HU ISSN 1588-6735

EUROPEAN INTEGRATION STUDIES

A Publication of the University of Miskolc

Volume 14, Number 1 (2018)

MISKOLC UNIVERSITY PRESS
2019

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European Integration Studies, Volume 14, Number 1 (2018), pp. 5–17.

LINGUISTIC CONDITIONS OF ACCESS TO LAW AND FAIR PROCESS*

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The following paper is to report a research stream, flowing for nearly two decades at the University of Miskolc. The questions to be answered were raised by two, partly empirical, research projects run by our research group, consisting of lawyers and linguists. The first stage of our research was entitled 'Language use in legal procedures: language translation and the nature of fact in the process of establishing legal statements of facts' and run between 2000 and 2003.[1] Its main task was to examine the requirement that laymen shall not get into subordinated position during the legal procedures just because they do not fully understand the language professionals use during that procedure. The research drew attention to the fact that laymen's opportunity to understand what is going on and what is happening to them during legal procedures is limited because of the gap between the codes of everyday and legal languages. Justification of this claim was served by recordings of police interrogations, court hearings and other procedural acts, together with interviews and questionnaires made with the lay and professional participants of the procedures.[2]

The second research, entitled 'Linguistic Aspects of Fair Trial: The Impact of Legal Language on the Fulfillment of Access to Justice', proceeding with the first, has come to its end in September 2018.[3] It was planned, in part, to continue the previous research referred to, and, in part, to open new directions of research with a (partly) new research personnel background (lawyers, linguists, and experts in informatics to act in cooperation as researchers). Opening new perspectives was made possible by new developments concerning available and researchable databases in the area of law. The digitalized body of rules of Hungarian law is not new;

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* The written and updated version of a contribution delivered at the 28th World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR) Lisbon, Portugal, 19 July 2017.

1 Hungarian Higher Education Research Project (FKFP) — No. 0653/2000.

2 In the course of this research 18 hours of sound material has been recorded (about 14 hours at police, 4 hours at court hearings) in different types of cases and in different categories (hearings of suspects/defendants, witnesses, victims of crime, confrontation hearings). Transcription of these records has been completed; at present we are going on with making further records and integrating them into a unified body of work *(corpus)*.

3 Hungarian Scientific Research Fund (OTKA) — No. 112172 (2014–2018).

but the digitalized and anonymized body of decisions of Hungarian courts of law is really new. Further possibilities, which have not been utilized for research purposes earlier, are available in our media-world: there are forums on the WEB discussing issues of law; other internet lists, topics, communities. Furthermore archives of radio and television programs on issues of law may serve as sources of linguistic records, as well. Taking into regard these new possibilities we have separated five written language corpora, cca. 200,000 words each, in order to describe and analyze the language(s) of (Hungarian) law. These are: paradigmatic statutes of law (i.e. classical codices, such as codices of penal, civil, labour, procedure etc. law); other enactments of statutory and decretory law; documents of legal praxis (court decisions); study-books for students of law; and texts downloaded from chat-forums on legal issues. They were amended by the sixth, oral language sub-corpus which, after going on with records of court trials, consists also of cca. 200,000 words, together with transcription. The main questions were the following three ones.

1. Where can be the front line drawn between ordinary language of lay participants of the process and technical legal language of professionals?

As it has been mentioned above one of our main efforts was to form a corpus of oral interactions between professional and lay participants of official conversations. This is so, because we suggest the front line between them may be best detected at personal encounters such as police or court hearings and best documented in records made about them. One part of our corpus of sound records has mainly been taken down at police interrogations as a result of our first research. During the ongoing second research we have not been permitted of taking more records at police interrogations but, contrary to the previous stage, we were allowed to record court hearings. We have succeeded with gathering 32 hours of such records, being transcripted in the meantime.

As an example, let us compare one of suspects' statements and the official record of it:

Suspect's utterance:

well well so, well so / I pushed her 'cause she wanted / to hit my son / well eh well eh well well well well / I pushed her / nothing happened / she fell to the wall so drunk / flo-floor, she fell on the floor and / no / well eh / didn't see on her at all / didn't see her that that well that well / 'cause the lights in the stairway is such / that you see almost nothing / then / not either / was she bleeding

Record of utterance:

While quarrelling with Mrs. S, she wanted / to hit my son. / I wanted to take up her quarrel. / I did not hit her, that is / I did not hurt her, nor hit I her with fist / and I did not kick her either. / I pushed her to the wall one time. / Then she fell to the wall. She was quite drunk / as well. / When we started quarrelling / I did not see injury / on Mrs. S, nor did I see after she stood up / neither did she bleed.

Criminal procedure code prescribes that an interrogated person shall be allowed to present her statement with her own words, without being interrupted. The exam-

ple shows one real life obstacle to obeying that rule, namely that a layperson is unable to present a story her own self. (Another obstacle is when she is able to speak continually, but unable to select relevant elements.) In the record a fragmented, gappy and incomplete utterance of the layperson turns into and looks like an elaborated, well formed story. This is characteristic to the beginning of the procedure. Later on, advancing during the stages of procedure, telling and recording the narration again and again, the layperson learns the well formed version of her story by heart, and recognizes it as her own story.

Naturally, the complete narration is not the interrogator's version, either. In fact it is the lawmaker's story. Criteria of relevance are fixed in the norms of law. In the Universe of Law that can only happen which has an official pattern, a narrative scheme, authoritatively fixed in some valid norm of law.[4] The procedure ends up when the facts of the case become determined so that they fit the decision-scheme of one of the norms.

2. What is the nature of the clash between the two sides of front line?

The sides of front line are occupied by (lay and professional) users of different registers of their common language. The connection between them can be understood as intra-lingual translation between two registers of language: those of ordinary language and legal language.[5] The goal of legal procedure is to turn the open, loose and fractured lay discourse into professional language with closed lexicon, accurate expressions and highly organized texts. In terms of linguistics the process can be explained as translation between linguistic codes: transformation one into the other. The chain of transformations consists of *linguistic events* — verbal expressions and recapitulations of former events. The relation between the elements (loops) of the chain is a relation of linguistic expressions. Transformation of one linguistic expression into another is called *translation* in the broad sense — in the sense of *code-switching*. Following R. Jakobson three types of translation can be distinguished:[6]

(1) *Interlingual translation* is translation *sensu stricto:* interpretation of linguistic signs with the help of another language. We have expression(s) or text(s) in one language (code) and translate them into another, e.g. from English into German.

(2) *Intersemiotic translation* or transformation is translation *sensu largo:* interpretation of linguistic signs with the help of a non-linguistic system of signs. We

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4 It has always been so, which becomes quite clear when reading the text of an archaic norm of law. See e.g. the Code of Hammurabi, 25.: "If fire break out in a house, and some one who comes to put it out cast his eye upon the property of the owner of the house, and take the property of the master of the house, he shall be thrown into that self-same fire." It sounds like the script of a crime story and/or a criminal case. From the other side the legally relevant content of e.g. Dostoyevsky's *Crime and Punishment* is that "a person intentionally causes the death of more than one individual in the course of committing or attempting to commit robbery".

5 In details see SZABÓ, M: Law as Translation. In: *Archiv für Rechts- und Sozialphilosophie.* (ARSP Beiheft Nr. 91: *Pluralism and Law. vol. 4: Legal Reasoning.* Ed by SOETEMAN, A.) 2004, pp. 60–68.

6 JAKOBSON, Roman: On Linguistic Aspects of Translation. In: BROWER, R. A. (ed.): *On Translation.* Cambridge, Mass., Harvard U.P., 1959.

have expression(s) or text(s) in a language and translate them into a non-verbal code, e.g. into pictures (like in comics or films).

(3) *Intralingual translation* or rewording is translation *sensu specifico:* interpretation of linguistic signs with the help of the same language. We have expression(s) or text(s) in one language and translate them into diferent expression(s) or text(s) — different register — of the same language, e.g. from (lay) English into (technical) English.

We take intralingual translation as the core model of human linguistic praxis. Narratives or texts expressed in the same language are transformed into one another, surrounding events (acts) or being events themselves. In one central dimension human praxis is a "struggle for words" (or "language war" as R. T. Lakoff calls it).[7] To act (as an event) is to make others accept one narrative (or version or interpretation or translation) of other events or narratives. This is evident in cases of law. Legal activity is linguistic activity; it is a series of transformations of linguistic expressions and texts ending up in the final event of court judgement.

If we understand legal activity as a series of translations, we can separate two — otherwise intertwined — chains of translations. The first runs along the *question of law*, with the texts of norms in the centre. This chain is divided into two phases. The first phase is called *legislation*, i.e. creation of legal norms. Legislation can be understood as translation, too. Legislation's initial event is a state of social reality (e.g. a certain rate of traffic accidents or thefts), which is described in initial (lay) code of newspaper articles, parliamantery speeches, statistical reports etc. It is this text then which goes trough linguistic processing by evaluation of existing state of affairs, by positing desirable state of affairs and by pointing at the instruments which could lead from existing to desirable state of affairs. These instruments are norms of law, supposed to be able to cause the possible (and desirable) world as an effect. The second phase of the first chain is called *adjudication.* Implementation of laws by judiciary starts from the text of a legal norm (with legislator's intent behind it), as an initial event. This turns into a norm-proposition, as initial code, which is transformed into a concrete reading of the norm[8] fitting the case and ends up in the text of a court decision, as a final event.

The other chain runs from an empirical act (event) to the decision of the court (as an event and as a text). To connect the loops of the second chain — which is not a *par excellence* legal job — is to reconstruct past events, to turn them into facts and to transform the latter into a legal state of affairs. Though both chains can be understood as a series of transformations, it is only the latter which can be understood as a series of translations. It is only the process of establishing legal states of affairs during which lay language use conflicts with professional language. Legal interpretation, which runs from the text of a general norm to the text of the norm as applied *(*the *Fallnorm),* remains within the same code — that of legal lan-

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7 LAKOFF, R. T.: *The Language War.* Berkeley etc., U. of California Press, 2000.

8 This is called a *Fallnorm* as "hermeneutic condensation of norm and case" by FIKENTSCHER, W.: *Methoden des Rechts. IV. Dogmatischer Teil.* Tübingen, J. C. B. Mohr, 1977, p. 198.

guage. The intertwinement of the two chains means that professional legal language is to transform — to translate — everyday language into the text of the laws. The ends of the chains meet within the text of the decision.

Making one further step ahead we have to recognize that inequalities in language use are backed by social inequalities. The first and best known theorist of the connection between the two kinds of inequalities is Basil Bernstein.[9] He distinguished (though later tinted[10]) two registers — for him: two 'codes' — comparable to lay and professional registers: *restricted* and *elaborated* codes.

"The speech is here [in restricted code] refracted through a common cultural identity which reduces the need to verbalize intent so that it becomes explicit, with the consequence that the structure of the speech is simplified, and the lexicon will be drawn from a narrow range. The extra-verbal component of the communication will become a major channel for transmitting individual qualifications and so individual difference. […] The meanings are likely to be concrete, descriptive or narrative rather than analytical or abstract."[11]

"The verbal planning here [in elaborated code], unlike the case of a restricted code, promotes a higher level of syntactic organization and lexical selection. The preparation and delivery of relatively explicit meaning is the major function of this code. This does not mean that these meanings are necessarily abstract, but abstraction inheres in the possibilities. The code will facilitate the *verbal* transmission and elaboration of the individual's unique experience. The condition of the listener, unlike that in the case of a restricted code, will *not* be taken for granted, as the speaker is likely to modify his speech in the light of the special conditions and attributes of the listener."[12]

When referring linguistic to social inequalities Bernstein claims: "Thus we can expect, broadly speaking, to find both modes of an elaborated code within the middle class together with restricted codes. In the lower working class we could expect to find a high proportion of families limited to a restricted code."[13] Taking into regard that half of Hungarian population graduated only in elementary or vocational school we can expect that their linguistic competence is limited to restricted code, but, actually, vast portions of those higher educated are not prepared to cope with texts in technical legal language, either.

3. What are the characteristics of legal language used by professionals?

Following the line prepared by the concept of translation, we can identify distortions stemming from translations in law. They may result from three sources, all of which putting some features of law and legal language in the light.

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9 See: BERNSTEIN, B.: *Class, Codes and Control. Vol. 1–3.* London, Routledge and Kegan Paul [1971–1975] 2003.

10 See *Postscript* to the 2003 edition, Vol. 1, p. 189 ff.

11 Ibid. p. 100.

12 Ibid. p. 101.

13 Ibid. p. 117.

(1) *Features of legal language as technical language.* Being a technical language basically means a limited vocabulary (terminology) and specified meaning. The legal code as a set of technical terms is closed in contrast to the openness of a natural language. One is not allowed to use any word or expression at one's disposal in natural language — in the sense that, in order to be relevant, expressions have to be changed or translated into the elements of the closed legal vocabulary as canonized in legal code(s).[14] Further, legal language tends to be monosemic: it tries to exclude different or vague meanings, metaphors or shades of meanings etc.

Anyhow, this is not the whole story. First, a legal lexicon is not so sharply circumscribed, as e.g. a medical vocabulary. Legal language includes a lot of colloquial words, though with meanings specified or biased by norms of law. This kind of semantic takeover by law may be institutionalized as in the "interpretive provisions" or "definitions" of an act or code;[15] may not be institutionalized by legislation, but introduced with authoritative force by courts;[16] or simply by becoming a part of legal vocabulary as a result of professionals' language use.[17]

Second, not each and all enactments of law are written in legal language. Intuitively, apart from the classical codes or acts (such as Civil Code, Penal Code, Labor Code, Juridical Act, Inheritance Act etc.) not much part of a legal system is encoded in legal language. Just think about enactments regulating such diverse areas as supervision of banks, medicament production, mining, public construction, taxation, energetics, children's day care, conservancy of forests etc. Each has her own profession(s) and each profession has her language(s). In fact, even drafts of regulations are prepared by stakeholders of the area concerned. The language of such products of legislation has nothing to do with the language of lawyers, leaving alone that of laypersons.

Third, compared again to other technical languages legal language is not only to serve safe and reliable communication of lawyers among themselves. The aim of laws of a political community is not only to inform the lawyers, but inform their addressees, i.e. all those, whose behavior is to be measured later on by those laws with the ministration of lawyers. Both democracy (the claim for control over the laws enacted in the name of the community) and fairness (the claim for laws being comprehensible for addressees) requires extending the range of the users of that language.

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[14] Something similar is expressed in the warning by Montesquieu: "…though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law." MONTESQUIEU, Charles-Louis: *The Spirit of Laws*. XI. 6. (Transl. by Thomas Nugent) Kitchener, Batoche Books, 2001, p. 175.

[15] E.g. words like "gang", "threat", "family member" in Section 459 of Hungarian Criminal Code (Act C of 2012).

[16] E.g. words like "signature", "pagination", "foyer" by different court decisions.

[17] E.g. "draft" (of facts) fixed by an advocate proving the list of facts given by her client forth; or certain quasi ritual, idiomatic collocations used when framing contracts (e.g. "fixed in wall or wood" referring to accessories of real estates, or "eternal and indefeasible" as rhetorical ornament of contractual will).

(2) *Features of legal language as basically written language.* Being basically written language gives certain artificial feature to legal language in contrast to other technical languages. Though it is a commonplace that technical languages are parts of their respective natural language, and that natural languages are basically oral languages, another pecularity of legal language is its written character. That is why legal language preserves long traditions, ritual phrases, long and difficult sentence-structures and makes lay people feel it something alien. The difference stemming from having oral/written form is just another dimension of differences specified as being lay/professional and being restricted/elaborated kind of speech. Lay speech uses restricted code and follows patterns of oral utterance, while professional communication with elaborated code follows patterns of written messages — even when it is expressed orally.

"The Law Wishes to Have a Formal Existence."[18] Despite the limits of formality, conveyed by the demands of morality and interpretation, the very existence and autonomy of law can only be imagined as formal and positive. Though thought of as a central problem of modern systems of law, actually it is a permanent dilemma of law. If we regard *regularity* and *generality* the dividing line between law and other systems of human behavior and we want the law work, there seems to be no other way than to manifest standards of law in positive — first of all: written — form. As a creation of man, law is necessarily imperfect; it needs continuous perfection through substantive considerations of legislation and adjudication. However, when considering law as such it cannot be done but by understanding it as positive law and its aim as formal justice/fairness/equity.[19]

However, we often recall Celsus' celebrated proposition according to which law is *ars boni at aequi*.[20] Even though, we have good reason to be cautious when citing Celsus' claim. "That Celsus should use *bonum et aequum* as an argument for granting a remedy of the strict law must have come as a shock to his contemporaries. But Celsus obviously loved to stun his colleagues. […] Ulpian, citing the Celsus definition of law almost one century later as »elegant«, must have still felt some surprise and a sense of paradox in this formula at his time."[21] The paradox lies in the conflict between the concept of law of jurists on one side, and that of philosophers on the other.

Jurists have a view of law embedded in praxis: for them law is that which is applicable *as law* in cases at court. *"Ius finitum et possit esse et debeat"* — "The law

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[18] FISH, Stanley: The Law Wishes to Have a Formal Existence. In: SARAT, A–KEARNS, T. R. (eds.): *The Fate of Law.* Ann Arbor, The University of Michigan Press, 1991, pp. 159–208.

[19] In details see SZABÓ, M.: Formal Justice and Positive Law: The Graeco-Roman Law Heritage. In: PÉTER, O.–SZABÓ, B. (eds.): *A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag*. Miskolc, Bíbor, 1998, pp. 253–267.

[20] Ulpian, D. 1.1.1: *"...ut eleganter Celsus definit, ius est ars boni et aequi."* ("…in terms of Celsus' elegant definition, the law is the art of goodness and fairness.")

[21] HAUSMANINGER, H.: Publius Iuventus Celsus – The Profile of a Classical Roman Jurist. In: KRAWIETZ, W–MACCORMICK, N.–VON WRIGHT, G. H. (eds.): *Festschrift Summers.* Berlin, Duncker & Humblot, 1994, p. 253.

can and should be definite".[22] The same view was characteristic long before classical Roman law, in Greece. Greek law — the "law without jurisprudence"[23] — was never organized into a system and has never developed any group of professional lawyers. Even though, the concept of law of the Greeks had nothing to do with the concept of law presented by Plato or Aristotle. The laws (of the "living" or "working" law of jurists) "are addressed not to the people at large but to the officials and magistrates who have to apply them. […] Nor are there preambles to the laws, and the tone is not one of persuasion but of blunt command sanctioned by penalties against any defaulting functionary and enforceable by any citizen who thinks it worth to bring him to book. The formula runs: […] Let the magistrate make use of no unwritten law."[24]

Looking back to the origins of law (i.e. separation from morals and customs) we find archaic codes of law — Hammurabi, Draco, Twelve Tables — writing down and bringing to canonic form and authority the laws of coexistence of a community. Human law, from the early centuries, is written and formal.[25] That is why we feel authorized to claim that the demand for the positivity of the law is present from the very beginning of legal solutions to human conflicts, positive law and legal positivism just reflecting to that demand.

Jacques Derrida's claim is that "writing" (in the — very — broad sense) is primer not only to phenomena such as law, but to language or to any kind of signifying;[26] "there is no linguistic sign before writing".[27] For Derrida language is but a species of writing, in the sense that possibilities hiding within language come only unbound after and because of writing. Writing makes us able to use verbal and only verbal communication — without the help of channels of nonverbal communication. Law and legal communication requires exactly that — clear verbal communication – because the eyes of Iustitia are hoodwinked, i.e. the judge ought to set aside all contextual information. What remains is *"sola scriptura"* — only the writing to inform the decision.

(3) *The imperative context of language use in law.* It is evident though not unique (see: Peter Goodrich[28]) that everyday language use confronts legal language

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22 NERATIUS, D. 22. 6. 2.

23 J. W. Jones' expression in the Preface of his *The Law and Legal Theory of the Greeks*. Oxford, Clarendon Press, 1956 (reprint: Aalen: Scientia Verlag, 1977).

24 Ibid. pp. 15–16.

25 "Roman legal science, reflecting at least four hundred years of continuous literary debate, of ever increasing complexity, coped over a long period of time with the problem of formality and the place it occupies in the law. From the beginning there was no doubt that rules and concepts that are structured in such a way as to be socially effective without the aid of substantive (and, as such, necessarily casuistic) arguments, are essential to law." BEHRENDS, O.: Formality and Substance in Classical Roman Law. In: KRAWIETZ, W.–MACCORMICK, N.–VON WRIGHT, G. H. (eds.): *op. cit.*, p. 207.

26 'And thus we say "writing" for all that gives rise to an inscription in general, whether it is literal or not and even if what it distributes in space is alien to the order of the voice: cinematography, choreography, of course, but also pictorial, musical, sculptural "writing."' Jacques Derrida: *Of Grammatology.* (Transl. G. Ch. Spivak) Baltimore, John Hopkins University Press, 1997, p. 9.

27 Ibid. p. 14.

28 E.g. GOODRICH, Peter–BARSHACK, Lior–SCHÝTZ, Anton (eds.): *Law, Text, Terror*. London, Routledge–Cavendish, 2006, but mainly Goodrich's writings from his work's first period.

within an imperative context. From our point of view the main impact of that context is the possibility of linguistic oppression. It is a living experience of laymen at police or court hearings that they are not allowed to set their narratives forth as they would like to. They are interrupted, they are questioned, they are corrected, they are instructed etc. Further, they are not allowed to resist or even to protest against (intralingual) translation of their narratives, even if they realize distorting transformation of their words. Beside this effect the phenomenon of "normative semantics" may be perceived: the abovementioned biasing of meaning by norms.

If we speak of translation, we have to speak about equivalence, too. The central issue of any translation as transformation is the question of equivalence, which means mutual correspondence of different level elements of two systems of language. Taking into regard that translation theorists hold that "back-translation" is methodologically impossible,[29] we have to face the final question if translation is possible at all. Though theoretically we may conclude that translation (in a certain sense) is impossible,[30] practically we know that translators translate a huge amount of texts every day. So the real question is what we should mean by "translation", what sort of "equivalence" we should require when accepting a text as translation of another. In the case of law the central sort of equivalence can be understood as functional equivalence (in general) or institutional equivalence (in specific). Each translation needs a *"tertium medium",* a common denominator, which mediates the content between languages and, this way, guarantees the equivalence (interchangeability) of the expressions.

"Functional equivalence" — as opposed to "formal" or one-to-one equivalence — is well known from the theory of Eugene A. Nida.[31] In the case of functional equivalence the common denominator is the impact, i.e. the impact taken on the target language reader has to be the same as the impact taken on the reader of the source language. "Impact" within law is "legal effect", so terms of law in different languages are equivalent if they have the same legal effect. The connection between an act (either empirical or symbolic) and a legal effect is fixed in institutions of law — so functional equivalence within law can be specified as institutional equivalence. Institutions of law are legal constructions:[32] combinations of rudimental particles — persons, things and actions, as Gaius first presented in his *Institutiones,* laying the foundations of a possible legal taxonomy and terminology. Institutions originating in Roman law form the common foundation of present institutions of law and serve as a specific (conventional) "legal reality" to be referred to by concepts of law. Besides the common legal reality there is another — linguis-

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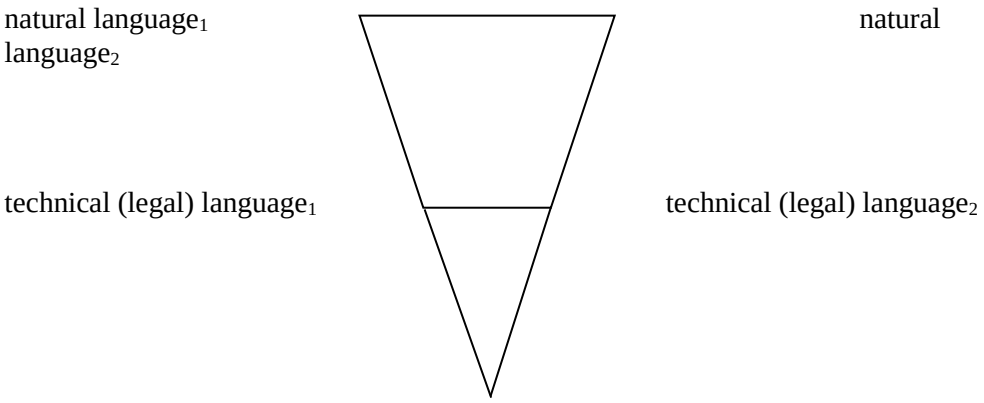
[29] For an experiment on back-translation and its results see KLAUDY, K.: Back-Translation as a Tool for Detecting Explication Strategies in Translation. In: KLAUDY, K.–LAMBERT, J.–SOHÁR, A. (eds.): *Translation Studies in Hungary.* Budapest, Scholastica, 1996, pp. 99–114.

[30] On the views about impossibility of translation see HATIM, B.–MASON, I.: *Discourse and the Translation.* London–New York, Longman, 1990, pp. 29–31.

[31] NIDA, E. A.: *The Theory and Praxis of Translation*. Leiden, E. J. Brill, 1982, p. 22.

[32] See e.g. SMITH, J. C.: The Unique Nature of Concepts of Western Law. 46 *The Canadian Bar Review / La Revue du Barreaun Canadien* (1968/2), pp. 191–225.

tic — common denominator, giving us a hand with translation: Latin language. Partly becoming a part of certain legal lexicons, partly serving as origins of legal termini in natural languages we always can go back to the origins of our concepts.



common original technical language (Latin)
common "perfect" artificial language (logic)

Latin may help us at the level of semantics: coping with the meaning of legal terms and concepts with reference to the constituents of legal reality. E.g. while the meaning of "dog" may be completely clear, it can be doubtful if a "goat" or a "cow" is a "dog" when interpreting the sign: "No dogs in restaurant." Normative sentences like this are practically or pragmatically ambiguous. But we have another bearer of common understanding at the level of grammar (or syntax in terms of semiotics). To get it we are to distinguish the concepts of "surface structure" and "deep structure" as introduced by Noam Chomsky,[33] expanded by J. R. Searle.[34] The problem to be handled within law — to resolve the problem of Hartian "open texture" — is similar to handling "syntactically ambiguous" sentences; the difficulty comes from the function of a grammatical connective (e.g. the "or"), the nature of a list (conjunctive or disjunctive) etc. Chomsky's solution is that in order to resolve (syntactical) ambiguities at the surface level of linguistic expressions (utterances as they are) one should carve down to their deep structure — I would say to their logical structure. Deep structure and surface structure are connected by transformational rules (e.g. by creating different grammatical structures to express the same possessive relation). This also means that the meaning of (surface) sentences is determined by their deep structures and that surface structures are con-

[33] CHOMSKY, Noam: Deep Structure, Surface Structure, and Semantic Interpretation. In: STEINBERG, D.–JACOBOVITZ, L. (eds.): *Semantics*. Cambridge, University Press, 1971.

[34] SEARLE, John R.: Chomsky's Revolution in Linguistics. *The New York Review of Books,* June 29, 1972, pp. 16–24.

nected with each other by their deep structures. So, both interlingual and intralingual transformation/translation of sentences are made possible by the medium of deep structure. The ideal common language would be a perfect language, in reality some logical language.[35]

4. What is the role of internet in the access to law?

Regarding the hearsay as conveyed by Livy Roman *decemvires* visited Athens in order to study the laws of Solon. Their aim was similar to the Greeks', too, i.e. establishing equality before the law, so that both private and public affairs shall be managed by the laws.[36] However, the very first condition of that is that taking cognizance of the laws would be possible. To refer to the verifiability of the laws Romans used the expression *"ius positum"* in the sense of the law as laid down, and so ascertainable.[37] Regular appearances of "ius positum" can be found in expressions *"ius in causa positum"* (the law ascertainable in the case) and *"ius in civitate positum"* (the law ascertainable in the city).[38] If we derive the expression "positive law" from *"ius positum"*, then it shall mean "the law ascertainable by its being fixed" and this meaning can be traced back to the origins of law. The proper term for "positive law" — *"ius positivum"* — appeared only during the twelfth century, apparently thanks to some misreading.[39]

Looking back to past centuries it seems to be self evident that verifiability of law presupposes ability to read the texts of law — written in technical legal language. However, being dammed in access to legal language does not anymore necessarily mean being dammed in access to law. Beyond general linguistic barriers against access to law the new phenomenon and services of internet bring a radical change in the position of laypersons. Search engines help with finding (comparatively) right answers without proficiency in legal language and with putting (seemingly) proper propositions to courts and other authorities.

This development may change the concept of law itself — a new version of "living law" seems to emerge. In the age of search-engines there is no need to flip through codes of law and study legal language as foreign language: in order to find the answer to your question it is pretty enough to type your keywords, be it ever so

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35 See ECO, Umberto: *The Search for the Perfect Language*. (Transl. by J. Fentress) Oxford, Blackwell, 1995; CHAITIN, Gregory J.: *The Search for the Perfect Language*. [www.cs.auckland.ac.nz/~chaitin/pi.html]

36 See e.g. WATSON, Alan: *Rome of the XII Tables.* Princeton U. P., 1975, p. 178.

37 The origin of *"positum"* is *"positio"* or "positing". 'In a *positio* the "opponent" begins by saying "I posit that *p*." The proposition *p* is called the *"positum"*. The "respondent" then says either "I admit it" or "I deny it," depending on certain conditions.' SPADE, Paul Vincent–YRJÖNSUURI, Mikko: Medieval Theories of *Obligationes. The Stanford Encyclopedia of Philosophy* (Winter 2014 edition). ZALTA, Edward N. (ed.) URL = https://plato.stanford.edu/archives/win2014/entries/obligationes/>.

38 E.g. *Digest*, 9. 2. 52. 2. (Alfenus)

39 KUTTNER, Steven: Sur les origines du terme droit positive. 15 *Revue historique du droit francais et étranger* (1936), pp. 728–30; see also KELLEY, Donald R.: Gaius Noster: Substructures of Western Social Thought. 84 *The American Historical Review*, 1979/3, pp. 619–648.

lay, and you get it within a second. There is a new possibility to collect documents of a new phenomenon, a by-effect of publishing numbers of court decisions: laymen may try to imitate professional (at least they hope so) petitions by assembling pieces of published decisions, a sort of "patchwork" petitions. These may show the way non-professionals believe the professionals communicate. And all that may be the end — at least radical change — of lawyers, as well.[40] Or, the same way, may it be the beginning of the real access to law?

5. What could be a test or indicator for evaluating the quality of access to law and fair process?

Legal language used in statutes, administrative decisions, court decisions and during legal procedures usually appears as an inexplicable and unclear mass of texts, while the simplification of legal language in the mass media and internet forums often leads to distortion of the content. The claim for a clear and plain legal language reappears from time to time on the part of both linguists and laymen. On the other hand, international and (in our case) Hungarian researches on professional languages warn us that all types of professional languages (including legal language) serve the interests and goals of a certain profession, therefore simplicity and sightliness shall not be the most important expectations. Legal language, as mentioned above, is in a special status compared to other types of professional language since law has become an integrative part of our lives. Therefore it shall be a respected demand that language should be clear and understandable at least for people with average knowledge and linguistic competence. This expectation should apply to all layers of legal language: statutes, administrative and court decisions as well as language usage in legal procedures, because all of them influence the fulfillment of the requirements of the right to fair trial.

