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POSSIBILITIES OF HUNGARIAN REINTEGRATION SURVEILLANCE – ELECTRONIC MONITORING

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From a legal point of view, in the Hungarian context, *rehabilitation* is understood as the extinction of the detrimental legal consequences connected with a conviction which can be effected by law, by the court or by an act of clemency and the convicted person is relieved from these consequences (see Act C of 2012 on the Criminal Code, Art 98 and 99). "The person cleared by extinction shall be deemed to have a clean criminal record, and – unless otherwise provided for by law – he cannot be required to give an account of any conviction from which he has been exempted" [Criminal Code, Art 98 (2)]. The time of statutory extinction differentiates along with the convict's punishment. In cases of imprisonment, the length of the sentence and the intent of the offender is also considered (Criminal Code, Art 100). In practice, these provisions mean that if the convict was imprisoned for a period between one year and five years for an intentional offense, the statutory exemption happens after a period of five years following the last day of serving the term of imprisonment.

From a criminological-penological perspective, the concept of *rehabilitation* also has its distinctive meaning in the Hungarian context. At the end of the 1960s, the crisis of Western correctionalism and the welfare state became evident for Hungarian criminologists, too. With the experience of the disrespect of the rule of law during the socialist regime, Hungary decided to follow a rather "rights-respecting" approach in law enforcement after the system change of 1989/1990. A consensus emerged that the mandatory treatment programs under the ambition of rehabilitation are endangering the principle of the rule of law. The concept of prisoner rehabilitation in this respect was somewhat discredited. During the two decades that followed the concept of criminal pedagogy or criminal andragogy has developed that emphasized the need for educational programs in prisons (see Ruzsonyi 1999: 24 ff., 2003: 123 ff.; Miklósi 2013: 163 ff.). More recently, Szabó attempted to rehabilitate and reintroduce the concept of rehabilitation (Szabó 2014: 28 ff.). Szabó's post-correctionalist approach argues from a psychological perspective that programs of rehabilitation should aim more than maintain the inmates' mental and psychical well-being, as they have the potential to affect factors that contribute to desistance. From a penological perspective, Fliegauf conceptualized the differences between

the three concepts of rehabilitation, resocialization and reintegration (see Vig and Fliegauf 2016).

The concept of *resocialization* has not developed fully in constitutional law or prison law, and no legal regulations mention it explicitly. Nevertheless, the Constitutional Court has started to develop the concept of "claim for resocialization" which is, however, not seen as a right. This "claim for resocialization" emerged in a 2008 decision of the Constitutional Court when it stated that the benefits of resocialization are acknowledged by society (Decision of the Constitutional Court, 144/2008, XI. 26.). The Court connected this claim to the right to self-determination and the right to privacy, which both derive from the right to human dignity. This was a welcome step that built on previous decisions around the acknowledgment of the principle of resocialization. This principle claimed that the restriction of rights should be limited to what is necessary for the protection of society. These positive developments notwithstanding, the adoption of the Fourth Amendment to the Constitution cut of the possibilities for the further development of this concept, when it declared on a constitutional level that the actual life sentence without the possibility of parole does not constitute a violation to the right to life. According to domestic laws, the Constitutional Court did not have the power to examine the constitutionality of this provision, which in fact made it impossible to raise the "claim for resocialization" to the level of a right.

The Criminal Enforcement Code (Act CCXL of 2013) uses the terms of *reintegration* and *(re)settlement*. The Criminal Enforcement Code shows a conceptual shift from the previous legislation in two respects. Firstly, it mentions resettlement as opposed to the previous term of settlement. Resettlement is one of the purposes of the enforcement of criminal sanctions along with retribution (the enforcement of the negative consequences outlined in the judgement). In our view, retribution remains the primary aim to which resettlement is secondary because the Criminal Enforcement Code prescribes the enforcement of the negative consequences as an imperative aim, whereby it only talks about the aim to foster resettlement, and it does not prescribe resettlement as an aim which is to be achieved under all circumstances [Criminal Enforcement Code, Art. 83 (1)].

The Criminal Enforcement Code mentions *reintegrative activities or reintegrative programmes* (Criminal Enforcement Code, Art 2, 82, 83). In relation to imprisonment, these programmes aim to foster the convicts' integration to the job market, to reduce the convicts' disadvantages that have resulted from their lifestyle and life circumstances prior to incarceration as well as to develop the personality and social competencies of the convicts [Criminal Enforcement Code, Art. 82 (5)]. In this sense, "reintegration" covers all programmes and activities that assist and promote the efficiency of reintegration into society, and minimizes the chances of re-offending. As of the ambitions of the Criminal Enforcement Code, it is im-

portant to seek to establish and improve the convicts' self-esteem and sense of responsibility and help their reintegration into society and labour market.[1]

1. Introduction[2]

The electronic tracking system was born in the mid-1960s, from the idea of Robin Schwitzgebel, psychologist at Harvard University, who thought that his solution could be a humane and cost-effective alternative to the institution of imprisonment.

The "Dr. Schwitzgebel Machine" – as the device was called – was patented in 1969, although its practical application began in the United States in the early 1980s. The system was based on the principle that that criminals who met certain conditions and agreed to wear a device 24 hours a day (commonly known as, the "tag", "bracelet", "wristlet", "anklet") in order to complete their sentence at home. Moreover, they also had to give their consent to install a Home Monitoring Device in their apartment. The HMD originally was used to be connected to the landline telephone and the local energy supply system.

18 November 2014, the Parliament adopted the act 2013: CCXL on the enforcement of sentences, actions, certain coercive measures, misdemeanour seclusion, and imprisonment, as well as act 2014: LXXII on the modification of other acts, which regulated the reintegration surveillance from 1 April 2015.

The essence of the surveillance can be summarized as that the time when convicts are in reintegration surveillance is counted in the custodial sentence and, if limited, the prisoners regain their freedom, since the restriction of the actual freedom of movement and freedom of choice of commorancy lasts during the whole surveillance.

The notion of electronic remote monitoring device – that is used to enforce the reintegration surveillance – is defined in the Code 2013: CCXL as follows: ,"technical device used for following the movement of the sentenced or otherwise detained person". Thus, reintegration surveillance is carried out with a device that continuously ensures that – if the detained person leaves the designated location of the commorancy or movement area – it alerts the authorities immediately. According to Art. 187/A (3) of the above mentioned Code: "Reintegration surveillance shall cease the total deprivation of liberty of the sentenced, but shall restrict his freedom of movement and freedom of choice of commorancy."

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1 Anita NAGY–Dávid VIG: Prisoner resettlement in Hungary. In: *Prisoner resettlement in Europe 2019*. Edited by Frieder DÜNKEL–Ineke PRUIN–Anette STORGAARD–Jonas WEBER. Routledge 2019, chapter. 2.10.

2 "This contribution was developed with the support of the Research and Development Support Agency of Slovak republic within the framework of the project: Privatization of criminal law – substantive, procedural, criminal and organizational-technical aspects; No. APVV-16-0362" – Kassa Projekt.

2. Delimitation of house arrest and reintegration surveillance

In fact, electronic surveillance has been available in Hungary since 2003 for classical house arrest, which aims to simplify the control of enforcement of "house arrest", which may be imposed instead of pre-trial arrest. However, until 2013 neither the financial nor the technical conditions were satisfactory. In terms of terminology and purpose, house arrest should be a completely different institution than reintegration surveillance, a common element in them is that both of them contributes to the reduction of the prison population.

Regarding its purpose, the main objective of reintegration surveillance is that the sentenced should be reintegrated into society as early as possible. However, house arrest aims to replace pre-trial detention (described in Art. 129 of the Code), provided that the aims of pre-trial detention can be guaranteed regarding the nature of the crime, the duration of the criminal proceeding or the behaviour of the accused.

house arrest	**differences**	**reintegration surveillance**
by criminal procedural law coercive measure	**regulation**	by punishment enforcement law a special kind of release for the sentenced
replacement of pre-trial detention that the aims of pre-trial detention can be guaranteed regarding the nature of the crime, the duration of the criminal proceeding, or the behaviour of the accused	**aims**	1. alternative form of completing the sentence 2. redound the reintegration of sentenced
yes	**the phase of the investigation – the prosecutor – judiciary enforcement**	the phase of law enforcement
yes	**reduction of the prison population**	yes

There are two models for the application of Electronic Monitoring – as it is called in Europe: the so-called frontdoor and backdoor model. The essential difference between them is that the frontdoor model does not get to a correctional institution, while in the blackdoor model, the sentenced is released from the correctional institution with a shackle on his legs.

Delimitation of frontdoor and backdoor

According to Klára Kerezsi, electronic surveillance is an alternative sanction to deprivation of liberty, but it cannot be considered as a community sanction due to the lack of an active connection with any participant of the criminal jurisdiction and with the community.[3]

Róbert Bogotyán emphasizes that reintegration surveillance is an alternative form of the penitentiary, which does not aim specific and general preventive goals related to punishment, but rather the successful social reintegration of the convicted person, thereby decreasing the relapse rate; thus it aims to achieve the purpose of the enforcement of the criminal proceeding.[4] János Schmehl emphasizes that social reintegration here is a gradual process, a phase – which is controlled by state organs – enters between the deprivation of liberty and responsible, independent life. During this period, the sentenced should secure his independent living, can seek and take employment, rebuild and strengthen his family and social relationships. His activities are followed by electronical remote monitoring devices.[5]

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[3] Klára KEREZSI: Az alternatív szankciók helye és szerepe a büntetőjog szankciórendszerében. In: Ferenc IRK (ed.): *Kriminológiai Tanulmányok 39.* OKRI, Budapest, 2002, p. 117.

[4] Róbert BOGOTYÁN: A zsúfoltság csökkentésének útjai a börtönépítésen túl. *Börtönügyi Szemle*, 2015/1., p. 35.

[5] János SCHMEHL: Az új szabályozás főbb szakmai elemei és üzenetei. *Börtönügyi Szemle*, 2013/4., p. 21.

3. Outlook to the European system[6]

Recommendation Rec(2014) Nr. 4. of the Committee of Ministers of the Council of Europe set out in detail the purpose of electronic monitoring[7] and, in order to support the broad application of this alternative sanction, and the application as an ultima ratio in the criminal proceeding. Therefore:

- during the pre-trial phase of criminal proceedings;
- as a condition of suspension of execution of the prison sentence;
- as an independent way of monitoring the enforcement of the sentence or measure imposed;
- together with other probationary interventions;
- before the release of prisoners in prison;
- conditional release;
- intensive management and supervision of certain types of offenders after their release from prison;
- controlling the internal movement of offenders within or outside prisons;
- in order to protect the victims of specific crimes against certain suspects or offenders.

The Recommendation emphasizes that electronic surveillance technology can only be used in a well-regulated and proportionate manner and that, to this end, regulatory constraints and ethical and professional rules need to be formulated in the participating Member States. The Recommendation declares the concept of electronic monitoring as: "Electronic surveillance" is a general term referring to the monitoring of the position, movement, and particular behavior of persons involved in criminal proceedings. Current forms of electronic surveillance are based on radio waves, biometric or satellite tracking technology. These are usually a personalized device that is monitored remotely."

4. Conditions of applicability of the electronic remote monitoring devices:

In order to the electronic monitoring device be applicable, the property designated to carry out reintegration surveillance must have:

1. electrical supply and uninterruptible power supply,
2. as well as the network coverage required for the data transmission of electronic remote monitoring devices; and
3. signal strength

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6 Az EFOP-3.6.2-16-2017-00007 *Az intelligens, fenntartható és inkluzív társadalom fejlesztésének aspektusai: társadalmi, technológiai, innovációs hálózatok a foglalkoztatásban és a digitalis gazdaságban* című project keretében 01/01/2019–01/04/2019.

7 Recommendation [Rec(2014) 4] of the Committee of Ministers to member States on electronic monitoring, II. Definitions "Electronic monitoring".

5. Installation of electronic remote monitoring device

The police provide electronic surveillance equipment and remote monitoring infrastructure (hereinafter referred to as "electronic monitoring system") related to tasks performed during the reintegration detention, but the electronic remote monitoring tool is installed to the sentenced by the staff member of the correctional institution. According to Ferenc Szabó,[8] the following devices are necessary for the application of electronic monitoring:

- an anklet, which is placed above the ankle for practical reasons;
- a mediatory device (HMD).

Further details of the technical requirements of the EM can be found in Ferenc Szabó's article on the possibilities of electronic monitoring (EM) for law enforcement, according to which the following possibilities can be used for the device:

- remote alcohol monitoring: the HMD device installed in the monitored home in equipped with a supplementary application that can measure and detect the alcohol influence through a random phone call and conversation;
- remote voice verification monitoring: in the frame of the application – even without using an anklet – remote, periodical, random and automatic control of the duty of staying at home can be possible. (Essentially, based on a voice sample digitally recorded on the surveillance computer, the system is able to identify, through a voice call, an automated voice analysis to determine if the person interviewed is actually the person being monitored.)
- Local (RF) home curfew monitoring units.
- In-prison monitoring.
- Group monitoring unit, etc.[9] (group monitoring tool)

[8] http://www.shp.hu/hpc/userfiles/riaszto/em_cikk.pdf (09/09/2015)
[9] http://www.shp.hu/hpc/userfiles/riaszto/em_cikk.pdf (09/08/2015)

6. Possible types of reintegration surveillance

7. Conditions of reintegration surveillance from 1st January 2017

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 reintegration 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 may be initiated once during the term of completing the punishment by the sentenced person or his defender. The request is forwarded by the correctional institution to the criminal court within fifteen days. "Once" is important because the sentenced receives a significant change in his conditions in his life-style and therefore it is only accessible to those sentenced who are less dangerous to society and who can reasonably be 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 ordi-

nary 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 reintegration surveillance – before the estimated date of release from punishment –, if he agrees with it and:

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

The duration of the reintegration surveillance is

a) up to one year if the sentenced person is sentenced to imprisonment for a 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).

8. Cases when reintegration surveillance shall be excluded or terminated

When using reintegration surveillance, there are three broad categories of cases in which it cannot be used.

1. The sentenced person shall not be placed in custody.

2. Reintegration surveillance shall be terminated.
3. An objective circumstance, that is, the residential property is unfit for reintegration surveillance.

1. The sentenced person shall not be placed in custody
   Art. 187/C of the Code regulates the cases in which the sentenced cannot be placed in custody, that is:
   a) further imprisonment shall be carried out against the sentenced person,
   b) his pre-trial detention on remand in custody has been suspended for the duration of his imprisonment,
   c) the reintegration surveillance allowed during his detention has been terminated for reasons attributable to the convicted person,
   d) has not already completed at least three months of imprisonment not exceeding one year, or completed at least six months of imprisonment exceeding one year,
   e) the designated apartment is not suitable for the installation of an electronic remote monitoring device.
2. Reintegration surveillance shall be terminated
   According to Art. 187/E (1) of the Code, the leader of the correctional institute shall immediately submit a request to the criminal judge for the termination of the reintegration surveillance, if during it:
   a) the institute is notified of a custodial sentence or a new criminal procedure,
   b) the convicted infringes the rules of using the electronic remote monitoring device, damages the electronic surveillance device or renders it unusable,
   c) the designated apartment has become unfit for the placement of the electronic monitoring equipment or the declaration has been withdrawn by the person making the declaration and the sentenced person is unable to designate another apartment that could be designated as a place for reintegration surveillance.
3. An objective circumstance, that is, the residential property is unfit for reintegration surveillance
   The applicability of a property or remote monitoring device shall be excluded if:
   a) there is no electricity available on the property and, as a result, the remote monitoring device cannot be charged,
   b) network coverage and signal strength required to transmit data from the remote monitoring device are not available in all areas of the property,
   c) the property is unfit for housing for any reason,
   d) he lack public utilities (drinking water or heating) endangers the livelihood of the prisoner to be reintegrated,
   e) the contact person designated by the detainee or any person living in the property threatens the effective reintegration of the detainee to be placed in reintegration surveillance from a criminological point of view.

To sum up, we can see that reintegration detention is a "multiplayer" procedure were not only the criminal judge but also the defender, probation officer and the correctional institute also has a major role to play.

9. Roles of the participants of the reintegration surveillance

convicted or his defender	is allowed to submit a request once during law enforcement deadline: 15 days
probation officer	prepares a study about the applicability of the property deadline: 30 days
correctional institute	orders the study and submits a request if the conditions are appropriate
criminal judge	makes a decision on the basis of the documents, or holds a hearing
	designates the property, if it is applicable
	assigns the purpose and the duration of leaving the property
	Indicates the end date of the reintegration detention. – Issues an arrest warrant if the convicted violates the rules on reintegration surveillance and moves to an unknown location.

10. Delimitation of conditional release and reintegration surveillance

Reintegration surveillance is distinguished from conditional release in that while the conditional release is a substantive criminal law institution in which the court, on the basis of its behaviour in the execution of its sentence, does not execute a specific part of the sentence. However, regarding reintegration surveillance, the convicted person is in fact serving his sentence but is not being completed in prison. The other part of the question is answered by the amending act (2014: LXXII) of the Code, as its Art. 113 regulates the conditional release. According to this: "if the conditional release is to be decided during the reintegration surveillance and the correctional institute proposes the conditional release in its request, the judge may refuse to hear the convicted. If the judge has ordered the conditional release of the sentenced, but the correctional institute notifies by the due date of the conditional release, that the convicted violated the rules of the reintegration surveillance or that of the application of the electronic remote monitoring device; the electronic remote monitoring device has been damaged or rendered unusable, on this basis, the decision of the judge may be put aside.

11. Summary

Electronic surveillance entails significant cost savings for the budget, although the technical requirements of the EM require a one-time major investment. After that, the supervision costs much less than the placement in the correctional institution. For comparison, the daily cost of using EM in England is £12.10, in Estonia, it is EUR 2.64, in Finland, it is EUR 3-4, in France, it is EUR 15.50, in Germany it is EUR 30, in Norway, it is EUR 100, in Poland, it is EUR 4.3, in Portugal, it is 16.35 EUR, 3.45 EUR in Sweden, and 65 EUR in Switzerland.

While in Europe, the average daily cost of a prisoner with guarding and provision is approx. From 60 to 80 EUR, the cost of running electronic surveillance is estimated at 21 EUR per day. We can highlight in favour of the EM, that the enforcement of the sentence in this way will relieve the correctional institutions. The convicted can keep his job, keep earning money, raise his child at home, and fulfill his social obligations. The convicted can also use the money to pay compensation or reparation to the victim of his crime.

Due to the custodial nature of electronic supervision, it restricts the personal liberty of the convicted, but is less restrictive than the custodial sentence to be carried out and does not involve the use of physical coercion.

However, the psychological impact of the continuous "invisible" control and the prospect of imprisonment in case of not obeying the rules are undeniable.

In addition, other fundamental constitutional rights of the convicted person, such as the right to human dignity, privacy, private housing and the protection of marriage and the family, arose. According to some opinions, Electronic Monitoring realizes an "Orwellian" total privacy control.

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FROM THE IDEA OF STATE-CHURCH TO THE IDEA OF SEPARATING THE STATE AND CHURCH [*]

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1. Introduction

In Hungary of the 19th century, it was the customary laws that predominated. In addition, the relationship between the state authorities and the organised social groups was characterised by the incongruous mixture of "government ordinances, instructions, prohibitions, licences as well as *ad hoc* arrangements" generating "a diversity of administrative practices and insecurely held privileges".[1] In such circumstances, increasingly arose the need to create a type of civil society in which the individuals were to be subjects to a single legal order, and were to be endowed the same rights and duties. The reform of the church-state relation based on freedom of conscience and religion also formed an important part of the endeavour to establish a civil society. In this contradictory situation, the natural law movement declaring the ideals of freedom and equality before the law and the freedom of association marked a breakthrough. As a product of the natural law movements, Civil Codes were enacted in order to protect the individual and the social groups by laws. After about 40 years preparatory works the Civil Code of Austria was enacted. By codifying along the lines of natural law, its leading drafters, Karl Anton Freiherr von Martini and Franz von Zeiller, similar to a modern constitution, aimed to give protection to fundamental rights.[2] Both of them were representatives of the natural law theory that became accepted in Hungarian Legal Philosophy. The objective of the 19th century-natural law which was the creation of a legal order safeguarding the liberty of conscience and religious met the monarch's wide powers in religious matters being largely customary and

[*] The described study was carried out as part of the EFOP-3.6.1-16-2016-00011 *Younger and Renewing University – Innovative Knowledge City – institutional development of the University of Miskolc aiming at intelligent specialisation* project implemented in the framework of the Széchenyi 2020 program. The realization of this project is supported by the European Union, co-financed by the European Social Fund.

[1] Péter LÁSZLÓ : Church-State Relations and Civil Society in Hungary: A Historical Perspective. *Hungarian Studies*, Vol. 10, No. 1, Akadémiai Kiadó, 1995, p. 4.

[2] Wilhelm BRAUNEDER: The "First" European Codification of Private Law: The ABGB. *Collected Papers of Zagreb Law Faculty*, Vol. 63, No. 5–6, 2013, p. 1023, https://hrcak.srce.hr/116252 (14/11/2019).

undefined. One of the natural law's essential tasks was to determine the framework of secular power in religious matters and this effort led to the idea of secularity.

2. Natural law and its concept in Hungary of the 19th century

The natural law of the 19th century appeared as a synthesis of interacting concepts going back to the 17th century. In this process, the natural law theory based on theological arguments had a significant impact. This tendency owing to its Reformation and Counter-Reformation Christian attitude, and based on rational perceptions, recognized the social reality of the state and developed the state-building principles of natural law. In the meantime, the mechanical concepts of natural law focusing on individual rights also became prevailing. They examined the universal principles that are regarded as decisive without the existence of God. By emphasizing the primacy of experiential knowledge, then it proclaimed the exclusivity of consensual social ethics directing the legal philosophy towards positivism. It was Immanuel Kant who, by his transcendental philosophy[3], was able to achieve the right balance between two competing dimensions heading for the crisis by the middle of the 18th century. This version of natural law recognized as Doctrine of Reason (School of Critical Reason) from the first decades of the 19th century[4] became more and more accepted in the Hungarian legal philosophy. Due to the change of approach in Austria[5] – where the concept of Karl Anton Martini[6] favored in royal circles was officially replaced by views of Franz Zeiller and Franz Egger[7] accepting Kantian doctrine at the University of Vienna – Mihály Szibenliszt[8]

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3 Kant, contrary to epistemologies relying solely on experimental knowledge, makes us aware of the fact that man's cognitive ability also extends to unobservable phenomena, so "The mind, apart from the intellect, is capable of creating ideas that have no objective form, that is, they cannot be perceived (eg. God, soul, free will)." László TENGELYI: *Kant*. Kossuth Könyvkiadó, Budapest, 1988, p. 89.

4 The name of School of Reason already appears at Adam Friedrich Glafey (1723), who was a follower of Thomasius, "but it has been used by Kant and it also characterizes the rational tendency of science in contrast to the Historical and Theological School of Jurisprudence". Tivadar PAULER: *Bevezetés az észjogtanba*. Pest, 1852, p. 6. and *History of the Philosophy of Law in the Civil Law Word 1600–1900*. Volumen 9, edit: Damiano CANALE–Paolo GROSSI–Hasso HOFMANN, Springer Science+Business Media, B. V. 2009, p. 23.

5 József SZABADFALVI: *A magyar jogbölcseleti gondolkodás kezdetei, Werbőczy Istvántól Somló Bódogig*. Gondolat Kiadó, Budapest, 2011, p. 33.

6 Karl Anton MARTINI: *Positiones de iure civitatis in usum auditorii Vindobonensis*. Vindobonae, Typis Ioann. Thom. nobilis de Trattern, 1779.

7 Franz von ZEILLER, Franz von EGGER: Francisci Nobilis de ZEILLER: *Jus naturae privatum*. Editio Germanica tertia Latine reddita a Francisco Nobili de EGGER, Viennae, apud Car, Ferdinandum Beck, MDCCCXIX and Franz von ZEILLER, Franz von EGGER: *Das natürliche öffentliche Recht*, nach den Lehrsätzen des seligen Freyherrn C. A. von Martini vom Staatsrechte, mit beständiger Rücksicht auf das natürliche Privat-Recht des k. k. Hofrather Franz Edlen von ZEILLER, von Franz EGGER

8 Mihály SZIBENLISZT: *Institutiones juris naturalis* conscriptae per Michaelem SZIBENLISZT, Tomus I. *Jus naturae extrasociale complectens*, Eger, 1820. and Mihály SZIBENLISZT: *Institutiones juris*

as forerunner tried to adopt this new critical theory of reason in Hungary. He was followed by Antal Virozsil,[9] Imre Csatskó,[10] István Bánó.[11] At the end of the 19th century, the theoretical summary of the Law of Reason can be found in several works of Tivadar Pauler,[12] who himself shared its principles but dealt with the Law of Reason mainly in a historical way.

3. Impacts on the traditional relationship between the state and Churches

The attitude of the state to Churches was clarified at a conceptual level by the modern natural law theory. Elaborating the individual rights and system of legal norms of public law derived from them and creating coherence between them, the concepts set out on the functions and nature of state power and last but not least, the institutions and categories of public law defined in the modern approach – all they contributed to the change brought about by natural law in this area.

The individual rights derived from the Right of Personality *(ius personalitatis)* expressing human dignity – such as the right to personal liberty *(ius personalis libertatis)*, the right to protect and improve physical and mental health *(ius conservandi et preficiendi corpus et animum)*, the freedom of expression and thought *(ius liberae cogitationis et liberae communicationis idearum)*, the freedom of conscience and religion *(libertas conscientiae seu ius in religionis juxta proprium arbitrium agendi)*, the inherent rights of disposal over things *(iura connata rerum)*, the freedom of contract *(libertas negotii contrahendi)* and the right of association[13] – by applying to social contract theory, they are considered in the system elaborated by natural law as a basis for institutions of public law. However, the theory of social contract founded not only the legitimacy of nation-states, but also *the raisons d'être* of various church denominations.

The interpretation of state as a *maxima societas* have prompted to reconsider the legal concept of Churches. On the one hand, an absolutist definition of the state was outlined demanding to coordinate the social life as a whole, on the other hand, an individualistic church concept emerged which tried to regard Churches as a

naturalis conscriptae per Michaelem SZIBENLISZT Tomus II. *Jus naturae sociale complectens*, Eger, 1821.

9 Antal VIROZSIL: *Epitome juris naturae seu universae doctrinae juris philosophicae*. Pest, Typis Josephi Beimel, 1839. Pars I. Liber I. Sectio II.

10 Imre CSATSKO: *Bevezetés a' természeti jogba és a' tiszta általános természeti jog*. Győrött Streibig Lipóld' betűivel, 1839.

11 István BÁNÓ: *Elementa Jurisprudentiae naturalis secundum vestigia celeberrimorum* FRANC. nob. de ZEILLER, ac de EGGER aliorumque de jurisprudentia meritissimorum virorum conscripta a STEPHANO BANÓ, Claudiopoli Typis Lycei Regii, 1836.

12 Tivadar PAULER: *Bevezetés az észjogtanba*. Pest, 1852. *Az észjogtudomány fejlődése 's jelen állapotja*. Tudománytár, Buda, 1843. *Észjogi előtan*. Budapest, 1873. *Észjogi alaptan*. Pest, 1854. Cf József SZABADFALVI: Pauler Tivadar, az észjogtudomány utolsó nagy alakja. [Tivadar Pauler, The Last Great Figure of the Law of Reason School] *Zempléni Múzsa*, *epa.oszk.hu/02900/02940/00054/pdf/EPA02940_zmimuzsa_2014_2_012-018.pdf (Downloaded: 05. 10. 2016).*

13 SZIBENLISZT: *Jus naturae extrasociale…*, 50–51. Cf. ZEILLER–EGGER: *Jus naturae privatum…*, pp. 59–61.

society, i.e. association in the sense of private law. Natural law concept also attributed great importance to the authorities competing between two entities, for dissolution of which, as a secular science offered tools to the state bearing in mind the *salus rei publicae,* the well-being of its citizens, the general good.

4. New Church Concept

In the concept of modern natural law, the *pacta sunt servanda* principle and the theory of social contract based upon it are regarded as a basis of any form of society. Thus, it deals with the laws in detail by which every model of society is defined. As a result of the interaction of Protestantism and modern natural law, the legal concept of the Church was supplemented with new content, with a consensual issue. The idea, that Church is also established through the union of freedom-minded people, just like any other society, including the state, pushed the divine origin of power into the dimensions of theology.[14] The legal concept of the Church emphasizes the associational its nature, by which the Church itself at an early stage was also considered as a *societas aequalis*, i.e., as an equal society.[15] Consequently, the matters have to be arranged by the Church members communally. The full Government of a Church is entitled only to those, whom the community authorized it to. As a result of this authority transfer, the Church functions in an unequal form of society *(societas inaequalis)*. The full Church Government is entitled only to those whom the community authorized it to. This natural law concept aimed to justify the autonomy of Churches.

5. Natural-law Interpretation of Relationship between State and Churches

The new church concept provided secularism characterizing the modern states and the need for separation of Church and state generating many benefits for both entities. With the spread of the idea of a modern, sovereign country, the state already reserved the authority defined as the collective term *"ius circa negotia religionis seu ecclesiastica"* by which it determines the relationship between secular power and religion. In this concept, the state is regarded as an ultimate and supreme authority which such phrases as *suprema maiestas*, *maxima societas* refer to. According to it, the state has competence for all forms of social coexistence, for which it no longer recognizes any intermediate powers. Therefore, the state is undoubtedly entitled to political rights over holy matters, all the more so the state

[14] On the development of church concept and the difference of Catholic and Protestant church concept are detailed in Béla SZATMÁRY*: A Magyarországi Református Egyház szervezetének kialakulása és jelenlegi működése, különös tekintettel az egyházi bíráskodásra*. Habilitation dissertation.

[15] About modells of society cf. Otto Friedrich VON GIERKE: *Natural Law and the Theory of Society, 1500 to 1800*. Volume II. Cambridge at University Press, 1934, p. 380.

demands the regulation of all issues that may have a direct or indirect impact on the purpose of the state, which may be any obstacle to the purpose of the state.[16]

Conversely, the Churches enjoy great moral prestige, which the state is willing to put it into its service. The citizens of the state are often members of a Church, that as a society *(societas)* has certain authority to give directives *(potestas)* their members.[17] Therefore, in order to avoid the conflict of competence and any overlapping of it between the state and the Church, it is necessary to clarify to what extent the state is allowed to intervene in the affairs of the Church. Natural law considers the prerequisite of understanding the answer to this matter by defining certain concepts.

6. Definition of Churches, religions and religious acts, delimination of *ius in sacra* and *ius circa sacra*

Natural law defines the term of the Church as a society of natural persons sharing the same faith. Referring to its permeation, a Church may be universal *(universalis)*, which acts out as a community spreading worldwide, and it may be particular *(particularis)* if limited to a certain region.[18] Religion is meant by natural law, as our knowledge about God. The exercise of religion *(cultus Dei)* is characterized, as an activity encouraging to contemplate the perfection of God. They can be manifested in two ways: internally *(internus)* and externally *(externus)*.[19]

A difference is made between true *(vera religio)* and false religions *(falsa religio)*. Natural law considers true religion which meets the divine attributes, and a religion contradicting these attributes is considered to be a false one. Religions based on divine revelation *(religio positiva)* must be distinquished from religions of nature (natural religions) *(religio naturalis)* whose doctrines can be revealed by the inspiration of pure reason. A religion whose followers consider God as an existing and influencing the good fate and misfortune of people is recognized as a religion based on the senses *(religio sensualis)* and identified by natural law as pagan, i.e., not a Christian religions. Contrarily, a religion regarding God as the

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[16] "Cum denique Imperanti jus in objecta, quae uti impedimenta, ita media promovendi finis Civitatis esse queunt." SZIBENLISZT: *Jus naturae sociale*..., op. cit. 194. Cf. MARTINI 71., ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 255. VIROZSIL 335.

[17] "Membra Civitatis sunt una membra ecclesiae, potestate instructae, ne igitur inter potestatem ecclesiasticam, et civilem collisiones eveniant: necessarium est determinare, an, et quatenus civile imperium semet in religionis negotia exserat." SZIBENLISZT: *Jus naturae sociale*..., op. cit. 191.

[18] "Ecclesia est societas personarum, eandem religionem profitentium; estque vel universalis, quae per terrarum loca quaecunque dispersa et, vel particularis, quae in certis quibusdam locis provincia pago vel vico existit." SZIBENLISZT: *Jus naturae sociale…,* op. cit. 191. Cf. MARTINI 71. ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 255.

[19] "Religio est cognitio Dei (Theoretica), et determinatus modus Deum colendi (Practica). Cultus Dei est complexus actionum, ad quas divinorum attributorum contemplatio nos impellit, et prout hae actiones sunt internae, vel externae." SZIBENLISZT: *Jus naturae sociale*…, op. cit. 191. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 255.

moral Legislator, Judge and Executor is defined as a moral religion *(religio moralis)* and the religion of Christians is considered to be of this character.[20]

Natural law distinguishes among authorities over Churches according to the fact whether they belong to the category of *ius in sacra* or *ius circa sacra*. Natural law uses the term *ius in sacra* for unlimited authorisation over holy things, considering the ultimate goal of which, they focus on the eternal life and refer to the essence of religion and the related matters. This involves the exercise of spiritual jurisdiction manifested by service and delivery of Sacrament of God. The *ius in sacra* is an autonomous power of Churches, which can only be subject to the coordinating supervision of state power. The *ius circa sacra* is focused on secular conditions and the worldly prosperity as the purpose of the state. It is considered to be an absolutely state authority that, according to Territorial Principle *(ius territoriale)*, it can be forced only a given state and in its territory. Its purpose is dual: on the one hand, to ensure the free practice of religion for the citizens, so as to follow their way of virtuous life in a safe condition. On the other hand, to secure the purpose of the state, which can be realized by separation between state and Church, the delimination of authorities of both entities. Its purpose, inter alia, is to ensure that the authority of the Church should not cause any conflicts with the aim of the state. Considering the facts stated above, the state's authority over the Churches should be exerted in two directions: a) the coordination of religious activities referring to *ius in sacra*; and b) the rights of the *ius circa sacra*. The principle is relevant for both cases according to which the state may exercise supervisory power to prevent acts hindering the purpose of the state and support the religious activities, promoting the aim of the state.

7. The natural-law reasons of the state's authorities over Churches and the question of freedom of conscience

Natural law regards religion as a suitable tool to achieve the purpose of the state. The activities of Churches can greatly contribute to the achievement of the state's goals. Its aptitude is manifested in the fact that a respected religion, by its own doctrines, encourages virtuous life, and teaches pure morality. The fact that God is respected as a Legislator, a Judge, and an Executor who, as the Omnipotent punishes and rewards regarding not only earthly life, has a much greater incentive for moral behavior of the citizens than the state itself can exert. Natural law justifies its necessity by the fact that as the legislation cannot provide a solution in most cases, religion can be used to resolve such situations as a beneficent help. The idea accepted as a dogma – that God witnesses everything, is present everywhere and also the witness of the most secretly committed misdeed and even recompenses

[20] SZIBENLISZT: *Jus naturae sociale..., op. cit.* 193. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 256.

them – is regarded as a powerful way to promote a law-abiding behavior, in particular, an abstain from the commission of crimes.[21]

The exercise of religion is embodied in various actions to which the state authority relates selectively. As regards the acts hindering the purposes of the state, the state has a supervisory power *(ius inspectionis)* over Churches. However, the state supports the activities of Churches *(ius advocatiae)* as an aptitude and necessary means for promoting the purpose of the state.[22]

To define the fact which religious acts the state power relates to, the nature of the various religious acts must be made clearfied. The exercise of religion – as pointed out above – means both external and internal types of acts. It can be said that both of them can relate to the essence of religion, but they may be irrelevant in this regard, and they may be compulsory or voluntary. For both internal and external acts, the natural law emphasizes that anyone who disagrees with one of these is not obliged to exercise them formally.[23] The state power over holy affairs cannot relate to the internal religious practice since they cannot be subjected to the state power anyway. These acts belong to the category where the intellectual way of thinking of citizens is getting shape. As the natural law recognizes the freedom of conscience, i.e., the freedom of thought and expression *(ius liberae cogitationis et liberae communicationis idearum)*.[24] Similarly, the dogmatic acts of the essence of religion are not within the competence of the state either, since according to the position of natural law, the citizens of the state did not intend to grant to state such

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[21] "Religio est medium aptum et necessarium ad facilius, perfectiusque assequendum finem Civitatis. Aptum ideo: quia religio venerabili sua doctrina ad virtutem nos erudit, puram moralitatem urget, Deumque, ut Legislatorem, Judicem, et Executorem praemiorum, et poenarum, sine restrictione ad terrestrem vitam proponit, motiva ad honos civiles mores invitantia suppeditat majora quam Imperans suppeditare valet. Necessarium; cum legislatio plurimis casibus destitutam se cerneret, nisi beneficam ei religio praeberet manum." SZIBENLISZT: *Jus naturae sociale...*, op. cit. 193. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 256.

[22] "Cum denique Imperanti jus in objecta, quae uti impedimenta, ita media promovendi finis Civitatis esset queunt (§ 119), proprium sit juris majestatici circa divisio in jus inspectionis, et advocatiae patet." SZIBENLISZT: *Jus naturae sociale*…, op. cit. 194. Andor CSIZMADIA provides an interesting concept about *ius advocatiae* in his monograph entitled *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig* (Akadémiai Press, Budapest, 1976.) on page 208–209. He takes the view that "it is not correct to classify *ius advocatiae* into the scope of *ius circa sacra*", whereas this is rather a duty for the state, namely „to promote the implementation of the acts of Church". However, according to natural law the sovereignties of the state cannot be assessed solely in terms of entitlements, since, on the basis of the principle that all rights at the same time are bound to duty, the sovereignties of the state are also accompanied by obligations. All sovereignties of the state by its own means must ensure any legal certainty for its citizens in the best possible way. Therefore, in accordance with natural law, the state's sovereignties cannot be interpreted without certain obligation of the state.

[23] SZIBENLISZT: *Jus naturae sociale*…, op. cit. 194. Cf. MARTINI: 72. ZEILLER–EGGER: *Das natürliche öffentliche Recht*…, op. cit. 59.

[24] SZIBENLISZT: *Jus naturae extrasociale…*, op. cit. 50–51. Cf. ZEILLER–EGGER: *Jus naturae privatum...*, op. cit. 59–61.

a profound right. The right to security does not include the right to determine the dogmas referring to salvation.[25]

Due to the freedom of conscience, natural law regards religious acts as being free of coercion. Whether they are basic dogmas manifested by internal and external acts or irrelevant to basic dogmas, they are generally indifferent to the state. Everyone is entitled to freedom of conscience, so everyone has the right to practice his religion voluntarily and freely.[26]

In addition, the natural law also relates to situations that may arise where the state cannot ignore certain religious activities. If any dispute arises relating to the question that whether a religiously motivated act affects the state or not, then the given Church has to take the decision of the state into account, since all circumstances relating to the state are clearly and exclusively within its competence.[27]

8. The state coordination over religious acts belonging to the category of *ius in sacra*

The state coordination practically relates to those dogmatic religious acts which the state has no right to interfere with. However, to achieve the state's purpose more effectively, the state has the right to exercise some coordinating activity.[28] In addition to the fact that the state is not basically entitled to intervene in the internal affair of the Church, natural law, in the interest of achieving the state's purpose, refers to the following state interventions by virtue of its supervisory power:

- it has the right to examine dogmata as the acts pertaining to the essence of the Church before they are proclaimed whether they are not contrary to the purpose of the state *(ius examinandi dogmata ante promulgationem)*;
- it has the right to prohibit the church denominations that are contrary to the constitutional system of the state, so as not to give a Church the right to operate which endangers the common good *(ius societatem ecclesiasticam civili statui contrariam excludendi)*;

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[25] "Jus circa sacra religionis actus internos non respicit […]. Sed neque essentiales (dogmata) actus subsunt imperio civili eo sensu, acsi Imperans eadem determinare, et mutare posset." SZIBENLISZT: *Jus naturae sociale*…, op. cit. 195. Cf. MARTINI: 72. ZEILLER–EGGER: *Das natürliche öffentliche Recht.…*, op. cit. 259.

[26] "Existunt itaque primo actus religionis coactionis expertes, utpote interni, et externi essentiales, imo etiam accidentales civiliter indiferentes (§ 72). Ex eo subditis competiti libertas conscientiae, seu jus in negotiis religionis juxta proprium arbitrium agendi." SZIBENLISZT: *Jus naturae sociale* …, op. cit. 191–196. MARTINI: 73.

[27] According to Mihály Szibenliszt from the point of view of the state, it cannot be indifferent that the members of a religious denomination join to another state with the aim of dealing with church affairs there, nor the demolishing temples serving the protection of the state, etc. SZIBENLISZT: *Jus naturae sociale*…, 195.

[28] "Etsi Imperanti civili jus essentialia religionis negotia determinandi non competat, jus tamen supremae inspectionis in eadem denegari non potest." SZIBENLISZT: *Jus naturae sociale*…, op. cit. 196.

- it ensures that the affairs of so-called true Churches are in accordance with the principles referring to the state welfare *(ius providendi, ut ecclesiae verae negotia cum salutate Civitatis consentiant)*, to which three more rights are attached, so the state pay a special attention to the followings:
  1. to prevent someone from abusing the gracious acts, and from making unjust gain from such acts;
  2. that no one should dare to refuse church services without reason to citizens who need it, and thus, endangers public peace;
  3. that the breakers, in the event of a disturbance by their operation, and if there is no other way to call them to order, they shall be banned from the territory of the state.[29]

The state power relating to the rights to advocacy *(ius advocatiae)*, must primarily ensure that its citizens are able to properly fulfill the requirements of the religion they choose. Otherwise, the benefits of the practice of religion for the state will not be manifested as much as the state could possibly use them.[30] In this context, state support should focus on the following:

- supporting theological education to provide a sufficient number of scholars to coordinate the religious life – without such support, anarchy would dominate over the practice of religion as a result of delusions;
- encouraging the spread of literacy among the priesthood, as they are in direct contact with the citizens whom they can pass their knowledge. It is desirable for the state that its citizens should be educated;
- giving the priesthood dignified material support to fulfill their pastoral responsibilities;
- support of the religious eagerness of citizens is desirable for achieving the state's purpose. In this field, however, the state cannot limit the external manifestations of religious practice until they disturb the peace of the state by their excessive formality.

Thus, the state for supporting religious life:

- might build churches, might declare religious holiday as official celebrations, might grant state recognition for establishing merciful congregations;
- may legally prohibit actions violating faith, as well as the spread of all other religious acts and belief that are contrary to good morals;
- may expect its citizens to participate in the practice of the religion which the state's Ruler participates in – that is to say, where a constitutional status of State Church is granted to a church denomination. Nevertheless, one can only be

[29] SZIBENLISZT: *Jus naturae sociale…, op. cit.* 195–197. Cf. MARTINI: 73–74. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 269–270.

[30] "Ex jure advocatiae respectu cultus interni fluit imprimis jus curandi, ut cives in officiis religionis, quam profitetur, rite instituantur, secus ex religione emolumentum, quod posset, in Civitatem non redundabit." SZIBENLISZT: *Jus naturae sociale…,* op. cit. 198.

forced to carry out a religious act, if it is allowed or prescribed by the doctrine of a certain religion so that one is not able to commit any scandalous activity among citizens by neglecting such acts and thus, the public good should not be harmed.[31]

8. Natural-law aspects of practicing *ius circa sacra*

All acts that do not belong to the essence of religion, but have a substantive effect on the fulfillment of the state's purpose, fall entirely within the competence of the state. Thus, based on the above-mentioned principle, according to which the state may regulate any issue that promotes or even impedes the purpose of the state, the *ius circa sacra* is considered to be a state power. Thus, the supervisory and the supportive power of the state also may be extended to this field.

In addition to the above classification, another aspect may be taken into account in this area, namely, the threefold powers of the state differentiated by natural law that are as follows: the legislative, the executive and the supervisory power. However, the supervisory power of the state can also be exercised in respect of the rights of both *ius circa sacra* and *ius in sacra*, which is based on the fact that the state may get familiar with all the activities that could endanger the purpose of the state.

On the basis of the legislative power of the state relating to *ius circa sacra*, it may establish provisions for the members of the Church, as of a society *(ius de personis)*. In this framework, this right relates to all members of certain Church, with particular regard to persons holding office or serving in the Church, who are citizens of the state, as well. Therefore, the state may lay down provisions for these persons. The state may exercise this power to such an extent that it should not suffer any damage in the absence of any provisions for them. In this field, the state has rights as follows:

- Optimizing the number of persons devoted to Church service *(ius cavendi numerus ministrorum)*. From the viewpoint of the state, it is reasonable that the number of these persons does not exceed the desired level. This requirement is related to the property of such persons so that the state may take restrictive measures in this respect *(ius ferendi amortisations)*. By these restrictive provisions, the state may determine the extent of property that may be attributed to the ecclesiastical bodies. The proliferation of such property of the "dead hand" *(manus moruta)* poses various dangers to the state, inter alia, it hinders the trade and the cash-flow.
- Determination of the age reaching which is required to devote himself to Church service *(ius definiendi aetatem, qua quis huic statui se addicere posset)*. Such a person is exempted from other state services, such as military service, guardianship, curatorship.

[31] Ibid. 199–200.

- In addition to the rights of the state to support the Church traditions, ceremonies, and the establishment of fraternal communities, – which would otherwise be based on the voluntary decision of a Church –, the state may limit them in the interest of the public good *(ius ritibus arbitrariis etiam restringendi bona communis gratia)*.
- Termination of Church communities that abuse their authority and foment hostilities in the territory of the state *(ius abusum potestatis ecclesiasticae si dissidia, et turbae inde immineant, tollendi)*.
- Tolerance or prohibition of the religions that are divergent from the so-called "true religions" *(ius tolerandi ecclesias ex religionibus a vera alienis compositas, aut non tolerandi)*. It may happen that a "false religion" is regarded as a harmless to the state or even it may be useful for it, but there may also be such a false religion that at the same time harms to citizens of the state. In the former case, the right of tolerance prevails, but in the latter, it is not the case. The *ius tolerandi* can also take place in controversial situations where the prohibition of a false religion would result in greater harm to the state as if it were to be tolerated. In this case, the state rightly tolerates the incidentally harmful religion. Exercising the tolerance toward a harmful religion is even more justified if its members are foreigners. Therefore, it is a general principle, according to which, it is more appropriate to tolerate a harmful religion, as the prohibition of it would lead to a religious war, and as a consequence, it would destroy the state.
- Suppression of disruptive religious debates *(ius concertationibus silentium imponendi, si tumultibus occasionem praebeant)*.
- Prohibition of all the doctrines and books promoting them that are harmful to the constitutional settlement of the state *(ius prohibendi doctrinas quascunque noxias rei publicae)*.
- Creations of the laws that separate the ecclesiastical authority from the secular matters in which the Church cannot exercise any power *(ius legibus separandi)*.

