in 2011 described his smart city concept focusing on education. In his opinion a smart city is the centre of higher education, highly qualified individuals and professional labour. He owes the development of a smart city partly to the fact that the candidates of higher education typically stay in the city after graduating, therefore the city area becomes bigger with most of he inhabitants owning a diploma from a higher educational institute. According to him the city can even become smarter by attracting creative people and labour like a magnet. A smart city is a human friendly environment which has multiple possibilities to utilize human potentials and establish a creative lifestyle.[32]

In 2011, Moe Thuzar explains that future smart cities will need a sustainable city development policy that would provide good livelihood for the citizens including the poor, and also maintain the cities' appealing feature. Smart cities are cities that provide high living standards by realizing sustainable economic growth, human and social capital input and also traditional and modern infrastructure as well as provide

[28] Ibid. pp. 286–287.
[29] Ibid. p. 287.
[30] Ibid. p. 288.
[31] Ibid. p. 288.
[32] Ibid. p. 288.

social partaking in natural resource-management. Smart cities need to realize sustainable, converged economic, social and environment protecting visions.[33]

According to Juan M. Barrionuevo Pascual Barrone and Joan E. Ricart a smart city utilizes technology and sources in its possession in unison in order to establish integrated, liveable and sustainable city centres. For a city to become smart there are five components: economic capital (GDP, international transactions, international investments), human capital (talent, innovations, creativity, education), social capital (traditions, customs, religion, family), environmental capital (energy policy, waste- and water management), and finally institutional capital (civil obligations, administrative authorities, elections).[34]

Karima Kourtit and Peter Nijkamp published in 2012 that smart cities are the result of such knowledge intensive and creative strategies that aim to emphasize the cities' social-economical, ecologic, logistic and competitive activities. A smart city's basic elements include human capital (such as professional labour), infrastructural capital (high-tech communication devices), social capital and entrepreneur capital (creative and risk-taking business activities).[35]

Sotiris Zygiaris explains in his 2012 publication that the term smart city is interpreted as a certain intelligent ability, which deals with several innovative, socio-technical and social-economic related issues for development. These aspects lead to such smart city concepts like "green", connected, intelligent, innovative cities.[36]

Renata Paola Dameri in her publication in 2013 defined the definition of smart city according to which on the one hand a smart city is a particular area in which developed technologies (like ICT, logistics, power generation, etc.) contribute to producing advantages in the aspect of the citizens' wealth, partaking, quality of environment and intelligent development. On the other hand, it is a city managed by a personal team that is capable of specifying the regulations and policies of the city management and development.[37]

According to Tuba Yesim Bakici, Esteve Almirall and Jonathan Wareham a smart city is a developed city that uses high technology, which connects people, information and city elements by applying the new technologies in order to estab-

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[33] THUZAR, Moe: *Urbanization in SouthEast Asia: developing smart cities for the future?* Regional Outlook, 2011, p. 96, DOI: 10.1355/9789814311694-022.

[34] BARRIONUEVO, Juan M. – BERRONE, Pascual –RICART, Joan E.: Smart Cities, Sustainable Progress: Opportunities of urban Development. *IESE Insight*, 2012/14, pp. 50–51, DOI: 10.15581/002.ART-2152.

[35] KOURTIT, Karima – NIJKAMP, Peter: Smart cities in the innovation age. *Innovation: The European Journal of Social Sciences*, 2012/2, p. 93, DOI: 10.1080/13511610.2012.660331.

[36] ZYGIARIS, Sotiris: Smart City Reference Model: Assisting Planners to Conceptualize the Building of Smart City Innovation Ecosystems. *Journal of the Knowledge Economy*, 2012/2, p. 218, DOI: 10.1007/s13132-012-0089-4

[37] DAMERI, Renata Paola: Searching for Smart City definition: a comprehensive proposal. *International Journal of Computers & Technology*, 2013/5, p. 2549, DOI: 10.24297/ijct.v11i5.1142.

lish sustainable, environment friendly city, competitive and innovative trade and also improve the quality of life.[38]

M. L. Marsal-Llacuna, Joan Colomer-Llinás and Joaquim Melendéz-Frigola explain in their study published in 2015 that smart cities try to improve the operation by utilizing data, they also provide more efficient services to the citizens with the use of the ICT, inspect and optimize the existing infrastructure, increase cooperation between the different economic individuals and support the innovative models both in public and in private sector.[39]

Saraju P. Mohanty, Uma Choppali and Elias Kougianos defined the elements, attributes, objects and infrastructures of a smart city.[40]

The elements of a smart city are the smart infrastructure, smart buildings, smart traffic, smart energy consumption, smart healthcare, smart technology, smart governing, smart education and smart citizens.[41]

The authors list sustainability, quality of life, smartness, and urbanization to the city's attributes.[42]

The subject matters of a smart city include society, economy, environment and governing. In regards of society a smart city is for its locals or citizen. Economically a smart city produces continuous employment and economical growth. In the environmental aspect the city is able to maintain its functions and will work for the existing and future generations. As for governing, the smart city is able to apply the policies and connect it with other elements.[43]