Intuitively, for the purpose of our research we supposed that, within the huge mass of different types of legal discourse, the ways of informing and warning may be characteristic to the (formal) use of legal language. The "paradigmatic case" of warnings is the well-known "Miranda warning".[41] As it comes clear from any American crime movie, the problem with this warning lies in its formal implementation. The officer gabbles out the words of the warning, quickly and mechanically, just to be over the requirement and to turn to the merits of the case. It used to happen in the same way with every warning and informing prescribed by Hungarian procedural codes, as well. Realizing the formality obeying to obligations to warn and inform, these codes are wording now even harsher obligating the authorities to con-

[40] See SUSSKIND, Richard: *The End of Lawyers?* Oxford U. P., 2010.

[41] In the 1966 *Miranda v. Alabama* case the Supreme Court of the USA declared the suspected rights under the 5th Amendment. Section 12. (1) of "Miranda doctrine" declares: "Any person under investigation of the commission of an offense shall have the right to be informed of his right to remain silent and to have a competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel."

vince if the person warned or informed did really understand it. The result is that official records contain the warning or informing word by word, adding to it the declaration by the person involved that she did really understand it. Present days' central issues is the procedure and obligation of authorities in cases of asylum seekers, refugees, immigrants. The extra difficulty in their cases is that all the information and warning should be comprehensible in their native legal languages. This topic, as comparatively new phenomenon, was not searched by our investigations.

The first of our affirmed presuppositions may be summarized as follows: one of the key pre-conditions of *fair process*, albeit one that has been disregarded in prior Hungarian research and analyses, is that the legal process should also be fair from a linguistic point of view. This means, firstly, that non-professionals should have the opportunity to discuss matters they are required to issue statements on in the course of the legal procedure following their own line of thought and in their own words; secondly, that they should be addressed by professional participants of the proceedings (inspectors, judges, even their own lawyers) in a manner that they understand. If these requirements are infringed upon in the course of the process, the fairness thereof becomes questionable, as a result of which it is also doubtful whether the voluntary following of legal rules by non-professionals may be ensured. Of course, there are basic rights and principles concerning language use; such as the right to mother tongue, the use of direct evidences, the right to make statements in one's own words etc. — but no disputes can be found on the meaning of "mother tongue", "one's own words" etc. For example, Hungarian is simply Hungarian, without perceiving the fact that there is no Hungarian language, just Hungarian languages — i.e. sociolects and registers of that language. Of course, the case is the same with any other language. Our claim is that professionals of law speak professional language of law, which is not identical with the language used by non-professionals. Communication among lay and professional participants within a fair process needs intralingual translation, which is not recognized and accepted, even not reflected till now.

The second affirmed hypothesis, referred to by keyword *access to law*, claims that linguistic competence my raise a barrier against instrumental access to law by non-professionals. It is a commonplace of sociolinguistics that two independent variables explain the chances of the use of tools of law to personal purposes: the income and the education. Of course, we know that these variables are closely connected to language skills (as we have referred to Bernstein's findings), but we claim that linguistic competence in professional language of law must be treated as a separate variable. It is not enough to be competent in your mother tongue — you have better to be competent in layers thereof, as well.

European Integration Studies, Volume 14, Number 1 (2018), pp. 18–29.

PROTECTION OF CURRENCY BY THE EUROPEAN AND DOMESTIC CRIMINAL LAW*

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1. Introduction

Crimes committed againts the order and security of cash-flow, as endangering the monetary interests of the state, are among the oldest criminal offences: money counterfeiting exist as long as money itself.[1]

Crime of counterfeiting money was considered as one of the most serious delictums in the Roman Law that violates the public confidence and public credibility.[2] Moreover, counterfeiting currency were punished by severe sanctions, often by death penalty, in every historic period and in every country. Criminal prosecution of these types of crimes is independent from the actual economic policy and the prohibition under criminal law is ethically justified.[3] The real threat of this crime is the damage it can cause to the economy. High numbers of fake money in the circulation can destabilize the economic relations and trust in a country's money.[4]

Monetary emission is a state monopoly in every country, however, in modern countries, not only legal tender in the strictest sense qualifies as currency, but also securities issued by the state or by certain legal entities can fulfill the role of currency, thus, function as currency.[5]

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* 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 KONDOROSI András: Gondolatok a pénzforgalom rendjét sértő bűncselekmények kapcsán. *Jogelméleti Szemle*, 2012/4, p. 76.

2 DERZSI Júlia: A pénzhamisítás bűncselekmény az erdélyi szászok jogkönyvében (1583). *Korunk*, 3. folyam, 20. évf., 6. sz. (2009. június).

3 GULA József: Pénzhamistás. In: *Fejezetek az európai büntetőjogból* (szerk.: FARKAS Ákos). Bíbor Kiadó, Miskolc, 2017, p. 92.

4 TÓTH Dávid: The Regulation of Counterfeiting Money in the German Criminal Code. *Zeszyty Naukowe Towarzyszwa Doktorantów Uj Nauki Spoleczne*, Nr 19 (4/2017), S. 61.

5 TÓTH Mihály: *Gazdasági bűnözés és bűncselekmények*. KJK-KERSZÖV Kft., Budapest, 2002, p. 374.

Penal action against criminal offences violating the order of circulation of money is fundamentally the duty of national criminal law, however, the nature of these acts justifies international co-operation, and the efforts of international organizations in these regards. International action against counterfeiting has already been taken in the first decades of the 20th century with the acceptance of the International Convention for the Suppression of Counterfeiting Currency signed in Geneva in 1929[6], and on European level, the same purpose is served currently by the Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014, on the protection of the Euro and other currencies by criminal law against counterfeiting, and the replacing of Council Framework Decision 2000/383/JHA.[7]

The study, without attempting to be comprehensive, aims to give an overview of the european and domestic legislation of crimes committed againts the order and security of money circulation, including the effective regulation and its case-law of these criminal offences. During my work I has sought to analyse the European Union Directive mentioned above, and try to answer the question whether the effective Hungarian regulation complies with the rules of the current EU provisions.

2. International actions against criminal acts violating the order of money circulation, especially counterfeiting currency

2.1. Background

Analyzing the methods of how action is taken against counterfeiting, we can distinguish between international, European Union and member state level. One can also differentiate between means that are included in criminal law and provisions relating to administrative measures.[8] In the current study, I am concentrating on the European Union level and on means included in criminal law, however, I need to note the importance of the International Convention mentioned above, which, firstly, determined precisely the scope of acts that are punishable as ordinary crimes[9],

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6 The Convention was transposed into the Hungarian law by the Act XI 1933. According to the one of the most important provisons of the Convention, money counterfeiting is an extraditable crime and the counterfeited money must be confiscated or seized.

7 Official Journal of the European Union, L 151/1 of 21st of May 2014.

8 See e.g. Regulation 974/98 of May 1998 on the introduction of the Euro, which requires all Member States to ensure adequate sanctions againts counterfeiting and falsification of the Euro banknotes and coins; Regulation No. 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of the Euro coins and handling of the Euro coins unfit for circulation; Regulation No. 2182/2004 of 6 December 2004 concerning medals and tokens similar to the Euro coins.

9 See Art. 3 of the Convention: "The following should be punishable as ordinary crimes:
(1) Any fraudulent making or altering of currency, whatever means are employed;
(2) The fraudulent uttering of counterfeit currency;
(3) The introduction into a country of or the receiving or obtaining counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit;
(4) Attempts to commit, and any intentional participation in, the foregoing acts;
(5) The fraudulent making, receiving or obtaining of instruments or other articles peculiarly adapted for the counterfeiting or altering of currency."

and secondly, provided that state parties should not differentiate between counterfeiting of national and foreign currency when sanctions are concerned.

From the viewpoint of the European-level struggle against counterfeiting, the Framework Decision of 29 May 2000 of the Council[10] had a major significance, which, among other things, determined the notion of currency, defined the punishable behaviours, and provided for punishment of incitement, aiding and abetting and attempt, and laid out the sanctions for natural persons and legal entities as well. The requirements of the sanctions to be applied were effectiveness, proportionality and having dissuasive effects, and the minimum of the upper bound of the possible imprisonment was at least eight years for fraudulent making or altering of currency.

In order to analyse the compliance with the Framework Decision, the Commission created many reports, and even the report of 2007 had to admit that the provisions of the Framework Decision had not been fully introduced to the law of every member state.

The Council adopted another framework decision in December 2001 (2001/888/JHA)[11] which added a new provisions to the 2000 Framework Decision (Art. 9a). According to this, member states must recognise as establishing habitual criminality the final decisions handed down in another member state for the counterfeiting of currency.

2.2. The Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014

The Directive is fundamentally built on the Council Framework Decision 2000 mentioned above, and it complements the Framework Decision with further provisions on the level of sanctions, on investigative tools, and on the analysis, identification and detection of counterfeit notes during judicial proceedings. [point (8) of the Directive]

The most important goal of the Directive is to establish minimum rules concerning the definition of criminal offences and sanctions in the area of counterfeiting of the euro and other currencies (Art. 1 of the Directive). This is due to the fact that the measures that had been taken against counterfeiting so far do not have the necessary level of dissuasion and therefore the protection against counterfeiting must be improved. Significant differences exists with respect to the severity of the sanctions applied in different member states in regards of the main forms of counterfeiting, namely, the production and distribution of counterfeit currency. These differences have a negative effect on cross-border law enforcement and judicial cooperation. To sum up: the current size of differences between the sanctioning systems of

[10] Council framework decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions againts counterfeiting in connection with the introduction of the euro, Official Journal of the European Communities, L 140/1 of 14th of June 2000.

[11] Official Journal of the European Communities, L 329/3 of 14th of December 2001.

the Member States have a negative impact on the protection of the euro and other currencies against counterfeiting by criminal law measures.[12]

It is worth mentioning that the accepted Directive is missing a provision included in the Proposal, according to which, in case of currencies with a total sum being lower than 5,000 EUR, and without especially aggravating circumstances, member states may apply sanctions other than imprisonment. The same thing happened to the idea that intended to establish the minimum of the upper bound of the possible penalty in eight years for all the criminal acts of counterfeiting, in case of a sum of minimum 5,000 EUR.[13]

The way in which the Proposal for the Directive has been received was controversial. The European Central Bank welcomed the Proposal, found the establishment of the provisions regarding the minimum of penalties necessary, along with the extension of the eight-year minimum of the upper bound of the penalty to every form of counterfeiting currency. Moreover, it considered this step justified even for criminal acts of preparatory nature.[14]

As opposed to this opinion, the European Economic and Social Committee questioned even the justification of the submission of the Proposal. The Committee regarded the dissuasive effect of the introduction of the minimal penalty threshold and the extension of the strict upper bound of imprisonment as controversial. According to its standpoint, the Proposal did not adequately take into account the differences between the legal traditions and legal systems.[15]

3. Provisions of the Directive 2014/62/EU in the context of the Hungarian Criminal Code

3.1. The definition of currency in the Directive and in the Hungarian Criminal Code

According to Art. 2(a) of the Directive, "currency means notes and coins, the circulation of which is legally authorised, including Euro notes and coins, the circulation of which is legally authorised pursuant to Regulation (EC) No 974/98". It is worth to mention that the Directive, contrary to the Framework Decision, uses the expres-

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[12] Proposal for a Directive of the European Parliament and of the Council on the protection of the Euro and other currencies by criminal law against counterfeiting, and the replacing of Council Framework Decision 2000/383/JHA, Strasbourg, 5. 2. 2013 COM(2013) 42 final, 2013/0023 (COD) p. 3.

[13] GULA: op. cit. 110.

[14] Opinion of the European Central Bank of 28 May 2013 on a proposal for a directive of the European Parliament and of the Council on the protection of the Euro and other currencies by criminal law against counterfeiting, and the replacing of Council Framework Decision 2000/383/JHA, CON/2013/37, Official Journal of the European Union, C 179/9 of 25th of June 2013.

[15] Opinion of the European Economic and Social Committee on the 'Proposal for a directive of the European Parliament and of the Council on the protection of the Euro and other currencies by criminal law against counterfeiting, and the replacing of Council Framework Decision 2000/383/JHA', COM/2013 42 final, Official Journal of the European Union, C 271/42 of 19th of September 2013, pp. 44–46.

sions ‘note’ and ‘coin’ instead of ‘paper money’ and ‘metallic money’, as legal tender can be made of paper, metallic or other material as well. On the other hand, the Directive's definition of currency includes also means that will function as legal tender only in the future.[16]

The Hungarian Criminal Code (HCC) currently in force does also establish the criminal law-definition of currency, although in a more casuistic way than the Directive, but in accordance with it. According to Articles 389(5a), (5b) and (6) of the HCC, currency means:

- banknotes and coins, the circulation of which is legally authorized;
- banknotes and coins that will be authorized in the future on the basis of law, European Union legislation, or official notice published by an institution vested with the privilege of monetary emission;
- banknotes and coins withdrawn from circulation, where the issuing national bank is required, or agreed, to redeem such withdrawn currency and exchange it to legal tender pursuant to the relevant national legislation or European Union legislation;
- printed *securities* issued as part of a series shall also be treated as banknotes, where the transfer of such securities is not restricted or precluded by law or by any endorsement made on the securities;
- foreign currencies and securities, including the Euro, since it is a legal tender in Hungary from 1 January 2002.

As seen from the above, marketable securities that are issued as part of a series, e.g. treasury bills, bonds and stocks, all qualify as currency, and their counterfeiting is punishable with an imprisonment for two to eight years. However, it is problematic that according to the Hungarian Civil Code, cheques, traveller’s cheques and bills of exchange are also securities, but according to the Criminal Code, these qualify as non-cash means of payment, the counterfeiting of which is punishable only with an imprisonment for two years.[17]

According to the court practice, the minimal condition of currency being considered fake in case of the imitation is merely that it should be trying to imitate the currency and its denomination of a certain country. The quality of the counterfeiting, and the extent to which it is capable to deceive, has no significance from the viewpoint of legal classification — it can only be a factor in sentencing[18]. Counterfeiting currency is realized even in case of an imitation being created with a black-and-white Xerox that is hardly suitable for deception.[19] Moreover, in an older case, the Supreme Court held that in case of obtaining counterfeit currency in order to

[16] See Art. 3(3): “Member States shall take the necessary measures to ensure that the conduct referred to in paragraphs 1 and 2 is punishable also in relation to notes and coins which are not yet issued, but are designated for circulation as legal tender.”

[17] TÓTH D.: op. cit. 128.

[18] Supreme Court, BH 1997. 7.

[19] Supreme Court, BH 1984. 482.

put it into circulation, counterfeiting currency is a completed crime even if it is a fake that is not suitable for deception.[20]

In my view however, *the counterfeit would need to be suitable for deception to a certain extent*, and this always needs to be examined in the given case,[21] namely because if the counterfeit is so rudimentary due to its primitive nature that even the abstract possibility of deception is not applicable, then no crime is realized.[22]

Currency with a denomination that is non-existent (so-called "fake money") cannot be the object of perpetration in counterfeiting currency, thereby the creation of fake money is not a crime, but putting it in circulation involves fraud.[23]

The Supreme Court held that the perpetrator, who created metal discs identical in size and shape to the 10 forint-coin, used in that time in Hungary, in order to fool a slot machine, committed fraud instead of counterfeiting currency.[24] The reason for the decision was that the perpetrator in this case was not striving for anyone to think that the coins created are real currency. However, the legal qualification of the case as fraud is problematic, as the perpetrator wished to realize with the self-made metal discs one of the functions of currency, namely, the suitability for use on the slot machine. Furthermore, it is a question regarding the case of fraud realized by causing deception for an "other" (or keeping them deceived), whether deception can even be realized by fooling a computer system, in an indirect way, or only by the deception of a human being.

3.2. The conducts of the crime in the Directive and the Hungarian Criminal Code

Art. 3 of the Directive provides for the punishable criminal acts. According to (1), Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offense, when committed intentionally:

a) any fraudulent making or altering of currency, whatever means are employed;

b) the fraudulent uttering of counterfeit currency;

c) the import, export, transport, receiving or obtaining of counterfeit currency with a view to uttering the same and with the knowledge that it is counterfeit;

d) the fraudulent making, receiving, obtaining or possession of

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[20] Supreme Court, BH 1989. 346.

[21] TÓTH Dávid: *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények büntetőjogi és kriminológiai aspektusai*. PhD-dolgozat, Pécs, 2018, p. 130.

[22] KARSAI Krisztina: A pénz- és bélyegforgalom biztonsága elleni bűncselekmények. In: KARSAI Krisztina–SZOMORA Zsolt–VIDA Mihály: *Anyagi büntetőjog Különös rész II.* Szeged, 2013, p. 241.

[23] TÓTH M.: op. cit. 381. According to other opinions, the order of money circulation can very well be disturbed by putting "currency" with a non-existent denomination into circulation, consequently, it would be justified to extend penal law-defense to fake money *de lege ferenda*. See KONDOROSI: op. cit. 79–80. In the case mentioned by the author, the perpetrator convicted for fraud paid the seller for three sheeps with two 54,000 forint denominated banknotes, emblazoned with the portrait of Ferenc Deák, found by him previously on a dunghill. (The 54,000 forint is a non-existed denomination in Hungary.)

[24] Supreme Court, BH 1986. 312.

(i) instruments, articles, computer programs and data, and any other means peculiarly adapted for the counterfeiting or altering of currency; or

(ii) security features, such as holograms, watermarks or other components of currency which serve to protect against counterfeiting.

With the exception of criminal conducts with a preparatory character, criminal law protection is extended to the formally valid currency which is made by using licensed materials and equipments but without entitlement.[25]

Chapter XXXVIII of the Hungarian Criminal Code currently in force, titled Crimes relating to Counterfeiting Currencies and Philatelic Forgeries, regulates *counterfeiting currency* (Article 389) as a criminal offence, and three forms of the crime can be distinguished:

a) *Imitating or counterfeiting currency with the purpose of distribution*, which comply with the "making or altering" criminal conducts mentioned in the Directive (and in the earlier framework decision), with the only difference being that the Hungarian regulation requires the intention to distribute. Consequently, counterfeiting without the intention to distribute does not qualify as a criminal offence, in this case, an administrative offence is established (see Article 213 of Act II 2012). *Since the Hungarian regulation, at first sight, adds an additional element to the statutory definition of the crime which is not existed in the Directive, one could ask whether it is narrowing down the punishability compared to the Directive or not?*

If the answer is positive, then it means that the regulation is less severe than the provisions of the Directive and their minimum requirements, which is not allowed.

According to my opinion however, the answer is negative, as the expression found in the English-language text of the Directive — which is unfortunately missing from the official Hungarian text —, "any *fraudulent* making or altering of currency", is in accordance with *the intention to distribute*, because counterfeiting fraudulently implies exactly that the perpetrator intended to distribute the counterfeit money, and it was not his intention, for example, to make token money for their children.

A similar reasoning can be found in the Explanation of the Act CXXI 2001 that modified the earlier Criminal Code. It states that in case of counterfeiting currency, fraudulence must mean the deception of someone else, thus, the usage of the counterfeit as real currency, which in itself implies its distribution. Without distribution, fraudulence cannot be realized. The qualifier "fraudulent" and the intention to distribute both result in that for example the hand-made copy of a single banknote made by a designer to decorate a flat will not qualify as counterfeiting currency. On the other hand, according to the standpoint of *Jacsó*, we cannot consider distri-

[25] See Article 3(2): "Member States shall take the necessary measures to ensure that the conduct referred to in points (a), (b) and (c) of paragraph 1 is punishable also with respect to notes or coins being manufactured or having been manufactured by use of legal facilities or materials in violation of the rights or the conditions under which competent authorities may issue notes or coins."

bution and fraudulence as synonyms in a contextual interpretation[26], although the notion of distribution is interpreted quite widely by the Hungarian court practice. Anyway, the Commission, in the third report (2007), has raised no objections to the Hungarian legislation in this respect.

Imitating means the creation of a copy based on a sample, resulting in a new piece, and counterfeiting of currency means the modification of real money. The HCC expressly states that any alteration of currency that has been withdrawn from circulation to create an impression as if it was still in circulation shall be considered imitation of currency. The term of 'counterfeiting' should also be interpreted broadly, since the application or removal of a sign serving as an indication that the currency is valid only in a specific country, and the diminution of the precious metal content of the currency shall also be considered as counterfeiting. [Article 389(5) c, d]

b) *Obtaining counterfeit or falsified currency* with the purpose of distribution, *exporting or importing* such currency or *transporting* it in transit through the territory of Hungary. These conducts are also in accordance with the provisions of the Directive, though the Hungarian regulation does not mention the "acceptance" of counterfeit or falsified currency. The expression "obtaining", which means taking into possession, in my opinion implies acceptance, so this difference does not concern the effective protection by the criminal law.[27]

The method of obtaining is indifferent, it can happen through an onerous contract or free-of-charge, but also in an unlawful way, by a criminal act.[28] At the time of obtaining, the perpetrator must be aware of the counterfeit or falsified nature of the currency, and must be motivated toward the goal of distribution. Finding foreign or native counterfeit currency in itself, without the intent to distribute, does not qualify as obtaining, it does not realize a criminal act, however, the subsequent distribution of found counterfeit currency is punishable.[29]

c) *Distributing counterfeit or falsified currency*, which conduct is harmonized with the "fraudulent uttering" included in the Directive, since if the perpetrator is aware of the counterfeit or falsified nature of currency — and this is a requisite for the establishment of an offence —, then the distribution cannot be anything else but fraudulent. Distribution means making it accessible for others, a typical example of which is paying with counterfeit currency, but giving it or donating it to a third person also qualifies as such.[30]

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[26] The author mentions that in case of the first two criminal conduct laid down in the framework decision (and in the directive), the legislator of the European Union uses the term "fraudulent" while in the third case, it explicitly includes the aim of the distribution. See JACSÓ Judit: Pénzhamisítás. In: *Az európai büntetőjog kézikönyve* (szerk.: KONDOROSI Ferenc–LIGETI Katalin). Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, pp. 482–483.

[27] Similarly GULA: op. cit. 111.

[28] Supreme Court, BH 1991. 138.

[29] MOLNÁR Gábor: A pénz- és bélyegforgalom biztonsága elleni bűncselekmények. In: *Magyar Büntetőjog. Kommentár a gyakorlat számára* (szerk. KÓNYA István). HVG-Orac Kft., 2013, p. 1461.

[30] Supreme Court, BH 1994. 173.

d) The Hungarian legislator defines as a separate criminal offence *the facilitation of counterfeiting currency*. The objects of the offense are any material, means, equipment, production plan, specifications or computer software that are necessary for counterfeiting currency, and the punishable acts are production, supply, receiving, obtaining, keeping, export, import or transport.

This criminal offence, a *sui generis delictum* that regulates preparatory acts related to counterfeiting currency as a completed crime,[31]is in accordance with the provision laid down in point d) of Art. 3 of the Directive, however, it has been subject to many years of heavy criticism in the Hungarian special literature. The background of the criticisms is that the Hungarian Criminal Code did previously and does now punish the preparation for counterfeiting currency, when the perpetrator realizes the preparatory acts[32] for the sake of committing counterfeiting currency. The separate crime of facilitating counterfeiting currency has been introduced by the Act CXXI 2001, modifying the previous Criminal Code. The Explanation of this Act states that it is possible to imagine a situation where the intent of the person who provides, obtains etc. the materials, means and computer software for counterfeiting currency may not imply committing counterfeiting currency. However, in this case, the rules of preparation cannot be applied. Since in the case of the conducts laid down in point d) of Art. 3 of the previous framework decision (and currently, of the Directive) it is not a requisite of the perpetrator's intent to imply the committing of counterfeiting currency, the Hungarian legislator

According to the criticism of Hungarian special literature, the separate crime of facilitating of counterfeiting currency is an unnecessary *duplum* beside the (real) preparation of counterfeiting currency, since it is unrealistic that the perpetrator is realizing the preparatory acts (the obtaining, creation, bearing etc. of special safety paper, printing machines, plates, paints) in order not to counterfeit currency.[33] Others claim that the criminal act of facilitating the counterfeiting of currency is seldom found in the Hungarian court practice.[34]

Further substantive criticism has been established regarding the *keeping* of materials, equipment, computer software necessary for counterfeiting currency without an intention to do it. According to *Varga*, the mentioned means can in most cases be legally created and possessed, so the punishability of these conduct is justified only if the perpetrator is motivated to commit the counterfeiting of currency.[35] *Jacsó* believes, that it is especially solicitous from a constitutional viewpoint to make the sole keeping of an equipment suitable for counterfeiting currency

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31 GULA: op. cit. 101.

32 The preparatory criminal act can be committed by a person who invites, volunteers, or undertakes to commit a crime, or agrees to commit a crime in league with others, or who provides the means necessary for the committing a criminal offense or facilitating that. See Article 11 of HCC.

33 NAGY Zoltán: A pénz- és bélyegforgalom biztonsága elleni bűncselekmények. In: TÓTH Mihály–NAGY Zoltán (szerk.): *Magyar Büntetőjog Különös Rész*. Osiris Kiadó, Budapest, 2014, p. 497.

34 TÓTH D. (2018): op. cit. 134.

35 VARGA Zoltán: Formálódó gazdasági büntetőjog. *Belügyi Szemle*, 2002/10, p. 125.

without intention punishable.[36] According to *Gula*, being in harmony with the framework decision did not make the creation of the separate offence of facilitating the counterfeiting of currency inevitable, and this is also true regarding the accordance to the Directive.[37] Based on all this, the decriminalization of the offence of facilitating the counterfeiting of currency is *de lege ferenda* justified.

According to my standpoint, the fact that a criminal act is unrealistic or that it occurs seldom in practice is not the most powerful argument against or for its punishability. It is much more problematic that, according to the traditional principle of Hungarian criminal law, in order to criminalize a certain behavior preceding a criminal offence is required for that behavior, by main rule, to have a relation in any form *to a particular criminal offence.* In case of the facilitation of counterfeiting currency, this is not valid, since if the person possessing the special paper himself or herself wants to counterfeit currency, or if this person gives the paper to another person who is clearly going to use it to counterfeit currency, this person is shall be found guilty of preparation for counterfeiting currency and not of facilitation of counterfeiting currency. It should be emphasized here that the person, who himself or herself does not intend to counterfeit currency, but commits the acts of a preparatory character knowing that related to his or her behavior, *someone else* is intending to commit a crime, is also punishable for preparation for counterfeiting currency.[38]

Regarding the behaviors included in the Hungarian regulation (producing, transferring, receiving, obtaining, keeping, the so-called transit behaviors and distribution), it is almost entirely unimaginable, *except for producing,* that the perpetrator would undertake these without the intention to counterfeit currency. However, in case of "producing", there is a chance that the perpetrator, who is producing the paper necessary for counterfeiting currency and is specialized for and also undertakes the creation of special paint and computer software, does not do counterfeiting him- or herself, and he or she had not transferred the above-mentioned tools to anyone, and had not started to distribute them. *At this stage,* the correct classification is the crime of facilitating the counterfeiting of currency, since this behavior does not qualify as preparation for the counterfeiting currency.

There is no doubt that the criminal act of facilitating the counterfeiting of currency propagates new cases for shifting the criminal responsibility and is dogmatically solicitous. However, this seems to be the price for improvement in the effectiveness of the struggle against counterfeiting currency. The production of tools necessary for professional counterfeiting of currency is an indispensable condition for serious counterfeiting,[39] thus, this type of conduct can be considered as the most dangerous criminal act in connection with counterfeiting currency, and all of its

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[36] JACSÓ: op. cit. 489.

[37] GULA: op. cit. 112.

[38] AMBRUS István–DEÁK Zoltán: Súlyponti kérdések a bankkártyával kapcsolatos bűncselekmények köréből. *Belügyi Szemle*, 2011/2, p. 95.

[39] BELOVICS Ervin–MOLNÁR Gábor–SINKU Pál: *Büntetőjog Különös Rész*. HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2005, p. 569.

possible forms need to be persecuted, furthermore, the sanction envisaged should not be considered disproportionate compared to the gravity of the criminal act.[40]

e) *The distribution of currency of minor value or less, obtained as genuine, and in a lawful way*. According to Article 389(4) of the HCC, the penalty of any person who distributes counterfeit or falsified currency of minor value or less, obtained as genuine, may be reduced without limitation. The previous HCC ordered this behavior to be sanctioned as a separate criminal offence and a privileged case, under the name of issuing counterfeit currency, without considering the value of the currency. As opposed to that, the Criminal Code currently in force considers this behavior also as counterfeiting of currency, but leaves room for reducing penalty without limitation, provided that the value of currency does not exceed 500,000 forints.

This regulation is in accordance with the Directive, which — as opposed to the severe sanction ordered in case of the classic counterfeiting of currency followed by distribution — allows even to envisage the penalty of a fine [Art. 5(5)].[41] As the Directive does not consider the value of the currency as significant in this case, the Hungarian regulation currently in force is more severe compared to the Directive, as the option of reducing penalty without limitation can only be applied in case of a criminal act involving currency with a value not exceeding 500,000 forints.

It is not a coincidence that in the Hungarian special literature, many people consider it justified to re-codify the previous criminal act of issuing counterfeit currency. The point of this criminal act is that the perpetrator considered the counterfeit as genuine when receiving it, or was mistaken at the time of obtaining, and realized only later that he or she obtained falsified or counterfeit currency in a lawful way.

Lawfulness refers to the legitimate claim of the obtaining. Consequently, the obtaining is unlawful if the perpetrator receives counterfeit currency via a criminal act. Finding accidentally a currency can also not be considered as lawful obtaining.[42] But if the perpetrator had not realized the counterfeit nature of the currency even at the time of distribution, he or she cannot be sanctioned even if the mistake had been caused by his or her negligence.

3.3. Other provisions of the Directive and the domestic criminal law

Following the provisions defined the criminal offences, the Directive requires member states to make the inciting or aiding and abetting of the offences punishable (Art. 4), this is coherent with the Hungarian criminal law.

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[40] The Directive orders the application of imprisonment for this criminal act [Article 5(2)], and the Hungarian regulation is in accordance with it, since both the acts of preparation for the counterfeiting of currency and facilitation of the counterfeiting of currency are to be sanctioned by imprisonment for a maximum of three years.

[41] In relation to the offence referred in point (b) of Art. 3(1), Member States may provide for effective, proportionate and dissuasive sanctions other than that referred to in paragraph 4 of this Article, including fines and imprisonment, if the counterfeit currency was received without knowledge, but passed on with the knowledge that it is counterfeit

[42] Supreme Court, BH 1991. 138.

Art. 5 set out the minimum standards to be applied in the field of criminal sanctions againts natural persons. According to the Art. 5(3) and 5(4), the fraudulent making or altering currency shall be punishable by a maximum term of imprisonment of at least eight years and at least five years in relation to the other criminal conducts. Counterfeiting currency is punishable by imprisonment between two to eight years in relation to any criminal conduct in the HCC. On this basis, *provisons on criminal sanctions of the Hungarian regulation are more stringent than is required by the Directive*.