The state may exercise the rights relating the supervisory power over religious affairs as follows:

- The state has the right to exclude those ecclesiastical persons operating in its territory from the leadership of the Church whose activities are suspected to be trouble-making or actually cause any disturbance. Against them, the state may also apply coercion *(ius exclusivae, coerendi)*. The state may enjoy this right over any society or association so that it may be exercised over the Church, as well.
- Associations and meetings endangering the purpose of state and suspicious in this regard can be checked and banned, if necessary *(ius heterias cohibendi)*.
- Provides access to the authorities of the state for every citizen who has been harmed by Church, obviously abusing its authority *(ius dandi recursum ad se)*.
- The state is entitled to the secular right to protect the Churches with its own authority *(ius brachii saecularis seu ius assistendi ecclesiae sua auctoritate)*.

- The state may exercise the right to impose state punishment on the subjects who, by not fulfilling their religious duties, also are in breach of their public duties *(ius puniendi)*.
- State penalties may be imposed for violating the Church laws that are not contrary to the purpose of the state, in order to increase their prestige *(ius leges ecclesiasticas sanctione civili muniendi)*.
- The state has a privileged authority over clerics which is manifested in eminent domain over ecclesiastical persons and goods *(ius eminens in ministros ecclesiae et bona ecclesiastica)*. Since the religion does not constitute an exemption from public duties, and the ecclesiastical goods are also regarded as private property over which the state has the right of expropriation. After all, the persons consecrated to religious services remain citizens of the state, and the assets used for the ecclesiastical purposes are also regarded as the national wealth of the state.[32]

The state exercises its supervisory power over religious affairs based on the theory that is becoming aware of any activity that could endanger the purpose of the state is within the competence of the state. The supervisory power of the state over religious affairs can prevail in both areas in *ius circa sacra* and in *ius in sacra*, thus it includes the supervision of the rules relating to the essence of the Church, the prohibition of church denominations which are contrary to the purpose of the state, and the repression of religious confrontations. These are explained in more detail in the following rights:

- The so-called "king's pleasure" *(ius placeti regii)* which means the supervision of decrees of Churches relating to disciplinary rules and religious dogmata from the aspect of whether they do not contain clauses jeopardizing the purpose of the state. The state exercises this right as a protector and advocate of the Church whose duty is to promote religious life.
- Convocation of clerics and seeking their advice in the religious issues *(ius ministros sacros convocandi, eorum consilia exquirendi)*.
- Prevention of schisms by appropriate means *(ius mediis aptis praecavendi, ne chismata oriantur)*.
- Establishing bodies, concluding agreements *(ius collegia, et tractatus instituendi)*.
- Supervising the use of the sacred objects, according to whether they are used for the intended purpose *(ius vigilandi, ut res sacrae suis adhibeantur usibus)*, as the abuse of the holy objects can repel the religious zeal.
- Preliminary examination of contracts with religious content concluded by the citizens of the state and, if they are contrary to the constitutional settlement and rule of the state, their annulment *(ius pacta civium, quae simul religionis negotia sint examinandi, si reipublicae noceant, irritandi)*. For example,

[32] SZIBENLISZT: *Jus naturae sociale…,* op. cit. pp. 208–210. MARTINI: 79. ZEILLER–EGGER: *Das natürliche öffentliche Recht*..., op. cit. pp. 286–287.

agreements that can also be regarded as secular contracts, such as engagement, marriage, as well as those that are related to a vow, a promise. The validity of transactions concluded with a religious vow can only extend as long as they are consonant with the purpose of the state. It produces an additional right entitled to the state that it may institutionalize marital barriers *(ius impedimenta matrimonium dirimentia stauendi)*[33].

9. Summary

Natural law derives the attitude of the state towards the Churches from the authority of the state. The power of the state to intervene in the affairs of the Churches, like all other powers, is purpose-related, thus has limitations. In the concept of natural law, the purpose of the state is the *salus rei publicae*, i.e., the public good, the guaranteeing of well-being and legal certainty of citizens of the state. In this context, the importance of religious life has a specific role, due to the fact that it is recognized by natural law as a useful, suitable and necessary means of promoting the public good. In parallel with this principle, individual rights are admitted by natural law as the starting point of the rules of the community, and they are regarded as based ones on human dignity. Both private and public law institutions should be at the service of human dignity.[34]

Natural law regards the right to freedom of conscience and religion as such an individual right to be enforced in a community that results in the freedom of expression and thought. Thus, the religious acts manifested internally cannot fall within the competence of the state. The so-called dogmatic actions related to the essence of the religions should be regarded as such. The definition of them is given by natural law within the scope of the *ius in sacra* which right does not otherwise fall into the state authority. According to its reasoning, the citizens were not willing to transfer the right of defining the dogmatic actions to the state.

Also, sharing the principle of the social contract theory, the natural law emphasizes a consensual basis of the legal status of Churches, religious denominations, and communities when it regardes them as a society, an association. According to this, they are considered as societies which involve natural persons confessing the same faith. Due to the *maxima societas* nature of the state, the associations established in the territory of the state may follow their aim freely until they impede the achievement of *salus rei publicae*, i.e., of public good, by their activities.

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[33] SZIBENLISZT: *Jus naturae sociale...*, op. cit. pp. 205–28. MARTINI: 78–79., ZEILLER–EGGER: *Das natürliche öffentliche Recht...*, op. cit. pp. 281–286.

[34] This concept still effecting to the present day can be read in the introductory part of the Act CCVI of 2011 on the Rights to Freedom of Conscience and Religion and on the Status of Churches, Religious Denominations and Communities. The Act, respecting the neutrality, *"admites the respect of human dignity as the key of promoting the common good which allows to fulfill their mission for the religious community"*. In this field, Churches of decisive importance of the country deserve special emphasis.

Natural law definitely emphasizes the requirement of the separation of state and Churches. The reason for separating the powers, however, is not based on the widespread opinion according to which the freedom of man is hindered by two interwired power, by the shackles of state and Church, therefore separating and weakening these two entities can lead to fulfilling the freedom of man. In the system of natural law, both the state and the associations established by citizens freely in the territory of the state, such as religious communities, may not serve a different purpose than the well-being of the members, that is of the citizens. Bringing these goals together is vital for both of them. In order to ensure them, the state admits the religious communities as a useful and necessary means of the public good. The Churches and religious communities, as suitable and necessary means of ensuring the *"salus rei publicae"*, cannot endanger the common good. However, they realize the common good by various means, so the distinction between these powers is justified by natural law, as well.

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EXPERIENCES IN CONNECTION WITH THE SYSTEM OF ONLINE INVOICE*

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1. Introduction

The digitalization has a great impact on the Hungarian tax procedures in the last years, so in this short article, I will review these and present the major milestones. One of them was the Online Account system, which can effectively help to ensure the highest possible level of tax revenues.

From 1 January 2016, every online billing program had to have data service functions. In case of an audit, the billing program provides data about a defined period or defined invoices. It is important that in the case of the amount of 100,000 HUF VAT it was obligatory to report about the invoices to the tax authority. The system was under testing from 1 January 2017. The tax authority aimed to introduce automatic data services. Similar systems are used in Turkish and Brazil with the exception that in those countries, only the tax authority is entitled to issue online invoices. From 1 January 2017, the invoice shall contain the tax number of the buyer if the amount of VAT is or over 100,000 HUF. After the testing period, the system entered into force. Advantage of the system that the data service is full and clear. Together with the EKÁER, it could be a great tool to filter out fictional invoicing on and of course, it contributes to environmental protection because it can decrease the amount of paper invoice. The disadvantage of the system is that it causes huge administrative burdens and costs to the companies. In order to reduce the costs, the government enhances to issue free billing programs to the companies.[1]

As of 1 July 2018, it is obligatory to provide data on the invoices containing charged value added tax at least of 100,000 HUF, issued of the transactions between domestic taxpayers.

As of 1 July 2018, the data disclosure regarding the data of the invoices issued (and documents to be regarded as equivalent to the invoice) shall be fulfilled after

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1 Zoltán NAGY–Beáta GERGELY–Balázs KATONA: *Problems relating to tax avoidance and possible solutions in the European Union's and Hungarian Regulation.* Curentul Juridic, The Juridical Current, Le Courant Juridique, Petru Maior University, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation, Vol. 74, p. 65, September 2018.

the issuance, within a short period of time, by electronic means. In the case of invoicing with the use of billing/accounting software, the invoice data shall be transmitted to the NTCA without human intervention, via the public internet immediately, after the preparation of the invoice.

Data of the invoice shall be recorded on the web interface in case of invoicing with the application of form, e.g., invoice pad (accordingly manual invoicing). The data report shall be fulfilled within five calendar days. This deadline is shortened if the invoice contains a charged tax of 500,000 HUF or more than this amount. The data of the invoice containing 500,000 HUF or more charged tax shall be recorded on the web interface on the day after the day on which the invoice was issued.

The data disclosure liability in principle is covered by such an invoice issued on the transactions between domestic taxpayers in which there is 100,000 HUF or more charged tax.

The objective of the introduction of the online data report and the establishment of the data management system is to further whiten the economy by discouraging tax frauds. This is complemented by the free online invoicing function, as a service of the NTCA. With this development, a large amount of invoice turnover becomes visible and traceable for the NTCA consequently the risk management can be more effective and the VAT revenues can be significantly increased.[2]

Within the system of online invoice

- real-time data on the issued invoices arrive at the NTCA,
- issued invoices can be queried by recipients of invoices and issuers of invoices as well,
- a large amount of the invoice data is rapidly available for the purpose of effective risk analysis and audit which is assisting the detection of tax frauds,
- with the automation of the data report, the administrative burdens are reducing for users of billing/invoicing software,
- the new system substitutes the consolidated data report of issuers of invoices.

The basis of the solution is such a combined IT system which is able

- to receive and to control the invoice data that were sent in an electronic standard message as well as to confirm the sending, with the application of a system-system connection provided to taxpayers,
- to support the manual recording of invoice data on a web portal,
- to trace economic activities and processes via the immediately available invoice data.

The online invoice assists the tax audit work of the NTCA; it makes the economic processes more transparent and broadens the group of the compliant taxpayers.[3]

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2 https://onlineszamla.nav.gov.hu/a_rendszerrol (14/11/2019).

3 Act CXXVII of 2007 on the Value Added Tax Chapter X INVOICING Rules on the Issue of Invoices.

2. Registration procedure

Pursuant to point 9 of Schedule No. 10 of the Act CXXVII of 2007 on Value Added Tax[4] being in force as of 1st July 2018 the data disclosure within the meaning of points 5 to 8 of the Schedule referred to above shall be fulfilled on the electronic platform provided by our Administration (in the case of issued invoices containing input tax reaching the amount determined by the referred legal regulation, the taxpayer obliged to do so has to perform data disclosure in relation to the data of concerned invoice to the state tax and customs authority). Registration is needed for the fulfilment of data disclosure obligation, which has to be accomplished either by the ones using an invoicing program or by the ones using an invoice pad (invoice issued manually).[5]

3. Taxpayer registration

The precondition for the fulfilment of data disclosure is an existing so-called "client gateway" access (KÜNY storage) of the taxpayer, the legal representative of the taxpayer, or rather the appointed agent of the taxpayer.

30 minutes are available for carrying out the registration; however, because of security reasons, which are the re-identification at the client gate, 5 minutes are granted for tax identification code to be provided.

In possession of the Client Gateway access, the single registration of the taxpayer, the legal representative of the taxpayer or the appointed agent of the taxpayer is necessary for the fulfilment of the data disclosure on the electronic platform of the Online Invoice System.

A person registered by the state tax and customs authority can be considered as the *legal representative* of the taxpayer who is entitled to represent the taxpayer according to the legislation applicable to the taxpayer. In the case of legal representatives, the state tax and customs authority ex officio provide the procedural right of the legal representatives as of 2014 (the so-called automatic right creation).

Appointed agent of the taxpayer registered by the state tax and customs authority is entitled to perform the registration if

- s/he is entitled to full representation in all types of cases before the state tax and customs authority;
- s/he is entitled to administer all taxation cases;
- s/he is entitled to administer all declaration, data disclosures/-supplies related to taxation and all report, submission and application;
- s/he is entitled to administer all data disclosure;
- s/he is entitled to administer the data disclosures related to value added tax.

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4 Hereinafter referred to as VAT Act.

5 Krisztina Elvira HONOSI: Az Online Számla felület használata kapcsán felmerült kérdések és válaszok. (Questions and Answers related to using the Online Invoice interface.) *Adóvilág*, April 2019, pp. 29–32.

4. Process of the registration of the taxpayer's representative

As it was already mentioned before, the taxpayer liable to data disclosure must be registered in the *Online Invoice System* to secure the fulfilment of obligation a registration, which can be conducted by the legal representative or appointed agent entitled thereto on behalf of the taxpayer liable to data disclosure. The natural person registering the taxpayer is a so-called *"primary user"*.

In order for the person liable to data disclosure to be able to perform his/her obligation according to legal provisions and without any human intervention in connection with data from his/her invoices produced by his/her invoicing program, registration of a so-called *"technical user"* is also necessary. After registration of the technical user, those data will be available that is necessary for the communication between the taxpayer's invoicing program and NTCA's server.

In order to perform data disclosure obligation, a so-called *"secondary user"* can also be created. The secondary user is created by the primary user with access rights defined by him/her.

In the course of client registration, technical user and the secondary user can be created in one step as well; however, a user can also be created later on after the successful registration, after logging in the Online Invoice portal.

5. Practical rules on the Issue of Invoices

Subject to the exception set out in the next subsection, as regards the obligations relating to invoicing, the rules of the Member State where the goods or services are supplied, is respect of which the invoice is made out, shall apply. [6]

Subject to the exception set out in next subsection, invoicing shall be subject to the rules applying in the Member State in which the supplier of the goods or services has established his business or has a fixed establishment that is most directly involved in the transaction in question, or the absence of such place of establishment or fixed establishment, the Member State where the supplier has his permanent address or usually resides, where:

a) the supplier of the goods or services is not established in the Member State in which the supply of goods or services is deemed to be made, or the supplier's fixed establishment situated in that Member State is not involved according to the Section 137/A in the supply of goods or services, and the person liable for the payment of the VAT is the person to whom the goods or services are supplied, or
b) the supply of goods or services is deemed not to be made within the Community.[7]

In the case provided for in previous Paragraph *a)*, invoicing shall be subject to the rules applying in the Member State in which the supply of goods or services is

[6] VAT Act, 158/A § (1).
[7] VAT Act, 158/A § (2).

deemed to be made where the invoice is issued by the customer to whom the goods and/or services are supplied.[8]

The provisions of this Section shall not apply to the obligation for the storage of invoices.[9]

6. The most common faults in connection with the Online invoice reporting

For nearly a year, in Hungary, taxpayers have been required to report their invoices issued to domestic taxpayers in real-time, whenever the chargeable VAT exceeds 100,000 HUF. Pitfalls of online invoice reporting

Experience shows that the internal audit practice related to online invoice reporting is not yet mature on the taxpayers' side, while the tax authority, following European trends, rapidly progresses towards the most comprehensive and extended reports possible.

It is the taxpayers' own responsibility to subsequently verify the data they submit via the online invoice reporting interface of National Tax and Customs Administration, Hungary (NAV), but not all taxpayers have taken steps to ensure this. However, it is highly recommended to detect and correct any errors. Partly because the ultimate, and not very distant goal of the tax authority is to be able to prepare tax returns(s) based on invoices reported. On the other hand, given that it is the taxpayer's responsibility to correct both the invoice and its reporting for invoices not accepted by NAV, if they fail to perform this, they may face fines. The most common online invoicing faults – 500,000 HUF per invoice.

6.1. Failed invoice reporting

The experiences show that there are still taxpayers with failed real-time invoice reports. One year after the introduction of online invoices, this is no longer a matter of discretion. In such cases, the tax authority may use its powers set out by law and impose a default penalty of 500,000 HUF after every invoice not reported. The tax authority's system technologically provides an opportunity for taxpayers to subsequently report any missing data, thereby avoiding the risk of future sanctions. However, as of 4 June 2019, subsequent data reporting for a former period is allowed using the new XSD (1.1) version only; the use of the former XSD 1.0 version is excluded.

6.2. Failure to check NAV receipts returned

For each invoice XML submitted on the online invoicing interface, taxpayers are returned a NAV message. The receipt/notification tells whether the invoice reported has been accepted by the tax authority, and if so, certain details are checked by the tax authority, and errors are reported back. Based on our experience, there are

8 VAT Act, 158/A § (3).
9 VAT Act, 158/A § (4).

still companies that either fail to or cannot read the notifications returned by the tax authority. These messages are important because if they contain any error requiring correction, it must be addressed in all cases, in order to avoid fines.

6.3. Incorrect reporting of corrective invoices

We still find a lot of mistakes on the taxpayers' side for corrective invoices. These are attributable partly to incorrectly issued invoices (the issued corrective invoice itself fails to comply with the VAT Act), partly to correctly issued, but incorrectly reported invoices (where the structure or content of the submitted XML schema fails to comply with the regulatory requirements). For corrective invoices, particular attention must be paid to the details of the original transaction affected by the correction. These data must appear on both the invoice and the associated XML schema. It is a common mistake when a correction is posted as an ordinary transaction instead of a correction, while this results in an invoice and invoice reporting with incorrect content for the tax authority.

6.4. Incorrect tax numbers specified

As regards tax numbers, the tax authority defines which characters of the tax number should be included in the XML schema (country code, number of digits). It is important that there is a difference between the definitions of the Hungarian and Community tax numbers, which results in issues for many taxpayers when they include the incorrect format. The tax number is of particular importance as, amongst others, the tax authority uses these to associate an invoice report submitted by the issuer of the invoice with the M-sheet submitted by the invoiced party. It may result in unnecessary inspections by the tax authority if the authority's risk analysis team indicates the need for an inspection due to different or missing tax numbers.

6.5. Incorrect dates specified

For invoices reported by taxpayers, the reported date and the one actually specified on the invoice often fail to match. In such cases, the tax authority may suspect that the data was not reported in real-time or via exclusively a machine-machine interface. The tax authority's system provides an opportunity to remedy the error, but this basically requires the detection of the error.

6.6. Recommended internal audit

The above errors can be controlled by monitoring the returned NAV online invoice report notifications, and a software solution is also available. As NAV checks the contents of invoice reports in an automated way, it is advised to run a test at least periodically, in order to detect and enable the addressing of risks and possible differences associated with online invoices before they are found by NAV. It is worth

considering the above since a failure to report invoice data in real-time can result in a fine of half million forints per invoice, which may lead, in a given case, to the risk of a tax penalty exceeding the VAT content of the invoice. What is more, NAV is already working on version 2.0 of the XSD foreseen for 2020, which builds on version 1.1, whereby compliance with the latter cannot be avoided.[10]

7. NAV Online invoice version 2.0

The Hungarian Tax Authority (NAV) published the missing, but most awaited component (the new XML template [XSD documentation]) of the real-time invoice reporting obligation, Online invoice version 2.0 for the last day of August. This template details the future structure in which automated invoicing applications, or ERPs must report data to the tax authority, including the type of data to be included in online invoice data reports.

The finalisation of online invoice reporting documentation was preceded by a multi-month period designed to make sure that both the developers and key Hungarian advisory firms can express their views about the draft published in May. It was a bit unconventional that in order to seek opinions a certain platform (called Git Hub) was also made available. Although this was unprecedented in Hungarian public administration, this not nothing new to software developers.

The new real-time invoice reporting version will surely represent some challenges for the developers of invoicing programs as the related template also offers or expects the provision of such data that, in the moment of closing and raising the invoice, are not always available. With these new data, the authority would like to receive such pieces of information that go beyond the original concept, which was the prompt reporting of the data of invoices raised. So far these data appeared neither in invoice images nor in the VAT Act, therefore (without enhancements) invoicing programs or ERPs will not be suitable for their reporting.[11]

8. The first specific details about Online invoice version 2.0

Following the outage, on the last day of July the interface of NAV Online invoice (real-time invoice) featured a new version. However, the long awaited "big score" – the description of the new 2.0 XSD version of online invoice – remains yet to be seen, but development on the side of HU TA continues undiminished. Now, real-time invoice moved forward by updating API, a feature facilitating data inquiry.

By taking a single step, HU TA managed to move forward by two versions, as versions 1.9 and 2.0 went live simultaneously. On top of this, these were made available not only in the test environment, but immediately appeared on the live interface of Online Invoice.

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[10] Lilla NÉMETH: *Online invoice reporting – the most common faults*. https://www.rsm.hu/en/blog/2019/06/online-invoice-reporting-the-most-common-faults (14/11/2019).

[11] Péter KÓCZÉ: *NAV Online invoice version 2.0 – more than just an invoice*. https://www.rsm.hu/en/blog/2019/09/nav-online-invoice-version-2-0-more-than-just-an-invoice (14/11/2019).

Reading the related technical pieces of information, it turns out that functions made available so far may mostly attract increased interest among developers. This present announcement has not yet outlined the changes that will need to be made in the invoicing and reporting modules, and the final details of new XSD version 2.0 have also not yet been revealed. In addition to minor corrections and enhancements, the most important feature is that the machine interface of Online Invoice was updated. This can be regarded as the second generation of the tax authority's development that was launched a year ago. The interface was expanded by adding useful inquires and functions that both strengthen the digital service provider role of the tax authority and also assist in promoting the digitalisation of taxation and financial administration.

With the new version:

- it is possible to inquire into the detailed data of invoices where our company appears not as a supplier but as a buyer, in cases where the seller indicated our tax number,
- regarding invoices reported it is possible to filter them according to periods based on either the date or even the date of the data processing of the invoice,
- based on the serial number of the original invoice, the related adjustment invoice chain can also be inquired into,
- whenever we look up invoices, in addition to mandatory search parameters, it is now also possible to enter further new optional search parameters.
- According to latest information provided by the Ministry of Finance, during the last 13 months the data of more than 50 million invoices were reported in the Online Invoice application. So currently this is the vast database in which corporate taxpayers can enter extended inquiries to obtain an increasing array of information about themselves.

For the time being, the new, version 2.0 machine interface can be used in parallel with version 1.x that is currently used to report data. So far, no information has yet been provided by the tax authority about the process of mandatory migration to the new version.

The opening of the new API is a small step for one man, but a significant (although not yet a giant) leap for companies in terms of the future of digital taxation. This may primarily promote the digitisation of financial processes, the further automation of control points and can take us one step closer to the practical application of eVAT, that has currently only been formulated as an objective.[12]

[12] Péter KÓCZÉ: *The first specific details about Online számla version 2.0.* https://www.rsm.hu/en/blog/2019/09/the-first-specific-details-about-online-szamla-version-2-0 (14/11/2019).

9. Closing remarks – All roads lead to digitization in taxation

Also as a result of electronic data disclosures – real-time invoice data reporting, EKAER, or online cash register data – the estimated VAT gap in Hungary has decreased considerably in the course of the past 5 years, to 9 per cent in 2018. In the meantime, the scope of tax information possible to be digitally queried from HU TA databases is extended significantly.

Although the proportion of the VAT gap has decreased significantly – already below the EU average – still, nearly HUF 350 billion per year does not flow in the budget. All this continues to motivate the Tax Authority to introduce further changes, such as the preparation of e-VAT schemes as soon as possible. In addition to real-time invoice data, the VAT return scheme – intended to be introduced by 2021 – can also be based on data received from online cash registers and ATMs. The plans of the HU TA include machine-aided processing of cash register log files, channelling them to accounting, and machine-aided electronic invoicing as well.

The digitization of taxation, the automation of invoicing and VAT returns entail both opportunities and risks for taxpayers. As shown by tax inspections considerably altered in recent years, there is an increased emphasis on continuous risk analysis based on the analysis and verification of information received online. Both domestic and international regulations build on data requests and data analyses more and more extensively. As a result, it is required to develop more efficient control and data processing strategies at management levels as well, in order to enable taxpayers to keep pace with following the information expected by and available to the Tax Authority.

For companies of rather complex operations, compilation of VAT analytics and VAT returns can be a challenge, tying up considerable capacities month by month. Where it is necessary to synchronize the work of several people and several systems, it is definitely worthwhile to take into consideration what means can be relied on for automation, even supported by databases made available by the HU TA.

As the first-round investigations by the HU TA are also conducted digitally, immediately, using risk analysis software products, those who do not want to fall behind the Tax Authority in terms of digitization are not offered the opportunity but are rather expected to compare information possible to be queried digitally with their own systems. Those who continue to perform manual checks only and still try to reconcile increasing data piles and to detect potential errors only manually, are required to make allowance for more and more potential errors and greater risks. The control process can be shortened and risks can be reduced by automation and software support.

All in all, by reason of the reporting obligations introduced by the tax authority, the lack of experts on the labour market and wage pressures, the solution for companies can be provided by investing into automation, perhaps by way of efficient risk management applications and software products developed by external service providers.

According to HU TA data, the number of taxpayers registered for the real-time invoicing system has exceeded 350 thousand, and real-time invoice data reports have been submitted by more than 260 thousand taxpayers. The number of invoices submitted is already around 60 million, associated with a total of 32 million successful data transmissions. Although the success rate is increasing, it is far from being perfect: on working days, the success rate is about 80% according to HU TA data. This is why on-going checks of real-time invoice data reports are required on the taxpayer side as well!

While major anomalies are eliminated by the system – for example, if data reporting of an invoice is attempted several thousand times by a system, even HU TA employees will become alerted and phone the taxpayer for reconciliation –, reports with errors must be dealt with by companies to find the root causes. To highlight some of the most frequent problems occurring in connection with real-time invoicing, it is important to establish a correct invoicing process and data content, to send them correctly to the HU TA, as well as to monitor – and correct, if necessary – certificates returned by the Tax Authority.

Real-time invoice data reporting will be extended by further data as from 01 April 2020; it is worthwhile to commence preparations for this as soon as possible, especially if the company uses its own individual ERP system or invoicing system. Reporting is feasible by external data disclosure modules, but XML files are required to contain the new data as well from April onwards. Such data include data that are not necessarily required to be indicated on the invoice itself pursuant to the VAT Act. Besides, there are data associated with relief or legal consequences by EU regulations in respect of displaying them on invoices, such as specifying the tax number of a (foreign) buyer. And companies need to start their switchover to the integration of new mandatory and recommended data content into their invoices in due time. The test interface of real-time invoice 2.0 is already available for preparations.[13]

Literature

[1] Krisztina Elvira HONOSI: Az Online Számla felület használata kapcsán felmerült kérdések és válaszok. (Questions and Answers related to using the Online Invoice interface.) *Adóvilág*, April 2019, pp. 29–32.

[2] Péter KÓCZÉ: *NAV Online invoice version 2.0 – more than just an invoice*. https://www.rsm.hu/en/blog/2019/09/nav-online-invoice-version-2-0-more-than-just-an-invoice (01/10/2019).

[3] Péter KÓCZÉ: The first specific details about Online invoice version 2.0 https://www.rsm.hu/en/blog/2019/09/the-first-specific-details-about-online-szamla-version-2-0 (01/10/2019).

[13] Lilla NÉMETH: *All roads lead to digitization in taxation as well*. https://www.rsm.hu/en/blog/2019/11/all-roads-lead-to-digitization-in-taxation-as-well (14/11/2019)

[4] Lilla NÉMETH: Online invoice reporting – the most common faults. https://www.rsm.hu/en/blog/2019/06/online-invoice-reporting-the-most-common-faults (01/10/2019).

[5] Lilla NÉMETH: *All roads lead to digitization in taxation as well*. https://www.rsm.hu/en/blog/2019/11/all-roads-lead-to-digitization-in-taxation-as-well (14/11/2019.).

[6] Zoltán NAGY–Beáta GERGELY–Balázs KATONA: *Problems relating to tax avoidance and possible solutions in the European Union's and Hungarian Regulation*. Curentul Juridic, The Juridical Current, Le Courant Juridique, Petru Maior University, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation, vol. 74, p. 64, September 2018.

[7] Act CXXVII of 2007 on the Value Added Tax Chapter X INVOICING Rules on the Issue of Invoices.

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BREXIT AS A FRUSTRATING EVENT? – REFLECTIONS BY THE DOCTRINE OF FRUSTRATION OF CONTRACT IN ENGLISH LAW

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1. Introduction

On 23 June 2016, a referendum took place in the United Kingdom (and Gibraltar) about the EU membership. 51.9% of voters were in favour of leaving the European Union. On 29 March 2017, the then British Prime Minister, Theresa May, based on the result of the referendum and having the consent of the Parliament, expressed the UK's intention to leave the EU.

Since that time, the withdrawal of the United Kingdom from the European Union has constantly been in the centre of the attention of the representatives of the various fields of law. Experts have been pondering how the leaving would go, will be a deal between the UK and the EU, or a 'no-deal Brexit' will take place, which impact will Brexit have on the labour market and the trade, and so on.[1] Nevertheless, among the mostly public law consequences, relatively little to say about those impacts, which Brexit has on the contractual relationships.

The main aim of the study is to give a respond to the question outlined in the title above. However, answering is not possible without the appropriate knowledge about the doctrine of frustration of contract as it exists in English law. Therefore, in the study, the evaluation of the doctrine of frustration of contract will comprehensively be reviewed, and the landmark cases relating to the topic will shortly be introduced. It should be added that the literature on the frustration of contract is extremely large; that is why the complete elaboration of the topic is not possible within the framework of this stud. There are several essential questions relating to

[1] From the relating literature see for instance Graham GEE–Luca RUBINI–Martin TRYBUS: Leaving the EU? The Legal Impact of "Brexit" on the United Kingdom. *European Public Law*, 2016/1., pp. 51–56.; Adam ŁAZOWSKI: EU Withdrawal: Good Business for British Business*? European Public Law*, 2016/1., pp. 115–129.; Martin GELTER–Alexandra REIF: What Is Dead May Never Die: The UK's Influence on EU Company Law. *Fordham International Law Journal*, 2017/5., pp. 1412–1442.; Lilla Nóra KISS: General Issues of Post-Brexit EU Law. *European Studies*, 2017/4., pp. 220–227.; Lilla Nóra KISS: Certain issues of the withdrawal of a member state: A public law aspect. *Curentul Juridic*, 2017/3., pp. 86–97.; Matthias LEHMANN–Dirk ZETZSCHE: Brexit and the Consequences for Commercial and Financial relations between the EU and the UK. *European Business Law Review*, 2016/27., pp. 999–1027.

frustration (e.g., legal effects of frustration, self-induced frustration, etc.), which have not been elaborated, of necessity, in this work.

After the short review of recent case law on frustration, it will be examined, if Brexit can be a frustration event. Accordingly, a recent English legal case, Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency will be presented, which is still pending, but has particular significance, since the Court of First Instance clearly delineated in its judgment those limits, along with Brexit can be assessed.

2. The theory of frustration of contract

All legal systems have their own solution for the treatment of the essential change of circumstance subsequent to the conclusion of the contract. The demand for treating the effects of the changes of circumstances on the contractual relationship, and for treating the situation evolved due to these changes, arose in the continental law relatively early. Similarly, this demand also appeared in the English law, since the various national legislators intended to react to the same problems, e.g., for the negative impact of the world wars.[2] Nevertheless, it is noteworthy that this demand arose much earlier in the English law, during the 1700s, than in the continental laws. In the judicial practice, the effects of the changes of circumstances can be treated along with the theory known as *frustration of contract*.

The binding force of a contract and its sanctity has practically not been controversial in the English law until the middle of the 19th century. According to the *doctrine of absolute contracts*, contractual duties were regarded as absolute, in the sense that supervening events provided no excuse for non-performance[3], regardless of the nature of the change. It meant that the contractual parties had to fulfil the contract even if changes occurred in the circumstances subsequent to the conclusion of the contract.

The doctrine of frustration of contract had been developed alongside various precedents and had been accepted as we know it now. In the course of this development process, various cases and events were outlined, which cause the essential change of circumstances and thereby lead to the frustration of contract and resolve the contractual parties from the duty to fulfil the contract. Such an event can be the failure of an anticipated event, the outbreak of war, the subsequent illegality and so on.

Nevertheless, it is important to note that there is no *numerus clausus*, i.e., the comprehensive classification of frustrating events is not possible. Over time, the number of these events has constantly been changing, sometimes faster, sometimes slower. At the beginning of the development of the theory, there was an extension, i.e., the number of judgments, in which the frustration of contract by a certain event was recognised, increased. Later, the initial frames started to narrow and there were

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2 Cf. Catharine MACMILLAN: English Contract Law and the Great War: The Development of a Doctrine of Frustration. *Comparative Legal History*, 2014/2., pp. 278–302.

3 Edwin PEEL: *Treitel on The Law of Contract*. Sweet and Maxwell, London, 2011, p. 920.

cases where frustration was successfully pleaded, but later, these were overruled.[4] Nowadays, the evolution and alteration of the doctrine are still ongoing, though its pace is much slower. Nevertheless, the question of frustration comes back time and again, which requires the courts to deal with and judge these cases.

3. Landmark cases in the English law relating frustration of contract

In the English law, literature and judicial practice relating to the doctrine of frustration of contract is fairly copious. English jurists prefer dealing with the topic, and the countless judgments, including recent cases, offer an excellent basis for them to do so. In the following, I review the most important cases of the development process of the above mentioned doctrine, since the introduction of all relevant judgment is not possible.

3.1. Declaring the binding force of contract: Paradine v Jane

The approach, which emphasised the binding force of contract, was based on a precedent that originated in the 17th century.

As evidenced by the facts of the case *Paradine v Jane*[5], a building rental contract was concluded between the contractual parties. However, the land was invaded by the enemy of the King and Jane was forced to leave the building. Since Jane could not use the building and could not take benefits, he denied paying the fee to Paradine, who brought an action against Jane and claimed the court to oblige Jane to pay the rent arrears.

As it was stated by the court, where a party creates a duty or charge upon himself by virtue of a contract, he is bound to perform the duty or pay the charge, notwithstanding any event, for which the party could have inserted a clause in the contract, which would prescribe what is to be done in case of an event. The party's duty to fulfil the contract, as well as his liability in case of the infringement of this duty, is absolute in nature.[6] Therefore, the court has held that Jane was bound to pay the fee to Paradine, despite the fact that the land was temporary invaded by the enemy, i.e., Jane was not relieved Jane of his obligation.

Though the court did not expressly deal with the question of impossibility, *William Page* emphasises that the case Paradine v Jane shall undoubtedly be deemed

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4 E.g. Carapanayoti & Co. Ltd. v. E. T. Green. Ltd. [1959] 1 Q.B. 131, overruled in Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93.; Government of Ceylon v Société Franco-Tunisienne d1Armement-Tunis ("The Massalia") (No. 2) [1960] 2 Lloyd1s Rep 352, overruled in Ocean Tramp Tankers Corp v V/O Sovfracht ("The Eugenia") [1964] 2 QB 226.

5 Paradine v Jane [1647] EWCH KB J5.

6 Cf. Hugh BEALE: Adaptation to Changed Circumstances, Specific Performance and Remedies. Report on English Law. In: Attila HARMATHY: *Binding Force of Contract*. MTA-JTI, Budapest, 1991, pp. 9–24.

as a milestone of the development process of the English law approach of the impossibility of the contract.[7, 8]

3.2. The first step to loosen the binding force of contract: Tylor v Caldwell

The strict and rigid approach of the courts to the binding force of the contract has seemed to be soften during the 19th century. The first stage of this process was the case of *Taylor v Caldwell* in 1863[9], in which the doctrine of frustration of contract was firstly enunciated. (It is noteworthy, that some authors mentioned it as the doctrine of impossibility of performance.[10])

According to the fact described, the plaintiff, Taylor, hired out the Surrey Gardens and Music Hall from the defendant, Caldwell, to use it for the series of 'grand concerts' enriched by visuals. Taylor took all the risks of organising the concerts, of the signing of the artists and so on. Just prior to the scheduled date for the first concert, the music hall was destroyed by an incidental fire and the concerts planned and already organised by Taylor could not have been held.

Taylor brought an action against Caldwell by reference to a breach of contract. Taylor considered that Caldwell could not fulfil his contractual duty because of the destruction of the building and therefore, he claimed compensation for damages incurred due to the breach of contract.

As *Justice Blackburn* formulated that *"(…) in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance"*. Accordingly, the burning to the ground of the music hall leads to the impossibility of the contract, which excused the contracting parties from performing the contract.[11]

The case Taylor v Caldwell is precedential for the practice of the fulfilment of contractual duties and of the excuse from them, since it derives from the previous, more than two-hundred-old practice. With the application of the fiction of an *implied condition*, Justice Blackburn created an exemption from the binding force of contract declared in Paradine v Jane, without derogating from the previous judicial

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7 William Herbert PAGE: The Development of the Doctrine of Impossibility of Performance. *Michigan Law Review*, 1920/7., pp. 589–614.

8 In the English law, Paradine v Jane was often misunderstood. The negative effects of this misinterpretation on the English law dogmatic was highlighted by *William Wade* in his relating work. See William WADE: The Principle of Impossibility in Contract. *Law Quarterly Review*, 1940/56., pp. 519–556. (hereinafter referred as to WADE [1]), p. 524.

9 Taylor v Caldwell [1863] EWCH QB J1.

10 Cf. Charles G. BROWN: The Doctrine of Impossibility of Performance and the Foreseeability Test. *Loyola University Chicago Law Journal*, 1975/3., pp. 575–593.

11 The doctrine of implied condition arises several theoretical and practical problems, therefore its applicability was hardly criticized not only in the past, but in the contemporary legal jurisprudence. See Leon E. TRAKMAN: Frustrated Contracts and Legal Fictions. *The Modern Law Review*, 1983/1., pp. 39–55.

practice.[12] Nevertheless, it is another question that the exemption had been more broadly interpreted in the judgments after Taylor v Caldwell than it was originally intended.[13] Thus, the scope of the exemption was considerably limited by the judgment in the case Taylor v Caldwell, since the impossibility of contract could have been based only on certain changes of circumstances, like the death or incapacity of the obligor, the occurrence of changes in circumstances, and the destruction either of the subject matter of contract or other thing, which is essential regarding the fulfilment of the contract.[14]

3.3. Krell v Henry

The exemption formulated in Taylor v Caldwell was the base of the judgment held in Krell v Henry 1902[15], which is arguably the best-known among the so-called coronation cases relating to the procession of King Edward VII that was cancelled due to his ill health. It is important to note that all of these cases are landmark cases regarding the evolvement and development of the theory of frustration of performance. [16]

As evidenced by the facts of the case, Henry hired rooms at Paul Krell's flat in Pall Mall, in London, to view from its windows the coronation procession of King Edward VII, which would pass along Pall Mall. After the conclusion of the contract, the king became seriously ill and therefore, the ceremony was cancelled just two days before the coronation. (Coronation was held much later, namely more than one year after the originally scheduled date.)

Henry paid £25 deposit but did not pay the fee for the room, because he could not use the flat. Krell brought an action against Henry and claimed for the outstanding £50. The court decided in favour of Henry and relieved him from paying the rest of the money. As it was stated, the inspecting of the coronation procession was the *foundation of the contract*, though the contract contained no reference to the coronation. At this point, it is worth invoking the stand of Justice Blackburn formulated in Taylor v Caldwell, in which he stated that the object of the contract should permanently exist.

Regarding the facts evidenced in Krell v Henry, it can be stated that the subject matter of contract did not change, inasmuch as the rooms to be hired by Henry still existed, and they were in an unchanged state, i.e. they were identical. In a legal sense, the impossibility of the fulfilment of the contract did not occur. Neverthe-

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12 R. G. McElroy–Glanville Williams: The Coronation Cases I. *Modern Law Journal*, 1941/4., pp. 241–260, p. 242.

13 Ibid.

14 Cf. Appleby v Myers [1867] LR 2 CP 651.

15 Krell v Henry [1902] 2 KB 740.

16 Coronation cases are reviewed and analysed by *McElroy* and *Williams* in their two-part study, in which they pay particular attention to Krell v Henry, Herne Bay Steamboat v Hutton (1903] 2 KB 683), and Chandler v Webster ([1904] 1 KB 493). See McElroy–Williams op. cit. and R. G. McElroy–Glanville Williams: The Coronation Cases II. *Modern Law Journal*, 1941/5., pp. 1–20.

less, the subject matter of the contract, or more precisely, the essential character of the subject matter of contract changed due to the change of circumstances. As *Lord Atkin* explained, "[t]he subject matter of the contract was 'rooms to view the procession', but the postponement mad the rooms not rooms to view the procession".[17] As *Wade* concluded in his referred work, "(…) all points which are within the contract as agreed by the parties are part of the subject-matter of the contract, and all points which are outside of it go at most to motive and are irrelevant".[18]

Briefly, in Krell v Henry the contract did not become impossible, but the purpose of the contract was frustrated, for which the contract was concluded. In this sense, the doctrine of frustration of contract was more broadly interpreted.[19]

It is also important that frustration covers both the frustration of performance of contract and the frustration of purpose (of contract) in English law. Conversely, the examined expression means only the frustration of purpose in the American law, i.e., it has a narrower interpretation, at which the commercial impossibility and impracticability appear as an independent category.[20] [21]

4. The theory of frustration from the 20th century

As it was previously emphasized, the above mentioned precedents are definitely landmark cases in the course of the development of the doctrine of frustration of contract. However, treating the impacts of the changes of circumstances arises time and again. New situations arise, and new judgments were born, by which even the LRA contains provisions, the original doctrine has further been refined and shaded.

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17 William WADE: *Consensus* Mistake and Impossibility in Contract *The Cambridge Law Journal*, 1941/3., pp. 361–378 (hereinafter referred as to WADE [2]), p. 366.

18 Ibid.

19 The Krell v Henry was elaborated by *Zoltán Csehi* in his work relating to impossibility. See Zoltán CSEHI: 'A király megbetegedett': a szerződés lehetetlenül. Az idő dimenziója a lehetetlenülés körében – az időszakos lehetetlenülés problémája. In: *Emlékkönyv Lontai Endre egyetemi tanár tiszteletére*. ELTE-ÁJK–Gondolat Kiadó, Budapest, 2005, pp. 37–52.

20 Rodrigo Uribe MOMBERG: *The effect of a change of circumstances on the binding force of contracts. Comparative perspectives*. Intersentia, Cambridge–Antwerpen–Portland, 2011, p. 139.; Arthur L. CORBIN: Recent Developments in the Law of Contracts. *Harward Law Review*, 1937/1., pp. 449–475., pp. 464–466.; Arthur ANDERSON: Frustration of Contract – A Rejected Doctrine. *DePaul Law Review*, 1953/1., pp. 1–22.; Steven W. HUBBARD: Relief from Burdensome Long-term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment. *Missouri Law Review*, 1982/1., pp. 79–111, pp. 83–84.; Melvin EISENBERG: Impossibility, Impracticability and Frustration. *Journal of Legal Analysis*, 2009/1., pp. 207–261., p. 210. and p. 233., footnote 52.

21 In this context see Paula WALTER: Commercial Impracticability in Contracts. *St. John's Law Review*, 1987/2., pp. 225–260.; Richard A. POSNER–Andrew M. ROSENFIELD: Impossibility and Related Doctrines in Contract Law: An Economic Analysis. *The Journal of Legal Studies*, 1977/1., pp. 83–118., and Myanna DELLINGER: An „Act of God" – Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change. *Hastings Law Journal*, 2016/6., pp. 1551–1620.

The doctrine of frustration of contract got a different, but also exact description in case *Davis Contractors v Fareham Urban UDC*[22].

According to the fact described, Davis Contractors agreed with Fareham Urban District Council to erect 78 houses within a period of eight months, at a price of £92,425. The work started in June 1946, but due to various reasons (e.g., a serious shortage of skilled labour and materials in the industry), it took not eight but 22 months and was completed only in May 1948. Moreover, the completion of the work was much more expensive than anticipated. Davis Contractors were paid the contractually agreed price but bought an action arguing for more money based on the fact that the contract had become frustrated and therefore, they were entitled to further payment based on a *quantum meruit* basis.

The court recognised that the obligor's duty to perform the contract became more difficult do to the changes in circumstances, i.e., the lack of skilled labour and materials. However, it formulated that the contract was not frustrated. At this point, the opinion of *Lord Radcliffe* shall be highlighted, in which he attempted to define the frustration of contract in the following way: *"(...) frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract*. [23]*"* This approach was later confirmed by other judgments, for instance in *National Carriers Ltd v Panalpina (Northern) Ltd*[24] and in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[25]. In the former case, it was held that the doctrine of frustration is also applicable to leases in exceptional circumstances, although lease is more than a simple contract.

Regarding all the above mentioned facts, that there are cases, when the literal compliance of contract conditions (e.g., contractual price) would be unfair for both parties in light of the new (changed) circumstances, therefore the law relieves both contractual parties from the duty to perform the contract.[26]

Relating the doctrine of frustration of contract, *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*[27] is also a landmark case.

According to the facts described, the defendant, Wijsmuller agreed to transport the plaintiff's large and heavy drilling rig, named Dan King, from Japan to the Rotterdam area of the North Sea, using a transportation unit, described as Super Servant One or Super Servant Two. These were large, self-propelled, semi-submersible barges built for carrying large loads such as this rig. Under the contract, the defendant

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22 Davis Contractors Limited v Fareham Urban District Council [1956] AC 696.

23 Davis Contractors Limited v Fareham Urban District Council [1956] AC 696. Cf. Hugh COLLINS: *The Law of Contract*. Cambridge University Press, 2003, p. 298.

24 National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675.

25 Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93.

26 A. B. Menezes CORDEIRO: Brexit as an Exceptional Change of Circumstance?, In: Nazaré da Costa CABRAL–José Renato GONÇALVES–Nuno Cunha RODRIGUES (eds.): *After Brexit. Consequences for the European Union*. Palgrave Macmillan, Cham, 2017, pp. 147–163, p. 154.

27 J. Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1.

could replace the transportation unit by other means of transport or cancel the contract on grounds determined in the contract. Such events were the force majeure, Acts of God, perils or danger and accidents of the sea, acts of war or warlike-operations, acts of public enemies, blockade, strikes, etc., which reasonably may impede, prevent or delay the performance of this contract.