To the infrastructure of smart cities the authors include the physical infrastructure, the ICT-s and the services. Physical infrastructures are the smart cities' actual physical or structural elements such as buildings, roads, railroads, water supply systems, etc. Physical infrastructure is typically not the smart element of a smart city. ICT infrastructure is the smart city's most important smart element. Service infrastructure is based on physical infrastructure and includes some ICT elements (such as smart grid).[44]

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38 BAKICI, Tuba Yesim – ALMIRALL, Esteve – WAREHAM, Jonathan: A Smart City Initiative: The Case of Barcelona. *Journal of the Knowledge Economy*, 2013/2, pp. 135–148, DOI: 10.1007/s13132-012-0084-9.

39 MARSAL-LLACUNA, Maria-Lluïsa – COLOMER-LLINÀS, Joan – MELÉNDEZ-FRIGOLA, Joaquim: Lessons in Urban Monitoring Taken From Sustainable And Livable Cities to Better Address the Smart Cities Initiative. *Technological Forecasting and Social Change*, 2015/90, pp. 611–622, DOI: 10.1016/j.techfore.2014.01.012.

40 MOHANTY, Saraju P. – CHOPPALI, Saraju P. – KOUGIANOS, Elias: Everything You wanted to Know about Smart Cities. The Internet of Things is the backbone. *IEEE Consumer Electronics Magazine*, 2016/3, pp. 61–62, DOI: 10.1109/MCE.2016.2556879.

41 Ibid. p. 61.

42 Ibid. p. 61.

43 Ibid. p. 62.

44 Ibid. p. 62.

Bhagya Nathali Silva, Murad Khan, Kijun Han specified a smart city's attributes and pillars in their study published in 2018.[45]

According to their standpoint – similarly to that of Mohanty, Choppali and Kougianos – most suggestions regarding smart cities include four main attributes: sustainability, quality of life, urbanization and smartness. Sustainability is an essential paradigm of the city's development from the 1980s and also plays an important role in the establishing of smart cities. In the category of sustainability in addition to infrastructure and governing they include issues concerning pollution and waste, energy and climate change, society, economy and healthcare. Urbanization focuses on technological, infrastructural and city management aspects in regards of developing from rural to city environment. The improvement of the quality of life is present in the citizens' emotional and financial prosperity. In smartness the authors mean the need for improving the city's social, economical and environmental conditions.[46]

The pillars of a smart city are the following: institutional, physical, human, and economical infrastructure. Institutional infrastructure includes city management, which involve partaking in decision making, public- and social services, transparent governing, political strategies and perspectives. Institutional infrastructure includes furthermore national and civil organizations necessary for the cooperation of services, and also keeps contact with the central government.[47]

The pillar of physical infrastructure ensures the sustainability of energy sources for the operation of the city. In the realization of a smart city in addition to the quality of ICT infrastructure the quality and accessibility of smart material networks also receives similar importance. Green institutes, green urban constructions and smart energy consumption also belong in this category. Most initiatives concerning smart cities focus on preserving natural resources, in another word a smart city utilizes technology for the purpose of better city management in the meantime increases the sustainability of natural resources.[48]

Human infrastructure includes intellectual and human capital as well as the quality of life. In the popularization of the smart city concept the people's consciousness, responsibility and commitment play an essential role, therefore human infrastructure is necessary regarding the development and sustainability of smart cities. Despite the fact that smart cities are well organized and use developed technology, sustainability is not guaranteed without social consciousness. Smart cities usually attract competent, well qualified (professional) citizens; therefore in smart cities knowledge based urban development is a basic factor. According to the au-

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[45] SILVA, Bhagya Nathali – KHAN, Murad – HAN, Kijun: Towards sustainable smart cities: A review of trends, architectures, components, and open challenges in smart cities. *Sustainable Cities and Society*, 2018/38, pp. 698–700, DOI: 10.1016/j.scs.2018.01.053.

[46] Ibid. pp. 698–699.

[47] Ibid. pp. 699–700.

[48] Ibid. p. 700.

thors human infrastructure affects people and their relationships, so this pillar is one of the basic elements of smart cities.[49]

Economic infrastructure of smart cities has several definitions in literature. The authors in a general sense by smart economy mean the use of e-trade and e-business applications and good practice for the increasing of productivity. Furthermore smart economy includes the new innovations of ICT and services relating to ICT.[50]

Literature groups smart cities into three generations. In the first generation we list the smart cities that are lead by technology and its most significant feature is that the city management systems are developed by concerned companies specializing in technology and they offer the smart services to the cities. The main problem concerning these cities on the one hand is that there is no interrelationship between the city and its citizens,[51] on the other hand technology lead city management systems do not accommodate to the city's nature.[52]

The second generation includes the smart cities that are lead by the cities themselves. In this phase city management utilizes the smart services offered by the developers and pursues technological solutions that improve the inhabitants' quality of life.[53] The third generation's typical feature is the cooperation and joint value creating between the city and its inhabitants.[54]

3. Challenges for the Smart Cities

Reviewing the challenges that smart cities face receives particular attention on an international level. Due to the limited volume of this paper I am introducing a few viewpoints. Mostafa Bahzadfar, Mahmoud Ghalenhoee, Mohsen Dadkhah and Nasrin Mehsen Haghighi divide the challenges facing smart cities into two basic groups: one group has the challenges before establishing a smart city, the other one has the ones after.[55]

3.1. Challenges before a smart city is being established

Challenges before a smart city is established can be economic, technologic, managing related, administrative, infrastructural as well as functional, educational, urban development related or interdisciplinary.