The Directive contains rules on the liability of legal persons and the organizational sanctions (Art. 6 and Art. 7). Since the Act CIV 2001, titled 'Criminal measures applicable againts legal persons' can be applied in case of committing any intentional crime and criminal measures provided by the Act (winding-up of a legal person, restriction of a legal person's activities and fine) can be considered as effective, proportionate and dissuasive sanctions, *provisions of the Directive in relation the liability of legal entities are in conformity with the Hungarian criminal law*.

4. Closing remarks

According to the crime statistics, crimes committed againts the order and security of cash-flow are rather frequent in Hungary. The registered numbers of counterfeiting currency: 187 crimes in 2013, 609 crimes in 2014, 584 in 2015, 497 in 2016 and 540 in 2017).[43] In contrast, the facilitation of counterfeiting currency is very rare, one or two case per year. To sum up, Hungary fulfilled the requirements of harmonization laid down in the Directive, moreover, the HCC contain more stringent provisions in relation to the punishable conducts and the applicable sanctions.

That is also true for the case of the distribution of currency of minor value or less, obtained as genuine, and in a lawful way. On basis of this, consideration has been given to amending the HCC and recodify as a separate criminal offence the crime of issuing counterfeit currency.

[43] Source: Egységes Nyomozóhatósági és Ügyészségi Bűnügyi Statisztika (ENYÜBS).

European Integration Studies, Volume 14, Number 1 (2018), pp. 30–46.

LEGAL CASES BEFORE THE EUROPEAN COURT OF JUSTICE IN CONNECTION WITH THE FINANCES OF THE OLD-AGE PENSIONS IN THE COORDINATION REGULATIONS *

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1. Introduction

Freedom of movement of workers is one of the founding principles of the European Community, as laid down in Article 39 of the EC Treaty. It is a fundamental right of individuals, and an essential element of European citizenship. Free movement of workers entitles EU citizens to search for a job in another Member State, to work there without needing a work permit, to live there for that purpose, to stay there even after the employment has finished and to enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages that may help them integrate in the host country.

It is estimated that there are 10.5 million migrant workers in the EU, one million people crossing EU borders for work every day and about 250,000 people who have worked in more than one Member State and need to export a part of their pension rights every year.

Ensuring the right of social security when the right of freedom of movement is exercised has been one of the major concerns for the EU Member States. To achieve this, it was necessary to adopt social security measures which prevent EU citizens working and residing in a Member State other than their own from losing some or all of their social security rights. This contributes to improving the standard of living of the migrant persons.

Recognizing the importance of this issue, the Council adopted two regulations on social security for migrant workers in 1958, Regulations 3/1958 and 4/1958, which were replaced by Regulation (EEC) No. 1408/71, supplemented by Implementing Regulation (EEC) No. 574/72. Nationals from Iceland, Liechtenstein and

* 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.

Norway are also covered by way of the European Economic Area (EEA) Agreement, and from Switzerland by the EU-Swiss Agreement.

In 2004, Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems was adopted to replace Regulation (EEC) No. 1408/71. On 16 September 2009, Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for Implementing Regulation (EC) No. 883/2004 on the coordination of social security systems was adopted to replace Regulation (EEC) No. 574/72.

The EU provisions on social security coordination do not replace national social security systems with a single European one. Such a harmonization would not be possible, as the social security systems of the Member States are the result of long-standing traditions deeply rooted in national culture and preferences. Hence, rather than harmonizing the national social security systems, the EU provisions provide for their coordination. Every Member state is free to decide who is to be insured under its legislation, which benefits are granted and under what conditions, how these benefits are calculated and what contributions should be paid.

The *coordination provisions* establish common rules and principles which have to be observed by all national authorities, social security institutions, courts and tribunals when applying national laws. By doing so, they ensure that the application of different national legislations does not adversely affect persons exercising their right to move and to stay within EU Member States. In other words, a person who has exercised the right to move within Europe may not be placed in a worse position than a person who has always resided and worked in one single Member State. A migrant worker could face problems due to the fact that in some Member States, access to social security coverage is based on residence, whilst in others only persons exercising an occupational activity (and the members of their families) are insured. In order to avoid a situation where migrant workers are either insured in more than one Member State or not at all, the coordination provisions determine which national legislation applies to a migrant worker in each particular case.[1]

The principles of coordination of social security systems which were first established by the EU rules in 1957 remain the same today, though the text of the regulations has been changed several times. These principles are:

- only one legislation applicable;
- equality of treatment;
- aggregation of the insurance, residence or work periods; and
- export of benefits.

In the new Regulation a new principle has been added – namely, the principle of good administration. This refers to the obligation of the institutions of Member States to cooperate with one another and provide mutual assistance for the benefit

[1] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 1.

of citizens. Since 1 May 2010 the legislation in force in the field of coordination of social security systems in the EU includes:

- Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems, as amended by Regulation (EC) No. 988/2009, hereinafter called the new Regulation;
- Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, hereinafter called the Implementing Regulation; and,
- Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.[2]

The objectives of the modernized EU social security coordination can be summarized as follows:

Extension of coverage in respect of the number of persons covered, the scope of coverage, and areas of social security covered. The population covered by the Regulation will include all nationals of Member States who are covered by the social security legislation of a Member State. This means that not only employees, self-employed persons, civil servants, students and pensioners will be protected by the coordination rules, but also persons who are not part of the active population. This simplifies and clarifies the rules determining the legislation applicable in cross-border situations;

The material coverage of the Regulation is extended to statutory pre-retirement schemes. This means that the beneficiaries of such schemes will be guaranteed payment of their benefits, covered for medical care and entitled to receive family benefits even when they are residents of another Member State;

Amendment of certain provisions relating to unemployment, including retention for a certain period (three months which can be extended to a maximum of six months) of the right to receive unemployment benefit by persons moving to another Member State in order to seek for employment;

Strengthening of the general principle of equal treatment;

Strengthening of the principle of exportability of benefits, meaning that insured persons temporarily staying in another Member State will be entitled to health care which may prove medically necessary during their stay;

Introduction of the principle of good administration, which places an obligation on the institutions of Member States to cooperate with one another and provide mutual assistance for the benefit of citizens.[3]

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[2] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 2.

[3] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 4.

2. Theoretical background of the old-age pensions in the coordination regulations

As defined in Article 1(w) of the new Regulation, "pension", covers not only pensions but lump-sum benefits. These can be substituted for pensions and payments in the form of reimbursement of contributions or for revaluation increases or supplementary allowances, subject to the provisions of Title III. The coordination of pensions is regulated by Title III, Chapter 5, Articles 50–60 of the new Regulation and Title III, Chapter IV, Articles 43–53 of the Implementing Regulation. The legislation states that people who have worked professionally in the territory of two or more Member States are allowed to retain their accrued benefits under the pension insurance legislation. There are no major changes in the rules of the coordination of pensions in the EU. The principles of the calculation of pensions remain almost the same as those in Regulation (EEC) No. 1408/71.

Basic principles of the coordination of the old-age pensions

The legal regulations for gaining an entitlement to an old-age pension differ from Member State to Member State. If the insured person ceases working in one Member State and continues working in another Member State, the insurance contributions paid in the first State are not transferred to the latter State. This means that the entitlement to a pension originates only towards the State where the claimant participated in pension insurance.

An entitlement of the insured person to an old-age pension may arise in the individual Member States as of different dates. This fact is given primarily by a different pensionable age in these Member State.

Therefore, the European law leaves the different national legislations on pensions unchanged; however, it replaces those provisions which are unfavourable for migrant persons and determines its own rules — coordination rules for these cases. The following two basic principles of social security coordination are most of all applied in the field of pension benefits:

a) Aggregation of periods of insurance. The basic principle is an aggregation of periods of insurance for the purposes of gaining entitlement to benefit. Its purpose is to exclude the unfavourable impact of the situation when a person who had been insured in several States does not fulfil the condition of the required insurance period in some of them (or in any of them). In this case, a Member State shall take into consideration periods gained in other Member States — and the periods before the accession of Hungary to the EU, too, prior to 1st May, 2004 — for gaining the entitlement to benefit.[4]

[4] The aggregation of insurance periods shall take into account periods of insurance or residence completed in the legislation of another Member State. There are also special provisions on the aggregation of periods for different situations, i.e. in a specific activity, in an occupation which is subject to a special scheme for employed or self-employed persons (Articles 6 and 51 of the new Regulation, Articles 12 and 13 of the Implementing Regulation) and specific provisions for civil servants (Article 60 of the new Regulation). Article 44 of the Implementing Regulation outlines the rules for taking child raising-periods into account when calculating a pension.

There is a special provision if the person concerned is insured in a Member State for an insurance period shorter than one year. In this case the State concerned is not obliged to award a pension, unless the entitlement to it arises from its national legislation.[5]

According to the principle of the aggregation of periods of insurance, the same period can be taken into account only once. This means that persons who during their previous employment abroad paid contributions to the Hungarian pension insurance in Hungary and were simultaneously insured in a foreign social insurance scheme can expect that this period will be considered only once when the pension is awarded.[6]

b) The export of (pension) benefits. The old-age pension will be paid to the claimant regardless of where he/she stays or resides within the European Union or the European Economic Area without the any reduction, modification or suspension. Pensions are paid after the announcement of the claim and the calculation of the benefit by the Member States concerned. Each Member State which is obliged to award partial pension shall pay benefits. According to the portability principle, if the entitled person leaves the territory of the Member State of payment and moves to another Member State, cash benefits — with special respect to pensions — will be paid to the territory of the other Member State, according to the principle of the export of benefits. [7]

Claiming the benefit

When a person claims a benefit in a Member State, all of the institutions of other Member States where the person carried out their activity must start the procedure of establishing rights and calculating benefits for that person unless the person expressly requests that the award of old-age benefits under the legislation of one or more Member States be deferred.[8] The institutions have to advise the person on the consequences of deferment in order to assess whether to exercise the right or not.[9]

Calculation of benefits

Every Member State first calculates the amount of benefits due under national legislation, taking into account the anti-overlapping provisions. Then, every Member State calculates the *pro-rata pension* amount due. Each State is to grant the higher amount between the two benefits.[10]

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5 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 123.

6 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 124.

7 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 124.

8 Article 50 of the new Regulation.

9 Article 46(2) of the Implementing Regulation.

10 Article 56(1) (a) of the new Regulation.

Pro-rata calculation of a pension requires that the institution calculate the amount of the pension which the person could claim if all periods of insurance or residence had been completed under its legislation when the periods completed under all periods under all Member State legislations is longer than the maximum period required to receive full benefit. This is limited to the maximum benefit amount under its legislation.[11]

Member States may waive the pro-rata pension calculation if certain conditions are fulfilled, as mentioned in Article 52(4) of the new Regulation. In part 1 of Annex VIII, Member States may list their schemes providing benefits in which periods of time are of no relevance to the calculation, and in these cases can waive the pro-rata calculation.

Period of insurance for less than a year

If a person has been insured in a Member State for less than one year and this Member State does not grant a pension, another Member State may not waive the pro-rata calculation, as I mentioned earlier. To guarantee that this period is not lost, the new Regulation takes into account the existence of "funded" schemes and schemes based on pension accounts simulating capitalized schemes. Article 52(5) of amended Regulation (EC) No. 883/2004 provides that the pro-rata calculation shall not apply to schemes providing benefits in which periods of time are of no relevance to the calculation.

Article 51 regarding the aggregation of periods has also been added here, explaining how the benefit is calculated in the case of special schemes.

The institution of a Member State is not required to grant a benefit if the total periods completed under its legislation do not reach a year, and if no entitlement to a benefit is created under its legislation. The institutions of the other States concerned take those periods into account only for the calculation of the theoretical pension.[12]

For the calculation of a person's benefit, their earnings under the legislation of the institution paying the pension will be taken into account.[13]

Any benefit paid by the institution of a Member State can be reviewed when the rights were exercised under the legislation of another Member State or when the worker asked for deferment under the legislation of another Member State. This cannot be done if the periods have already been taken into account for the initial calculation.[14]

Rules to prevent overlapping

The coordination regulations establish specific rules to prevent the overlapping of benefits (of the same or of a different kind) calculated or provided on the basis of the same insurance, employment or residence periods.[15]

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11 Article 56(1) (a) of the new Regulation.
12 Article 57 of the new Regulation.
13 Article 56(1) (c) of the new Regulation
14 Article 50(4) of the new Regulation.
15 Articles 53–55 of the new Regulation.

Complement for the minimum pension

If the total amount of an insured's pension is less than the minimum pension in their country of residence, the amount of the pension in their country of residence is increased so that the total reaches the minimum pension in that State.[16]

Provisional instalments and advance payments of benefits

If while investigating a claim for benefits the institution establishes that the claimant is entitled to an independent benefit under the applicable legislation, it will pay that benefit provisionally. That payment shall be considered provisional if the amount may be affected by the result of the claim investigation procedure. Each institution paying the provisional benefits or advance payments are to inform the claimant without delay of the provisional nature of the measure and of any rights of appeal the claimant has in accordance with its legislation.

Calculation of old-age pension benefits — Dual calculation system

Claims are judged by the competent institution in each Member State pursuant to national legislation and the provisions of the Regulation. If the claimant has entitlement according to the national legislation of the given Member State, the pension is calculated with the so called double calculation:
1. The claimant has entitlement to national pension
A) The benefit payable according to the national legislation is calculated on the basis of the period of insurance completed in that Member State and the average earnings. This is called theoretical pension.
B) The proportional part of the pension is calculated according to the following (pro rata pension):
a) the sum of the theoretical pension is calculated; this is the pension which would be paid if the claimant had completed all his/her periods of insurance in the given Member State; and
b) the proportional part of the pension is calculated, which reflects the proportion of the period of service completed in the given Member State to the entire period of insurance.
The more favourable pension of the two — that is the higher amount — shall be awarded and paid.
2. *If the claimant has no entitlement to national pension,* different rules are to be applied. In this case only the proportional pension (pro rata temporis) can be calculated. The pension from each Member State shall be paid to the claimant according to national legislation.[17]

[16] Article 58 of the new Regulation.
[17] HAJDÚ, József: Coordination of the old-age pension in the EU. In: *Emlékkönyv Román László születésének 80. évfordulójára.* Pécs, 2008, p. 125.

3. Case law in connection with the calculation of the pensions

3.1. Manzoni-case[18]

This case is on the interpretation of Article 51 of the EEC Treaty and Article 46(3) of regulation No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

Two questions have been referred in the context of an action concerning the way in which the competent Belgian institution calculated the invalidity pension of an Italian national, the plaintiff in the main action, who worked first in Italy and then in Belgium as an underground worker in the mines. In Belgium that worker satisfied all the conditions laid down by the national legislation for entitlement to an invalidity pension under the scheme for mineworkers. On the other hand, for his entitlement to benefit in Italy, he had to have recourse to the provisions of article 45 of regulation No. 1408/71; for the purposes of calculating that benefit, the periods actually completed in both member states were aggregated and the Italian benefit was apportioned. Relying on the rule for the limitation of benefits laid down by article 46(3) of regulation no 1408/71, the Belgian institution believed it could reduce the invalidity pension by the amount of the apportioned Italian benefit and claimed repayment of the amount overpaid.

The Court decided, that the Article 46(3) of regulation No. 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on benefits acquired in different member states by a reduction in the amount of a benefit acquired under the national legislation of a member state alone.

Salgado González case[19]

By order of 9 May 2011, received at the Court on 6 June 2011, the Tribunal Superior de Justicia de Galicia (Spain) referred to the Court for a preliminary ruling four questions on the interpretation of Council Regulation (EEC) No. 1408/71 of 14 June 1971, as amended by Council Regulation (EC) No. 1791/2006 of 20 November 2006. (Regulation No. 1408/71) and of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems as amended by Regulation (EC) No. 988/2009 of the European Parliament and of the Council of 16 September 2009 (Regulation No. 883/2004).

According to the Spanish national law, Article 161(1) (b) of the General Law on Social Security makes entitlement to an old-age pension conditional upon, inter alia, having paid contributions for at least 15 years. Article 162(1) of the General Law on Social Security provides that 'the basis for determination of the retirement pension, under the contributory scheme, will be the quotient given by dividing by

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[18] Judgment of the Court of 13 October 1977. — Renato Manzoni v Fonds national de retraite des ouvriers mineurs. — Reference for a preliminary ruling: Tribunal du travail de Charleroi — Belgium. — Case 112–76.

[19] Case C-282/11 Concepción Salgado González v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

210 the contribution bases of the interested party during the 180 months immediately before the month preceding the operative event'.

Ms Salgado González made contributions in Spain to the Special Scheme for Self-Employed Persons (Régimen Especial de Trabajadores Autónomos), for a total of 3711 days, from 1 February 1989 to 31 March 1999, and in Portugal for a total of 2,100 days, from 1 March 2000 to 31 December 2005.

Ms Salgado González applied for a retirement pension in Spain, which was granted from 1 January 2006. In calculating Ms Salgado González's pension, the INSS added her Spanish contribution bases from 1 April 1984 to 31 March 1999, which relate to the 15 years immediately preceding payment of her last contribution to the Spanish social security. The INSS then divided those contribution bases by a divisor of 210 (which corresponds to the number of ordinary monthly contributions and of extraordinary annual contributions paid during 180 months or 15 years) in accordance with Article 162(1) of the General Law on Social Security. This resulted in a 'base reguladora' or a basis for determination. Given that Ms Salgado González only started contributing to the Spanish social security from 1 February 1989, the contribution bases for the period 1 April 1984 to 31 January 1989 were calculated by the INSS as 0, thus leading to a reduction of her basis for determination (base reguladora).

Ms Salgado González's basis for determination was eventually fixed at EUR336.83 per month. The basis for determination (base reguladora) for 1 April 1984 to 31 March 1999 was then reduced by multiplying it by 53%, corresponding to Ms Salgado González's years of contribution and also by 63.86% corresponding to a pro rata temporis for Spain.

Having exhausted the preliminary administrative route, Ms Salgado González brought an action before the Juzgado de lo Social (Social Court) No. 003, Ourense, claiming differences in retirement pension. The Juzgado de lo Social dismissed her application. That decision was appealed by Ms Salgado González to the referring court.

The referring court in the order for reference notes that in calculating the basis for determination (base reguladora), the INSS relied on Heading H, paragraph 4 (Spain), of Annex VI to Regulation No. 1408/71 combined with Article 162(1) of the General Law on Social Security. It is this combined application that has given rise to doubts on behalf of the referring court.

The questions were raised in proceedings brought by Ms Salgado González against the *Instituto Nacional de la Seguridad Social* (National Social Security Institute, "the INSS") and the *Tesorería General de la Seguridad Social* (General Social Security Fund, "the TGSS") concerning the calculation of Ms Salgado González's old-age pension. The referring court seeks clarification on whether the application of certain provisions of Regulation No. 1408/71 or Regulation No. 883/2004 in conjunction with Article 162(1) of the Spanish General Law on Social Security (la Ley General de la Seguridad Social) leads to an undue reduction of the pension of a self-employed migrant worker.

The Court answered the questions referred by the Tribunal Superior de Justicia de Galicia (Spain) for a preliminary ruling as follows: Where a self-employed migrant

worker has insurance contributions in one or more Member States for a period equal to or in excess of a reference period provided by Spanish legislation, Article 46(2) (a) and Article 47(1) (g) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Heading H, paragraph 4 (Spain), of Annex VI of Regulation No. 1408/71 preclude the calculation of that worker's theoretical Spanish benefit on the basis of his actual Spanish contributions, during the years immediately preceding payment of his last contribution to the Spanish social security, where the sum thus obtained is divided by a divisor, corresponding to the number of ordinary monthly contributions and extraordinary annual contributions payable over the reference period, which fails to take account of the fact that the worker exercised his right to free movement.

3.2. Salgado Alonzo case[20]

This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 39 EC and 42 EC and of Articles 45 and 48(1) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Council Regulation (EC) No. 1606/98 of 29 June 1998.

Mrs Salgado Alonso, who was born on 30 May 1936, applied to INEM on 7 August 1992 for the special unemployment allowance for unemployed persons over 52 years of age. At the time, she was able to establish actual periods of insurance of 74 months — more than six years — under German legislation, between 29 June 1964 and 30 July 1970, of 26 months under Swiss legislation, between 1 December 1971 and 31 March 1975, and 182 days under Spanish legislation, between 8 January and 7 July 1992.

The INEM[21] initially refused to grant her the special unemployment allowance, on the ground that she had not completed in Spain the necessary minimum qualifying period of 15 years.

Mrs Salgado Alonso thereupon brought proceedings against that decision before the Juzgado de lo Social n o 2 de Orense (Social Court No. 2, Orense, Spain), which by judgment of 22 June 1993 ruled that she was entitled to that allowance. INSS and TGSS and the Spanish Government explain that judgment essentially by reference to the fact that, in accordance with the Spanish case-law at the time, even qualifying periods of shorter duration completed abroad were recognised as equiva-

[20] Case C-306/03 Cristalina Salgado Alonso v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

[21] The Instituto Nacional de Empleo (National Institute of Employment, 'INEM').

lent to the qualifying period of 15 years required by Article 161(1) (b) of the General Social Security Law.[22]

Mrs Salgado Alonso thus received the unemployment allowance for unemployed persons over 52 years of age from 7 August 1992 to 30 May 2001, that is, a period of 3 219 days during which old-age insurance contributions were paid on her behalf by INEM. In May 2001, on reaching the age of 65, Mrs Salgado Alonso applied for the award of the pension she was entitled to under the German, Swiss and Spanish social security schemes. While she was granted pensions in Germany and Switzerland, INSS, by decision of 21 March 2002, rejected her application on the ground that she had not completed in Spain the minimum contribution period necessary for acquiring the right to a pension and that Article 46(2) of Regulation No. 1408/71 on the aggregation of periods of insurance was not applicable, in accordance with Article 48(1) of that regulation, since the period of insurance completed in Spain was less than one year. INSS also based its refusal on the 28th Additional Provision of the General Social Security Law. On 13 February 2002, Mrs Salgado Alonso brought proceedings against INSS and TGSS before the Juzgado de lo Social n o 3 de Orense (Social Court No. 3, Orense), seeking a declaration that she was entitled to receive a retirement pension under the Spanish legislation from 31 May 2001.

In support of her application, she submitted essentially that there should be taken into consideration not only the initial period of 182 days of contribution she had completed in Spain but also the entire period during which INEM had paid contributions on her behalf to the statutory old-age insurance scheme while she was receiving the special unemployment allowance, so that she could now rely in Spain on a total of 3 401 days of contribution, a period of more than nine years and three months of contribution.

The INSS, in applying both Heading H, paragraph 4 (Spain), of Annex VI to Regulation No. 1408/71 and Article 162(1) of the General Law on Social Security, adds the actual contributions of the insured person during the 15 years immediately preceding the last contribution to the Spanish social security, and divides the sum by 210.

The Court (Second Chamber) decided as follows: Articles 39 EC and 42 EC and Article 45 of Regulation No. 1408/71, in the version amended and updated by Regulation No. 118/97, as amended by Regulation No. 1606/98, must be interpreted as not precluding a national provision which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit

[22] That national case-law had, however, been altered in the meantime to take account of the Court's judgments in Joined Cases C-88/95, C-102/95 and C-103/95 Martínez Losada and Others [1997] ECR I-869 and Case C-320/95 Ferreiro Alvite [1999] ECR I-951.

agency, such periods being taken into consideration solely for the calculation of the amount of that pension.

4. Case law in connection with the aggregation of the pensions

Tomaszewska case[23]

The present reference for a preliminary ruling concerns the interpretation of Article 45 of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Regulation (EC) No. 1992/2006 of the European Parliament and of the Council of 18 December 2006.

The reference has been made in the context of proceedings between Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu (Social Security Institution — Nowy Sącz Branch) ('the Zakład Ubezpieczeń Społecznych') and Ms Tomaszewska concerning the account to be taken of the period of contribution which she completed in another Member State and the detailed rules for determining the minimum period required under Polish law for acquisition of entitlement to a retirement pension.

In Poland, retirement and other pensions are governed by the ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law on retirement and other pensions provided by the Social Security Fund) of 17 December 1998, in its consolidated version (Dziennik Ustaw 2004, No. 39, item 353) ('the Law on retirement pensions').

Article 5 of the Law on retirement pensions provides:
1. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, the following periods shall be taken into account, subject to paragraphs 2 to 5:
   (1) contribution periods as referred to in Article 6;
   (2) non-contribution periods as referred to in Article 7.
2. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, non-contribution periods shall be taken into account up to a maximum of one third of the proven contribution periods.
Article 10(1) of that Law provides: In establishing entitlement to a retirement pension and in calculating the amount thereof, the following periods shall also be included and treated as contribution periods, subject to Article 56:
   (3) periods of employment on agricultural holdings after the age of 16, falling before 1 January 1983, where the contribution and non-contribution periods established pursuant to Articles 5 to 7 are shorter than the period required for the award of a retirement pension, to the extent necessary to supplement this period.

[23] Case C-440/09 Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v Stanisława Tomaszewska.

Article 29(1) (1) of the Law on retirement pensions is worded as follows:

> 'Insured persons who were born before 1 January 1949 and who have not attained the retirement age laid down in Article 27(1) may retire:
>
> (1) in the case of a woman — after attaining the age of 55 — where she has a contribution and non-contribution period amounting to at least 30 years or has a contribution and non-contribution period amounting to at least 20 years and has been declared to be totally incapable of working.'

Under Article 46 of that Law:

> '1. Insured persons born after 31 December 1948 and before 1 January 1969 shall also be entitled to a retirement pension, subject to the conditions laid down in Articles 29, 32, 33 and 39, in so far as they satisfy the following cumulative conditions:
>
> (1) they have not become affiliated to an open pension fund or applied to transfer funds accumulated in an account in an open pension fund, via the Social Security Institution, to the State budget;
>
> (2) they satisfy the conditions for obtaining a retirement pension laid down in these provisions up to 31 December 2008.'

Ms Tomaszewska, who was born on 1 March 1952, applied for an early retirement pension when she reached the age of 55.

She had not become affiliated to the open retirement fund and had completed, in Poland, contribution periods of 181 months, non-contribution periods of 77 months and 11 days and periods of employment on her parents' agricultural holding of 56 months and 25 days. She had also completed, in the former Republic of Czechoslovakia, contribution periods totalling 49 months.

By a decision of 2 August 2007, the Zakład Ubezpieczeń Społecznych rejected Ms Tomaszewska's application for a retirement pension on the ground that she had failed to furnish proof that she had completed the mandatory minimum 30-year insurance period prescribed in Article 29(1)(1) of the Law on retirement pensions. Since, under Article 5(2) of that Law, the non-contribution periods may not exceed one third of the contribution periods completed in Poland, the Zakład Ubezpieczeń Społecznych credited her with only 181 months in respect of contribution periods and 60 months and 10 days in respect of non-contribution periods. As Ms Tomaszewska also did not hold a certificate attesting to her total incapacity for work, the Zakład Ubezpieczeń Społecznych found that she did not satisfy the conditions laid down for early retirement for women.

Ms Tomaszewska brought an action against that decision before the Sąd Okręgowy w Nowym Sączu (Regional Court, Nowy Sącz). By judgment of 7 December 2007, that court partially upheld Ms Tomaszewska's claim, holding that she was entitled to a proportional retirement pension as from 14 May 2007.

By judgment of 5 August 2008, the Sąd Apelacyjny w Krakowie (Court of Appeal, Cracow) dismissed the appeal brought by the Zakład Ubezpieczeń Społecznych and upheld the decision delivered at first instance.

According to the Sąd Apelacyjny w Krakowie, the aggregation of the insurance periods completed in and outside Poland allows for full account to be taken of the

contribution periods completed in Poland and outside Poland, in accordance with the principle of equal treatment of migrant workers. The fact of not allowing the non-contribution periods to exceed one third of the contribution periods completed in Poland gives rise to a situation in which non-contribution periods are taken into account in a less favourable manner in the case of migrant workers than in the case of individuals who can furnish proof of relatively lengthy contribution periods in Poland.

The Zakład Ubezpieczeń Społecznych lodged an appeal in cassation, arguing that there had been a misinterpretation of Article 45(1) of Regulation No. 1408/71, Article 15(1) (a) of Council Regulation (EEC) No. 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No. 1408/71 [OJ, English Special Edition 1972(I), p. 159], as updated and amended by Regulation No. 118/97 ('Regulation No. 574/72'), and also of Article 5(2) of the Law on retirement pensions, claiming that the Sąd Apelacyjny w Krakowie had erred in holding that the non-contribution periods completed in Poland must be taken into account up to a maximum of one third of proven Polish and foreign contribution periods

On those grounds, the Court (Fifth Chamber) hereby rules: Article 45(1) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Regulation (EC) No. 1992/2006 of the European Parliament and of the Council of 18 December 2006, must be interpreted as meaning that, in the determination of the minimum insurance period required by national law for the purpose of the acquisition by a migrant worker of entitlement to a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

5. Closing remarks

Each EU Member State has its own national regulation of social insurance. For economic, historical and practical reasons, these differ from country to country. Therefore the differences between national systems could cause problems when the European citizen migrates and two or more Member States are involved. This article dealt mainly these problems and difficulties. However, the EU social security legislation coordinates these national schemes to ensure that the application of different national regulations does not adversely affect persons who move within the European Union and the European Economic Area. (EEA)

This coordination means that Member States may freely determine detailed rules such as the conditions that must be met in order to qualify for the rights, the

way in which the benefits are calculated, but they must at the same time respect the common rules and principles of EU legislation. [24]

Mulders case[25]

This request for a preliminary ruling concerns the interpretation of Articles 1(r) and 46 of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996.

The request was made in proceedings between Mr Mulders and the Rijksdienst voor Pensionen (National Belgian Pensions Office) ('the RVP') concerning the failure to take into account, for the purpose of calculating his retirement pension in Belgium, a period of incapacity for work in respect of which he received sickness insurance benefit in another Member State, namely the Netherlands.

Mr Mulders, a Belgian national resident in Belgium, worked in that Member State from 25 January 1957. As a result of an accident at work on 2 October 1962, a permanent invalidity rate of 10% was applied to Mr Mulders. The Belgian Fund for Accidents at Work awarded him a benefit with effect from 1 January 1969 on the basis of his permanent invalidity. As of 14 November 1966, Mr Mulders was employed as a frontier worker in Maastricht (the Netherlands).

On 10 February 1982, Mr Mulders was declared incapable of work in the Netherlands and therefore received, by way of sickness insurance benefit, the benefit provided for by the Netherlands WAO, equivalent to a rate of incapacity for work of 80% to 100% ('the WAO benefit'). Contributions were deducted from that benefit, including pension contributions paid under the Netherlands AOW into the Netherlands social security scheme.

Mr Mulders received the WAO benefit until 25 October 1997. During 1996, Mr Mulders applied for his pension, both in the Netherlands, to the Sociale Verzekeringsbank van Amstelveen (Social Insurance Office, Amstelveen) ('the Netherlands SV') and in Belgium, to the RVP.

By decision of 20 November 1997, the RVP granted Mr Mulders a retirement pension. However, for the purpose of calculating the pension, account was not taken of the period from 10 February 1982, the date on which he was recognized as being incapable of work in the Netherlands, to 25 October 1997. The RVP based its decision on the statement provided by the Netherlands SV setting out the periods during which Mr Mulders had been insured in the Netherlands.