In January 1981, several months before Dan King was due to be tendered for carriage, Super Servant Two foundered and became a total loss in the course of off-loading another drilling rig in the Zaire River. Wijsmuller informed Lauritzen, that they would not carry out the transportation of the rig with either Super Servant One or Super Servant Two. Wijsmuller alleged that Super Servant Two would have been used for the Dan King carriage contract. It was added, that the other vessel, Super Servant One, had been scheduled to carry, and did carry, cargo under two other contracts spanning the expected period of performance under the Dan King contract.

Wijsmuller and Lauritzen entered into new negotiations, which led to a further agreement in April 1981 under which the rig was transported by Wijsmuller between July and October by barge and tug. This different method got carriage caused both of the parties' loss or increased expense, therefore both parties claimed for the loss it has suffered. In the action, Lauritzen claimed damages for breach of the Dan King carriage contract, while Wijsmuller pleaded that the contract had been frustrated and claimed for the extra costs arisen by the performance of the contract.

The court of first instance ruled in favour of the plaintiff, who appealed to the Court of Appeal. The appeal was dismissed by *Lord Justice Bingham*. In his judgment he resumed the essential elements of the frustration contract and defined its special conditions in the given case. According to the judgment, the contract was not frustrated, because Wijsmuller's chance to perform the carriage contract physically still remained after the sinking of the Super Servant Two. Anyway, Wijsmuller put its own interests above the other party's, when considering economic and business policy aspects, decided to perform another existing contract, and, with this act, booked the other, in the carriage contract also specified vessel which would also be suitable for transporting Lauritzen's rig. In the judgment it was stated that the frustration of contract could occur only in case of a certain external event or change in circumstances, i.e., frustration cannot base on the conduct or the choice of the party claiming frustration. Moreover, this party cannot contribute to the occurrence of the frustrating event.[28] [29]

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[28] The case was reviewed and criticised by *Steve Hedley*. See Steve HEDLEY: Carriage by Sea. Frustration and Force Majeure. *The Cambridge Law Journal*, No. 2 (1990), pp. 209–211.

[29] The contribution of the party claiming frustration to the occurrence of the frustrating event was also examined by the court in *DGM Commodities Corporation v Sea Metropolitan SA.* As it was formulated in the findings of the judgment, the party's contribution shall be interpreted broadly; it does not require the party's wrongful conduct, but the active conduct of the party or of other person representing the party is enough to state the contribution. See DGM Commodities Corporation v Sea Metropolitan SA [2012] EWHC 1984.

The frustration of contract was also examined by the court in *Gamerco SA v ICM/Fair Warning (Agency) Ltd*.[30] Gamerco, a Spanish company, agreed with the corporate persona of the American rock band, Guns N' Roses to organise a concert to the stadium Atletico Madrid. Above the concrete organising tasks, Gamerco also agreed on the previous promotion of the event. A few days before the concert, engineers reported the venue was structurally unsound and the competent authorities banned its further use pending further investigations. At the same time, Gamerco's license to use the venue was revoked. Since there was no chance to use another appropriate venue, the concert finally was cancelled. Gamerco brought an action against the band and claimed the recovery of the sum of 412,500 dollars, which was previously paid by Gamerco. In its judgment the court stated that the contract was frustrated because the performance of the contract became incapable due to the revocation of the permit by the competent authority. Therefore, the band was obliged to recover the sum paid.

In *Sea Angel*[31], the frustration of the contract also was stated by the court. As evidenced by the facts of the case, in the summer of 2003, the Tasman Spirit, a tanker loaded with light crude oil, ran aground and was broken in two, near the port of Karachi, Pakistan. Due to the accident, large quantities of crude oil spilled from the tanker, causing significant marine oil pollution.

Tsavrilis, a group dedicated to saving life and property at sea and to protecting the marine environment from accident-related pollution, concluded a contract with the owners of the Tamsan Spirit to assist in the salvage operation concerning the tanker. In order to perform the contract, Tsavrilis concluded further contracts and hired several vessels. One of them, the Sea Angel had the task to act as a shuttle tanker and to carry the oil from the damaged Tasman Spirit to a larger tanker. The Sea Angel was hired for twenty days, but the vessel arrived at the location about three months after the expiry of the contract. The delay was due to the fact that the vessel was withheld by the authorities in the port of departure. (As it was later proved, the authorities' conduct was unlawful.) Tsavrilis denied paying the fee for the time after the expiry of the contract.

The claimants took legal action to recover the hire fees. The Queen's Bench ruled in favour of the claimants and stated that the contract was not frustrated. On the one hand, the risk of detention is well-known and typical in the salvage industry, and it is inherent in such contracts, therefore Tsavrilis should have taken it into account as reasonable risk, i.e. this risk was foreseeable. On the other hand, the risk of delay falls within the scope of contractual risks, which should be taken by the hirer, Tsavrilis. Tsavliris appealed to the Court of Appeal, which dismissed the appeal.

[30] Gamerco SA v ICM/Fair Warning (Agency) Ltd [1995] 1 WLR 1226.
[31] The Sea Angel [2007] EWCA Civ 547.

5. Brexit as a frustrating event?

The political changes of the last few years showed several examples, which evaluation as a frustrating event is controversial at present.

Among these examples, the Brexit, i.e., the withdrawal of the United Kingdom from the European Union, has special importance. Brexit can have several impacts on contracts and their performance. Thus, after the occurrence of Brexit exchange rate changes can occur or various taxes and duties can be introduced, due to which the profitability of the previously concluded (i.e., at the time of Brexit already existing) contracts can decrease. Accordingly, neither the actual date of Brexit nor its conditions are foreseeable, which made the assessment of the situation particularly difficult.

Moreover, the fact that the fundamental freedoms guaranteed by EU law, such as the free movement of goods and services, will no longer prevail, causes further difficulties in the case of the performance of existing contracts. There may be cases where due to Brexit, the performance of the contract becomes impossible or the maintenance of the contract is no longer in the interest of either or both of the parties. According to *Lehmann* and *Zetzsche*, such a situation would arise, when an English law firm provides advisory services regarding EU subsidies for an investment in the UK. Since these subsidies will no longer be available after Brexit, the service promised will become aimless.[32]

Nevertheless, in the majority of cases, Brexit makes the performance of the contract more difficult but does not make it impossible. When evaluating the impacts of Brexit, we need to be aware of the fact that not every contract is equally effected by Brexit, but its impact depends on the type of the given contract.[33] Accordingly, taking the findings of the previous judgments[34] into account, referring to Brexit as frustrating event can be successful very rarely, only in those cases, when Brexit actually causes the essential and radical change of the duties to be performed upon an existing contract.[35] Nevertheless, it cannot be excluded that in certain cases, Brexit gives rise to the early, impossibility-based termination of a given contract.[36]

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[32] Matthias LEHMANN–Dirk ZETZSCHE: Brexit and the Consequences for Commercial and Financial relations between the EU and the UK. *European Business Law Review*, 2016/27., pp. 999–1027, p. 1007.

[33] LEHMANN–ZETZSCHE op.cit. p. 1010.

[34] Relating to the closure of Suez Canal in 1956, some judgments were born, in which the court held that the Suez Crisis shall not be deemed as frustrating event, since the existing contracts were finally performed with significant time delays. See Albert D. Gaon & Co. v. Societé Interprofessionelle des Olégiaux Fluides Alimentaires [1959] 2 Lloyd's Rep. 30; Société Franco Tunisienne D'Armement v. Sidermar S.P.A. [1960] 3 W.L.R. 701; Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93. About the facts, the findings of judgments and the legal arguments see Michael FURMSTON: Contract Frustrated. Then Performed! *The Modern Law Journal*, 1961/1., pp. 173–178.

[35] CORDEIRO op. cit. p. 161.

[36] In its relating work, *Catharine MacMillan* examines the effects of Brexit upon English contract law. See Catharine MACMILLAN: The Impact of Brexit upon English Contract Law. *King's Law Journal*, 2016/3., pp. 420–430.

It should also be noted that in the English contract law practice, more and more contract is supplemented in the last few years by a hardship clause in the event of Brexit. By the insertion of a so-called Brexit clause into the contract, parties can provide about the functioning of their contractual relationship after Brexit. Parties may, for instance, determine either the automatic changes (e.g., termination of contract) or a procedure whereby discussions are held with a view to changing the contract, due to Brexit. Inserting a Brexit clause means security for the contractual parties. Nevertheless, in all other cases where parties do not insert such a clause, the impact of the Brexit on the existing contractual relationship will be examined and assessed, and legal consequences will be applied by courts on a case-by-case basis.

With regard thereto, *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency*[37], shall be mentioned.

According to the facts of the case, the European Medicines Agency (hereinafter referred as to EMA), after multiannual negotiations, entered into a lease for a term of 25 years in 2014 with the Canary Wharf Group (hereinafter referred as to CW) to secure premises for its headquarters in London. In August 2017, EMA informed CW that having considered the position under English law they intend to treat Brexit as a frustrating event. The EMA stated that after the United Kingdom's withdrawal from the European Union, the EMA should re-locate away from the UK. As the EMA stated, "[i]t would be unprecedented and incongruous for an EU body (…) to be located in the UK and continue to pursue its mission in London after the UK has left the EU".[38] Although Brexit has not occurred yet, in 2018, the EU passed a Regulation that relocated the EMA headquarters from London to Amsterdam. CW brought a claim against the EMA and disputed that Brexit would be a frustrating event. The EMA argued that the contract was frustrating on the grounds of *supervening illegality* since it would not be legally possible for it to continue with its headquarters in London as it did not have the legal capacity to hold or deal with immovable property outside the EU. On the other hand, EMA also it also relied upon the *frustration of a common purpose*.

The court decided in favour of CW and found that the lease would not be frustrated by Brexit, either because of supervening illegality or frustration of a common purpose. As it was stated, English contract law did not take into account supervening illegality arising under foreign law (e.g., EU law) when determining whether a contract had been frustrated. Therefore, though EU law may be relevant to the capacity of EMA to enter into the lease, it was not relevant to the question of whether subsequent illegality had caused the lease to be frustrated.

It is important to note that prior to this judgment, it was suggested that a 'no-deal Brexit' may constitute the kind of *unexpected and serious event* that would be classified as a frustrating event. Nevertheless, in spite of the clear reasons of the judgment, far-reaching conclusions must not be drawn, since the case is to be con-

[37] Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency [2019] EWHC 335 (Ch) (20 February 2019).

[38] Quotation from the EMA's letter of 2 August 2017.

tinued before the Court of Appeal, as the EMA appealed against the judgement. Anyway, the final judgment of the Court of Appeal could be a landmark case in the future regarding the assessment of Brexit. At the same time, it shall be seen that the United Kingdom's withdrawal from the European Union shall be examined by the court case-by-case, taking all special circumstances, conditions and features of the given case into consideration.

The assessment of Brexit and deeming it as an exceptional event is an important question not only from the English law but all Member States of the EU; both representatives of the literature and legal practice are concerned about the question. Relying on Brexit as a frustrating event can marginally be successful by English law. Nonetheless, there can be another approach outside the UK, in case of cross-border contractual relationships not governed by English law, since the change of circumstances and the supervening of special events are regulated b law in several states in the European continent.

In connection with the withdrawal of the United Kingdom, *Cordeiro* concluded that Brexit could be considered as an essential change of circumstances, which can be the basis for the amendment or termination of the contract, according to the provisions of the given national (German, French, Italian, etc.) laws.

At the same time, a contrary view seems to emerge in Germany. The representatives of this approach compare Brexit to the German reunification in 1990 and, by invoking the contemporary German judicial practice, does not consider the Brexit as an event, which would base, in general, the amendment and adaptation of contract to the changed circumstances. Instead of this, it is held that the impacts of Brexit should be assessed in the relationships between British and German business partners case-by-case and in full knowledge of the facts and circumstances. [39]

As it can be seen, Brexit can be assessed by the various national laws in different way. However, the examination of this question goes beyond the applicability of the civil law provisions of the various states, since a prior question, namely the question of the applicable law has to be answered. Thus, contractual parties have the right to choose the law to be applied for the given contract. Nevertheless, the Brexit also impacts international private law relations[40, 41], which also shall be taken into account.

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[39] Cf. David PAULUS: Der "Brexit" als Störung der "politischen" Geschäftsgrundlage? Privat- und Wirtschaftsrecht der Europäischen Union. In: Malte KRAMME–Christian BALDUS–Martin SCHMIDT-KESSEL: *Brexit und die juristischen Folgen*. Nomos Verlag, Baden-Baden, 2017, pp. 101–127.; Barbara MAYER–Gerhard MANZ: Der Brexit und seine Folgen auf den Rechtsverkehr zwischen der EU und dem Vereinigten Königreich. *Betriebs Berater*, 2016/30., pp. 1731–1740. (https://www.fgvw.de/files/brexit_160725_bb.pdf, date of download: 9 April 2019)

[40] Cf. Andrew DICKINSON: Back to the Future: The UK's EU Exit and the Conflict of Laws. *Journal of Private International Law*, 2016, pp. 204–205.; Johannes UNGERER: Consequences of Brexit for European Private International Law. *European Papers*, 2019/1., pp. 395–407.

[41] Cf.: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations, 2019, No. 834 (draft).

6. Conclusion

After the brief review of the relating precedents, it can be stated that English law recognises the effect of the change of circumstance, the supervening of a certain event, on the contractual relationship, by the application of the theory of frustration of contract.

However, as it was previously mentioned, the number and the classes of the frustrating events are not closed, but the scope of these events constantly changes. New cases arise, while others are overruled. Some questions have to be assessed in the same way for hundreds of years, while others need for new approach regarding the development of law and the economic and political changes all over the world.

There are events, which "frustrating effect" depends on the actual facts and circumstances of the given case. For instance, as *Lord Roskin* explained in National Carriers Ltd v Panalpina[42],

"(…) inflation, sudden outbreaks of war in different parts of the world, are all recent examples of circumstances, in which the doctrine [of the frustration of contract] has been invoked, sometimes with success, sometimes without."

Although the theory of frustration of contract is a relatively old doctrine in English law, it is still shaping, since the new events arise new questions to be answered, new situations sometimes require a new solution.

The assessment of Brexit is inevitable. Nevertheless, Brexit is difficult to assess, since there is only one case in which Brexit was invoked as a frustrating event. Based on the only, not yet final, judgment is known so far, Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency, Brexit does not cause supervening illegality, due to which the contract in question would be frustrated. As it was previously indicated, the case is pending and the parties are waiting for the decision of the Court of Appeal if it agrees or not with the grounds of the Court of First Instance. Whether it does or not, the judgment undoubtedly will be a milestone in the course of the recent development of the doctrine of frustration of contract.

[42] National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675.

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SOME REMARKS ON THE FUNCTIONING AND THE FUTURE PROSPECTS OF THE EUROPEAN BANKING UNION

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1. Introduction

The writing of the current article serves a two-fold purpose: *firstly*, to briefly introduce the history and the institutional framework of the *European Banking Union* (hereafter: EBU) created within the new supervisory framework of the *Economic and Monetary Union* (hereafter: EMU)[1] and to evaluate its functioning based on the reports of various EU institutions – e.g., the *European Court of Auditors* (hereafter: ECA) and the *European Central Bank* (hereafter: ECB) – and the case-law of the *Court of Justice of the European Union* (hereafter: CJEU). *Secondly*, to introduce the future prospects and possible policy options for the further development of the EMU. In doing so, the author introduces both pro and contra arguments in order to facilitate the drawing of thorough conclusions.

2. A superficial overlook of the institutional answers to the crisis: the creation of a system of supervision and banking union

The Ecofin Council of October 2007 acknowledged – though not *expressis verbis* – that the then shaping crisis of the US finance sector could possibly affect the single market. In conjunction with this, scholars,[2] think tanks[3] and the expert group

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[1] The author of the current article already elaborated the topic in his earlier writings, therefore dispenses with introducing this process in details again. For details see: György MARINKÁS: How not to build a Monetary Union? – The structural weaknesses of the EMU in the light of the 2008 crisis and the institutional reforms for their correction. Marcell SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International Law and European Law*. Vol. 2018 (Year of publication: 2019), pp. 437–471.; György MARINKÁS: Institutional Answers to the 2008 Crisis in the US and the EU: A Comparative Study. *European Integration Studies*, Vol. 14, No. 1 (2018), pp. 55–65.

[2] *Dennis Kelleher* and his fellow co-authors wrote – though regarding the situation in the US and not in the EU –, that strong and prospering market economies need strict and consequent regulation. As *Marek Dabrowski* argued in conjunction with this, weak and recessing markets on the other hand need prompt and firm intervention of public authorities in order to avoid the total collapse of the financial system. – D. M. KELLEHER et al.: The Dodd-Frank Act is Working and Will Protect the American People If It Is Not Killed before Fully Implemented. *North Carolina Banking Institute*, Vol. 20 (2016), pp. 145–147.; Marek DABROWSKI: The Global Financial Crisis. Lessons for European Integration. *CASE Network Studies & Analyses*, No. 384/2009, pp. 17–18.

chaired by *Jacques de Larosière*[4] already suggested back in 2008/2009 that the EU should create some sort of community level supervisory system. Legislators and regulators of the EU was lagging behind,[5] however; it was not until 2011[6] when the EU – as a belated response to the crisis and in order to eliminate any possible threats, which could jeopardize the stability of the financial systems of the EMU –, established the *European System of Financial Supervision* (ESFS).

The change in the ECB's director seat in 2011 gave an impetus for the already ongoing policy changes: while *Jean-Claude Trichet* insisted that the restrictive dispositions of the TFEU – namely the 'no bailout',[7] no default[8] assumptions – shall be kept under all circumstances, the new president *Mario Draghi* made his 'whatever it takes' speech in 2012 giving the green light to the *Outright Market Transactions*[9] (hereafter: OMT) and other reforms, which saved the Eurozone. However Draghi was praised for this revolutionary step – and not without a reason –, it is worth mentioning that despite the consistent denial of the *Banca D'Italia* – the Italian Central Bank –, it is probable that he played a serious role in the *forging* of Italian and Greek

3 CEPS: *Concrete Steps Towards More Integrated Financial Oversight. The EU's Policy Response to the Crisis*. Rapporteur: Karel Lannoo, Brussels, 2008, p. 59.

4 The High-Level Group on Financial Supervision in the EU: *De Larosiére Report*, 25/02/2009, Brussels. – Online available at: http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (11/11/2019).

5 As *advocate general Gerard Hogan* wrote in his opinion in the *Landeskreditbank Baden-Württemberg v. ECB* case: '[…] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.' – C-450/17 P – *Landeskreditbank Baden-Württemberg v. ECB*, opinion of advocate general Gerard Hogan, 5 December 2018, para. 2.

6 To be more precise in 2010 – before establishing the ESFS – the Council – as a transitional solution – called the *European Financial Stabilisation Mechanism* (EFSM) into being. The aim of the creation of the EFSM was to grant credit to the member states, which struggle with problems. The *European Stability Mechanism* (ESM) started to function in 2012. The aim of its creation was to provide the EU with a lender of last resort (LLR), which – in case of necessity – could grant credits to the member states and financial institutions facing crisis. – Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12/5/2010, p. 1–4); Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No. 407/2010 establishing a European financial stabilisation mechanism (OJ L 210, 7. 8. 2015, p. 1–2); ESM Treaty – Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017); See also: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en (11/11/2019) and https://www.esm.europa.eu/financial-assistance (11/11/2019).

7 Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26. 10. 2012, pp. 47–390, Article 125.

8 Ibid. Article 9.

9 See: Benoît Cœuré,: *Outright Monetary Transactions. One Year On*. Berlin, 2 September 2013. Online available on: https://www.ecb.europa.eu/press/key/date/2013/html/sp130902.en.html (03/11/2019).

'books' to secure the Eurozone entry of these countries.[10] – A machination that had serious long-run effects: that is to say, the Eurozone came near to its end. *Tim Worstall* an economist of the *Adam Smith Institute* – and a stubborn euro-sceptic – believes that one of the main causes for keeping the Euro alive by the member states is that they cannot even estimate the costs of its possible wind up.[11]

In addition to the above mentioned, the European legislators created the EBU, which was proposed by several authors years before. The banking union is based on two pillars, namely the *Single Supervisory Mechanism*[12] (SSM) and the *Single Resolution Mechanism*[13] (SRM). As *Luigi Chiarella* pointed out,[14] the previous banking supervision and resolution framework – which was based on cooperation –, failed during the crisis, because domestic authorities were prone to either turn a blind eye, when it came to their 'national champions' or to be reluctant to use public money for bailouts. The work started with the European Commission's *Roadmap towards a Banking Union*,[15] which outlined the current system, a combination of three methods,[16] forming a two-tier system consisting of the national and supranational levels. The domestic authorities and the ECB are obliged to cooperate in good faith

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[10] See: Simon JOHNSON: Mario Draghi and Goldman Sachs, Again. *The Baseline Scenario*, 17 March, 2010. – Online available at: https://baselinescenario.com/2010/03/17/mario-draghi-and-goldman-sachs-again/ (06/11/2019); James KWAK: Bank of Italy Defends Draghi. *The Baseline Scenario*, 19 February 2010. – Online available at: https://baselinescenario.com/2010/02/19/bank-of-italy-defends-draghi/ (06/11/2019); Yves SMITH: Corruption, EuroStyle: ECB Chief Draghi Fudged Italy's Books to Secure Eurozone Entry, Italy Stuck with Derivative Losses. *Naked Capitalism*, 26 June 2013. – Online available at: https://www.nakedcapitalism.com/2013/06/corruption-eurostyle-mario-draghi-fudged-italys-books-to-secure-eurozone-entry-italy-stuck-with-derivative-losses.html (06/11/2019).

[11] Tim WORSTALL: Both Krugman And Friedman Said The Euro Was A Stupid Idea: But They Did It Anyway, Didn't They? *Forbes*, 6 July 2015. Online available at: https://www.forbes.com/sites/timworstall/2015/07/06/both-krugman-and-friedman-said-the-euro-was-a-stupid-idea-but-they-did-it-anyway-didnt-they/#5a3b9f520e81 (10/11/2019); See also: Joseph E. STIGLITZ: Can the Euro be Saved? *Project Syndicate*, 05 May 2010. Online available at: https://www.project-syndicate.org/commentary/can-the-euro-be-saved?barrier=accesspaylog (10/11/2019).

[12] Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29/10/2013, pp. 63–89) *(SSM Regulation)*.

[13] Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30/7/2014, pp. 1–90) *(SRM Regulation)*.

[14] Luigi CHIARELLA: The Single Supervisory Mechanism: the Building Pillar of the European Banking Union. *University of Bologna Law Review*, Vol. 1 (2016), Issue 1, ISSN 2531-6133, pp. 34–90, pp. 41–46, p. 85.

[15] European Commission: *Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union.* Brussels, 12/9/2012, COM(2012) 510 final.

[16] Namely a scheme based on (i) the *cooperation and coordination* between national authorities, or on a (ii) *lead home supervisor* – which means that the home authority has supervisory powers over the whole cross-border group – or on a (iii) *supranational authority*. The current structure of the SSM is the combination of three methods.

and share powers.[17] The exact rules on this cooperation were refined in the case-law of the CJEU – as the author will introduce it in the second chapter.

The SRM – the second pillar of the banking union – covers the same scope as the SSM: that is to say, financial institutions that fall under the SSM are covered by the SRM too. The SRM Regulation established the framework for failing banks within the banking union.

However, the creation of such a system was a huge step forward – as a final obstacle to be tackled –; the newly established institutions had to withstand the supervision of the CJEU. Fortunately, they did well in this regard. In the *United Kingdom v. Parliament and Council* case[18] – also known as the 'ESMA-case',[19] the *Court of Justice* (hereafter: CJ) – in *Zoltán Angyal*'s words – delivered an amicable decision[20] for the EU in order to protect the authority of the ESMA. Similarly, in the *Gauweiler and Others* case,[21] the CJ was of the view that the so-called OMTs – in case they obey certain criteria – conform to the EU law.[22]

3. The practice and evaluation of the SSM and the SRM

3.1. The SSM

3.1.1. The main rules on the functioning of the SSM and the related case-law

While the *less significant credit institutions*[23] *fall under the supervision of the national authorities, the significant* ones[24] *are under the direct supervision of the ECB.*[25] – It has to be pointed out that *the notion of credit institution is a concept of the European Union Law*, which shall prevail.[26] – The ECB's *Framework Regulation*[27] for the SSM – alongside with the *CJ's case-law* – further refined the rules on

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17 SSM Regulation, Article 6(2).

18 C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014.

19 European Securities and Markets Authority.

20 Zoltán ANGYAL: Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, Tomus XXXIII, 2015, pp. 129–143.

21 C-62/14, *Gauweiler and Other*s, Judgment, 16 June 2015.

22 Ibid. para. 128; See also: P. A. VAN MALLEGHEM: Pringle A Paradigm Shift in the European Union Monetary Constitution. *German Law Journal*, Vol. 14 (2013), pp. 141–168.

23 The SSM Regulation does not contain the definition of credit institutions, instead it refers to Article 4(1) of Regulation (EU) No. 575/2013 of the European Parliament and of the Council, which defines credit institutions as follows: credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

24 The delimitation is to be made as contained Article 6(4) of the SSM Regulation.

25 The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold system of review: an *internal administrative review* and an *external judicial review*. – CHIARELLA, p. 70.

26 Ibid. p. 48.

27 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Cen-

cooperation, including: (i) the methodology for determining the quantitative criteria for classifying banks as significant or less significant; (ii) the exercise of powers; (iii) and the relations between domestic regulators and the ECB.

A crucial point of the regulation is the *separation of the ECB's functions as a central bank and as a financial supervisory authority:* while the Preamble records the general principles of this separation, Article 25 of the SSM Regulations contains the explicit rules.[28] Last, but not least, it is worth mentioning that, while – as a basic rule – the SSM applies to the member states of the Eurozone, it allows any EU member states to enter a 'close cooperation scheme'.[29] As mentioned above, some of the definitions and procedural rules were refined by the CJ.

In its recent judgment – delivered on 9 May 2019 –, brought in the C-450/17 P *Landeskreditbank Baden-Württemberg v. ECB* case,[30] which started after an appeal was lodged against GC judgement in the T-122/15 case,[31] the CJ – interpreting the provisions of Council Regulation 1024/2013 (SSM Regulation) and Regulation 468/2014 – held that 'the ECB is exclusively competent to carry out the tasks stated in that provision[32] in relation to all those institutions […] The national competent authorities thus assist the ECB in carrying out the tasks conferred on it by Regulation No. 1024/2013, by a decentralised implementation of some of those tasks in relation to less significant credit institutions […]'[33] The other parts of the judgment[34] – read in conjunction with the opinion of the advocate general[35] – made it clear that the SSM Regulation *assumes ex ante* that the direct ECB supervision is required and *the supervision of the national authorities are exceptional* and can prevail only in the case if particular circumstances existed under Paragraph 1 Article 70 of the said regulation.

In the C-52/17 *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde* the domestic court asked among others: whether […] a supervisory procedure may be regarded as having been formally initiated, within the meaning of that provision, where a credit institution reports to the national supervisory authority […] or where that authority has already adopted a decision in a parallel procedure concerning similar breaches. The court was of the view that a supervisory procedure cannot be regarded as having been formally initiated in the above mentioned case.[36]

In the C-219/17 *Berlusconi and Fininvest v. Banca d'Italia and IVASS* the CJ was of the view that Article 263 TFEU must be interpreted as precluding national

tral Bank and national competent authorities and with national designated authorities *(SSM Framework Regulation)*.

28 SSM Regulation, Preamble Articles 65, 66, 73, 77, 85 and Article 25.

29 SSM Regulation, Article 7.

30 C-450/17 P, *Landeskreditbank Baden-Württemberg* v ECB, Judgment, 8 May 2019.

31 T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*, Judgment, 16 May 2017.

32 Namely Article 4 and 6 of the SSM Regulation.

33 C-450/17 P, *Landeskreditbank Baden-Württemberg* v. ECB, Judgment, paras. 38, 41.

34 Ibid, paras, 31–33.

35 C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB*, opinion (op. cit. 5), para. 36.

36 C-52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, Judgment 19 December 2018, paras. 29–30, p. 61.

courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by competent national authorities in the procedure provided in [the related EU law].[37] – That is to say*; these decisions fall under the sole jurisdiction of the CJEU.*

In the C-594/16 Buccioni v. Banca d'Italia case, the CJ was of the view that the relevant EU law does not preclude the competent authorities of the Member States from disclosing confidential information. As the court stated it is for the competent authorities and courts to evaluate the interests of the parties.[38]

The General Court too, contributed to the clarification of some definitions and how the court shall interpret some of the provisions.

In the T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v. ECB,* the applicant contested the ECB's decision, in which it classified the applicant as significant, thus subject to its sole supervision. Similarly, in the T-712/15 *Crédit Mutuel Arkéa v. ECB* the applicant in its letter of 19 September 2014 contested the ECB's decision, in which the ECB claimed that it has the right to exercise the sole supervisory authority. In both cases, the GC rejected the applicant's pleas and upheld the ECB's decision.[39] – In the Landeskreditbank-case – as mentioned above – the appeal against the GC's judgement was recently decided by the CJ.

In the T-133/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB* the applicant alleged that the ECB interpreted the concept of 'effective director incorrectly' The GC rejected all the four pleas in law of the applicant as ill-grounded and upheld the ECB's decision.[40]

In the T-733/16 *La Banque postale v. ECB,* T-745/16 *BPCE v. ECB,* T-751/16 *Confédération nationale du Crédit mutuel v. ECB,* T-757/16, *Société générale v. ECB,* T-758/16, *Crédit agricole SA v. ECB and* T-768/16, *BNP Paribas v. ECB* cases *the applicants asked for derogation, which was denied by the ECB.* In each case, the GC was of the view that the ECB did not provide suffice and firm proof for the necessity of denying the derogation. Thus the GC annulled the contested decisions in each case.[41]

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37 C-219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, Judgment, 19 December 2018, para. 60.

38 C-594/16, *Buccioni v. Banca d'Italia*, Judgment, 13 September 2018, para. 41.

39 T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB,* Judgment, 16 May 2017, paras. 100, 112, 136, 142, 150; T-712/15, *Crédit Mutuel Arkéa v. ECB*, Judgment, 13 December 2017, paras. 108–109, 160–161, 212–214.

40 T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, Judgment 24 April 2018, paras. 33, 94, 103.

41 T-751/16, *Confédération nationale du Crédit mutuel v. ECB, Judgment*, 13 July 2018, paras. 1–11, 23–24, 59, 118; T-745/16, *BPCE v. ECB*, Judgment, 13 July 2018, paras. 1–10, 19, 20–21, 58, 112; T-757/16, *Société générale v. ECB*, Judgment, 13 July 2018, paras. 1–10, 19, 58, 111; T-758/16, *Crédit agricole SA v. ECB*, Judgment, 13 July 2018, paras. 1–10, 2324, 83–87; T-768/16, *BNP Paribas v. ECB*, Judgment, 13 July 2018, paras. 1–10, 23, 24, 83–87.

3.1.2. The evaluation of the functioning of the SSM

Both the European Institutions – namely the European Commission[42] and the ECA[43] – and also the *German Federal Ministry of Finance*[44] valuated the first three years of the SSM as a success in their reports, though indicated that there is still a room for further improvements. As an example, it was a common and crucial point in both reports that the ECB should put further emphasis on maintaining a strict separation between the ECB's monetary policy functions and its supervisory tasks as demanded by the SSM Regulation. The *Bruegel*[45] in its 2016 report – while also hitting a positive tone – criticized the *black box nature*[46] of the SSM's decision making procedure. The Bruegel – just like the ECA[47] – suggested the streamlining of the decision making procedure and the delegation of decision making.[48] The SSM related case-law of the GC – each of the judgments[49] delivered after the Bruegel's report – supports these findings: the pleas in law presented by the financial institutions were mostly based on the insufficiency of the ECB's reasoning. – Alongside with the incorrect interpretation of the EU-law and the excess of power. The latter is still a source of debates: having regarded the latest CJ judgments and scholar reviews on the SSM Regulation and its implementation, one can argue that a scheme like the SSM requires a clear accountability relationship also between the ECB and the *national competent authorities* (NCAs), something that is not fully fledged in the current legal framework as pointed out by *Karagianni* and *Scholten.*[50]

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42 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation, COM(2017) 591 final, Brussels, 11. 10. 2017, pp. 18–19.

43 ECA, Single Supervisory Mechanism – Good start but further improvements needed. *Special Report*, No. 29 (2016) Doi:10.2865/023587.

44 Federal Ministry of Finance (Bundesministerium der Finanzen), The Single Supervisory Mechanism: Lessons learned after the first three years. January 2018, pp. 4–5 – Online available at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/2018-01-26-SSM.pdf?__blob=publicationFile&v=2 (11/11/2019).

45 European think tank that specialises in economics.

46 The lack of transparency was a key point of the Transparency International's report too: B. BRAUN: Two sides of the same coin? Independence and Accountability of the European Central Bank. Transparency International EU, 2017 – Online available at: https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf (11/11/2019).

47 ECA, Special Report No. 29, Recommendation 1.

48 The Bruegel referred to the more transparent US system as an example to be followed. – Bruegel, European Banking Supervision: the First Eighteen Months D. SCHOENMAKER–N. VÉRON (eds.): *Bruegel Blueprint Series*, Vol. XXV (2016), pp. 4–6, ISBN: 978-9-07 8910-41-1.

49 T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB*; T-712/15, *Crédit Mutuel Arkéa v. ECB*; T-133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*; T-733/16, *La Banque postale v. ECB*; T-745/16, *BPCE v. ECB*; T-751/16, *Confédération nationale du Crédit mutuel v. ECB.*

50 Argyro KARAGIANNI–Miroslava SCHOLTEN: Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework. *Utrecht Journal of International and European Law*, Vol. 34 (2018), Issue 2, pp.185–194. Doi: http://doi.org/10.5334/ujiel.463.

3.2. The SRM

3.2.1. The main rules on the functioning of the SRM and the related case-law

As mentioned in chapter one, the SRM covers the same scope as the SSM, and the SRM Regulation's purpose is to provide a framework for failing banks within the banking union. The resolution is managed by the *Single Resolution Board* (SRB), a new agency of the EU, established in 2015. The SRB cooperates with the *national resolution authorities*[51] (NRAs). The resolution procedure is financed through a single resolution fund, which is financed by the bank sector. The purpose of the SRM is to ensure an orderly resolution of failing banks with minimal costs for taxpayers and to the real economy.

The case-law of the General Court – even if eight out of nine cases[52] have been dismissed so far[53] as inadmissible because of various reasons[54] – shows that the *financial institutions do not evaluate the procedure of the SRB as transparent:* in their applications,[55] they frequently claim that (i) the SRB should have notified them on their decisions – not only the NRAs – and that (ii) the SRB should have disclosed more details on the grounds of its decision.

As another conclusion, some procedural rules relating the functioning of the SRM are still to be clarified: in the *ABLV Bank AS v. ECB* the GC held that 'the contested acts are preparatory measures, which do not change the applicant's legal status […] in no way binding, but which constitutes the basis for the adoption by the SRB of resolution schemes or decisions establishing that resolution is not in the public interest'.[56] That is to say, the GC was of the view that these acts do not fall

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51 For details of the Hungarian regulation and domestic supervision system please see: Zoltán NAGY–Anett CSISZÁR: A hazai pénzügyi felügyeleti szabályozás a változások tükrében. *Publicationes Universitatis Miskolciensis,* Vol. XXXIV (2016), pp. 157–163.

52 T‑645/16, *Vorarlberger Landes- und Hypothekenbank v. SRB,* Order of the GC, 6 February 2017; T-661/16, *Credito Fondiario v. SRB*; Order of the GC, 19 November 2018; T-14/17, *Landesbank Baden-Württemberg v. SRB*, Order of the GC, 19 November 2018; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, 19 November 2018; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, 19 November 2018; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, 18 September 2018; T-281/18, *ABLV Bank AS v. ECB*, Order of the GC, 6 May 2019, para. 49; T‑283/18, *Bernis et al. v. ECB*, Order of the GC, 6 May 2019; T-158/18, *Scaloni and Figni v. Commission, EP, Council*, Order of the GC, 9 July 2019.

53 15 November 2019.

54 T-661/16, *Credito Fondiario v. SRB*; order of the GC, paras. 49, 55; T-14/17, *Landesbank Baden-Württemberg v. SRB*, Order of the GC, paras. 33, 51; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Order of the GC, paras. 24, 51; T-494/17, *Iccrea Banca v. Commission and SRB*, Order of the GC, paras 24–26, 69; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Order of the GC, paras. 15, 23–27.

55 T-661/16, *Credito Fondiario v. SRB,* Application, 19/09/2016; T-14/17, *Landesbank Baden-Württemberg v. SRB,* Application, 12/01/2017; T-42/17, *VR-Bank Rhein-Sieg v. SRB*, Application, 25. 01. 2017; T-494/17, *Iccrea Banca v. Commission and SRB*, Application, 28/07/2017; T-618/17, *Activa Minoristas del Popular v. ECB and SRB*, Application, 08/09/2017.

55 20 January 2019.

56 T-281/18, *ABLV Bank AS v. ECB*, Order of the GC, 6 May 2019, para. 49.

under the revision procedure contained by Article 263 of the TFEU. In this regard GC dismissed the applicants' arguments, namely that 'a declaration that an entity is failing or is likely to fail is a functional equivalent to withdrawing that entity's licence, and, as such, must also be open to judicial review'.[57] In the *T‑283/18 Bernis et al. v. ECB* case, the GC came to identical conclusions[58] under almost identical statement of facts.

In the T-158/18 *Scaloni and Figni v. Commission, EP, Council* case the GC had to deal with the question of jurisdiction over an alleged damage – which, based on the applicants' allegations –, was attributable to the Commission.[59] The GC was of the view that the application was 'noticeably inaccurate' and did not make it possible to state the nature of the Commission's failure and to establish a causal link between the unlawful act and the alleged damage. Thus the GC dismissed the application.[60]

As mentioned above, the only case, which was declared admissible so far, thus decided in its merits by the GC, was the T‑645/16 – *Vorarlberger Landes- und Hypothekenbank v.* SRB case, in which the applicant alleged the breach of essential procedural requirements by (i) lack of (full) disclosure of the contested decision, (ii) inadequate statement of reasons for the contested decision. The Court was of the view that the applicant has failed to show that the implementation of the contested decision could result in serious and irreparable harm.[61]

3.2.2. The evaluation of the functioning of the SRM

Based on a 2018 special report[62] of the ECA, the first three years of the SRB's functioning showed a mixed picture:[63] e.g., its hesitation to order the liquidation of *Banca Popolare di Vicenza* and *Veneto Banca* only in 2017 instead of 2016 – when it should have been – cost the Italian taxpayers a significant amount as pointed out by *Nicolas Véron*,[64] an economist at the Bruegel. As *Martin Sandbu* noted – how-

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57 Ibid, para. 24.

58 T‑283/18, *Bernis et al. v. ECB*, Order of the GC, 6 May 2019, paras. 4–6, 17, 22–23, 36–41, 51.

59 T-158/18, *Scaloni and Figni v. Commission, EP, Council*, Order of the GC, 9 July 2019, paras. 20–22.

60 Ibid, paras. 37–40, 50.

61 T‑645/16, *Vorarlberger Landes- und Hypothekenbank v SRB*, Order of the GC, 6 February 2017, para. 42; see also: Application (07/09/2016) to the GC in the T‑645/16 case.

62 ECA, Special report No. 23/2017: Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go, p. 68.

63 The agency was understaffed and resolution planning was not completed within the deadline. On the other hand, these shortcomings were associated with the period of starting, which could be tackled in the future. – Ibid. paras. 34, 55–56, 60, 63, 64–68, 103, 114, 125, 141.

64 Véron NICOLAS: *Bad News and Good News for the Single Resolution Board*. Bruegel, 15 January 2018. Online available at: http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board/ (11/11/2019).

ever, not in connection with the above mentioned case – that the ECB started to use its recent empowerment half-hearted.[65]

Even the latest reports show that 'the SRB's trajectory is still at a very early stage.'[66] In accordance with this, the European Commission stated[67] that 'it is premature to design and adopt legislative proposals at this stage'. While the reports made on behalf of the EU institutions or by them, seemed to hit a cautious tone, some academics concluded[68] that the member states of the EBU had recognised prevalence of the ECB's rights. In their view, the SRM regulation leaves no room for national resolution tools.

4. Future prospects

Regarding the future prospects, the literature is rather heterogeneous: it is portrayed either dark or thriving. *Joseph Stiglitz* – who predicted the fall of the EMU,[69] when the current crisis broke out – is still very sceptical regarding its chances to survive.[70] He argues that *the only way out is putting an end to the policy of austerity*: if the European policymakers were to put emphasis on growth instead of austerity, the chances of the EMU not to fall apart would grow. – The historic moment has arrived as the Franco-German tandem seems to be revived.[71] – On the other hand: in his view, it is still an open question whether it would ever retrieve its prosperity experienced in the first ten years of its existence.[72] One should not wonder that the member states, which have not strived to access earlier – because evaluating monetary sovereignty higher than the advantages of the common currency –, are less

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65 Martin SANDBU: *Europe's Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princeton NJ, 2015, p. 336, p. 313.

66 Nicolas VÉRON: Taking stock of the Single Resolution Board. Banking Union Scrutiny. *In-depth Analysis Requested by the ECON committee*. March 2019, p. 21.

67 European Commission, *The Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)*, Brussels, 30. 4. 2019, p. 12.

68 Danny BUSCH–Mirik RIJN–Marije LOUISSE: *How Single is the Single Resolution Mechanism?* European Banking Institute Working Paper Series 2019 – No. 30 – Available at SSRN: https://ssrn.com/abstract=3309189 or http://dx.doi.org/10.2139/ssrn.3309189 (12/11/2019).

69 STIGLITZ 2010.

70 Joseph E STIGLITZ: *Can the euro be saved? An analysis of the future of the currency union*, Rome, May 2014 – Online available at: https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2014_Rome_euro_ppt.pdf (11/11/2019).

71 The inauguration of *Emmanuel Macron* indicated the beginning of a new era, where France strives to become the equal partner of Germany again, which – since economic miracle of the 2000s – became the quasi singlehanded leader of the EMU. Sebastian PŁÓCIENNIK: Recovery of the Eurozone and a New Dynamic in European Integration: Implications for Member States outside the Monetary Union. *The Polish Quarterly of International Affairs*, 26/2017, pp. 7–21, pp. 15–16.

72 J. E. STIGLITZ: *The Euro. How a Common Currency Threatens the Future of Europe*. 1st ed., W. W. Norton & Company, New York, 2016, p. 448, Part IV/9–10, ISBN-10: 039325402X.

keen on adherence.[73] Moreover, in a recent article, *György Matolcsy* – the governor of the *Central Bank of Hungary* – sharing this scepticism, argues[74] that the introduction of the common currency was the result of a 'harmful dogma'; namely that the euro was the 'necessary' or 'normal' next step towards a unified Europe. In his view, neither of the two allegations were true. He argues that the introduction of the common currency was the outcome of some political considerations at the end of the 80s and the beginning of the 90s. He furthermore argues that the Eurozone still lacks most of the necessary pillars of a successful global currency e.g. a greater budget, a common finance minister and a ministry. He concludes that due to these shortcomings, the whole Eurozone should be winded up. – In his words: 'the time has come to wake up from this a harmful and fruitless dream.' Most interestingly, while he only mentions the negative aspects of the Euro in his writing – and dispenses with the positive ones –, he seems to be less critical when it comes to a possible common – and digital – Eurasian currency.[75] As a reply to the thoughts of the governor – and most probably as a measure aimed at calming the markets and the public opinion –, *Mihály Varga*, the current finance minister of Hungary stated that Euro-project is not hopeless and that Hungary will comply with her obligations arising from EU-membership, namely the introduction of the Euro.

István Dobozi – a former lead economist of the *World Bank* – while agrees with some of Matolcsy's statements and conclusions in his response, holds that the governor misdiagnosed the reason for the failure. In Dobozi's view, the latter one is not to be found in the lack of a common state or a common fiscal ministry: instead, it is attributable to *the failure of the internally fixed-exchange regime of the Eurozone* – which has not succeeded in eliminating the exchange rate risk – and to the *lack of fiscal co-ordination*.

While some appear to bury the Euro already – with an ill-concealed joy –, others argue that the fall of the EMU would jeopardise the future of the integration. In

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[73] Sebastian Płóciennik argues that there are three main reasons for this reluctance: (i) the EMU was on the margin of disintegration for years; (ii) they [the non-members of the EMU] fear that losing their monetary sovereignty would impose them to a possible asymmetric shock; and last (iii) so far they did not have to fear of being marginalized by two-speed integration as the UK gave serious weight to the non-euro platform. The Brexit will change the game however: both the platform's economic and political weight will shrink. – PŁÓCIENNIK 2017, pp. 8–10, 13–14; For a more detailed analysis on the effects of Brexit please see: Lilla Nóra KISS: General Issues of Post-Brexit EU Law (December 2017). *European Studies*, Vol. 4/2017, Available at SSRN: https://ssrn.com/abstract=3196102.

[74] György MATOLCSY: We need to admit the euro was a mistake. *Financial Times*, 3 November 2019 – Online available at: https://www.ft.com/content/35b27568-f734-11e9-bbe1-4db3476c5ff0 (03/11/2019).

[75] See: *Adózóna.hu* (31/10/2019), Matolcsy: Jön az eurázsiai digitális közös pénz. – Online available at: https://adozona.hu/altalanos/Matolcsy_jon_az_eurazsiai_digitalis_kozos_p_6DPJY3 (03/11/2019); See also: *Political Capital* (30/10/2019), Orbán-Putin meeting: lots of symbolism, no major development. Online available at: https://politicalcapital.hu/hireink.php?article_read=1&article_id=2465 (03/11/2019).

Angela Merkel's words: 'If the Euro falls, Europe falls.' [76] *Annamária Artner* and *Péter Róna* also share this view.[77] There are more optimistic authors; however; *Fred Bergsten* argues that the EMU and the EU will emerge even stronger once the crisis is over. He based his point of view on the history of the European project, which already survived several gross crises during its half-century long history.[78]

The survival of the Eurozone depends on the future path of the integration selected by the member states: based on the 2017 White Paper of the European Commission,[79] there are five scenarios. Two out of the five – namely scenarios No. 3: 'Those who want more do more' and No. 5; 'Doing much more together' – suggest closer cooperation and would practically result in the creation of a 'two- or multi-tier' integration structure. While there is a visible demand for such solutions in the political and academic debates, *János Martonyi* – the former foreign minister of Hungary – identifies any 'two- or multi-tier integration structure' as a threat. He argues[80] that there is not a single geographical, political or cultural borderline, which would legitimize and make an integration built on different levels functional. While he acknowledges that some of the recent developments – e.g., the banking union – was necessary, he warns that a situation, where the Eurozone would mean the European Union itself – a union within the union – shall be avoided. After the Brexit, however, when the 19 Eurozone countries will make up for more than 85% of the total GDP of the European Union, the realization of such a scenario shall be taken into account as a probable threat.