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[49] Ibid. p. 700.

[50] Ibid. p. 700.

[51] EGEDY Tamás: Városfejlesztési paradigmák az új évezredben – a kreatív város és az okos város. *Földrajzi Közlemények*, 2017/3, p. 257.

[52] ROZSNYAI Gábor: Az okos város nem egy applikáció. *Mérnök Újság*, 2017/7, p. 30.

[53] EGEDY: op. cit. p. 257.

[54] Ibid. p. 257.

[55] BEHZADFAR, Mostafa – GHALEHNOEE, Mahmoud – DADKHAH, Mohsen – HAGHIGHI, Nasrin Mohsen: International Challenges of Smart Cities. *Armanshahr Architecture & Urban Development*, 2017/10, p. 82.

Establishing a smart city requires national and international subservience as well as strict budget: it is necessary to have technology, ICT bases which are extensive, energy saving, decrease pollution and travel expenses, makes cities competitive, increase GDP, tourism as well as lead to further development.[56]

Establishing smart cities also requires smart technology; however, in many countries the appliances and/or solutions are either only few or not available at all. Furthermore, a smart city has to face technical nature and security-based ICT challenges such as data-security, target-user interface, service search, etc. As a result the global establishment of smart cities requires technologies which can only be realized by the involvement and cooperation of international research centres and multinational corporations.[57]

In some countries the involvement of public and the political decentralization are either not at all or only little provided, however, to establish a smart city these are necessary principals: the public fully takes part in solving problems on different levels, and the government provides the necessary special infrastructure to carry this out.[58]

Even though several countries have the necessary area to establish a smart city, the ICT infrastructure is relatively weak which also presents a challenge to the countries.[59]

The citizens of a smart city need to be trained and educated: they need to utilize smart technologies otherwise they won't be able to live in the smart city, they will encounter problems. In many countries indicators of education are given, including the paradigm of lifelong learning and the essential role of computers. The question is how knowledge, knowledge management and digital library can be placed in smart city platforms, furthermore how it can be available for the public on the internet.[60]

Further challenge is that in order to establish and operate a smart city the experts of different sciences need to cooperate and the smart city needs to manage and organize in all fields of sciences. Existing needs can only be identified this way and the proper suggestions of a solution elaborated.[61]

3.2. Challenges after establishing a smart city

After a smart city is being established the city is faced with challenges presented by the hackers, changed city area utilization, challenges created by the older generation's inability of learning, as well as execution, human, technological and cultural challenges.

The most notable challenge smart cities face is dealing with the hackers. If the security of computer networks is not guaranteed then the hackers can easily have

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56 Ibid. p. 82–83.
57 Ibid. p. 83.
58 Ibid. p. 83
59 Ibid. p. 84.
60 Ibid. p. 84.
61 Ibid. p. 84.

access and control bank, statistical, purchase, transport, registration, notification, etc systems and by doing so they interrupt the city operation. In order to eliminate this, proper setting – online and offline – for the networks is necessary, for the employees a confidential password access, users can only get access to verified programs, or another possibility could be establishing so called ethical hacker groups.[62]

According to reports written by the World Bank the ICT creates new workplaces and labour market is becoming more innovative and global.[63]

Further challenges after a smart city is established are presented by the fact that the elderly has limited media and computer knowledge; they don't have or have very little experience which is not enough to use ICT. Learning the use of the different programs and applications is much more difficult for the older generation than the young.[64]

Another challenging factor is to provide the Big Data as there is immense volume of data generated in the operation of a smart city; therefore future smart cities need to have priority attention to work out and provide Big Data concepts and techniques.[65]

The theories of smart cities have problems that people cannot accept or solve, and which perhaps oppose to all positive and negative effects of smart cities.[66]

Another challenge can occur following the establishment of a smart city, and that is that the city focuses on technology more than on the citizens' well being and providing a liveable environment. People need the face to face, personal relationships and if these are ignored due to the use of technology then this could lead to problems in the future.[67]

Smart cities must also face cultural challenges. Smart cities could have an important role in establishing, propagating, transforming or even ruining culture. The wrongful use of technologies can have negative consequences in family structure and family relationships in some cultures.