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[24] HAJDÚ, József: Coordination of the old-age pension in the EU. In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 141.

[25] In Case C-548/11, REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeidshof te Antwerpen (Belgium), made by decision of 27 October 2011, received at the Court on 31 October 2011, in the proceedings Edgard Mulders v Rijksdienst voor Pensioenen.

On 13 January 1998, on examining the pension application submitted by Mr Mulders in the Netherlands, the Netherlands SV took the view that, during the period referred to above, Mr Mulders had not been insured under the Netherlands AOW because, at the same time as he had been in receipt of the WAO benefit, he had also been in receipt of a benefit in Belgium on the basis of accident at-work insurance. Such benefits could not be combined under Netherlands legislation and precluded any entitlement to the insurance cover provided by the Netherlands AOW.

By application of 12 February 1998, Mr Mulders challenged the RVP's decision before the Arbeidsrechtbank te Tongeren (the Labour Tribunal, Tongeren).

By judgment of 9 June 1999, that court declared the action unfounded. However, it referred to the competent Netherlands court, in accordance with Article 86 of Regulation No. 1408/71, Mr Mulders' claim for recognition of the period from 10 February 1982 to 25 October 1997 as a period of insurance for the purposes of his retirement pension.

On 8 July 1999, Mr Mulders lodged an appeal before the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp) against the decision of the Arbeidsrechtbank te Tongeren of 9 June 1999. He argued that the failure to take account of the period of incapacity for work following the definitive cessation of his activities as an employed person in the Netherlands was liable to affect the right of freedom of movement conferred by European Union law, by depriving him of benefits guaranteed by the legislation of a Member State.

On 24 November 1999, on the basis of the documents forwarded by the Arbeidsrechtbank te Tongeren, the Netherlands SV concluded that Mr Mulders had not been insured during the period in question under the Netherlands AOW. According to that authority, since Mr Mulders had definitively ceased working in the Netherlands on 10 February 1982, his old-age insurance position had to be assessed as of that date solely on the basis of Netherlands legislation, since the rules for determining the applicable legislation laid down in Regulation No. 1408/71 no longer had any effect in his regard. Moreover, the Netherlands SV also stated that, as regards the period from 10 February 1982 to 25 October 1997, Mr Mulders did not comply either with Article 6(1) (b) of the Netherlands AOW — which provides that, for AOW insurance purposes, a person who does not reside in the Netherlands is required to have worked in that Member State in a position that is subject to income tax — or with Netherlands legislation which precludes the cumulation of the WAO benefit with benefits received under foreign legislation

It is apparent from the European Commission's observations, which refer to information provided by the RVP in the main proceedings, that Mr Mulders has not appealed against the Netherlands SV's decision.

In those circumstances, the Arbeidshof te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
Is Article 46 of … Regulation … No. 1408/71 … infringed in cases where, in the calculation of the pension of a migrant worker, a period of incapacity for work during which a work incapacity benefit was awarded and contributions under the

[Netherlands AOW] were paid is not regarded as a "period of insurance" within the meaning of Article 1(r) of that regulation? On those grounds, the Court (Third Chamber) decided:

Articles 1(r) and 46 of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, read in the light of Article 13(2) (a) of that regulation and Articles 45 TFEU and 48 TFEU, are to be interpreted, for the purpose of calculating a retirement pension in one Member State, as precluding the legislation of another Member State under which a period of incapacity for work during which sickness insurance benefit — from which contributions were deducted by way of old-age insurance — was paid in that other Member State to a migrant worker is not regarded as a 'period of insurance' within the meaning of those provisions, on the ground that the person concerned is not resident in the latter State and/or was in receipt of a similar benefit under the legislation of the first Member State, which could not be combined with the sickness insurance benefit.

European Integration Studies, Volume 14, Number 1 (2018), pp. 47–57.

TOWARDS A EUROPEAN REGULATION OF AUTONOMOUS VEHICLES — EU PERSPECTIVES AND THE GERMAN MODEL*

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1. Introductory thoughts

Until recent years, it seemed so futuristic that the time would come when no drivers would be needed and cars would drive themselves. Today, the existence of so-called self-driving cars (in other words, autonomous or automated cars) and their participation in road transport is reality, and that raises countless legal and ethical questions. Nowadays, more and more essays and publications analyse the regulatory issues and various aspects of self-driving cars in a comprehensive manner.[1] In order to create a regulation on self-driving cars, the mapping of the legal questions raised by the appearance of these vehicles is essential. Among these questions, liability issues relating to self-driving cars are undoubtedly the most important questions, but other legal aspects shall also be examined. The use of intellectual properties (e.g. software) in the course of the operation of self-driving cars raises questions in the field of copyright law. Furthermore, the installation of so-called 'black box' into self-driving cars, specifically the data recording possibilities of this equipment and the prescription of the data retention duty in order to allow for the reconstruction of an incidental accident caused by the self-driving car, raises further questions. These issues fall within the field of data protection law.

The above-mentioned legal issues are regulated by the various national legislators in different ways. Nevertheless, it is a common feature of these legal regulations that they are always behind the technical reality since the process and rhythm of creating an appropriate legal background is incapable of competing with the

* 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 See: HILGENDORF, Eric–HÖTITZSCH, Sven–LUTZ, Lennart: *Rechtliche Aspekte automatisierter Fahrzeuge*. Nomos, Baden-Baden, 2015; LOHMANN, Melinda Florina: *Automatisierte Fahrzeuge im Lichte des Schweizer Zulassungs- und Haftungsrechts*. Nomos, Baden-Baden, 2016; MAURER, Markus–GERDES, J. Christian–LENZ, Barbara–WINNER, Hermann (eds.): *Autonomes Fahren Technische, rechtliche und gesellschaftliche Aspekte*. Springer, 2015; OPPERMANN, Bernd–STENDER-VORWACH, Jutta (eds.): *Autonomes Fahren. Rechtsfolgen, Rechtsprobleme, technische Grundlagen*. C. H. Becks, München, 2017.

explosive technological progress that has taken place in the automotive industry in the last few years.

On a world scale, the United States leads the way in regulating self-driving cars. This prominent role has both technological and legal reasons.[2] Nevertheless, in the last few years, the USA has had to face several rivals in the development of self-driving vehicle technology. In the Far East, namely in China and Japan, a large amount of money is spent on motor vehicle improvement; the creation of the appropriate legal environment is coming forth in the near future. Though technological developments also take place in Europe, the future regulation of self-driving vehicles shall be examined from several viewpoints and levels in this region.

On the next few pages, the main tendencies of current and future European regulation are reviewed. It is important to mention that in the legal practise of European states there is a lack of legal provisions specifically concerning the legal issues of self-driving cars. Nevertheless, from a legislative point of view, Germany can be regarded as a pioneer at the European level because it was the first state on the continent to adjust the legal environment to technological developments. Therefore, the German regulation amended in 2017 will be examined in detail, since the German legislature created not only a framework for the participation of self-driving cars on the road but also attempted to resolve liability issues in connection with possible damage caused by such vehicles with the amendment of the existing German Federal Road Traffic Act. Nevertheless, the recent regulatory tendencies of other countries will be reviewed as well.

2. European tendencies in the regulation of self-driving cars

As it was mentioned above, the future European regulation of self-driving vehicles shall be examined from several viewpoints and levels. This is caused by the fact that distances in Europe are relatively small, i.e. travelling is necessarily coupled with the crossing of borders. Therefore, the appearance of self-driving motor vehicles on European roads brings up the demand for relatively unified, or at least harmonised, legal regulation. It would be the best solution if technical and legal questions related to self-driving vehicles would be regulated not at the national (or Member State) level but at the supranational level. However, a future regulation to be adopted by the European Union would cover the European continent only in part. Thus, the creation of such a legal framework would not be a satisfactory solution since the crossing of the external borders of the EU with a self-driving car raises further questions that can be arranged only by means of bilateral agreements.

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[2] About the US regulation see: BEIKER, Sven: History and Status of Automated Driving in the United States. In: MEYER, Gereon–BEIKER, Sven (eds.): *Road Vehicle Automation*. Springer, Cham, 2014, pp. 61–70; SMITH, Bryant Walker: Automated Vehicles Are Probably Legal in the United States. *Texas A&M Law Review*, 1/2014, pp. 411–521; PEARL, Tracy Hresko: Fast & Furious: The Misregulation of Driverless Cars. *Annual Survey of American Law*, 1/2017, pp. 19–72; JUHÁSZ, Ágnes: The Regulatory Frames and Models of Self-Driving Cars. *Zbornik Radova: Pravni Fakultet u Novom Sadu*, 3/2018 (forthcoming).

Since transport policy forms part of the common policies of the European Union, the designation of the main directions of regulation of the various sectors (e.g. road transport, railway transport, aerial transport and navigation) falls within the competence of the EU. Therefore, the minimum rules on self-driving cars will presumably be worked out at the EU level. However, road transport is regulated at the national level by all Member States, in line with the previously mentioned international road traffic conventions.[3]

In the middle of the 2000s, a European Technology Platform (ETP) was set up with the recognition and support of the European Commission. As main tasks, the *European Road Transport Research Advisory Council* (hereinafter referred to as ERTRAC) cooperates with the actors of the road transport sector to create a common approach and to shape the image of the future of European road transport. At the same time, it drafts the possible strategies and the main directions of research and development in the field of road transport.[4] National road transport strategies are worked out along these lines.

However, during the last few years, the Commission has expressed that it intends to create an intelligent transport system that is in step with technological developments and utilises recent achievements in the field of the motor vehicles as an industry having strategic importance. Moreover, the system to be worked out within the European Union should comply with the various aims (e.g. sustainability) of the EU.[5] Towards the realisation of this goal, the Commission launched several projects (e.g. HAVEit, Interactive, AdaptIVe, i-GAME, AutoNOMOS, etc.), which concern the development and testing of self-driving vehicles.[6]

In October 2015, the Commission set up the *High Level Group on the Competitiveness and Sustainable Growth of the Automotive Industry in the European Union* (hereinafter referred to as *GEAR 2030*), consisting of 25 members who are experts from different sectors. Moreover, certain members of the Commission, certain Member States' ministers of economy, industry or transport, representatives of consumers, trade unions, environmental protection and road safety organisations (e.g. the European Association of Automotive Suppliers, the European Federation for Transport and Environment, the European Consumer Organisation, etc.) and observers of other organisations (e.g. the European Investment Bank, the Commit-

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3 In Hungary, Act No. I. of 1988 contains provisions on road transport.

4 About the tasks and activities of the ERTRAC, see the organisation's homepage (www.ertrac.org).

5 See White Paper — Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system, COM(2011) 144 final, Brussels, 28. 03. 2011; CARS 2020: Action Plan for a competitive and sustainable automotive industry in Europe, COM(2012) 636 final, Brussels, 08. 11. 2012. About the white paper see IVÁN Gábor: Közlekedési politika. In: KENDE Tamás (szerk.): *Bevezetés az Európai Unió politikáiba.* Wolters Kluwer, Budapest, 2015, pp. 657–660.

6 See MEYER, Gereon–DEIX, Stefan: Research and Innovation for Automated Driving in Germany and Europe. In: MEYER, Gereon–BEIKER, Sven (eds.): *Road Vehicle Automation*. Springer, Cham, 2014, pp. 71–81 and pp. 73–74.

tee of the Regions, the European Economic and Social Committee) also participated in the work of GEAR 2030.

In 2016, GEAR 2030 prepared a discussion paper for the Commission *(Roadmap on Highly Automated Vehicles)*[7], in which the working group defined the need for the revision and amendment of the legal and political framework of highly automated motor vehicles. According to GEAR 2030's paper, the abovementioned need is especially strong in the field of traffic rules, while provisions on the acquisition of driving license, road conformance, road signs, liability and insurance, as well as cyber security and data protection, shall also be revised or amended. As GEAR 2030 formulated, the final goal is the creation of a common legal foundation that is based on the international standards laid down by the UNECE and harmonised to the highest degree. In autumn 2017, GEAR 2030 published its final report[8], in which it made recommendations for the Commission and the Member States relating to the future direction of the regulation of automated and connected motor vehicles.

In May 2018, considering the recommendations of the report by GEAR 2030, the Commission published a communication[9], in which it envisaged the comprehensive revision of vehicle safety regulations[10] and the adoption of further legislative acts regarding the questions of self-driving cars. Furthermore, EU provisions on driving licenses[11] should also be amended in the near future due to the appearance of self-driving vehicles in open road traffic. Nevertheless, the direction of these amendments is uncertain at present since it has not been decided yet if the operation of these vehicles, provided that possession of special knowledge is needed, requires a new kind of driving license or not.

It is also important to note that both national legislators and the legislative bodies of the EU should take into consideration the amended and newly inserted provisions of the Vienna Convention[12] in the course of the adoption of their regulations on self-driving vehicles.

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7 https://circabc.europa.eu/sd/a/a68ddba0-996e-4795-b207-8da58b4ca83e/Discussion%20Paper%C2%A0-%20Roadmap%20on%20 Highly%20Automated%20Vehicles%2008-01-2016.pdf, (Date of download: 6th April 2018).

8 https://ec.europa.eu/growth/content/high-level-group-gear-2030-report-on-automotive-competitive ness-and-sustainability_en, (Date of download: 18th June 2018).

9 Communication from the Commission — On the road to automated mobility: An EU strategy for mobility of the future, COM(2018) 283 final, Brussels, 17. 05. 2018.

10 Regulation (EC) No. 661/2009 of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefore, OJ L 200, 31. 7. 2009, pp. 1–24.

11 Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences, OJ L 403, 30. 12. 2006, pp. 18–60.

12 The Convention on Road Traffic was signed in Vienna, on 8th November 1968. Although the Vienna Convention was regarded as a modern document at the time of its adoption, the jump in technological evolution in parallel with the appearance of new tendencies in the field of motor vehicle improvements make it clear that the revision of the Vienna Convention is indispensable since road traffic regulation, in the lack of an appropriate amendment, could not adapt itself to the regulation demands caused by technological evolution. With awareness of these factors, the Vi-

It is obvious that the revision of the EU regulations on road traffic is necessary because of the appearance and the future use of self-driving cars. Beyond this need, the potential directions of the revision became even more concrete in the last few years, therefore it should be taken into account that various legal regulations will be adopted in the EU, even if there has not been any explicit legal initiative up to now. EU legislation has its own time.

3. Legalisation of testing and operating self-driving cars on European roads

While the creation of a single EU regulation on self-driving cars will be a long, gradual and very slow process, several political declarations have been published at the national level in which the introduction of self-driving vehicles and the adoption of the regulatory framework have been scheduled. The activity of national legislators is also due to the pressure from leading motor vehicle producers since the existence of a clear, safe and predictable legal environment is particularly important to them. These manufacturers expect for good reason to see how and under which conditions the testing and the open-road use of automated vehicles or vehicles equipped with driving assistance technologies will occur.

Nowadays, there are more states that are interested in the introduction of self-driving vehicles, and that manifests this intention at the political level. However, there are also some states where the adoption of the related provisions or the modification of previously existing regulations is in process or has already occurred. For the present, the application of the latter solution, i.e. the amendment of the existing rules, is more common since the testing of self-driving vehicles (limited to a certain section of road and only in possession of a special permit) typically requires the appropriate amendment to road traffic rules.

In the *Netherlands*, for instance, road traffic rules were amended; since summer 2015, the wide open-road testing of self-driving vehicles (both cars and buses) is possible in possession of a permit from the competent authority.

In April 2016, a new legislative proposal was submitted, which suggested that the Swedish Transport Agency should be responsible for authorising permits to carry out trials at all levels of automation on *Swedish* roads. From 2017, the above mentioned authority is competent for authorizing permits and supervising trials in accordance with the law. The party that has been granted such permission is legally responsible for the operation of autonomous cars and for the damages caused by such vehicles operating in autonomous mode. However, in those cases, when vehicles operate at lower levels of automation, drivers will bear criminal and civil law liabilities. It is also important to mention that the Swedish government started a project in collaboration with the Volvo. The project titled *'Drive me — self-driving cars for sustainable mobility'* aims at testing highly autonomous vehicles on a larger scale with citizens.

enna Convention was amended in March 2016 on the initiative of several European countries, including Germany. As a result of this amendment, the previously mentioned Article 8 of the Vienna Convention was also completed with a further paragraph (5bis). At the same time, Article 39 of the convention was also amended.

In 2017, *Estonia* also has taken a step to introduce autonomous vehicles to the public, since it allowed the test driving of autonomous cars on the streets and roads of the country. However, the car must have a driver who sit within the vehicle and is able to take control of the car any time needed.

In *Hungary*, some steps have also been taken recently towards the future introduction of self-driving cars. In 2017, amendments to two ministerial decrees (Ministerial Decree KöHÉM No. 5/1990 of 12 April 1990 on the technical inspection of road vehicles and Ministerial Decree KöHÉM No. 6/1990 of 12 April 1990 on the technical conditions for placing and keeping road vehicles in circulation) were adopted[13] in relation to the testing of *vehicles for experimental purposes.* Thereafter the open-road testing of these vehicles became legal in Hungary.

It should be noted that Hungarian regulations use neither the expression 'self-driving vehicle' nor the term 'automated vehicle'. As an alternative, Hungarian legislators introduced a broader expression. An 'autonomous vehicle for experimental purposes' is such a vehicle for experimental purposes that (a) is aimed at the development of partially or fully automated operation and (b) has a qualified test driver who, depending on the level of automatisation of the vehicle, can exercise manual control when it is needed in cases that jeopardise traffic safety.[14]

Annex 18 of Decree No. 6/1990 contains the classing of the above-mentioned vehicles in line with internationally defined and recognised taxonomy.[15] Annex 17 of the same decree contains the detailed operational and technical conditions relating to autonomous vehicles with the aim of development.[16]

Although several European countries has already taken steps towards the introduction of self-driving cars, regarding the regulation of such vehicles at the European level, Germany is clearly a pioneer. The German legislation has already established the legal framework in which the participation of self-driving cars on the road is possible, despite the fact that until now there has been no adopted legislation at the EU level. Since the adopted legislation in Germany is unique at the European level and can be an example for other national and EU legislators, the main provisions will be described in more detail below.

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13 Ministerial Decree NFM 11/2017 of 12 April 2017 amending the Ministerial Decree KöHÉM No. 5/1990 of 12 April 1990 on the technical inspection of road vehicles and Ministerial Decree KöHÉM No. 6/1990 of 12 April 1990 on the technical conditions for placing and keeping road vehicles in circulation in relation to the testing of vehicles for experimental purposes.

14 See Decree No. 5/1990, Article §2 (3b), point b).

15 In 2014, the Society of Automotive Engineers (SAE) International published a standard by which the definition of autonomous motor vehicles and the five levels of automatisation were determined. See *Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*, https://www.sae.org/standards/content/j3016_201806/.

16 Annex 17 of the Decree No. 6/1990 contains provisions on the expected status of the autonomous vehicle for experimental purposes and prescribes the requirement of prior notification of testing in autonomous mode to the Minister of Transport. It also prescribes that the vehicle developer shall provide a data recorder in autonomous vehicles with the aim of development that can record the digital signals from the movement of the vehicle and can reconstruct events in the case of a road accident. The Annex settles the requirements of the switching system between manual control and automatic control.

4. The German model of the regulation of self-driving cars

In the last few years, the demand for national regulation of self-driving vehicles has been growing even stronger in Germany in parallel with the great leap forward in the technology of automated and self-driving motor vehicles. The leading German motor vehicle producers (e.g. Mercedes [Daimler], BMW, Audi, Volkswagen, etc.) presented their innovative solutions and the prototypes of self-driving cars, as well as the testing on the open road and the use in road traffic of such vehicles that have been built to serve future generations, required for clear and precisely defined frames. In recent times, the attention of lawyers also turned toward the direction of self-driving vehicles and problems generated by their appearance. They tried to draft a solution for all of those questions that arose due to the appearance of self-driving vehicles and to the lack of their appropriate regulation.[17]

In November 2015, the Federal Government of Germany published a strategy[18] which defined the need for the modification of road traffic regulations in order to make the use of self-driving cars on the road possible. Afterwards, the government proposed a draft[19] to the Bundestag, according to which the German Road Traffic Act (*Straßenverkehrsgesetz,* hereinafter referred to as *StVG*) was amended in 2017.[20] With the adoption of this amendment, the German legislature paved the way for the safe introduction of vehicles equipped with automated functions to the open road traffic.

The new Article §1a of the StVG contains the basic provisions on automated motor vehicles, distinguishing between motor vehicles with highly or fully automated driving functions. As a starting point, Article §1a establishes that the operation of a motor vehicle with highly or fully automated driving function is permissible provided *the function is used for its intended purpose*. In addition, the referenced article of the StVG defines the conceptual framework of the above-mentioned motor vehicles. In the application of the StVG, those motor vehicles shall be deemed as motor vehicles with highly or fully automated driving functions, which are equipped with technical equipment that is able to perform, after activation, driving tasks in compliance with traffic laws. The definition set by the act also specifies that the automated system can be manually overridden or deac-

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17 FRANKE, Ulrich: Rechtsprobleme beim automatisierten Fahren — ein Überblick. *Deutsches Autorecht*, 2/2016, pp. 61–66; JÄNICH, Michael Volker–SCHRADER, Paul–RECK, Vivien: Rechtsprobleme des autonomen Fahrens. *Neue Zeitschrift fuer Verkehrsrecht*, 7/2015, pp. 313–318.

18 See *Strategie automatisiertes und vernetztes Fahren*, https://www.bmvi.de/SharedDocs/DE/ Publikationen/DG/broschuere-strategie-automatisiertes-vernetztes-fahren.html (Date of download: 17th June 2018), p. 17.

19 About the draft of the amendment of the StVG, see in detail BERNDT, Stephan: Der Gesetzentwurf zur änderung des Strassenverkehrsgesetzes. Ein Überblick. *Strassenverkehrsrecht*, 4/2017, pp. 121–127.

20 About the new provisions of the StVG, see HILGENDORF, Eric: Auf dem Weg zu einer Regulierung des automatisierten Fahrens: Anmerkungen zur jüngsten Reform des StVG. *Kriminalpolitische Zeitschrift*, 4/2017, pp. 225–228 and KÖNIG, Carsten: Die gesetzlichen Neuregelungen zum automatisierten Fahren. *Neue Zeitschrift für Verkehrsrecht*, 3/2017, pp. 124–128.

tivated by the driver at any time. It is laid down as a further requirement that the necessity of manual vehicle control can be recognised by the driver, who is to be alerted visually, acoustically, tactilely or otherwise perceivably by the automated system. In case of alert, the automated system shall ensure enough time for the driver to take control over the motor vehicle.[21]

It is also important to note that the definition of motor vehicles with highly or fully automated driving functions diverge from the notion used by the US state regulations. The definition of the StVG is more complex since it requires not only the existence of automated driving function and the possibility of taking over control of the car but also the fulfilment of other conditions. Moreover, the StVG determines who shall be deemed a driver. According to Article §1a (4), a driver can be anyone who activates a highly or fully automated driving function and uses such a function for vehicle control, even if he does not control the vehicle manually by himself during the time of the intended use of the automated function. Due to the application of a fiction, the notion of driver also covers those persons who actually do not exercise control over the motor vehicle. This is the reason why the general road traffic requirements for drivers shall be applied to the driver of motor vehicles with highly or fully automated driving functions.[22]

The amended text of the StVG also defines the basic rules for the relationship existing between the driver and the highly or fully automated motor vehicle. These provisions determine those rights and duties (responsibilities) that can be exercised or shall be fulfilled by the driver during the use of the motor vehicle in automated mode. Nevertheless, these rights and duties have an additional aspect since they, because of the normative extension of the notion of driver, complement those rights and duties which are generally prescribed for drivers of traditional motor vehicles.

Article §1b (1) of the StVG provides for the driver to divert his attention from the road traffic occurrences and vehicle control when the vehicle is controlled by means of highly or fully automated driving functions. However, the driver shall remain alert at any time to fulfil his duty prescribed by law, i.e. to take over control of the car.

According to the paragraph (2) of Article §1b, the driver is obliged to take control of the motor vehicle without delay if he is expressly asked to by the automated system or he himself recognises or on the basis of obvious circumstances should recognise that the prerequisites for the intended use of automated driving functions no longer exist.[23]

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21 StVG, Art. 1a (2).

22 HILGENDORF, p. 226.

23 The above-mentioned paragraph of the StVG was strongly criticised by specialists. See WAGNER, Bernd–GOEBLE, Thilo: Freie Fahrt für das Auto der Zukunft? Kritische Analyse des Gesetzentwurfs zum hoch- und vollautomatisierten Fahren. *Zeitschrift für Datenschutz*, 6/2017, p. 265; SCHIRMER, Jan-Erik: Augen auf beim automatisierten Fahren! Die StVG-Novelle ist ein Montagsstück. *Neue Zeitschrift für Verkehrsrecht*, 6/2017, p. 255.

Beyond the general rules of motor vehicles with highly or fully automated driving functions, the StVG also contains special provisions regarding data management (§63a). These rules have been strongly criticised in the literature.[24]

During the use of highly or fully automated driving functions, some data is stored by means of the satellite navigation system. Among others, motor vehicles store information on the exact time and place (i.e. coordinates) when a change of vehicle control between the (human) driver and the highly or fully automated system takes place. Moreover, the system records the time when the driver is asked to take over or take back control of the vehicle, or when a technical failure or malfunction occurs. According to Article §63a (4), the owner of the vehicle shall delete the data stored after six months. Nevertheless, in certain cases (e.g. in case of a traffic accident), this data can be transmitted to the authorities. In those cases, the owner of the vehicle is obliged to delete the data stored (and transmitted) after three years.

Though the German legislature amended several provisions of the StVG regarding motor vehicles with highly or fully automated driving functions, the modification did not concern issues of liability. The liability of the driver is essentially based on Article §823 of the German Civil Code (BGB) and §18 of the StVG. However, beyond such general delictual (fault-based) liability, the rule of strict liability can also be applied as it is prescribed by Article §7 of the StVG. The application of strict liability in the case of damage caused by a motor vehicle is widespread in European liability systems. Nevertheless, the use of motor vehicles with highly or fully automated driving functions raises the question of whether the application of such a form of liability shall be rethought. As *Hilgendorf* noted in his already mentioned work, the German legislature should have redefined the existing liability structure with regard to highly or fully automated motor vehicles. Since such modification was not adopted, the keeper of a highly or fully automated vehicle is still liable for the damage caused by his vehicle under strict liability rules according to the related provisions of the StVG. However, while the driver can be exonerated from liability if the automated driving function was used and the damage was caused by the malfunction of the automated driving system, this exoneration cannot be applied to the keeper. Hilgendorf also added that other legal acts like the German Product Liability Act[25] and the related provisions of the German Criminal Code[26] have not been amended.[27] Accordingly, in the case of a defect of a product, the producer or the operator of the technological system can be liable for the damage. Such liability is also based on fault. In his recent work, *König* agrees

[24] SCHMIED, Alexander–WESSELS, Ferdinand: Event Data Recording für das hoch- und vollautomatisierte Kfz. Eine kritische Betrachtung der neuen Regelungen im StVG. *Neue Zeitschrift fuer Verkehrsrecht*, 8/2017, pp. 357–364.

[25] *Gesetz über die Haftung für fehlerhafte Produkte (ProdHaftG).*

[26] *Strafgesetzbuch (StGB)*, Art. 222 and Art. 229.

[27] HILGENDORF, p. 227.

with the opinion of Hilgendorf and emphasizes that rules about the liability of the keeper, driver and producer should have been created.[28]

As it was mentioned, the amendments and the newly inserted provisions of the StVG have been strongly criticised by both theoreticians and practitioners. At the same time, it should be noted that the introduction of the new provisions has an experimental nature, as it is shown by Article §1c of the StVG. According to this Article, after 2019, the competent ministry (i.e. the Federal Ministry of Transport and Digital Infrastructure)[29] is obliged to revise the application of the amended provisions of the StVG and evaluate the application on the grounds of economic considerations. Afterwards, the ministry is obliged to report the results to the Bundestag.

Nonetheless, it should also be noted that the amended provisions of the StVG, aimed at creating the legal framework for the use of self-driving cars in open road traffic, are unique and exemplary in Europe. Therefore, these new German regulations can serve as a model for other European states in the course of working out their own national regulations on self-driving cars.[30]

5. Closing remarks

The automatisation of motor vehicles is a long development process. In the course of such a process, modern technologies like lane-keeping assistance, blind spot detection systems, adaptive cruise control (ACC), autonomous emergency braking system (AEB) or collision avoidance systems have been the first steps. However, these assistance systems were superseded by new science and technology, and such systems that are able to take over full operation (control) of the vehicle for shorter or longer periods have been tested.

With regard to the distribution of driving tasks between the (human) driver and the assistance system, vehicles can be ranked into levels on the basis of the measure of their automatisation. The first level encompasses those motor vehicles that are fully and exclusively controlled by a human driver, i.e. operating tasks like steering, braking, accelerating or slowing down and so forth are performed by the driver. Contrary to this, those vehicles that are at the highest level of automatisation *("fully automated vehicles")* are able to drive themselves, i.e. these vehicles do not require human attention (and human presence) since the autonomous vehicle system controls all critical tasks, such as the monitoring of the environment and identification of unique driving conditions like traffic jams, and is capable of allowing safe participation in public road traffic. Although the development of self-driving vehicles is quite fast, their appearance on public roads is only predicted to

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[28] KÖNIG, Cartsten: Gesetzgeber ebnet den Weg fuer automatisiertes Fahren — weitgehend gelungen. *Neue Zeitschrift für Verkehrsrecht*, 6/2017, p. 251.

[29] *Bundesministerium für Verkehr unf digitale Infrastruktur, BMVI.*

[30] By way of example, the German provisions are examined by *Konrad Lachmayer* in respect to their practicability for the creation of future Austrian regulation on self-driving cars. See LACHMAYER, Konrad: Von Testfahrten zum regulären Einsatz automatisierter Fahrzeuge. *Zeitschrift für Verkehrsrecht*, 12a/2017 (Sonderheft), p. 519.

happen in the 2020s or 2030s at the earliest; currently the testing of highly automated vehicle prototypes on public roads is in progress.

At present, national legislators are expected to create regulations on self-driving cars. The law should keep abreast of technological development, even if it is obvious that the legal environment cannot change as fast as the improvement of automated vehicles and other modern technologies. Not only the producers of motor vehicles but also the members of society as a whole need a safe and predictable legal background that designates the legal parameters of automatised systems and defines the ethical and legal requirements to be fulfilled.

Resolving liability questions is indisputably a cornerstone of the regulation to be created in the future.[31] There is a basic need for designating the borders of the liability of the (vehicle) keeper and driver, the producer of the vehicle or the built-in automated driving system and the operator of the technological system. Furthermore, defining the relationship among these liability forms is also essential. The clear designation and delimitation of civil (law) liability cases is undoubtedly the most urgent task. Nevertheless, questions also emerge in other fields of liability (e.g. criminal law and administrative law) to be answered in the near future.[32]

The existence of self-driving cars is not futurity but reality, therefore the creation of the appropriate regulatory environment is necessary, both at the national and supranational level. National legislators should start from already existing (e.g. German, American) regulation and, learning from their noticed deficiencies, should aim to create such a legal framework that satisfies the needs that arise and arranges more broadly the questions relating to the use of self-driving vehicles in open road traffic.