Last but not least, it has to be mentioned that the ECB has a new president in the person of *Christine Lagarde*,[81] which can be evaluated as a new possibility to leave behind some caveats of *Draghi's legacy*, e.g., *the negative interest rates*, which induced serious tensions between the ECB and the *Deutsche Bundesbank* – the central bank of the Federal Republic of Germany –, since these dry up the savings of the German citizens.[82] – It has to be noted that in the recent time, other gov-

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[76] As *Angela Merkel* stated: 'If the Euro falls, Europe falls.' See: Peter SPIEGEL: If the euro falls, Europe falls. *Financial Times*, 15 May 2014. Online available at: https://www.ft.com/content/b4e2e140-d9c3-11e3-920f-00144feabdc0 (01/11/19).

[77] Annamária ARTNER–Péter RÓNA: Eurosz(k)epszis: Az optimális valutaövezet elmélete és az euró gyakorlata. *Közgazdaság*, 2012/1., pp. 83–102, p. 100.

[78] Fred BERGSTEN: Why the Euro Will Survive: Completing the Continent's Half-Built House. *Foreign Affairs*, Vol. 91, Issue 5, 2012, pp. 16–22.

[79] European Commission: White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025. COM(2017) 2025 of 1 March 2017.

[80] JÁNOS MARTONYI: Differentiation or Disintegration. In: Marcel SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International and European Law 2018*, Eleven Publishing, The Hague, 2019, pp. 3–18, p. 18.

[81] European Council Press Release (18/10/2019) Christine Lagarde appointed President of the European Central Bank. Online available at: https://www.consilium.europa.eu/en/press/press-releases/2019/10/18/christine-lagarde-appointed-president-of-the-european-central-bank/ (06/11/2019).

[82] Paul CARREL: Count Draghila is sucking our accounts dry', says Germany's Bild. *Reuters*, 13 September 2019. Online available: https://www.reuters.com/article/us-ecb-policy-germany/count-draghila-is-sucking-our-accounts-dry-says-germanys-bild-idUSKCN1VY0MN (06/11/2019).

ernors, too, expressed their concerns.[83] – Another and even greater problems are that, while the negative interest rates proved to be effective during the darkest years of the latest crisis, as a result of their long-term application 'the monetary policy is almost out of ammunition' as *Olivier Blanchard* – a former chief economist at the IMF – stated.[84] That is to say; the ECB is left without effective tools in case of a new crisis.[85] The latter one seems to be a rather probable possibility, even Draghi indicated it as a serious threat during his last press conference as the president of the ECB.[86] Regarding the first question – namely, the tension with the Deutsche Bundesbank –, Lagarde seemed to steady down the nerves and induce a return to normalcy: the German government's decision to nominate *Isabel Schnabel* for the succession of ECB Executive Board member *Sabine Lautenschläger* indicated conciliatory attitude on the German side.[87] In sharp contrast with this however; Lagarde received sharp criticism from *Jens Weidmann*, the governor of the Deutsche Bundesbank, even before she had the opportunity to sit into the presidential chair. Weidmann expressed his concerns[88] regarding Lagarde's plans to make environmental considerations part of the ECB's decision making process and policies e.g. favouring the purchase of the so called green bonds. – Not to mention that Lagarde – just like Draghi – has some shady spots in her past,[89] which could induce further attacks against the newly inaugurated president of the ECB.

5. Summary and conclusions

The purpose of the article was to examine the institutional reforms of the EU – which sought to remedy the innate structural weaknesses of the EMU – and their functioning in practice. Although the EMU remained asymmetrical – that is to say the fiscal policy remained in the hand of the member states – a proper system of supervision have been created in the form of the ESFS and the EBU consisting of

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83 Matt CLINCH: European Central Bank members voice concern over its negative rate policy. *CNBC*, 18 October 2019. Online available at: https://www.cnbc.com/2019/10/18/ecb-members-voice-concern-over-its-negative-rate-policy.html (06/11/2019).

84 Martin ARNOLD: What will Christine Lagarde's ECB look like? *Financial Times*, 27 October 2019. Online available at: https://www.ft.com/content/1683ea12-f4f7-11e9-a79c-bc9acae3b654 (06/11/2019).

85 Reza MOGHADAM: The ECB must make negative interest rate policy effective. *Financial Times*, 24 July 2019. Online available at: https://www.ft.com/content/2eca3b2a-ac8c-11e9-b3e2-4fdf846f48f5 (06/11/2019).

86 Press Conference, Frankfurt am Main, 24 October 2019. Online available at: https://www.ecb.europa.eu/press/pressconf/2019/html/ecb.is191024~78a5550bc1.en.html (06/11/2019).

87 Carsten BRZESKI: ECB: The Good German. *ING Snaps*, 22 October 2019. Online available at: https://think.ing.com/snaps/ecb-the-good-german/?utm_campaign=October-22_ecb-the-good-german&utm_medium=email&utm_source=emailing_snap (06/11/2019).

88 Martin ARNOLD–Olaf STORBECK: Weidmann opposes using monetary policy to fight climate change. *Financial Times*, 29 October 2019. Online available at: https://www.ft.com/content/60d9832c-fa3f-11e9-a354-36acbbb0d9b6 (06/11/2019).

89 BBC (20/12/2016), Christine Lagarde: IMF Chief Convicted over Payout. Online available at: https://www.bbc.com/news/world-europe-38369822 (06/11/2019).

the SSM and the SRM. The ECB gained authority to supervise the functioning of the EMU: amongst others, it became empowered in 2014 to liquidate the so called 'ill enterprises' within the SRM. – It has to be noted that the latter opportunity is not used properly by the ECB as some authors argue. – Nevertheless, these systems endured the difficulties of practice and the supervision of the CJEU. What is more, the CJEU showed a willingness to protect the achievements of the reforms as it is clear from judgment delivered in the ESMA and Gauweiler-cases.

Regarding the future prospects of the EU, the author of the current article introduced both optimistic and pessimistic opinions. This very chapter provides space for the author to express his own opinion regarding future prospects: the author argues that instead of winding-up the EMU – as some authors suggested –, the EMU members shall strive to achieve closer cooperation and the non-members shall strive to access to the EMU. The author does not understand why shall the builders pull down everything they built so far and go home instead of finishing the 'half-built[90] house'? Similarly, he does not understand what hinders us from reaching a closer cooperation e.g. to create a greater budget and a common finance ministry? If one accepts that the European integration is built on the *spill-over effects* of the *ever-closer union*, any step back will induce unforeseen consequences. Here should be the thoughts of Worstall brought to our minds, namely that the costs of a possible winding up cannot even be estimated. – Even if the Eurosceptic Worstall used it as an argument against the EMU.

Summarizing the above mentioned, the author of the current article argues that the maintaining of the common currency – or its introduction in case of the non-EMU states – is the only workable way even despite the well-known drawbacks of the EMU. In conjunction with these thoughts, the author also firmly believes – in accordance with Martonyi's thoughts – that a two- or multi-tier integration would be detrimental for the future of the integration. Furthermore, the author thinks that we – Hungarians – are already lagging behind in preventing this scenario with or omission, namely that we haven't accessed so far and do not really strive to access to the EMU.

[90] The expression borrowed from Bergsten (2012); See also: Miklós KIRÁLY: From the Treaty of Rome to the Rome Declaration. Scenarios for the European Union's Future. In: Marcel SZABÓ–Petra Lea LÁNCOS–Réka VARGA (eds.): *Hungarian Yearbook of International and European Law 2018*. Eleven Publishing, The Hague, 2019, pp. 19–30.

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EFFECTS OF ARTIFICIAL INTELLIGENCE ON LABOUR LAW AND LABOUR MARKET: CAN AI BE A BOSS?*

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1. Introduction

Using Artificial Intelligence (AI) has totally transformed our days, and this is the future as well. The changes suggest such aspects that are mostly still not clear today. In my opinion, we are far from certain post-apocalyptic visions and they are not likely to happen in the future. We should not fear the revolution of machines, and the scenes of the Terminator are also not likely to recur. But it does not mean that using AI will not have negative effects or even dangers for our days. Although using AI is not just a set of issues to be treated globally. Using it in a certain life situation brings up at least so many questions as using it in general. These questions should be answered in a complex way. We should not look at the questions only from technical or legal aspects. These aspects are totally related, and the changes in the certain parameters influence the other elements as well.

However, we should try to define the legally relevant definition of AI before starting to analyse it in detail from the employment aspects. The report made for the House of Lords ascertains that the field actually has not any unified definitions.[1] It highlights the definition of the Industrial Strategy from the others. According to the definition, we are talking about technologies that can perform tasks that would presume human intelligence, for example, vision. It reveals from this general text that they are primarily used in such situations that are associated with the replacement of human manpower. The replacement of human labour can happen on more levels. The simplest way is to replace simple work tasks. This would mean the replacement of employees working next to the tape. A more complex AI which can learn could replace tasks requiring more complicated professionalism as well. The number of positions that will be performed by mechanical thinking is growing

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1 *Ai in the UK: ready, willing and able*. Published by the Authority of the House of Lords, 2018, p. 14.

with the development of technology.[2] In the case of certain positions, the time is likely to come when not the possibility of replacing human manpower by an AI will be the question, but if it is worth it.

It is already not a question in the present labour market conditions that using AI will have more significant frames in the future than today. For example, József Hajdú writes it in his study that if we change to robots from one day to the next, 11% of the Hungarian employees could be replaced immediately[3]. Here, in our present conditions, primarily, the employees performing operator work would be replaced. This correlation suggests the question of what chances do those employees with lower qualifications have on the future's labour market whose manpower has been replaced by an AI?[4] The technological innovation and development will bring the necessity of a newer social innovation as well. Namely, in my opinion[5], social innovation is such a social change that fits the new, changed life situations. Social innovation is generated by the technological development, and in a sense, it enforces it. Using AI, the basis of this paper will be one of these significant factors. In this study, as can be seen above, we would like to highlight its effects on labour and labour market. We would like to examine the questions coming up if an AI takes part in justifying or making employment decisions. It may happen that we should worry about losing our jobs because of the decision made by this AI, or maybe we even do not get the desired position. However, not just the narrow legal frames should be examined, but the wider social science context as well.

2. The connection between social innovation and robotization

Using robots in industrial and everyday life has already been an important part of social innovation. On the other hand, the expansion of robotization and AI connects in several cases. AI, software controls the activity of the robotic manpower when it is programmed. In several cases, it is only automatism, but robots are getting in a decision situation in more and more cases. And solving decision situations is related to programming. The basic question is the task of what a certain robot is intended for. After determining the task, the written program is loaded. The loaded program can perform its task in the given frames, and make the decisions assigned to it.

But before jumping at the questions drawn above, it is worth to clarify two things. One of them: what is a robot? It has no exact definitions accepted by legal sciences. According to certain views, it should be imagined as a non-biological

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[2] Compare: Zoltán RÁCZ: Az ügyvédi hivatás jövője a robotika fejlődésének fényében. *Advocat*, 2019/1., pp. 9–12.

[3] József HAJDU: A munkavégzés jövője: A robotika forradalmának hatása a munkaerőpiacra. In: Klára GELLÉN (ed.): Jog, innováció, versenyképesség. Budapest, Wolters Kluwer, p. 51.

[4] Ralf KOPP: Workplace Innovation (WPI) as Social Innovation (SI): Slow farewell or continuation of the techno-centric age. *Future of Work*, Neuchatel, 11/09/2019.

[5] Compare: György KOCZISZKY–Mariann VERESNÉ SOMOS–Károly BALATON: A társadalmi innováció vizsgálatának tapasztalatai és fejlesztési lehetőségei. *Vezetéstudomány*, 2017/6–7., p. 16.

agent.[6] The cited thought is extended by Richards and Smart, and they describe a robot as a constructed system that shows both mental and physical activity, but it is not alive in a biological sense.[7] In this form, a robot is a machine which is able to perform mental and physical activity, but all of them are automatic. Mind is missing from the machine.[8] Using AI is necessary for robots to have greater autonomy.

As I have already mentioned before, robots and AI have connected. We should complete the previous train of thought by the definition of AI. But it should be made clear that robots do not always suppose an AI, and it is true in reverse as well. AI does not necessarily require becoming real by built-in a robot. The basic difference is that the robot has a physical extension.[9] Shortly, the two do not suppose each other, but they are often connected. A robot is a machine that can be used for performing a lot of different tasks, such as cleaning or even waitering.[10] But as I have mentioned, they are capable of more complicated tasks as well. That is why their use is so various. In a lot of cases, robots are used to make our lives more comfortable and to put energy investment in it.

Actually, we have discovered robots to substitute ourselves. Robots can do almost all the tasks instead of us. This perception is a positive start point to oversimplify our own life. But its simplifying nature and the alternative suggestions for a solution connected to it can have dangers as well. The lifestyle generated by robots leads to new adjustment strategies. As relationships have changed, our personal relationships are also transformed. Robots have primarily been developed for replacing humans. For example, if there is a machine which does a part of the housework instead of us. This is entirely about ensuring our own comfort and freedom. As he recognized this, Zsolt Ződi cites in his book that some people think about robots as the slaves of the modern era.[11]

Using the new generation of robots is much more extended as they cannot be found only on all the fields of everyday life. A great many robots have been employed for example, in the car industry as well. A significant part of the work pro-

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6 RICHARDS–SMART: How should be the law think about the robots? In: CALEO et al. (eds.): *Robot Law*, Edward Elgar Publishing, Cheltenham-Northampton, 2016, p. 4.

7 Niel M. RICHARDS–William D. SMART: op. cit. p. 6.

8 Referring to the cult Japanese anime called Ghost in the Shell, which may have founded some pop-cultural references of AI in the most abiding way.

9 Zsolt ZŐDI: *Platformok, robotok és a jog*. Gondolat, 2018, p. 184.

10 Robotpincér viszi ki az ételt egy győri kínaiban (In English: A waiter robot serves the meals in a Chinese restaurant in Győr). In: https://hvg.hu/kkv/20180912_Robotpincer_viszi_ki_az_etelt_egy_gyori kinaiban ˙(23/09/2019).

11 Zsolt ZŐDI cites Pagallo's thoughts (PAGALLO: *Law of Robots.* p. 104.). Revealing this question would significantly divert the context of this text from the targeted aim. But it is worth to think about that robots cannot be the subjects of human legal relationships in the sense that law regulates primarily human interactions. I agree with the author that if robots are considered to be slaves, they should be given personality, and they should be treated as humans. Robots should be emancipated for this, which would suggest that they are entities with independent free will and they are sentient beings. But technology is still not at this level in its current state. The process would even suggest the fiction of creation and the so-called divine spark, in connection with robots awaken to self-consciousness.

cesses is performed by them. In addition, we can find factories which are totally automatized and robotized.[12] Men cannot enter to these places to work. The more spread use of robots and AI transforms the currently known legal law relationships. The tendency is not likely to change the itemized legal regulation, but the way of asserting interests. This process is perfectly illustrated by Vasil Kirov in connection with the difficulties of enforcing the collective contract rights of employees working in the bank sector.[13]

The future will mostly be about what kind of competencies should be owned by someone compared to his earlier position.

3. Employment issues associated with using AI

Based on the above, how at all can we deal with employment issues if there are not any unified AI definitions? Moreover, if we look at it from the aspect of technical sciences, the concept of AI has been significantly transformed compared to János Neumann's basic thought.[14] To our knowledge today, the definition of a robot and an AI is often confused. To perform our analysis, we adjust to the main conceptual characters in the way that we do not start from Neumann's theory about the singularity, and we do not require to look at self-developing robots as AIs. In connection with the industrial production, the expression "AI" is usually used for all the programs and solutions which have decisional competences. The decisional competences are originated from the algorithms as well, but they make AI perform independent activities. From the aspect of labour relations and employment, the duality of decisional and acting autonomy should be examined. The two definitions mentioned before are especially important from the aspect of the function of labour relations. They mean the basics of classic labour relations. The power shift between the parties is originated from the subordination relationship of them.[15] The employer directs and controls the employees' work based on his right of instruction. And the employee performs the instructions or, if he legally has the opportunity, he can deny it. An employment relationship based on trust has been formed during the last about 150 years of development of labour relations, and it is still personal in a lot of cases. Even if we can say that most parts of the employment relations are realized in the factories by next-to-the-tape work.

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[12] Robottal avatta fel automata magasraktárát a HELL ENERGY Magyarország Kft. (In English: The HELL ENERGY Hungary LTD. inaugurated its automatic high-bay warehouse by a robot) ic https://arhiv.minap.hu/cikkek/robottal-avatta-fel-automata-magasraktarat-hell-energy-video-kepgaleria, (10/09/2019).

[13] Vasil N. KIROV–Patrick THILL: The impact of crisis and restructuring on employment relations in banking: The cases of France, Luxembourg and Romania. *European Journal of Industrial Relations*, 2018/3., pp. 297–313 (doi: https://doi.org/10.1177/0959680117752047).

[14] Compare: Béla POKOL: A mesterséges intelligencia: egy új létréteg kialakulása? *Információ és Társadalom*, 2017/4., p. 39.

[15] Tamás PRUGBERGER–György NÁDAS: *Európai és magyar összehasonlító munka és közszolgálati jog*. Complex Kiadó, 2016, p. 12.

If we think about how this relationship will change, it will partially or totally give its place for the AI. Those possibilities will be analysed next when AI would get to an employer's or employee's position.

3.1. Making employer decisions and AI

Making employer decisions is a series of decisional competencies with several questions. That's why highlighting the employer's responsibility is significantly important in labour law relations. Making employer decisions can be concentrated in one hand as well, or it can be solved on more levels by delegating the authorities. In the first case, we can talk about a micro, small or probably medium-sized business. In the second case, we can talk about the operation of a medium-sized or bigger business.

The basics of exercising the employer's authority are defined in § 20 of Act I of 2012 in the Hungarian Labour Code (hereinafter: LC). The detachment of the employer and the practitioner of the employer's authority is a well precipitable duality in the labour relation. This duality builds on that an employer is a legal person in most cases. And a legal person does not have such human characteristics that would help it to perform its rights and obligations related to the labour relation on its own. In the case of a natural employer person, the two roles can overlap. But mostly, the roles do not overlap. That's why these regulations are written in the chapter about representation. The level of practicing the employer's authority is determined by the employer. The question arises that who can the exercising of the right be delegated for. In connection with clearing the previous legal barriers, the § 20 (2) of the Act says that the person who exercises the employer's authority can be such a person who does not have a labour relation with the employer.[16] In practice, it means that the task can be performed even by agency or work contracts.

You may think about that why does the topic of representation connects to the theme undertaken in this study? One of the connection points is the option defined in § 20 of the Labour Code. In connection with this, the extension of exercising the employer's authority determines a wide personal range. The question is what kind of personal circle can be defined. How wide should we interpret the range of the persons who are entitled to exercise the employer's authority in a way? The interpretation range of the problem depends on the basic character of the actually examined legal relations as well. This is presented in Ildikó Rácz's study, which examined work-via-platform and applications. In these cases, one of the greatest questions in the analysis of the consumers' behaviour. The consumers may rate the service provided by the worker[17], which is processed by an algorithm, so in fact, not the employer is the person who makes the decisions associated with perfor-

[16] Zoltán BANKÓ–Gyula BERKE–György KISS: *Kommentár a munka törvénykönyvéhez*. Wolters Kluwer, 2017, p. 108.

[17] In case of digitalized legal authorities, it is still subservient to make difference between the employee and the person in employment. But in case of digitalized forms, the character of the legal relations is still not clear, so it is worth to point on the differences also in the conceptual set.

mance evaluation, but it is based only on the calculation of the algorithm.[18] The question is whether it means the outsourcing of the employer's authority, such as in case of a booking or a cleaning service? I think it is not the classic outsourcing in this case.[19] A significant part of platform providers does not look at themselves as employers, or at least they communicate this for a third person. Although, the five-star evaluation system developed for the consumers still influences the decisions and can materialize the outsourcing of decisional competences. However, the platform providers protest against it, they define more requirements for the working persons as they would be in an employer position, or at least in a quasi employer role.[20] The evaluation significantly influences a worker's fate in these legal relations. So, the performance evaluation is made by persons who are not in a labour relation with the employer platform provider according to the § 20 (2) of the LC. Over that, an outsourced performance evaluating system is quite endangered due to abuse, it is also necessary to take account of the fact that the consumer is actually in no real legal relation with the operator of the platform. Does this solution fit to the examined section of the LC? Currently, there is no actual legal interpretation for this question. Nevertheless, a kind of automatization of exercising employer legal authority has happened, since the approval of the algorithm's decision happens based on the consumers' decisions. This cannot be completely considered as the expansion of AI, but we are one step closer to it. In my opinion, the algorithm mentioned in this case cannot be matched with the definition of AI. However, it suggests the possibility that some certain employer authorities could be delegated for even an AI.

The examination of the tendency analysed by Mirela Ivanova and her co-researchers is a newer step forward this way.[21] During their study, they examined the works via applications from the aspect of that whether there is always a person behind the instructions given for the workers via the app, or the program is able to give instructions in a completely autonomic way.[22] Their research ascertained that there are application-generated decisions behind which there is no human presence. This is different from the examined possibilities as the algorithm does not use the external evaluations as a strong point, but it evaluates the situation based on its communication with the working person and tries to give the instruction suitable

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[18] Ildikó RÁCZ: Teljesítményértékelés – kiszervezve? In: Lajos PÁL–Zoltán PETROVICS (eds.): *Visegrád 15.0 – A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*. Wolters Kluwer, 2018, pp. 417–416.

[19] A kiszervezés, outsourcing magyar gyakorlatáról lásd: Bernadett SZEKERES: A változó munkavégzés megjelenése és megítélése a bírói gyakorlatban. *Miskolci Jogi Szemle*, 2018, 13. évf., 1. sz., p. 141.

[20] Hilda TÓTH: A munkajog új kihívásai: a "gig" gazdaság munkavállalói csoportjai. In: Veronika SZIKORA–Éva TÖRÖK (eds.): Ünnepi tanulmányok Csécsy György 65. születésnapja tiszteletére I–II. kötet. Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen, 2017, pp. 393–400.

[21] See more details about the research: Mirela IVANOVA–Joana BRONOWICKA–Eva KOCHER–Anne DEGNER: The App as Boss? – Control and Autonomy in Application-Based Management, Europa Universität Viadriana, http://www.labourlawresearch.net/sites/default/files/papers/ArbeitGrenzeFlussVol02.pdf, (22/09/2019).

[22] IANOVA et al.: pp. 7–8.

for the situation. The application-based management has already become able to make the appearance of whether the program would send its own decisions to the worker. However, such programs cannot think yet, and they are far from the self-developing robots mentioned by Neumann. But the marked direction is increasingly attracting new technologies. If we look at the two previous examples as developmental stations, then it is understandable that, according to the examined sources, the most likely script is that the main field of the AI exercising employer role will be the field of performing HR tasks.[23]

3.2. Men as data? – Basic problems of using HR robots

One of the most important elements of exercising employer authority is human resources. That' s why it is an interesting and exciting issue that this can be the first field where AI can replace human decision-makers. We have to examine a multi-level and complex problem set. A significant part of the problems will be legal; the other will be ethical in nature.

One possible outcome of the proceeding changes happening in the current labour market is rooted in the labour law sci-fi presented in the journal called Munkajog by György Lőrincz. According to him, it will be the founder of the necessity of the new labour law regulations. One of his hypothesis says: the social transformation *"[…] affects and transforms the character of the labour relation basically in the way that the personal contact of the subjects of the relation takes a back seat, and the personal relation will be replaced by the relation between the employee and the digitalized environment. An additional change which necessarily affects the content of the regulation is the looseness of the limitations of work (primarily its place and time)."*[24] Although, this point of view should be completed with another thought as well. This thought is that whether a machine, an AI could be interpreted as a person. Is it even possible to look at the AI as a person? Does the regulation of the Civil Code make it possible to treat AI as a person in the far future?[25] The relevance of the issue is that, based on the rule defined in the previously mentioned § 20 in the LC, the employer's power can be delegated for a person. The Hungarian regulation in force does not look at AI as an entity with special legal personality, so especially as a special legal person.

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[23] György BÖGEL: Mesterséges intelligencia a humánpolitikai munkában. *Opus et Educatio*, 2018/3., http://opuseteducatio.hu/index.php/opusHU/article/view/272/470; Balázs ÖRSI: A mesterséges munkatársakról – Gondolati előretekintés. *Munkaügyi Szemle*, 2019/5., pp. 46–51; Attila KUN: Munkajog és digitalizáció- rendszerszintű kihívások és kezdetleges európai uniós reakciók. In: Lajos PÁL–Zoltán PETROVICS (eds.): *Visegrád 15.0 – A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*. Wolters Kluwer, 2018, pp. 389–416.

[24] György LŐRINCZ: Kommentár a munka törvénykönyvéről szóló 2012. évi I. törvényhez – Munkajogi sci-fi. Munkajog, 2018/4., pp. 1–16.

[25] Dániel ESZTERI researches the answers for similar questions: A mesterséges intelligencia fejlesztésének és üzemeltetésének egyes felelősségi kérdései. *Infokommunikáció és jog*, 2015/62–63., pp. 47–57.

Currently, as AI is not a person, it cannot do HR tasks. If a change happens in this issue, then personalising AI would generate further questions.[26] However, if such a solution would get green light legally, technical and ethical questions should also be answered. Technically, one of the tasks to be solved is datafication (looking at humans as data). A human politician works with humans. AI has promising future in human politics if a man can be "datafied", the human's characteristics, status, position, and environment can be caught by data, moreover, by digital data. Countless examples prove that the datafication of humans proceeds fast which has remarkable consequences, possibilities and risks, and this process transforms the human political work as well.[27] Can a human become a set of data? Would treating humans as data sets mean the reduction of their personality? In this case, the internal sensations of the persons should be examined, and the question whether we will be able to accept the decision of a machine that affects our life. Currently, it tells us whether we are good at working at a certain company or not. Will the emancipation of AI be necessary for the future? The practical relevance of the real practical usefulness of the answer given for the question seems to become relevant later. However, in my opinion, researching this question in the present is not useless. The necessity of analysing this question is supported by the case that happened at Amazon which experimented with developing an HR robot. The experimental project was closed with several results and edifications. It reveals from the article in Reuters that the project started in 2015, and the company finished it for 2017.[28] The project was not successful, more mistakes came up which would affect the company in the future, and they would seriously bring the responsibility of the employer to the fore. One of the greatest problems with using HR robots was that it started to make causeless differences between male and female applicants. According to the analyses, one cause of making differences was linguistic analysis. The program found the expressions used by men more convincing. The presentation of their achievements was more powerful in men's CVs. Such verbs characterized these texts as "perform" and "finish". One basis of the distinction was the difference between the language skills of men and women. The AI found the CVs written in the masculine language more effective. The above-drawn problem was only one part of the functional difficulties of HR robots. The other field was that it often offered unqualified manpower for positions where highly qualified knowledge was necessary.

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[26] In the frames of the theme marked by the article and this paper, we cannot deal with this issue in details. But it is necessary to highlight that personalizing AI suggests a completely transformed technological and social environment which basically generates such life situations that have never existed before. The social innovation in this context would be accompanied by a significant dogmatic change.

[27] György BÖGEL: op. cit.

[28] Jeffry DASTIN: *Amazon scraps secret AI recruiting tool that showed bias against women*. https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G (21/09/2019).

If we examine the employer's authority of AI through the example of the Amazon, it is completely clear that it was a hasty decision.[29] If we look at the actual legal consequences of such a case, then it brings up issues, such as:

- Can the employer's decision-making authorities be delegated to the authority of an AI?
- Can the acceptance of the fact be ethically justified that the AI decides on human fates?
- What will be the legal consequences of artificial intelligence's mistakes? Can it be held accountable because of its legally putative personality, or the employer is responsible for it?

These questions are not simple ones. I would not like to answer all of them; the only aim is to reveal the contexts connecting to the case and our daily Hungarian legal practice. The answer to the first question has been examined in this paper earlier. Then we found that AI is not a person according to the Hungarian legal rules. Here, we could finish answering the questions based on the law in force, because we should stop. But it is worth to conduct the complete theoretical experiment.

Anyway, giving competences and skills for machines by the help of which they could decide on human fates will be the central issue of great arguments. This issue has a quite strong moral-philosophical embedment. Are men able to, or is it necessary for men to emancipate their own technologies and acknowledge them as equal ones? It must be added that this issue is a bit artificial and false, despite its importance. We are often leaving our lives for machines, robots, and artificial intelligence. Maybe not so much as mentioned in the example, but it is real. It is an increasingly common practice in banks to use artificial intelligence for making decisions on credit assessments or starting enforcement proceedings. We can talk with even chatbots during the administration without knowing it. Life situations influenced by artificial intelligence are here in the present,[30] we are just not aware of it.

In the frames of this current study, I would not try to explain the pros and contra ethical arguments completely. Instead of this, the started theoretical experiment should rather be finished. Regarding the examined solution in the case of Amazon, the suspicion of programmed discrimination came up as well. The truth content of this statement could not be examined, but the literature knows the possible reasons of this phenomenon:

- if the algorithm was taught on prejudiced data,
- if it is taught by data referring to the present world well,
- if the programmer was prejudicing when defining the aim,
- if, after giving the data, the programmer chooses the variables which can be taken into account by the algorithm.[31]

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[29] The company could be saved, because it had a bombastic growth in the mentioned period which justified the employment of numerous new employees, and they wanted to make the process to be more efficient.

[30] Another common example is using personal, targeted advertisements after a google search.
Another common example is using personal, targeted advertisements after a google search.

Any of the listed reasons could cause mistakes in the HR processes. The company will probably never reveal in public, how the settings referring to the special interpretation of the language could result in the discriminative behaviour of the AI. But the process used by the robot brings up the violation of the equality requirements of our laws in force. These regulations could be found in Act CXXV of 2003 (hereinafter: Ebktv.). The illegal disadvantageous discrimination applied in the frames of employment relationships is under the scope of the Ebktv., since the employer is in a dominant position to the employee. Because of this dominance, the employer is obliged to keep the requirements of equal treatment in the range of the private law debtors.[32]

The requirement of equal treatment is such a principle that is basically important to be followed in our current social and legal relations. The application of it is also highly important from the aspect of legal law relations. Violating equal treatment bases the possibility of acting against the employer. The basic question is whether using AI changes the legal foundations of the employer's responsibility. In the current legal situation, based on § 6:540 (1) in Act V of 2013 in the Hungarian Civil Code (hereinafter: CC), the employer is responsible against the harmed person if the worker (employee) causes damage for a third person in connection with his legal relationship referring to his employment. This rule is completed by the rule of § 6:540 (3) in the CC, according to which the employee is jointly responsible for the damage with the employer if it is caused intentionally. But can wilfulness be suggested in the case of an AI?

On the other hand, the criterion of applying this additional rule would be to recognize the Ai's personality and independent will. Thirdly, we should suggest that AI has such goods from which it can compensate for the damage. These are still uninterpretable categories in the case of AI. The current solution is more likely, and, in my opinion, easier to interpret in the future, if the AI causes damage when acting as the employer's "representative". That type of passing responsibility that connects the responsibility for the employee with the employee's labour law responsibility is not a working construction in the case of an AI. That's why we are talking about either the employer's own damage or such a passed responsibility that can redirect us to the issues of even consumer protecting responsibility in respect of guarantee-warranty-product liability.[33] We should suppose free will and at

AI is prejudiced, and this is the humans' mistake, https://qubit.hu/2019/08/16/mar-a-mesterseges - intelligencia-is-eloiteletes-es-ez-az-ember-hibaja (23/09/2019).

[32] Katalin GREGOR–Judit VARGA–Adél LUKÉT–Veronika MOLNÁR: *Az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény alkalmazása*. Egyenlő Bánásmód Hatóság, 2018, p. 18.; Tamás GYULAVÁRI–András Kristóf KÁDÁR: *A magyar antidiszkriminációs jog vázlata*. Bíbor, 2009, pp. 22–29.; Nóra JAKAB: *Az egyenlő bánásmód nemzetközi, európai és magyar összefüggései?* Bíbor, 2016, p. 32.

[33] During the deduction of the example, it has become completely clear that we should not think about a unified liability system in case of artificial intelligences in the future. In my opinion, regarding the legal basis of damages caused by HR robots, it differs from damages caused by a self-driving car or even a drone. Compare: Réka PUSZTAHELYI: Reflections on Civil Liability for

least limited legal and default capacity of the AI to be actually a subject of liability relationships. But in fact, the mistakes attributed to the AI are human mistakes that are added to the algorithm during the programming process. And the realization of the mistake is so drastic because the machine itself is not able to treat it in an intuitive human way or overwrite it if it is necessary. If we translate it for the language of labour relations, the set of tools and interactions over a personal interview and/or law can overwrite the employer's earlier preconception about female manpower, and the employer can decide despite his preconceptions. In the case of the machine, there are only set objective parameters and decisional competencies or those considered to be objective, which cannot be overwritten by the machine. That's why AI executes but does not change the programmed preconception. So it happened that the realization became a failure in the case of the Amazon. On the other hand, the precise execution of the program is able to enlarge the problem that can be treated easily on the emotional and communicational base by a human.

Another practical element should be highlighted over the above-mentioned thoughts in connection with the establishment of liability. The legal specialist interviewed by Reuters has underlined that the third person often do not realize that the decisions about them have been made by an AI. Because of this, the person who is the subject of the procedure in connection with the damage or infringement made by the AI employed by the company should face with significant evidence difficulty.[34]

In connection with our daily relationships we are mostly unable to tell it actually what the basis of a decision about us is, and the basis of the decision having been made will mostly not been revealed.

4. Closing thoughts

Before writing this study, I thought that I would like to examine the effects of artificial intelligence on labour law from the aspect of the employees. During writing the article, I realized that introducing new technologies can affect the employees in several ways. The issue of the effects of those cases which bring up questions primarily on the employer's side has come into view during my research. So, I arrived at the problem set which I have tried to draw up in this study, hopefully successfully. In my opinion, the effects of AI and robotics will be different in the world of work, despite their correlations. The field of using AI will have a significant role in supporting the employer's decisions and replacing jobs requiring higher qualifications. And the effects of robotics endanger the positions of employees with lower qualification. It seems at first whether I have drawn a sharp line between them, but of course, these two phenomena are usually blurred, and their effects accumulate.
But examining their effects cannot be started quite early, since the law, as the following system, is lagged that is shown well by the fact that Amazon has tried to

Damages Caused by Unmanned Aircrafts. *Zbornik Radova,* Pravni Fakultet (Novi Sad) 2019/1., pp. 311–326. (Doi: 10.5937/zrpfns53-21513).

[34] Jeffry DASTIN: op. cit.

automatize a part of the decision-making processes, as I have mentioned before. The actual mass application of these systems is far in time, but the law should be ready to give answers for questions such as can exercising the employer's authorities or a part of it be delegated to an entity which is a program created by a human? In my opinion, the importance of legal issues is a secondary one behind the ethical issues. If a consensus can be made in connection with using this technology, the legal issues will become primary ones. These processes will proceed relatively fast and partly parallelly. The transformation of the employment relations does not necessarily happen in legal frames, but primarily in connection with the content of the legal relation. The basis of the changes will be the disappearance of the trust character mentioned by György Lőrincz, which occurs parallelly by the problem of big data[35] and the dematerialisation of workplaces.

The primary subject of labour law research will always be the study of the employees' rights and possibilities. Researching these topics is extremely important since the victims of digitalization, just like in cases of industrial technological development of earlier eras, are the employees participating in mass production. Although, in my opinion, the employees' rights should always be examined in the context of the other party, the employer.[36] So it especially important to examine the employer's legal entity, even in connection with the role of AI. The importance of this is shown by the fact that the phenomena and changes on the employer's side always influence the labour law guarantees, but mostly the definition of the employee as well. So it is especially significant to examine in case of employment or legal law regulation in the future whether an AI can have an HR position or not.

[35] In details: Yuval Noah HARARI: *21 lecke a 21. századra*. Animus Kiadó, 2019.

[36] Compare: Gábor MÉLYPATAKI: A munkavállaló fogalma a magyar és a német jogban a munkáltató szempontjából. *Publicationes Universitatis Miskolcinensis Series Juridica et Politica*, XXX/2, pp. 521–540.

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POSSIBILITIES OF HARMONISATION IN THE FIELD OF FAMILY PROPERTY LAW*

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1. The emergence of family property law in the European Union

For a long time after the emergence of the contemporary legal systems, it has not been a problem for the states of Europe to keep their legal disputes within the borders. This was also true for family law disputes as well, but the number of so-called *'mixed relationships'*[1] where the parties were of different nationalities increased.

The cross-border acquisition is the necessary implication of mixed relationships, which goes beyond the framework of national regulations, and it made necessarily international regulation. After the born of the European Union, the settlement of family law disputes has not been on the agenda of the EU for a long time. However, the cross-border legislative process began later.

The aim of the unification is to facilitate the resolution of cross-border family law disputes and to enforce the requirement of legal certainty at the highest possible level. At the same time, many factors stand in the way of unification efforts. Such a problematic factor is the diversity of legal systems on the property law solutions between family members.[2] *Wopera Zsuzsa* emphasizes that there are significant differences in the property regimes of the Member States, but it can be a common point that the parties can generally decide whether to separate their property or to choose another property settlement at the time of the marriage.[3] The biggest difference can be found between common-law and continental law systems. The basis of the difference it that the common-law regime does not know the concepts of property law during the cohabitation and of property system and there are no special regulations for them.[4]

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1 From 2008 to 2012 approximately 200 000 citizens are affected in the dissolution of international marriages in every year. Zsuzsa WOPERA–Barbara TÓTH: A nemzetközi párok vagyoni viszonyainak uniós rendezése. In: Katalin RAFFAI (ed.): *Határokon átnyúló családjogi ügyek. Nemzetközi személyes- és családjogi kérdések a XXI. században.* Pázmány Press, Budapest, 2018, p. 190.

2 WOPERA–TÓTH 2018, p. 198.

3 Zsuzsa WOPERA: *Az Európai Családjog Kézikönyve*. HVG-Orac, Budapest, 2012, p. 220.

4 WOPERA 2012, p. 220.

1.1. Common law vs. continental law

In 1882 the regulation[5] was initiated in England, which made it clear that an existing marriage could have no property consequences. However, this does not mean that there is no property dispute between the parties in the event of the termination or dissolution of marriage. The Act of 1973[6] provided an opportunity for the courts to settle[7] the property relations of the parties in the light of *"requirements of rationality"*[8] in the event of dissolution of marriage. This meant particularly that the judge had to consider the parties' standard of living and other circumstances at the time of the marriage and then had to decide on a sort of financial compensation.[9] Later, however, the adjudication criteria of courts were changed and beside the criterion of rationality, the social and equity aspects were also emphasized in these disputes.[10] The change of viewpoints has not only occurred in practice, but it can be found in the amendments of the Act of 1973.[11] Article 25(2) lists those aspects and circumstances, which shall be examined by the courts in the event of the dissolution of marriage. Such aspects are the income of parties, their earning capacity, the owned properties and other financial sources and their living conditions during the marriage.[12] This change represented significant progress in the application of the effective law, but according to the consistent points of view of the experts, the application of case law of the English courts can be difficult.[13] The status of prop-

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5 This was the Married Women's Property Act – Walter PINTENS: *Matrimonil Property Law in Europe*. Intersentia, Antwerpen, 2011, p. 20.

6 Matrimonial Causes Act 1973 – it is in effective nowadays as well.

7 *Thorpe* emphasizes that the abandonment of matrimonial property regimes was necessary to eliminate the possibility of marrying primarily for material gain – as he says *"the gold miners and those who disregard the marriage vow".* An appropriate solution was the empowerment of the courts to make a reasonable decision by considering all the circumstances of the case. – Mathew THORPE: *Financial consequences of divorce: England versus the rest of Europe.* Intersentia, Antwerpen, 2011, p. 5.

8 THORPE 2011, p. 4. – The most significant and most precedent case was the Preston v. Preston, where the parties had significant property at the time of the divorce, much of their property was acquired by the husband during their cohabitation. The Court stated that the reasonable interpretation of the term *"financial needs"* in the Article 25(1) b) of the Act 1973 means only the actual costs and expenses and does not mean the actual distribution of the total assets. – Preston v. Preston [1982] Fan 17.

9 This compensation is called *"financial needs"*. The compensation shall be paid by the party in the better financial position after the dissolution of the marriage to ensure a fair standard of living. It also shows that this type of compensation is quite different from the property law solutions of the continental legal systems. It is less a classical property law element and is rather an ancillary issue related to dissolution of marriage.

10 THORPE 2011, p. 5. See also: Rebecca BAILEY-HARRIS–Judith MASSON–Rebecca PROBERT: *Cretney's Principles of Family Law.* 8th edition, Sweet & Maxwell, London, 2008.

11 Orsolya SZEIBERT: Házassági vagyonjogi megoldások Európában. *Családi Jog*, 2009/1., p. 44.

12 Nicola PEART–Mark HENAGHAN: Children's Interests in Division of Property on Relationship Breakdown. In: Jessica PALMER–Nicola PEART–Margaret BRIGGS–Mark HENAGHAN (eds.): *Law and Policy in Modern Family Finance – Property Division of the 21st Century*. Intersentia, Cambridge–Antwerp–Portland, 2017, p. 73.

13 THORPE 2011, p. 5.

erty law agreements that play a significant role in the English legal development also need to be mentioned. Taking into consideration, that the common-law legal system does not know the settlement of the matrimonial property for the duration of the marriage, it would be logical that property agreements are not regulated and their application is not widespread at all. However, this statement is only partially true, because it is true that the Act of 1973 does not deal with the specific rules of property contracts, but it is possible to conclude such contracts in the practice. The pre-marital and matrimonial property agreements are formulated as a result of the reform proposals of 1998,[14] which covers the agreements on financial relations based on the free will of the parties. The Matrimonial Causes Act was amended in 2003, and according to Article 34–36 the spouses can already conclude matrimonial property contracts anytime[15] , and the agreements concluded at the time of dissolution of the marriage are also becoming widespread.[16] The latter kind of agreements were disapproved by the common-law system for a long time because the agreement eliminated the discretionary power of the courts to settle disputes over property rights between the parties. Beyond that, the contractual freedom of contracts created a collision and competed with the provisions of the Act of 1973, from which the discretionary power of the courts was considered stronger by the legal practice.

Later the *Mcleod v. Mcleod case* brought a breakthrough because it was stated, that the term *"at any time"* in the Act covers the agreements concluded for the dissolution of marriage, so it should not be disadvantaged in relation to other property agreements.[17] It can be stated upon the above mentioned that common-law legal systems seek to create autonomous property laws for those affected, while in the common-law systems, there are no rules on property issues for the time of marriage. Another important difference is that the household and the protection of family home is an integral part of marital property in the continental-law systems, as opposed to other elements.[18] In the common-law system, this distinction has no importance because the property elements shall be judged as equal. Another important difference between the two systems is that the continental-law rules separately the property and maintenance situations, while in the common-law, they are

[14] Pre-nuptial agreement.

[15] THORPE 2011, p. 8.

[16] post-nuptial agreement

[17] Mcleod v. Mcleod [2008] UKPC 64. – In the case the dissolution of a second marriage of both spouses happened. The parties entered into 3 agreements with each other taking into account the significant differences in their wealth, because the husband, as an entrepreneur, made millions of dollars in assets during the cohabitation. He intended to give a certain portion of it to his wife if the marriage is terminating and the parties observe the *"loyalty clause"* throughout their cohabitation. Two of the three agreements were made during the cohabitation, and the third was an agreement at the time of the divorce, in which the husband increased the share of the wife and changed the content of the loyalty clause as well.

[18] *Pintens* calls this primary property law – PINTENS 2011, p. 20.

often combining.[19] The spousal support can only be considered in the common-law system if the amount provided in the divorce does not ensure an adequate standard of living.[20] However, the common point in both systems is the guaranteeing of the freedom of contract, because the spouses' private autonomy has priority in both legal systems, so they can determine their financial situation according to their own needs, regardless of most of the legal requirements.

1.2. The content and procedure of harmonization

The content of harmonization is another great problem with the procedure of the harmonization. There is a constant dilemma among professionals to harmonize procedural issues or some substantive law provisions, as with other EU sources.[21] There are lots of pros and cons of both viewpoints, but the unification of substantive law is much more controversial indeed. This would constitute a significant restriction on the sovereignty of the Member States, which is the reason the European Union prefers the harmonization of procedural issues. The unification process itself supports this tendency which has led to the development of the contemporary legislation of the European Union. The history goes back to the agreements of The Hague Conference on Private International Law. The first inter-state agreement was born in 1905, which contains the conflict-of-laws rules on the personal and financial situation of spouses.[22]

This agreement was ratified by only a few European states, so it only came into force in February 1915, but remained in force until 1987.[23] Subsequently, The Hague Convention on the conflict-of-laws governing matrimonial property law was

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[19] Tone SVEDRUP: Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property. In: Katharina BOELE-WOELKI (ed.): *Common Core and Better Law in European Family Law*. Intersentia, Antwerp–Oxford, 2005, pp. 127–128.

[20] PINTENS 2011, p. 21.

[21] The European Union's legislative process clearly considers the harmonization of procedural law to be acceptable, but there are authors in the legal literature who support the harmonization of substantive law. One such example is *Dieter Heinrich*, who sees the future of unification in a "limited community of property" as a universal system – Dieter HEINRICH: *Zur Zukunft der Güterrecht in Europa*. FamRZ, 2002, p. 1524.
Anne Röthel examines is similarly, according to the examination of the applicability of the German community system as a European model. See: Anne RÖTHEL: Die Zugewinngemeinschaft als europäisches Modell? In: Volker LIPP–Eva SCHUMANN–Barbara VEIT (eds.): *Die Zugewinngemeinschaft – ein europäisches Modell?* 7. Göttinger workshop zum Familienrecht, Göttinger Juristische Schriften, Göttingen, 2009.
See also: Branka RESETAR: Matrimonial Property in Europe: A Link between Sociology and Family Law. *Electronic Journal of Comparative Law*, 2008/12.

[22] Orsolya SZEIBERT: A házassági vagyonjogi rnedszerek közötti eltérések áthidalhatósága, különös tekintettel a házastársi vagyonközösségre és a közszerzeményi rendszerre. *Családi Jog*, 2016/1., 4–5.