According to Narmeen Zakaria Bawany és Jawwad A. Shamsi smart cities must facet the challenges presented by IT infrastructure, security and privacy, big data management, costs, efficiency, availability and social adaptability. The lack of IT infrastructure can cause a significant difficulty for a smart city to achieve its goals. Reliable, high efficiency networks and infrastructure are the bases for integrating informatics systems into city environment. Besides efficient and reliable infrastructure, accomplishing security and data protection requirements is also a basic challenge for a smart city, where there is high volume of sensitive data collection, pro-

62 Ibid. p. 84–85.
63 Ibid. p. 85.
64 Ibid. p. 85.
65 BAJI Péter: Okos városok és alrendszereik – Kihívások a jövő városkutatói számára? *Tér és társadalom*, 2017/1, pp. 102–103, DOI: 10.17649/TET.31.1.2807.
66 BEHZADFAR, Mostafa – GHALEHNOEE, Mahmoud – DADKHAH, Mohsen – HAGHIGHI, Nasrin Mohsen: op. cit. 85.
67 Ibid. p. 85.

cessing, storing and data distribution in progress. Smart cities demand large information infrastructure: millions of sensors, thousands of network and information technology devices, in addition the needs of information technology experts and advisers also presents significant costs. The investment is not limited to only one occasion, the cost of the operation and maintenance of a real time system is high. The reliance and efficiency requirements demand several sources which result in higher costs as well. For example in an intelligent traffic control system all cars need to be equipped with sensors and each intersection needs to have an intelligent traffic controlling device. Such system cannot afford to break down; it needs to be reliable and efficient. The cost of a project like this is significant.[68]

Pinaki Ghosh and T. R. Mahesh list the challenges facing a smart city into the following categories:

a) privacy and security: personal identification of the involved needs to be separated from other collected data as when data of an individual is collected by smart devices privacy protection is essential. Personal data and identification of a person is not only important from a technical point of view, but legal and communication aspect as well.[69]
b) traffic systems: new technologies need to be developed to decrease mobility needs of individuals as well as cargo. Another challenge is the availability of determining the exact location therefore, new technologies need to be developed which are able to determine location even when there is no GPS signal.[70]
c) energy and environment protection: the increasing need for energy sources present a significant challenge for smart cities. The new technologies increase electromagnetic noise and network efficiency. Intelligent energy networks are the backbone of smart cities. Paring smart processes with technologies allows for energy efficiency and savings.[71]

4. Final Thoughts

Cities attract more and more people from the countryside. This phenomenon presents new challenges for the city inhabitants, infrastructure, environment and city management. For the sustainability of cities there is a need for innovative solutions and developments. For all these to be accomplished the involvement and cooperation of the public, local and central bodies as well as European institutions are necessary.

In the past few years smart cities – due to the research-development projects by the governments – received a special attention. Although there is no clear defini-

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[68] BAWANY, Narmeen Zakaria – SHAMSI, Jawwad A.: Smart City Architecture: Vision and Challenges. *International Journal of Advanced Computer Science and Applicatioms*, 2015/11, pp. 247–248, DOI: 10.14569/IJACSA.2015.061132.

[69] GHOSH, Pinaki – MAHESH, T. R.: Smart City, Concept and Challenges. *International Journal on Advances in Engineering, Technology and Science*, 2015/1, p. 26.

[70] Ibid. 26.

[71] Ibid. 27.

tion to what we mean by smart cities, it could still be stated that smart cities are for the people's welfare; technology is only a resource which (can) realize the fulfillment of the inhabitants' life, makes it possible for them to be involved, and ensures sustainability and the high quality of the services. The new means and their applications can be considered useful if operating them is simple, transparent and easy and also has advantages. The involvements of ICT in local services help cities become more intelligent in the aspect of managing sources. Furthermore, cities with the new technological means could create new business opportunities and become the center of research.

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[9] BARRIONUEVO, Juan M. –BERRONE, Pascual –RICART, Joan E.: Smart Cities, Sustainable Progress: Opportunities of urban Development. *IESE Insight*, 2012/14, pp. 50–57, DOI: 10.15581/002.ART-2152.

[10] KOURTIT, Karima – NIJKAMP, Peter: Smart cities in the innovation age. *Innovation: The European Journal of Social Sciences*, 2012/2, pp. 93–95, DOI: 10.1080/13511610.2012.660331.

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[12] THUZAR, Moe: *Urbanization in SouthEast Asia: developing smart cities for the future?* Regional Outlook, 2011, p. 96, DOI: 10.1355/9789814311694-022.

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SOME REMARKS ON THE LEGAL INSTITUTION OF THE ADVOCATE GENERAL

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According to the article 252 of the Treaty on the Functioning of European Union (TFEU), the Court of Justice of the European Union (CJEU) shall be assisted by Advocates-General.[1] The institution of the Advocate General was first introduced into the Treaty of Rome (1957) under the influence of the French delegation during the preparation of the Treaty.