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[31] DE BRUYNE, Jan–TANGHE, Jochen: Liability for damage caused by autonomous vehicles: a Belgian perspective. *Journal of European Tort Law*, 3/2017, pp. 324–371; GOMILLE, Christian: Herstellerhaftung für automatisierte Fahrzeuge. *Juristen Zeitung*, 2/2016, pp. 76–82; HARNONCOURT, Maximilian: Haftungsrechtliche Aspekte des autonomen Fahrens. *Zeitschrift für Verkehrsrecht*, 12a/2016, pp. 546–552; SCHRADER, Paul: Haftungsfragen für Schäden beim Einsatz automatisierter Fahrzeuge im Straßenverkehr. *Deutsches Autorecht*, 5/2016, pp. 242–246; TEMPL, Heinz: Über die Haftungsfrage von selbsttätig am Straßenverkehr teilnehmenden KFZ. *Zeitschrift für Verkehrsrecht*, 1/2016, pp. 10–14; JUHÁSZ, Ágnes–PUSZTAHELYI Réka: Legal Questions on the Appearance of Self-Driving Cars in the Road Traffic with Special Regard on the Civil Law Liability. *European Integration Studies*, 1/2016, pp. 10–28; LIIVAK, Taivo–LAHE, Janno: Delictual Liability for Damage Caused by Fully Autonomous Vehicles: The Estonian Perspective. *Masaryk University Journal of Law and Technology*, 1/2018, pp. 49–73

[32] BARTOLINI, Cesare–TETTAMANTI, Tamás–VARGA, István: Critical features of autonomous road transport from the perspective of technological regulation and law. *Transportation Research Procedia*, 17/2017, pp. 796–797.

European Integration Studies, Volume 14, Number 1 (2018), pp. 58–69.

INSTITUTIONAL ANSWERS TO THE 2008 CRISIS IN THE US AND THE EU: A COMPARATIVE STUDY

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1. Introduction

The crisis of 2008 highlighted the existence of a regulation deficit in the field of the supervision of financial markets and institutes both in the US and the EU, or rather the nearly non-existent supervision in the case of the EU.[1]

Some economists even argue that the crisis of 2008 was caused only by the lack of sufficient supervision; a legacy of the deregulation process, which took place during the Reagan era. Although it cannot be stated that the majority of the economist completely share this point of view — moreover the relevant literature is rather heterogeneous regarding the causes of the crisis[2] —, the author in his earlier studies[3] accepted that the lack of proper supervision was of paramount importance and argued so.

Another issue, which gives rise to debates, is the role of 2008 crisis in eliciting the crisis of the *Economic and Monetary Union* (hereafter: EMU), namely that the crisis of 2008 was the basic cause or only the catalyst?[4] In this regard the literature seems to be more homogenous and the majority of the authors accept that the innate structural weaknesses of the EMU — namely its asymmetrical structure, the lack of proper control mechanism and the lack of political union — foreshadowed the crisis.[5] Thus the crisis of 2008 could only be the catalyst of the crisis of the EMU.

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1 ANGYAL Zoltán: A gazdasági és monetáris unió elsődleges jogi keretei Lisszabon után. *Európai tükör*, Vol. 13 (2008), Issue 7–8, pp. 59–77.

2 As Andrew Lo noted: the only thing the economist can agree is that they cannot agree. — LO, Andrew, Reading About the Financial Crisis: A Twenty-One-Book Review. *Journal of Economic Literature*, Vol. L (March 2012), pp. 151–178, p. 173.

3 MARINKÁS György: A 2008-as válság lehetséges okai és a válságra adott amerikai és európai válaszok, különös tekintettel a törvényi szabályozásra. To be published in the 2019 issue of Publicationes Universitatis Miskolcinensis, *Sectio Juridica et Politica*; MARINKÁS György: *Változó közgazdasági elméletek, avagy a keynesi-modell alkalmazhatósága napjaink gazdasági válságának kezelésére*. Szakdolgozat. Miskolci Egyetem Gazdaságtudományi Kar Gazdaságelméleti Intézet Posztgraduális képzés (2013), p. 104.

4 The author is intends to seek an answer for this question in his next study to be written within the frameworks of the above mentioned project.

5 SANDBU, Martin, *Europe's Orphan. The Future of the Euro and the Politics of Debt*. Princeton University Press, Princton, 2015, 336.

Although it's beyond the scope of the current study to discuss these topics, one cannot evade the fiscal and monetary crisis management, when the crisis of 2008 and the crisis of EMU come into question. The author — referring to his earlier studies[6] — argues that, while as late as 2014 the crisis management of the US seemed to be more viable, starting from that year the economy of the EU 28 started to overtake the US economy in several indicators. This growth cannot be separated from the legal environment: as Kelleher and his fellow co-authors argue:[7] strong and prospering market economies need strict and consequent regulation.[8] Having regarded this, the author examines how the legislation of the US and the EU responded to the crisis.

2. The answer of the US legislation: The Dodd-Frank Act[9]

The legislation of the US responded to the evident regulation deficit by enacting the Dodd-Frank Act, which is focused on the following: (i) the establishment of an independent and competent consumer protection authority and more generally (ii) creating a more effective oversight of the financial markets by reforming the rules on the Fed[10] and the financial institutions and eliminating the system-level risks. Furthermore (iii) ending the governmental bail-out of 'too big to fail'[11] institutions, so tax-payers would not pay the cheque instead of the great firms anymore. The latter provision of the Dodd-Frank Act, which is recorded in the Preamble[12] too, is one of the most debated parts of the Act.[13]

The author introduces the provisions of the act and the concerning critiques according to the three focal points. In order to reform the regulation, the act established the *Bureau of Consumer Financial Protection* (hereafter: BCFP), headed by a director appointed by the president and approved by the Senate. The BCFP has full autonomy,[14] its own budget and cannot be instructed by any other federal body. The BCFP has supervision powers and is entitled to apply coercing

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6 See footnote No. 3!

7 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*, 20 (2016), pp. 145–147.

8 Even if President Trump surely disagrees with this, as introduced in the second chapter.

9 Public Law 111–203 (July 21, 2010), H.R. 4173 (hereafter: Dodd-Frank Act).

10 The Federal Reserve System, the US central bank.

11 The "too big to fail" refers to the phenomenon that leaders of the great financial institutions — being aware of the significance of their firms and that the government cannot let them down due to their weight in the economy — behave reckless and bare too much risk. The costs of the bail-outs are paid by the tax-payers in the end. — KELLEHER, op. cit. p. 142.

12 To […] end "too big to fail", to protect the American taxpayer by ending bailouts […] — The Preamble of the Dodd-Frank Act.

13 *Martin Sandbu* argues that it is a key element in the US regulation and, which in his view makes it better than the regulation of the EU: instead of keeping alive the so called 'sick enterprises' it is more advisable to liquidate them before they cause more serious problems and let the market fill in the gap. Although the EU too, started to liquidate these enterprises in 2014, it was late and half-hearted. — SANDBU, op.cit. p. 313.

14 This wide-scale autonomy served as a ground for criticism and a constitutional supervision, which is to be introduced in the following parts.

measures if needed. Its discretional power to issue decrees[15] allows the implementation of effective measures to protect the consumers.

In order to foresee and to react to any potential threats, the Act established the *Financial Stability Oversight Council* (hereafter: FSOC). Its membership is constituted by members with and without voting rights. Without being exhaustive, the Secretary of the Treasury — holding the position of the FSOC president at the same time —, the chairman of the *Board of Governors of the Federal Reserve System* — namely the president of the Fed[16] —, and the president of the BCFP. The task of the FSOC is to hinder the development of 'too big to fail' firms, by issuing recommendations for the Fed and to determine the permissible maximum extent of the gearing[17] — or leverage according to the terminology of the Dodd-Frank Act.

The regulation closed the back doors for the hedge funds — the principle institutions of the *shadow banking system* — by extending the supervision scope of the *Securities and Exchange Commission* (hereafter: SEC) over the above mentioned banking system.[18]

Another focal point of the Dodd-Frank is cutting the licences of the Fed as the lender of last resort (hereafter: LLR). As the preamble of the Act stipulates, it cannot occur again, that taxpayers shall pay the cheque instead of the top managers of financial enterprises. According to the provisions of the act the shareholders and investors shall bear the losses — as it should be according to the rules of capital economy — moreover the managers exhibiting shall bear criminal liability in case of attributable behaviour.

The new regulation — just the Act established the Fed — prohibits any occasional lending to insolvent firms, which fall outside the bank system. As a progress however, it regulates the neutralisation of the threat that these firms mean to the financial system. These firms may ask the *Orderly Liquidation Authority* (hereafter: OLA) for a bail-out in case they fulfil the criteria set-out in the law. Should the firm fail to fulfil them, its liquidation shall be ordered. In order to facilitate the liquidation, every firm shall prepare and refresh its liquidation plan; this enables the oversight authority to understand the functioning of the given firm and to easily liquidate the firm if it remains the only option.[19]

Having regarded that the Dodd-Frank applies crisis management tools, which are unfamiliar with the mind-set of a casual American entrepreneur — e.g. strong central regulation, privileges to smaller market actors — its enactment was encompassed by heated debates. As *Alain Sherter* wrote: 'Loved by Few, Hated by

15 Dodd-Frank Act, Title X, § 1001–1100.

16 The Board of Governors of the Federal Reserve System is the collective leadership of the Fed. For more details, please visit: http://www.federalreserve.gov/aboutthefed/bios/board/default.htm (05/12/2018).

17 Dodd-Frank Act, Title I–II., § 101–217.

18 Dodd-Frank Act, Title XIV, § 1400–1498.

19 Dodd-Frank Act, Title II, § 201–217.

Many.'[20] Those who criticized the act can be divided into two groups: the *first group* consists of those, who attacked or attack the act on an ideological basis — since it is incompatible with pure-blooded Republican mind-set[21] —, without weighting long-run effects of the Act. The second group is consists of those, who agree with the necessity of the regulation and the aims of the act, but would welcome a more radical shift in the regulation. That is to say the Act became exposed to cross-fire.

Instead of grouping the critiques as pro and contra, the author introduces the critiques grouped into two categories: *firstly* those, which concern the reform of the regulation and *secondly,* those which concern the new regulations on the Fed as the lenders of last resort.

As mentioned above, those critiques, which find the reforms insufficient or on the contrary and believe it to be overgrown and self-contained. First of all it is a rather common critique that the act does not provide a real solution to the problem caused by 'too big to fail' firms: the Dodd-Frank only restricts the growth of the firms by fusion and fails to regulate the inner growth of financial firms. Having regarded the fact that the five biggest financial institutions of the US grew by 20% since the outbreak of the crisis, this insufficiency in the provisions can be regarded as grave, and critiques — which state that the otherwise avoidable risks still exist — are as well grounded.[22] *Cary M. Shelby* argues that the regulation on the hedge funds too, cannot be regarded as satisfactory, while a wider sphere of authority and more serious tools for the SEC could solve the problem in her opinion.[23]

Other authors argue that the reforms grant too wide-authority for the regulating bodies: *J. V. Verrett,*[24] *Iain Murray*[25] and *Arielle Rabinovitch* criticise the wide-scope of authority of the BCFP, the FSOC and the FDIC and the unheard immunity of their

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[20] SHERTER, Alain: *Dodd-Frank Financial Reform: Loved by Few, Hated by Many, Essential to All*. CBS, 22 July 2011.– Online available at: http://www.cbsnews.com/8301-505123_162-43554955/dodd-frank-financial-reform-loved-by-few-hated-by-many-essential-to-all/(5/12/2018);
The webpage of the BCFP http://www.consumerfinance.gov/ (5/12/2018).

[21] The Republican economic policy is based on the presumption that the market can solve everything better and more effectively, while regulation — being a self-contained thing by its very nature — only hinders development. They brought up these arguments against the Dodd-Frank Act too, passing over the fact that, while the economy was soaring in the 1930s — despite the strict regulation unprecedented earlier —, this cannot be said in the case of the post 1980s deregulation. One should remember the words of Kelleher and his fellow co-authors: strong and prospering market economies need strict and consequent regulation. — KELLEHER op. cit. p. 134.

[22] GREEN, Edward F.: Dodd-Frank and the Future of Financial Regulation. *Harvard Business Law Review Online* (11 October 2011), Chapter V. — Online available at: http://www.hblr.org/2011/10/greene-symposium-dfa/ (6/06/2018).

[23] SHELBY, Cary M.: Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk. *Boston College Law Review*, Vol. 58 (2017), pp. 639–701.

[24] VERRETT, J. V.: About The Dodd-Frank Act, George Washington Would Be Turning Over In His Grave. *Forbes,* 2 July 2012 — Online available at: http://www.forbes.com/sites/realspin/2012/07/02/about-the-dodd-frank-act-george-washington-would-be-turning-over-in-his-grave/(15/06/2018)

[25] MURRAY, Iain: Rethinking the Consumer Financial Protection Bureau. *Competitive Enterprise Institute*, 16 August 2017 — Online available at: https://cei.org/shrinkinggov/cfpb (14/06/2018).

decisions from judicial review. Based on Article and III of the US Constitution the sole legislator is the Congress and the judicial branch shall exercise control over the executive branch.[26] Not surprisingly the first petition[27] aiming to annul these provisions of the act as unconstitutional[28] was submitted to the *District of Columbia Court* (hereafter: D.D.C.) very soon after the act was enacted. The D.D.C. suspended[29] the case until the very same court delivered judgement in the *PHH Corp. v. Consumer Financial Protection Bureau* case in 2016. The courts stated that the wide-scope of authority of the one-person managed authority and its endowments paid out automatically by the Fed and without the approval of the Congress constitute an infringement of the Constitution.[30] On the other hand, the Court pointed out that in case these problems are remedied, the Act would be in conformity with the constitution. The judgement — which was delivered in the finish of the 2016 presidential election —, received politically overheated reactions from both sides: while the Republicans interpreted it as a proof of the Obama administration's unsuccessful crisis management, the Democrats were afraid of losing the efforts already achieved.[31] The BCFP filed an appeal against the judgement the appellate court held its first hearing on the 24 May 2017. The democrats rang the storm-bells: when Donald Trump became the president of the US, the transformation of the BCFP into a collective body — with Republican majority — and its subordination to the Congress and the President became a possible scenario.[32] To state it bluntly: the Trump administration strives to take the sting out of the BCFP,[33] in order to please the Wall-Street, which prefers deregulation.[34]

This process was accelerated by the resignation of the first director of the BCFP, *Richard Cordray* – a man with a Democrat attitude –, who chose to run for the governor's seat in Ohio as he claimed in his resignation letter of November

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26 RABINOVITCH, Arielle: Constitutional Challenges to the Dodd-Frank. *The Antitrust Bulletin*, Vol. 58 (2013), No. 4, pp. 635–649.

27 D.D.C., *State National Bank of Big Spring et. al vs. BCFP et al*. (2012).

28 SIMON, Ammon: Dodd-Frank Is Unconstitutional. *National Review Online*. – Online available at: http://www.nationalreview.com/bench-memos/303812/dodd-frank-unconstitutional-ammon-simon# (14/06/2018)

29 D.D.C., MEMORANDUM OPINION re 53 59 parties' cross-motions for summary judgment. Signed by Judge Ellen S. Huvelle on July 12, 2016.

30 D.D.C., *PHH Corp. v. Consumer Financial Protection Bureau*, Case No. 15–1177 (October 11, 2016), pp. 99–100.

31 LAMBERT, Lisa–RAYMOND, Nate: U.S. Court Rules CFPB Structure Unconstitutional, Bureau Can Still Operate. *Reuters*, October 11, 2016. – Online available at: http://www.reuters.com/article/us-usa-court-cfpb-idUSKCN12B1TN (15/06/2018)

32 EDER, Steve–SILVER-GREENBERG, Jessica–COWLEY, Stacy: Republicans Want to Sideline This Regulator. But It May Be Too Popular. *The New York Times*, 13 August, 2017 — Online available: https://www.nytimes.com/2017/08/31/business/consumer-financial-protection-bureau.html?mcubz=3 (05/12/2018).

33 HSIEH, Lawrence, U.S. consumer bureau faces fateful test in U.S. appeals court. *Reuters*, May 18, 2017. Online available at: http://www.reuters.com/article/bc-finreg-cfpb-structure-idUSKCN18D2EU (05/12/2018).

34 KELLEHER op.cit. pp. 143–144.

2017. — Obviously he has ran out of friends as the director of the BCFP[35] — President Trump acting within his discretionary powers vested on him by the *Federal Vacancies Reform Act*[36] appointed *Mick Mulvaney* as acting director. A debate rose regarding the act of the president: the Dodd-Frank Act provides that the resigned director shall be succeeded automatically by his deputy, which renders the presidential appointment unnecessary.[37] Nevertheless, the D.D.C. — deciding on the matter — ruled in favour of *Mulvaney* on the 28 November 2017,[38] who could take his chair. The new director — who earlier stated in public that the BCFP should be eliminated[39] — did not waste time: in January 2018 he filed an application for a zero dollars (sic!) budget for the Bureau. He argued that it was necessary to cut the federal debt.[40] Furthermore he terminated several proceedings, which concerned great financial firms. — Including proceedings against 'payday' lenders, which provide loans with an interest rate of 900%[41] for people in necessity and without choice.[42]

On the other hand, the BCFP achieved a victory on the 31 January 2018: the appellate court of the D.D.C. found the structure and the director's wide-scope of powers constitutional.[43] However the Supreme Court of the US will have the final word on the matter, the BFCP desperately needed this moment of ease in an

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35 BARRETT, Paul: The Head of the Consumer Financial Protection Bureau Isn't Going Down Without a Fight. *Bloomberg*, 20 July 2017 — Online available at: https://www.bloomberg.com/news/articles/2017-07-20/the-head-of-the-consumer-financial-protection-bureau-isn-t-going-down-without-a-fight (06/06/2018).

36 Federal Vacancies Reform Act of 1998, S. Rept. 105–250; 105th Congress (1997–1998).

37 ROGERS, Katie–BERNARDNOV, Tara Siegel: President Wins Round in the Battle for the Consumer Bureau. *The New York Times*, 28 November 2017 — Online available at: https://www.nytimes.com/2017/11/28/us/politics/mick-mulvaney-leandra-english-consumer-bureau.html (05/12/2018)

38 D.D.C. *Leandra English v. Donald Trump, et al*., No. 1:17-cv-02534 (D.D.C. 2017).

39 KOLHATKAR, Sheelah: The Steady, Alarming Destruction of the Consumer Financial Protection Bureau. *The New Yorker*, 7 February 2018. — Online available at: https://www.newyorker.com/news/news-desk/the-steady-alarming-destruction-of-the-consumer-financial-protection-bureau (05/12/2018).

40 HAYASHI, Yuka: CFPB Requests $0 Budget, Will Draw Down Reserves Instead. Acting Director Mick Mulvaney says move will cut the federal deficit. *The Wall Street Journal*, 18 January 2018 — Online available at: https://www.wsj.com/articles/cfpb-requests-0-budget-will-draw-down-reserves-instead-1516291949 (14/06/2018).

41 ARNOLD, Chris: Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders. *National Public Radio*, 24 January 2018 — Online available at: https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders (05/12/2018).

42 The typical customers of these payday lenders are people below the poverty line, who are denied to have access to credit cards at commercial banks.

43 The court argued that while the president may hold any official accountable, the constitution can be interpreted in a way to allow the quasi legislators and quasi-judicial bodies or persons to act independently in certain cases. — Court of Appeals for the D.D.C., *PHH Corp. v. Consumer Financial Protection Bureau*, Case No. 15–1177 (January 31, 2018), pp. 21–22.

unfriendly political environment,[44] which still threatens its very existence. — One should only mention the acting-director of the Bureau, who openly opposed its creation.

Edward F. Green criticized the regulation as a whole in his study: he believes that the act renders the already complicated system of regulation even harder to comprehend.[45] New regulating authorities mean bigger state apparatus, which — as a legacy of American history[46] — is opposed by most of the American people, as the growing administrative burdens can reduce the competitiveness of the country.[47] At this point the classic Wall Street pet subject arises: the cost-effectiveness analysis, or rather the lack of it in case of the Dodd-Frank. The *Batkins–Brannon* co-authors claimed that based on their calculations, the execution of the act cost 20 billion USD only until 2013.[48] It is worth mentioning that the crisis caused damage worth 20 trillion (sic!) USD, and without a proper regulation it's beyond guarantee that it will not happen again. In the light of this fact Kelleher and his fellow co-authors ask whether it is fairer to make the financial institutions pay for the regulation or — in case of another crisis — the multiple of that will be 'charged' on the society.[49]

The latter question is the so called moral dilemma, which occurred concerning the bail-out of the 'too big to fail' enterprises. The legislation decided that by cutting the licences of the Fed as the LLR. — The second group of critiques concerns this issue. — Green argues that the government cannot let the great financial institutions go down — independent from the behaviour of their leader — otherwise the economic actors would have to face unforeseen consequences. Proper regulation is the key in his opinion.[50] *Eric Posner* illustrates the moral dilemma by an ample example:

'As an analogy, imagine that a town is plagued by residential fires, caused by the carelessness of homeowners who do not install smoke detectors and store

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44 PUZZANGHERA, Jim: Consumer Financial Protection Bureau's structure is constitutional, appeals court rules in a blow to agency's opponents. *The Los Angeles Times,* 31 January 2018 — Online available at: http://www.latimes.com/business/la-fi-cfpb-court-ruling-20180131-story.html (15/June/2018).

45 GREEN: op.cit.

46 See: SUNDQUIST, James L.: *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States.* Brookings Institution Press, Washington D.C., 1983, p. 466.

47 Verrett argues that the obligations, which the new regulation prescribes on the credit institution — among others the obligation to evaluate the financial situation of the potential borrowers —, may result in the exclusion of those who live under the poverty line or have low income. These people will not receive credit or only for a higher cost. Verrett took a critical standing point regarding the BCFP's jurisdiction over credit cards, granted by the so called *Durbin amendment* of the Act. Verrett argues that several leading companies of our times — like the Google, the Youtube — financed its start by credit card loans, when they started to operate in garages of their founders, who could not do the same under the current legislation. — See the study of Verrett, cited above!

48 BATKINS, Sam–BRANNON, Ike: The Unknown Costs of Dodd-Frank. *Regulation,* Vol. 36 (2013), No. 4, pp. 4–5.

49 KELLEHER, op.cit. p. 142.

50 Green argues that — in the long-run — a rigid regulation will hinder the American firms in keeping their competitiveness. — GREEN: op.cit. Chapter IV/3.

flammable materials in their basements. The town could sensibly address this problem by enacting a fire code that it enforces with inspections. It could also address this problem by directing the fire department to replace hoses with squirt guns and tanker trucks with horse drawn carriages. The second approach would certainly address moral hazard; residents, fearful that the fire department will not save their houses, would be more careful. But not all fires are caused by carelessness, and not all careless fires should be allowed to burn, since, by a process similar to financial contagion, fires may spread from house to house. The town does better with the fire code along with a modern fire department. And so with the LLR.'[51]

Posner argues that the bankruptcy of the Lehman-Brothers was the point of no return, where the fire could still have been extinguished: afterwards the crisis was out of control and the occurrence of another 1929 became a possible scenario. Although the Lehman-Brothers could have been saved with a financial aid, the hands of the Fed were tied. Subsequently — realizing how grave the crisis was, the Fed — circumventing the regulation — provided financial subsidies to several financial institutions. Its lag proved to be fatal, however.[52] *Buchanan and Dorf* also argue that tying the hands of the Fed as LLR is a bad idea: as they point out, the Fed did a great job managing the crisis, which was possible due to its political independence, [53] which is under fire at the moment. [54]

3. The institutional answers of the EU

As a response to the crisis and in order to prevent the possible risks threatening the stability of the European Financial System, in 2011 the EU established the *European System of Financial Supervision* (hereafter: ESFS), which is built-up as follows:

The European Parliament and the Council created the *European Systemic Risk Board* (hereafter: ESRB) — by adopting Regulation No. 1092/2010[55] — and vested special spheres of authority on the *European Central Bank* (hereafter: ECB)

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51 POSNER, Eric A.: What Legal Authority Does the Fed Need During a Financial Crisis? *Minnesota Law Review*, Vol. 101 (2017), pp. 1529–1578, p. 1576.

52 POSNER: op.cit. p.1530.

53 BUCHANAN–DORF: op.cit. pp. 83–85.

54 WORSTALL, Tim: President Trump, Keep The Federal Reserve Independent — It's Too Expensive Not To. *Forbes*, 13 February 2017 — Online available at: https://www.forbes.com/sites/timworstall/2017/02/13/president-trump-keep-the-federal-reserve-independent-its-too-expensive-not-to/#27f3078429d7 (19/06/ 2018); VINIK, Danny: What Trump could do to the Federal Reserve? His inner circle contains some radical monetary thinkers — and Wall Street bankers. Who will prevail? *Politico*, 15 March 2017 — Online available at: http://www.politico.com/agenda/story/2017/03/donald-trump-remake-federal-reserve-monetary-policy-000360 (14/06/2018).

55 Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15. 12. 2010, pp. 1–11).

concerning the ESRB by adopting Regulation No. 1096/2010/EU.[56] Second and third articles of the said regulation state that:

'The ECB shall ensure a Secretariat, and thereby provide analytical, statistical, logistical and administrative support to the ESRB. […] The ECB shall provide sufficient human and financial resources for the fulfilment of its task of ensuring the Secretariat.'[57]

Article 4 states that: *'The ESRB's Chair and its Steering Committee shall give directions to the head of the Secretariat on behalf of the ESRB.'* [58]

Article 5 of the regulation states that:

'The ESRB shall determine the information necessary for the purposes of the performance of its tasks, as set out in Article 3 of Regulation (EU) No. 1092/2010. In view thereof, the Secretariat shall collect all the necessary information on behalf of the ESRB on a regular and ad hoc basis […]' [59]

The EU legislation created furthermore the *European Supervisory Authorities* (hereafter: ESAs), which consists of: the *European Banking Authority*[60] (hereafter: EBA) — which is responsible for contributing to the formulation of EU-wide regulation and supervision standards —, the *European Insurance and Occupational Pensions Authority*[61] (hereafter: EIOPA), which is also responsible for regulation and supervision and strives at enhancing the functioning of the internal market, and last, but not least, the *European Securities and Markets Authority*[62] (hereafter: ESMA).

The network based on the domestic supervisory authorities is also part of the ESFS.

In the following the author introduces the functioning of the ESRB and the ESMA in details, but with emphasis put on to the latter one. The task of the ESRB is to continuously monitor and evaluate the innate risks of the system. Furthermore the ESRB contributes to financial stability and supresses the impacts arriving outside the internal market, which may have an effect on it or on the real

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56 Council Regulation (EU) No. 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15. 12. 2010, pp. 162–164).

57 Ibid, Article 2, 3.

58 Ibid, Article 4.

59 Ibid, Article 5.

60 Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15. 12. 2010, pp. 12–47).

61 Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15. 12. 2010, pp. 48–83).

62 Regulation (EU) No. 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15. 12. 2010, pp. 84–119).

economy.[63] Although the ESRB is independent from the ECB, it is seated in the ECB headquarter and its secretariat is also provided by the ECB.

The aim of the ESMA is the contribution to the stability and effectiveness of the financial system, including the protection of the interests of the citizens of the union and the enterprises seated in the union. In order to achieve this, the ESME strives to assure the transparency and the regular functioning of the financial markets and to enhance the international supervision cooperation. The sphere of authority of the ESMA was widened by the Regulation No. 236/2012 of the European Parliament and of the Council on short selling[64] (hereafter: Regulation on short selling) which was adopted on the ground provided by Article 114 of the TFEU.[65] Article 28 of the said Regulation on short selling vested new intervention powers on the ESMA, which — among others — could:

'Prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.'[66]

The United Kingdom in its application submitted to the *Court of Justice of the European Union* (hereafter: CJEU) asked the Court to annul Article 28 of the Regulation on short selling. [67] The government of the UK argued that Article 28 actually authorizes the ESMA to adopt quasi-legislative measures of general application without any ground implied in Article 114 and that such power is contrary to the principle established in the Romano-case,[68] namely that legislative powers on the institutions shall only be vested by the founding treaties. The advocate general accepted only one legal basis — the one, which concerned the Article 114 of the TFEU — out of the four brought up by the government of the UK.[69] The CJEU in contradiction with the opinion did not state the infringement of the said principle,[70] moreover did not bother to disprove the opinion of the advocate general. — Although the CJEU is not obliged to do so, having regarded

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63 Regulation No. 1092/2010, Preamble, Section 10.

64 Regulation (EU) No. 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps Text with EEA relevance (OJ L 86, 24. 3. 2012, pp. 1–24).

65 Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26. 10. 2012, pp. 47–390).

66 Regulation (EU) No. 236/2012, Article 28, Section 1, Point (b).

67 For more details please see: ANGYAL Zoltán: Jogvita az európai értékpapír-piaci hatóság rendkívüli körülményekkel kapcsolatos beavatkozási hatásköréről. *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica,* Tomus XXXIII (2015), pp. 129–143.

68 C-98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité* case, the judgment of the CJEU, 12 May 1981.

69 C-270/12, *United Kingdom vs. European Parlimanet and the Council of the European Union*, the opinion of advocate general *Niilo Jääskinen*, 12 September 2013, paras. 102–103.

70 C-270/12. *United Kingdom vs. European Parlimanet and the Council of the European Union*, the judgement of the CJEU, 22 January 2014, paras. 119–120.

the significant differences in the interpretation of law, it should have done it. — As *Angyal Zoltán* wrote: the Court delivered an amicable decision for the EU in order to protect the authority of the ESMA, which is needed for the successful functioning of the European Banking Union in the future.[71]

In addition to creating the ESFS, the Council — as a transitional solution — called the *European Financial Stabilisation Mechanism*[72] (a hereafter: EFSM) into being. The aim of the creation of the EFSM was to grant credit to the member states, which struggle with problems. To draw in outline, the procedure starts, when a member state — after consulting with the ECB — submits its claim to the European Commission. The Council shall decide on granting the credit with a qualified majority and the European Commission shall supervise its investment.[73] The *European Stability Mechanism*[74] (hereafter: ESM) started to function in 2012.[75] The aim of its creation was to provide the EU with an LLR, which — in case of necessity — could grant credits to the member states and financial institutions facing crisis. Spain, Ireland, Portugal, The Republic of Cyprus and Greece have asked for credit so far.[76]

4. Summary

In the introductory chapter the author of the current study argued that the lack of sufficient and proper regulation played an important role in inducing both crises. The US and the EU legislation realizing this fact started to create a stricter regulation, or in the case of the EU, remedy the lack of it.

Both legislations enhanced the supervision of financial markets and focused on monitoring and evaluating system-level risks in order to prevent any possible crisis in the future. There are differences too: while the EU created its own LLR for the first time, the US opted for cutting the powers of the Fed as LLR. *Martin Sandbu* argues that it is a key element in the US regulation, which — in his view — makes it better: instead of keeping alive the so called 'sick enterprises' it is more advisable to liquidate them before they cause more serious problems and let the market fill in the gap. Although the EU too, started to liquidate these enterprises in 2014, it was late and half-hearted.