[23] The ratifying states included Germany, Belgium, France, Italy, the Netherlands, Poland, Portugal, Romania and the free cities of Gdansk. – Lucia VALENTOVÁ: Property regimes of spouses and partners in new EU regulations – Jurisdiction, prorogation and choice of law. *International and Comperative Law Review*, 2016/16., p. 223.

born in 1978, which was of even lesser interest, was ratified only by France, Luxembourg and the Netherlands.[24] The *Vienna Action Plan of 1998*, which was followed by some experiments considered partially unsuccessful, also focused on the creation of a community matrimonial property law.

The program, which was adopted on 30th November 2000, provided for the adoption of an act on jurisdiction and the recognition and enforcement of judgments.

Four years later, *The Hague Program* was adopted by the European Council, which defined the implementation of the mutual recognition program as a priority and in line with the Action Plan called on the Commission to draw up[25] a *Green Paper on property law*.[26]A special feature of this document is that it examines such problematic issues that affect the property of spouses and registered partners at the same time. *The Stockholm Program of 2003* emphasized the harmonization of matrimonial property rules and envisaged the extension of the rules to the property consequences of the separation of non-spouses. On 16th March 2011, the Commission issued a *Communication* to terminate the uncertainty of property rights of international couples and presented two proposals for regulations.[27] The *Impact Assessment summary of the Communication* drew attention to three possible solutions to ensure legal certainty. First of all, it examined the applicability of bilateral agreements such as the 2010 inter-state agreement of Germany and France[28] , but it did not consider it feasible for all EU Member States. The second option was the harmonization of substantive law, but it is excluded by the Treaties of the Union, so the Union cannot have the power to enforce it. The third option was the submitted draft Regulations, which focused primarily on the harmonization of procedural issues. [29] The debate of the Commission's proposals lasted until 2015 when the Council concluded that it was impossible to achieve the required unanimity for the regulations. In 2016 there was a turnaround when 17 Member States indicated that they want to establish enhanced cooperation, which resulted in two Regulations being published in the Offi-

[24] The Convention came into force in 1992.

[25] WOPERA–TÓTH 2018, p. 193.

[26] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition [SEC(2006) 952] /* COM(2006) 400 final */

[27] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. COM(2011) 126 final Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships. COM(2011) 127 final.

[28] The aim of the German-French bilateral agreement was to set up a common contractual property regime between the two states, in which the rules of the German system and the French system were mixed. To the process of harmonization and the details of the agreement, see: Maria Giovanna CUBEDDU WIEDEMANN (ed.): *The Optional Matrimonial Property Regime – The Franco-German Community of Accrued Gains*. Intersentia, Cambridge–Antwerp–Portland, 2014, pp. 12–16. and 95–138.

[29] Anita Krisztina TRUNKOS: A házassági vagyonjog szabályozási tendenciája az Európai Unióban. *Sectio Juridica et Politica*, 2011/2., p. 654.

cial Journal of the EU this year.[30] Their common feature is that the rules cover property matters arising from contractual[31] and statutory property laws of the Member States as well. The private autonomy of the parties is also strongly enforced because both regulations give priority to the parties' choice of law. Its disadvantage can be found mostly regarding to the conceptual issues, which is regarded the most hindering factor of unanimous acceptance by the *Wopera–Tóth* co-authors.[32]

1.3. Problems of conceptual interpretation

The *Matrimonial Property Regulation*[33] does not define the concept of marriage but leaves it to the Member States to decide what shall be considered a marriage. We can find divergent opinions on the necessity of a uniformed definition, but the Union still does not consider it necessary to settle it in legal sources.[34] The *Wopera–Tóth* co-authors seek the solution to this problem in the principle of proportionality, which means that a uniform concept can only be formed to the extent of necessity.[35] Nevertheless, a uniform definition regarding the Matrimonial Property Regulation would be necessary.[36] This is not an unprecedented solution, because the Regulation on the registered partnership[37] contains a definition of registered partnership, which shall be interpreted solely in relation to the Regulation.

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30 They are the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8. 7. 2016, pp. 1–29) and the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8. 7. 2016, pp. 30–56).
The reason of the split regulation is that the Commission considered it easier to take into account the specialities of each form of cohabitation or partnership if two separate legal acts were adopted. – WOPERA 2011, p. 223.

31 Almost all states of Europe recognize and regulate matrimonial property agreements. The exception is Romania, where such contracts shall be null and void. Orsolya SZEIBERT: Házassági vagyonjogi szerződés az Európai Unióban. *Családi Jog*, 2007/1., p. 23.

32 WOPERA–TÓTH 2018, pp. 197–198. One of the most problematic definition is the marriage. See in details: Zsuzsa WOPERA: Az uniós jog hatása a határokon átnyúló családjogi ügyekre – fogalmi zavarok. *Iustum Aequum Salutare*, 2016/2., pp. 61–70.

33 Council Regulation 2016/1103.

34 According to *Szeibert Orsolya's* point of view there is no need to define marriage. She adds that solving a single dispute is not merely a matter of law, but it goes far beyond that, and the court sometimes shall decide on a matter not settled by law and the lack of terminology makes is much more difficult. Orsolya SZEIBERT: Az élettársi kapcsolat fogalma – itthon és Európában különös tekintettel a de facto élettársi viszonyokra. *Magyar Jog*, 2011/5., p. 297.

35 WOPERA–TÓTH 2018, p. 197.

36 Taking into consideration that some European states still do not incorporate same-sex marriage into their legal systems, uniform terminology would be necessary, at least in line with the applicability of the Regulation. The EU CJEU has also emphasized in a decision that a Member State cannot be obliged to regulate a legal institution which is not accepted, but that does not mean that the Member State shall not recognize rights stemming from a legal relationship recognized by another Member State. See in details: C-673/16.

37 Council Regulation 2016/1104.

This is reinforced by the recital 17 of the Registered Partnership Regulation, which states that *"[n]othing in this Regulation should oblige a Member State whose law does not have the institution of registered partnership to provide for it in its national law"*. [38]

The practical problem of the applicability of the abovementioned property law regulations can be found in their relationships with other EU regulations. Family property law is a part of private law and within it, an integral part of family law, but it is closely linked to and mixed with other areas of law. The number of disputes that have already been closed by the Court of Justice of the European Union is slight, while the existing ones deal with this issue.

In a concrete case,[39] the spouses had common real estates in several EU countries, and after the death of the husband, the applicability of the matrimonial property regulation and the succession regulation were conflicted.

The matrimonial property regimes were governed by the rules of marital property acquisition regime of the German law,[40] and no matrimonial property contract was concluded.

In this case, the question was, which regulation is applicable in such a case where succession law and matrimonial property law are confusing so much? The question is important because both regulations exclude the other from the scope of the case. In the present case, the Court decided on the basis of succession regulation. In the justification, the Court primarily referred to the fact that the purpose of the Matrimonial Property Regulation is mainly to settle the issues arising due to marriage and dissolution of marriage and to divide the spouses' existing assets.[41] Notwithstanding, in this case, the most important issue was the determination of the amount of the share in the succession to be paid to the surviving spouse which is closer to the law of succession.

Overall, it can be said that the road to the EU harmonization is long and rough, but the attitude of the Member States is more positive day by day. This slow but ultimately successful change of approach is what makes the area of family law, and especially marital property law, suitable for the harmonization.[42] This is reinforced

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38 According to this, the Member State cannot be obliged to establish internal rules, but can be obliged to recognize a legal relationship established in another Member State. – Council Regulation 2016/1104. recital (17).

39 C-558/16.

40 It is a speciality of the German legal system, that if the parties' marriage is terminated because of the death of one of them, the rules of family law is mixing with the rules of succession law in the case of the matrimonial property regime, the *Zugewinngemeinschaft*. In these cases, the amount of the share of the acquisition community will be higher and the spouse is entitled to the share of the succession as well. See in: Wilfried SCHLÜCHTER–Helga SZABÓ: A német családi jog áttekintése. *Forum Acta Juridica et Politica*, 2013/2., pp. 236–237.

41 C-558/16, 40–41.

42 M. ANTOKOLSKAIA: *Harmonisation of Family Law in Europe: A historical perspective*. Intersentia, Antwerpen–Oxford, 2006, pp. 483–484.

by the fact that national legislators are increasingly seeking to give room for new trends and changes.[43]

2. Matrimonial property law according to the Guidelines of the CEFL

Another group that supports the harmonization of family property law is those who aim a certain level of harmonization of substantive law in addition to the harmonization of procedural issues. The *Commission on European Family Law* (henceforward: CEFL) is at the forefront of this field. The CEFL has produced such conceptual findings that can help to harmonize this area more effectively.

The CEFL was formed in September 2001 at a professional meeting organized by the University of Utrecht.[44] Its members are university professors and senior researchers in the field of family law from various European countries.[45] The CEFL is be based on a scientific initiative and is independent of any other organization or institution.[46] The organization aims to develop such proposals that will facilitate the free movement of European citizens more largely and efficiently and to enhance all the fundamental freedoms of the European Union.[47] In order to achieve these objectives, CEFL is primarily developed the so-called *Principles of European Family Law*, which aims to raise the awareness of national legislators to the current trends and social changes.[48] The Principles are clearly intended to be guidelines, but they are not model rules.[49] The Principles have been elaborated separately in accordance with the internal parts of family law, and currently, there are three recommendations.[50]

The elaboration of the Principles poses a great challenge to the CEFL because as it was mentioned before, the regulation of member states is different. However, their researches show several identities so it is always a constant dilemma of the CEFL that whether the similar elements (so-called "common core") shall be the basis or the so-called "better law," which is based on the differences. Both solu-

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43 VALENTOVA 2016, p. 223.

44 Orsolya SZEIBERT: *A családjogi harmonizáció kérdései és lehetőségei Európában*. HVG-Orac, Budapest, 2014, p. 25.

45 Hungary was represented by prof. dr. Weiss Emília firstly, and now the member is dr. habil. Szeibert Orsolya in the CEFL.

46 Katharina BOELE-WOELKI: The principles of European Family Law: its aims ans prospects. *Ultrecht Law Review*, 2005/1., p. 160.

47 Walter PINTENS: Europeanisation of Family Law. In: Katharina BOELE-WOELKI (ed.): *Perspectives for the Unification and Hamonisation of Family Law in Europe*, Intersentia, Antwerp–Oxford–New York, 2003, p. 29.; Emília WEISS: Kezdeti lépések a családog egyes intézményeinek harmonizálása irányában. In: András KISFALUDI (ed.): *Emlékkönyv Lontai Endre egyetemi tanár tiszteletére*. Bibliotheca Iuridica ELTE ÁJK Polgári Jogi Tanszék, Budapest, 2005, p. 204.

48 Katharina BOELE-WOELKI–Frédérique FERRAND–Cristina GONZÁLEZ BEILFUSS–Maarit JÄNTERA-JAREBORG–Nigel LOWE–Dieter MARTINY–Walter PINTENS: *Principles of European Family Law regarding Property Relations between Spouses.* Intersentia, Cambridge–Antwerp–Portland, 2013, p. 2.

49 SZEIBERT 2014, p. 25.

50 These are the Principles on Divorce and Maintenance Between Former Spouses, the Principles on Parental Responsibilities and the Principles on Property Relations between Spouses.

tions have advantages and disadvantages. The advantage of the *common core* is that it is a set of rules accepted and applied in most legal regimes, so it would be easier for the Member States to accept them. However, this feature means the disadvantage as well, because the CEFL has found in many cases that the national solutions are based on a common theoretical framework and system, but in the details, there can already be such differences which can cause disputes and can delay the adoption. Using *better law* as a basis is a much more difficult case, and it is challenging to identify arguments that may have made a previously unused principle attractive to a given nation, so much depends on the method and approach which is used to develop the content of better law.[51] The advantage of it is that this solution can be better adapted to the needs and expectations of society and it can be able to keep up with the fast development of the world.

The principle, including property law issues, is the *„Principles on Property Relations between Spouses"*[52]. It can be stated, that the CEFL deals with the issues of matrimonial property law and it does not dedicate the family property issues in a wider sense.

Chapter, I of the Principles, sets out the general requirements emphasizing the equality of spouses[53] and sets out the requirements in line with the contribution to the needs of the family. It declares a high level of protection in respect of family home and household equipment, which can be feasible as a common disposition, regardless of the system of marital property.[54] In addition, it proposes issues on matrimonial property contracts in a separate chapter, where it sets the unification of formal requirements, the obligation of information of spouses and the protection of third parties, in line with a high degree of freedom of contract. This third chapter includes detailed descriptions of two mixed matrimonial property regimes, including their share of the acquisition and the acquisition community. According to this, it can be stated that the Principles of the Commission explicitly strive toward a substantive law harmonization.

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51 SZEIBERT 2014, p. 28.

52 http://ceflonline.net/wp-content/uploads/Hungarian-translation-of-CEFL-Principles-on-property-relations-of-spouses.pdf (02/07/2019). The Hungarian translation of the Principles is made by dr. habil. Szeibert Orsolya, associate professor of the Eötvös Loránd University and member of the CEFL.

53 Orsolya SZEIBERT: *Az élettársak és vagyoni viszonyaik: különös tekintettel a magyar ítélkezési gyakorlatra és a házasságon kívüli partnerkapcsolatok szabályozási megoldásaira Európában*. HVG-Orac, Budapest, 2010, p. 11.

54 The protection of family home can be found in the regulation of several European countries, e.g. Austria, England, Wales or France – Franco Salerno CARDILLO: Javaslat az "Európai" Házassági Szerződésre. *Közjegyzők Közlönye*, 2006/1., p. 4.

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THE REVISION OF BRUSSELS IIA REGULATION ON QUESTIONS OF PARENTAL RESPONSIBILITY AND CHILD ABDUCTION*

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1. Introduction

The growing mobility of citizens within the Union[1] has led to an increasing number of families with an international dimension, notably families whose members are of different nationalities, live in the different Member States or live in a Member State of which one or more of them are not nationals. According to Article 81 of the Treaty on the Functioning of the European Union, the Union adopts measures in the field of judicial cooperation in civil matters having cross-border implications. Where families break up, such cooperation is particularly necessary to give children a secure legal environment to maintain relations with persons who have parental responsibility for them and may live in another Member State.

Regulation No. 1347/2000 laying down rules on jurisdiction, recognition, and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses was the first Union instrument adopted in the area of judicial cooperation in family law matters.[2] This Regulation was repealed by Regulation No. 2201/2003[3] (commonly

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1 In 2011 there were 33.3 million foreign citizens resident in the Union-27, 6.6% of the total population. The majority, 20.5 million, were citizens of non-Union countries, while the remaining 12.8 million were citizens of other Union Member States. Since citizenship can change over time, it is also useful to present information by country of birth. There were 48.9 million foreign-born residents in the Union in 2011, 9.7% of the total population. Of these, 32.4 million were born outside the Union and 16.5 million were born in another Union Member State (Statistics in Focus, 31/2012: "Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27", Eurostat).

2 Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30. 6. 2000, amended by Council Regulation (EC) No. 2116/2004 of 2 December 2004, OJ L 367, 14. 12. 2004.

known as the Brussels IIa Regulation). The Brussels IIa Regulation is the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental responsibility. It applies since 1 March 2005 to all Member States except Denmark.[4]

The Brussels IIa Regulation provides for uniform rules to settle conflicts of jurisdiction between the Member States and facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in another Member State. It complements the Hague Convention of 25 October 1980 on the civil aspects of international child abduction[5] (hereafter "the 1980 Hague Convention") and lays down specific rules with regard to its relation with several provisions provided for in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[6] (hereafter "the 1996 Hague Convention").[7] Pursuant to Article 65 of the Brussels IIa Regulation the Commission to the European Parliament, the Council and the European Economic and Social Committee have made a Report on the application of Regulation.[8] The Report is a first assessment of the application of the Brussels IIa Regulation to date and does not purport to be exhaustive. It is based on input received from the members of the European Judicial Network in civil and commercial matters (hereafter "the EJN")[9] as well as on available studies,[10] the Commission's Green Paper on

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3 Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23. 12. 2003, p. 1.

4 Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, does not participate in the Regulation and is therefore neither bound by it nor subject to its application. For the purpose of this report, the term "Member States" does not include Denmark.

5 The Convention applies in all Member States.

6 Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, OJ L 48, 21/2/2003, p. 1. The Convention applies in all Member States except Belgium and Italy, which have signed the Convention but not yet ratified it.

7 The Regulation applies: (i) where the child has his or her habitual residence in a Member State and (ii) with regard to the recognition and enforcement of a judgment given in a Member State, even if the child has his or her habitual residence in a third State which is Party to the Convention; Article 61.

8 Report from the Comission to the European Parliament, the Council and the European Economic and Social Comittee on the application of Council Regulation (EC) No. 2201/2003 concerning jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 COM(2014) 225 final.

9 In particular, discussions in the framework of EJN meetings and replies of the EJN to a 2013 Commission questionnaire. See also the EJN Guide to best practices and common minimum standards, available at: https://e-justice.europa.eu/content_parental_responsibility-46-en.do.

10 See the Annex to this report.

applicable law and jurisdiction in divorce matters,[11] the 2006 Commission proposal to amend the Regulation, and the work done within the framework of the Hague Conference on Private International Law on the follow-up of the 1980 and 1996 Hague Conventions. Finally, it takes into account citizen letters, complaints, petitions and case law of the Court of Justice of the European Union (hereafter "the CJEU") concerning the Regulation.

2. The Revision of Brussels IIa Regulation

Ten years after the entry into force of the Brussels IIa Regulation, the Commission has assessed the operation of it in practice and considered necessary amendments to the instrument in its application report adopted in April 2014. This is an initiative within the Regulatory Fitness Programme (REFIT). In addition, the European Court of Justice (CJEU) has so far rendered 24 judgments concerning the interpretation of the Regulation, which were taken into account.

The objective of the recast is to develop further the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the best interests of the child by simplifying the procedures and enhancing their efficiency.

The Juncker Commission's Political Guidelines[12] emphasise that judicial cooperation among the EU Member States must be improved step by step keeping up with the reality of increasingly mobile citizens across the Union getting married and having children, by building bridges between the different justice systems and by mutual recognition of judgments so that citizens can more easily exercise their rights across the Union.[13]

Thanks to the revision procedure, after five years of work the Council adopted the 2019/1111 Council Regulation[14] (hereinafter Regulation) on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction on the 25 July 2019, which is a recast of the Brussels IIa Regulation.

In this paper, I would like to focus on those points of the Report, which were encouraged the European legislator to create a new Regulation. Because modifications concerned mostly the rules on parental responsibility and international child abduction, end the Regulation keeps status quo in the questions on matrimonial matters, I would like to focus on the problems related to parental responsibility.

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11 COM(2005) 82 final.

12 https://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf

13 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM(2016) 411 final – 2016/0190 (CNS)

14 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, L 178, 2/7/2019, pp. 1–115.

3. Problems in connection with Parental Responsibility

The Brussels IIa Regulation covers all decisions on parental responsibility independently of any link with matrimonial proceedings in order to ensure equality for all children. This reflects the significant increase of the share of extra-marital births over the last two decades in almost all Member States, which indicates a change in the pattern of traditional family formation.[15]

While the Brussels IIa Regulation is overall considered to work well, the consultation of stakeholders and a number of studies have revealed several deficiencies in the Brussels IIa Regulation, the matrimonial and parental responsibility matters, the latter were identified to have caused acute problems which need to be addressed urgently.[16]

Essentially, six main shortcomings concerning parental responsibility matters could be identified and have been modified correspondently in the new Regulation.

3.1. Child return procedure

The harmful impact of parental child abduction on the child and the left-behind parent is significant enough that measures at both international and Union level have been taken.

One of the main objectives of the Regulation is to deter child abductions between the Member States and to protect the child from their harmful effects by establishing procedures to ensure the child's prompt return to the Member State of habitual residence immediately before his/her abduction.[17] In this respect, Brussels IIa Regulation complements the 1980 Hague Convention by clarifying some of its aspects. It also introduces provisions governing conflicting return and non-return orders issued in the different Member States.[18]

The CJEU and the European Court of Human Rights (hereafter "the ECtHR") have laid down a number of principles in their case law on international child abduction with the child's best interests as the primary consideration. The CJEU has upheld the principle that the Regulation seeks to deter child abduction between the Member States and to obtain the child's return without delay once an abduction

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[15] Each year, more than 5 million children are born in the Union-28 (2004–2011 Eurostat Statistics). In 2010, some 38.3% of children were born outside marriage, while the corresponding figure in 1990 was 17.4% (Eurostat).

[16] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) COM(2016) 411 final – 2016/0190 (CNS).

[17] In 2008, 706 return applications were made between Member States. Statistics show that the overall return rate between Member States was 52% in 2008 while it was 39% when the requesting State was a third State: Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No. 8 B — update of November 2011 for the attention of the Special Commission of June 2011, available at http://www.hcch.net.

[18] COM(2014) 225 final, p. 12.

has taken place.[19] For its part, the ECtHR has ruled[20] that, once it has been found that a child has been wrongfully removed, Member States have a duty to make adequate and effective efforts to secure the return of the child and that failure to make such efforts constitutes a violation of the right to a family life as set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the ECHR").[21]

In cases of parental child, abduction timing is key to the successful operation of the child return procedure established in the Brussels IIa Regulation. It appeared however that the immediate return of the child could not be ensured in all cases.[22] The Brussels IIa Regulation provides that the court to which an application for the return of a child has been made must issue its judgment no later than six weeks after the application is lodged. Member State courts have not always been able to meet this deadline.[23] The inefficiency of the return proceedings can be attributed to several aspects. The six-week time limit to issue a return order proved inadequate in practice since there are doubts among judges and practitioners whether the six weeks apply per instance, include appeals or even the enforcement of a return decision. In addition, the Brussels IIa Regulation sets no time limit for the processing of an application by the receiving Central Authority. Furthermore, problems in meeting the deadline have been attributed in particular to the lack in the national law of a limitation of the number of appeals that can be brought against a return order.[24]

In cases of conflict between a non-return order issued by the court of the Member State to which the child was abducted and a subsequent return order adopted by the court of origin, the Brussels IIa Regulation resolves in favour of the latter in order to secure the return of the child[25] where it is certified by the court of origin, the return order benefits from the abolition of *exequatur*, that is, it is immediately recognised and enforceable in the Member State to which the child was abducted, without the need for a declaration of enforceability and without the

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19 Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, paragraph 52.

20 See, for example, Cases *Šneersone and Kampanella v Italy* (application No. 14737/09), paragraph 85(iv); *Iglesias Gil and A.U.I. v Spain* (application No. 56673/00); *Ignaccolo-Zenide v Romania* (application No. 31679/96), *Maire v Portugal* (application No. 48206/99); *PP v Poland* (application No. 8677/03) and *Raw v France* (application No. 10131/11).

21 The ECtHR has also held in some cases that it may be a breach of Article 8 of the ECHR to return a child, in particular where it found that the requested court had not sufficiently appreciated the seriousness of the difficulties which the child was likely to encounter on return to his/her State of origin, that the requested court could not have determined in an informed manner whether a risk within the meaning of Article 13(b) of the 1980 Hague Convention existed or the requested court failed to carry out an effective examination of the applicant's allegations under Article 13(b) of the 1980 Hague Convention. See, for example, Cases *Šneersone and Kampanella v Italy* (Application No. 14737/09), paragraph 95; *B v Belgium* (application No. 4320/11), paragraph 76; *X v Latvia* (application No. 27853/09), paragraph 119.

22 COM(2016) 411 final, p. 3.

23 In 2008, 15% of applications between Member States were resolved within 6 weeks: see statistical analysis referred to in footnote 56.

24 COM(2016) 411 final, p. 3.

25 Articles 11(8) and 42.

possibility of its recognition being opposed.[26] Such a return order does not need to be preceded by a final judgment on the custody of the child, as the purpose of the return order is also to contribute to resolving the issue of custody of the child.[27] The practical application of the 'overriding mechanism' has proven difficult because the custody proceedings do not take place in the Member State where the child is present and because the abducting parent is often not cooperative. In particular, it is often difficult to hear the child.[28]

Several substantial modifications are proposed with the aim of improving the efficiency of the return of an abducted child and the problems relating to the complexity of the "overriding mechanism" under the Regulation. First of all, the Regulation clarifies the time limit for issuing an enforceable return order in line with the view prevailing among those Member States which handle return cases under the 1980 Hague Convention most quickly. A separate six-week time limit would apply to the proceedings before the first instance court and the appellate court, respectively. In addition, the Regulation would oblige Central Authorities to also work under a six-week time limit to receive and process the application; locate the respondent and the child; promote mediation while making sure that this does not delay the proceedings, and refer the applicant to a qualified lawyer or file the case with the court (depending on the national legal system). This would render the time limit for courts more realistic with a view to protecting the right of the defendant to a fair trial while limiting it to the shortest period realistically possible. The Regulation limits the number of possibilities to appeal a decision on return to one and explicitly invites a judge to consider whether a decision ordering return should be provisionally enforceable. [29]

Moreover, the measures proposed include an obligation for the Member States to concentrate jurisdiction for child abduction cases in a limited number of courts while respecting the structure of the legal system concerned. This would ensure that judges experienced with this very specific type of procedure would rule on the return applications.[30]

Where the child might be at a grave risk of harm or might otherwise be placed in an intolerable situation if returned to the country of the child's habitual residence without any safeguards, it should also be possible for the court of the Member State

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[26] As the Regulation intends to secure the rapid return of the child, the issuing of a certificate by the court of origin in relation to its return order cannot be subject to appeal, and the only pleas in law which can be relied on in relation to the certificate are those seeking its rectification or raising doubts on its authenticity under the law of the Member State of origin; Article 43(2) and Case C-211/10 PPU *Povse*, [2010] ECR I-06673, paragraph 73.

[27] Case C-211/10 PPU *Povse*, [2010] ECR I-06673, paragraph 53. Pursuant to Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, once a non-return order has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of the court of origin issuing a certified return order, that the non-return order has not become final or has been overturned in so far as the return of the child has not actually taken place.

[28] COM(2016) 411 final, p. 3.

[29] COM(2016) 411 final, p. 13.

[30] COM(2016) 411 final, p. 13.

of refuge to order urgent protective measures required there and which, if necessary, can also "travel with the child" to the State of habitual residence where a final decision on the substance has to be taken. Such an urgent measure would be recognised by the operation of law in the Member State where the child was habitually resident immediately before the wrongful removal or retention but would lapse as soon as the courts of that State have taken the measures required by the situation. For example, the court before which return proceedings are pending will be able to grant access rights to one of the parents which will also be enforceable in the Member State of habitual residence of the child until the court of that country takes a final decision with respect to the access to a child.[31]

3.2. Placement of the child in another Member State

The Brussels IIa Regulation contains in Article 56 specific provisions on the placement of a child in institutional care or with a foster family in another Member State. Where the court of a Member State contemplates the placement of a child in another Member State and public authority intervention is required in the host State for domestic cases of child placement, the court must consult the Central Authority or other competent authority in the host State and obtain the consent of the competent authority in that State prior to the adoption of the placement decision. Currently, the procedures for consultation and consent are governed by the national law of the host Member State, which means that diverging internal Member State procedures apply. Central Authorities must cooperate, where requested, in providing information and assistance.[32] Central Authorities which must assist courts and authorities in arranging cross-border placements have regularly reported that sometimes it takes several months until it is established whether consent is required in a particular case. If consent is required, the consultation procedure as such has to follow and is reported to be equally lengthy as there is no deadline for requested authorities to reply. As a result, in practice, many requesting authorities order the placement and send the child to the receiving State while the consultation procedure is still pending or even at the moment it is initiated because they consider the placement as urgent and are aware of the length of proceedings. Receiving States, therefore, complained that children were often already placed before consent had been given, leaving the children in a situation of legal uncertainty.[33]

The CJEU has confirmed that a placement judgment must be, before it can be enforced in the host Member State, declared enforceable in that Member State. One of the grounds that can be opposed against a declaration of enforceability of a decision placing a child in another Member State is the failure to respect the procedure laid down in Article 56 of the Brussels IIa Regulation[34] so as to avoid the imposition of the placement measure on the host State.

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31 COM(2016) 411 final, p. 13.
32 Article 55(d).
33 COM(2016) 411 final, p. 4.
34 Articles 31(2) and 23(g).

In order to solve these problems, the Regulation concerning cross-border placements introduces a number of new rules. The consent is of the receiving State mandatory for all cross-border placements originating from a court or authority in a Member State. All request has to be channeled through Central Authorities. And it introduces a time limit of eight weeks for the requested State to decide about the request.[35]

3.3. The requirement of exequatur

The protection of the child's best interests is one of the main objectives of Union action in the context of recognition and enforceability provisions, in particular by giving concrete expression to the child's fundamental right to maintain contact with both parents, as laid down in Article 24 of the Charter of Fundamental Rights of the European Union. In addition, the Regulation aims to achieve the free circulation of judgments in all matrimonial and parental responsibility matters[36]. The abolition of *exequatur*[37] in the area of civil law and the possible introduction of common minimum standards with regard to the recognition and enforceability of parental responsibility decisions were identified in the Stockholm Programme[38] and the Stockholm Action Plan[39] as key for the Commission's future work in civil matters.[40]

The Brussels IIa Regulation was the first Union instrument abolished *exequatur* in civil matters in respect of certain decisions, namely certified judgments on access rights to children and certified return orders in child abduction cases. It also extended the principle of mutual recognition of judgments to all decisions on parental responsibility (protecting the child regardless of the existence of matrimonial links between the parents) thereby completing, in accordance with the Stockholm Programme, the first stage of the programme of mutual recognition, the ultimate objective remaining the abolition of *exequatur* for all decisions.[41]

Exequatur remains an obstacle to the free circulation of decisions, which entails unnecessary costs and delays for parents and their children involved in cross-border proceedings. The time for obtaining *exequatur* varies between the Member States; it can take from a couple of days to several months, depending on the juris-

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35 COM(2016) 411 final, p. 14.

36 The Regulation provides that authentic instruments and agreements must be declared enforceable under the same conditions as judgments if they are enforceable in their Member State of origin. The fact that certificates used in the *exequatur* procedure refer only to "judgments" has caused difficulties.

37 The procedure for declaring a decision given in another Member State enforceable.

38 Stockholm Programme (Council document No. 17024/09 JAI 896), paragraphs 3.1.2 and 3.3.2.

39 Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan Implementing the Stockholm Programme of 20 April 2010, COM(2010) 171 final, pp. 10, 12, 23.

40 COM(2014) 225 final, p. 9.

41 Explanatory Report p. 9.

diction and the complexity of the case. If an appeal is lodged against the grant or refusal of *exequatur*, this delay increases considerably: appeal proceedings can take up to two years in some Member States.[42]

As a substantial change, the Regulation, therefore, abolishes the exequatur procedure for all decisions covered by the Regulation's scope. The abolition of exequatur will be accompanied by procedural safeguards that ensure that the defendant's right to an effective remedy and the right to a fair trial as guaranteed in Article 47 of the EU Charter of Fundamental Rights are adequately protected. The abolition of exequatur would allow the European citizens engaged in cross-border litigation to save the major part of the current costs of the procedure (on average € 2,200 to be paid for processing the application) and eliminate delays, which in some cases amount to a couple of months. Where there is a concern that any of the grounds of non-recognition or grounds to challenge concrete enforcement measures might apply, the defendant could make an application to challenge recognition and/or enforcement in the Member State of enforcement in the same procedure. As such, the time and costs of the exequatur procedure will be saved while the necessary protection of defendants will remain ensured. [43]

As it is already the case under the Brussels IIa Regulation, the new Regulation also contains a series of standard certificates which aim at facilitating the recognition or enforcement of the foreign decision in the absence of the exequatur procedure. These certificates will facilitate the enforcement of the decision by the competent authorities and reduce the need for a translation of the decision.[44]

3.4. Hearing of the child

Regarding the recognition of judgments in both matrimonial and parental responsibility matters, the use of the "public policy" ground of non-recognition has been rare. However, in matters of parental responsibility, significant divergences have arisen in practice with regard to a broader or narrower application of this ground.[45] In addition, in matters of parental responsibility, a frequently raised ground of opposition has been the fact that the judgment was given without the child having been given an opportunity to be heard.[46] In this connection, particular difficulties arise due to the fact that the Member States have diverging rules governing the hearing of the child.

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42 COM(2016) 411 final, p. 4.
43 COM(2016) 411 final, p. 14.
44 COM(2016) 411 final, p. 15.
45 Study on the Interpretation of the Public Policy Exception referred to in the Annex to this report.
46 Other frequently raised grounds for the non-recognition of judgments have been the service of documents where the judgment was given in default of appearance, the failure to comply with the procedure laid down in the Regulation for the placement of a child in another Member State and the fact that the judgement was given without the parent concerned having been given an opportunity to be heard. These are important considerations referring to the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter.

The Regulation is based on the principle that children's views must be taken into account in cases concerning them as long as this is appropriate in light of their age and maturity and line with their best interests. Difficulties arise due to the fact that the Member States have diverging rules governing the hearing of the child. In particular, the Member States with stricter standards regarding the hearing of the child than the Member State of origin of the decision are encouraged by the current rules to refuse recognition and exequatur if the hearing of the child does not meet their own standards. In addition, the importance of hearing children is not highlighted in the Brussels IIa Regulation in general terms for all cases on matters of parental responsibility, but only in relation to returning proceedings.[47]

The new Regulation leaves Member States' rules and practices on how to hear a child untouched but requires mutual recognition between the legal systems. This means that an obligation to give the child who is capable of forming his or her own views an opportunity to express these views would be made explicit in the Regulation, bearing in mind that all Member States have ratified the UN Convention on the Rights of the Child which already obliges them to hear the children meeting the condition mentioned above in any domestic and cross-border proceedings concerning them. Notably, a distinction is made, as it is the case in the respective Article of the Charter of Fundamental Rights, between the question when the child needs to be allowed to be heard on the one hand (i.e., when he or she is capable of forming/expressing his or her own views) and the question what weight the judge shall give to the child's views on the other hand (which depends on the age and maturity of the child). This distinction has to be recorded in the decision and a certificate annexed to it. For a parent seeking recognition of a decision on another Member State, this means that a court in that country will not refuse to recognise it on the mere fact that a hearing of the child in another country was done differently comparing to the standards applied by that court.[48]

3.5. Actual enforcement of decisions

Decisions on parental responsibility are often enforced late or not at all. Efficient enforcement depends on the national structures put in place to ensure enforcement. The legal and practical approach to the enforcement of family decisions varies among the Member States, in particular with regard to the enforcement measures taken. Once an order has been made, it is important to have effective measures available for enforcing it while it has to be borne in mind that for enforcement against children, it must still be possible to react quickly to any temporary or permanent risks to the child's best interests which might be caused by enforcement.[49]
The Brussels IIa Regulation provides that a judgment delivered by a court of another Member State and declared enforceable in the Member State of enforce-

[47] COM(2016) 411 final, p. 4.
[48] COM(2016) 411 final, p. 15.
[49] COM(2016) 411, p. 4.

ment must be enforced under the same conditions as if it had been delivered there.[50] As the enforcement procedure is governed by the law of the Member State of enforcement and differences exist between national laws, difficulties arise with regard to the enforcement of parental responsibility decisions. Some national systems do not contain special rules for the enforcement of family law decisions, and parties must resort to procedures available for ordinary civil or commercial decisions, which do not take into account the fact that, in the area of parental responsibility, the passing of time is irreversible.[51] The application of different Member State procedures (for example, concerning the right of appeal, which suspends the effects of the judgment) may not, therefore, guarantee effective and expeditious enforcement of judgments.[52]

With regard, in particular, to the enforcement of return orders in cases of parental child abduction, the Regulation provides that a certified return order issued by the court of origin must be enforced in the Member State of enforcement in the same conditions as if it had been delivered there and that the order cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.[53]

While the Regulation abolished exequatur to all categories of decisions under the scope of the Regulation in line with recent Union legislation, so in this connection, the functioning of the current grounds of refusal for the recognition and enforceability of a judgment should be taken into account to establish the necessary safeguards. In addition, the introduction of common minimum procedural standards, in particular regarding the hearing of the child, would enhance mutual trust between the Member States and, thus, the application of the provisions concerning recognition and enforceability.

A party challenging the enforcement of a decision given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal of recognition, the grounds for refusal against enforcement as such. The incompatibility with the child's best interests which has been caused by a change of circumstances (such as the serious illness of a child) or by the strength of the objections of a child of sufficient age and maturity should only be considered if it reaches importance comparable to the public policy exception.[54]

The Regulation also foresees an indicative time limit for the actual enforcement of a decision. In case the enforcement has not occurred after the lapse of 6 weeks from the moment the enforcement proceedings were initiated, the court of the Member State of enforcement would have to inform the requesting Central Authority in the Member State of origin (or the applicant, if the proceedings were con-

50 Article 47.

51 See the Comparative study on enforcement procedures of family rights referred to in the Annex to this report.

52 COM(2014) 225 final, p. 14.

53 The same enforcement provisions apply in respect of certified judgments concerning rights of access to children; Article 47.

54 COM(2016) 411 final, p. 15.

ducted without Central Authority assistance) about this fact and the reasons for the lack of timely enforcement.[55]

3.6. Cooperation between the Central Authorities

The Brussels IIa Regulation lays down provisions on cooperation between Central Authorities in matters of parental responsibility. This cooperation is essential for the effective application of the Regulation. Central Authorities must, for example, collect and exchange information on the situation of the child (for instance in connection with custody or child return proceedings), assist holders of parental responsibility to have their judgments recognised and enforced (in particular concerning access rights and the return of the child) and facilitate mediation. Central Authorities also meet regularly within the framework of the EJN to exchange views on their practices as well as bilaterally to discuss on-going cases.[56] Despite their overall positive functioning, the provisions on cooperation have been considered as not sufficiently specific. In particular, experts have reported difficulties in connection with the obligation to collect and exchange information on the situation of the child.[57] The main concerns relate to the interpretation of this provision, the fact that applications for information have not always been handled in a timely manner as well as to the translation of the information exchanged. Also, significant differences exist between the Member States with regard to the assistance provided by Central Authorities to holders of parental responsibility that seek enforcement of access rights judgments.[58]

The new Regulation clarifies the following aspects: (1) who can ask (2) which assistance or information (3) from whom and (4) under which conditions. It makes clear that also courts and child welfare authorities can request the assistance of Central Authorities. Moreover, with respect to the transmission of social reports, the proposal clarifies to cover also reports on adults or siblings which are of relevance in child-related proceedings under the Regulation if the situation of the child so requires. The request is to be accompanied by a translation into the language of the requested State. Likewise, the Regulation establishes some minimum requirements for a request for a social report, namely a description of the proceedings for which it is needed and the factual situation that gave rise to those proceedings. In addition, it states that the Member States shall ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation.[59]

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55 COM(2016) 411 final, p. 15.
56 Since 2010, 155 cases have been discussed in bilateral meetings.
57 Article 55(a).
58 COM(2014) 225 final, p. 11.
59 COM(2016) 411 final, p. 16.

4. Conclusion

The Brussels IIa Regulation is a well-functioning instrument that has brought important benefits to citizens. However, there were indications on the basis of data and preliminary feedback from experts that existing rules could be improved. In order to explore comprehensively the concerns identified in the report, the Commission intends to launch a further policy evaluation of the existing rules and their impact on citizens. To this end, the Commission launched a public consultation. On the basis of the evaluation and the replies to the public consultation, the Commission took action as appropriate.[60] And thanks to that 2019/1111/EU Regulation has born. The Regulation does not contain any changes with regard to the scope and the matrimonial matters for which the status quo is retained. This means that Chapter I (with the exception of mere clarification in definitions) and Chapter II Section 1 (except for clarification of the Articles 6 and 7) remain unchanged. But as we can above, there are many other changes which could hopefully make the application of the Regulation easier in the future.

In order to monitor the effective application of the amended Regulation, regular reporting and ex post evaluation by the Commission will take place supported by consultations of the Member States, stakeholders and external experts. Regular expert meetings will be organised to discuss application problems and exchange best practices between the Member States in the framework of the European Judicial Network in civil and commercial matters. The cooperation with the latter will be particularly useful to formulate the need for the collection of specific data to underpin any future proposal by statistical evidence.

[60] COM(2014) 225 final, p. 16.

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CREEPING EXTENSION OF EU COMPETENCES OR TEXTBOOK EXCEPTION THAT PROVES THE RULE? SOME REMARKS ON C-591/17., AUSTRIA V GERMANY CASE [*]

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1. Introduction

The case is one of the recent and of the benchmarks of the Court of Justice of the European Union (hereinafter referred to as: CJEU) that was followed by intense political debates, high-level legal argumentation, and expectations based on the national competences and the equal treatment from both – Austrian and German – sides, all across the European Union (hereinafter referred to as: EU).

The case is a landmark one from several aspects. First, this is an infringement procedure, the rarer version when a Member State (hereinafter referred to as: MS) sues another MS for the breach of obligations arising from EU law.[1] Secondly, the case is unique from the point of differences in the opinion of the Advocate General *Nils Wahl* and the reasoning of the CJEU. Thirdly, the judgement might be categorized as a *borderline* case of *collision*. Both the AG and the CJEU had to examine the EU competences in the light of the principle of subsidiarity declared in Article 5(3) of the Treaty on European Union (TEU) and Protocol (No. 2) on the application of subsidiarity and proportionality regarding the tax-sovereignty of the MSs. The reasoning of the AG and the CJEU is altering and in a significant sense. This difference highlights the values of the scientific reasoning and perspective and the pragmatic one. Both argumentations are convincing besides being controversial. AG *Wahl* applied a clear scientific analysis wrapped in wise reasoning. The CJEU has *solved* the case by following a pragmatic aspect, using the discriminatory-reference as a *Trump-card* of constituting the legal base, which usually over-

[*] Due to the fact that in the Member States of the EU consumers are able to purchase the infrastructural fees online, the digital aspect of the topic is also relevant. This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

[1] It is very rare for a Member State to bring infringement proceedings against another Member State. The present action is the seventh of a total of eight in the history of the Court (see for the first six, Press Release No. 131/12; the eighth case is pending: Slovenia v Croatia, C-457/18).

writes national interests. Last, but not least, the decision – arising from the abovementioned significances – is a newborn textbook example for the *creeping extension of Union competences*, too.

Within the frames of this paper, we emphasize the different perspectives of the AG and the Court. This paper aims to present the importance of uniform legal interpretation, especially in today's innovative societies. The European Union intends to modernize the integration from a technological and a legal point, too. The objective is to reach social welfare and economic progress within a modern and quite flexible legal system of harmonized rules and a well-functioning internal market. The guarantee for the well-functioning (border- and obstacle-less) internal market is one the one hand, the adequate share of competences between the EU and the MSs.

On the other hand, the provision of equal treatment to the nationals of other MSs who intend to live cross-border lifestyles and by this, to accomplish the market in practice. Thus, it is not that simple to cross the appropriate line between the sovereignty and competences of a state and its obligation for the equal treatment (which means non-discrimination in practice). The field of taxation belongs to MSs competence. However, the MSs shall ensure equal treatment in all circumstances and this is the *edge of the room-maneuver* for the freedom of the MSs to exercise their full powers with full power. Besides, the CJEU has already started to slowly, creepingly extend its competences regarding the interpretation of EU law. By the unique interpretation, the Court fills the legal acts with content and able to (trans)form law, not just the *Common European Law*, but also – by having an indirect impact – the national laws, too. This is called, the *creeping extension of Union competences.* We find significant to examine the differences of the reasoning of the AG and the Court which could be found in the perspective and methodology. Since the CJEU has maybe the most relevant role in the transformation of European law and its tendencies, it might be interesting to see how the Court *forms the law*. In the case of *Austria v Germany*, the controversial argumentation of the relevant actors is very thoughtful. Well, does the case provide the *main rule* or an *extraordinary exception that proves the rule*?

2. The facts of the case in a nutshell[2]

From 2015, Germany has put in place a legal framework for the introduction of a charge for the use by passenger vehicles of federal roads, including motorways: the 'infrastructure use charge'. By that charge, Germany intends to move in part from a system of financing by means of taxation to a system of financing based on the *'user pays'* and *'polluter pays'* principles. The revenue from that charge will be entirely allocated to financing the road infrastructure, the amount of which will be calculated on the basis of cylinder capacity, the type of engine and the emission standard of the vehicle.

[2] This point used the Press Release No. 75/19, summary of the judgement in C-591/1 case. Available: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190075en.pdf

Every owner of a vehicle registered in Germany will have to pay the charge, in the form of an annual vignette, of no more than €130. For vehicles registered abroad, payment of the charge will be required (of the owner or the driver) for use of the German motorways. In that regard, a 10 day vignette is available costing between €2.50 and €25,2 months costing between €7 and €50 and annual vignettes are available, at no more than a maximum of €130. In parallel, Germany has provided that, from the revenue from the infrastructure use charge, the owners of vehicles registered in Germany will qualify for relief from the motor vehicle tax to an amount that is at least equivalent to the amount of the charge that they will have had to pay.

Austria considers that, on the one hand, the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany and, on the other, the structuring and application of the infrastructure use charge are contrary to EU law, in particular, the prohibition of discrimination on the grounds of nationality. Having brought the matter before the European Commission for an opinion, which was not delivered within the prescribed period, Austria brought infringement proceedings against Germany before the Court. In these proceedings, Austria is supported by the Netherlands, whereas Denmark supports Germany.

3. The argumentation of the AG

Advocate General *Wahl* used a scientifically supported, clear, logical, legally-based analysis, where he examined from sentence to sentence the essence and meaning of all the concepts *(A) indirect discrimination on the grounds of nationality through the combination of the measures at issue – in addition, the concept of discrimination, the nature of a measure and its capability to discriminate, & other issues; (B) indirect discrimination on grounds of nationality through the design of the infrastructure charge, (C) Breach of Art. 34 & 56. TFEU, (D) Breach of Art. 92 TFEU*. AG *Wahl* started his opinion with nominating the prohibition (in particular discrimination based on *nationality*) of non-discrimination as one of the few *commandments* of EU law. By placing non-discrimination to the first point of the opinion, the reader may have the impression that equal treatment and non-discrimination have a dominant role in the argumentation. Nevertheless, the focus was taken to the concept of discrimination. It is essence, function, the meaning of that in a scientifically supported manner.

AG's conclusion was a result of a clear analysis of the question of what discrimination is. Besides, under what circumstances can we talk about discrimination. What does it mean to have a comparable base in order to examine the alleged breach of the obligation for equal treatment? Alternatively, if the whole concept lacks' the essence (namely, the comparable base for examining the discrimination) from the beginning, we cannot move further to analyze the cumulative effect of the regulations. It is also important that even if a national regulation might be able to result in a kind of discrimination, there are some fields (such as direct taxation)

where the Member States have the competence to legislate, and EU law could be only interpreted when the values or general principles are affected.