In general, this legal institution is unfamiliar to many legal systems. Before fixing regulations of status of advocates general in the mentioned EEC primary source, advocate generals had assisted only the French and German judicial systems. The French were staunchly opposed to allowing individual judges to present dissenting or concurring opinions, and instead proposed this be done by an Advocate General, a figure modelled on the French commissaire du gouvernement, who offers legal advice to the Conseil d'État (supreme administrative court) on the cases being tried.[2]

Initially, under the Treaty of Rome, there were only two Advocates General – one from France (Maurice Lagrange) and another from Germany (Karl Roemer).[3] As Takis Tridimas points out, Lagrange and Roemer served during the most formative years of Community law fulfilling in effect the role of pathfinders. Their influence has been particularly instrumental in establishing the principles of Community administrative law, and in distilling, through a comparative method of interpretation, the elements of national laws most suitable for transposition in the Community legal order. They often composed a synthesis of national laws, performing par

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1 Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26. 10. 2012, Article 252.

2 See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union.* Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf ,(03/11/2019).

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excellence a creative exercise, bridging the gap between national and Community law and ensuring conceptual and ideological continuity.[4]

With the development of the European Union and the increase in the number of countries that joined the Union, the number of Advocates General positions has been growing steadily.

Following the first enlargement of the European Communities (1972), the number of Advocates General grew to four. Although, appointment to these four offices was the prerogative of large Member States such as France, Germany, the United Kingdom (UK), and Italy. It was only in 1981 – at the time of the second enlargement, when Greece joined – that a fifth Advocate General's post was added. This post was intended for rotation between smaller Member States. In 1986, when Spain and Portugal joined the Community, a sixth Advocate General's office was created where Spain has the right of appointment. In 1995, it was decided to increase the permanent number of Advocates General to eight and after some time – to nine. Five larger Member States (Germany, France, Italy, the UK and Spain) would continue to choose permanent Advocates General, and the remaining posts would rotate among the other Member States. The rotation between Member States was based on alphabetical order.[5]

According to Article 252(1) TFEU, the minimum number of Advocates General is set at eight. However, upon the request of the CJEU, the Council of the EU, by its unanimous decision, may increase that number. Moreover, for a period of five years in the past, as mentioned above, the number of Advocates General had been set at nine.[6] At the intergovernmental conference in Lisbon in 2007, the representatives of the Member States agreed in principle to raise the number of Advocates General to 11, where six countries (Germany, France, Italy, the UK, Spain, and Poland) would have a permanent Advocate General, although this decision was formally taken only in 2013, following the Court's request.[7]

Under the second paragraph of Article 252 TFEU the Advocate General is obliged to act "with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement"[8].

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4 See: TRIDIMAS, T.: The Role of the Advocate General in the Development of Community Law: Some Reflections. *Common Market Law Review*, 1997, p. 1354.

5 See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union*. Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2019).

6 WÄGENBAUR, B.: *Court of Justice of the European Union. Commentary on the Statute and Rules of Procedure*. CH Beck, 2013, p. 25.

7 Cf. PIRIS, J.-C.: *The Lisbon Treaty: A Legal and Political Analysis*. Cambridge University Press, 2010, p. 233.

8 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012, Article 252.

It is hard not to agree that the role of Advocates General is immeasurable. As a result, with the participation of the Advocate General, we have some kind of a double case consideration at the first instance. First, there is an in-depth study of all the factual circumstances, applicable law and judicial practice on the part of the Advocate General and its critical view of the dispute resolution, then a "re-examination" of the case by the court, taking into account the lawyer's position. And here is no matter whether the court will follow the lawyer's point of view or not in the end, in any case, we can safely say that the case was surveyed in such detail and professionalism.

In the literature, a large number of approaches to the functions of Advocates General are distinguished. For instance, the most detailed was a position of T. Tridimas who has highlighted the following destination of the Advocates General:

- providing assistance to the Court of Justice with the preparation of a case;
- proposing solutions to cases before the Court of Justice;
- providing 'legal grounds to justify that solution, in particular, relating it to the existing case law';
- opining 'on such points of law incidental to the case'; and making 'a critical assessment of the case law or commenting on the development of the law in the area in issue'.[9]

Thus, no doubts, the existence of this legal institution significantly facilitates and reduces the procedure for considering a case at the court since the applicable to a certain case legislation and conclusions with references to the analyzed judicial practice have been already outlined in the opinions of Advocates General.

In general, the functions of AG are clear while there is a substantial discussion concerning the role of this legal institution. A lot of arguments have been presented to explain the value of having this type of figure in the Court of Justice. Some argue that it is essential to have the AG's opinion, because the court's decisions do not contain enough detailed legal arguments underlying the decision. In other words, the submissions of the AG can complement the understanding of the legal issues considered in a particular case and the case law. Another common point of view is that opinions of the AG can provide an alternative interpretation of the law which may be useful for further reference. Others have an interesting suggestion as well that the Advocate General may even be seen as a kind of first instance with mandatory appeal.[10] All the mentioned views on the role of the Advocate General more or less reveal its purpose. However, in our opinion, if it is necessary to define concisely and accurately the essence of this legal institution, the Advocates General

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[9] See: TRIDIMAS, T.: The Role of the Advocate General in the Development of Community Law: Some Reflections. *Common Market Law Review*, 1997, p. 1358.