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71 ANGYAL: 2015 op. cit. p. 143.

72 Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12. 5. 2010, pp. 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, pp. 1–2).

73 Regulation No. 407/2010, Article 3.

74 ESM Treaty — Treaty Establishing the ESM (signed on 2 February 2012, entry into force: 27 September 2017).

75 The EFSM, however, remains in place for specific tasks such as the lengthening of maturities for loans to Ireland and Portugal and providing bridge loans. — For further details please visit: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/loan-programmes/european-financial-stabilisation-mechanism-efsm_en (06/12/2018)

76 For further details please visit: https://www.esm.europa.eu/financial-assistance (06/12/2018)

Furthermore the EU lags behind the US in one aspect and it does not seem to change in the near future: the EU is still not in phase of political union, which is one of the greatest shortcomings of the EMU as several authors argue.[77] On the other hand, the supervising authorities of the US too, have to face some serious threats: the new president and his perception on economic policy hinder the results of the legislation achieved under the Obama administration. President Trump, as an entrepreneur and Republican opposes strict regulations and extensive financial market supervision. The case of the BFCP clearly demonstrates his attitude.

Thus the question is open: will the US regulation and supervising system remain as developed as the one of the EU, or the new administration will slowly, but steadily erode it and restore the era of deregulation. The latter one will surely lead to another crisis.

[77] The author intends to elaborate this matter in his next publication.

European Integration Studies, Volume 14, Number 1 (2018), pp. 70–78.

CODIFICATION RESULTS IN THE HUNGARIAN PRISON LEGISLATION

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1. Introduction

For the purposes of this scientific paper it is necessary, at least in brief, to characterize the terms of injured party, claim for damages and adhesion proceedings. These terms are defined in Criminal Procedural Code. Injured party is the person who has been harmed on health, has been caused a property damage, moral or other damage, or there were violated or threatened legally protected rights or freedoms, by the crime.[1] The common feature of the damages is the fact that they were in causal relationship with a crime for which criminal prosecution is carried out, and at the same time it can be objectively expressed in money. The term "injured party" cannot be confused with the term "victim of the crime". The legal definition of the term injured party is contained in the Criminal Procedure Code, where the injured party may be a natural person as well as a legal entity — person (or a state). The term of victim of a crime is defined in Act No. 274/2017 Coll. about Victims of crimes and on Amendments to certain Acts (the "Victims Act") in the current version. The Criminal Procedural Code distinguishes two groups of injured party in the criminal proceedings:

(a) the injured party who is entitled to compensation, that is injured party who has, in addition to the general rights mentioned in § 46 par. 1 of Criminal Procedural Code, as well the right to be the subject of an adhesion proceedings and has the possibility to claim the damages, it means he has the right to get compensation for the damage directly in criminal proceedings. In this case, injured party:

- has claimed for damages against the accused person (the injured party who has suffered any of the categories of damage by a crime, as well as non-material damages);
- has claimed for damages before state authority in criminal proceedings (police organs, prosecutor);

[1] § 46 sec. 1 of Criminal Procedural Code

- has claimed for damages on time, at the latest by the end of the investigation or shortened investigation;
- has claimed for damages properly, it is clear from the proposal why and for what amount the claim for damages is being claimed.

(b) injured party without right for compensation (damages), which has only the procedural rights listed in § 46 par. 1 of Criminal Procedural Code. In this case, injured party does not have the right to claim for damages against the accused person, because he did not fulfill the above requirements.

The basic assumption for the court to decide on the claim for damages is that the injured party has applied his right properly and on time against a particular accused person, because the court cannot decide on that claim *ex officio*. The Criminal Procedural Code grants to the injured party the right to request that the court impose an obligation upon the accused person in conviction judgment to compensate injured party for the damage. Therefore, the injured party can claim for damages directly in criminal proceedings. This part of the criminal proceedings is called "adhesion proceedings". In adhesion proceedings, the criminal court has to, when deciding on the obligation of the accused to compensate injured party for the damage, apply all relevant substantive acts of civil law (or other law).[2]

Injured party is according to Criminal Procedural Code a party in criminal proceedings, regardless of whether or not he is entitled to compensation (that is to say whether he is the subject of an adhesion proceedings). The status of the injured party in criminal proceedings determines the rights which the injured party is granted by the Criminal Procedure Code. These rights include, in particular, the right of the injured party to compensation for the damage caused by the crime.[3]

If the court decides on the claim for damages, there are possible differentiated decisions depending on whether the court finds the accused person guilty or innocent. If the court finds accused person innocent (or stops the criminal prosecution), the injured party is always referred with his claim for damages to civil proceedings (possibly for proceedings before other competent authorities), which results from § 288 par. 3 of Criminal Procedural Code. If the court finds accused person guilty, court would decide on the claim of the injured party to one of the three possible ways:

- court refers injured party with his claim for damages to civil proceedings, or the proceedings before another competent authority, if the results of the evidence situation cannot be used as the basis for the claim for damages, or if it is necessary to carry out additional proving, which would prolong the criminal proceedings;
- court decides on claim for damages only in part and refers the injured party to civil proceedings or to proceedings before other competent authorities with rest of claim;
- court decides on all claims for damages with no referring.

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2 IVOR, J.–ZÁHORA, J.–POLÁK, P.: *Trestné právo procesné 1.* Bratislava, Wolters Kluwer, 2017, p. 244.

3 FERENČÍKOVÁ, S.: Uloženie ochranného liečenia trestne nezodpovednému páchateľovi a náhrada škody. *Štát a parvo,* 2018, roč. 5, p. 3.

As we mentioned above, one of the fundamental procedural rights of injured party guaranteed by Criminal Procedural Code is the right of the injured party to compensation (to claim for damages). Invalid Criminal Procedural Code — Act No. 141/1961 Coll., valid until 31 December 2005 [4], allowed the court in criminal proceedings to adjudicate only property damage, which from the effectiveness of the current Criminal Procedural Code No. 301/2005 Coll. has changed. Criminal Procedural Code specifies precisely the conditions in which the injured party can claim for material and non-material damages, which is also demonstrated by the above definition of the injured party.

The distinction between an institute of damages and non-material damages in Criminal Procedural Code complicates the injured party application of claims for non-material damages caused by a crime. The current legislation guarantees to the injured party right to compensation according to health, material, moral or other damage, but the fact how courts apply this right in criminal proceedings varies considerably.

Criminal Procedural Code clearly gives an option for courts to decide on claim for non-material damages and it is really important that court would respect this in criminal proceeding according to strengthening of rights of the injured party. With regard to the settled court practice of referring injured party with claim for damages (non-material damages) to a civil proceedings, the injured party has only option to claim non-material damages under the Civil Code by an action for protection of personality according to § 13 par. 2 of the Civil Code. Actually, there are considerable problems related to these issues, because non-material damage was caused by crime and it should be decided in civil proceedings, what is inappropriate and there are also issues of limitation and preclusion.

In this regard, we point to Judgment of the Regional Court in Žilina, file mark 1To/10/2011, which adjudicate, that it is clear that the criminal concept of "damages" is significantly broader and more comprehensive than the concept of "damages" in private law. Criminal law, especially in the mentioned § 46 par. 1 of Criminal Procedural code, is based on the notion of damage, respectively defines its content, not in the sense of a progressively overcome and overwhelmed notion of damage in Europe, as an interference only with the property rights of the injured party, but views the more modern, advanced European understanding as an unlawful interference with material and non-material rights, so the result is not only material damage (property or financial), but also non-material damage (immaterial), that is damage not occurring in the material sphere, but in the sphere of another, constituted by all other non-material rights, whose protection is guaranteed by law and their interference can be sanctioned. The Criminal Procedure Code therefore understands damage as property damage, moral and other damage, referring to the viola-

[4] JÁGER, R.: Rekonštrukcia súdneho procesu v predcyrilometodskom a cyrilometodskom práve. In *Míľniky práva v stredoeurópskom priestore 2015*: zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov, Bratislava, 19–21. 3. 2015. Bratislava: Univerzita Komenského, Právnická fakulta, 2015.

tion or endangering of other legal rights or freedoms of the injured party, with the term of "moral damage" and "other damage" in relation to the harmful consequences caused by the unlawful conduct sanctioned by criminal law must be perceived as terms that are directly related to the term "non-material, immaterial damage" in civil law, that is a term which is as diverse as the content of the various rights of the law which are protected by law and the their interference is sanctioned (usually in the form of an order to remove/remedy/stop). In view of these facts, particularly with regard to the immaterial nature of these protected rights, such non-material damage resulting from the interference of rights can only be moderated by money, but in no case can it be repaired, due to the nature of those rights unlawful interference to the health or the honor of a natural person cannot be remedied by money or a material reparation, the monetary compensation serves only to moderate the consequences of the crime.

It is therefore clear from above mentioned decision that, when court decides on the claim for damages in adhesion proceedings, it is necessary to respect the substantive provisions of the specific acts on which the claim is based. These regulations specifically govern the creation of a claim for damages, its content and scope, the method of compensation. Then, when deciding on interference with personal rights and remedies, decisions are made according to § 11 of the Civil Code (relating specifically to non-material damage compensation).

In our view, it would be more appropriate to replace the term of moral and other damage in § 46, par. 1 of the Criminal Procedural Code with the term of non-material damage, thus avoiding many inconsistencies in the claim for damages by injured party in criminal proceedings.

If the right to compensation for non-material damage as well as the method of its admission were conceived in the Criminal Procedural Code separately with an explicit modification of the specific remedy, injured party would have the obligation to separately determine the claim for damages and the claim for non-material damages and injured party could properly claim each of these claims in criminal proceedings. Since it is not a joint claim, the court would have to decide on both claims.[5]

If the abovementioned reservations and comments would not be respected by the courts, they could worsen the ability of the injured party to claim for damages under the law, thus weakening the position and status of the injured party in criminal proceedings, which is unsustainable in relation to the direction of the European rules on non-material damage. Of course, the obligation of the injured party is to clearly identify the claims separately and justify them in proposal for their recognition.[6] Failure to comply with this condition may lead the court to refer the injured party to civil proceedings, where the injured party may face a number of problems related to mentioned above statements.[7]

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5 See the decision of the Supreme Court of Czech Republic, file mark 8To 46/2013.

6 Principles of European Tort Law.

7 In the majority of cases, the injured party is awaiting the results of the criminal proceedings and thus the conviction judgment which, if the court refers him to civil proceedings, knows who to designate as the responsible person.

2. Compensation for damage to health

The issue of the application of non-material damage compensation concerns, in particular, damages caused to the injured party's health — harm to health, in the event that the injured party claims for health damages, which he has suffered in a direct connection with the offender's conduct and which can be objectified on the basis of civil law provisions.[8] According to § 444 of the Civil Code *"In case of health damage, injured party has right to one-off damages of the pain of and the decreasing (burden) of social application."* It means, that this claims could be applied together with health damage.

According to § 2 of the Act No. 437/2004 Coll. about compensation for pain and compensation for the burden of social application, *"Pain is a harm caused by damage to health, its treatment or removing its consequences. The burden of social application is a status of health damage that has a demonstrably negative effects on the life of the injured party, to meet his life and social needs or to fulfill his social tasks."*

Compensation for pain and burden of social application is quantified by point assessment based on a medical opinion. This can be objectivized on the basis of medical opinions, which results in its financial statement, which can without any doubt be in the case of its proper application granted by court in criminal proceedings. What still remains the question is granting of non-material damage, which consists of interfering the personal rights of the injured party, because there were created different opinions in the Slovak jurisprudence. The Civil Code in § 11 guarantees to every natural person the right to the protection of personality, in particular life and health, civil honor and human dignity, as well as privacy, his name and expressions of a personal nature. The Act does not provide the calculation of specific forms of interference that may affect personality rights, but identifies signs in the presence of which a particular conduct can be considered as an interference with the personality (objective ability to intervene adversely to the personality of the individual, violation or threat of personality rights). Non-material damage within the meaning of § 13 par. 2 of Civil Code is such a harm that translates into the psychic sphere of a natural person and into his or her status in society. This kind of harm is not immediately translated into the physical integrity or property sphere of a natural person. It is therefore necessary to distinguish it from property damage, including damage to health with property consequences (see § 16 of Civil Code) and other non-material damage as a direct consequence of interference with the physical integrity of a natural person for whom compensation is provided under other regulations (see § 444 of Civil Code). The meaning of compensation of non-material damage in money according to § 13 par. 2 of Civil Code is to balance the harm to the values of human dignity with a specific financial expression of compensation for such non-material damage and to consider all circumstances and ef-

[8] § 444 of Civil Code; Act No. 437/2004 Coll. about compensation for pain and compensation for the burden of social application.

fectively decrease the negative consequences of interference and provide the most effective civil protection of the personality of the natural person. In contrast, the meaning of compensation for damage as a direct consequence of the physical integrity of a natural person (see § 444 of Civil Code) is to try to provide compensation for harm caused by damage to health, its treating or the elimination of its painful consequences to health, which have demonstrably negative consequences for the injured person's life, for the satisfaction of his or her life and social needs or for the fulfillment of his or her social tasks (burden of social application). It means that, the meaning of compensation for pain and the burden of social application is to provide compensation for the damage caused by interference with the physical integrity of the natural person. Neither from these, nor from the principles for the assessment of pain (§ 9 of Act No. 437/2004 Coll.), the principles for the assessment of the burden of social application (§ 10 of Act No. 437/2004 Coll.), it cannot be deducted that the compensation for pain and the burden of social application would be granted for the harm which is translated into the psychic sphere of the natural person and his status in the society.[9]

It is clear from the cited judgment of the Supreme Court that, in addition to the health damages (the pain of the injured and the burden of the social application), these claims of the injured party are different from non-material damage which can be applied individually and independently of another, which implies that those claims can be directly asked in criminal proceedings and the court should decide on them. The Supreme Court in its judgment broke the decision-making practice of general courts[10], which was finally upheld by the Constitutional Court of the Slovak Republic in its decision.[11]

We believe that health damages and burden of social application are different claims than non-material damages, according to above-mentioned acts citations and judgment of Supreme Court of Slovak Republic. Claim for damages in criminal proceedings by injured party covers health damages, burden of social application and non-material damages. Injured party is obliged to claim for damages properly and on time, at the latest by the end of the investigation or the shortened investigation and duly justifying them. Claiming these damages in criminal proceedings causes in practice several problems.

According to the relevant sections of Criminal Procedural Code, a shortened investigation must generally be terminated within two months of the accusation. Investigation of particularly serious crimes must be completed within six months of the accusation, in other cases up to four months. These deadlines complicate the right of the injured party to claim for damages, because medical opinion is issued only after the health condition of the injured party can be considered as stable. In a case of a burden on social application, generally after one year after the injury.

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9 Judgment of The Supreme court of Slovak Republic, file mark 7Cdo 65/2013.

10 See Judgment of Regional court of Prešov, file mark 16 Co 107/2013.

11 See Judgment of Constitutional Court of Slovak republic, file mark I ÚS 426/2014.

It is clear from the cited legal provisions that it is difficult to claim for damages in criminal proceedings, because of time of the investigation and the only way is to claim for damages in civil proceeding, what we find inappropriate because damage was caused by crime.

We believe, it would be more appropriate to replace the term "health damage" used in the Civil Code, by term used in the Criminal Code "harm to health" to make it clear. Compensation for pain and burden of social application should not be dependent on medical assessments and point assessments to which the injured person must wait. We can imagine, that judges would decide on these claims, but it should not be arbitrary. We need approved method to limit these claims in criminal proceedings, what would definitely strengthen the status of injured party.

3. The guilt and punishment agreement

The Guilt and Punishment Agreement is an alternative to a proper criminal process. In the case of the Guilt and Punishment Agreement, where the main hearing and the taking of evidence are not carried out, the court in the public session will either agree on the agreement in the form of judgment or return the case back to the preliminary proceedings.[12] Using the Institute of the Guilt and Punishment Agreement implies a considerable weakening status of injured party in the situation of material and non-material claims for damages. The Guilt and Punishment Agreement represents, on the one hand, an effective punishment procedure, but on the other hand this institute often fails to secure the rights of injured party, especially the claims for damages, according to current legislation.

On the basis of a faster and more efficient course of the Guilt and Punishment Agreement, the agreement is approved by court in the form of a condemnation judgment, which also contains a statement of compensation, but only if injured party and accused person expressly agree with the compensation. Injured party is invited to the agreement procedure, but very often injured party ignores the procedure and his claims for damages remains only in the hands of the prosecutor. If there is no agreement on the amount of the injured claim, the prosecutor proposes to refer the injured party to the civil proceeding, which means that his position of injured party is considerably more difficult.[13]

4. Reconciliation

One of the alternatives to the standard criminal proceedings is the reconciliation between accused person and injured party.[14] The aim of this institute is with the consent of the injured party and after strict conditions filling, the reconciliation of

[12] § 331 of Criminal Procedural Code.

[13] We strongly believe that prosecutor is obliged to defend the interests of injured party and if there is no agreement between injured party and accused person on claim for damages, agreement of guilt and punishment may not be approved.

[14] § 220 of Criminal Procedural Code.

injured party and accused person. The result is the rapid satisfaction and compensation of the injured party (claim for damages). One of the basic conditions is the compensation of damage at the material and non-material level. It follows the text of the Criminal Procedural Code which directly obliges accused person to compensate committed damages by crime, or to take other measures to compensate injured party, or otherwise eliminate the damage caused by the crime (even a non-material damage). This implies the obligation of the accused person to satisfy the material of the injured party.[15] It is clear from the above that one of the rights of the injured party in the case of reconciliation is also the claim for damages caused by crime. In the case of personal damages, injured party would also have right to claim non-material damage, which was affected by crime. It is obvious from these claims that each of them is capable of providing satisfaction to the injured party in another sphere. Obviously, it is obligatory for the accused person and the injured party to agree on the compensation of material damage and non-material damage, which can be challenging and lasting but ultimately advantageous for both parties. However, it is essential that agreement on damages material or non-material is one of the obligatory conditions in reconciliation. Injured party can obtain material damages in money but also for non-property damage, which may not be guaranteed in monetary terms but may also constitute a certain justification or excuse or other claim that the injured party considers as a damage caused by a crime.[16]

5. Conditional suspension of criminal prosecution

Other procedural alternative in criminal proceedings is called Conditional suspension of criminal prosecution.[17] This institute is different in a case of damages from the aforementioned reconciliation. Even by using this institute, the right of damages for injured party is respected. Damages must be objectified, what is a strict condition by Criminal Procedural Code. Other condition of this institute is that accused person has to compensate the damages caused by crime or has entered into an agreement about damages with the injured party or has to make necessary measures for compensation.[18] It is clear that the legislator expressly regulates the entitlement of the injured party to non-material damages as well but there are different views in legal theory and practice on this issue.

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[15] The first is to compensate the damages caused to the injured party by crime or to make other appropriate remedies (which may mean the agreement) a contract that binds the accused person for the compensation of the damage, applied and objectified, and third, the removal of the damage caused by the crime.

[16] Opinion of the authors.

[17] § 216–217 of Criminal Procedural Code.

[18] ŠTRKOLEC, M.: Náhľad na vývoj právnej úpravy poškodeného trestným činom od druhej polovice 20. storočia až po súčasnosť. *Štát a parvo*, 2018, roč. 5, p. 3.

6. Closing Thoughts

The aim of this scientific paper was to point out application problems due to claim for damages of the injured party in criminal proceeding. It is acceptable, that injured party has also right to claim non-material damages, health damages and other damages guaranteed by Criminal Procedural Code but practice is often different. In conclusion we have to say that the status of the injured party in criminal proceedings is often difficult especially in trial or by using procedural alternatives. We believe that legislation would change and improve in the future in the direction of strengthening status and rights of the injured party, because injured party is most affected by crime and should be strongly protected by state authorities.

European Integration Studies, Volume 14, Number 1 (2018), pp. 79–89.

IMPORTANCE OF EXECUTION IN THE ADMINISTRATIVE PROCEDURE

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Modern social coexistence presumes the existence of norms that determine the means of conduct to be followed in different situations by its society members. Throughout the history of man, such norms increasingly take shape in the form of legislations. A basic requirement on any legislation is that it must fully fulfil the role intended for it, because if the whole or a part of any legislation should fail to be capable of fulfilling such a role, organised social coexistence itself may be exposed to dangers. Consequently, legislators must take several different aspects into consideration in the process of preparing legislations. One of such aspects is to ensure that legislations must include clear and understandable notions and terms, as law abiders can only be expected to ensure proper conduct upon such conditions. If this condition should fail to be met, it could easily lead to cases when people, without any fault, would act in an unlawful manner as a result of a disputable interpretation of a law. Nevertheless, legislators must reasonably expect that voluntary legal compliance does not always take place in every case. According to the subjectivity of man, people do not intend to follow the rules stipulated for them, especially if such rules include some kind of obligation as well. A hazard of non-compliance with the law is also increased by the fact that belonging to a society requires a person to make plenty of compromises, as no person would choose to pay the taxes, or take the interests of their neighbours and the public into account during constructing a house, if it was not compulsory. Accordingly, an individual may get to the point of not being inclined all the time to make the expected compromises in all circumstances. Regarding their intent to resolve this issue, legislators found it out rather quickly that some preventive measures needed to be built into legislations that encourage the law abiding conduct of subjects. Perhaps one of the most common mean for this purpose can be the adoption of criminal laws. However, the rules of criminal law rather have the characteristics of "ultima ratio", and, moreover, based on the lack of grounds — if the severity of the given act does not make it reasonable — their enforcement is not possible and justified in all cases. In case a person does not mow the grass on their land or in their garden, and consequently, ragweed overspread may be witnessed, the act — or in this case, the lack of it — is not yet justified to be punished with the means of criminal law. Fortunately, it can be stated that the majority of unlawful conducts does not require the

enforcement of legal consequences belonging to criminal law; nevertheless, this imposes a rather peculiar duty on legislators. This means that preventive means need to be specified in each and every legal field, which are capable of facilitating voluntarily compliant conduct even in the light of the particularities of the given field of law. Based on their different functions, each of such different fields of law has to fill different, specific roles. Accordingly, in the cases of different legal branches, needs for preventive measures appear on different bases, and different demands result in the need of enforcing compliant conduct.[1] In the case of civil law, preventive characteristics should aim to serve the protection of harmed parties. Regarding the field of criminal law, it is the protection of the members and order of the society against criminal acts and criminals that should be most present in the sphere of prevention. Administrative law should focus on facilitating the undisturbed practise of the executive power of the government, ultimately meaning the enforcement of complying with the legislations. Accordingly, it is rather apparent that the need for prevention exists within each and every legal field, though resting on different bases.

Proceeding with the above presented train of thoughts, I am trying to present and justify through this study that execution is a mean of prevention with respect to administrative law. The Hungarian word "végrehajtás" has several different meanings, which is an interesting peculiarity of the Hungarian language, and this ambiguity is also true for Hungarian special legal terms, and that is why it is important that I define what I mean under the term 'execution'. The term 'execution' has a rather broad scope of interpretation in Hungarian law, and it is used in a totally different context when it refers to the executive-ordering acts implemented by public administration. In such cases, the term is associated with the execution of legislations, and in this sense, it is applied — besides in legal literature — by courts, for example when they define an act or crime. The term of "végrehajtás" execution is used in a totally different meaning (~collection) when it means the enforcement of collecting a liability in default. The ambiguity behind the term is well reflected by the fact that special legal dictionaries often omit this term despite the fact that a number of relevant legal terms

[1] Decision No. 60/2009. (V. 28.) AB of the Hungarian Constitutional Court — "In Decision No. 3/1998 (II. 11.) AB, the Constitutional Court stated that "[a] based on properly justifiable reasons, the legislator determines the rules referring to all persons involved in transport in order that the lives and safety of all people involved in transport could be ensured. The legislator also wishes to facilitate compliance with the regulations through different — administrative, misdemeanour or offense — sanctions" (ABH [Decisions of the Hungarian Constitutional Court] 1998, 61, pp. 65–66).
When examining whether the legislator used the legal institution for purposes other than its function, it is the basic function that needs to be considered. Regarding the relations of civil law, criminal law and administrative law protections with respect to one another, it can be stated that the aim of determining the liability for risk is primarily the legal protection of the particular injured persons. Through its special and general preventive function, criminal law protects its society against criminals committing crimes hazardous to the society, whereas the primary function of administrative law is to ensure justice and accordingly, prevention as well. While civil and criminal law liabilities are responsive to consequences of acts already done, the aim of administrative law, in this case, is to prevent graver consequences — loss of life, physical injuries or material damages.

are clearly defined in them.[2] Legislations also use the term of execution based on different interpretations, which is presented in extensive details in the work of András Kovács.[3] In the context of the preventive means of administration, I am going to use the term execution for the execution procedure and its rules. By execution procedure, I mean the procedures according to the definition of András Kovács, i.e. "The execution procedure is a type of state constraint that serves the specific enforcement of a public authority act (court judgment, authority decision) or any other legal act legally equal to the former items."[4]

The selection of means that would facilitate compliant conduct on a specific legal field is determined both on functionality and the characteristics of the given field. Obviously, the legislator only allows intervention in private law affairs to the minimum extent required. On the other hand, such intervention is justified to be of greater extent in the field of administrative law[5]. Accordingly, in administrative law, prevention is to be ensured by means of a system of tools. Nevertheless, before commencing to present these means, I think it is important to define what is to be meant by preventive means.[6] In my view, I find the precise definition of this term important because it allows us to decide on what basis should the legal means classified in this category and discussed herein should be selected. I believe that when we talk about the prevention of law, we consider the whole legal system in this range in a broader sense, as law itself already has a preventive characteristic and function. When a way of conduct is stipulated under a piece of legislation, the legislator intends (through such conduct) to prevent the occurrence of disputable, undesired life situations. This statement is both true for substantive and procedural law legislations, because while in substantive legislations a specific way of conduct or a life situation is specified and "evaluated" from the perspective of law, regarding procedural legislations, the state act taking place due to the given life situation will be specified. If an act requires permission according to the relevant legislations, such obligation will be determined in the substantive legislations. However, if the state is obligated to take any respective actions through any of its bodies, such acts are set out in procedural legislations. It can be said that a client is typically informed about the fact that their act requires permission through information provided by the relevant authorities. In my opinion, the authority aims to prevent a

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2 BÍRÓ Endre: *Jogi szakszótár* [Legal Dictionary]. Dialog Kampus, Budapest–Pécs, 2006, pp. 520–522. The author defines several terms ranging from the expiration of execution to the executive body, but not the term of execution in itself.

3 KOVÁCS András: A közigazgatási jogerő és a végrehajthatóság [The Binding Force and Execution of Administrative Decisions]. *Jogtudományi Közlöny*, 2008, pp. 437–440.

4 KOVÁCS: op. cit. 3, p. 438.

5 On the differentiation between justice and public administration, please refer to: VARGA ZS. András: *Ombudsman, ügyész, magánjogi felelősség. Alternatív közigazgatási kontroll Magyarországon.* [Ombudsman, Attorney, Private Law Liability. Alternative administrative control in Hungary] Pázmány Press, 2012, p. 15.

6 BÍRÓ: op. cit. 3, p. 398. According to the definition accepted by the author, prevention means forestalling, which, from a legal perspective, can be general, such as the material criminal law rules, or special, e.g. the prevention of aggression in the field of international law.

clearly non-intentional unlawful act by means of providing information, therefore the preventive characteristic is present in this case as well. Procedural rules also serve to prevent authorities from exercising their tasks in an abusive manner, or by causing harm to members of the society. Nevertheless, there are some means of law the function of which is to keep people from potential or wilful misconduct. I include means among these ones that embody the dissuasive force of law. It is a much narrower category, as it includes means in which some sort of forcing issue is present further to the general dissuasive force of law, through which the relevant subjects can be "made to comply" with the contents of the legislations. Accordingly, these means can also be considered as securities for successful and effective creation and application of law. The means considered by me as preventive ones are classified as the means of law enforcement by other experts.[7] Nevertheless, I fully agree with this kind of statement. I call the means specified in this study preventive because the term 'means of law enforcement' stands for a broader category, in my view. I believe that law enforcement operates in a two-way manner, as it also includes law enforcement from the side of subjects, even in the field of administrative law. On this basis, legal remedies or different rights of clients — right of access to the files of proceedings, etc. — can be included in this category, although their preventive features in a narrower sense is not significant. Undoubtedly, if law enforcement only stands for the implementation of state will through different state bodies, the two groups are practically the same. The reasons behind it, in my opinion, is that law enforcement is the consequence of the lack of voluntary legal compliance, the means of which, beside or together with effectiveness, must involve the issue of prevention.

I believe that basically there are three legal institutions that have such preventive effects, which are control, sanction as well as the execution of a decision or act. These three legal institutions are interrelated and have strengthening effects on one another, practically forming a chain together. In this chain, the role of the first link is the legal institution of control. Regarding control, it can be stated that it is a legal institution mainly used in administrative law, as it is not applied in the field of civil law and it is not characteristic to criminal law either. For the sake of completeness, it is worth pointing out that I have made this statement based on legal relations. Accordingly, something is to be classified in the field of administrative law if an administrative body carries out controlling activities in relation to an executive ordering act. Consequently, I also include here the inspections made with respect to tax and customs control, irrespective of the fact that according to some views, they belong to the category of financial law — if such field of law exists at all — and I also include personnel and labour safety inspections as well, considered to belong to the field of labour law.

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[7] NAGY Marianna: Meddig növelhető a közigazgatási jogérvényesítés hatékonysága a szankcionálás szigorításával? [How can the effectiveness of administrative law enforcement be increased through stricter sanctions?] *Iustum, Aequum, Salutare,* 2012.

The preventive characteristic of control can be derived from its primary purpose, according to which control serves to ensure that unlawful acts should, if possible, not be hidden. If we examine the reasons for people carrying out wilful unlawful conduct, I am quite sure that the leading reason would be the hope that such act would not be found out by the authorities. Accordingly, if control works well, and it is rather unlikely that an unlawful conduct would not be revealed by the authorities, the preventive characteristic can be considered implemented. Nevertheless, it should be asked when control is supposed to work well in general. In legal literature, studies published in the subject of control typically focus on financial control. As far as I am concerned, I think that generally the same statement can be made on control, regardless of the respective type of public administration, according to which control must fulfil alarm and restraining functions.[8] In my view, control can be implemented in an effective way if it meets three basic requirements. One of such requirements is the sureness of control. By sureness, I mean that a potentially inspectable person may have a reasonable expectation to be controlled by inspection sooner or later. I believe that the significance of sureness cannot be emphasized enough, which I wish to illustrate with the following example. In food market trading, the notion of primary producers was introduced, perhaps in the 1990s. The reason provided by the regulators was that "rural people" who wished to sell their products grown in their properties should be able to do such activities free of state burdens, which would have been justified based on the essence of market trade. For this purpose, a limit value was stipulated — as far as I know, its sum was five hundred thousand HUF at first — below which primary producers were able to do trading activities free of burdens. Practically, you only needed an identification certificate as a primary producer, which could be acquired in a rather easy way. The respective intention of the legislator could be — and still is — considered as justified. However, no party inspected in practice how such primary producer activities take place in reality. People prone to speculations soon found out about this issue, and soon a quite serious extent of black market trading evolved on the food markets throughout Hungary. According to some estimations, such black market activities added up to a total of almost (or maybe even more than) an annual turnover of 1 billion HUF on the central market of the town of Miskolc in the second half of the 1990s. The basic reason is rather evident, as any person carrying out such activities could be quite sure that no party would inspect the actual extent of their sales and whether their turnover would actually exceed the value limit stipulated in the relevant legislation. For the record, it needs mentioning that primary producers were not obligated to issue receipts on the money taken, therefore the conditions for effective inspections were totally unavailable. It can be quite certain that the intensions of the legislator were not realised at all.