According to AG *Wahl,* the CJEU should dismiss the action brought by Austria against Germany as the fact that owners of vehicles registered in Germany benefit from tax relief on the German motor vehicle tax in an amount that corresponds to the amount of the charge do not constitute discrimination on the grounds of nationality.

AG *Wahl* considers in particular that Austria's arguments based on alleged discrimination on the grounds of nationality are premised on a fundamental misunderstanding of the concept of 'discrimination'. The AG concedes that the owners of domestic vehicles are mainly German nationals, whereas drivers of foreign vehicles are mostly of the nationality of other Member States. Thus, although the German legislation in question does not establish any express discrimination based on nationality, if the arguments put forward by Austria were to be held well-founded, there would be indirect discrimination on the ground of nationality and, consequently, a breach of EU law.

However, the two groups of persons (Germans and other EU citizens) who were compared by Austria, are not comparable concerning the measures criticized. They are not in a comparable situation, because German users of the infrastructure are German taxpayers as well, while foreign drivers are only the users of the infrastructure built and maintained by Germans, but do not pay any tax in Germany. The non-German EU citizens who might be the users of the German infrastructure are the taxpayers (or tax beneficiaries) of other MSs, due to the fact that they have registered their vehicles outside the territory of Germany.

Secondly, Austria could not point to any less favorable treatment that the measures at issue grant to drivers of foreign vehicles. Drivers of foreign vehicles are not, and can never be, in a situation that is less favorable than that in which owners of domestic vehicles find themselves. In order to be allowed to drive on German motorways, the former is to pay only the infrastructure charge and are not obliged to pay for the yearly rate: they can opt for a vignette of shorter duration, depending on their actual need. Consequently, when both measures are considered together – as Austria asked the CJEU to do so – there is no less favorable treatment for foreign drivers. The German regulation in question is proportionate as users of the infrastructure can choose the tickets provided for a shorter period of time, while German users have to pay the yearly[3] amount. If Germany were obliged to abolish tax advantages, the owners of domestic vehicles would have been subject to a dispro-

[3] For example, in Hungary, we can decide whether we intend to use the motorway. We might use the main roads instead which are not burdened with extra fees. If a Hungarian or foreign citizen opts to choose the motorway, they have the opportunity to choose from several types of tickets depending on the category of the vehicle and the period of time. Hungarian people are not obliged to purchase the yearly ticket. See: https://e-autopalyamatrica.hu/?gclid=CjwKCAiA58fvBRAzEiwAQW-hzayqTFEKUcj-PSy0XmaqGvleelatwnotUGXwBBF85uNBpHujhLAH8BoCKIUQAvD_BwE (30 November 2019). The same situation is applied e.g. in Slovakia.
See: https://eznamka.sk/en (downloaded: 30 November 2019).

portionate amount of taxation had they been subject to both the infrastructure charge and the motor vehicle tax.

The Advocate General admits that the amount of the motor vehicle tax to be paid by owners of domestic vehicles will be lower than in the past, thanks to the tax relief. However, even if the tax relief had the effect of *'zeroing'* the motor vehicle tax (which is not the case), any foreign driver would be required to pay for using German motorways an amount that would be payable by owners of domestic vehicles.

Therefore, the AG concluded and proposed for the CJEU to dismiss the action, order the Republic of Austria to bear its costs and pay those incurred by the Federal Republic of Germany, and order the Kingdom of Denmark and the Kingdom of the Netherlands to bear their costs.

4. The reasoning of the CJEU

The CJEU used a different base − a more pragmatic one − to reach its conclusion. Due to our experiences, it is very rare that the CJEU and the AG have such diverse argumentation and conclude so differently from each other.

The CJEU used a pragmatic approach by examining the cumulative effect of different measures. The CJEU based its argumentation on the effect of taxation, and infrastructural fee applied together, and did not agree with the AG on the comparable base of the groups of people. This is important in our view as without comparing two groups to see whether they are in the same situation, or not, we have to analyze if they can be compared. If they have the features to be compared, or not. The AG started by that. The Court hypotised that the groups are comparable as they use the German infrastructure, and even if both groups pay for that, the foreign EU citizens cannot ask it back as tax relief.

Thus, the CJEU found that the effects of the manners examined from the *"result side"* are discriminatory, due to their cumulative impact. The CJEU concluded that as the national laws of which determines the infrastructure charge and the other that includes the tax relief are so connected both by the time (of legislation, then modification) and by the sum, that it is not justifiable to value them separately. (Thus, the subjective aim and the objective content of the national regulations perform a unit and have a cumulative effect on the equal treatment.)

The CJEU found that the infrastructure use charge, in combination with the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany, constitutes indirect discrimination on the grounds of nationality and is in breach of the principles of the free movement of goods and of the freedom to provide services. As regards the prohibition of discrimination on grounds of nationality, the Court found that the effect of the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany is to offset entirely the infrastructure use charge paid by those persons, with the result that the economic burden of that char-

ge falls, *de facto*, solely on the owners and drivers of vehicles registered in the other Member States.

It is indeed open to the Member States to alter the system for the financing of their road infrastructure by replacing a system of financing by means of taxation with a system of financing by all users, including the owners and drivers of vehicles registered in other Member States who use that infrastructure, so that all those users contribute equitably and proportionately to that financing. However, such alteration must comply with EU law, in particular, the principle of non-discrimination, which is not so in this case.

5. The significance of the judgement

By considering this case, the CJEU addressed the *legal order*.[4] The judgement provides a *de facto* solution. While the AG's opinion was rather a *de iure* one. The CJEU applied the *overriding principle* and obligation of non-discrimination[5] and highlighted a *kind of cumulative effect* of an infrastructure charge of the motorway and tax relief for domestic car holders'. According to the CJEU, the cumulative effect of the infrastructural charge and the tax relief amount to indirect discrimination on the grounds of nationality. In the following, we summarize the argumentation of AG *Wahl* and the CJEU.

The CJEU declared that *"the Federal Republic of Germany, by introducing the infrastructure use charge for passenger vehicles and by providing, simultaneously, a relief from motor vehicle tax in an amount at least equivalent to the amount of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfill its obligations under Articles 18, 34, 56 and 92 TFEU".*

Therefore, the infrastructure use charge, in combination with the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany, constitutes indirect discrimination on the grounds of nationality and is in breach of the principles of the free movement of goods and of the freedom to provide services. As regards the prohibition of discrimination on grounds of nationality, the Court found that the effect of the relief from motor vehicle tax enjoyed by the owners of vehicles registered in Germany is to offset entirely the infrastructure use charge paid by those persons, with the result that the economic burden of that charge falls, de facto, solely on the owners and drivers of vehicles registered in the other Member States.

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4 Niels KIRST: The Court's judgement in C-591/17 (Austria v Germany), or why the German light-vehicle vignette system is discriminatory. *European Law Blog*, 2019, available at: https://europeanlawblog.eu/2019/06/27/the-courts-judgement-in-c-591-17-austria-v-germany-or-why-the-german-light-vehicle-vignette-system-is-discriminatory/ (downloaded: 30 November 2019).

5 Article 18, TFEU.

those users contribute equitably and proportionately to that financing. However, such alteration must comply with EU law, in particular, the principle of non-discrimination, which was not so in the present case.

In the case, it was not possible to agree with the argument of Germany, in particular, that relief motor vehicle tax for the owners of vehicles registered in that Member State is a reflection of movement to a system of financing of road infrastructure by all users, according to the *'user pays'* and *'polluter pays'* principles.

Having produced no details of the extent of the contribution of the charge to the financing of federal infrastructure, Germany has in no way established that the compensation granted to the owners of vehicles registered in Germany, in the form of relief from motor vehicle tax to an amount at least equivalent to the amount of the infrastructure use charge which they were required to pay, does not exceed that contribution and is therefore appropriate.

Furthermore, concerning owners of vehicles registered in Germany, the infrastructure use charge is payable annually without any opportunity to choose a vignette for a shorter period if that better corresponds to the frequency of his use of those roads. Those factors, coupled with relief from the motor vehicle tax to an amount that is at least equivalent to the amount paid concerning that charge, demonstrate that the movement to a system of financing based on the *'user pays'* and *'polluter pays'* principles affects the owners and drivers of vehicles registered in the other Member States exclusively, whereas the principle of financing by means of taxation continues to apply with respect to owners of vehicles registered in Germany. Moreover, Germany has not established how environmental or other considerations could justify the discrimination found to arise.

As regards the free movement of goods, the Court found that the measures at issue were liable to restrict the access to the German market of goods from the other Member States. The infrastructure use charge to which, in reality, only vehicles that carry those goods are subject is liable to increase the costs of transport and, as a consequence, the price of those goods, thereby affecting their competitiveness. As regards the freedom to provide services, the Court finds that the national measures at issue are liable to restrict the access to the German market of service providers and service recipients from another Member State.

The infrastructure use charge is liable, because of the relief from motor vehicle tax, either to increase the cost of services supplied in Germany by those service providers or to increase the cost for those service recipients inherent in traveling into Germany in order to be supplied with a service there. However, contrary to what is claimed by Austria, the Court finds that the rules for the structuring and application of the infrastructure use charge are not discriminatory. This concerns the random inspections, any prohibition on continuing the journey using the vehicle concerned, the recovery *a posteriori* of the infrastructure use charge, the possible imposition of a fine, and the payment of a security.[6]

[6] See the Press Release No. 75/19, summary of the judgement in C-591/1 case. Available: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190075en.pdf

6. Concluding remarks: the implications of the case

To highlight the main differences between the argumentation of the CJEU and the opinion of the AG, we would conclude that the perspective of these actors is controversially altering, altering controversial. As the Advocate General uses a scientifically logical, analytical perspective, and the CJEU uses a more pragmatic (practical) one following its case-law and the practical effects of the case. This time, the CJEU did not follow the opinion of the AG. Both methods of the examination are convincing. The most interesting for us is that the CJEU and the AG used different approaches both for the method of analysis and the legal base of argumentation.

In this case, the CJEU faced serious questions related to state competences and their *'intangible borders'*. The Court examined whether there are any interrelationship and impact assessments between car tax exemption or the infrastructural fee. The CJEU concluded in point 44 of the judgment, that the measures have cumulative effects, both temporally and materially, since the application of the car tax exemption is subject to the charging of an infrastructure charge in the German law. Secondly, the CJEU examined concerning the abovementioned – more economical aspect – the discrimination perspective of the case, too. In point 47 of the judgment, the CJEU concludes that it was necessary to ascertain whether the national measures at issue, assessed jointly, establish a difference in treatment on the ground of nationality. The CJEU also declared that *it must be recalled that the general principle of non-discrimination on the grounds of nationality, as enshrined in the first paragraph of Article 18 TFEU, prohibits not only direct discrimination on the grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.*[7] This is already a wide interpretation that might be used again and again, from a case-by-case basis, and might base the further development of the anti-discrimination law field. In point 41, the Court forms the legal base for its rule: *It follows that, in the present case, the national measures at issue can be examined having regard to the first paragraph of Article 18 TFEU only to the extent that they apply to situations which do not fall within the scope of such specific rules on non-discrimination laid down by the FEU Treaty.*

In our view, it is not disputed that, in respect of the costs of a vehicle, the tax and the toll are a cumulative burden on the taxable person, the scope of the two provisions is and the judgment, could be evaluated as the creeping extension of Union competences. This derivation, because of the cumulative effect of the combined treatment of the two separate taxes and the parafiscal infrastructural charge provision, establishes an infringement of the principle of *different treatment* based on nationality in Article 18 TFEU. Member State competence is primary, so tax sovereignty is severely impaired in the judgment in our view.

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[7] See, to that effect, judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 40.

The CJEU also examined the German provision from an environmental point of view, on the basis of the polluter pays principle, and concluded that this principle would also be undermined by the exemption from motor vehicle tax, as it only applies to road users not registered in Germany.

Finally, it can be stated that this case also illustrates that the principle of differential treatment (TFEU 18) is very strong in EU tax law and, in the broad interpretation of the CJEU, must be examined in terms of its overall impact and its direct impact on taxation.

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CHILDREN, ONLINE DANGERS AND SOLUTIONS *

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1. Introduction

At the turn of the 20–21. century changes occurred in production, economy, and society, in which information played the most decisive role. This process has not finished yet; it continues today. Digitalization is embracing every aspect of our lives, rewriting our communication, our learning processes, our work, administration, shopping habits, and human relationships. This continual change at the global level can be traced to the lives of families, to the ever-widening gap between generations, and the changing situation of children. Nevertheless, it has not avoided the everyday life of educational institutions, too, including more and more challenges to solve and contradictions.

2. New generations, new challenges

The information explosion has brought the emergence of new generations who are already on a completely different path of information gathering and personality development than their predecessors. Before analysing the dangers of the digital world, it is inabitable to get to know better the characteristics of children of the new generation and all the occurrences, which help us to understand them and all the situations that threaten them.

It is a natural phenomenon that the older generation will always see the next one differently, and this statement is increasingly valid today. The question that arises is that we really only have to think about the misunderstanding between eternal generations, or the situation is much more serious and have more serious consequences than the stylistic separation of generations.

The youngest members of the information society are "born in the digital world", "digital natives", the net generation, the download generation – to mention a few of the names they are entitled to – who have never lived without computers and the internet. Members of the Z Generation Z and the Generation Alpha are

* This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

skilled at the technical level and technical achievements are a natural part of their daily lives.[1]

Today's children's digital brain can handle an incredible amount of information processing simultaneously, and their perception has accelerated significantly. The vibrant online environment, providing new information in every second, may have made it necessary, for example, they need more images per second to sense a series of images in motion. Thanks to the continuous stimulation of their ability to process multiple operations at the most responsive age of 1–4 years, multitasking becomes a natural requirement for them in their daily activities.

However, the question arises that if, at a time when the neural network of the brain is developing at its most intense and the child is in the most receptive state, does not have enough real interaction, but digital stimuli actively surround it, does not distort too much his perception of reality or his compassion. It can be stated that while previous generations are interested in new technology, they use new tools, are represented on social networks, yet they are able to create real interactions and can separate their online life from offline situations. On the other hand, members of the Generations Z and Alpha often have a major problem distinguishing their online and offline personalities. Emotional incontinence among young people is intensifying through impersonal communication via the Internet.[2] They avoid situations that require personal, verbal communication, because it is difficult for them to recognize the meaning of facial expressions and gestures in face-to-face situations, and they also struggle to cope with their own verbal and emotional toolkits to express their emotions.

Consequence of the excessive use of the Internet by today's children is sensory overload, which can lead to sleep disorders, sudden mood swings, and outbursts from an early age (electric screen syndrome). It is believed that excessive Internet use in early childhood leads to tissue loss and tissue wasting in the gray matter of the brain, and as a result, empathic skills, detection and integration of compassion are not well developed.

We cannot go beyond the contradiction either, that comes with changing the situation of children. Based on decades of research by Jean M. Twenge and Stacy M. Campbell[3], the following observations are formulated. From the 1960s onwards, the role of individuality, self-fulfillment, and the need for a spectacular individual career gradually increased. As a result of this phenomenon, people's self-esteem and narcissistic personality traits were extended as well. In parallel with the rise of individualism, the desire to conform to social expectations has diminished and the formerly strict rules of social behaviour have loosened. In families, child-centered

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1 Marc PRENSKY: Digital Natives, Digital Immigrants. *MCB University Press*, Vol. 9, No. 5, October 2001; Generation Z: born between 1995–2009; Generation Alpha: born after 2010.

2 Annamária TARI: Bátor generációk #SzorongokTehatVagyok. Tericum Könyvkiadó, Budapest, 2017.

3 J. M. TWENGE–S. M. CAMPBELL: Generational differences in psychological traits and their impact on the workplace. *Journal of Managerial Psychology*, 2008, 23 (8), pp. 862–877.

education has taken over, and the basic principle of education has been to allow the individuality of the child to unfold, resulting in fewer restrictions and more freedom for children. Human relations have become democratized. The increase in self-esteem and narcissism over the past decades has been well understood, which has been only strengthened by technological developments (e.g., selfie, social networking). The "I think I'm a special person" (self-marketing, "personal branding"), "I can live my life the way I want" attitude, self-centered self-love, overestimation of my abilities make it very difficult for both school and community, but at the same time they have higher expectations of both employers and educators. Members of previous generations (Baby Boomer, X Generation), due to their "old-fashioned" upbringing, take a different view of today's age, including children, and have the same expectations that their parents had previously set for them, although these two generations are different. So not only the old standard but well-established traditional education methods are ineffective against them. Generational differences in mentality cause a great deal of tension and misunderstanding in the workplace and between teachers and students. In the eyes of young people, the teacher, and generally the older generation, is no longer the only and unquestionable source of knowledge. Celebrities, media personalities, "youtube-gurus", vloggers are much more prominent in their role models today. For a long time, the general phenomenon whereby the younger learned from the older has fallen. Nowadays, digitalization has reversed the direction of socialization.

Schools are in a particularly difficult situation, not only because of the generational differences already mentioned but also because of the increased demands placed on them. The exciting opportunities offered by the consumer welfare society, the online space, all socialize children to demand and expect this stimulating entertainment in all walks of life. Thus, it is a requirement for schools and teachers to deliver useful knowledge in an exciting, entertaining and diverse way. Many parents and students are increasingly beginning to interpret school as a service and expect high-quality, student-centered education. Parents and students are less and less willing to meet the requirements of the school, and it is noticeable that parents no longer look at the teacher in a traditional sense, and there is a growing need for teachers to meet the individual needs of parents and children.

Well, whatever we consider being decisive, we have to realize that as the world evolves, the characteristics of generations will change, and the development of the brain itself will take different paths today, as it will be subjected to completely different stimuli. The Internet has become a medium of socialization. Digitization has begun a process of value change and value rearrangement that poses many problems to be solved for generations.

3. Dangers and Deviances

With the opening of the online space, many new tools and opportunities have been created to make everyday life easier, and as technology advances, the number of novelties and opportunities approaches infinity, bringing new threats to life. It is a

major challenge for the legislator to keep up with the dynamically evolving technology and to solve the problems it brings to light with the same degree of legislative regulation as digital development would require.

By exploring the risks inherent in online communication, we can get closer to understanding the psychology of the virtual environment and its deviations and exploring treatment options. The online world is a space where you can take advantage of many attractive opportunities, where you can easily connect with unfamiliar people, share opinions, and information. Anonymity, one of these key risk factors, raises many dilemmas. By hiding your real name and identity, not only can you keep your personal information safe, but the online identity that you create can help you live up to the potential of the online world. Without name and behind a mask not only facilitates networking, but can also cause many abuses. Secrecy, the physical distance from the other party (the victim), all provided by the Internet, allows for dehumanization, emotionless, all self-controlled actions, reduces empathy and creates the appearance of irresponsibility and accountability. This has a profound effect on the relationship between the individual and the environment. Through these interactive processes, the individual's relationship with himself/herself and the world is transformed. If this process becomes pathological, psychiatric disorders, personality disorder, addictive behaviors and online deviations will develop.

So while on the one hand, we need to look at anonymity, which can provide scope for different forms of online harassment and abuse, on the other hand, we also need to talk about personal data circulating uncontrolled in the virtual world, by which may also put the individual at risk. In the network, user existence begins with the provision of personal information, while others are hiding, while others voluntarily disclose their data, photos, and current mood on social networking profile pages. Based on this information, the possibility of linking profiles is enhanced. Data circulating uncontrolled in virtual space can often be easily used for purposes beyond the data subject's original intent.

While researching the dangers of the Internet, we cannot go beyond content – typically sites that are violent, pornographic, suicidal, drug-taking, or malnutrition – that adversely affect the physical and mental development of minors and young people. They also have the risk that access to harmful content is not necessarily a matter of intention, and the user may accidentally open such pages.

In most cases, children have a low sense of danger, which means that minors appear on both the victim and offender side of online deviations. The best example of this is online harassment. With the rise of the Internet, bullying has become an act that can be committed in online space, which can take place through a variety of offending behaviors and in many places it is more dangerous than offline bullying. The cyberbullying, which most affects the 10–16 age group, always starts with some personal motivation. The perpetrator harasses his or her victim repeatedly or continuously over time, harnessing some form of a power imbalance to evoke fear, stress, or anxiety in his or her target, harming or compromising his or her safety.

However, these harassing behaviors may vary. The most common forms of presentation are flaming, denigation, impersonation, outing, trickery, exclusion, cyberstalking and the online cyberthreats. Burning refers to an online fight in which mass messages are sent to the victim in an angry, threatening or vulgar manner. Significant amounts of denigation also occur. In this case, online messages are sent that are capable of violating the victim's reputation (for example, sending despicable drawings, testimonials, comments to the person's sexual abilities and dimensions to the school website). The purpose of impersonation is to destroy a friendship, love, and social relationships by sending messages and texting on behalf of the victim (e.g. taking care of their password). The talk is not negligible either, and in doing so, the perpetrator fraudulently obtains and shares the victim's secret, or embarrassing information, secret feature. We also need to talk about deliberate exclusion when someone is deliberately excluded from a particular online group (e.g. chat rooms). During cyberstalking, the victim's online habits were monitored and sending threatening, intimidating messages and using them to arouse fear of the other person's own security. Cyberthreats are direct threats or unsettling statements that suggest that their author is emotionally upset and is considering hurting someone or himself/herself or committing suicide.[4]

While formerly school-based bullying has ceased to exist, the victim remains in the victim's position at home due to the continued availability of the Internet. Each of these offenses can have a very significant impact on the development of the minor victim's personality. It is not an easy task for the victim to deal with long-term online abuse not detected by the environment in time, finding a way out which can lead self-harm to suicide. It is not unusual to become a victim again or even the victim becomes an offender.

Sexual overheating and experimental behaviour characterized by teenagers, or the lack of awareness of the severity of their actions, may be behind the spread of so-called sexting. Sexting refers to the transmission of erotic images or videos via Infocommunication devices, which has become a fashionable phenomenon among young people in recent years. Reproduced images can be transmitted without further permission or other restrictions, thus allowing for abuse. In addition to irresponsibility, the desire for revenge can be a powerful motivator in certain situations. Usually in cases where after a breakup, one of the parties – usually a male – discloses footage of the couple. In relating sexting, two problems appear: abuse of prohibited pornographic material and also misuse of personal data, but there is no common understanding of how to deal with the cause of the problem. The only problem is judging by the fact that, in many cases, the recordings are made and transmitted by the data owners themselves.[5] Cyberbullying does not respect others' privacy while sexting as the user opens his/her private section, giving up protecting voluntarily. Thousands of child pornography ads are placed on Hungarian dating

[4] Government Decision 1488/2016. (IX. 2.) – Digital Child Protection Strategy.

[5] Zoltán SZATHMÁRY: Bűnözés az információs társadalomban, Alkotmányos büntetőjogi dilemmák az információs társadalomban. Doktori disszertáció, PTE-ÁJK, Pécs, 2012.

sites every year. According to data from the second project of the Eu Kids Online[6] survey, almost 16% of Hungarian children aged 9–16 have encountered sexually explicit images or videos.[7] Most of the sexually explicit content reaches the young generation by chance or is sent via messaging. Commonly, young people can witness the sexual actions of other persons on the Internet. In most cases, this is a specific message, but it is also sometimes the case that someone is asked to engage in sexual dialogue or to share photos of their intimate body.

And this is how we came to the issue of Internet paedophilia. A paedophile is an adult who has a sexual desire for children due to personality disorder. The social perception of paedophilia is extremely negative and its various manifestations are punished by criminal law in several states of affairs, such as sexual abuse or child pornography. Offenders naturally keep their activities secret, and the Internet is an excellent forum for experiencing paedophile desires through anonymity. Beyond individual crimes, online crime is also well suited to the realization of organized crime, as it is much faster to obtain and transfer child pornographic images through the network. The internet works as a tool for offenders to dating for sexual abuse, to build relationships, or to obtain pornographic material that seriously violates the real intent or interest of the victims. It is also a serious problem that in many cases, the victim himself/herself unintentionally facilitates the collection of pornographic images by voluntarily uploading the image of himself/herself.

In relation to Internet paedophilia, we have to mention so-called grooming, which can best be described as hacking. In this case, the majority of perpetrators hunt for months, with a consciously built strategy, for young people, girls, and boys on social networks. They gain their trust, cheat on their personal information, engage them in their sex games via the Internet, and ultimately get them to meet in person. In the beginning, children, through a well-built relationship of trust, do not even recognize what is happening to them, nor does it cause them to fracture that the person who initially pretended to be peer, but it is not true in reality. The excitement and curiosity in children are much greater. Because of their shame, they usually do not ask for help or they do it too late.

Adam Alter writes in his book, titled Irresistible. Why you are addicted to technology and how to set yourself free? that in the 1960s, young people had to maneuver between a few traps, which were cigarettes, alcohol, and expensive drugs that were generally difficult to access. In 2010, however, there are many more sources of danger that leads to the emergence of new addictions. These "traps" are Facebook, Instagram, porn, online shopping and online games. Addictive behaviors have long existed, but have become more prevalent in recent decades and are much

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6 In 2011 the National Media and Infocommunication Authority has commissioned Eu Kids Online I–III projects, with the overall aim of discovering and understanding the characteristics of using the Internet by children and the risks and dangers associated with them.

7 *EU Kids Online II. A magyarországi kutatás eredményei*. Made for the National Media and Communications Authority. Ed.: ITHAKA Nonprofit Kft., September 2011, http://nmhh.hu/dokumentum/3886/ITHAKA_EU_KIDS_Magyar_Jelentes_NMHH_Final_12.pdf (downloaded: 20 March 2019).

harder to resist. We do not need to inject any substance into our body to develop these new addictions, and although they do not directly inject chemicals into the bloodstream, they do produce the same effect because of their compelling effect and excellent structure. And professionals who develop technologies, games, and interactive experiences precisely build on these effects. Full-immersive technologies like the virtual world evoke such an intense emotional experience that almost made for misuse Once you skillfully overcome the first difficulty in a computer game, and figure out how to handle the game effectively then you can timelessly immerse in the alternation of tension and success. Some games are more motivating to continue than others. In daily multi-hour computering the most seductive games are the ones that allow playing with others through the Internet. Players' thoughts are preoccupied with the virtual world, the desire to be present even when they are offline. Navigating a new world of senses is a fascinating experience for many players.[8] The reward system in the games also provides for long playtime. The attractive virtual gameplay environment, the myriad possibilities for the creation of a custom character by the player, and the adventure of working with other players are all great temptations.

We have to deal with the negative impact of social media interfaces among online threats. In many cases, these surfaces present false images for children, ideas that may be considered to be accepted norms, and followed as an example. The image conveyed in this way creates compliance constraints, which can carry not only privacy but also psychological risks.

The data protection abuse is among the online threats, whereby any breach of data protection rules is considered a data protection abuse. Examples include online phishing, which is a way to deceive users into disclosing their personal and financial information through misleading e-mail messages or websites. Identity theft is an internet crime that is largely linked to phishing and social networking. It is very dangerous as it can have a serious impact on the victim's life. The perpetrators steal the identity of their victim, all their personal information, and in many cases, obtain confidential information about the victim. Risky Internet activities include, for example, careless disclosure of personal information, registration for promising sweepstakes, which can easily lead to data protection incidents.[9]

4. Solutions – Digital Child Protection Strategy

In 2016, as part of the Digital Success Program, Digital Child Protection Strategy of Hungary (DGYS) has become indispensable due to the emergence in recent years of new hazards and concepts in connection with the use of the Internet by children, which require new types of solutions and, to a limited extent, a new system of government instruments. The goal of the Digital Child Protection Strategy is

[8] The most popular game software for Hungarian children is an Internet role-playing game, which includes a number of attractive game elements, called the MMORPG (Massively Multiplayer Online Role-Playing Game) nails them in front of a monitor.

[9] Government Decision 1488/2016. (IX. 2.) – Digital Child Protection Strategy.

to protect children from harmful content and methods on the Internet, from risks and to prepare them, their parents, and their teachers for a conscious and value-creating use of the Internet. In addition to the development of protection methods, the strategy devotes a fundamental role in the development of media education and awareness. In its chapter on Security and Safety, it describes in detail the dangers of online space and explores the possibilities of protection. The strategy emphasizes that the awareness of parents and teachers and educators is key to the field. If people involved in the education of children do not have information about the conscious use of the Internet and do not able to intent and ability to convey this information, this can have serious consequences. In other words, the responsibility and the role of parents (the family) have outstanding significance in terms of consciousness, as in everyday life, they are (rightly) expected to provide a similar amount of help and assistance in the online world. It would greatly facilitate the raising of awareness if grandparents were familiar with the characteristics of children's use of the Internet and their relevant attitudes and habits as the Internet also plays a substantial role in the communication of grandparents and grandchildren. Teachers also have a prominent role and task. It is because the teacher is the adult who is, for example, in a cyberbullying case, in a direct relationship with the victim and often with the perpetrators and victims, too, and may thus be a key factor in detecting and resolving conflicts. The role of teachers is thus manifested in the passing on of information, while they are also responsible for possessing the skills of consciousness as an active participant of discussion and conflict management mechanisms within the framework of the educational system. It should also be developed, where the advantages of the use of the Internet and the related hazards are demonstrated to the target groups by similar-age schoolchildren. Participation in media education training should also be available to parents by organising courses that provide skills relevant to the use of the Internet at a reasonable cost in order to enable parents to use the skills so acquired in raising their children. An effort must be made to provide cost-free training courses, too, through the Digital Success Program Points (DSP Points). People working in the administration of justice, faced with crimes and other offenses against children as part of their job (i.e. people working primarily at the police or the public prosecutor's office and judges) should be trained on an ongoing basis in terms of media education, focusing on the areas relevant for their jobs. The aim is to include digital security issues in the National Curriculum (NAT). The Strategy will also initiate the development of a free-access, Hungarian-language child protection filtering software, as well as the development and operation of a website featuring safe content for minors.

Chapter 3 of the Strategy provides a wide range of sanctions and assistance, from civil and criminal law tools, through the inaccessibility of electronic data, to alternative dispute resolution for school conflicts, of which the use of the latter as a secondary medium, has an undeniably significant educational, personality-shaping impact on the lives of all of us. Some of the conflicts that occur there are inherent in the existence of the community, but the effects of recognizing, identifying, and

successfully or less successfully managing conflicts can go far beyond the school. Domestic and international research has confirmed that the role of the school is not only limited to the education of children but also plays a decisive role in the process of becoming a criminal offender, as it handles conflicts and problematic children. Disorders of integration, learning difficulties, peer rejection, violations of school norms, and responses from school all contribute to alienation from school, which is crucial for later problem behaviors, deviance, and criminalization.[10]

The previously described cyberbullying, online abuse, harassment have added a new dimension to school conflicts. Contemporary offenders often do not know how long a "joke" will last and where the boundaries of the criminal category are, and bullying can often be interpreted as a part of their entertainment, which is legalized by the online group norm. So what's going on in the classroom is not the important question for the teachers, but what's going on in the invisible online space! The difficulty of dealing with online abuse is the complexity of the situation, as it combines pedagogical, legal, and IT aspects. The biggest problem is that, in most cases, teachers do not even presume what conflicts in the classroom will develop in cyberspace. Most of them have difficulties handling computer devices, are unfamiliar with "trendy" mobile applications, and do not consider the Internet as an educational place so that they can reflect on situations in the classroom. Detecting cases of harassment committed to the detriment of children, whether by contemporary or other offenders, is difficult precisely because they hide their abuse from their parents. Law as a deterrent is not relevant to young, child offenders. Deterrence does not work because the belief hampers it in online anonymity, which promises the illusion of impunity. The criminalization of Internet-based harassment is also problematic, partly due to age-related difficulties. The concept of harassment itself is not barrier-free, as in many cases, the concept of everyday harassment does not overlap with the concept of criminal harassment. For teachers, the key to this would be to get to know and understand the different attitudes and online habits of today's children. It would be extremely important for them to be aware of and follow up on fashionable social platforms, applications, games, and to set an exemplary online presence for their students.

Decree No. 20/2012 of 31 August 2012 of the Ministry of Human Resources on the operation of public education institutions and their use of names provides the opportunity for conducting, prior to the disciplinary procedure against the student, a conciliation procedure with a view to discussing and assessing the events leading to the breach of duty and reaching, on that basis, an agreement between the person suspected with the breach of duty and the aggrieved party to remedy the grievance [Section 53(2)]. A similar legal institution is a procedure by an educational mediator, which may be conducted if the educational institution is unable to eliminate the threats to children or students by pedagogical means or where this is justified in order to protect the community of children or students. In such situations, the edu-

[10] Ágnes SOLT: *Peremen billegő fiatalok – Veszélyeztető és kriminalizáló tényezők gyermek- és ifjúkorban*. Doktori (PhD)-disszertáció, Budapest, ELTE-TáTK, 2012.

cational institution may turn to a conflict management consultant or the youth protection or family law service for assistance [Section 62(1)]. Alternatively, educational mediation may take place in the framework of a conciliation procedure. In other words, of the various forms of alternative dispute settlement, the Decree explicitly addresses the possibility of restorative mediation. Where an educational mediator is involved in the conciliation procedure, an agreement is reached between the parties if a common position has been reached between the aggrieved party and the negligent student concerning the compensation for the damages caused by the breach of duty or the reparation or mitigation of its harmful consequences in another manner [Section 62(9)]. Thus, the use of alternative dispute resolution, the restorative method, is not completely foreign to educational institutions. The Digital Child Protection Strategy seeks to extend the scope of this opportunity to include the resolution of online abuse situations affecting school communities. The various conducts qualifying as bullying or cyberbullying also need to be regulated outside criminal law, i.e. in the law of management and education. The point of such regulation is to increase the responsibility of schools and, as a long-term objective, to require schools to implement an anti-cyberbullying programme or at least a programme to promote the safe use of the Internet, to prepare, in their everyday practice, for managing online hazards in the form of internal protocols and special policies and to adopt an appropriate prevention strategy to ensure the peaceful co-existence of students and teachers according to predictable rules. In cases of cyberbullying, school protocols must also set out the procedure to be followed, possible administrative responses as well as civil law and criminal law consequences as the ultimate solution.[11]

5. Summary

Adolescence is a time of path-finding and experiencing large, sometimes extreme, emotional waves, and thus the most vulnerable period of one's life. The Information Age has brought the possibility of unlimited connection, yet young people, trapped in their own network of relationships, find it difficult to find their own reality, which has real emotions with strong attachments. The emergence of online identity, the negative impact it has on offline personality, the constant need for sharing (oversharing), the increasing narcissism, and the growing online danger require constant attention, preparedness and it is a big challenge for all adults dealing with children. However, shutting down the internet cannot be the solution to the problems, as it is a natural medium for them, and they live most of their days here, no wonder they are trying to resolve their frustrations here. It is the responsibility of the family, the parents, first and foremost, to try to be prepared for these situations, because if children cannot interpret something, it can lead to unresolved tensions. The situation of educational institutions and expectations towards schools has also changed.

[11] Government Decision 1488/2016. (IX. 2.) – Digital Child Protection Strategy.

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CRIMINAL AND TECHNICAL ASPECTS OF THE IMPOSITION AND EXECUTION OF A HOME PRISON PENALTY IN THE SLOVAK REPUBLIC [*]

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1. Introduction

In 2006, the penal system in the Criminal Code was enriched by previously unused types of punishments, including the home prison penalty. So called alternative sentences, which should be a significant competition against real imprisonment in the case of minor offenses. The incorporation of new types of alternative sanctions into our legislation reflects the period of the second half of the 20th century, which can be described not only as a period of revolutionary political-economic changes but also in terms of criminal justice, as a period of seeking new forms of justice to replace some inflexible institutes in criminal law. The use of these alternatives is based on the concept of restorative justice, which is in contrast to the repressive concept of retributive criminal justice.[1] Alternative penalties may include those who do not entail the imposition of imprisonment connected with the isolation of the convicted person. The advantage of alternative punishments is that the criminal is spared the damaging consequences of imprisonment. He is not exposed to the negative aspects of this punishment and remains integrated into society, being able to continue to maintain social, family and work relationships, which can significantly improve the remedy of criminal.

The home prison penalty like any other kind of punishment, has also gone through its gradual development. This institute has been used for many centuries, especially in the private sector, as a tool to restrict movement. It was used to people who were too strong or too influential to be placed in a real prison. For example, hereditary rulers, prominent political figures, religious leaders whose imprisonment

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[1] Jaroslav KLÁTIK: Odklon v trestnom konaní ako prostriedok racionalizácie trestnej spravodlivosti. *Právny obzor*, roč. 90, č. 1, 2007 p. 53.

could cause rebellion, political unrest. The first mention of the institution of home prison is the detention of the Apostle Paul. There is also a story in which a man was granted home prison for his faith in Kopernik's theory. He remained in home prison until 1642, when he died. Many former presidents have been sentenced to home prison for crimes against their countries, for example, Pol Pot (Cambodia), Rafael Videla (Argentina), Habib Bourgiba (Tunisia), Aung San Suu Kyi (Burma). Former dictator Augusto Pinochet was placed in home prison upon order; a former leader had been placed in home prison for the last 16 years of his life. Former Prime Minister of the Soviet Union Nikita Khrushchev was placed in a home prison for seven years before his death after being overthrown in 1964.[2]

Even in the historical development of the home prison, it was clear that without technical control, this sentence will be ineffective, unless home prison is just a 'less severe form of imprisonment' where the convicted person has no access to the means of communication or, if he has access, he is most likely to be watched, and the home prison is connected to strict isolation. In the mid-1960s, the first electronic monitoring device was developed by Harvard psychologist Dr. Ralph Schwitzgebel, who worked on the Science Committee in Psychological Experiments at Harvard University. In 1964 he developed a one-kilogram weighing radio telemetry device, which consisted of a battery and a transmitter and transmitted signals that could be traced to a distance of 400 meters and determine the whereabouts of the wearer. Dr. Schwitzgebel hypothesized that his invention could provide a more humane and cheaper alternative to detention for many people involved in the justice process. This device was patented in 1969. However, this device came into practice only in 1977 when Judge Jack Love from Albuquerque, New Mexico, inspired by an episode from the cartoon series Spiderman, discovered the possible use of electronic monitoring. Judge Love convinced Michael Goss, an electronics specialist, to manufacture and construct an electronic control device. In 1983, Judge Love sentenced the perpetrator to a home prison with electronic monitoring for the first time. Subsequently, other states began to use this institute. Electronic surveillance systems grew at the fastest rate in the United States of America, and by 1988 they were already in place in 32 countries, with a total of 2300 offenders monitored electronically.

However, the home prison is not a completely new institute even in our conditions (Slovak Republic) and has its historical roots. It was already anchored in the Criminal Code No. 117/1852 Coll. Home prison was essentially an alternative to the first-instance prison and could be imposed if the offender had no criminal records. He had to undertake not to leave the house under any excuse. Otherwise, he had to execute the remainder of his sentence in prison because of a breach of the obligation. Sometimes the vow of the convict was sufficient; sometimes, the guard was present.

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[2] M. RAJNIČ: Trest domáceho väzenia v systéme trestov. *Justičná revue*, 61, 2009, č. 6–7.

2. Current legislation

The home prison penalty was re-enacted in the Slovak legislation upon re-codification of the Criminal Code with effect from January 01, 2006. The legislator stated the "Front-end" type of home prison, which means that the criminal could spend all time of penalty in home prison.[3] The second option, "Back-end" type, means that criminals firstly go to a real prison and if the behavior is acceptable, criminals can spend the final stage of penalty in home prison. This option is in Criminal code since 2016, as we mention lower. Home prison can be considered as an alternative sanction to sanction of imprisonment for less serious criminal acts, as resulting from the law diction expressed in § 53 clause 1 of Criminal Code, to which the home prison penalty can be imposed on the criminal in duration up to four years. Till 2019 home prison could be imposed only up to two years.

Provision of § 53 clauses 2 of Criminal Code regulates that the court may impose a home prison penalty for a crime where the upper limit of penalty rate of imprisonment is a maximum of ten years. Till 2019 home prison could be imposed only for the crime with an upper limit of penalty rate maximum of 5 years.

Provision of § 53 clauses 1 of the Criminal Code regulates the terms of home prison penalty awarding that must be fulfilled cumulatively. The home prison penalty may be imposed by the court to the offender if:

(a) in view of the nature of the crime committed by offender imprisonment is not necessary due to criminal personality circumstances of the crime,

(b) the offender has given a written statement to reside in the dwelling at the specified address at a specified time and to provide the necessary assistance in carrying out the inspection and control,

(c) the conditions for carrying out control by technical means are fulfilled.

By imposing the home prison penalty, the court must take into account evaluation criteria related to the nature and importance of the offense committed, and also the offender.[4] In the case of offences, the court of justice makes an assessment of the criminal act commitment method, its consequences, circumstances of the act committed, the blame rate and the offender´s motive. Primarily, the court should consider the nature of criminal activity since imposing the home prison penalty was probably undesirable in certain cases of home violence and criminal acts against family and youth, as constituted in the III. head of the special section of the Criminal Code. Evaluating an offender, the court takes into account especially personal and family conditions but proprietary conditions of the offender should be neither neglected and, last but not least, future perpetrator's prognosis and re-socialization possibilities – correction possibilities should be considered. The third condition

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[3] L. TOBIÁŠOVÁ: Domáce väzenie – nový trest v rekodifikovanom Trestnom zákone. *Justičná revue*, 58, 2006, č. 10.

[4] L. MICHAĽOV: Trest domáceho väzenia – súčasnosť a perspektívy. In: *Trestná politika štátu-história, súčasnosť a perspektívy: zborník vedeckých príspevkov z interdisciplinárnej celoštátnej vedeckej konferencie s medzinárodnou účasťou*. 4–5 November 2015, Košice, Košice Univerzita Pavla Jozefa Šafárika v Košiciach, 2015.

representing the essence of the home prison penalty corresponds to the written statement of the offender declaring that criminals will stay in the determined address and provide required cooperation during control. The fourth requirement of such sanction imposing represents fulfillment of conditions for control by technical means. Control of sanction execution by technical means is stipulated in a special law dealing with the control of certain sanction execution by technical means mentioned lower. Control of home prison penalty execution by technical means can be undoubtedly considered an innovation in relation to control of sanction execution in general.[5]

Sentenced criminal is obliged to stay in his residence, including adjacent premises, to live a respectful life and to withstand control by technical means during the period of home prison penalty execution during the time period determined by the court. Speaking of the uncertainty of legislation, the court deciding on home prison penalty should specify the exact place of home prison penalty in the verdict where the sentenced person shall stay, since currently, it is a common praxis that a sentenced person can have permanent stay in the place other than he stays in. The judge should also specify the exact time in the verdict when the sentenced person shall stay in residence. Judicial praxis demonstrated that obligation to stay in residence applies to the weekly working days and out of the working time within approx. 7:30 p.m.–06:00 a.m. To ensure that the sentenced person runs a proper working and family life during the home prison penalty execution. The court of justice is also authorized to inflict restrictions or obligations stated in § 51 clauses 3 and clause 4 of the Criminal Code.

For the duration of the home prison penalty, the person may leave his or her dwelling only with the prior consent of the probation and mediation officer, and only on imperative grounds and for the necessary time. This time counts towards the sentence.

As it was mentioned above, the maximum length of sanction that a criminal can be sentenced by the court to the home prison penalty refers currently to four years. If the sentenced person fails to fulfill obligations imposed by the court of justice, and restrictions resulting from the home prison penalty, the court shall change the home prison penalty or a part of it to imprisonment. § 53, clause 6 of Criminal Code stipulates the way of changing the home prison penalty to unconditional imprisonment in proportion 1 : 1, following the prior hearing of the sentenced person, in the form of a resolution passed by the court at public proceedings. It means that one pending day of the home prison penalty shall correspond to one day of imprisonment and the court of justice shall decide on the way of such imprisonment.

Amendment of Criminal Code that became effective on January 01, 2016, introduced the institute of change of the remaining sentence to imprisonment in § 65a of Criminal Code to home prison penalty also called “Back-end” as another type of

[5] V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague: CBU Research Institute, doi:https://doi.org/10.12955/cbup.v7.1435

home prison penalty, an alternative to parole. The essence of the "Back-end" type of the home prison penalty lies in unconditional sentencing to imprisonment that will change to parole in the form of home prison penalty after passed certain parts of the imprisonment.

3. Electronic monitoring

Electronic monitoring represents a substantial part of penal systems worldwide, applied across all criminal proceedings stages from the preparation proceeding, including proceedings in front of the Court, and also in execution proceedings. Electronic monitoring is a technical mean used by the law enforcement bodies, aimed at increasing the effectiveness in the area of offenders movement monitoring for purposes of criminal proceedings and instant check of his/her restricted movement, and also monitoring of all bans imposed.[6]

Influenced by the penal policy development trends especially in the area of punishment and by penal proceedings modernization, the electronic system of person monitoring has been enacted in the Slovak legislation and law order. While the system had been considered already in re-codifications, in particular, in case of technical check in relation to established home imprisonment sanction, the system was implemented much later. It was enacted in the legislation upon adopted Act No. 78/2015 Coll. on Control of Certain Decisions Execution by Technical Means as amended (hereinafter "Act No. 78/2015 Coll."). The Act became effective on January 01, 2016, and the Electronic System of Persons Monitoring was established in Slovakia on the same date.[7] Act No. 78/2015 Coll. Regulates technical means, their terms of use and the course of control.

Electronic monitoring represents the system of monitoring the observance of certain bans, restrictions, and orders, as well as sanctions and certain protection measures as the forms of penal law sanctions. Pursuant to regulation in effect, we distinguish six types of monitoring where different types of technical means are used in each type of monitoring.[8] Technical means operating cost is borne by the state and partly by the monitored person. The amount of its share is determined in the executive command. Technical means are the state property connected to a so-called central monitoring system. It is this that allows for the check of the detain-

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6 V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague, CBU Research Institute, doi: https://doi.org/10.12955/cbup.v7.1435.

7 A. JECKOVÁ: *Elektronický systém monitorovania osôb. I. Košické dni trestného práva – Perspektívy vývoja európskeho trestného práva*. Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 2018.