[10] See: Arrebola, C. – Mauricio, A. J. – Portilla, H. J.: An Economic Analysis of the Influence of the Advocate General on the Court of Justice of the European Union. *Cambridge Journal of International and Comparative Law*, Vol. 5, Issue 5, 2016, p. 111.

perform their main work by writing opinions or, in other words, "reasoned submission" for further consideration by the court.

The opinion of the Advocate General is sought in every case tried by the Court of Justice of the European Union, unless the latter decides that there is no new point of law. This happens in roughly 30% of the cases each year. Even though the General Court has the power to appoint Advocates General, however it rarely happens in practice.[11]

The opinions of the Advocates General, definitely, play a role in the outcome of the cases before the Court of Justice. Although, the noticing fact here is that these opinions are not obligatory for the court. At the same time it is important to find out what kind of influence is meant.

In general, according to Cambridge dictionary[12], an influence means the power to have an effect on people or things. So it can be absolutely applicable in the context of the relationship between the opinions of the Advocates General and the decisions of the Court of Justice. In that way, it is widely recognized that AG opinions impact court decision-making. However, it is a controversial issue among academics whether it is possible to assess this impact using a quantitative method.

We have a sufficient number of studies in this area when a certain category of cases has been analyzed (most often, an action for annulment). Consequently, the conclusion has been made about a certain percentage of cases in judicial practice when the court follows the AG's position. However, we do not support the idea that the criterion of the percentage ratio of how many times the court followed the AG's opinion is an important and determining factor. As it was noted, the court is not obliged to take into account the opinion without fail, but we have to consider the advocates general, like judges, have the appropriate education, extensive experience in the legal field, know the application of legislation, and analyze judicial practice, so it is the norm that in most cases the court's decision and the AG's opinion are in solidarity regarding the resolution of the case.

Moreover, some academics who criticize the mentioned quantitative approach have noted it is not simple to ascertain whether the Court of Justice followed the opinion of AG in a given case. It is known that deliberations of the Court are secret[13], and the court does not automatically quote an opinion of AG, even if it follows it. In some cases, the court points out the opinion of AG and refers to it as one of the proofs offered in support of the decision, but sometimes, on the contrary, it

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[11] See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union*. Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2020).

[12] *Cambridge English Dictionary*. Online available on: https://dictionary.cambridge.org/dictionary/english/influence (14/11/2020).

[13] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 35.

may not be evident which parts of the AG's reasoning the Court has taken. In addition, the opinion may have been followed to a greater or lesser extent.

Thus, we completely support the point of view that it is impossible to assess the influence of opinion of the AG on the court decision based only on the percentage ratio because many elements may be missing from the quantitative analysis that was carried out of the relationship between the Advocate General and the Court. Although, at the same time, a considerable proportion of matching solutions, at least, shows the significance of the institution.

Furthermore, there is also a point of criticism that the influence of AG's opinions on the court decision-making does not fit into the guiding principle of judicial independence. In this case we agree with the position of researchers who argue that due to the principle of separation of powers the judiciary should, first of all, be independent of the executive and legislative branches, but not necessarily from internal elements within the judiciary. In compliance with TFEU and Statute of the CJEU the Advocate General is considered a full member of the Court of Justice of the European Union. Therefore, the independence of judges does not suffer from the fact that the AG's submission has an impact on the final outcome of the case, and, vice versa, this impact is quite expected and logical.

Talking about features of opinions of AG, it should be mentioned, unlike court decisions which are always written in a formal and terse language that uses standard phrases and wording often borrowed from earlier judgments, the Advocates General can choose their own style delving into details and sound reasoning. This is a fact that the opinions on a case are usually longer than the court's decision. Advocates General also consider the interpretive alternatives and various options of deciding on a case, before proposing their own solution. Even if the court have not follow the opinion the latter can be referred to in later cases[14]. Also this helps the parties to build their position on a particular case by borrowing arguments from the opinions of the AG.

It should be noted that, by and large, the status of the AG is very close to the status of judges and is regulated by the articles TFEU and Statute of the CJEU which contain provisions on the appointment, principles of work, the privileges and immunities, replacement, dismissal from office, and etc.

Article 253 TFEU establishes the necessary requirements to be appointed as the judges and AG of the Court of Justice, the latter considers "persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence". The AG as well as the judges are ap-

[14] See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union.* Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2019).

pointed "by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255".[15]

Articles 5 and 6 of the Statute of the CJEU set out the conditions for dismissal from the posts. These provisions can be conditionally divided into two groups: subjective (which depend on the will of the person) and objective (which do not depend on the will of a person). Objective conditions include the end of the term in office (or, in other words, normal replacement), death, deprivation of a position due to non-compliance with the requisite conditions or the duties arising from the office. While the subjective condition is the resignation of the judge by the letter of resignation "addressed to the President of the Court of Justice for transmission to the President of the Council".[16]

Having touched upon the topic of appointment and dismissal from the position of AG one should not miss the burning issue of Eleanor Sharpston's premature removal from office which is currently being actively discussed among specialists of constitutional and European law.