[8] NAGY Marianna: Az állami ellenőrzés kérdőjelei, szabályos és szabálytalan a közigazgatásban [Question marks in state control; regularities and irregularities in public administration]. *Pénzügyi szemle*, 2012 (57. évf.), 1. sz., p. 88.

The regularity and continuity (also meaning chronological uninterruptedness) of control, as the second requirement, has similar significance. Typically, this requirement has an increased significance in relation to the inspection of acts that take place regularly or in a continuous manner, such as participating in transport activities or practising certain activities requiring permits, for example industrial, trading or service provision activities. The continuity of control can also have similar significance, if the aim of the given activity is the achievement of a result, the production of a product, as in the case of production-type activities, or construction work activities.[9] Unfortunately, news can often be heard about the distribution of products that are of poor quality or even hazardous to health, and such distribution takes place through multinational trade, thus allowing such products to reach a broad range of customers.[10] In such cases, the harms caused in health and in materials can no longer be remedied. The solution — as shown through examples — could be ensured through prevention executed by public administration. However, this is not fully implemented, one of the reasons of which is definitely the inspections not being carried out with frequent enough regularity, which is obviously known by the offenders of such abuses. Such irregularities are usually revealed in a posterior manner, if revealed at all. The party carrying out such abuse is able to earn high profits, therefore in several cases unlawful conduct can be considered worth doing. Regarding tax issues, it frequently happens that after a tax year closed with profit, an operating business organisation suffer significant losses (in proportion to its size) within a relatively short time period, a dominant part of which is made up of public debts. Usually, this sum, or the majority of it never makes its way into the state treasury. Regular and continuous control could probably decrease the occurrence of such situations. Another example is that during a period of a serious case of influenza epidemic, my general practitioner prescribed a relatively new and intensively advertised medicine for my illness. I had never experienced any side effect with respect to any medication before; however in this case the first pill I took caused such a reaction that I was not able to use the rest of the medicine. As a number of people also took this medicine in my environment during the same period, I asked around and nearly everyone described similar effect to mine regarding this medicine. When I returned to my GP, I complained about this issue; he responded that unfortunately it was a quite common phenomenon, and he prescribed me some other medicine that I had successfully taken in previous times and which had no side effects. The manufacturer of the new medicine did provide written notification on the product regarding the side effect that I personally experienced, however, its probability was indicated to be at the level of 1% of the patients. Obviously, in this case, a much higher rate could be witnessed within my micro environment. One year later, one of my acquaintances told me about the use

[9] KÁRPÁTI Zoltán–KOZMA György–MADARÁSZ, Gabriella–PETRIK, Ferenc: *Az építésügy kézikönyve* [Handbook for Construction Issues]. HVG-Orac, 1998, p. 124.

[10] As an example, I would just like to mention the cases of red paprika contaminated with lead or food products containing guar gum, that were well presented by public media.

of a medicine that had caused effects fact he had never experienced before and it turned out to be the same medicine I mentioned above. I do not know which party was responsible for the preliminary justification of the notification made by the manufacturer and displayed on the medicine about potentially expectable side effects, but I am rather sure that in the process of applying this medicine there was no party checking this information on an annual basis. It is rather hard to try to estimate how much damage may have been caused by this fact. I also wish to bring up another example in relation to construction industry. I heard a saying from a mason according to which the most important issue is the attractive façade, as it covers everything. Dozens of legal cases known by me have verified how true this saying was, and how it is only serendipity that the unpleasant truth can come out at times. In more fortunate cases, only material damages take place — which usually cannot be claimed in a posterior manner — however, sloppy work may also have consequences hazardous to health. The reason is quite obvious; in practice the regular, thorough, comprehensive inspection of construction procedures usually do not take place, although they are stipulated by law and would be or should be efficient.[11]

Nevertheless, control may not effectively of work even if the above two conditions are met, unless the third requirement is also a completely fulfilled. According to this third requirement, inspections must be carried out in a way that all the necessary information on the subject of the inspection could be revealed as a result of that inspection. Quite often, the targeted people can be almost certain that they cannot avoid control and the second condition is also met, as the competent authorities carry out their controlling activities in a continuous, regular manner with respect to all elements of the controlled activity. And despite all that, control is still not efficient, if the committing of an unlawful act or the clear exclusion of such unlawful act cannot be verified through the inspection. To reduce offensive in public transportation, the legislator introduced the institution of so-called objective liability in the legislation regulating public transport.[12] As a result of the changes in the legislations, it could already be presumed that prosecution could become more efficient, and, consequently, the number of offenses would show a decreasing tendency. The bodies and persons carrying out the controlling activities often carried out inspections in a negligent manner as they trusted the success of procedure based on legal regulations. As a result of such negligent work, the actually committed offence could not be verified. Naturally, such inappropriate inspections do not only take place in the field of public transport; according to my experiences, they are present in nearly every branch of public administration. I admit that there may be cases presumably not in small number when one time or random inspections even if they are not thorough, may lead to success. Nevertheless, in such cases the factor of good luck plays a significant role, because it is only a fortunate coincidence that an unlawful status existed or an unlawful act was carried out exactly at

[11] MAGYAR Mária: *Építésügyi hatósági engedélyezési eljárások* [], KJK-KERSZÖV Budapest, 2001, pp. 160–161.

[12] Section 5 of Act CLXXV of 2007 on the Amendment of certain Acts on transport.

the time and place of the inspection. Not to mention the fact that the certain exclusion of unlawful act cannot be determined by such inspections. I believe that a competent legal institution can only realise proper prevention if the number of coincidences can be decreased to a minimum or, ideally, could be fully excluded. Another considerable issue is that a significant part of acts of unlawful conduct are committed for some kind of an intention, primarily for financial gain.[13] If the efficiency of the means that was meant to prevent committing such act can be significantly influenced by coincidences, the increase in people's inclination to commit offences can be presumed to be present. Accordingly, the preventive effect will definitely not take place in such cases.

Control is only a single link in the chain of preventive legal means of public administration, which in itself, even if it works well, cannot ensure prevention. There must be some kind of proper dissuasive legal consequence related to control in function of the giving inspection's results. This is the point where the system of administrative sanctions joins the preventive means of administrative law.[14] The system of sanctions in public administration is subject to comprehensive researches, therefore I only wish to discuss it herein in a short manner. In accordance with the definition of Marianna Nagy[15], the effectiveness of public administration can be increased by means of stricter sanctions, and this way its preventive effect could not be questionable. Undoubtedly, if a sanction is not severe enough, it cannot be considered as a dissuasive force. This may bring up the question how severe a sanction should be to ensure a proper preventive function. Nevertheless, the intentions of the legislator that can be witnessed in the general regulations of the administrative sanction system are rather contradictory to the intention of increasing the dissuasive force of sanctions through enhancing their severity.[16] The law introduced two legal institutions the nature of which does not increase the severity of the sanction system, yet the legislator expects them to cause the strengthening of the preventive characteristic of sanctions. These two legal institutions are the notice and the administrative security deposit. Notice serves as the form of the weakest, primary sanction. Its dissuasive force is that the client is subject to no actual penalty, but it serves as the basis for applying a more severe sanction in the future.[17]

In my view, the intention of the legislator according to which this solution would be efficient with respect to a significant proportion of administrative offences can be justified. Please note that the law is based on the principle of proportionality, with which the legislator also wishes to strengthen dissuasive forces. Accord-

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13 NAGY: op. cit. 6. p 126.

14 NAGY Marianna: *A közigazgatási szankciórendszer* [The system of administrative sanctions]. Budapest, Osiris, 2000.

15 NAGY: op. cit. 6. p 126.

16 Act CXXI of 2017 on Sanctions against administrative misconduct

17 Act CXXI of 2017 on Sanctions against administrative misconduct, Section 6(1) Through the notice, the authority expressed its disapproval for the committing of the administrative offense, and warns the client to restrain from committing any further administrative offenses, otherwise further sanctions will have to be introduced.

ingly, notices are followed by the imposing of an administrative security deposit, which "only" generates a presumed legal sanction regarding the client,[18] as the deposit is to be paid back to the client in case the client does not commit any subsequent act that could be the basis for sanctioning. Undoubtedly, this legal institution indeed generates a dissuasive force, despite the fact that its severity is rather questionable. The security deposit can be actually considered as a link between the notice and the imposing of a fine, i.e. a penalty causing an actual legal sanction. The extent of such fine — and the determination of the extent of the security deposit — raises further concerns, which are based on substantive law. It is a basic principle that in case the extent of an imposable sanction is high enough, and exceeds the extent of profits that can be acquired through the relevant offenses, or it is capable of forcing a party to restrain from any unlawful conduct not intended for material gain, it will realise prevention.[19] Nevertheless, the dissuasive force of a sanction actually depends on the extent how much it can or cannot be implemented. Even if a sanction is rather severe and can be imposed a number of times, it is not effective if it cannot be implemented in practice. Accordingly, in the chain of preventive means control — if its results make it possible — is followed by the imposing of sanctions, and if necessary, the chain is closed by the mean of execution. Following this thread of thought, it can be seen that such preventive means are closely interrelated. If any of the links is broken in the chain — i.e. there is a deficiency in their application — it has a practical effect on the final outcome. If is rather difficult, if not impossible, to differentiate the three means of the basis of the level of priority. Nevertheless, based on the perspective of law enforcement, it can be stated that the role of execution seems to have begun domineering. In civil law relations and disputes, I always wholeheartedly gave everyone the advice to first examine — regardless of the expectable or expected legal judgment — that they should consider the potential outcome, i.e. even if they are the winning party in the dispute, whether they would be able to execute the decision, and whether the dispute is worth initiating at all. Naturally, I do not wish to downgrade the value of a court judgment, but it is indeed a fact that a positive court decision often only means that the given party is justified to be right by the government. If the contents of the decision cannot be implemented — naturally in the case of the lack of voluntary compliance — the party will not find the contents of the given judgment satisfactory, as the dispute does not only aim the determination of rightfulness but also

[18] Act CXXI of 2017 on Sanctions against administrative misconduct, Section 8 (1) The sum of administrative security deposit shall be paid back by the body assigned by the Government to manage the administrative security deposit to the client or their legal successor upon the expiration of one year after the payment of the surety.
(2) The client loses their right for the sum of the administrative security deposit if any administrative sanctions are applied with respect to the client within a year upon the payment of the administrative security deposit.

[19] Deciding on this cannot be done beforehand, therefore the legislator usually sets out a limit range from min to max, the application of which the law applying body is granted a quite broad power of assessment. The aspects of assessment, however, as stipulated by law. Act CXXI of 2017 on Sanctions against administrative misconduct, Section 10 Subsection (1) a)–g)

to achieve a certain outcome. It is true that the decision is an integral part of the outcome but it is not a major part. This statement made on private law relations can also be referred to administrative law relations. In my view, the basic technique of law enforcement is sufficient — if I consider administrative law enforcement from the aspect of substantive efficiency — if I make a preliminary assessment where I can get to through the process from a given point and I decide on the steps of my actions accordingly. If the accomplishment of the final goal is questionable, it is not worth wasting state resources on it. The significance of execution in administrative procedures is well presented by facts the bases of which were the lack of its effective execution. Several cases occurred when a malpractice done by a land owner in relation to a real estate caused loss(es) of life. In a number of cases with high media attention, the competent personnel of the respective competent municipality could make statements. Their responses were always nearly the same, i.e. that they had no sufficient means in their power to resolve such situations in a safe manner. Several times they were able to verify that they indeed did everything they could. Nearly in all cases, the fault was to be found in the impossibility of execution. During the inspection, the actual misconduct was revealed, resulting in consequent responses, but it was quite apparent even at the beginning of the procedure that in case voluntary compliance does not take place, no sufficient measures could be taken. Regarding a case of this nature, a notary public stated that the only reason they carry out the procedure in the first place is to protect themselves from accusations of negligence.

Apparently, the body obligated to conduct the respective procedure cannot actually do anything more by the means of law. In such cases, the legal and substantive conditions of control are provided, and therefore the outcomes of control are successful as well. The inclination to avoid or defy such controlling inspections is often non-existent in these cases. The system of sanction means ensured by legislations should also be sufficient for embodying a dissuasive force. However, I did intentionally used the modal "should" in the previous sentence, as this issue could only be true if such sanction means could be executable. In the course of liquidation proceedings known by me, public debts were always present as well, and usually not in a negligible extent. Such debts were typically uncollectible, and were never paid to the state treasury despite the fact that the owners had no actual financial difficulties as a result of a wealth gathered from different operations. In the case of larger outstanding debts, it is not surprising that the tax authority is willing to enter into reconciliatory discussions; this may also be connected to collectability. If the authority could surely expect to have a successful collection of debts, it would be unnecessary for the authority to enter into negotiations, and would surely not be done at all. If we examine the efficiency of public administration merely on the basis of execution, I strongly believe that we could not find sufficient efficiency in certain areas. In this context, it can also be stated that the current execution regulations only provide opportunities for efficient legal enforcement regarding a narrow layer of the society, and the preventive effect only appears in there regard. Finding out why this current situation could emerge would require more thorough

research. Nevertheless, it can be definitely stated that the situation cannot be traced back to one single reason, in case we examine the background. The low efficiency of execution can be attributed to social, economic as well as legal aspects. If we only examine legal aspects in themselves, we will still find a rather comprehensive phenomenon. The examination of regulations and principles belonging to different legal branches should be required to have a clear view on the reasons for low efficiency, at least from the perspective of law. In this regard, the examination of issues related to constitutional law, civil law and criminal law might be necessary. It can certainly be stated that the legal institutions mentioned above and applied in administrative law make-up the chain and thus have impacts on execution. Due to the fact that in this chain, execution is preceded by the issuance of sanctions the voluntary compliance of which results in execution, sanctions have a more direct effect than control. The potential success of execution as well as the outcome of the procedure often depend on the extent of sanctioning set out in the relevant decision — if legislations leave discretion to the law enforcement party at all. In my opinion there can be no doubt that the rules of control, sanctions and execution are jointly meant to implement prevention in administrative law. Without any of them, the other two prove to be not only inefficient but unenforceable as well.

However, when viewing from the perspective of prevention, I believe that it can be stated without exaggeration that the effective emphasis is placed on execution. Here is a case for illustration. Let us presume that within a given special administrative area, controlling practices work in a flawless manner and no misconducts can be hidden from the authorities. Consequently, the bases for potential issuance of sanctions are provided. The authority first sends a notice, stating the prospect of a more severe future sanction. If the client believes that the specified sanction could not be implemented — i.e. executed – in their case, the question is whether the client will restrain from further misconduct or can we only hope for their good conscience? In my opinion, it is clear that only the second alternative is realistic, i.e. the conscience of the client. However, behind the unlawful acts implemented in the field of public administration you will find such conduct of clients that already carry conscience and awareness-related problems in themselves. From the aspect of authority law enforcement and hence the effectiveness of public administration, it can be stated that the effectiveness of execution has a crucial role. In this regard, when it comes to the role of execution among the preventive means of administrative law enforcement nothing is more telling than the old Hungarian saying according to which “each law is only worth as much as it can be enforced”.

European Integration Studies, Volume 14, Number 1 (2018), pp. 90–101.

NATURE OF THE PROTECTION IN THE COPYRIGHT LAW OF THE UNITED KINGDOM

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1. Introductory thoughts

While the ancient Greek world is considered as the cradle of art and culture, the United Kingdom is undeniably the birthplace of copyright law legislation and codification. The reason for this is that the world's first copyright law, the Queen Anne's Statute on Copyright[1] was born in Great Britain. Before the Statute was adopted, in the fifteenth century copyright derived from the monopoly privilages granted by the Crown to the printers. In line with the printing privilages, which are granted by the Crown, the printing trade also developed its own system of regulation through the Stationers' Company in London.[2] The proposal of the abovementioned Statute (from 1707) has already used the term that authors have "undoubted property" in their books. This term has been changed to the term "sole right and liberty of printing" in the adopted law, primarily because of positivistic viewpoints.

Therefore, the copyright law legislation was first emerged in England at the time of the reign of Queen Anne, when she issued the Statute in 1709, which entered into force on April 10, 1710. The significance of Queen Anne's Statute can primarily be found in the fact, that it was not only the first written law on copyright in Great Britain, but in the whole world. As part of this process, the Statute was a major step to creating the so-called civil state as well.[3] The Statute of Anne actually created an *alienable copyright* and it aimed at protecting not only the authors, but publishers too as legal successors of authors.[4] Following this pioneer activity of the United Kingdom in the field of copyright law, other countries embarked on copyright law legislation. Following the British copyright law, the first copyright law of the United States was adopted in 1790.[5] Even in the same century, the first

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1 http://avalon.law.yale.edu/18th_century/anne_1710.asp (Date of downloading: 19. 07. 2018.) The title of the Statute from 1707 was: Bill for the Encouragement of Learning and for Securing the Property of Copies of Books.

2 STOKES, Simon: *Art and Copyright*. Hart Publishing, Oxford and Portland, Oregon, 2012, p. 27.

3 CSÉCSY György: A szellemi alkotások jogának fejlődéstörténete. In: MISKOLCZI BODNÁR Péter (szerk.): *A civilisztika fejlődéstörténete*. Bíbor Kiadó, Miskolc, 2006, p. 97.

4 BOYTHA, György: Whose Right is Copyight? In: CSEHI Zoltán (szerk.): *Boytha György válogatott írásai*. Gondolat Kiadó, Budapest, 2015, pp. 186–187.

5 Copyright Act of 1790. The full title: An Act for the encouragement of learning, by securing the copies of maps, Charts and books, to the authors and proprietors of such copies, during the times

modern French copyright law was adopted,[6] than the Prussian[7] and the Austrian[8] acts were born in the 19th century.

The national regulations of the countries intended to provide transboundary copyright protection for works. Both authors and jurists noticed the characteristic of copyright works that these works are able to flow through the countries. In the 1840's, the countries settled their copyright relations due to bilateral agreements.[9] The first multilateral international copyright convention, the Berne Convention were adopted in 1886. Between the adoption of the Berne Convention and the Statute of Anne there were several initiatives, which were unfortunately shipwrecked.[10]

The importance of legal regulations on copyright relations and on copyright works can be found in the thought of *Thomas B. Nachhar*, who said that *"The copyright system allocates control over certain creative content by awarding copyright protection to authors for their creative expression."*[11] The cited thought shows the main mission of copyright law, which aim is stived to be ensured by legislation and legal interpretation as well.

2. Historical development of the British copyright law legislation and jurisdiction — from the Statute of Anne to the CDPA

The development of copyright law of the United Kingdom has been characterized by a kind of fragmentation, which was mostly shown by the legislation policy that

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therein mentioned. A jogszabály elérhető: https://copyright.gov/about/1790-copyright-act.html (Date of downloading: 25. 07. 2018.)

6 In France the relevant legislation was adopted on 19 July 1793, with the following original title: *"Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs (avec le rapport de Lakanal)."* See: RIDEAU, Frédéric: Commentary on the French Literary and Artistic Property Act (1793). In: BENTLY, Lionel–KRETSCHMER, Martin (eds.): Primary Sources on Copyright (1450–1900). http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_f_1793 (Date of downloading: 25. 07. 2018.)

7 The Prussian copyright law was born on 11 July 1837. *Gesetz zum Schutze des Eigentums an Werken der Wissenschaft und der Kunst gegen Nachdruck und Nachbildung*. See in detail: http://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=4961&url_tabelle=tab_quelle (Date of downloading: 25. 07. 2018.)

8 In Austria an imperial edict was adopted in 1846, which aimed to protect copyright works. *Gesetz zum Schutze des literarischen und artistischen Eigentums gegen unbefugte Veröffentlichung, Nachdruck und Nachbildung*. See in dateils: LEGEZA Dénes: *„Egyszer mindenkorra és örökáron" a szerzői jog és forgalomképessége Magyarországon a reformkortól 1952-ig*. (PhD-értekezés), Szeged, 2017, pp. 34–38.

9 For example, the bilateral agreement between Austria and Sardinia, which was born on 22 May 1840, have already contained the conceptual and general definition of "work". LEGEZA Dénes: *„Egyszer mindenkorra és örökáron" a szerzői jog és forgalomképessége Magyarországon a reformkortól 1952-ig.* (PhD-értekezés), Szeged, 2017, p. 35.

10 We can mention the pursuit of *Johann Rudolf Thurneysen,* the professor of the University of Basel, from 1738. After this, a dutch lawyer, *Elie Luzac* initiated legislation in 1745, which was against piracy. See in detail: VON LEWINSKI, Silke: *International Copyright Law and Policy*, Oxford University Press, 2008, pp. 13–14.

11 NACHHAR, Thomas B.: Rules and Standards in Copyright. *Houston Law Review*, 2014/2, p. 589.

the separate types of artworks were protected by separate acts. This legislative technique basically resulted, that there were no uniform principles, which would govern the general and uniform regulations of the different types of copyrighted works.[12] To illustrate the fragmentation of the British copyright law, the following copyright law acts were created: Statute of Anne 1709, Engraving Copyright Act 1734, Sculpture Copyright Act 1798, Dramatic Copyright Act 1833, Lectures Copyright Act 1835, Fine Arts Copyright Act 1862, Copyright Act 1911, Copyright Act 1956 and the contemporary effective Copyright, Design and Patent Act (henceforward abbreviated: CDPA), which was adopted in 1988.[13] The aforementioned fragmentation can be seen from this list and the titles of the acts too. So, we can state that, while in Hungary we have the fourth act on copyright law since 1884,[14] the United Kingdom has the ninth act in this field.

In order to facilitate the process of legislation, a number of important judicial decisions were born in relation to separate artworks, but these decisions and interpretations promoted not only the concrete artworks' legal protection but advanced the development of the whole system of copyright law. For instance, in 1769 the King's Bench stated that authors have special rights relating to their artworks in the *Millar v. Taylor* case.[15] One year later, the court interpreted the questions concerning to publishing a work in the Macklin v. Richardson case. The play in question[16] was never published, but it was performed numerous times between 1759 and 1766. The starting point of the dispute was that the owner of a newspaper sent an employee to see the performance of the work, and then describe the story. The play was published in the newspaper in 1766, and the author thought it infringes his rights on the play. The representatives of the periodical argued that: *"The performance gave a right to any of the audience to carry away what they could and make any use of it."* [17] They also argued that *"The plaintiff has not sustained, nor can sustain, any damage, as he has, and will continue to receive the advantage arising from the representation upon the stage."*[18] It is interesting to read in the argument that the defendant emphasized the author's ethical appreciation and his moral

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[12] PATTERSON, Lyman Ray: *Copyright in Historical Perspective.* Nashville, Vanderbilt University Press, 1968, p. 222.

[13] This list does not include the bills and the amendments of the laws. Behind the title of the law, it is the year when the law was adopted.

[14] In Hungary the first copyright act was the Act XVI. of 1884 on Copyright, the second was the Act LIV. of 1921, the third was the Act III. of 1969 and the contemporary, fourth is the Act LXXVI. of 1999 on Copyright Law.

[15] Millar v. Taylor (1769) 4 Burr. 2303.

[16] Charles Macklin: Love a la Mode.

[17] DEAZLEY, Ronan: Commentary on Dramatic Literary Property Act 1833. In: BENTLY, Lionel–KRETSCHMER, Martin (eds.): Primary Sources on Copyright (1450–1900). 2008. http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_18 (Date of down-loading: 30. 07. 2018.).

[18] DEAZLEY, Ronan: Commentary on Dramatic Literary Property Act 1833. In: BENTLY, Lionel–KRETSCHMER, Martin (eds.): Primary Sources on Copyright (1450–1900). 2008. http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_18 (Date of downloading: 30. 07. 2018.).

rights. This approach is all the more interesting, because the Anglo-Saxon law rather focuses on the property nature and economic value of copyright, than on the moral side. The author won the dispute, and the court was on the position, that the author has the right to decide about the first publication of the work, which right covers the publication in a newspaper as well. The judgment refleceted to the defensive arguments of the newspaper and enhanced that *"(…) the advantage from the performance, the author has another means of profit, from the printing and publishing; and there is as much reason that he should be protected in that right as any other author"*. [19]

In 1988, the Copyright Design and Patent Act was adopted, which is currently in force. It is important to note, that when the bill of the CDPA was discussed by rhe Parliament, the harmonization with the rules of moral rights of the Berne Convention[20] was highly emphasized. In fact, guaranteeing the authors' moral rights facilitated Great Britain to ratify the BC.[21]

3. Overview of the CDPA and the relevant judicial decisions

As its name presents, the Copyright, Design and Patent Act, unlike the Hungarian Act, not only contains the relevant norms of copyright relations, but it provides the legal protection of designs and patent as well. The first part of the Act is concerning to copyright relations, which consists of ten huge chapters.[22] The second part of the Act still remins in the field of copyright law, because it deals with the rules of performing rights within four chapters,[23] and the rules on designs and patents can be found in the last two parts.

3.1. The nature of the protection

According to the Section 1 of the CDPA *"Copyright is a property right (…)"*. In relation to the meaning of copyright as a 'property', we can read an expressive and ingenius thought line in the monograph of *Lior Zemer*, who writes, that *"'I have a copyright' is a challenge to the world. It denotes a property rights against all other conflicting rights and interests. It is superior to all non-rights. Like property, the*

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[19] DEAZLEY, Ronan: Commentary on Dramatic Literary Property Act 1833. In: BENTLY, Lionel–KRETSCHMER, Martin (eds.): Primary Sources on Copyright (1450–1900). 2008. http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_18 (Date of downloading: 30. 07. 2018.).

[20] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. Henceforward abbreviated: BC.

[21] ADENEY, Elizabeth: *The Moral Rights of Authors and Performers. An International and Comparative Analysis*. Oxford University Press, New York, 2006, p. 285.

[22] In order: Subsistence, ownership and duration of copyright; Rights of Copyright Owner; Acts Permitted in relation to Copyright Works; Moral Rights; Dealings with Rights in Copyright Works; Remedies for Infringement; Copyright Licensing; The Copyright Tribunal; Miscellaneous and General.

[23] In order: Introductory; Economic Rights; Moral Rights; Qualification for Protection, Extent and Interpretation.

strength of the title secures excessive rights of use and exclusion."[24] The approach of copyright law as a "property" is an important difference between the common law and continental law countries. The so-called 'creator doctrine'[25] can be found in the CDPA too.[26] According to this doctrine the author is the initial copyright owner of the works. This doctrine leads to the difference between "authorship" and "ownership". The importance of the difference can be found, that *"ownership flows from authorship"*.[27] Normally, the author is the first owner of the work,[28] (s)he crated it.[29] A significant exception is the area of works made for hire. If the author is an employee whose job requires to make an artwork, the employer is the first owner of any copyright in the work.[30] If the author is the first owner of copyright, it does not mean, that (s)he remains the all-time owner of the work, because (s)he can assign, transfer or licence the rights to another.[31] Consequently, the author has the moral rights[32] and the owner has the economic rights.[33]

3.2. The protected works under CDPA

The CDPA lists the protected works. Another important difference in relation to the natue of copyright protection is that the list of the protected works in the CDPA is an exclusive list[34], unlike to the Hungarian Copyright Act[35] and to the German Copyright Act.[36] Both in the HCA and in the UrhG we can see the list of the *most common* works protected by copyright and the texts of these acts refer to the non-exclusive nature of the lists with the expression *"in particular"*.[37] In accordance

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24 ZEMER, Lior: *The Idea of Authorship in Copyright*. Routledge Press, London–New York, 2016, 43.

25 GOLDSTEIN, Paul–HUGENHOLTZ, Bernt: International Copyright. Principles, Law and Public, Oxford University Press, 2013, p. 247.

26 CDPA Section 2 and Section 9.

27 NWABACHILI, Chioma O.–NWABACHILI, Chudi C.: Authorship and Ownership of Copyright: A Critical Review. *Journal of Law, Policy and Globalization*, Vol. 34., 2015, p. 1.

28 CDPA Section 11(1).

29 creator-doctrine

30 CDPA Section 11(2).

31 The legal basis is the Section 90 of the CDPA, which states, that *"copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property"*.

32 The so-called Paternity Rights (CDPA Section 77–79), Right of Integrity (CDPA Section 80–83), Right to privacy of certain photographs and films (CDPA Section 85) See in details: ADENEY, Elizabeth: *The Moral Rights of Authors and Performers. An International and Comparative Analysis.* Oxford University Press, New York, 2006.

33 NWABACHILI, Chioma O.–NWABACHILI, Chudi C.: Authorship and Ownership of Copyright: A Critical Review. *Journal of Law, Policy and Globalization*, Vol. 34., 2015, p. 4.

34 APLIN, Tanya: Subject matter. In: DERCLAY, Estelle (ed.): *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing, Cheltenham, 2009, p. 54.

35 The Act LXXVI. of 1999. on Copyright Law (henceformard abbreviated: HCA).

36 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), 1965 (henceforward abbreviated: UrhG).

37 HCA 1. § (2) All literary, academic, scientific, and artistic works are protected by copyright, regardless of whether they are designated in this Act. The following *in particular* are considered works of this kind.

with the CDPA the legal protection covers original literary, dramatic, musical or artistic works, sound recordings, films, and the typographical arrangement of published editions.[38] The CDPA also gives us supports to the conceptual interpretation of the abovementioned protected works.[39]

According to the text of the Act, *literary work* means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes a table or compilation, a computer program, preparatory design material for a computer program, or a database. The judicial practice decided in a case[40], that a telegraphic code, consisiting of a table matching sequences of electrical pulses to the letters of the alphabet can be regarded a literary work.[41] In the interpretation of the legal literature, in line with the legal rules, literary works covers computer program, databases and the preparatory materials of computer programs as well.[42] The legal literature emphasizes, that the statutory definition about literary works is not exhaustive.[43] In relation to computer programs, the literarture points out that production of a program is a complex process involving the expression of an alaysis of the functions to be performed as a set of algorithms, its restatement in a computer language and the translation by a computer running under a compiler program of the source code into a machine-readable language.[44] It also states, that we cannot find any definition for computer programs, but *"the lack of a definition a computer program is to avoid failure to cover advances in the technology; arguments that object code in incapable of copyright protection are no longer sustainable".*[45]

Furthermore, the Act states *dramatic work* includes a work of dance or mime. British legal literature explains that there is a lack of legal definition of dramatic works, because the definition of literary, dramatic and musical works is less relevant in relation to the implications of copyright protection.[46] According to the Briatin legal literatue and legal interpretation, dramatic works *shall be able to public performance.*[47] This requirement origins from the ascertainments of the *Hugh Hug-*

UrhG § 2(1) Zu den geschützten Werken der Literatur, Wissenschaft und Kunst gehören *insbesondere*.