8 M. TITTLOVÁ: Trestnoprávne sankcie ukladané fyzickým osobám. Wolters Kluwer, Bratislava, 2018.

ment regime observance through signals transmitted by technical means, and the record of security and operating incidents.[9]

Technical means can be used in relation to proprietary law institutes (home imprisonment sanction; change of imprisonment sanction to home imprisonment sanction; sanction of restricted stay; sanction of restricted attendance of public events; protection supervision; probation supervision in case of conditional postponing of imprisonment sanction; probation supervision in case of parole), and in relation to procedural law institutes (conditionally suspended criminal prosecution; detention replacement by probation and mediation officer). Despite the broad application of technical means in the area of the penal law, possibilities of their further use have been still identified.[10]

Legislations of Austria, Switzerland, the Czech Republic, Norway, Scotland, Great Britain, Belgium, the Netherlands, Canada, USA, Australia, New Zealand, South Africa, Singapore, and Brazil allow the same or similar control system by technical means[11]. Active and passive monitoring systems represent two basic types of electronic monitoring of the sentenced people. Active monitoring systems allow for non-stop monitoring of a sentenced person and passive monitoring systems require the sentenced person to call in to report themselves on pre-determined intervals.[12] Different technical means are used in various world countries.

Effective control of sentences without deprivation of liberty can be ensured through technical means and electronic monitoring. The project of the electronic system for monitoring accused and sentenced persons (ESMO), co-funded by the European Union from the European Regional Development Fund through the Operational Program Informatization of the Company, was launched by the Ministry of Justice of the Slovak republic in 2013.[13]

The Act on the control of the enforcement of certain decisions by technical means distinguishes more types of technical means. For home prison penalty execution, it is necessary to use

(1) personal identification device,

(2) a device for checking presence at the place of the sentence,

(3) the Probationary and Mediation officer's device.

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9 J. KLÁTIK: Uplatňovanie restoratívnej justície a elektronického monitoringu na Slovensku a vo vybraných štátoch Európskej únie. In: *Košické dni trestného práva – Perspektívy vývoja európskeho trestného práva*. Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 2018.

10 V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague: CBU Research Institute, doi: https://doi.org/10.12955/cbup.v7.1435.

11 See more: A. NAGY: Release from prison in hungary and european court of human rights. *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016/3., pp. 199–206, release from prison in Hungary, Zbornik radova pravni fakultat, 49:4, pp. 2011–2021.

12 T. STRÉMY–J. KLÁTIK: *Alternatívne tresty*. C. H. Beck, Bratislava, 2018.

13 L. MICHAĽOV–M. ŠTRKOLEC: Hmotnoprávne a procesnoprávne aspekty kontroly niektorých trestných rozhodnutí prostredníctvom technických prostriedkov. In: Alternativní řešení trestních věcí (trestněprávní, trestněprocesní a kriminologické aspekty): sborník z mezinárodní vědecké konference Olomoucké právnické dny, May 2015, Olomouc–Praha, Leges, 2015.

The basic element of the electronic monitoring and technical means is the personal identification device – currently in the form of a bracelet, which is set on the body of the monitored person, usually on his/her ankle. The monitored person is obliged to tolerate the attachment of this device to his/her body throughout the enforcement of the decision by technical means. Any attempts to interfere with this device or to damage or destroy it are evaluated as security incidents. This general device is used in the execution of a home prison penalty, by the imposition of various appropriate limitations and obligations.

A device for checking presence at the place of sentence used in home prison penalty is located in the dwelling (house, apartment, residence) of the monitored person and based on communication with the personal identification device, it is possible to check the presence of the monitored person at a specified time in the specific place. At present, this device is in the form of the home monitoring station. This device communicates with a personal identification device whose radio frequency signal receives and evaluates the presence and the absence of the monitored person at a specified place and at a specified time in accordance with a court decision. In the event of a violation of the conditions, this device will signal this fact to the Operations Center, which will pass this information to the relevant Probationary and Mediation Officer.

The probationary and mediation officer's device is used by a probationary and a mediation officer. This technical device enables a probationary and a mediation officer to carry out a control of prohibition, limitation, or obligation "on-site" (on place) by identifying the presence of a personal identification device within a range of approximately 300 m in its geographic conditions and thereby detect the presence of people who have this device connected to the body. In a particular case, for example, it will be possible to verify whether the controlled person is at a specified time in the designated place or, on the other hand, is not in the specified place at a specified time.

4. Application problems

The home prison penalty is aimed at pointing to offender's correction since the sanction execution is associated with various re-socialization programs focused on offenders' personality, the sentenced person is not deprived of social and emotional bonds.

Despite all positive aspects of the home prison penalty enlisted herein, we should state that it is least imposed sanction as resulting from the statistics of the Slovak Ministry of Justice. In 2015, the home prison penalty was imposed 18 times and 23 times in 2016. The average frequency has been affected by only 14 home prison penalty awards in 2017 but again 20 awards in 2018, which, however, is hard to define as a satisfactory number.

There are a few reasons for such rarely awarded type of sanction. As stated above, the possibility to check the sanction execution with technical means represents one of the terms of the home prison penalty awarding. The court must obligatorily examine the terms of sanction execution when awarding the home prison

penalty. Thus the court must primarily examine the availability of required technical means (limited availability), technical equipment (GPS signal availability), power supply connection, fixed phone connection and location of the home monitoring station. Such examination of the conditions is very demanding for the court of justice and hence the tendency to award more comfortable sanction (for the court). It would be more appropriate when probation and mediation officers examined the technical background and report to the court of justice on possibilities of the home prison penalty award to a particular accused person.

Here we encounter further application problems: only 98 persons perform as probation and mediation officers at particular courts of justice in the Slovak Republic. These officers have to monitor fulfillment of duties and restrictions under § 51 clauses 3, 4 of Criminal Code that can be ordered to a sentenced person in relation to the home prison penalty, along with other competences, but what is of utmost importance, probation and mediation officers check the technical means and this duty is called electronic monitoring, which is obligatory within the home prison penalty. Accordingly, a person sentenced to the home prison penalty should enter the process of re-socialization upon very close collaboration with probation officers. For illustration purposes only, we have to state that the justice system has current capacities to concurrently monitor 2,000 persons subject to electronic monitoring but the capacity can be increased. Thus, if the electronic monitoring is used exclusively for monitoring of the awarded home prison penalty, a single officer would be in charge of approx. 20 person monitoring, taking into account such a demanding work comprising of installation and uninstalling the technical means, recording, reporting and attending the incidents within control execution, checking of accessibility and proper operation of technical equipment.

5. Closing Thoughts

This scientific paper aimed to point out the historical aspects, the current legislation and also the enforcement and control of the home prison penalty through electronic monitoring. The aim of this scientific paper was also to point out application problems connected with this penalty. The home prison penalty should have a privileged position in the system of penalties is the Slovak Republic, as it is a penalty competing with imprisonment and is associated with more beneficial consequences not only for the offender but also for society. However, there are still many unresolved problems, especially of the technical and operational nature that we have to face. In recent days The Ministry of Justice is also trying to solve the low number of home prison penalties imposed, even with specific legislative changes. The last ones in 2019 expanded the possibilities of imposing this penalty. We believe that, as a result of recent legislative changes, the home prison penalty will become a significant pillar of the system of penalties in the Slovak Republic

Bibliography

[1] JECKOVÁ, A. Elektronický systém monitorovania osôb. I. In: *Košické dni trestného práva. Perspektívy vývoja európskeho trestného práva*. Košice, 2018, Univerzita Pavla Jozefa Šafárika v Košiciach.

[2] KLÁTIK, J. Odklon v trestnom konaní ako prostriedok racionalizácie trestnej spravodlivosti. *Právny obzor*, roč. 90, č. 1, 2007, p. 53.

[3] KLÁTIK, J.: Uplatňovanie restoratívnej justície a elektronického monitoringu na Slovensku a vo vybraných štátoch Európskej únie. I. Košické dni trestného práva. Perspektívy vývoja európskeho trestného práva. Košice, 2018, Univerzita Pavla Jozefa Šafárika v Košiciach.

[4] MICHAĽOV, L.: Trest domáceho väzenia – súčasnosť a perspektívy. In: *Trestná politika štátu- história, súčasnosť a perspektívy: zborník vedeckých príspevkov z interdisciplinárnej celoštátnej vedeckej konferencie s medzinárodnou účasťou*: 4–5. november 2015, Košice, Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2015.

[5] MICHAĽOV, L., ŠTRKOLEC, M.: Hmotnoprávne a procesnoprávne aspekty kontroly niektorých trestných rozhodnutí prostredníctvom technických prostriedkov. In: Alternativní řešení trestních věcí (trestněprávní, trestněprocesní a kriminologické aspekty), sborník z mezinárodní vědecké konference Olomoucké právnické dny, May 2015, Olomouc–Praha, Leges, 2015.

[6] RAJNIČ, M.: *Trest domáceho väzenia v systéme trestov*. Justičná revue, 61, 2009, č. 6–7, pp. 834–840.

[7] STRÉMY, T.–KLÁTIK, J.: *Alternatívne tresty*. C. H. Beck, Bratislava, 2018.

[8] TITTLOVÁ, M.: *Trestnoprávne sankcie ukladané fyzickým osobám*. Wolters Kluwer, Bratislava, 2018.

[9] TOBIÁŠOVÁ, L.: Domáce väzenie – nový trest v rekodifikovanom Trestnom zákone. *Justičná revue*, 58, 2006, č. 10, pp. 1373–1385.

[10] TÓTHOVÁ, V.–FERENČÍKOVÁ, S.: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*, 7, pp. 661–670. Prague: CBU Research Institute.2019, doi: https://doi.org/10.12955/cbup.v7.1435.

[11] Act No. 300/2005 Coll. Criminal Code.

[12] Act No. 78/2015 Coll. on Control of Certain Decisions Execution by Technical Means as amended.

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE – FROM MYTH TO REALITY*

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1. Historical backgrounds of the European Public Prosecutor's Office

The idea of the *establishment of a unified European law enforcement body* has a long history. The European Public Prosecutor's Office (hereinafter referred to as: EPPO) was first mentioned in the so-called *Corpus Juris* project in 1997.[1] The

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1 See in details: Mireille DELMAS-MARTY: *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union.* Economia, Paris, 1997, pp. 13–144; Mireille DELMAS-MARTY: A Corpus Juris szükségessége, legitimitása és megvalósíthatósága. *Magyar Jog*, 2000/11., pp. 641–645; Mireille DELMAS-MARTY–John A. E. VERVAELE (eds.): *The Implementation of the Corpus Juris in the Member States.* Vol. 1. Intersentia Publishing, Antwerp–Groningen–Oxford, 2000, pp. 7–394; Gabriele DONA: Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 6/3, 1998, pp. 282–297; Ákos FARKAS: *Büntetőjogi együttműködés az Európai Unióban.* Osiris Kiadó, Budapest, 2001, pp. 50–69; Bernd HECKER: *Europäisches Strafrecht.* Springer Verlag, Berlin–Heidelberg, 2012, pp. 485–488; Katalin HOLÉ: Gondolatok az Európai Ügyészségről. In: Balázs GELLÉR (ed.): *Györgyi Kálmán ünnepi kötet*. KJK-Kerszöv Kiadó, Budapest, 2004, pp. 311–319; Maria KAIAFA-GBANDI: Das Corpus Juris und die Typisierung des Strafphänomens im Bereich der Europäischen Union. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2/1999, pp. 162–180; Anna KISS: Corpus Juris. A büntetőeljárás egységes szabályai az Európai Unió pénzügyi érdekei sértő bűncselekmények esetén. In: Ferenc IRK (ed.): Kriminológiai és Kriminalisztikai Tanulmányok. XXXV. Országos Kriminológiai és Kriminalisztikai Intézet, Budapest, 1998, 297–315; Ilona LÉVAI: Corpus Juris Europae. Európai büntetőjog és Ügyészség az EU pénzügyi érdekei védelmére? *Európai Tükör*, 1998/4., pp. 71–88; Andreas RASNER: *Erforderlichkeit, Legitimität und Umsetzbarkeit des Corpus Juris Florenz.* Duncker & Humblot GmbH, Berlin, 2005, pp. 65–73, 132–234; Dionysios D. SPINELLIS: Das Corpus Juris zum Schutz der finanziellen Interessen der Europäischen Union. *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2/1999., pp. 144–161; Christine VAN DEN WYNGAERT: Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire? In: Neil WALKER (ed.): *Europe's Area of Freedom, Security and Justice*. Oxford University Press, Oxford–New York, 2004, pp. 215–224; Andreas WATTENBERG: Der »Corpus Juris« – Tauglicher Entwurf für ein einheitliches europäisches Straf- und Strafprozeßrecht? *Strafverteidiger*, 2/2000, pp. 95–103; Simone WHITE: *Protection of the Financial Interests of the European Communities:*

Corpus Juris, which was presented by a working group of European criminal lawyers[2] set up at the request of the European Parliament and the European Commission, focused on the protection of the financial interests of the European Union and contained both substantive and procedural criminal law provisions. The Corpus Juris determined eight criminal offences affecting the financial interests of the Union and envisaged the establishment of a European Public Prosecutor's Office for the prosecution of these crimes. The thought of the EPPO was later taken over by the *European Commission* which issued a *Green Paper about the establishment of a European Prosecutor* in 2001.[3]

Despite these efforts, the European Public Prosecutor's Office has only become a reality with the *Treaty of Lisbon* which created an explicit legal basis for the establishment of the EPPO. According to *Article 86 TFEU*, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union. The regulations shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules

The Fight against Frand and Corruption. Kluwer Law International, The Hague – London – Boston, 1998, 179–186.

2 The leader of the group was Mireille Delmas-Marty (France), the members of the group were Enrique Bacigalupo (Spain), Giovanni Grasso (Italy), Nils Jareborg (Sweden), John R. Spencer (United Kingdom), Dionysios Spinellis (Greece), Klaus Tiedemann (Germany), Christine van der Wynagaert (Belgium).

3 Green paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor [COM(2001) 715., 11/12/2001]. See in details: F. H. BRÜNER–H. SPITZER: Der Europäische Staatsanwalt – ein Instrument zur Verbesserung des Schutzes der EU-Finanzen oder ein Beitrag zur Verwirklichung eines Europas der Freiheit, der Sicherheit und des Rechts? *Neue Zeitschrift für Strafrecht*, 8/2002, pp. 393–398; C. FIJNAUT–M. S. GROENHUIJSEN: A European Public Prosecution Service: Comments on the Green Paper. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10/4., 2002, 321–336; KISS Anna: Eurojustból Európai Ügyész? In: György VIRÁG (ed.): *Kriminológiai Tanulmányok 46.* Országos Kriminológiai Intézet, Budapest, 2009, pp. 117–125, 129–130; Katalin LIGETI: The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined? *European Criminal Law Review*, Vol. 1/2, 2011, pp. 127–131; Silke NÜRNBERGER: Die zukünftige Europäische Staatsanwaltschaft – Eine Einführung. *Zeitschrift für das Juristische Studium*, 5/2009, pp. 497–502; Henning RADTKE: The Proposal to Establish a European Prosecutor. In: Erling Johannes HUSABO–Asbjorn STRANDBAKKEN (eds.): *Harmonization of Criminal Law in Europe*. Intersentia Publishing, Antwerp–Oxford, 2005, pp. 103–118; Helmut SATZGER–Frank ZIMMERMANN: The Protection of EC Financial Interests by Means of Penal Law. In: M. Cherif BASSIOUNI–Vincenzo MILITELLO–Helmut SATZGER (eds.): *European Cooperation in Penal Matters: Issues and Perspectives*. Casa Editrice Dott. Antonio Milani, Padova, 2008, pp. 182–187; Mark A. ZÖLLER: Eurojust, EJN und Europäische Staatsanwaltschaft. In: Martin BÖSE (Hrsg.): *Europäisches Strafrecht mit polizeilicher Zusammenarbeit*. Nomos Verlagsgesellschaft, Baden-Baden, 2013, pp. 825–826, 829–840; Martijn Willen ZWIERS: *The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System.* Intersentia Publishing, Cambridge–Antwerp–Portland, 2011, pp. 355–385.

applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Based on the legal basis of Article 86 TFEU, the European Commission issued a *Proposal for a regulation on the establishment the European Public Prosecutor's Office* in 2013.[4] However, according to Article 86 TFEU, the regulation could only be adopted unanimously by the Council after obtaining the consent of the European Parliament. During the long negotiations, it became clear that the unanimity required for the adoption of the regulation cannot be achieved. Article 86 TFEU, however, allows that in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. Within four months of this suspension, in case of a consensus, the European Council shall refer the draft back to the Council for adoption, while in case of disagreement, at least nine Member States are entitled to establish *enhanced cooperation* on the basis of the draft regulation concerned. On the 3rd April 2017, 16 Member States announced their intention to establish the EPPO through enhanced cooperation. The Council finally adopted the *Regulation establishing the European Public Prosecutor's Office* on the 12th October 2017.[5] The *enhanced cooperation* currently involves *22 Member States*[6]; only Denmark, Great-Britain and Ireland, which has a special position in the area of freedom, security and justice as well as Poland, Hungary and Sweden will not take part in the operation of the European Public Prosecutor's Office.[7]

2. The status of the European Public Prosecutor's Office

According to the EPPO Regulation, the European Public Prosecutor's Office is an *indivisible Union body* operating as *one single Office with a decentralised structure*.[8] The EPPO has *legal personality*.[9]

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4 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM(2013) 534 final, 17/7/2013] (hereinafter referred to as: EPPO Proposal).

5 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [OJ L 283, 31/10/2017, pp. 1–71] (hereinafter referred to as: EPPO Regulation).

6 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain.

7 However, according to some points of view, the non-participation in the EPPO cannot be sustained for a long time and the 'coercive powers' of the legal integration in connection with the nature of these transnational offences will force the non-participating Member States to join the enhanced cooperation. See in details: KARSAI Krisztina: A kívülmaradás lehetetlensége – az Európai Ügyészség működésének várható hatásai a kimaradó tagállamokban. *Magyar Jog*, 2018/12., pp. 670–678; Krisztina KARSAI: External Effects of the European Public Prosecutor's Office Regime. *Miskolci Jogi Szemle*, 2019/2., special issue, Vol. 1, pp. 461–470.

8 Article 8(1) of the EPPO Regulation.

9 Article 3(2) of the EPPO Regulation.

The European Public Prosecutor's Office is required to respect the *principles of rule of law and proportionality* in all its activities. The EPPO has to conduct its investigations in an *impartial manner*. The EPPO is *independent*, it can neither seek nor take instructions from any person, any Member State of the European Union or any institution, body, office or agency of the Union. The EPPO is *accountable* to the European Parliament, to the Council and to the European Commission for its general activities, and is required to issue *annual reports* to the European Parliament and to national parliaments, as well as to the Council and to the Commission.[10]

The European Public Prosecutor's Office has to ensure that its activities respect the *rights enshrined in the Charter of the Fundamental Rights of the EU*.[11] It this respect, the activity of the EPPO has to be carried out in full compliance with the *rights of suspects and accused persons*, including the *right to a fair trial* and the *rights of defence*. The suspected or accused person have the *procedural rights* provided for in the EU law during the criminal proceedings of the EPPO, e.g., the right to interpretation and translation; the right to information and access to the case materials; the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention; the right to remain silent and the right to be presumed innocent; and the right to legal aid.[12]

3. The competence of the European Public Prosecutor's Office

3.1. General tasks of the EPPO

According to *Article 86(2) TFEU*, the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests as determined by the regulation establishing the EPPO.

This provision of the Treaty is reiterated by the EPPO Regulation, according to which the European Public Prosecutor's Office is responsible for *investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union*[13] which are provided for in Directive (EU) 2017/1371[14] and determined by the EPPO Regulation. In that

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10 Articles 5–7 of the EPPO Regulation.

11 Article 5(1) of the EPPO Regulation.

12 Article 41 of the EPPO Regulation.

13 According to Article 2(3) of the EPPO Regulation, the financial interests of the Union means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them.

14 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28/7/2017, p. 29–41] (hereinafter referred to as: PIF Directive). See in details: Judit JACSÓ: *Europäisierung des Steuerstrafrechts am Beispiel der gesetzlichen Regelungen in Deutschland, Österreich und Ungarn*. Bíbor Verlag, Miskolc, 2017, pp. 114–131; Judit JACSÓ–Bence UDVARHELYI:

respect, the EPPO *undertakes investigations, carries out acts of prosecution* and *exercises the functions of the prosecutor* in the competent courts of the Member States until the case has been finally disposed of.[15]

3.2. The material scope of competences of the EPPO

The material competence of the European Public Prosecutor's Office can be divided into three main categories.[16] Firstly, the EPPO can be competent in respect of the *criminal offences affecting the financial interests of the Union* that are provided for in the PIF Directive, as implemented by national law. It means that the competence of the EPPO covers the criminal offences defined in the PIF Directive, i.e. *fraud affecting the Union's financial interests*, *money laundering*, *active and passive corruption* and *misappropriation*, irrespective of whether the same criminal conduct could be classified as another type of offence under national law. However, in connection with *VAT-fraud* referred to in Article 3(2)(d) of the PIF Directive, the EPPO can only be competent when the intentional acts or omissions are connected with the territory of two or more Member States and involve total damage of at least EUR 10 million.[17]

Secondly, the EPPO is also competent for *offences regarding participation in a criminal organisation*[18] if the focus of the criminal activity of such a criminal organisation is to commit any of the criminal offences affecting the financial interests of the European Union.

Thirdly, the competence of the EPPO also covers any *other criminal offence* that is *inextricably linked to the aforementioned crimes against the financial interests of the Union*. In this case, however, the EPPO refrains from exercising its competence if the maximum sanction provided for by national law for an offence affecting the financial interests of the Union is equal to or less severe than the maximum sanction for an inextricably linked offence, unless the latter offence has been

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Új irányelv az uniós csalások elleni büntetőjogi védelemről. *Magyar Jog*, 2018/6., pp. 327–337; Maria KAIAFA-GBANDI: Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. In: Ákos FARKAS–Gerhard DANNECKER–Judit JACSÓ (eds.): *Criminal Law Aspects of the Protection of the Financial Interests of the European Union.* Wolters Kluwer Hungary, Budapest, 2019, pp. 36–51; Sándor MADAI: Nem csalás, de ámítás? Dogmatikai megjegyzések a PIF Irányelvhez. *Miskolci Jogi Szemle*, 2019/2., special issue, Vol. 2, pp. 131–140; Bence UDVARHELYI: *Az Európai Unió anyagi büntetőjoga a Lisszaboni Szerződés után*. Patrocínium Kiadó, Budapest, 2019, pp. 205–215.

15 Article 4 of the EPPO Regulation.

16 Article 22(1)–(3) of the EPPO Regulation. For the critical analysis of the competence of the EPPO see in details: Ádám BÉKÉS–Tamás GÉPÉSZ: Az Európai Ügyészség hatásköri szabályozása. *Iustum aequum salutare*, 2019/2., pp. 42–49; John A. E. VERVAELE: The material scope of competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia? *ERA Forum*, Vol. 15/1., 2014, pp. 92–96.

17 See: Article 2(2) of the PIF Directive.

18 See: Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11/11/2008, pp. 42–45].

instrumental to commit the former offence; or if there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence affecting the financial interests of the EU does not exceed the damage caused, or likely to be caused to another victim. However, in the latter case, the EPPO may – with the consent of the competent national authorities – still, exercise its competence if it appears that the EPPO is better placed to investigate or prosecute.[19]

Furthermore, the EPPO Regulation also stipulates that the EPPO does not have competence for criminal offences in respect of *national direct taxes including offences inextricably linked thereto*. The structure and functioning of the tax administration of the Member States shall not be affected by the Regulation.[20]

In connection with the aforementioned three categories of criminal offences, the European Public Prosecutor's Office can exercise its competences in the following cases: a) if the crime concerned was *committed in whole or in part within the territory of one or several Member States*; b) if it was *committed by a national of a Member State*, provided that a Member State has jurisdiction for such offences when committed outside its territory; c) if it was *committed outside the aforementioned territories by a person who was subject to the Staff Regulations or to the Conditions of Employment*, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.[21]

3.3. The possibility of the extension of the competences of the EPPO

Although the European Public Prosecutor's Office primarily serves for the fight against criminal offences affecting the financial interests of the European Union, Article 86(4) TFEU provides the opportunity to the European Council to *extend the powers of the EPPO to other serious crimes having a cross-border dimension*. In this case, the European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

The question of the extension of the competences of the European Public Prosecutor's Office to other criminal offences has already arisen at the level of the EU institutions. In 2018, the European Commission issued a Communication in which it recommended the European Council to use its competence under Article 86(4) TFEU and adopt a decision amending Article 86(1)–(2) TFEU to extend the competence of the European Public Prosecutor's Office to *terrorist offences affecting more than one Member State* as part of the comprehensive and strengthened European response to terrorist threats. In its justifications, the European Commission highlighted that there are number of gaps in the current anti-terrorism legal, institutional and operational framework, in particular, there is no common Union approach to the investigation, prosecution and bringing to judgment of cross-border terrorist crimes. Pursuant to the Commission, the EPPO can address the existing

[19] See Article 25(3)–(4) of the EPPO Regulation.
[20] Article 22(4) of the EPPO Regulation.
[21] Article 23 of the EPPO Regulation.

gaps and could bring added value to combating terrorist crimes. After the possible positive decision of the European Council, the EPPO Regulation is also required to be amended by the European Commission.[22]

4. The structure and organization of the European Public Prosecutor's Office

The structure of the European Public Prosecutor's Office was significantly modified during the negotiations of the EPPO Regulation. The *office model* of the Commission, which was mostly based on the concepts of the Corpus Juris and the Green Paper, was substituted by the *college model* supported by the Council and the Member States.[23] It also has to be mentioned that a third model, the *network model* was presented by Péter Polt, Prosecutor General of Hungary, which could serve as an adequate alternative and could solve several problematic points of the aforementioned two systems.[24] However, the European Union chose the college model in the EPPO Regulation.

4.1. Office model according to the EPPO Proposal

The original EPPO Proposal of the European Commission envisaged the *office model* according to which the European Public Prosecutor's Office would have comprised the European Public Prosecutor, his Deputies, the staff supporting them in the execution of their tasks, and the European Delegated Prosecutors located in the Member States.[25]

According to the EPPO Proposal, the head of the European Public Prosecutor's Office is the *European Public Prosecutor*, who directs its activities and organises its work. The European Public Prosecutor is assisted by *four Deputies* in all his duties who act as a replacement when he is absent or prevented from attending to them. The European Public Prosecutor and its Deputies are appointed by the Council – acting by a simple majority – with the consent of the European Parliament for a non-renewable term of eight years. The investigations and prosecutions of the European Public Prosecutor's Office are carried out by the *European Delegated Prosecutors* under the direction and supervision of the European Public Prosecutor. Each Member State has at least one European Delegated Prosecutor who are appointed by the European Public Prosecutor from a list of at least three candidates,

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[22] See: Communication from the Commission to the European Parliament and the European Council: A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes [COM(2018) 641 final, 12/9/2018].

[23] See in details: Krisztina CSORDÁSNÉ NAGY: Az Európai Ügyészség jövője. *Ügyészek Lapja*, 2016/3–4., pp. 121–126; Szabolcs PETRUS: Európai Ügyészség. *Európai Jog*, 2017/4., p. 33; Péter POLT: Critics and alternatives towards an enhanced protection of the financial interests of the EU. In: Ákos FARKAS–Gerhard DANNECKER–JUDIT JACSÓ (eds.): *Criminal Law Aspects of the Protection of the Financial Interests of the European Union.* Wolters Kluwer Hungary, Budapest, 2019, pp. 512–513.

[24] See in details: Péter POLT: Európai Ügyész: Tendenciák és lehetőségek. *Európai Jog*, 2015/6., pp. 2–5.

[25] Article 6(1) of the EPPO Proposal.

for a renewable term of five years. The European Delegated Prosecutors act under the exclusive authority of the European Public Prosecutor and follow his instructions, guidelines and decisions when they carry out investigations and prosecutions assigned to them. The European Delegated Prosecutors may also exercise their function as national prosecutors.[26]

4.2. College model according to the EPPO Regulation

Compared with the office model of the Commission, the final accepted college model of the EPPO is a more decentralised structure where the decision-making powers are closer to the Member States.[27] According to EPPO Regulation, the European Public Prosecutor's Office can be divided into a *central level* and a *decentralised level*. The central level consists of a Central Office at the seat of the EPPO, which includes the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. The decentralised level consists of European Delegated Prosecutors who are located in the Member States.[28]

The head of the European Public Prosecutor's Office is the *European Chief Prosecutor*, who is responsible to organise the work of the EPPO, direct its activities, and take decisions in accordance with the EPPO Regulation and the internal rules of procedure of the EPPO. Furthermore, the European Chief Prosecutor represents the EPPO vis-à-vis the institutions of the Union and of the Member States, and third parties. The European Chief Prosecutor is appointed by the European Parliament and the Council – by a simple majority – by common accord for a non-renewable term of 7 years. The Council acts by a simple majority. The Chief Prosecutor has to be selected from among candidates who are active members of the public prosecution service or judiciary of the Member States, or active European Prosecutors; whose independence is beyond doubt; who possess the qualifications required for appointment to the highest prosecutorial or judicial offices in their respective Member States; and have relevant practical experience of national legal systems, financial investigations and of international judicial cooperation in criminal matters, or have served as European Prosecutors, and who have sufficient managerial experience and qualifications for the position. Two *Deputy European Chief Prosecutors* have to be appointed to assist the European Chief Prosecutor in the discharge of his duties and to act as a replacement when he is absent or is prevented from attending to those duties. The Deputy European Chief Prosecutors are appointed from the European Prosecutors by the College for a renewable mandate period of 3 years.[29]

The *European Prosecutors* are appointed by the Council, acting by simple majority, for a non-renewable term of 6 years. The Council may decide to extend the

[26] Articles 6 and 8–10 of the EPPO Proposal.
[27] POLT 2015, op. cit. 3.
[28] Article 8(2)–(4) of the EPPO Regulation.
[29] Articles 11 and 14–15 of the EPPO Regulation.

mandate for a maximum of 3 years at the end of the 6-year period. Every 3 years a partial replacement of one-third of the European Prosecutors take place. Before the appointment in the Council, the Member States are required to nominate three candidates who are active members of the public prosecution service or judiciary of the relevant Member State; whose independence is beyond doubt; who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience. Among these candidates, the Council selects and appoints the European Prosecutor of each Member State.[30]

The *College of the EPPO* consists of the European Chief Prosecutor and one European Prosecutor per Member State. The College is chaired by the European Chief Prosecutor and takes decisions by a simple majority; each member has one vote. The College is responsible for the general oversight of the activities of the EPPO, it takes decisions on strategic matters, and on general issues arising from individual cases in order to ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the Member States. However, the College does not take operational decisions in individual cases.[31]

The *Permanent Chambers* are set up by the College of the EPPO.[32] Each Permanent Chamber has three members and is chaired by the European Chief Prosecutor; one of the Deputy European Chief Prosecutors; or a European Prosecutor. The Permanent Chambers take decisions by simple majority, each member has one vote and the Chair has a casting vote in the event of a tie vote. The tasks of the Permanent Chambers are to monitor and direct the investigations and prosecutions conducted by the European Delegated Prosecutors and to ensure the coordination of investigations and prosecutions in cross-border cases as well as the implementation of decisions taken by the College. In this context, the Permanent Chambers decide on the following issues: a) the carrying of a case to judgment; b) the dismissal of a case[33]; c) the application of a simplified prosecution procedure; d) the refer of a case to the national authorities; e) the reopening of an investigation; f) the instruction of the European Delegated Prosecutors to initiate an investigation or to exercise the right of evocation; g) the reference of strategic matters or general issues arising from individual cases to the College; h) the allocation and reallocation of a case; i) the approval of the decision of a European Prosecutor to conduct the investigation himself. The Permanent Chambers can also give instructions – in compliance with applicable national law – to the handling European Delegated Prosecutor through the European Prosecu-

30 Article 16 of the EPPO Regulation.

31 Article 9 of the EPPO Regulation.

32 Article 9(3) of the EPPO Regulation.

33 In connection with the first two decision-making tasks, Article 10(7) of the EPPO Regulation allows the Permanent Chambers to delegate them to the European Prosecutor supervising the case, if such delegations can be duly justified with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, with regard to an offence that has caused or is likely to cause damage to the financial interests of the Union of less than 100,000 EUR. The decision to delegate decision-making power may be withdrawn at any time.

tor who is supervising the investigation or the prosecution, where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO.[34]

The *European Prosecutors* supervise the investigations and prosecutions of the European Delegated Prosecutors on behalf of the Permanent Chamber. The supervising European Prosecutors can also give instructions to the handling European Delegated Prosecutor. Furthermore, they function as liaisons and information channels between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin, they monitor the implementation of the tasks of the EPPO in their Member States, and ensure that all relevant information from the Central Office is provided to European Delegated Prosecutors and vice versa.[35]

The decentralised level of the European Public Prosecutor's Office consists of the *European Delegated Prosecutors*. Each Member State has two or more European Delegated Prosecutors, who are appointed by the College based on the nomination of the Member States and upon a proposal by the European Chief Prosecutor for a renewable term of 5 years. The European Delegated Prosecutors have to be active members of the public prosecution service or judiciary of the respective Member States, their independence has to be beyond doubt and they are required to possess the necessary qualifications and relevant practical experience of their national legal system. The European Delegated Prosecutors act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment. The European Delegated Prosecutors are responsible for the investigations and prosecutions that they have initiated, that have been allocated to them or that they have taken over using their right of evocation; and for bringing a case to judgment, in particular, to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law. The European Delegated Prosecutors have to follow the direction and instructions of the Permanent Chambers as well as the instructions from the supervising European Prosecutor. The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations.[36]

5. Procedural rules of the European Public Prosecutor's Office

According to the EPPO Regulation, all institutions, bodies, offices and agencies of the Union, as well as the competent national authorities, have to *report* to the European Public Prosecutor's Office without undue delay any criminal conduct in respect of which the EPPO could exercise its competence. Furthermore, when a judicial or law enforcement authority of a Member State initiates an investigation

[34] Article 10 of the EPPO Regulation.
[35] Article 12 of the EPPO Regulation.
[36] Articles 13 and 17 of the EPPO Regulation.

in respect of a criminal offence for which the EPPO could exercise its competence, it has to *inform* the EPPO without delay. The obligation of information also applies to the EPPO, since in case of a criminal offence that does not fall in the competence of the EPPO, it is required to inform the competent national authorities and forward all relevant evidence to them.[37]

Based on the aforementioned information, the European Public Prosecutor's Office can exercise its competence in two ways: either by *initiating an investigation* or by deciding to *use its right of evocation*. If the EPPO decides to exercise its competence, the competent national authorities cannot exercise their own competence in respect of the same criminal conduct.[38]

In case of the criminal offences falling within the competence of the EPPO, the procedure of the EPPO is *mandatory*. However, due to the pressure of Member States, important *exceptions from the obligatory prosecution* were introduced in the EPPO Regulation. On the one hand, in case of a criminal offence that caused or is likely to cause damage to the Union's financial interests of less than EUR 10,000, the EPPO may only exercise its competence if the case has repercussions at Union level which require an investigation to be conducted by the EPPO; or if officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence. On the other hand, in case of a criminal offence which caused or are likely to cause damage to the Union's financial interests of less than EUR 100,000 and the College considers that – with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case – there is no need to investigate or to prosecute at Union level, the European Delegated Prosecutors may decide – based on the guidelines of the College – not to evoke the case.[39]

The *investigation is initiated by a European Delegated Prosecutor* if there are reasonable grounds to believe that a criminal offence within the competence of the EPPO is being or has been committed. As a general rule, the criminal procedure can be initiated and handled by the European Delegated Prosecutor of the Member State where the focus of the criminal activity is or where the bulk of the offences has been committed. Another European Delegated Prosecutor can only initiate an investigation where a deviation from the aforementioned rule is duly justified, based on the following criteria: a) the place of the suspect's or accused person's habitual residence; b) the nationality of the suspect or accused person; c) the place where the main financial damage has occurred. If no investigation has been initiated, the Permanent Chamber to which the case has been allocated has to instruct a European Delegated Prosecutor to initiate an investigation. Furthermore, the Permanent Chamber – taking into account of the current state of the investigations –

[37] Article 24 of the EPPO Regulation.
[38] Article 25(1) of the EPPO Regulation. See also Article 27(5) of the EPPO Regulation.
[39] Articles 25(2) and 27(8) of the EPPO Regulation. See also Article 34(3) of the EPPO Regulation.

can also decide to reallocate the case to other European Delegated Prosecutor; or to merge or split cases, if these decisions are in the general interest of justice.[40]

During the investigation phase, the European Delegated Prosecutor handling the case can either *undertake the investigation or other measures on his own*; or *instruct the competent authorities in the Member State* who has to follow all instructions and undertake the measures assigned to them. The handling Delegated Prosecutor has to report to the competent European Prosecutor and the Permanent Chamber any significant developments in the case. In exceptional cases, the supervising European Prosecutor may also decide to conduct the investigation personally – either by undertaking the investigation measures or by instructing the competent authorities –, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution because of the seriousness of the offence, and its possible repercussions at Union level; or if the investigation concerns officials or other servants of the Union or members of the institutions of the Union. The EPPO Regulation also lists the *types of investigation measures* which the European Delegated Prosecutor are entitled to order or request: a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; b) obtain the production of any relevant object or document; c) obtain the production of stored – encrypted or decrypted – computer data; d) freeze instrumentalities or proceeds of crime; e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using; f) track and trace an object by technical means, including controlled deliveries of goods.[41]

In the case of *cross-border investigations*, the European Delegated Prosecutors have to act in close cooperation by assisting and regularly consulting each other. If a measure needs to be undertaken in another Member State, the European Delegated Prosecutor can decide on the adoption of the necessary measure and assign it to the other Delegated Prosecutor located in the Member State where the measure needs to be carried out. The handling European Delegated Prosecutor may assign any measures, which are available to him. The assisting Delegated Prosecutor has to undertake the assigned measure or instruct the competent national authority to do so. If the European Delegated Prosecutors cannot resolve the matter within 7 working days, the matter has to be referred to the competent Permanent Chamber, which hears the Delegated Prosecutors concerned and decides without undue delay, whether and by when the assigned or a substitute measure has to be undertaken by the assisting European Delegated Prosecutor. The assigned measures have to be carried out in accordance with the law of the Member State of the assisting European Delegated Prosecutor.[42]

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40 Article 26 of the EPPO Regulation.

41 Articles 28 and 30 of the EPPO Regulation.

42 Articles 31–32 of the EPPO Regulation.

If the handling European Delegated Prosecutor considers the investigation to be completed, he submits a report to the supervising European Prosecutor, which contains a summary of the case and a draft decision about the prosecution before a national court or about the referral or the dismissal of the case. The supervising European Prosecutor forwards the documents to the competent Permanent Chamber accompanied by his own assessment.[43]

Based on the report of the Delegated Prosecutor, the Permanent Chamber can make two types of decisions. On the one hand, the Permanent Chamber may decide to *bring the case to judgement*. As a principle, the Permanent Chamber has to bring the case to prosecution in the Member State of the handling European Delegated Prosecutor. However, if there are sufficiently justified grounds, the Permanent Chamber can decide to bring the case to prosecution in another Member States, i.e., in the Member States where the suspect's or accused person's habitual residence can be found; in the Member States of the nationality of the suspect or accused person; or in the Member State where the main financial damage has occurred. For the criminal procedure, the law of the Member States concerned has to be applied. On the other hand, the Permanent Chamber may decide to *dismiss the case* if the prosecution has become impossible based on the following grounds: a) the death of the suspect or accused person or winding up of a suspect or accused legal person; b) the insanity of the suspect or accused person; c) amnesty granted to the suspect or accused person; d) immunity granted to the suspect or accused person unless it has been lifted; e) expiry of the national statutory limitation to prosecute; f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts; g) the lack of relevant evidence. In this case, the EPPO is required to officially notify the competent national authorities and inform the relevant institutions, bodies, offices and agencies of the Union, as well as the suspects or accused persons and the victims of the crime. The dismissed cases may also be referred to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-up.[44]

If the applicable national law provides for a *simplified prosecution procedure* aiming at the final disposal of a case based on terms agreed with the suspect, the handling European Delegated Prosecutor can propose to the competent Permanent Chamber to apply that procedure. The Permanent Chamber can decide on the proposal considering the following grounds: a) the seriousness of the offence, based on in particular the damage caused; b) the willingness of the suspected offender to repair the damage caused by the illegal conduct; c) the use of this procedure would be in accordance with the general objectives and basic principles of the EPPO as set out in this Regulation. The College can adopt guidelines on the application of those grounds.[45]

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43 Article 35(1) of the EPPO Regulation.

44 Articles 36 and 39 of the EPPO Regulation.

45 Article 40 of the EPPO Regulation.

6. Closing thoughts

According to the EPPO Regulation, the European Public Prosecutor's Office shall assume the investigative and prosecutorial tasks conferred on it on a date to be determined by a decision of the European Commission, which shall not be earlier than 3 years after the date of entry into force of the Regulation.[46] According to the plans of the Commission, the EPPO will begin its operation at the end of 2020; the first European Chief Prosecutor was already appointed.[47]

Naturally, the has been and still are vivid debates among the EU institutions, the Member States and in the legal literature in connection with the structure, the competences, the procedural rules of the EPPO as well as the cooperation between the EPPO and the non-EPPO Member States. However, it can be stated that the European Public Prosecutor's Office has now become a reality, and we are convinced that it can contribute in better and more effective protection of the financial interests of the European Union.

[46] Article 120(2) of the EPPO Regulation.

[47] See: Decision 2019/1798 of the European Parliament and of the Council of 14 October 2019 appointing the European Chief Prosecutor of the European Public Prosecutor's Office [OJ L 274, 28/10/2019, pp. 1–2].

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THE DYNAMICS AND STRUCTURE OF DEVELOPMENT OF EUROPEAN INTEGRATION

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1. Introduction

An integration process in EU went through several stages, from the free trade area through customs union, common market to economic, monetary union*: European Coal and Steel Community* (ECSC)[1] in 1951, *European Economic Community* (EEC)[2] to develop common economic policies, single market and *European Atomic Energy Community (EURATOM)* in 1958. *European Community* (EC) in 1967 and a significant step to more political cooperation was Treaty on *European Union* (Maastricht Treaty in 1993)[3] via establishing modern-day European Union with the single market, currency, monetary policy.

Now the EU, according to this main two binding treaty at the same time characteristic supranational level (shaped competence of EU institutions) and also intergovernmental organization (cooperation is based on consensus between member states and others states) and has achieved a unique level of integration with land area 4,236,562 sq km and population: 513.4 million in January 2019[4] and the world's third-largest population after China and India.[5] EU members share a customs union, a single market (freedom of movement of goods, services, people and capital) trade, common agricultural policy and a common Euro currency (19 member states).

More than three-quarters of Europeans (77%) have a positive view of the European Union. Europeans feel that the EU's main assets are its respect for democracy, human rights and the rule of law (34%), the economic, industrial and trading power of the EU (31%), the standard of living of EU citizens (25%) and the good relationship between the EU Member States (22%).[6] However, now globalization unites

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1 *Treaty establishing the European Coal and Steel Community*, ECSC Treaty, 1951

2 *Treaty establishing the European Economic Community*, EEC Treaty, 1958.

3 *Treaty on European Union, European Union*, November 1993.

4 *Database, Eurostat of the European Union*, January 2019, https://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001.

5 *Database, Eurostat of the European Union*, January 2019, Online available at: https://europa.eu/european-union/about-eu/figures/living_en (15/11/2019).

6 Special Euro barometer, "Future of Europe", European Commission, October – November 2018, Online available at: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/index#p=1&instruments=special&yearFrom=1974&yearTo=2019 (15/11/2019).

brings territories and societies into contact and makes them more uniform and furthers their ongoing, asymmetric differentiation process. Moreover, in this globalized and dynamic world, the EU must be deeply integrated in order to be able to cope with the challenges ahead of it and continue to develop own unique path of development integration and be a sample to many other unions in the world.

As a background, the White Paper of the European Commission (March 2017)[7] describes the drivers of the EU's future, including important facts about a place of the EU in a changing world. The main points of the White Paper emphasize that the EU and its member states must move quicker to interact with each other and citizens, be more accountable and deliver better, faster since the EU is not an easy construct to understand as it combines both the supranational and national level.

Europe is a mosaic composed of different ethnic, regional or national patterns of identification, manifold historical traditions and a variegated set of languages and cultural standards. These should not be conceived of as static 'primordial' ties.[8] Having regarded these, in the deepening integration context a model such as a confederation for EU will reintroduce new normative and institutional order for balancing power, subsidiarity, sovereignty, representation, and solidarity inside and outside to be a strong political actor as a state in the international relations and world politics. The opportunities of Unity can thus be more effectively looked at through the lens of confederalism or asymmetrical federalism[9], and in this article, the author focuses on the first one.

2. Drivers of the European Union Future

This EU multi-vector approach leads to the conclusion that the EU is more than an international organization[10]. In the narrow-based aspects, White Paper maps out the drivers of change with a range' of 5 scenarios for how Europe could evolve by 2025[11] and Policy paper 'Future of Europe' EU's strategic agenda 2019–2024 for preparing for a more united, stronger and more democratic Union in an increasingly uncertain world[12]

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7 *The White Paper*, "Future of Europe", European Commission, March 2017, pp. 15–29.

8 Peter A. KRAUS: *A Union of Diversity: Language, Identity and Polity-Building in Europe.* Cambridge University Press, 2008, p. 8.

9 Carolin ZWILLING: What Does Asymmetry Mean in Today's Europe? *Einstein Center for International Studies (CESI)*, The Federalist Debate Papers on Federalism in Europe and the World, No. 2, July 2008, pp. 42–43.

10 J. PIERRE–B. G. PETERS: *Governance, Politics and the State.* New York, 2000.

11 *The White Paper*, European Commission, March 2017, pp.15–29. Online available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf (15/11/2019).

12 Policy paper "Future of Europe", "Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world", European Commission, May 2019, pp. 10–74. Online available at: https://ec.europa.eu/commission/sites/beta-political/files/euco_sibiu_communication_en.pdf (15/11/2019).