Eleanor Sharpston was one of the AG of the Court of Justice of the European Union. Her first appointment was in 2006 following her nomination by the UK government, her status as the AG had been renewed twice, most recently in 2015. That means that her fixed-term period of the legal tenure should have been valid until 6 October 2021. Despite this fact, the national governments of 27 EU Member States decided to terminate her appointment earlier. There is only one reason – Brexit.[17]

This decision is fixed in a declaration adopted on 29 January 2020 by the Conference of the Representatives of the 27 Governments of the EU Member States. Two days later, the President of the Court of Justice confirmed the existence of a vacancy from 1 February 2020, following the entry into force of the Withdrawal Agreement, while AG Sharpston was allowed to continue sitting until a new AG arrives.

There is a lot of criticism and contradictions around the current situation, and we consider it necessary to go deeper into the issue and analyze the arguments from different sides.

On the one hand, let us figure out what arguments are on the side of the European Union. Do the mandates, including within the judicial system, end with the withdrawal of the state?

There is the only Treaty provision in the Declaration of 29 January 2020 adopted by the Conference of Representatives in support of AG Sharpston's mandate was automatically terminated due to Brexit. It is Article 50(3) TEU, according to

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[15] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012, Article 253.

[16] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 5–6.

[17] BOFFEY, D.: *Last British member of European court of justice could sue EU.* Online available on: https://www.theguardian.com/law/2020/feb/17/british-ecj-could-sue-eu-eleanor-sharpston (10/11/2020).

which "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement…"[18]

It should also be noted that the Declaration of 29 January 2020 refers only to a recital from the Withdrawal Agreement when it noted the current mandates of members of institutions, bodies, offices and institutions of the EU nominated, appointed or elected in connection with the UK's membership of the Union will therefore automatically cease as soon as the treaties cease to apply to the United Kingdom, that is, on the day of withdrawal.[19]

In September, 2020 there was launched an unprecedented case, the AG sued the "European Union" before the court. Eleanor Sharpston made an action for annulment of Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States before the Court of Justice of EU against the Representatives of the Governments of the Member States and the Council of the European Union. The claimant requested to annul partially the contested decision, in so far as it concerns the appointment of Mr Rantos to the post of Advocate General at the Court of Justice, for the period from 7 September 2020 to 6 October 2021.

She based her claim on four main points. The first alleges an error of law in the interpretation of Article 50(3) TEU, the second, infringement of the constitutional principle of the independence of the judiciary in EU law, the third, infringement of the procedures laid down by the Statute of the Court of Justice of the European Union to relieve a member of his or her duties, and the fourth, a lack of proportionality on legitimate and compelling grounds justifying the premature termination of her mandate. Also the applicant has mentioned that there are clear structural links between the decisions of the intergovernmental conferences of the Member States concerning the appointment of members of the Court of Justice, on the one hand, and the provisions of the TEU and the TFEU, on the other hand[20].

As a result[21], we can see from the judgment, the court rejected the claim because of formal grounds, Eleonor Sharpston's arguments were not considered on the merits. As noted, the claim was addressed to the Representatives of the Governments of the Member States and the Council of the European Union. The Court has concluded that the Council is an improper defendant in this case because the contested document was not adopted by the Council but by the Representatives of the governments of the Member States, on the basis of Article 253(1) TFEU. The court also has noted that it was not possible to file a complaint against the second respondent too, since, based on case law, acts adopted by Representatives of Member

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[18] Consolidated version of the Treaty on European Union, OJ C 326, 26. 10. 2012, Article 50.

[19] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I, 12. 11. 2019, pp. 1–177.

[20] C-424/20 *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States*, 10 September 2020.

[21] T-550/20 *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States*, 6 October 2020.

States acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts. Thus, based on the court's conclusions we do not see a real analysis of whether the decision to terminate the AG's powers prematurely made by the Representatives of the governments of the Member States is legitimate.

On the other hand, it is worth considering the arguments in favor of Eleanor Sharpston. The main question raised by academics is how the mentioned Conference of the Representatives could make such decision.

As a preliminary note, it is important to remind that the AG are covered by the Statute of the CJEU. The Statute makes it very clear that the AG should be considered judges as far as their status is concerned[22]. This was confirmed by the court itself: "Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which the may be deprived of their office, which guarantees their full impartiality and total independence".[23] This means, in particular, that both the EU judges and the AG must perform their duties in a completely impartial and independent manner and meet the same conditions set in the TFEU and the Statute of the CJEU.

As it has been already mentioned, the Statute of the CJEU gives the clear and close list of legal grounds for the duties of an AG to end: normal replacement, death, resignation, or deprivation of office. It is quite obvious that in the case of Eleanor Sharpston none of the listed grounds was applied. Although, only in the cases mentioned above, in compliance with the Statute of the CJEU, a vacancy might arise, allowing the Member States to appoint a replacement.[24] The Statute and the Treaties more generally do not provide for any external intervention and mechanism when it comes to depriving the AG (the EU judges as well) of their offices.