38 CDPA Section 1 a) b) c).

39 CDPA Section 3.

40 D P Anderson v Lieber Code Co [1917] 2 KB 469.

41 The decision was cited by: PRESS, Tim: *Intellectual Property Law Concentrate: Law Revision and Study Guide*. OUP Oxford, 2013, p. 13.

42 PRESS, Tim: *Intellectual Property Law Concentrate: Law Revision and Study Guide*. OUP Oxford, 2013, p. 13.

43 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, p. 62.

44 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, p. 64.

45 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, p. 64.

46 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, p. 69.

47 MACQUEEN, Hecto–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, pp. 70–71.;

es v Broadcasting Corporation of New Zealand[48] case from 1989. In this case, the rule of CDPA[49] was of central importance, because it states that copyright protection depends on the fixation of the certain work (literary work, dramatic work or musical work).[50] The requirement of fixation is also a difference between the British and the Hungarian copyright law system, because the domestic law does not prescribe such a condition for the legal protection.

In line with the law, *musical work* means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.

According to the Act, a*rtistic works* are graphic works, photographs, sculptures or collages, irrespective of their artistic quality, furthermore works of architecture being, a building or a model for a building, or works of artistic craftsmanship.[51]

Sound recordings means a recording of sounds, from which the sounds may be reproduced, or recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.[52]

According to the legislation *films* means a recording on any medium from which a moving image may by any means be produced.[53] One of the most famous and widely cited decision[54] dealt with the connection and differences between films and dramatic works.[55] The question had to be answered whether and on what conditions a movie can be a dramatic work. In the lawsuit the applicant stated that the defendant reproduces a substantial detail from the applicant's film, *Joy*, into his film, titled *Anticipation*. The *Joy* is a very short movie, approximately one-minute length, in which only one character can be seen and he does not say a word but he performs an odd dance at the top of a London house. *Mehdi Norowzian*, the applicant used the so-called *"jump cutting"* [56] technique for making the film. The de-

BENTLY, Lionel–SHERMAN, Brad: *Intellectual Property Law*. Oxford Uniersity Press, 2014, p. 70. *"The Privy Council has stated that a dramatic work must have sufficient unity to be capable of performance (...)"* See the same: TORREMANS, Paul (ed.): *Holyoak and Torremans Intellectual Property Law.* Oxford University Press, United Kingdom, 2016, p. 206.

48 Hugh Huges Green (Appeal No. 18 of 1989) v Broadcasting Corporation of New Zealand (New Zealand) [1989] UKPC 26 (18 July 1989).

49 CDPA Section 3(2) Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.

50 On this topic, see also: GRIFFITHS, Jonathan: United Kingdom. In: HILTY, Reto M.–NÉRISSON, Sylvie (eds.): *Balancing Copyright — A Survey of National Approaches*, Max Planck Institute for Intellectual Property and Competition Law, Munich, Springer-Verlag, Berlin–Heidelberg, 2012, p. 1061.; CRONE, Tom: *Law and the Media*. Focal Press, Oxford, 1995, p. 45.

51 CDPA Section 5.

52 CDPA Section 5A.

53 CDPA Section 5B.

54 Norowzian v Arks Ltd & Anor (No. 2) [1999] EWCA Civ 3014 (04 November 1999).

55 See deails: KAMINA, Pascal: *Film Copyright in the Euroean Union.* Cambridge University Press, 2016, p. 74.

56 The essence of this technique is that the entire film is cut and creates a surreal look at the end.

fendant made an advertisement for *Guinness* beer, with the title *Anticipation* in which a man performs a strange dance, while waiting for his beer. In the ad *jump cutting* technique was applied too. *Norowzian* argued that the *Joy* is a dramatic work, fixed in film and the defendant copied the essential elements of the *Joy*, consequently he infringed his copyright. The first-instance decision rejected Norowzian's claim and stated that a film cannot be regarded merely a dramatic work,[57] because the law categorises these two types of works separately. Furthermore, the *Joy* can be regarded an audiovisual work, not a dramatic work. Because of it, the hiring of style and cutting technique does not result copyright infringement.

3.3. The authors' economic rights under CDPA

The legal literature emphasizes that various national laws differ in how they define economic rights.[58] The second chapter of the CDPA regulates the economic rights of authors and the Section 16 lists these economic rights. The title of this Chapter is *"Rights of Copyright Owner".* This expression refers to the abovementioned approach, that the authorship and ownership can be different and to the fact, that the economic rights are bound to the copyright *owner.* Compared to the Hungarian law, it is an important difference, that in the HCA tha main rule is that *authors have the exclusive right to utilize works* in whole or any identifiable part, whether financially or non-financially, and to authorize each and every use.[59] On the contrary, the CDPA expressely regulates the right of *owner, not the rights of* author. The reason of this rule is that, as we mentioned above: the subject of copyright ownership is not always the author. According to the law, *'[t]he owner of the copyright in a work has (…) the exclusive right to to copy the work, to issue copies of the work to the public, to rent or lend the work to the public, to perform, show or play the work in public, to communicate the work to the public and to make an adaptation of the work or do any of the above in relation to an adaptation'.*[60]

It is also a significant difference between the British and the domestic system, that the CDPA approaches the economic rights from the viewpoint of infringing copyright law, because of the different dogmatical system. For this reason, the regulation of CDPA has a sanctioning character, as opposed to the Hungarian copyright law. The British Act distinguishes two types of copyright infringements: *primary* and *secondary infringements*. The most important difference between the two concepts can be shown that while primary infringing acts involve the initiation of infringing activity, secondary infringement typically means activities in relation to infringing copies of such works.[61] In line with the abovementioned, according to

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57 DAVIS, Jennifer: *Intellectual Property Law*. Oxford University Press, Oxford, 2012, p. 27.

58 GOLDSTEIN, Paul–HUGENHOLTZ, Bernt: *International Copyright. Principles, Law and Practice.* Oxford University Press, 2013, p. 306.

59 See: HCA 16. § (1).

60 CDPA Section 16(1).

61 PRESS, Tim: *Intellectual Property Law Concentrate: Law Revision and Study Guide*. OUP Oxford, 2013, pp. 24–25.

the relevant rules of the CDPA, we can talk about primary infringements, if the work is copied, issued to the public, rent or lend public, performed public, communicated to the public or adapted without the consent of the author.[62] Secondary infringements incorporate the following activities: importing infringing copies to the United Kingdom, possessing or dealing with infringing copies, providing means for making infringing copies, or permitting use of premises for infringing performances.[63] The legal literature interprets the difference between the two types of infringements with the reason, that there is a mental, subjective element in the case of secondary infringing acts, namely *'the infringer must know or have reason to believe they were committing the act in relation to an infringing article or performance'*.[64]

3.4. The interpreatiton of certain economic rights

As we mentioned it before, the CDPA lists the economic rights in the field of copyright law. In the paper we would not like to deal with all the economic rights, but only with those which raise some interpretative questions.

The section 17 of the CDPA provides the *right to copying*, in other words the *right of reproduction*. According to this, the copying of the work is an act restricted by the copyright in every description of copyright work. The Act regulates the right of copying in relation to the difference categories of works. Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form, which includes storing the work in any medium by electronic means. In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work. Copying in relation to a film includes taking a photograph of the whole or any substantial part of any image forming part of the film. Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.[65]

Rigth of reproduction is the most fundamental economic right, which covers many separate rights deriving from a multiplicity of methods, such as printing, engravings, lithography, or photocopying.[66] The legal literature emphasizes, that an important element of copying, is the connection between two works, which are similar. The similarity of two works can results infringement in some cases, but in most of the cases it is not a problem. The legal literature reflects to the fact, that *"generally, problems begin to arise, when works are similar but not the same. (…) The issue is perhaps more acute, when where it is alleged that a work has been*

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62 CDPA Sections 17–21.
63 CDPA Sections 22–26.
64 PRESS, Tim: *Intellectual Property Law Concentrate: Law Revision and Study Guide*. OUP Oxford, 2013, p. 25.
65 CDPA Section 17 (2)–(5).
66 UNESCO: *The ABC of Copyright*. Paris, 1986, p. 28.

reproduced in a different medium from the original."[67] In relation to right of reproduction we can mention a case[68], in which Dan Brown, the author of the famous book, The Da Vinci Code, was sued because of copyright infringement. According to the lawsuit, Dan Brown infringed the right of reproduction of Michael Baigent and Richard Leigh, two of the three authors of book, The Holy Blood and The Holy Grail. The pair sued the Random House publisher, which published The Holy Blood and the Holy Grail and The Da Vinci Code as well, claiming that the theme of Dan Brown's book was copied from their work.[69] The claimants argued that Brown used the central elements and theme of theis book, so infringed their copyright. The evidence showed that Brown indeed used the The Holy Blood and The Holy Grail, when he was working on the Da Vinci Code, and there was some limited textual copying as well, but these copying were insignificant. In the final trial, the Judge said, that *"[i]t does not, however, extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about".*[70] So, the case was closed by rejecting the claim of Baigent and Leigh, because historical facts, themes and ideas can be only protected by copyright in the way, how these were put together in a work. The facts, themes, and ideas in themselves are open to everybody.[71]

In relation to the *right of public performance*, it is important to interpret the meaning *"public"* and *"performance"* too. According to the CDPA, the performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.[72] The term "performance" includes delivery in the case of lectures, addresses, speeches and sermons, and in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film of the work. In addition the legal definition of performance can be found within the rules on neighbouring rights, which states, that a dramatic performance (which includes dance and mime), a musical performance, a reading or recitation of a literary work, or a performance of a variety act or any similar presentation, which can be a live performance given by one or more individuals and can be "record-

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67 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy.* Second Edition. Oxford University Press, 2008, p. 134.

68 Baigent and Leigh v The Random House Group Ltd (CA) [2007] EWCA Civ 247.

69 See also: https://www.theguardian.com/uk/2007/mar/28/danbrown.books; https://www.scribd.com/document/325447714/Baigent-and-Leigh-v-The-Random-House-Group-Ltd-docx (Date of downloading: 12. 10. 2018.) The full judgement can be read: http://www.5rb.com/wp-content/uploads/2013/10/Baigent-v-Random-House-CA-28-Mar-2007.pdf (Date of downloading: 12. 10. 2018.).

70 http://www.5rb.com/wp-content/uploads/2013/10/Baigent-v-Random-House-CA-28-Mar-2007.pdf, point 156.

71 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy.* Second Edition. Oxford University Press, 2008, p. 140.

72 CDPA Section 19.

ing". Recording in relation to a performance, means a film or sound recording, which is made directly from the live performance, from a broadcast of the performance, or directly or indirectly, from another recording of the performance.[73]

In the case of the work is performed without the permission of the owner and the number of audiences is not limited, furthermore the performance is made for profit, the performance will be unlawful (primary infringement).[74] In relation to the right of public performances it is emphasized by the legal literature, that this is the traditional way of utilizing stage performances. *Eaton S. Drone* illustrated that the right of performance is able to the public performance of musical works.[75]

In the British copyright law, the content of the law of public performances has been developed by judicial practice, [76] which resulted a quite flexible concept.[77] With regard to its content, the watershed issue is whether the performance goes beyond the family life and circle of friends.[78] So, the expression *"public"* means that the usage of the work goes beyond the circle of members of the family and friends.[79] The *Court of Appeal* dealt with the issue of *publicity* in relation to the performances in 1884. The interpretation was inferred in relation to a performance of an amateur group. In this case, an amateur performance was performed in a hospital room, without the permission of the copyright owner, and the audience were doctors, nurses and family members.[80] According to the summary of the judgment, the hospital room where the performance was realized can not be considered as a public location, consequently there were no copyright infringement, nevertheless, approximately 170 people participated in the performance.[81] According to the justification this *"quasi-domestical"* performance can be regarded private performance, so it can not be considered public, infringing performance.

The Section 21 of the CDPA regulates the *right to adaptation*. According to the relevant rule, the making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work. In relation to a literary or a dramatic work, adaptation means translation of the work. Furthermore, with regards dramatic works, it covers a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is

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73 CDPA Section 180(2).

74 MACQUEEN, Hector–WAELDE, Charlotte–LAURIE, Graeme–BROWN, Abbe: *Contemporary Intellectual Property. Law and Policy*. Second Edition, Oxford University Press, 2008, p. 152.

75 DRONE, Eaton S.: *A treatise on the law of property in intellectual productions in Great Britain and in the United States. Copyright in Works of Literature and Art, and playright in Dramatic and Musical Compositions*. Little, Brown and Company, Boston, 1879, pp. 553–554.

76 DAVIS, Jennifer: *Intellectual Property Law*. Oxford University Press, Oxford, 2012, p. 57.

77 APLIN, Tanya: *Copyright Law in the Digital Society: The Challenges of Multimedia*. Hart Publishing, Oxford–Portland Oregon, 2005, p. 126.

78 The same interpreatation can be found in the copyright law of the United States of America. [USC 106. § (4)] See: GASAWAY, Laura N.: Copyright Basics: from Earliest Times to the Digital Age. *Wake Forest Intellectual Property Law Journal*, Vol. 10, No. 3, 2009–2010, p. 251.

79 STRONG, William S.: *The Copyright Book. A practical guide*. The MIT Press, Cambridge, 2014, p. 182.

80 Duck v. Bates (1884) 12 QBD 79.

81 BAINBRIDGE, David I.: *Intellectual Property*. Pearson Education, 2009, p. 162.

converted into a dramatic work and a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.[82] In relation to a musical work, adaptation means an arrangement or transcription of the work.[83] Making an adaptation of a work results another work, which is called derivative work. It is important, that shortening a literary work can not be regarded as adaptation.[84]

4. Summary

The United Kingdom is a pioneer in the field of copyright law legislation, because of the Statute of Anne. Nowadays, the European Union put special emphasis on copyright law and intellectual property law in general. In the EU there are twelve directives and some regulations which are dealing with the issues of copyright, especially the challenges of copyright law in the modern world and these legal instruments shall be applied in the legislation of EU Member States. The question can arise that whether British Copyright law will be changing after the Brexit? We think it can cause some surprises, but we don't believe that it will cause radical changes. The minimum standards and fundamental rules of copyright law shall be provided in the national laws because of international conventions and agreements. Furthermore, differencies could be found in Anglo-Saxon and continental copyright law since its birth, such as the diffefent approach of authorship and ownership. Despite of the diversity of the legal systems and some rules, the most important thing always (shall) remain the same: *"Authors are the heart of copyright."*[85] and they shall be protected, because if theres is no author, then no work and if there are no artworks, there won't be culture, art and science.

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82 CDPA Section 19(2). See: HOWELL–FARRAND (2014), p. 46.

83 CDPA Section 19(3).

84 PRESS, Tim: *Intellectual Property Law Concentrate: Law Revision and Study Guide*. OUP Oxford, 2013, p. 25.

85 GINSBURG, Jane C.: The Concept of Authorship in Comparative Copyright Law. *Columbia Law School, Public Law & Legal Theory Research Paper Gruop*, Vol. 51, 2003, p. 3.

European Integration Studies, Volume 14, Number 1 (2018), pp. 102–110.

GENERAL AND LABOR LAW ASPECTS OF THE GDPR

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1. Introductory thoughts

The Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (henceforward: Regulation or GDPR — General Data Protection Regulation — based on the abbreviation which was commonly used) the new regulatory of the European Union on data protection entered into force on 25 May 2018. The GDPR unifies the data processing rules of the EU Member States with the supersedence of national legislation. The new regulation has generated a great interest in a society as a whole, which may be due to the fact that not only large companies are affected by regulation, but also all data processing organizations and, on the other hand the regulation may arise not only the interests of legal persons but individuals because they have greater insight and rights relation to the processing of their personal data. Thirdly, it is not negligible that any failure is being punished by a higher fine than ever before.[1] In the next few pages, we present the regulation of GDPR, furthermore what changes would occur in the Hungarian legal system in particular the labor law aspect.

2. The GDPR's scope of application

The Regulation requires wider territorial and material scope than the previous data protection laws. Examining the material scope shall be applied to both the activities of the data controllers and processors. As regards the material scope the Regulation shall be applied to the processing of personal data in an automated manner and to the processing of personal data in a non-automated manner that are part of a registration system or which are intended to be part of a registration system.[2] Consequently, the Regulation shall not be applied if the personal data is handled for personal or household purposes. In terms of territorial scope it shall be applied to data processing in connection with the activities of data controllers or data processors in

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1 *Amit a GDPR-ról tudni kell.* p. 1. http://www.fmkik.hu/upload/fmkik/gdpr_szakanyag.pdf (23. 10. 2018).
2 Article 2, point 1 of GDPR.

the Union. Furthermore, it shall be applied to the treatment of personal data of persons residing in the Union by a data controller or data processor not having an activity in the Union, Furthermore, it shall be applied to the treatment of personal data of persons residing in the Union by a data controller or processor not established in the Union if data processing activities are linked to the provision of goods or services to persons in the Union, regardless of whether the person has to pay for them or related to the behavior of the data subject, provided within the Union.[3]

3. Lawfulness of processing

It is important to determine the legal basis for data processing as an essential element of the lawfulness of processing. The controller must ensure the appropriate legal basis for the data processing.[4]
Article 6 of GDPR defines the legal bases for data processing:

- the data subject has given consent to the processing of his or her personal data,
- processing is necessary for the performance of a contract to which the data subject is party,
- processing is necessary for compliance with a legal obligation,
- processing is necessary in order to protect the vital interests of the data subject or of another natural person,
- processing is necessary for the performance of a task carried out in the public interest,
- processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party.[5]

These legal bases are essentially the same as those set out in Article 7 of Directive 95/46/EC.[6] What constitutes a significant change compared to the previous legislation is that due to the direct effect of GDPR, there will be no transposition into the Member States and thus avoiding the difficulties of applying the law when determining the appropriate legal basis.[7] At workplace processing may arise: the consent of the data subject, statutory authorization, performance of the contract of employment or processing based on the legitimate interest of the employer.

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3 GDPR közérthetően — Part 1. https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-1-r%C3%A9sz (23. 10. 2018).

4 Point 40. of the Preamble, GDPR.

5 Article 6, point 1 of GDPR.

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter: Data Protection Directive).

7 PÓK László: *Mik lehetnek a jogszerű adatkezelés jogalapjai a GDPR alapján?* https://gdpr.blog.hu/2018/05/22/mik_lehetnek_a_jogszeru_adatkezeles_jogalapjai_a_gdpr_alapjan (24. 10. 2018).

3.1. The consent of the data subject

The legal basis we have mentioned first, the consent may raise certain issues. Consent is considered to be a kind of priority, primary legal basis in practice. Therefore, significant number of controllers seek to obtain a consent whenever this is not necessary at all. This so-called "consent-centricity" can be related to the fact that the right of informational self-determination of the data subject may be exercised mostly with the consent.[8] In our opinion, GDPR also reaffirms the idea that if processing can legitimately be carried out in the light of a different legal basis, there is no need to obtain a consent.

The GDPR defines the concept of data subject's consent: "consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."[9] Consequently, the conceptual elements are: voluntary, concrete, informed and unambiguous. In addition, Article 7 deals with the terms of the consent, accordingly, the controller's obligation is to prove that the data subject has consent to the processing of personal data, so that the principle of accountability already appears here. Article 7 also states that the data subject is entitled to withdraw his consent at any time. The withdrawal of the consent should be allowed the same simple way as granting the consent. The withdrawal of consent also shows that in cases where another legal basis is available, it must be used, otherwise further processing will be impossible only because of the withdrawal of the consent or if the controllers suddenly set up a different legal basis for processing on the basis of the withdrawal it may even call into question the legality of the entire processing in the past.[10]

As we have already mentioned, the conceptual component of consent is volunteering, so it is independent from any outside influence. The question may arise that can we talk about a real voluntary consent in an employment relationship. In our view, we cannot speak of a purely voluntary consent in a hierarchical, subsuperior relationship.

Article 29 Working Party[11] also expressed its point of view on this issue and noted that the decision of the data subject could be affected by financial or emotional considerations.[12] Quite simply, the employee only decides whether to take the job or not. In this case the consent of the processing is a quasi-condition. From this it can be

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8 PÓK *László: Az adatvédelem svájci bicskája – A hozzájárulás*. https://gdpr.blog.hu/2017/07/17/az_adatvedelem_svajci_bicskaja_a_hozzajarulas (24. 10. 2018).

9 Article 4(11) of GDPR.

10 Article 7(1)–(3) of GDPR.

11 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data — Article 29 set up the Working Group.

12 Article 29 data protection working party 01197/11/EN WP187 Opinion 15/2011 on the definition of consent https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf?fbclid=IwAR1RnMQYnImo0dRB1ZaD1anODxzitonXCioPoaKpO6DmHla93t7J6nXWrYE (24. 10. 2018).

deduced that in the legal relations of employment it is not possible to interpret the volunteering of the consent in the final analysis, if the employee refuses to grant his consent that may cause him or her financial or non-financial detriment.[13]

3.2. Statutory processing

Regarding processing in the workplace, the statutory processing should also be mentioned, since most of the processing is based on this legal basis. We can talk about a statutory provision that makes processing compulsory or a legal basis that only allows processing. Within this we can make a distinction according to whether the details of the processing are determined by the law or left to the controller. Compulsory processing is ordered by tax liability and social security legislation. The above mentioned compulsory processing are also an obligation for the employer and the employee.[14]

3.3. Processing based on the legitimate interest of the employer

Personal data can be processed even if workplace processing is required by the employer's legitimate interest. It is the limit of this type of processing if the right to the protection of personal data of the employee and right to privacy is higher than the employer's legitimate interest. The legitimate interest of the employer will be the legal basis of processing in the case of supervision of the employee's behavior during the employment relationship therefore, it will be necessary for the employer to elaborate in its internal rules the processing and the conditions of the processing, because the employees can make sure that processing actually limits their rights in a proportionate manner.[15]

In the face of the above-mentioned right's conflicts: the legitimate interest, the right to privacy and the right to the protection to personal data, a question may arise what we have to examine to give preference one of them. The test of the balance of interests gives us the answer. If necessary, the controller in this context the employer must demonstrate that his legitimate interest is above the employee's fundamental rights. This is a multi-step method, above all, the employer must determine what the purpose of processing and whether personal data is needed at all. Then we have to consider whether there is any solution that can be achieved without the need to personal data processing. It is important to ascertain as precisely as possible the legitimate interest motivated by the employer in the processing of personal data, in particular by taking into consideration Section 10(1) of Act I of 2012 on the Labor Code (hereinafter: Labor Code).[16]

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[13] Hungarian National Authority for Data Protection and Freedom of Information report on the basic requirements of workplace processing (hereinafter: NAIH Report) p. 7. https://www.naih.hu/files/2016_11_15_Tajekoztato_munkahelyi_adatkezelesek.pdf (29. 10. 2018).

[14] NAIH Report p. 8.

[15] NAIH Report p. 9.

[16] Labor Code 10. A worker may be requested to make a statement or to disclose certain information only if it does not violate his personal rights, and if deemed necessary for the conclusion, fulfill-

This is followed by the determination by the employer of employee rights that may hinder the employer's processing. Finally, the employer summarizes the balance, so it basically decides whether the restriction is proportionate or not.[17]

Article 29 Working Party has also expressed its views on the test of the balance of interest. Firstly, it recommended that legitimate interest-based processing be maintained as an independent legal basis in the Regulation, which is justified by the fact that, if used in the right context, its flexibility promotes the lawfulness of data management. In addition, it considers the maintenance of the test of the balance of interests to be of paramount importance as this increases the enforcement of the principle of responsibility. In our opinion, this actually enhance the effectiveness of this argument because, as mentioned earlier, conducting the test is also the duty and the interest of the employer, failure to conduct the test can result in disadvantages for both the employer and the employee in certain cases.[18]

4. Rights of the data subject

The rights of the data subject are set out in Chapter III of the GDPR from which it can be concluded that the data subjects have extra rights due to the right of access and right to rectification and erasure, which explains in some details.

4.1. Transparent information

Under the GDPR III. Chapter 1, Article 12(1)[19] the controller has an obligation to give a concise, transparent, intelligible and easily accessible form, clear and plain information to the entitle person about their personal data processing.
The information shall include:

- the identity and contact details of the controller,
- the data protection officer's (DPO) contact details,
- the purpose and duration of the proposed processing,
- the legal basis for the processing (in the case of processing based on legitimate interests, these legitimate interests),

ment or termination of the employment relationship. An employee may be requested to take an aptitude test if one is prescribed by employment regulations, or if deemed necessary with a view to exercising rights and discharging obligations in accordance with employment regulations.

17 „GDPR a HR-ben" – *Mi az „érdekmérlegelési teszt"?* http://kamaraonline.hu/cikk/gdpr-a-hr-ben-mi-az-erdekmerlegelesi-teszt (29. 10. 2018).

18 Opinion 06/2014 on the "Notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC" https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf (30. 10. 2018).

19 Article 12(1) of GDPR "The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means."

- the recipients of the personal data,
- the adequate guarantees in case of data transferring outside the EU,
- the right of the data subject to request from the controller to access and rectification and erasure or limitation of access to the personal data and to object to the processing such personal data or his or her right to data portability,
- any automated decisions, furthermore profiling,
- the right to submit a complaint addressed to the supervisory authority,
- whether the conclusion of the contract is conditional upon the data being provided, and the possible consequences of the failure of data provision (in the case of an employment relationship, the existence of such possible consequences excludes the basis of the consent).[20]

The content of the information obligation in the above list is in the interest of the data subject, in that context employee. In fact, that it can be said that the transparent information is the first step of the upcoming right of access.

4.2. Right of access

At the second stage of the aforementioned theoretical step is the right of access under which the data subject is entitled to receive information from the controller that his personal data is being processed and, if so, is entitled to access such data. The obligations of the controller related to this are set out in Article 15(3) of the GDPR.[21]

On the one hand, the importance of the right of access is based on the fact that the data subject has the opportunity to collect information about his personal data processing and to know what the purposes of the processing. On the other hand, if the data subject has known, he has the opportunity to request the rectification of any defective or inaccurate data, or you can request the erasure of your data for certain reasons.

4.3. Right to rectification and erasure ('right to be forgotten')

By arriving at the third stage of the theoretical step, we must speak about the right to rectification and the right to erasure, which are governed by Articles 16 and 17 of Section 3 of the GDPR. In fact, the right to rectification means that the data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her.[22]

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[20] GDPR közérthetően – 2. rész https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-2-r%C3%A9sz (29. 10. 2018).

[21] Article 15(3) of GDPR "The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form."

[22] Article 16 of GDPR.

On the basis of the right to erasure, the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:

- the personal data are no longer necessary in relation to the purposes for which they were collecte,
- the data subject withdraws consent, and where there is no other legal ground for the processing,
- the data subject objects to the processing and there are no overriding legitimate grounds for the processing, therefore the right to protection of personal data cannot be restricted by the legitimate interest of the data controller, the result of test of the balance of interests is not for the benefit of the data controller,
- the personal data have been unlawfully processed.[23]

The question may arise that whether the "right to be forgotten" can be enforced in the context of an employment relationship as well. Of course, the answer is not. An employee shall not request the erasure of his or her personal data in any case. According to the GDPR, the right to be forgotten cannot be enforced if the employer process the data for a legal obligation, for example because of the National Tax and Customs Authority notification or proof of compliance with mandatory minimum wage rules.[24]

Regarding the right to forget, GDPR has two major changes. On the one hand, the burden of proof is revered because the data controller must prove that data can not be erased and processing is still justified for a relevant reason. On the other hand, the extraterritorial scope of the Regulation ensures that its rules apply to non-EU data controllers when processing EU citizens' data, irrespective of where the data processing company's server is located. In the absence of this, the right to forgetting would be empty. The most obvious reason is that the GDPR would not be applicable to data controllers based in the United States.[25]

4.4. Right to restriction of processing

At the aforementioned theoretical step, the right to restriction the processing of data can be placed on the same level as the right to rectification and erasure. The difference is due to the reasons for its validation, duration and the basic outcome, as this is a simple restriction that exists in a certain time interval. This includes the fact that the data subject who has obtained restriction of processing pursuant to the

[23] GDPR közérthetően – 2. rész https://www.gdpr.info.hu/single-post/GDPR-k%C3%B6z%C3%A9rthet%C5%91en-2-r%C3%A9sz (01. 11. 2018).

[24] RÁTKAI Ildikó: *Mire terjed ki az „elfeledtetéshez való jog"?* http://kamaraonline.hu/szakerto_valaszol_reszletes/mire-terjed-ki-az-elfeledteteshez-valo-jog (01. 11. 2018).

[25] SCHUBAUER Petra: Az elfeledtetéshez való jog az új adatvédelmi rendelet tükrében. *Infokommunikáció és Jog*, 2017/2, pp. 87–89.

reasons stipulated in the Regulation[26] shall be informed by the controller before the restriction of processing is lifted.

4.5. Right to data portability

The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller if the processing is based on consent or on a contract and the processing is carried out by automated means.[27] The question is whether the right to data portability can be exercised with regard to employment? Of course, yes, it should be noted that only in the case where data processing is made on the basis of a contract. As we have already mentioned that in the context of the employment relationship the employee's consent does not qualify voluntary and therefore can not be the legal basis.

5. Conclusion

In this short study, we tried to describe the changes and provisions of GDPR that are relevant to labor law. In this article, there have been more words about the general innovations of GDPR, but less about the impacts of the Regulation on the domestic labor law. There are several simple reasons for this. After the entry into force of the GDPR, the Labor Code needs to be amended, modified and clarified. The amendment that is currently underway — due to the domestic strict rules — is unlikely to be major. In its resolution of 9 October 2018, National Authority for Data Protection and Freedom of Information did not find the draft legislative amendment appropriate and missed its consistency with GDPR.[28]

Another reason is that the domestic legislation on data protection has been amended and tightened by the legislator under the ePrivacy Directive. GDPR has therefore fundamentally changed the way for EU law-practitioners, envisaging a much tighter regulatory regime, but this does not have the same impact on our country as it is in other countries with a lighter regulatory environment. As we

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[26] Article 18(1) of the GDPR "The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:
(a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;
(b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;
(c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;
(d) the data subject has objected to processing pursuant to Article 21 (1) pending the verification whether the legitimate grounds of the controller override those of the data subject."

[27] Article 20 of GDPR.

[28] NAIH: Az egyes törvényeknek az Európai Unió adatvédelmi reformjával összefüggő módosításáról szóló kormány-előterjesztés. https://www.naih.hu/files/NAIH_2018_6123_2_J_2018-10-09.pdf (10. 11. 2018).

mentioned, the Labor Code is being amended. On the basis of the recent materials it can be concluded that although there are and will be changes due to GDPR, but it is not nearly as serious as changes in labor law, such as the introduction of a teleworking institution.

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Secreteriat of the Vice-Rector for Research and International Relations,
University of Miskolc
Responsible for the publication: Prof. dr. Tamás Kékesi
Published by the Miskolc University Press under leadership of Attila Szendi
Responsible for duplication: Erzsébet Pásztor
Technical editor: Csilla Gramantik
Corrector: Zoltán Juhász
Number of copies printed: 158
Put to the press in 2019
Number of permission: TNRT-2019-37-ME

HU ISSN 1588-6735