1. *Scenario #1: THE EUROPEAN UNION FOCUSES ON DELIVERING ITS POSITIVE REFORM AGENDA ('Carrying On').*
2. *Scenario #2: THE EUROPEAN UNION IS GRADUALLY RE-CENTRED ON THE SINGLE MARKET ('Nothing but the Single Market').*
3. *Scenario #3: THE EUROPEAN UNION ALLOWS WILLING MEMBER STATES TO DO MORE TOGETHER IN SPECIFIC AREAS ('Those Who Want More Do More').*
4. *Scenario #4: THE EUROPEAN UNION FOCUSES ON DELIVERING MORE AND FASTER IN SELECTED POLICY AREAS, WHILE DOING LESS ELSEWHERE ('Doing Less More Efficiently').*
5. *Scenario #5: THE EUROPEAN UNION DECIDES TO DO MUCH MORE TOGETHER ACROSS ALL POLICY AREAS ('Doing Much More Together').*

As a result of an author's summary of 5 scenarios by 2015 and 'Future of Europe', the EU's strategic agenda 2019–2024, it can be noted that among these scenarios, there is no possible disintegration of the EU, although it should not be excluded. The practical implementation idea of creating 'multi-speed' means that the different speeds remain as a consequence of the difference in social standards and various levels of member state's economy. For example representatives of the EU 'second speed' have to accept their unequal position within others 'first speed' and it means that 27 countries follow the chosen own path of development (each state determine these areas of integration itself) in the conditions full of consensus and however, this looks unattainable from practice.

There are several prospects such as the practical transformation of the Union into a 'superpower' of the federal type before the formation of the so-called 'multi-speed Europe', in which there will be different groups of states considering the prospects of integration only in certain areas and. The idea and approach 'multi-speed Europe' is not beneficial for Central and South-Eastern European countries in the long term since this EU development model would solidify their secondary role, particularly in addressing food and consumption issues. Moreover, the experience of the migration crisis shows that in case of serious disagreements, Unity can be broken. At the same time, integration solutions to the problems of the Eurozone related to the future of the European currency. In this regard, the choice seems obvious either to return to national currencies, which would lead to heavy disintegration processes and the gradual decline of the EU or to create a common Banking Union and a Budget within the Eurozone.

However, while the document avoids referring to the term of differentiated integration expressis verbis, the concept is implicitly present in the third scenario, calling for further differentiation through which a group of countries, including the euro area and possibly a few others, chooses to work much closer notably on taxation and social matters. Scenarios 2 and 4, in turn, call for a 'spill-back' in several policy areas, such as regional development, public health, or parts of employment and social policy not directly related to the functioning of the single mar-

ket. These cannot be grasped as 'opt-outs' but should rather be conceived of as different forms of disintegration[13]. Geography is one factor (North-South, East-West), but it is combined with factors related to the level of economic development and the economic and fiscal policies involved. None of the geographic divisions are carved in stone. Social and economic policies change, as do the governments that set them. Differences between the policies of various groups of member states may increase or decrease depending upon the changing economic, social and political conditions.[14]

The EU needs to adopt a coherent approach to further development of the European pillar of social rights, which will allow the single market to deliver results that are visible to European citizens. In addition, there is also a contradiction, but an important conclusion also that it seems that the main efforts of the EU made towards keeping and development internal market in any outcome of integration political processes even with the possibility of disintegration or if member states cannot agree on a common position on political issues. For example, as well as a good evidence base is that no wonder that international institutions such as World Bank, International Monetary Fund, European Bank for Reconstruction and Development, Organization for Economic Co-operation and Development and others pay increasing attention to negative effects of globalization, and to the thinning of the social fabric and social fragmentation that can end in full-blown political disarray. There is a discussion of the need to redesign the social contract in view of increasing distributional tensions and a spreading sentiment of unfairness in society[15]. For example, the quite interesting proposal puts forward the priorities of Finland's Presidency are to strengthen common values and the rule of law, to make the EU more competitive and socially inclusive, to strengthen the EU's position as a global leader in climate action and to protect the security of citizens comprehensively.[16]

3. Confederation as a beneficial model for the future of the European Union integration

Although committing to the same *'acquis communautaire'*, it has founded heterogeneous outcomes through analyzing specific fields of integration, such as trade integration[17], monetary integration[18], capital market integration[19], labor market integ-

[13] B. LERUTH–S. GANZLE–J. TRONDAL: Exploring Differentiated Disintegration in a Post-Brexit European Union. *Journal of Common Market Studies*, Vol. 57, No. 5, pp. 1013–1030. Online available at: https://doi.org/10.1111/jcms.12869 (15/11/2019).

[14] János MARTONYI: Differentiation, not Disintegration. *Hungarian Yearbook of International Law and European Law*, 2018, pp. 9–16.

[15] Daniel DAIANU: Can Democracies Tackle Illiberal and Inward-Looking Drives. *Romanian Journal of European Affairs*, Vol. 19, No. 1, June 2019, pp. 8–9.

[16] Finland's Presidency Programme. *Sustainable Europe Sustainable Future*. Presidency of the Council of the European Union, 1 July–31 December 2019, pp. 2–3.

[17] R. BALDWIN: *In or Out: Does it Matter? An Evidence-Based Analysis of the Euro's Trade Effects*. London, Center for Economic Policy Research, 2006, pp. 15–54.

ration[20], or institutional integration[21] *(Annex #1),* it should be noted that here the author rather than a detailed examination of the causes and background conditions which shaped the initial course of European integration more focus for summarizing in a very rough way the process of progressive EU integration with an increase in EU share competences institutions than members states[22]. Since the discussion of the perspectives of the European constitution-making seems to require a thorough reflection on how Europe's institutional framework relates to the identity of the political subjects of the Union. Along with that, it is important to consider through the main 4 prisms of the theory for different forms of integration which are currently being applied to European integration and critical to assess the reasons for their failure. 1) The 'functionalism' integration dynamics leads to create functional organizations with certain powers granted directly by the states themselves. Theory of functionalism dominates the law of international organizations, explaining why organizations have the powers they possess, why they can claim privileges and immunities, and often how they are designed as well[23]. 2) The 'neo-functionalism' for the creation system of powerful central institutions and to transfer by states their sovereignty. Some critics of neo-functionalism mourned the loss of its original faith in automaticity and uni-directionality and complained about the proliferation of potential trajectories, but this was a logical and desirable result of its comparative application and its conversion of 'taken-for-granted' constants into 'should-be-taken-into-consideration' variables. Any comprehensive theory of integration should potentially be a theory of disintegration[24]. 3) The transactionalism or theory of community security involves the study of peaceful coexistence and friendly relations between states which is inherent in the process of integration, is a consequence of mutual sympathy, preferences, trust, and collective consciousness. The functional optimism of neofunctionalism and liberal intergovernmentalism appears less plausible with respect to core state powers. Policy options that work in market integration are unattainable or dysfunctional in

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18 Andros GREGORIOU–Alexandros KONTONIKAS–Alberto MONTAGNOLI: Euro Area Inflation Differentials: Unit Roots and Nonlinear Adjustment. *JCMS: Journal of Common Market Studies*, Vol. 49, Issue 3, May 2011, pp. 525–540, 2011. On line available at: https://ssrn.com/abstract=1802940 or http://dx.doi. org/10.1111/j.1468-5965.2010.02150.x

19 Lieven BAELE–Annalisa FERRANDO–Peter HÖRDAHL–Elizaveta KRYLOVA–Cyril MONNET: Measuring European Financial Integration. *Oxford Review of Economic Policy*, Vol. 20, Issue 4, December 2004, pp. 509–530.

20 D. HOWARTH–T. SADEH: *The ever incomplete single market: Differentiation and the evolving frontier of integration*. The political economy of Europe's incomplete single market. London, 2014, pp. 2–15.

21 F. P. MONGELLI–E. DORRUCC–I. AGUR: What Does European Institutional Integration Tell Us about Trade Integration? European Central Bank, *Occasional paper series*, No. 40, December 2005, pp. 7–47.

22 See more: András TORMA–Balázs SZABÓ: *EU Public Administration and Institutions and their Relationship with Member States*. Tirgu Mures, Romania, Editura Universitatii "Petru maior" 2011.

23 Jan KLABBERS: The Emergence of Functionalism in International Institutional Law: Colonial Inspiration. *European Journal of International Law*, Vol. 25, Issue 3, August 2014, pp. 645–675.

24 Philippe C. SCHMITTER: Neo-Neo-Functionalism. European University Institute, July 2002, pp. 3–39.

the integration of core state powers. Intergovernmentalism and neofunctionalism do not help much to understand this difference because they focus on variance in the institutional mechanisms of integration (supranational vs. intergovernmental) but neglect variance in the integration field[25]. 4) EU for confederalism is not surprising since confederation is an instrument for resolving one of the most pressing problems which allow nations to manage to grow and enlarging territories. In modern life, especially in recent years multilevel and governance have developed in the EU, which includes mainly three relatively independent centers of power: 'supranational' (EU), 'national' (member states) and 'subnational' (regional or local government).

From the above, it follows that, if functionalism, neo-functionalism, and transnationalism cannot capture the uncomplicated complex and multi-faced order in Europe, in this case, confederation may serve as well as a way of analytical, institutional and normative approach. Since European integration is cooperative and it functions by the involvement of member states in almost all community decisions from the preparatory stages to implementation as shared competences. Furthermore, the concept of "European governance" has traveled to the EU's external governance of neighboring countries.[26] Confederalist ideas and the spirit of confederalism itself have always been part of the European design. The ideas formulated by the Founding Fathers of the European integration process after the Second World War. Robert Schumann, Jean Monnet, Alcide de Gasperi, Paul-Henri Spaak and the others understood integration as a process leading to the peaceful coexistence of nations. Limiting their sovereignty and transferring some prerogatives to the supranational level through the creation of federal bonds – was the way to achieve it[27].

Nevertheless, based on the classical understanding of the Federal structure, it can be stated unequivocally that the EU is not a 'Federation of States'. Treated oppositely, if the troubled situation in the EU (after the UK has decided to withdraw from the EU) is a result of too much of the federal content, and therefore federative approach shall be limited. From a historical point of view, it can be understood as the term of Europeanization has developed from a concept originally applied to the member states of the EU to the entire region[28]. For comparative study, the author proposes to briefly consider the integration processes of the United

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[25] Philipp GENSCHEL–Markus JACHTENFUCHS: From market integration to core state powers: the Eurozone crisis, the refugee crisis and integration theory. Robert Schuman Centre for Advanced Studies, European University Institute, 2017, pp. 1–24. Online available at: https://cadmus.eui.eu/bitstream/handle/1814/46424/RSCAS_2017_26.pdf (15/11/2019).

[26] Sandra LAVENEX–Frank SCHIMMELFENNIG: EU rules beyond EU borders: theorizing external governance in European politics. *Journal of European Public Policy*, 2009, Vol. 16, No. 6, pp. 791–812. Online available at: https://archive-ouverte.unige.ch/unige:76475 (15/11/2019).

[27] Umiński STANISŁAW: The Pros and Cons of Integration VS. Disintegration Scenarios for Europe. The University of Gdańsk, Research Centre on European Integration, Poland, 2017. Online available at: file:///C:/Users/TechLine/Downloads/18955-Article%20Text-57423-1-10-20171024%20(3).pdf (15/11/2019).

[28] Tanja A. BÖRZEL–Thomas RISSE: From Europeanization to Diffusion. *West European Politics*, Vol. 35, No. 1, pp. 1–19, January 2012, pp. 4–15.

States of America and the European Union. Confederalism has American roots, so discussions about whether the American State structure, whose is a good example for comparative analysis, criticism: *Can unite numerous states of modern Europe Union on a state – structural basis as the USA?* Since confederation in the USA also arose in a challenge-response situation (USA was a Confederation, Article 1781–89 of the constitution of the United States). Such as the USA federal system is characterized by sovereignty being shared and divided between different levels of government, and the EU meets this criterion of constitutionally guaranteed territorial division of powers, as sovereignty is divided between EU and its member states. *'Sui generis'* nature of the EU has many characteristics in common with federal systems and here is a brief comparison and conclusion:

USA	**EU**
● The absolute priority of the Federal Constitution and Federal laws. ● Equal constitutional status of the constituent entities of Federation (no official classification of the Member States according to their national composition or economic potential). ● Clear division of powers between the Federal State and the States (mainly in the legislative field, competence) and ensuring distribution for each of these levels of financial annual incomes. ● Member States themselves determine their electorate, establish mandatory requirements for the passage of party candidates for public office through primaries (primary elections). ● Separate entities have the right to create a unicameral Parliament (Nebraska), and can pass laws according to which courts and Cabinet members must be elected (at the Federal level, they are appointed). ● The individual States have the right to pass laws on holding petition referendums. ● Established special status for unincorporated territories (Puerto Rico, GUAM, Micronesia, Virgin Islands, Eastern Samoa, etc.) And so-called adjacent (associated) territories.	• Lisbon Treaty as making the European Union more efficient, more effective and more democratic, but even elections of the European Parliament take place every five years (but not always the electorate knows the candidate for Prime Minister from a political party during the election campaign) and it should be claimed that the EU has a democratic deficit. European actors proposed to set up a more participatory democracy by promoting transparency. • European decision-making processes show several characteristics of consensus democracy and based upon mechanisms and procedures that are typical of confederation systems. • Article 5 of the Treaty on the European Union (TEU) sets the limits of the EU competences according to the principle of conferral. • Principles of subsidiarity and proportionality apply. The EU's ability to act, or to interfere with the member-states is not unlimited. • Community Law enjoys supremacy over member state law, and the European Court of Justice is the supreme judicial arbiter (as the Supreme Court in the US). • Commission, which proposes legislation in the EU, is a federal institution independent of the member states

EU also differs from a federal state, such as the US, in several important ways[29]:

- The EU was set up by states in contrast to the US that was established by the people, and states remain the 'masters' of the treaties.EU member states retain the right to act independently in matters of foreign policy and defense, and also enjoy a near-monopoly over other major policy areas such as criminal justice and taxation.
- Member states are separate, sovereign entities under international law, and possess a de facto right of secession from the EU (this has been made a de jure right in the new Constitution).
- The EU possesses no independent powers of taxation and the EU spends less than 2% of the public expenditure of the Member States.

The EU lacks essential characteristics of a state, such as a head of state, and perhaps more importantly, a European polity or demos with a strong sense of European identity. The European people lack the identity that American people have, which could overwrite their national or ethnic origin: Europeans consider them as German, French, and Hungarian, etc. in the first place[30].

As a result, the EU may adopt an institutional structure that bears a closer resemblance to the federal system of the United States as a 'new' type of confederation where member states may seek to limit the powers of the EU to strengthen the democratic structures at the national (state) level.

Now on top of political and legal discourse, that democratic deficit in EU is an ongoing debate that took off after the failure of the referendum on the Treaty of Maastricht in Denmark in 1992. Both scientists and politicians seek to find optimistic mechanisms; the author of the article admits that it can be seen as rooted in the institutional structure of the Union. Moreover, it has been argued that the EU should move towards a more confederal model for example, such as Switzerland. The article proposes to consider, analyze the model of Confederation.

Switzerland as a possible state – structure role model for EU[31]

Switzerland is a classic example of a multinational confederation state (26 multilingual cantons, 3 thousand communities) in Europe and one of the most developed countries in the world. Switzerland, the basis for Swiss confederalism development of is the principle of subsidiarity, direct democracy, compromise solutions (consensus basis), and protect various minorities (religious and ethnic).

[29] EU Briefings: Policy Area: *Political and Institutional Factors*. Policy Area: Political and Institutional Factors, European Union Center of North Carolina, 2006. Online available at: https://europe.unc.edu/files/2016/11/Brief_Decision_Making_Legislation_2006.pdf (15/11/2019).

[30] György MARINKÁS: How Not to Build a Monetary Union? The Structural Weaknesses of the EMU in the Light of the 2008 Crisis and the Institutional Reforms for Their Correction. *Hungarian Yearbook of International Law and European Law*, 2018.

[31] Swiss government: https://www.admin.ch/

Following best practices, important principles, approaches can be adopted from experience for the EU Confederation[32].

- The confederal structure European institution based upon the collegial and consensus principle.
- National elections based upon the party-list version of proportional representation and equal elected representation of States.
- Direct democracy and local communal democracy and the use of obligatory and optional referenda and popular initiatives; referenda for constitutional and legislative reform.
- The principle of proportionality: power-sharing in small communities.
- The principle of double majorities; citizens participating in the electoral politics of decision-making in their dual capacity as states' interests and identities and confederal (national) interests and identities.
- State autonomy and strong local powers with competences.

In this case, confederation-decision between the European Parliament and the Council of Ministers will be introduced as a general rule, the veto-powers of the member states will be reduced to a large extent, participatory democracy will be introduced, justice and home affairs will be communitarian and a quasi-foreign minister, supported by a European External Action Service will be introduced.

4. Author's discussion, critical analysis

The Lisbon Treaty can be considered as a breakthrough for European democracy and more about from a Union of governments to a Union of citizens, and it is not the last European treaty. The more thrilling part of future integration of the European Union will be confederation and then possible federation.

The European Community is not a confederation, but within its institutional structures, there are some elements similar to confederalist mechanisms. It has to admit that in the context of globalization, the traditional perception of the role of the state and the meaning of its formal attribute of state sovereignty is changing. The ability of the EU has always been functional, but member states have international legal personality. Under these conditions, in modern political science, there is a sharp rise in interest in the problem of transformation (crisis or devaluation) of state sovereignty. EU's highest authorities do not have sovereignty, which remains in the hands of member States. The Maastricht Treaty establishes a procedure for decision-making at intergovernmental conferences with the full consent of all members of the Union, which is expressed by the signing. It should be emphasized that the internal political aspect of EU systemic has a crisis, which has become by far the most painful and insurmountable obstacle in building the political union and in this regard, the best option will be a confederation which was analyzed in this

[32] Michael BURGESS: *Comparative Federalism. Theory and practice*. USA–Canada, 2006, pp. 118–121.

article. In the following, the author will have a glance at the possibility of existence in a hypothetical perspective through a brief SWOT – analysis of the confederation model for the EU.

Strengths • *Direct democracy* • *Diffusing power* • *Unified state foreign policy* • *Increases participatory approach (level of participation by citizens)* • *Eurozone budget*[33] • *Tax harmonization or even European taxation*[34] • *Eurozone enlargements* • *European Monetary Fund that also includes a backstop for banks*	***Weaknesses*** • *Encourage the passing of conflicting laws* • *Create oppositional competition* • *Intergovernmental conflict* • *Multilevel legal alignment*
Opportunities • *Encourages a system of cooperation* • *Reaches bilateral cooperation and in* • *Encourages innovation in governing* • *Allows the government to become more responsive to individual needs* • *Financial support for national economic reforms greater emphasis on innovation* • *Protection different segregation*	***Threats*** • *A different measure of national ambition, any sense of national belonging* • *Blockage nationalist policies by the Federal States* • *Inequalities between different member states* • *Wealth gap*

The SWOT analysis highlights the significant potential and already existing both political and institutional conditions for the confederation. To strengthen the argument, the author once again wants to take an example Spinelli project. One of the fundamental ideas of development towards confederation and the federation of the Union Spinelli's concepts for an EU constitution, which he unveiled in 1972, embraced both the constitutional process and institutional aspects. From the start, Spinelli was convinced that the Union's constitution could not be created in a sing-

[33] See: Zoltán ANGYAL: Monetary Sovereignty and the European Economic and Monetary Union, *European Integration Studies*, 2009, 7, 1, pp. 109–119, p. 11.

[34] See: Éva ERDŐS: The Tendencies Of Direct Tax Harmonization – Tackling The Digital Tax Avoidance. *Curentul Juridic*, Year XXII, 2019, Vol. 76, No. 1, pp. 108–120. http://revcurentjur.ro/old/arhiva/attachments_201901/recjurid191_8F.pdf, p. 13.; Éva ERDŐS: The Tax Conflicts in the Light of the European Tax Harmonization. In: Tamás KÉKESI (ed.): *The Publications of the MultiScience – XXX. microCAD International Multidisciplinary Scientific Conference*. Miskolc, University of Miskolc, 2016, Paper E_6, p. 8.; Éva ERDŐS: The extentional interpretation of the principle of public burden sharing in the light of European tax harmonisation. *European Integration Studies*, 2011, 9, 1, pp. 41–56, p. 16 p.

le step; rather, it had to be the outcome of a multi-stage process[35]. He offered very topical prospects as regards the development of its institutional architecture. Spinelli was advancing views which – at least in principle – reappear in the texts of the most recent draft constitutions: Strengthening and involvement of the European Council; Comprehensive co-decision rights for the European Parliament in the legislative process; Strengthening of the position of the Commission President; The Commission to be politically accountable to the EP; Transfer of common foreign policy competence to the Commission; Restructuring of the Council into a European chamber of states; Establishment of separate EU diplomatic missions in third countries. Given all the above arguments EU citizens not be scared to oppose Eurosceptic views and rather strongly demand further steps towards a United Europe as a Confederation. It is critically important to note from the perspective of a rational approach that European integration is a role model. EU has its great advantages as one of the greatest achievements in integration is to recognize that the dynamism of European law and European decision-making processes involve several characteristics of consensus democracy and based upon mechanisms and procedures that are typical of confederal systems characterized by de jure asymmetry[36].

The true challenge for the EU is to face the competitive pressure from China, USA, Japan, Russia, and having this regards normative unity is required, which would be provided by confederation to the European Union. Except all of the above trends have complicated the EU's ability to deal with multiple internal and external challenges. Among the most prominent challenges such as migration and integration concerns, democracy deficit, European identity and leaving UK from the EU Brexit[37] which became clear that the EU is experiencing an existential crisis. An important aspect is the problem of European identity since Europeans still associate themselves rather with their states, culture than with supranational institutions of the EU. The empirical literature generally supports the view that such a distinction exists. One interesting twist is that within any given country, some people hold a more *ethnic conception* of nationalism and some hold a more *civic conception*[38]. The main issue on the agenda determinately depends on whether one defines identity in civic or ethnic terms. For example, a striking example is the multilingualism policy of EU aims at ensuring multiculturalism, tolerance and European citizenship with modern civil liberties, the rule of law. Moreover, the lack of common immigration policy, botched interventions abroad that have mis-

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35 Policy paper, Constitutional Affairs: Altiero Spinelli: European Federalist. European Parliament's Committee on Constitutional Affairs, October 2007.

36 Policy paper, Constitutional Affairs: Altiero Spinelli: European Federalist. European Parliament's Committee on Constitutional Affairs, October 2007.

37 See further more: Lilla Nóra KISS: Exiting the EU: Pre- and Post-Lisbon. *Curentul Juridic*, Year XXI, 2018, No. 3 (74), 3, pp. 13–26., and Lilla Nóra KISS: General issues of Post-Brexit EU Law, *European Studies: The Review Of European Law Economics And Politics*, 4/2017, pp. 220–227, p. 7.

38 T. REESKENS–M. HOOGHE: Beyond the civic-ethnic dichotomy. Investigating the structure of citizenship concepts across thirty-three countries. *Nations and Nationalism*, 16 (4), 2010, pp. 579–597.

fired, permeable EU frontiers, and the diminishing cohesion and trust among EU member states have all, inter alia, brought about this crisis-quite likely, more threatening than the Eurozone crisis[39]. To address challenges of integration EU has taken steps to further support member states in their integration policies, where economic integration will eventually lead to the political unification of Europe.

The authors draw attention to the strengths of the Union, which will be a fundamental impetus to a strong confederation, for example, the EU legal system, 'hard law' and 'soft law' mechanisms both enforced with institutional flexibility. In this regard, the role of CJEU is strengthened, and the CJEU is endowed with the powers to issue the referring court with all criteria for the interpretation of Community law, which enables it to judge the compatibility of the national legal rule with the Community regime[40]. Another example, EU Council President has initiated a full 'leaders agenda' in the run-up to the European Parliament elections in 2019 which presented as a win-win outcome for everyone. Moreover, the EU needs a new multiannual financial framework (MFF), which also demands a comprehensive perspective on new policy objectives and sources of fresh money so that the EU that delivers can be constructed[41]. In sum, the current EU narrative at the EU level is one of a comprehensive agenda, which should be with deeper integration. Even as a reform, Piketty[42] proposes to establish a strong parliamentary representation of the Eurozone. Also, a separate budget shall be made for the Eurozone countries, 'supplied' from the European tax. It would enable us to fulfill 'taxation with representation' principle.

5. Conclusion

In the last 25 years alone, the mainly European Union treaties (Maastricht, Amsterdam, Lisbon) have profoundly reformed and transformed a Union and has become an example for many integrations how naturally from one stage consistently could shift move to another. Obviously, the Lisbon Treaty has opened a new chapter of European integration, but at the same time, it must admit that it still holds the unfulfilled potential of it for today.

While studying European integration issues, it should be noted that there is no easy way out of the European institutional debate. From the background of the UK's exit from the EU and the growing popularity of Euroscepticism, the preserva-

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39 Daniel DAIANU: Can Democracies Tackle Illiberal and Inward-Looking Drives. *Romanian Journal of European Affairs*, 19, No. 1, June 2019, pp. 5–22.

40 CJE, C-292/92, *Hunermud v Laudesapothekerkammer Baden–Württemberg*, marginal note 8; *Streinz/Ehricke*, TEU/TFEU, 2nd Edition, Article 267, marginal note 14, from 15/12/1993.

41 G. A. OETTINGER: Budget matching our ambitions, speech given at the conference "Shaping our Future". EU Commission, 2018. Online available at: https://ec.europa.eu/commission/commissioners/ 2014-2019/oettinger/blog/budget-matching-our-ambitions-speech-given-conference-shaping-our-future-812018_en (15/11/2019.).

42 S. HENNETTE–T. PIKETTY–G. SACRISTE–A. VAUCHEZ: Draft Treaty on the democratization of the governance of the Euro area. 2017. Online available at: http://piketty.pse.ens.fr/files/T-DEM%20-%20Final%20english%20version%209march2017.pdf (15/11/2019).

tion of EU unity and a new stage of integration with equal not only political, economical, but also social opportunities is the most important factor of future development of the EU. Now European Union ranges from an intergovernmental organization to a quasi-state structure, being neither a classical international organization nor a federal state. European the concept of enlargement of Union remains unchanged, by offering the prospect of EU membership as an applicant -countries meet the EU requirements which are a crisis in the EU has made some adjustments to the European plans. According to the author's opinion in the foreseeable future, Germany will continue to play a leading role in the EU and its role after Brexit[43] will further strengthen as a locomotive of European integration with the participation of France, Italy and others member states engagement. Germany and France will seek political compromises on the future vision of the Union and will continue to search an effective model for overcoming the systemic crisis on the basis deeper European Union with preserving the EU integrity, continuing its further deepening with restrained expansion by prospect of transition to a political Union and at the same time, they will be a staunch ally of the United States and NATO.

However, to transform such an entity as the EU into a confederation, it is necessary to change its concept and move from an economic union to a political one. While economic integration was the first practical step, it was never seen as a final phenomenon, but only as a step towards political unification. Those changes should also include the emergence of the European nation as the exponent of the unity of such a structure. One of the main conclusions can also be called that as life shows, the formation of European regulatory mechanisms is a long-term and permanent process. Having this regard, it should be noted that success of European integration depends not only from Europe Union institution, bodies, legislation, programs but also factor of support for such actions on the part of the EU citizens, who must not only understand these ongoing processes but also actively participate and support it. The EU as a structure that claims to be the center of European civilization, must determine more precisely its collective identity, framework, possible transformations and European identity.

Among the advantages of such 5 scenarios about the future of the UE are that the activities of the EU will continue to produce concrete results, as well as that the unity of the 27 EU countries will be preserved. Among the negative factors, including the fact that the unity of the Union can continue to be tested in moments of major disagreements.

The EU should promote its own unique model of cooperation as a confederation for inspiration for other states such as cooperation.

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[43] Lilla Nóra Kiss: General issues of Post-Brexit EU Law. *European Studies: The Review Of European Law Economics and Politics*, 4/2017, pp. 220–227, p. 7.

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DRONE UTILISATION AS A POSSIBLE ABNORMALLY HAZARDOUS OPERATION

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1. Introduction

These days the technological development rising and has a huge effect on the life of humankind that will be possibly more relevant in the future. The connection between the field of law and technological development can be a very interesting topic, especially how the law can respond to these phenomena. We believe that the legal system should be prepared for these changes and make a solution to the likely problems.

The aim of this paper to examine which rules can be applied for damages caused by drone operation for third parties. We are concentrating on the non-contractual liability because up to the present no national legal literature; no judicial decision had examined or assessed in full details the main question whether the drone operation could be considered as hazardous operation or what extent or in which circumstances. In this study, we would like to know more about this possibility.

2. Basics

First of all, it is important to define the term the drone. We can describe it as an aerial vehicle that can be operated automatically or remotely controlled. In Hungary, Act No. XCVIII of 1995 on Aviation does not refer to it as a drone, but as an unmanned aerial vehicle (hereinafter: UAV) as *"a civil aerial vehicle, which designed and operated without a man on board"*[1]. The most important regulations are, the above: the Regulation No. 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending other regulations (hereinafter: Regulation No. 2018/1139) – it was the first document of the European Union, which described the UAVs –, the Commission Delegated Regulation No. 2019/945 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems (hereinafter: Regulation No. 2019/945) and the Commission Implementing Regulation No. 2019/947 on the rules and procedures for the operation of unmanned aircraft (hereinafter: Regulation No. 2019/947). We have to note that the regulations have a huge significance because they must be applied to the Member States and these regulations cover all commercial and private drones regardless of

[1] Act No. XCVIII of 1995 on Aviation, Section 71, Point 35.

their weight. The regulation No. 2019/945 and the Regulation No. 2019/947 give two important definitions. One of them is the unmanned aircraft (so-called UA),[2] the other one is the unmanned aircraft system (so-called UAS).[3] People name these devices as a drone in everyday life after the buzzing bees, but the official designation follows the aviation terminology: it is also known as UAV (unmanned aerial vehicle), UAS (unmanned aircraft systems), RPV (remotely piloted vehicles), RPAS (remotely piloted aircraft systems).[4]

The attractiveness of these products stems from two reasons. Firstly, people can use it for several aims (versatility), secondly, they are easy to use without any specific knowledge (easy handling) or without special certificate or permission. We can separate the devices into three groups according to the purposes of exploitation, such as governmental[5], commercial and private drones.[6] The essence of the commercial drones that the owner of the machine provides service for financial or non-financial compensation, like in the field of entertainment, event management, agriculture, industry or in research and development.

Personal drones can be called as a hobby or recreational drones. These vehicles are smaller in size than the commercial ones, despite this fact they can be used on quite a wide range of possibilities, for example making photos and videos.[7] We also have to note that in this category of use the weight of the device mostly less than 250 grams.[8] The reason for their attractiveness derives from their small dimensions, and from the fact that they can be managed easily and safely.

3. Examination of hazardous operation

3.1. Defining the highly dangerous activity

Primarily, it is important to identify the conceptual meaning of hazardous operation. Act No. V of 2013, the Hungarian Civil Code (hereinafter: HCC) only describes the operation itself and says *"who pursues an activity that is considered*

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2 *"Unmanned aircraft means any aircraft operating or designed to operate autonomously or to be piloted remotely without a pilot on board."* Regulation No. 2019/945, Article 3(1): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0945&from=EN (Date of download: 12/12/2019).

3 *"Unmanned aircraft system means an unmanned aircraft and the equipment to control it remotely."* Regulation No. 2019/945, Article 3(3). Regulation No. 2019/947, Article 2(1): https://eur-lex. europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0947&from=EN (Date of download: 12/12/2019).

4 Ibolya STEFÁN: A drónokkal kapcsolatos szabályok vizsgálata. *Miskolci Jogtudó*, 2017/1., 71, https://jogtudo.uni-miskolc.hu/files/821/MJ2017iss1art8Stefan.pdf (Date of download: 12/12/2019).

5 For the governmental use, namely, the applicability of the drones in the public administration, see among others: Balázs SZABÓ: *Technical and technological development of Hungarian administration in the first two decades of the 21th century*. Ph.d. Dissertation, pp. 144–161, University of Miskolc, 2020.

6 STEFÁN: ibid. 72.

7 STEFÁN: ibid. 73–74.

8 STEFÁN: ibid. 77.

highly dangerous shall be liable for any damage caused thereby"[9]. This liability rule is a general clause and it is very flexible for this reason. Moreover, as the old Hungarian Civil Code (Act No. IV of 1959) neither contained any definition of hazardous or highly dangerous activity, nor listed any types of activity deemed as highly dangerous, it was the judicial practice which elaborated some elements of the definition. As a result of this phenomenon, a great number of hazardous operations have identified in the last century parallel with technological development.[10] *"Under the judicial practice, in order to assess the highly dangerous nature of an activity, one should take into account the characteristic features of the device applied in the course of activity and the potential consequences of the events triggered by this activity. The issue should be assessed on a case-by-case basis whether a slight abnormality occurring under normal conditions of use can cause damage in a disproportionately wide range or disproportionately large amount." (BDT 2010.2358.)*[11]

This definition of the judicial practice can be compared with results of comparative law about the phenomenon of dangerousness: Koziol states the following: *"It has already been mentioned above that three criteria are relevant in assessing dangerousness: the probability that damage will occur, the extent of the possible damage and the controllability of the risk. These three criteria may have different influences on the outcome; however, they must always be examined together: if there is a high risk of injury then liability based on dangerousness may even be justified if the possible damage is relatively minor; in this connection, the damage caused by motor vehicles comes to mind. On the other hand, liability based on dangerousness is also appropriate if the probability of damage is minor but the damage that could occur in the event may be massive; an example in this respect would be nuclear power plants."*[12]

3.2. Dangerousness in drone operation

In this section, we should examine how the definition of hazardous operation can be applied to the drones. These years we read news about emergencies, accidents, and damages that were caused by UAVs. These tools can be very dangerous. For example, we present an accident and claims for damages stemmed from that in the following. The RPV caused a helicopter accident. A private helicopter teacher was tutoring practical skills to his student, while an unknown drone entered the airspace used by

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9 HCC: Section 6:535 (1).

10 Tamás LÁBADY: Felelősség fokozott veszéllyel járó tevékenységért. In: Lajos VÉKÁS–Péter GÁRDOS (eds.): *Kommentár a Polgári Törvénykönyvhöz*. 2. kötet. Wolters Kluwer Kft., Budapest, 2014, pp. 2268–2269.

11 Réka PUSZTAHELYI: Liability for intelligent robots from the viewpoint of the strict liability rule of the Hungarian Civil Code. *Acta Universitatis Sapientiae, Legal Studies*, 2019, EMTE-Sapientia (forthcoming).

12 Helmut KOZIOL: Basic Questions of Tort Law from a Germanic Perspective. Wien, Jan Sramek Verlag, 2012, p. 235.

the helicopter. The operator of the helicopter tried to avoid the collision; unfortunately, he lost control over the aerial vehicle and crashed the ground. Luckily the passengers did not suffer any harm. We also have to mention a study made by the Federal Aviation Agency in the USA. In that document, the scientists published the results of their research, where the aim was the examination of air collision between drones and commercial planes, contrary to birds. In the simulation, the tools weighed the same as regular birds – between 1.2 kg and 3.6 kg – and crushed into the different parts of the plane. The damages can be separated into for levels:

1. Level: the damage is minimal; there are some small deformations.
2. Level: significant, visible damage can be seen on the external surface and a smaller internal deformation, but the cover does not break.
3. Level: The cover of the plane is broken and at least one item gets into the internal structure from that UAV, which had a collision with the plane.
4. Level: The entire UAV gets into the plane and the system fails.

As a result, the researchers proved that the damage of a plane and bird collision is a 2. Level damage, meanwhile, the damages caused by drones are at least 3. and 4. level damages. They stated that among the same characteristics, the drones can make a larger amount of damages than birds. Furthermore, the tools can cause fire, if their battery penetrates into the structure.[13]

From the above-mentioned information, we can see that the unmanned aerial vehicles during their operation are capable of causing a huge amount of damage, moreover to endanger individuals of aircraft and people on the ground. According to this, we can state that the operation of the drone can be described as a highly dangerous activity. However, it is important to note, this state is not true in connection with the above mentioned little drones – weighed less than 250 grams.

3.3. The notion of the operator

In this chapter, we are examining the position of the operator focusing on the regulations of the European Union and the Hungarian Civil Code. The Hungarian Civil Code gives a short, and – in our opinion – not an exclusive definition of the person who is liable for damages caused by the hazardous operation. Section 6:536 (1) says, *"the person on whose behalf the hazardous operation is carried out shall be recognized as the pursuer of a highly dangerous activity"*. If we focus only on that person who has an interest in the operation in connection with the proof of the liability, this method will give us a fault result.

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[13] Gerardo OLIVARES–Thomas LACY–Luis GOMEZ–Jaime ESPINOSA DE LOS MONTEROS–J. Russel BALDRIDGE–Chandresh ZINZUWADIA–Tom ALDAG–Kalyan Raj KOTA–Trent RICKS–Nimesh JAYAKODY: UAS Airborne Collision Severity Evaluation: Executive Summary – Structural Evaluation. Federal Aviation Administration, Washington, 2017, pp. 9–23. https://www.researchgate.net/publication/328942360_Volume_I_UAS_Airborne_Collision_Severity_Evaluation_Summary_of_Structural_Evaluation (Date of download: 12/12/2019).

According to the judicial practice, the operator is the person who can lower or decline the risk of the damages, control and keep the hazardous operation, has a right to the disposal of the dangerous activity or gets any compensation from the operation.[14] The above-mentioned information is not enough for describing the exact definition because it gives the possibility to identify people as the keeper of the hazardous operation, who does the operation occasionally or temporarily. A judgement gave the missing component, says, *"keeping the highly dangerous activity means frequent, recurring and permanent activity, which should be examined from the characteristics of each case". (PK 40.)*

We also have to focus on the regulations of the European Union and Hungary, because it must be applied to every Member State, as we mentioned above. Regulation No. 2019/945 and Regulation No. 2019/947 contain the same definition for the UAS operator as *"any legal or natural person operating or intending to operate one or more UAS"*[15].

The Regulation No. 2018/1139 and the Regulation No. 2019/945 have several dispositions on unmanned aerial vehicles, such as the concept of the remote pilot *"means a natural person responsible for safely conducting the flight of a UA by operating its flight controls, either manually or, when the UA flies automatically, by monitoring its course and remaining able to intervene and change its course at any time"*[16].

According to this, it can conclude it, which in the EU legislation, the operator and the remote pilot may be up to two separate persons. Problems may be rising if this rule is linked to the category of the operator of the Hungarian hazardous operation, and we want to determine who is responsible for the damage caused by the drone to a third party. However, the solution might be the rule of general responsibility. As a result of the separation of the operator and the person who actually cause damage, the former shall be subject to the regulations of the hazardous operation, while the latter, shall be responsible for the caused damage of the general provisions of liability.[17]

3.4. Some issues relating to defences against strict liability

The nature of the liability rule for highly dangerous activity is strict. It is not a fault-based, but a risk-based liability rule,[18] where it is more difficult to be exempt-

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[14] Ádám FUGLINSZKY: Kártérítési jog. HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2015, pp. 381–382.

[15] Regulation No. 2019/945, Article 3(4); Regulation No. 2019/947, Article 2(2).

[16] Regulation No. 2018/1139, Article 3(31). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1139&from=EN (Date of download: 12/12/2019).
Regulation No. 2019/945, Article 3(27).

[17] Barbara BÚZÁS: Veszélyes üzemi felelősség. *Miskolci Jogtudó*, 2017/1., p. 3. https://jogtudo.uni-miskolc.hu/files/814/MJ2017iss1art1Buzas.pdf (Date of download: 12/12/2019).

[18] See *"Finally, when the risk of damages is linked to dangerous activities, some jurisdictions may attribute liability to the person that carries out the activity (e.g. the operator of a nuclear power plant or of an aircraft or the driver of a car) or is ultimately responsible for the dangerous activi-*

ed from the liability for damages. The underlying principle for this regulation based on the fact that an inherent and increased risk stems from the activity even if the operator acts in the most cautious and careful way, and take all the appropriate measure to avoid harm in advance. The second subsection of the 6:535 establishes the possibility of defence for the tortfeasor, providing that he could prove successfully that the damage was caused by an external (it falls beyond the scope of activity) and unavoidable event (it was neither foreseeable or predictable nor avoidable with preventive safety measures up to the extent of economic rationality).

The point of the unavoidable event is that the tortfeasor was unable to avoid it. This does not mean that for some reason he could not avoid it, but it means he did not have the opportunity to do so, he was unable to do it according to the state of the science. We also have to mention when examining the avoidability of the event, the time when the damage incurred will be irrelevant instead of it the whole process will be relevant, which resulted in damage. According to this, the damage is not considered to be unavoidable if it was excepted from the circumstances or if it could have been avoided earlier by making the right decision.[19]

The damaging event is external if it falls beyond the scope of the activity. The scope is interpreted widely. Technical failure is considered to be internal, including defects of the material or component and changes in the health condition or capabilities of the operator such as sickness or some kind of disease. Because of the requirement that the two conditions should meet, it is quite impossible for the operator to be exempted from the liability.[20] However, the following cases are examples for exoneration such as force majeure, the contributory negligence of the injured party and other external circumstances, events.[21]

Our opinion is that the defence is even more difficult in the case of unmanned aerial vehicles because they are massively developed devices. Even the smallest devices are equipped with different sensors. The point of it, they are used to inform the vehicle, and, on the other hand, they try to avoid, reduce the possibility of collisions during flight or landing. Besides, damage can be prevented by both external and internal components. Accessories developed and marketed by some drone manufacturers are external devices, their role to minimize the risk of damage, such as propeller protectors[22] and parachutes.[23] On the other hand, internal mechanisms

ty to happen (e.g. the owner of a vehicle). The rationale typically is that this person has created a risk, which materialises in a damage and at the same time also derives an economic benefit from this activity."
SWD(2018) 137 final, Commission Staff Working Document – Liability for emerging digital technologies Commission, 9.

19 FUGLINSZKY: ibid. 372.

20 FUGLINSZKY: ibid. 376.

21 Edit UJVÁRINÉ ANTAL: *Felelősségtan*. Novotni Alapítvány a Magánjog Fejlesztéséért, Miskolc, 2014, p. 129.

22 DJI officially released the Phantom Prop Guard: https://www.dji.com/hu/newsroom/news/dji-officially-released-the-phantom-prop-guard (Date of download: 12/12/2019).

23 DJI Dropsafe: https://www.dji.com/dropsafe?site=brandsite&from=insite_search (Date of download: 12/12/2019).

are programmed into the software of the machine, like the return-to-home function. It means the drone automatically returns to its starting point when the battery is low or signal problems occur, instead of unexpectedly stopping and crashing into something or someone. [24] As stated above the chances of exemption are very low. However, it is possible in the following conditions:

1) The notion of force majeure refers to events beyond human control, such as natural disasters, lightning, extreme storms, and war.[25] When flying drones, the operator must follow operating rules. It is the main rule that operation can be performed during appropriate visual and weather conditions. Based on this statement, it is difficult to imagine the possibility of liability exemption unless there is an exceptional weather anomaly during operation which the pilot could not expect based on his prior knowledge. For example, if the pilot made a flight plan and monitored the weather in the area but a solar flare causes disorder in the device and flies onto a high-value vehicle, he could prove that the event was the external cause of damage and it fell beyond his control, that is unavoidable.
2) The behaviour of the injured person or third persons and other external circumstances rarely have the consequence of exempting him from liability because the drone operators must be prepared for almost every possibility. Our viewpoint is that the exemption can be possible if the third party is connected to the tool while operating the vehicle and infects the device with a newly developed virus, and as a result, it causes a serious technical defect, crashes and causes damage to someone.

3.5. The concurrence of hazardous operations and other regulations

We should take a closer look at other rules like concurrence of hazardous operations and the period of limitation. The hazardous operations may cause damage to each other. In these cases, the rules of Section 6:539 shall be used *"where damage is caused by one hazardous operation to another, the operators shall be liable to provide compensation as commensurate according to attributability"*[26]. If none of them is liable, *"compensation shall be provided by the party whose highly dangerous activity is responsible for the malfunction that contributed to causing the damage"*[27]. After all, if both of them or none of them are responsible for the malfunction scope of hazardous activities, each person has to bear his damage.[28] This phenomenon looks possible according to aerial vehicles; it can happen during operation, such as the collision of two drones.

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[24] *How to use DJI's Return to Home (RTH) Safely*. https://store.dji.com/guides/how-to-use-the-djis-return-to-home/ (Date of download: 12/12/2019).
[25] UJVÁRINÉ: ibid. 130.
[26] Section 6:539 (1) of HCC.
[27] Section 6:539 (2) of HCC.
[28] Section 6:539 (3) of HCC.

Lastly, we also have to mention the limitation period. The three years of rules[29] can be applied to drones without any problem. We have to note that the injured party can enforce its claim, even if the three years passed – because of the regular, five-year limitation – but only according to the general rule of extra-contractual liability.[30]

4. Problems with the hazardous operation and their solutions

4.1. Drone operation as a highly dangerous activity

We can state on the above mentioned; it would be useful to apply the rules of hazardous operation on damages caused by drone operation for the third party. However, we also have to mention that these rules are not perfect in relation to drones weighed below 250 grams. If we compare these small UAVs to much bigger ones, like agriculture drones and we apply to both the rules of highly dangerous activities, we can see the difference between them. As a result, it would not be equitable to apply the stricter rules for the smaller tools.

In our view, the prevailing of the principles of equity and justice is very important. As a result of our research, we believe there are two solutions. Firstly, applying the rules of hazardous operation for drone operation, except the smaller drones, weighed less than 250 grams. Secondly, judicial practice or legislators revise the actual rules of liability or establish a new one.

4.2. Problems with the operator

We can separate the operator and the actual pilot of the vehicle. In some cases, it is hard to tell which one will be liable for the damage because both qualities quite similar to each other. We believe that the real, actual influence should be appreciated more. The basis of this statement comes from French civil law. The point of the strict liability is the keeper of the thing will be liable for the caused damage. For example, in a case, the French Court of Cassation said that a three years old child was the keeper of a stick – as a thing – which caused harm to one of his friends –, because he influenced the stick.[31]

5. Summary

In this study, we wanted to answer the question, who will be liable for the third party damages caused by drone operation. Finding the right to answer this question is very difficult especially because this is a new and unique technology. We have to focus on the regulation of the European Union while making the solution for the

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[29] Section 6:538 of HCC.

[30] Péter HAVASI: Felelősség fokozott veszéllyel járó tevékenységért. In: Ferenc PETRIK (ed.): Polgári jog – Kommentár a gyakorlat számára (a 2013. évi V. törvény, az új Ptk. kommentárja) Vol. IV. HVG-Orac Lap-és Könyvkiadó Kft., Budapest, 2016, pp. 990–991. (BH 1996.256.)

[31] Cees VAN DAM: European Tort Law. Second Edition. Oxford University Press, Oxford, 2013, p. 64.

above – mentioned problems. We believe that coherent will be only on the field of public law, and the likelihood is very low of a coherent regulation in the field of civil law. Technological development themed researches are very important because the results can be a good starting point in the future.

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