Moreover, that is noticing that there is *no* provision in the Statute granting either the Council or any other body, for example, "Conference of the Representatives of the Governments of the Member States" the authority to declare a judicial post within the CJEU vacant, in particular in a situation where the mandate of the AG is still valid. Furthermore, the CJEU, by confirming following the Declaration of the Conference of the Representatives, that AG Sharpston must stay in post and continue to hold office until her successor is appointed under the articles 5 and 8 of the Statute. As we can observe, on the one side, it is obviously that AG Eleanor Sharpston is covered by the Statute of the CJEU. But, on the other side, the Statute must also be respected by the Council and/or the Conference of the Repsentatives. This means that the early termination of her mandate cannot take place legally if

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[22] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 8.

[23] C-17/98 Emesa Sugar (Free Zone) NV v Aruba, 4 February 2000.

[24] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

the court's jurisdiction to declare the termination of the mandate is not respected and the procedure and related conditions set out in the Statute are not followed. In other words, only the court, based on the Statute, should exclusively decide on the legal consequences of Brexit (if any) for AG Sharpston's mandate. Non-political actors should decide this issue, in particular through an organization that is not even mentioned once in either the TEU or the TFEU[25].

Based on the analysis of the provisions of the TEU, the TFEU or the Statute of the CJEU, there is not stipulation as to origin or nationality as far as the AG are concerned, there is no direct link made to any particular Member State. In other words, there is no legally binding provision linking AG with specific Member States. The only link between the UK and AG Eleanor Sharpston is the UK government's decision to nominate her for three consecutive mandates (in 2006, 2009 and 2015). At the same time, there is no such a phenomenon as a "UK AG". Otherwise, AG Sharpston did not and does not represent the UK and her mandate was never tied to a position which is legally linked to the UK. This is the reason why she was allowed to continue in her current position after the UK left the EU. And even if there really was one "British AG", this post would be abolished, and not just included in the rotation system, as happened in this case with Greece, which received the post instead of AG Sharpston.[26]

As stated above, the only connection between AG Sharpston and the UK is the decision of the UK government to nominate her. Thus, the question is whether Brexit, in the light of the legal framework applicable to the EU AG, can be interpreted as a legitimate and compelling reason that can justify the premature and automatic termination of AG Sharpston, and without breaching the principle of proportionality. It seems that the negative answer is justified.

For Professor Halberstam, AG Sharpston should be allowed to remain in her office until the end of her six-year mandate in order to "safeguard the independence of the Court, the rule of law, and the constitutional structure of the Union".[27] For Professor Kochenov, concurring with Professor Halberstam, the declaration of 29 January 2020 not only violates EU primary law but also violates one of the core components of the rule of law: the "security of tenure of the members of courts".[28]

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[25] See: PECH, L.: The Schrödinger's Advocate General. *VerfBlog*, 29 May 2020. Online available on: https://verfassungsblog.de/the-schroedingers-advocate-general/ (10/11/2020).

[26] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

[27] See: HALBERSTAM, D.: Could there be a Rule of Law Problem at the EU Court of Justice? The Puzzling Plan to let U.K. Advocate General Sharpston Go After Brexit. *VerfBlog*, 23 February 2020. Online available on: https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/ (08/11/2020).

[28] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

In agreement with Professors Halberstam and Kochenov, it can be noted early removal of Eleanor Sharpston from office, as well as the immediate announcement of a vacancy, looks like a violation of basic legislation and a threat to the independence of the judicial system, since in this unprecedented case, the established legal grounds were ignored.[29] As the Court itself has repeatedly held, "the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external (our emphasis) interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".[30]

Also in the context of cases involving national measures that violate the most basic principles of the rule of law, the Court has fairly emphasized the "cardinal importance" of the principle of irremovability of judges which "requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality".[31]

Summing up, we can conclude that the current situation is really complicated to evaluate, in addition, political factors play their role too. As noted, Eleonor Sharpston was appointed by common accord of all the Member States acting jointly. AG Sharpston is therefore not the "AG of the UK" but rather one of the Court's AG and EU primary law does not allow for the automatic termination of AG's mandates. The Declaration of 29 January 2020 does not offer any arguments on this issue and does not even attempt to propose any legitimate and compelling reasons other than to put forward an opinion on whether we dare to say that Brexit should mean Brexit. Furthermore, the principle of proportionality is completely ignored, despite the court's case law, which, as noted above, requires that any exception to the principle of irremovability also fall within the scope of the principle of proportionality. Thus, as we can see, the rule of law is losing its force, and the principle of irremovability and the guarantee of judicial self-government at the supranational level are violated in relation to AG Sharpston.

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[29] See: PECH, L.: The Schrödinger's Advocate General. *VerfBlog*, 29 May 2020. Online available on: https://verfassungsblog.de/the-schroedingers-advocate-general/ (10/11/2020).

[30] C-64/16 *Associação Sindical dos Juízes Portugueses*, 27 February 2018.

[31] C-274/14 *Banco de Santander SA*, 21 January 2020.

NOTES FOR CONTRIBUTORS
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